1. Developing countries at WTO Dispute Settlement Understanding: strengthening participation

The World Trade Organization (WTO) dispute settlement system is a remarkable example of international ‘rule of law’ and multilateral adjudication. The WTO grants several rights to its members, and the WTO Dispute Settlement Understanding (DSU) provides a rule-oriented consultative and judicial mechanism to protect and enforce these rights in cases of WTO-incompatible trade infringements. The quasi-universal (and unceasingly increasing) WTO membership, significant use of dispute settlement mechanism, enthusiastic multilateral negotiations, and notable media coverage of WTO developments and disputes – all goes to show that the WTO system is here to stay as it renders trade benefits to its Member States. However, there is no denying the fact that these trade benefits have come at heavy costs; these costs are even more onerous when it comes to the protection of WTO rights because WTO DSU is a formidably resource-demanding system. This has, to a large extent, swung the pendulum of WTO DSU in favour of developed countries, as resource-constrained developing countries have often stumbled over the costs and complexities of WTO DSU.

The book examines how developing countries can deal with the capacity constraints they have faced at WTO DSU. To begin with, this chapter gives a brief account of the participation benefits, participation challenges and options to overcome those challenges that developing countries can possibly avail. In doing so, Section 1.1 provides a brief overview of how individual countries and business entities can benefit from the system, and which factors influence the nature and extent of possible DSU benefits. Section 2.1 clarifies and narrows down the typology of ‘developing countries’ as it will be used in this book. In doing so, it usefully identifies a specific group of developing countries that could benefit directly from the analysis and suggestions provided in this work. Section 3.1 talks about various capacity-related challenges that developing country participants have had to cope with at WTO DSU.

Readers at this stage should envisage WTO DSU as a two-level mechanism. The first level is domestic, where trade barriers are identified and investigated at the domestic level. The second level is international, where...
consultations are conducted or disputes are launched and fought in the form of international adjudications. Following this logic, in Section 4.1, we will look at the possible options at international and domestic levels that can strengthen the dispute settlement capacity of developing countries. Readers are reminded that the subject matter of this book is the capacity-building measures that can be taken at the domestic level. Therefore, the focus of this chapter lies in providing a conceptual background on how the disputes can be effectively handled at the domestic level in order to improve the performance and participation of developing countries at the second level; that is, at WTO DSU.

1.1 PARTICIPATION AT WTO DSU: BENEFITS FOR MEMBER STATES AND BUSINESS ENTITIES

The WTO empowers its Member State to protect and expand its foreign market access by challenging foreign trade practices and defending its measures through a time-defined procedure of consultation, litigation and implementation. One of the key objectives of WTO DSU is to enhance a country’s overall economic growth and development, by reducing trade barriers and expanding foreign trade through multilateral regulation.

In essence, the market access benefits from participation at WTO DSU are mainly realised by business entities that conduct foreign trade. Non-state entities do not enjoy any direct rights and remedies under WTO DSU provisions as only governments are authorised to bring disputes to WTO.¹ However, it is mainly the trade interests of business communities that are defined, clarified and protected through dispute settlement procedures. Exporters and importers are the direct beneficiaries and victims of international trade regulation, and it is, in practice, the regulation of their business conduct and conflicts that gives rise to the burgeoning jurisprudence on international trade law.

Open markets and an increase in foreign trade activities can create more employment and investment opportunities, and thereby contribute to a country’s better living standards and overall development.² More

