

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz

Frontmatter

[More information](#)

DISPUTE SETTLEMENT AT THE WTO

This examination of the law in action of WTO dispute settlement takes a developing-country perspective. Providing a bottom-up assessment of the challenges, experiences and strategies of individual developing countries, it assesses what these countries have done and can do to build the capacity to deploy and shape the WTO legal system, as well as the daunting challenges that they face. Chapters address developing countries of varying size and wealth, including China, India, Brazil, Argentina, Thailand, South Africa, Egypt, Kenya and Bangladesh. Building from empirical work by leading academics and practitioners, this book provides a much needed understanding of how the WTO dispute settlement system actually operates behind the scenes for developing countries.

GREGORY C. SHAFFER is Melvin C. Steen Professor of Law at the University of Minnesota Law School.

RICARDO MELÉNDEZ-ORTIZ is the co-founder and Chief Executive of the International Centre for Trade and Sustainable Development (ICTSD).

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz

Frontmatter

[More information](#)

DISPUTE SETTLEMENT AT THE WTO

The Developing Country Experience

Edited by

GREGORY C. SHAFFER

and

RICARDO MELÉNDEZ-ORTIZ



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521769679

© International Centre for Trade and Sustainable Development (ICTSD) 2010

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2010

Reprinted 2011

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

ISBN 978-0-521-76967-9 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

CONTENTS

List of tables vii
List of figures viii
List of contributors ix
Preface: The ICTSD dispute settlement project xi
GREGORY C. SHAFFER AND RICARDO MELÉNDEZ-ORTIZ

Introduction 1
DAVID EVANS AND GREGORY C. SHAFFER

PART I Case Studies from South America 19

1. Winning at the WTO: the development of a trade
policy community within Brazil 21
GREGORY C. SHAFFER, MICHELLE RATTON SANCHEZ BADIN
AND BARBARA ROSENBERG

2. Argentina’s experience with WTO dispute settlement:
development of national capacity and the use
of in-house lawyers 105
JOSÉ L. PÉREZ GABILONDO

PART II Case Studies from Asia 135

3. China’s experience in utilizing the WTO Dispute
Settlement Mechanism 137
HAN LIYU AND HENRY GAO

4. Learning from the India–EC GSP dispute: the issues
and the process 174
BISWAJIT DHAR AND ABHIK MAJUMDAR

5.	Thailand’s experience in the WTO dispute settlement system: challenging the EC sugar regime	210
	PORNCHAI DANVIVATHANA	
6.	How the DSU worked for Bangladesh: the first least developed country to bring a WTO claim	230
	MOHAMMAD ALI TASLIM	
	PART III Case Studies from Africa	249
7.	South Africa’s experience with international trade dispute settlement	251
	GUSTAV BRINK	
8.	WTO dispute settlement for a middle-income developing country: the situation of Egypt	275
	MAGDA SHAHIN	
9.	Sub-Saharan Africa and WTO dispute settlement: the case of Kenya	301
	DAVID OUMA OCHIENG AND DAVID S. MAJANJA	
10.	Conclusion	342
	DAVID EVANS AND GREGORY C. SHAFFER	
	<i>Index</i>	349

TABLES

1.1 Brazil WTO cases by country (1995–2008) 38

2.1 Three cases illustrating the importance of combining elements
in light of the factors of each case 130

4.1 Price after tariff of bed sheets from India and Pakistan 208

4.2 EU tariffs on selected products covered under
Chapters 61 to 63 of Tariff Schedule 208

6.1 Trade between Bangladesh and India (US\$ million) 232

6.2 Major export products of Bangladesh (US\$ million) 235

6.3 Tariff concessions given by India on lead acid battery
import under SAPTA (3rd Round) 236

6.4 Export of lead acid batteries from Bangladesh to India 237

7.1 Link between exchange rate and number of anti-dumping
investigations 255

9.1 Direction of Kenya’s exports and origin of its imports,
1990–2002 304

9.2 Nile Perch exports grouped by market regions (Kg) 308

9.3 Impact of EU bans on fish exports 309

9.4 Kenya’s tea exports: top five destinations (2003) 317

FIGURES

I.1 Use of the DSU by region 5
I.2 Use of the DSU in South America 6
I.3 Use of the DSU in Asia 9
1.1 Brazil as a complainant and respondent in WTO
cases by year (1995–2008) 34
7.1 Organogram 1: South Africa’s Institutional Structure 257
7.2 Organogram 2: Proper Dispute Resolution Process 258
7.3 Organogram 3: Actual Process Followed 263
9.1 Kenya’s National Structure for WTO Trade Negotiations 323
9.2 Process of Dispute Settlement 324

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz

Frontmatter

[More information](#)

LIST OF CONTRIBUTORS

MICHELLE RATTON SANCHEZ BADIN is Professor of Law at the Law School of São Paulo, Getúlio Vargas Foundation (DireitoGV) and researcher at the Brazilian Center for Planning and Analysis (CEBRAP).

