Introduction

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Over its first fifteen years of operation, the World Trade Organization (WTO)'s Dispute Settlement Understanding (DSU) has assumed a central role in the enforcement and implementation of WTO commitments. The DSU provides a singularly effective mechanism by which WTO Members can seek the full implementation of previously negotiated trade concessions. Yet WTO Members are not equally positioned to access and effectively utilize it, affecting developing countries in particular.

Analysing how developing countries have used the DSU, however, is not straightforward. For a start, a number of studies in this area address the definitional question of what constitutes a 'developing country'[1] as the WTO system leaves the term undefined, so that members self-determine their status. In addition, when turning to statistics to aid in the analysis, the questions multiply. Precisely when does a 'dispute' arise – when consultations are requested, or only after they have failed? How do we count multiple disputes on essentially the same matter? Should we focus on consultations initiated, panels established, or Appellate Body Reports adopted? How do we measure whether a case has been 'won' by a complainant, or whether a ruling

* The views expressed here are those of the author and not necessarily those of the New Zealand Ministry of Foreign Affairs and Trade.

[1] For the purposes of this volume, developing countries are those that have self-declared themselves as such under the WTO. Other studies have used other criteria such as GDP or membership in other organizations such as the OECD. See for example, R. Abbot, 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the Years 1995–2005'. ECIPE Working Paper No. 01/2007, available at www.ecipe.org/publications/ecipe-working-papers/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system/PDF; and H. Horn and P. Mavroidis, 'The WTO Dispute Settlement System 1995–2004: Some Descriptive Statistics' (Washington, DC: World Bank, 2006).

has been fully implemented by a respondent?[2] For the purposes of this Introduction, a dispute is regarded to have been initiated when DSU consultations are requested.

With these caveats in mind, however, it is useful to consider the following:

- in fifteen years of dispute settlement under the DSU, over 400 disputes were initiated;[3]
- no African country has ever initiated a dispute under the DSU;
- only one Least Developed Country (LDC) initiated a dispute, and that dispute did not progress beyond the consultation phase (Bangladesh); and
- the United States (US) and European Communities (EC) between them have been complainants in approximately forty-one per cent of all cases.

Faced with these statistics, it might be tempting to conclude immediately that the DSU, a system designed to provide for the rule of law – or 'one law for all' – in international trade relations, is failing in this fundamental task with respect to developing countries. Yet, a different set of statistics may give pause:

- seven out of the top eleven most frequent complainants are developing countries. They are, in order of frequency as a complainant: Brazil, Mexico, India, Argentina, Republic of Korea, Thailand, and Chile;
- over forty per cent of all complaints have been initiated by developing countries;
- of the forty WTO Members to have initiated at least one WTO dispute, twenty-nine have been developing countries; and
- the US and the EC, between them, have been respondents in approximately forty per cent of all cases.[4]

From these somewhat contrary pictures, at least two points are clear: some developing countries have actively used the DSU, and other

[2] The statistics used in the introductory sections of this volume are drawn from the WTO website, www.wto.org, as of 5 November 2009. Another source of WTO statistics is the World Trade Law website, www.worldtradelaw.net.

[3] As at 5 November 2009, the WTO records 400 dispute settlement cases initiated. This represents 400 consultation requests received. However, in a number of disputes there were multiple complainants associated with a single consultation request. For the purposes of the figures used in this introductory section these have been disaggregated and counted as separate disputes.

[4] This figure does not include disputes against individual EC member states.

developing countries have not used it at all. The point can be made in a more immediate context. The nine WTO Members included in this volume, between them, have initiated seventy-seven complaints under the DSU, amounting to eighteen per cent of all complaints initiated. But this masks a significant disparity. Brazil and India, two of the most frequent developing country users, have initiated forty-two complaints between them (roughly ten per cent of all disputes initiated), while Egypt, South Africa, and Kenya have not initiated a single dispute.