¹ As an exception to this inter-state rule, the Agreement on Preshipment Inspection (art 2.21) confers a direct right to an individual to petition the WTO’s Independent Entity if its rights guaranteed under the said Agreement are violated by an importing country. (Agreement on Preshipment Inspection (15/04/1994) LT/UR/A-1A/6, arts 2–4).
² On the contrary, certain scholars have vehemently argued that free trade can have a damaging impact on the living standard, human welfare, sustainable
particularly, WTO dispute settlement experience can enhance the Member States’ understanding of, and expertise in, international trade law, which the governments can utilise in identifying WTO-incompatible foreign trade practices and invoking WTO DSU provisions. With the experience, expertise and confidence to invoke the WTO rules, the governments can develop bargaining strategies, which they can employ to amicably resolve (and diffuse) trade conflicts and thereby protect their industries’ trade interests in the ‘shadow of a potential WTO litigation’. Galanter refers to this process as ‘litigotiation’, as he observes that ‘the career of most cases does not lead to full-blown trial and adjudication but consists of negotiation and manoeuvre in the strategic pursuit of settlement through mobilization of the court process’. In this manner, developing countries can strengthen their negotiating abilities once they have strengthened their litigation abilities.

With better bargaining and litigation strategies, and with the consequentially enhanced capacity to raise credible litigation threats, Member States can improve the terms on which they can trade with other member countries. This can generate further wide economic, social and environmental benefits for their economic sectors and society at large. The overarching ambit of WTO dispute settlement now encompasses areas other than commerce, as the Panels and Appellate Body have interpreted and clarified issues that go well beyond law and economics, such as those relating to strategic raw material, green technology, consumer welfare, economic growth and employment aspects. See, for example, Sarah Joseph, ‘The WTO, Poverty, and Development’, in Sarah Joseph, Blame it on the WTO: A Human Rights Critique (Oxford Scholarship Online, September 2011).

3 Benefits from WTO DSU participation are discussed at length in Gregory Shaffer, ‘Developing Countries Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed’, in James Hartigan (ed), Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment Vol 6 (Emerald Group Publishing 2009) 172.

4 M Galanter, ‘Contract in Court; Or Almost Everything You May or May Not Want to Know about Contract Litigation’ (2001) 3 Wisconsin Law Review 577, 579.


Public private partnership for WTO dispute settlement

public health\(^8\) and purely social concerns.\(^9\) Hence, one can understand how, against a limited legal representation by Member States, WTO DSM can generate far-reaching economic and non-economic benefits for governments as well as business entities. However, these benefits differ from country to country and case to case.

The nature of a dispute, chances of winning and implementation of award, a country’s negotiating clout and its retaliation capacity can impact its ability to realise the full benefits of WTO DSU participation. For instance, a Member State with poor retaliation capacity and bargaining power may prefer not to invoke DSU provisions even if a WTO-inconsistent measure injures its trade interests. This is especially so in cases where the challenged measure is maintained by an important trading partner or a country with a relatively stronger bargaining, litigation and retaliation capacity. Moreover, a country may decide against launching a formal action after unsuccessful rounds of bilateral negotiations with an offending Member State if the anticipated cost and time involved in dispute settlement procedures exceed the expected benefits of settlement, or if the nature of a dispute makes a formal action socially, diplomatically or politically undesirable due to reasons beyond economics.

Furthermore, a country with small market size\(^10\) and small absolute trading stakes\(^11\) will generally face poor economies of scale and high cost of mobilising resources for DSU participation.\(^12\) This is because their low volumes of trade and profit margins may not justify covering any non-economic (that is, litigation) costs required for the removal of WTO-incompatible trade barriers. This is mainly due to the fact that the WTO litigation costs are insensitive to the economic stakes or market size of a country involved in a dispute. Hence, a country with small market size and stakes is less likely to participate repeatedly at WTO DSU. Due to this low participation rate, such countries would have little incentive to enhance their in-house dispute settlement capacity to fully realise the

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\(^8\) European Union and a Member State – Seizure of Generic Drugs in Transit, WT/DS408, in consultations on 11 May 2010.


\(^10\) Market size is a measurement of total volume of a given market; or put differently, the total number of buyers and sellers in a particular market.

\(^11\) Absolute trading stakes are the aggregate of a country’s overall exports and imports (including the value, volume and variety of exports and imports).

