RMO Notes
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Rules, Negotiations and Disputes
At the WTO from a perspective of Sustainable Development

SD Perspective

- Societal aspirations
- As a universal system of governance, beyond trade measures at the border
- WTO as part of a larger system of governance – AB recognition

Rules

- What we have today – is it fit for purpose?
- One size fits all vs targeted rules
  - Priorities of global governance - vulnerability
    - Poverty – employment
    - Biodiversity loss (and SLM)
    - Water
    - Climate Change and sustainable energy (security)
  - Reviewing what we have? Against what?
    - "Rolling rules"
    - "modulation of rules": acting on situations
  - When rules are onerous – addressing overshooting
  - Agenda setting for the future
    - Can we afford more of the same?
    - Imaging a next stage

Negotiations

- Content and approach
  - Negotiating concessions
    - Case of tariffs (updating MFN?)
  - Reciprocal bargaining on country by country (member) basis vs bargaining among groupings
  - Rule-making by study and persuasion
  - Other forms of collective action

The WTO dispute settlement system,

- The jewel in the crown –
- Evolution – need to make it more amiable to develoing countries

Concluding thoughts

- End of liberalization or economic inernationalism
- South-south
- Regionalism, other GEG regimes – where next?

One Size fits all

A new consensus has taken root in the field of international development around a simple but powerful idea: one size does not fit all. There is no single "right" answer to the questions of development strategy: the "right" development strategies are as diverse as the countries of the global south.

In contrast to the orthodoxy that dominated the 1990s, the new consensus is sensitive to the heterogeneity of institutional forms and policy stances that have helped countries join sustainable development paths. It casts doubt on "best practice" approaches that counsel wholesale adoption of any single, "ideal" policy stance. Instead, the new consensus stresses the importance of crafting development strategies tailored to the particularities of each developing country's circumstances.

However, while the consensus supporting this view has grown ever stronger, the multilateral trade regime has lagged behind. However, while the consensus supporting this view has grown ever stronger, the multilateral trade regime has lagged behind. Operating on the basis of agreements negotiated at the height of the old orthodoxy's intellectual currency, the WTO's current system of Special and Differential Treatment (S&DT) for developing countries adopts a one-size-fits-all model of development strategy. Ever since the World Trade Organization was created in 1995, its developing country Members have been frustrated by its excessively rigid framework of rules which bar them from adopting a wide variety of policy instruments that had long been seen as pillars of development strategy.

The S&DT system is no longer "fit for purpose". A system that had originally been conceived as a means to adapt multilateral trade rules to the needs of developing countries has become, over time, a framework for adapting developing country policies to the needs of the multilateral trade regime. The result is a multilateral regime that hinders developing countries as they seek to optimize the development benefits they derive from integration into global trade flows.

To reconcile the WTO system with the legitimate sustainable development aspirations of the majority of its Members, the insight that one size does not fit all must be embedded into the structure of WTO rules.

WTO's SD system, which came into effect in 1995, is renowned for advancing the rule of law in international economic relations. Not only did the Uruguay Round agreements add 30,000 pages of new legal texts, but the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) introduced substantial reforms to the old GATT system by grounding the dispute settlement mechanism in defined, automatic and binding rules and procedures. Clearly the DSU is where the action is today. Not only is the Doha "development round" of trade negotiations in serious trouble, but even if it is concluded, its ambitions have been severely curtailed. In contrast, the WTO dispute settlement system continues to thrive – to grow steadily and healthy. Under this more legalized dispute settlement system, every country is to have an equal chance of success regardless of its economic context.

The rule of law in the WTO, however, is of less use to members if they lack the basic resources and capacity to deploy it. The WTO's legalized system, for example, has become more complex and resource demanding. It has created new procedural requirements for making claims, tight deadlines for submissions, and an appellate review system, complemented by arbitration over compliance and the amount of authorized retaliation in an enforcement action. The body of WTO case law, moreover, continues to

proliferate, with individual rulings averaging hundreds of pages, and the total amount exceeding 25,000 pages. These features raise concerns about the impact of such legalisation on the capacity of developing countries to utilise the system to safeguard their trade rights and secure their sustainable development objectives.

We believe that participation in the WTO dispute settlement system is important for four primary reasons.[1]

- First, participation matters in specific adjudication when WTO legal decisions affect specific economic outcomes, as they have done.
- Second, the failure to participate in WTO dispute settlement can have terms-of-trade effects that adversely affect the overall social welfare of a country. If an importing country raises an illegal trade barrier and that country exercises market power so that foreign exporters must lower their prices to sell in its market, then the exporting country's terms of trade are prejudiced.
- Third, participation matters where WTO jurisprudence shapes the interpretation, application and perceptions of the law over time, and thus affects future bargaining positions in light of these developments. In other words, the outcome of an individual WTO case has not only a tangible component, but also a systemic one. The tangible component is that a measure is found either to violate or comply with a legal obligation, and if it is in violation, give rise to a remedy. The systemic component affects what the law means over time.
- This systemic component leads to the fourth way in which participation matters. WTO law affects bargaining in the shadow of a potential case without any formal complaint being filed. WTO case law, in specifying what the law means, informs subsequent dispute settlement negotiations conducted in the law's shadow.