What is *not* so clear from these statistics, however, is precisely *why* this is the case. A number of studies have attempted to assess statistically patterns of initiation of WTO complaints, examining respectively whether use simply reflects economic size, whether market power factors favour use by powerful countries because of their ability to retaliate to enforce rulings, and whether legal capacity differences explain disparate use.[5] Regardless of the outcome of this debate, case studies will provide us with a more nuanced understanding of the underlying reasons and factors that have led particular developing WTO Members to act as they have – both those that have actively used the system, and those that have not. Most importantly from a policy perspective, such an appreciation will assist in the development of strategies to better enable (or prepare) developing countries for dispute settlement under the WTO. Developing such strategies is particularly important today.

We are standing at an important moment in the development of the WTO. Will the Doha Round succeed, or will it be the first Round ever to fail? Whatever the answer, the importance of the DSU is likely only to grow. Should the Round fail, it seems reasonable to assume that WTO Members will look to the DSU to fully enforce existing obligations and perhaps to try to obtain through litigation what they could not achieve in a clear manner through negotiation. Should the Round succeed, not only will the DSU play this role, but there will be a whole new set of WTO commitments to be implemented and,

[5] C. Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders', *World Bank Economic Review* 19 (2005), 287–310 (assessing market power); M. Busch, E. Reinhardt and G. Shaffer, 'Does Legal Capacity Matter? A Survey of WTO Members', *World Trade Review* 8 (2009), 559–77 (addressing legal capacity); J. Francois, H. Horn, and N. Kaunitz, 'Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System', IFN Working Paper No. 730, 2008. Research Institute of Industrial Economics (addressing trading profiles); A. Guzman and B. Simmons, 'To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO', *Journal of Legal Studies* 31 (2002), 205–35 (addressing legal capacity versus market power).

if necessary, enforced through the DSU. In short, under any likely scenario, there will be many future WTO disputes.

It is in this context that the International Centre for Trade and Sustainable Development (ICTSD) has developed a programme to explore strategies to enhance the participation and legal capacity of developing countries in WTO dispute settlement. This volume forms an important part of that programme. It gathers together the perspectives of developing country authors on the use of the dispute settlement mechanism by nine developing WTO Members. The authors include academics, policymakers, and government officials, and the WTO Members range from those that have never brought a WTO complaint to those that are among its most frequent users. The chapters were commissioned as inputs to three multi-stakeholder regional dialogues in South America, Asia, and Africa, and have evolved in response to discussions during those dialogues.

This volume follows the structure of these regional workshops. It is divided into three sections, representing South America, Asia, and Africa. This allows for the exploration not only of individual country, but also of regional, experiences. Figure I.1 provides an indication of how use of the DSU has varied by region.

We hear first about one of the most frequent and sophisticated users of the DSU (Brazil), and conclude with a WTO Member with very little direct experience of the dispute settlement system (Kenya). In between these two extremes, we hear about other frequent users (India), more moderate users (Argentina, Thailand, and China, the latter, however, one of the most frequent users recently, as respondent and complainant), the first LDC ever to have initiated a dispute under the DSU (Bangladesh), and two nations that have experienced the DSU only as respondents or third parties (Egypt and South Africa).

The result is a fascinating kaleidoscope of perspectives, viewpoints and observations. The chapters contained in this volume delve beneath the statistics, and help deepen our understanding of individual country experiences. Nine different stories are told of WTO Members coming to terms (or attempting to come to terms) with an increasingly 'legalized' and 'judicialized' system for settling international trade disputes, and all the opportunities and challenges associated with this legal system. Although each country faces its own unique challenges, the similarities in the experiences explored in this volume are often as striking as the differences. With respect to the more active users, patterns start to emerge in terms of how domestic systems and institutions, both public and private, gradually evolve and better organize themselves. This helps to provide a road map

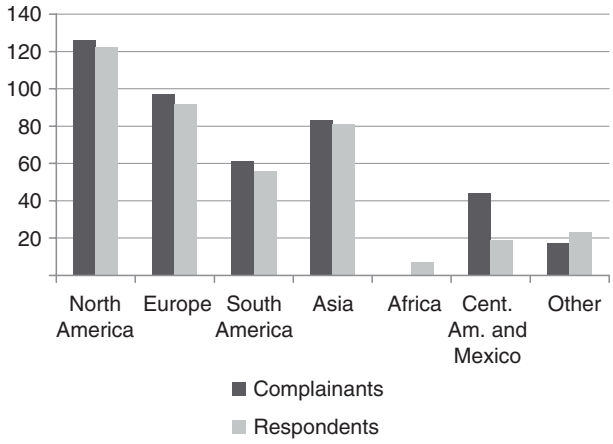

Figure I.1 Use of the DSU by region
Note: This Figure represents disputes as of 5 November 2009. 'Asia' includes Japan, which accounts for thirteen cases as complainant and fifteen cases as respondent. 'Other' includes Australia, New Zealand, Turkey, Dominican Republic, Trinidad and Tobago, and Antigua and Barbuda.
Source: WTO website, www.wto.org, as of November 2009.