GUSTAV BRINK is a Tralac Associate, Managing Partner of Trade Remedies Unlimited and Extraordinary Lecturer in International Trade Law at the University of Pretoria. He worked previously in the South African Anti-dumping Investigative Authority.

PORNCHAI DANVIVATHANA is Deputy Director-General, Department of Treaties and Legal Affairs, Thailand. Previously he handled dispute settlement matters in Geneva on behalf of the Thai Mission to the WTO.

BISWAJIT DHAR is a Professor and Director of RIS (Research and Information Systems for Developing Countries). He was formerly Director of the Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi, India.

DAVID EVANS is a senior legal adviser to the New Zealand Ministry of Foreign Affairs and Trade. From 2002 to 2005 he was the delegate from New Zealand responsible for dispute settlement matters at the New Zealand Mission to the WTO in Geneva.

JOSÉ L. PÉREZ GABILONDO is a lawyer and an Argentinean diplomat. He served formerly as the Chairman of the National Foreign Trade Commission of Argentina, as Head of Delegation to WTO Rules Negotiations Group and Director of International Economic Dispute Settlements within the Ministry of Foreign Affairs, International Trade and Worship of Argentina.

X LIST OF CONTRIBUTORS

HENRY GAO is Associate Professor of Law at Singapore Management University while currently on leave from the University of Hong Kong.

HAN LIYU is Professor of Law, Renmin University of China Law School.

DAVID S. MAJANJA is a partner in Mohammed Muigai Advocates in Kenya.

ABHIK MAJUMDAR is a graduate of the National Law School of India University, and gained his Masters Degree from the National University of Singapore.

RICARDO MELÉNDEZ-ORTIZ is the co-founder and Chief Executive of the International Centre for Trade and Sustainable Development (ICTSD).

DAVID OUMA OCHIENG is the Executive Director of the Centre for International Trade and Investment Law based in Kenya.

BARBARA ROSENBERG teaches at the Law School of São Paulo, Getúlio Vargas Foundation (DireitoGV), and is a partner in the law firm of Barbosa, Müssnich & Aragão Advogados, based in São Paulo.

GREGORY C. SHAFFER is the Melvin C. Steen Professor of Law at the University of Minnesota Law School.

MAGDA SHAHIN was ambassador at Egypt's Ministry of Foreign Affairs.

MOHAMMAD ALI TASLIM is a Professor in the Department of Economics, Faculty of Social Sciences, University of Dhaka, Bangladesh, and serves as Chairman of the Bureau of Economic Research, University of Dhaka.

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz

Frontmatter

[More information](#)

PREFACE: THE ICTSD DISPUTE SETTLEMENT PROJECT

GREGORY C. SHAFFER AND RICARDO MELÉNDEZ-ORTIZ

This book examines dispute settlement at the World Trade Organization (WTO) from a developing country perspective. It is written largely by academics and practitioners from developing countries, and thus brings new voices to the appraisal of the WTO's dispute settlement system. The book builds from a bottom-up assessment of the challenges, experiences and strategies of nine developing countries from Africa, Asia, and South America to address the central question of how the WTO legal system, and in particular its arrangements for dispute management and resolution, could more effectively serve and advance the interests of developing countries.

Since succeeding the General Agreement on Tariffs and Trade (GATT) system in 1995, the WTO has established itself as an indispensable multilateral institution. It has instituted clear rules for multilateral exchange and a broad range of trade-related measures, and supported the development of norms in favour of open markets and predictable policies.

The WTO's dispute settlement system has been called its 'crown jewel'. The automatic dispute settlement procedures, with their ability to authorize commercial countermeasures as sanctions, make the WTO a rare international institution. The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) introduced substantial reforms to the old GATT system by providing defined, binding rules and procedures. The resulting rulings have reached into important areas for sustainable development, such as trade-distorting farm subsidies, resource management and the protection of public health.