\(^12\) Shaffer, ‘Developing Country Use of the WTO Dispute Settlement System’ (n 3) 182.
benefits of WTO DSU. For that reason, low economies of scale would generally be accompanied by high start-up costs as additional resources may be required for hiring overseas lawyers and economic consultants, or for purchasing information and evidential documents from external agencies in the absence of standing monitoring institutions, information repositories and in-house expertise. In this manner, the high cost of WTO litigation can significantly reduce the anticipated economic benefit that a country’s economic sector could expect to make from the removal of a trade barrier.

Bohanes and Garza observe that ‘larger WTO members trade greater volumes of more diversified trade to a greater number of trading partners, which in turn leads to a greater number of potential trade frictions and greater propensity to bring disputes’. Shaffer and Sutton have also observed a positive correlation between the size of market and the capacity to participate and power to retaliate or negotiate. They observe that ‘[power] in the international trading system roughly corresponds to the size of a country’s market – measured in terms of the ability of a country to exercise leverage by offering market access, or threatening to withdraw access, for foreign goods and services’.

Let us consider the examples of India and China to further illustrate this correlation. Both are developing country members of WTO with low per capita income, but they have made an active use of WTO DSU provisions. Figures 1.1 and 1.2 are indicative of a somewhat positive and symmetrical correlation between the value of the export of goods and services in China and India and their respective rate of participation at WTO DSU (as complainant, respondent and third party).

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Figure 1.1 illustrates that China had minimal litigation experience (other than third party participation) until the year 2005. However, by the years 2010 and 2013, the increasing value of exports in China was accompanied by its higher relative participation as a complainant and respondent at WTO DSU. Now, let us have a look at how this correlation has played out in the case of India.

Figure 1.2 also shows a positive correlation between the increased value of exports and number of WTO complaints filed by the government in India, although this correlation is not as strong as we have seen in the case of China. Together, both figures show that with increase in exports, China and India have significantly increased the number of times they have joined disputes as third parties. This can partly be attributed to their increase in trading stakes, and to some extent to their growing willingness to enhance their understanding of, and expertise in, WTO law. High aggregate trading stakes, export-oriented economic structure and a wealth of DSU experience, which have further resulted in high economies of scale in which consultations were requested by the complainant(s). This data is shown on the left axis.
Developing countries at WTO Dispute Settlement Understanding

and low start-up costs in building in-house dispute settlement capacity, have better enabled these countries to self-enforce their WTO rights.

Moreover, it may be fair to argue that their rapidly growing market size and position in the global economy have strengthened their capacity to negotiate a settlement, threaten retaliation or face a retaliation threat, although it is very difficult (and beyond the scope of this book) to assess or measure the same. As a result, these countries can generally benefit more from a successful WTO litigation because their in-house capacity enables their governments to litigate and defend the market access interests of their industries in a cost-effective manner. Hence, high trading stakes and market size have, to some extent, contributed to making these countries less susceptible to high participation costs at WTO DSU.

The above observations reinforce the claim that DSU participation benefits come at a cost and these costs may not be equally affordable by all WTO members. Busch and Reinhardt explain the problem of increased cost and the complexity of WTO DSM as follows:

By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute, such as

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Figure 1.2  WTO DSU participation versus exports of goods and services in India
appeals, compliance reviews, and compensation arbitration; by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential two years or more to defendants’ legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation.16

In other words, with the more complex and rule-oriented system of WTO DSU, the Member States require higher relative capacity to use the adjudicatory mechanism than they required under the previous trading regime; that is, they require more resources to monitor and enforce their international trade rights. Busch and Reinhardt further observe that WTO Member States, in order to participate effectively at WTO DSU, require ‘experienced trade lawyers to litigate a case’, ‘seasoned politicians and bureaucrats to decide whether it is worth litigating a case’, ‘staff to monitor trade practices abroad’, ‘domestic institutions necessary to participate in international negotiations’, and sufficient market power to ensure compliance and threaten retaliation in cases of non-compliance.17 This demand for greater resources impedes developing countries’ access to WTO DSM, which in turn negatively impacts the legitimacy of WTO as a global forum for negotiations and dispute settlement.