of what is required at the domestic level in order to take advantage of the opportunities created by the DSU, and respond to its challenges.

Ultimately, this volume is intended not simply as an academic exercise, but also as a practical policy tool. Law is a world of action and one of the aims of this research is to inform not only scholars who assess the system, but also government representatives and practitioners engaged in that world of action. It is hoped that the volume will be useful to the many actors that together contribute to the 'capacity' of developing countries to use the system – including academics, policymakers, government officials, private sector groups, lawyers, and civil society organizations. While clearly there is no magic formula, or one-size-fits-all response for WTO Members, the concluding section will attempt to highlight common themes or 'lessons learned' in the hope of providing practical guidance to enhance and broaden developing country participation in the operation of the WTO.

I. South America

South American countries have been active users of dispute settlement under the WTO (see Figure I.2 below). In total, sixty-one complaints have been initiated by South American nations, as of the end of 2009.

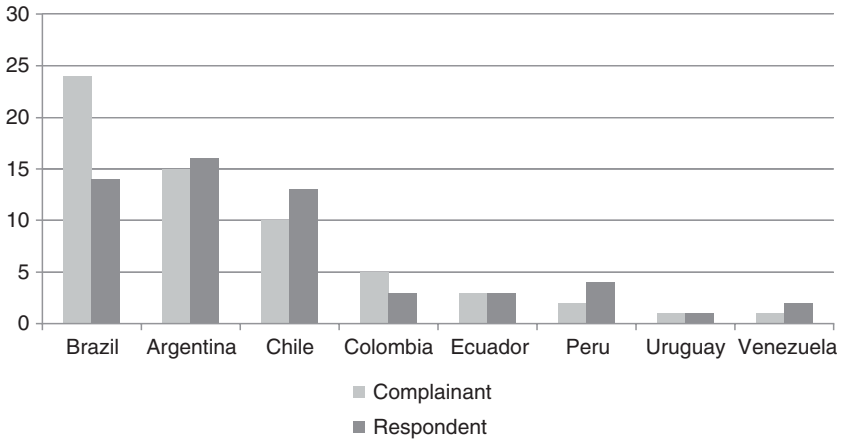

Figure I.2 Use of the DSU in South America
Source: WTO website, www.wto.org, as of November 2009.

Brazil alone accounts for twenty-four of these, making it the most active developing country user of the DSU, and the fourth most active user overall, after the US, EC, and Canada. Argentina and Chile have also been frequent users, initiating fifteen and ten disputes respectively, and together with Brazil, account for eighty per cent of the complaints originating from South America. Nearly thirty per cent of the cases initiated by South American countries have been against other countries in the region. Argentina, for example, has initiated six cases against Chile, while five of Chile's ten disputes are directed at the trade practices of other South American countries. The US and the EC have also regularly targeted, and been targeted by, countries in South America.

It seems fitting to begin this volume with a chapter examining the experiences of the most active and successful developing country user of the DSU, Brazil. The chapter, by Gregory C. Shaffer, Michelle Ratton Sanchez Badin, and Barbara Rosenberg, provides an in-depth look at how Brazil has adapted institutionally to respond to a more legalized and judicialized WTO regime. Brazil has been a complainant in twenty-four, a respondent in fourteen, and a third party in forty-nine cases. Moreover, it has 'largely prevailed in each of its complaints, and the settlements that it obtained have been largely to its satisfaction'. As the authors note, 'Brazil's trajectory is of great interest to many developing country members of the WTO, as it shows how a developing country can

mobilize legal resources to respond to, and advance its interests through, the judicialized WTO regime, including against the most powerful WTO members . . . .'