Recognising that developing countries will have to adapt in a cost-effective manner if they are to benefit from the DSU, ICTSD has created a program to assess the system from a developing country perspective.[2] The goals of this ICTSD project are three-fold. First, the project aims to generate new information and analysis as to how the WTO dispute settlement system works in practice, both in global perspective and on the ground for developing countries.[3] Second, building from these analyses, the project explores pragmatic strategies that individual developing countries have adapted, and can adapt, so

[1] This point is developed in Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed and its Impact on Bargaining* (presented at the Appellate Body at 10 conference, Sao Paulo, May 2005), available at http://www.ictsd.org/issarea/dsu/resources/Shaffer_1.pdf.

[2] The DSU project's web site is at http://www.ictsd.org/issarea/dsu/index.htm.

[3] In addition to the studies in this Field Guide, ICTSD is publishing two cross-cutting systemic studies of the factors that explain developing country use (and lack of use) of the DSU. First, economists Henrik Horn and Joseph Francois have prepared a new study of "Trading profiles and developing country participation in the WTO dispute settlement system." Second, political scientists and legal scholar Marc Busch, Eric Reinhardt and Gregory Shaffer have written a paper entitled Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions." In this latter project, Busch, Reinhardt and Shaffer, with the help of ICTSD staff, conducted a survey of WTO members that addresses different measures of legal capacity. From the resulting data, they examine the impact of variations in WTO-specific legal capacity on filings of WTO claims and on deterrence of antidumping measures against members' exports.

as to make better use of the system. Third, the project hopes to generate new thinking as to how the system itself can be adapted to facilitate use by developing countries and thereby promote their sustainable development objectives.[4] These broader sustainable development aims, in our view, are in the interest of all WTO members. They are reflected not only in the UN Millennium goals, but also in a great number of WTO activities, and in particular its trade-related capacity-building activities which are now part of its core program and which play a central role in the Doha agenda.

We have advanced these objectives through two primary mechanisms. First, ICTSD has solicited and coordinated original research through forming a network of scholars and practitioners from developed and developing countries. Second, ICTSD has organized a series of three regional dialogues in Asia, Africa, and South America, complemented by dialogues in Geneva and other capitals, that bring together developing countries' WTO representatives, government officials from different departments, members of the Advisory Centre on WTO Law (ACWL), private attorneys specializing in the trade field, the private sector, civil society representatives, development policy analysts, and legal scholars, economists, and political scientists from developed and developing countries. In these dialogues, participants examine and deliberate over developing country experiences, challenges, practices and options for the future.

This new Field Guide advances the DSU project's first two goals by empirically investigating individual developing country encounters with and adaptations to the DSU and by examining different strategies that these countries might consider. This guide consists of case studies of nine developing countries from three regions, with three case studies each for the regions of Africa, Asia and South America. These case studies were presented and discussed at regional dialogues held in Brazil, Indonesia and Kenya, and they have since been revised for this volume.

Our goal with these case studies is not to provide a single model for effective use of the DSU. Rather, the aim is for countries to share challenges, experiences, and best (and better) practices so as to inform debate and deliberation over what can be done. Each of the case studies provides original, empirical, bottom-up examination of countries' practices. The countries examined range from the most frequent developing country users of the DSU (Brazil and India), to relatively more frequent users (Argentina, Chile and Thailand), to countries that have never filed claims but have been respondents (Egypt and South Africa), to the first and only least developed country to have filed a complaint (Bangladesh), to a country that has neither been a complainant or respondent (Kenya). The Field Guide begins with an introduction by David Evans[5] which provides an overview of developing countries' use of the DSU, addressing each region separately. The volume then turns to the nine case studies, divided into three sections for the three

[4] The project's third aim (to advance study of how the DSU procedures themselves could be reformed) is addressed through a series of systemic studies, many of which are now available on the ICTSD DSU website.

[5] David Evans was the delegate from New Zealand responsible for dispute settlement matters, including in New Zealand's successful challenges against three of the largest WTO members, the United States, European Communities, and Canada.

regions presented in the following order—South America, Asia and Africa—which reflects the region's relative use of the DSU. Each of the three sections is preceded with a brief presentation of the regional dialogues in which the respective case studies were first presented, spurring deliberation among the wide-ranging participants. The volume then concludes, noting what might be learned from these empirical studies.

Our goal has also been to help to ensure that developing country perspectives are better understood on the broader international stage so that the DSU is not evaluated from simply a Euro-North American vantage, as it often has been. All of the authors of the case studies (but for one co-author) are from the countries studied. Once again, in this way, we aim to further a better bottom-up understanding of the WTO dispute settlement system.

In short, this book addresses what developing countries have done, and can do, on their own to build capacity for WTO dispute settlement. Given that negotiations over DSU reform have gone nowhere (including as regards amendments that could facilitate developing country participation), we believe that investment in this bottom-up approach will be the most effective and secure way for developing countries to obtain better results. We hope that this Field Guide to WTO dispute settlement, built from empirical work in developing countries, can be of use in generating a broader understanding of how the WTO dispute settlement system works, and of how individual developing countries can adapt and deploy different strategies to use it more effectively in advancing their trade objectives and defending their trade rights through the DSU system.

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