Efficient, reliable dispute settlement and enforcement are critical for ascertaining compliance with obligations, redressing imbalances and, thus, introducing greater predictability and stability in the rules-based trading system. Challenges remain, however. The design of the DSU, like the rest of the WTO, was shaped through a process of political

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz

Frontmatter

[More information](#)

deliberation and compromise. The negotiated text, along with the DSU's subsequent evolution, reflect asymmetric power, resulting in procedural rules that favour stronger economies. Weaker actors such as most developing countries, small and vulnerable economies with limited institutional capacity and marginalized small and medium-sized enterprises, are left to struggle to effectively seize opportunities, avail themselves of rights and, generally, benefit from the existing multilateral trading system.

Rules on compliance and retaliation exemplify this situation. Research conducted by the International Centre for Trade and Sustainable Development (ICTSD) has shown that available options for retaliation are geared more towards re-balancing the level of concessions than inducing compliance with Member obligations. The smaller the economy and the narrower the trading profile, the slimmer the opportunities to find a retaliatory target without adversely affecting the domestic market. As a consequence, as long as retaliation is the only remedy, and the system does not provide adequate opportunity or incentives for disputing parties to agree to meaningful compensation, only larger economies are in a position to impose 'effective' retaliation.¹

Nonetheless, we believe that participation in the WTO dispute settlement system is important for three primary reasons. First, participation matters for specific economic outcomes. 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 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.

As reflected in the failure to conclude the Doha Round negotiations, WTO dispute settlement is where the action is likely to continue in trade law today. The DSU system continues to thrive, with new cases brought to it regularly. Under this more legalized dispute settlement system with its systemic implications, it is particularly important that every country has an equal chance of success regardless of its economic context.

¹ V. Plasai, 'Compliance and Remedies Against Non-Compliance Under the WTO System: Towards A More Balanced Regime for All Members', Issue Paper No. 3 (Geneva, Switzerland: ICTSD, 2007).

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz

Frontmatter

[More information](#)

PREFACE

xiii

But the rule of law in the WTO is of less use to members if they lack the basic resources and capacity to deploy it. For many developing countries, the obstacles to effective participation are significant. The DSU system is procedurally demanding, with strict requirements for making claims, tight deadlines for submissions, and an appellate review system, complemented by arbitration over compliance and retaliation awards. The body of WTO case law continues to proliferate, with individual rulings averaging hundreds of pages, and the total amount exceeding 40,000 pages. This *legalization* could further impact the capacity of developing countries to utilize the system to safeguard their trade rights and secure their objectives.

To gain effective recourse to the WTO's dispute settlement mechanism, developing countries need experienced legal, economic and diplomatic staff, and an engaged stakeholder community. Many of them, however, lack sufficient human resources and have weak public institutions and fragile private networks. The establishment of the Advisory Centre on WTO Law (ACWL) has contributed significantly to redressing this imbalance for several members by providing Geneva-based legal advice at a reduced rate. But a critical piece remains missing – the development of domestic legal capacity for countries to better articulate their interests, identify claims, provide background factual support in cases, bargain in the shadow of potential litigation, and, overall, make optimal use of the WTO dispute settlement process. Indeed, research undertaken by ICTSD² has shown that, to varying degrees, developing countries are impeded from using WTO dispute settlement, and are at a disadvantage in bargaining in its shadow, due to insufficient *legal capacity*. In an empirical survey of 52 WTO Members (including 10 'low income' and 16 'lower middle income' countries), 88 per cent of all participants cited legal capacity as a principal advantage of powerful

² In addition to the studies in this book, ICTSD is publishing a series of cross-cutting systemic studies of the factors that explain developing country use (and lack of use) of the DSU. See e.g., H. Horn and J. Francois, 'Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System', Issue Paper No. 6 (Geneva, Switzerland: ICTSD, 2008); and M. Busch, E. Reinhardt and G. Shaffer, 'Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions', Issue Paper No. 4 (Geneva, Switzerland: ICTSD, 2008). 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.

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz

Frontmatter

[More information](#)

xiv

PREFACE

members in using the DSU.³ ICTSD research has shown that, in particular, inadequate coordination between the government and private sector, a weak stakeholder community, and difficulty in determining the existence of undue trade barriers due to insufficiently processed information, constrain developing countries in their efforts to benefit from the WTO legal system.

Since 2003, ICTSD has aimed to address the need for in-depth research, discussion and exchange on how to improve WTO dispute settlement rules and the ability of weaker actors to make efficient use of the options provided within the system. With its introductory study *How to Make the Dispute Settlement System Work for Developing Countries*⁴ and extensive subsequent research, the Centre has established itself as a unique player in the trade law community. Building international, regional and domestic networks for stakeholder cooperation and facilitating exchange between the legal community and policymakers, lies at the core of ICTSD's activities on WTO dispute settlement.