Brazil's approach to WTO dispute settlement is placed within the context of a broader shift from inward (import substitution) to outward (export-oriented) economic policies. The chapter explains how Brazil has reorganized itself both within government and through more effective public–private coordination to take advantage of the DSU. At the highest level, an inter-ministerial body has been created to investigate, prepare and approve the filing of WTO disputes. In addition, a 'three pillar' structure has been developed, starting with the establishment of a specialized WTO dispute settlement unit in the capital, Brasília (the first pillar), coordination between this unit and an expanded Geneva Mission (the second pillar), and coordination between both of these entities and Brazil's private sector and law firms (the third pillar). A deliberate effort has been made to broaden capacity by proactively working with a wide variety of non-state actors: private Brazilian companies, trade associations, economic consultancies, private Brazilian law firms, Washington- and Geneva-based law firms, as well as academics, the media, and other Brazilian and international civil society organizations. The authors conclude that the result is a diffusion of WTO expertise that has strengthened Brazil's overall dispute settlement capacity. Interestingly, it was a case in which Brazil was on the defensive, *Brazil – Aircraft,* that provided a catalyst for the development of new dispute settlement strategies which then enabled Brazil to become a proactive user of the DSU.

As described in the second chapter, by José L. Pérez Gabilondo, Argentina's early experiences of the DSU were also primarily as a respondent in cases involving sensitive sectors. First the US challenged Argentina's minimum specific import duties on textiles and clothing (*Argentina – Textiles)*, and then in a related case the EC challenged Argentina's safeguard measures on footwear (*Argentina – Footwear*). Although Argentina had no specific structure in place, and 'responsibilities' for dealing with WTO disputes were blurred, the requirement to defend these cases 'triggered a governmental capacity building process of human resources devoted to WTO litigation'. As private sector interest was low, the public sector had to rely on 'in-house lawyers'.

One early challenge was to better integrate 'public international law' into Argentina's approach to trade dispute settlement, which under the General Agreement on Tariffs and Trade (GATT) had relied primarily on economic argumentation. Under the DSU, WTO Agreements are

interpreted 'in accordance with customary rules of public international law'. It became clear from these early cases that the specificity and resource-intensive nature of dispute settlement requires a dedicated unit separate from that which deals with general WTO affairs. Pérez Gabilondo uses Argentina's experiences in the *Argentina – Patent* case as an example of the benefits of this new 'legal' focus as it enhances 'the bargaining position of the weaker party' during the consultation phase of a dispute.

As a result of these experiences, Argentina established a new Division of International Economic Dispute Settlement within the Ministry of Foreign Affairs and International Trade. The Division takes the lead on dispute settlement under the WTO and Free Trade Agreements (FTAs), except for MERCOSUR, and provides legal advice on bilateral and multilateral trade negotiations. A high number of ongoing cases, and staff continuity, established a 'solid base of expertise with which to turn the defensive nature of Argentina's participation in international dispute settlement into an offensive exercise'. Three major cases were initiated, against Chile, the US and the EC. Public sector capacity in Argentina has, at times, been complemented by the involvement of private law firms (considered essential to succeed, for example, in an anti-dumping case against the US), academia, and industry groups. The *Chile – Price Band* case required a 'large amount of coordination with other agencies', and particular benefit came from having negotiators with in-depth experience of the WTO agricultural negotiations. The successful outcome in that case is considered a turning point for Argentina, proving that "it was feasible to litigate a complaint before the WTO based mainly on the resources developed in previous years' defensive litigation'. Despite these successes, challenges remain, such as maintaining in-house expertise in the face of a policy of rotating staff, capacity restraints when dealing with large cases, and the need to bring more actors into the process in a more structured way.

II. Asia

As might be expected from a region so vast, Asia is home to a diverse range of experiences regarding DSU use (see Figure I.3 below). China has been a complainant only six times as of the end of 2009, but a respondent seventeen times.[6] It has also been a third party more than

[6] This figure represents the total number of separate complaints made against China. It should be noted, however, that often these cases involved more than one complaining

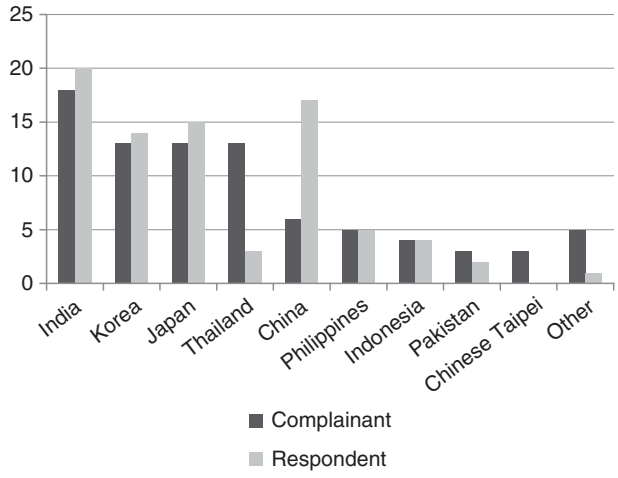

Figure I.3 Use of the DSU in Asia
Source: WTO website, www.wto.org, as of November 2009.

sixty times, clearly evidencing a strategy of capacity-building and 'learning by doing' through third party participation.[7] India's eighteen complaints make it the sixth most frequent user of the DSU, and the third most frequent developing country user behind Brazil and Mexico. Korea and Thailand have also made significant use of the DSU, while the Philippines, Indonesia, Chinese-Taipei and Pakistan have been more moderate users. A number of Asian WTO Members have initiated only one or two complaints (Bangladesh, Hong Kong-China, Malaysia, Singapore, Sri Lanka, Vietnam), while others have not been directly involved in WTO dispute settlement at all (for example, Brunei and Myanmar).[8] Only about six per cent of cases have been initiated by Asian developing countries against other developing countries in the region, which contrasts with patterns in South America.

party. The number of actual trade 'disputes' is therefore significantly lower than seventeen. In fact, the seventeen trade disputes have involved eight discrete trade issues. Of course, the same caveat applies to the figures used for other WTO Members, such as the US and the EC.

[7] See H. Liyu and H. Gao, 'China's Experience in Utilising the WTO Dispute Settlement Mechanism', Chapter 3 *infra*.

[8] Vietnam initiated a complaint on 1 February 2010 against the US. It has also participated as a third party in two cases.

The four chapters in this section, regarding China, India, Thailand, and Bangladesh, reflect this regional diversity. The first chapter, by Han Liyu and Henry Gao, examines the dramatic changes in China since it joined the WTO in December 2001, after fifteen years of negotiation. China's economy has been the fastest growing in the world, with its trade surplus expanding to over US$262 billion by the end of 2007, and exports accounting for forty per cent of China's gross domestic product. China has become a major player in the WTO on account of the size of its trade. It has, accordingly, become an increasing target of WTO complaints, and was the most frequent target over the three-year period ending in November 2009.[9] However, China has also gone on the offensive, bringing six WTO complaints, which includes three new complaints brought in 2009 alone, against measures imposed by the US, EC and Mexico respectively.

China has invested a great deal in developing WTO-related legal capacity. It has done so particularly through participation as a third party in almost every WTO case since August 2003. The government has sponsored significant legal-capacity training for Chinese officials, as well as the private sector, and WTO law has become an increasing subject of research and teaching in Chinese universities. The chapter examines how China has also developed a number of municipal government centres for WTO affairs, the most important being in Shanghai, Beijing and Shenzen.

As China has moved to a market economy, Chinese industry associations and chambers of commerce have become more involved with WTO matters. The government has even developed a Trade Barrier Investigation procedure pursuant to which domestic firms and industry can formally petition the government to investigate and challenge foreign trade barriers. It is modelled after those used in the US and EC. The authors note how the Jiangsu Laver Association used it with respect to Japanese restrictions on Chinese laver exports, although this petition remains the only example. The authors find, moreover, that industry associations are not always completely independent of the government, often employing current and former government officials.

[9] Some of these complaints involved essentially the same case, but were taken by numerous co-complainants. Thus the number of actual 'disputes' (involving discrete measures) was six. Over the same period the US was the target of eleven complaints initiated against it, involving ten measures; and the EC had nine cases initiated against it, involving six measures.