The goals of ICTSD's programme on the DSU are three-fold. First, it 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, in light of sustainable development concerns. Second, building from these analyses, the project seeks to generate new thinking about how rules can be redefined so as to respond to existing imbalances and improve access for weaker actors.⁵ Third, it explores challenges that developing countries face as well as pragmatic strategies that individual developing countries have used, and can use, to better take advantage of the system.⁶

ICTSD has advanced these objectives through two primary mechanisms. First, it has solicited and coordinated original research by

³ *Ibid.*, Busch *et al.*

⁴ See G. Shaffer, V. Mosoti and A. Qureshi, *Towards a Development-Supportive Dispute Settlement System in the WTO*, ICTSD Resource Paper No. 5 (Geneva, Switzerland: ICTSD, March 2003).

⁵ This aim is addressed through a series of systemic studies, many of which are now available on the ICTSD DSU website. See, e.g., J. Pauwelyn, 'Appeal Without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix It', Issue Paper No. 1 (Geneva, Switzerland: ICTSD, 2007); H. Nordstrom and G. Shaffer, 'Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure: A Preliminary Analysis', Issue Paper No. 2 (Geneva, Switzerland: ICTSD, 2007).

⁶ See e.g. A. Appleton, 'Suspension of Concessions in the Services Sector: Legal, Technical and Economic Problems', Issue Paper No. 7 (Geneva, Switzerland: ICTSD, 2009); F. Abbott, 'Cross-Retaliation in TRIPS: Options for Developing Countries', Issue Paper No. 8 (Geneva, Switzerland: ICTSD, 2009).

Cambridge University Press

978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience

Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz

Frontmatter

[More information](#)

PREFACE

XV

brokering knowledge and forming a network of scholars and practitioners from developed and developing countries. Second, ICTSD has organized a series of regional dialogues in Asia, Africa, and South America, complemented by dialogues in Geneva and other locations, that bring together developing countries' WTO representatives, government officials from different departments, members of the Advisory Centre on WTO Law, private attorneys specializing in the trade field, the private sector, civil society representatives, development policy analysts, legal scholars, economists, and political scientists from a cross-section of high-, middle-, and low-income countries. In these dialogues, participants examine and deliberate over developing country experiences, challenges, practices, and options for the future. In addition to fostering creative thinking through constructive dialogue, these activities aim to foster network-building among participants.

This book complements and advances ICTSD's previous research. The nine case studies empirically investigate individual developing country encounters with and adaptations to the DSU, and examine different strategies that these countries could consider. The case studies were developed through the regional dialogues.

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 practices, and to inform deliberation and debate over what is possible. In addition, we hope to make developing country perspectives better understood on the broader international stage, in comparison to the Western vantage points from which the DSU tends to be evaluated. With one exception, the authors of the case studies are from the countries studied. In this way, we aim to further a better bottom-up understanding of the WTO dispute settlement system. We hope that this book will further support this exchange among individual developing country representatives and the greater stakeholder community in order to generate understanding and discussion on how WTO dispute settlement works in practice, and how it can be improved.

The implementation of this comprehensive programme and the conduct of the research would not have been possible without our generous supporters and partners. In that regard, we thank RUIG-GIAN and the Swedish Board of Trade for their generous financial support, which has made this volume and ICTSD's larger ongoing DSU project possible. We thank the University of Wisconsin East Asian Legal Studies Center for its financial support for the dialogue held in Jakarta, Indonesia. We wish also to thank our principal partners for the regional and China dialogues

Cambridge University Press
978-0-521-76967-9 - Dispute Settlement at the WTO: The Developing Country Experience
Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz
Frontmatter
[More information](#)

(Hassan Kartadjoemena in Indonesia; Michelle Ratton Sanchez Badin and FGV-São Paulo in Brazil; David Ouma Ochieng in Kenya, the China Society for WTO Studies, WTO Studies School of Wuhan University and the Shanghai WTO Affairs Consultation Centre, in China), our partners at the ACWL whose attorneys attended each of the regional dialogues, all those at ICTSD who have worked on this project, including Yvonne Apea, Christophe Bellmann, Johannes Bernabe, Shuaihua Cheng, El Hadji Diouf, Victor Mosoti, Sheila Sabune, Knirie Sogaard, David Vivas-Eugui and Marie Wilke, as well as the many participants in the ICTSD regional and other dialogues held under this project.