Before we look at developing countries’ participation challenges and ways to overcome them, let us try to understand the term ‘developing countries’, which is commonly used in a very broad and ambiguous manner as it often groups high income, middle income and low income countries under the same category. This terminology lacks a universally accepted definition. The use of purely economic indicators by the World Bank and International Monetary Fund (IMF), social and economic indicators by the United Nations (UN), and of self-identification process employed by WTO to categorise countries and define development has, to some extent, diluted the meaningfulness of this term. Hence, before we proceed, it is vital to define and categorise ‘developing countries’ as will be used in the context of this book, and hence, to neatly identify the group of countries that remain the focus of attention of this work.


2.1 DEVELOPING COUNTRIES: MEANING AND CLASSIFICATION

Under the General Agreement on Tariffs and Trade (GATT) 1947, the term ‘developing’ was used for those countries where the economies ‘... [could] only support low standards of living and [were] in the early stage of development’. The WTO agreements have not provided any definition or classification of the term, as they have incorporated a system of self-classification. The WTO allows Member States to self-designate themselves as developed or developing countries, and it adheres to the UN’s definition and classification of least developed countries (LDCs), which is based on GNP per capita, human assets and economic vulnerability indicators.

The WTO’s self-classification system has given rise to a broad and heterogeneous group of ‘developing countries’, as it ranges from small economies that are predominantly based on subsistence agriculture, to large and emerging economies such as China, Brazil, Mexico and India. At one end of this category, you have high income countries such as Argentina and Korea. At the other end, the same group comprises least developed countries with very low per capita income and GDP. These diversely developed countries have very different levels of development, market size and foreign trade interests. Moreover, they have hugely diverse experience of participation at WTO DSU as some of them have participated actively, while others have had a minimal or no DSU participation experience. For instance, from January 1995 to January 2017, Brazil has filed 30 complaints and responded to 16 complaints, while Cuba has filed a single complaint and responded to none at WTO DSU. It is therefore neither practicable nor meaningful to identify and analyse the usefulness and weaknesses of common strategies that can be employed, broadly speaking, by any ‘developing’ country member that is endeavouring to enforce its WTO rights.

In light of this, the book seeks to analyse specific capacity-building strategies that a specific group of developing country members can practically employ in the future. To achieve this purpose, it centres its attention

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18 General Agreement on Tariffs and Trade 1947 (55 UNTS 194) 61 STAT pt 5; TIAS 1700, art XVIII: 1
20 Out of the 164 WTO members (as on 26 January 2017), only 37 are developed countries. More than 80% of WTO members have self-designated themselves under the wide category of ‘developing countries’.
Public private partnership for WTO dispute settlement

on the experience and interests of those developing country members of WTO that are classified as middle income countries (MICs) (including upper middle, middle and lower middle income countries as on 15 April 2017) by the World Bank. The economies and markets of MICs have risen faster than the rest of the world, and they have shown increasing enthusiasm for creating new market opportunities and defending domestic policies through the use of WTO DSU. More particularly, large MICs such as Brazil, China, India, Mexico and Thailand have become more advanced in using WTO DSU to restore and protect their foreign market access. This can be seen in Table 1.1, as it illustrates the total number of times some of the most active DSU users among MICs have participated as a complainant, respondent and third party.

Table 1.1 clearly ranks the leading developing countries, Brazil, India and China (BIC), as the top three users of DSU among MIC countries, with Mexico and Thailand following the trail of participation. The table

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Table 1.1 Participation of middle income countries at WTO DSU (1995–2017)

<table>
<thead>
<tr>
<th>Country</th>
<th>Complainants</th>
<th>Respondents</th>
<th>Third Party</th>
<th>Total Participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>15</td>
<td>39</td>
<td>135</td>
<td>189</td>
</tr>
<tr>
<td>India</td>
<td>23</td>
<td>24</td>
<td>123</td>
<td>170</td>
</tr>
<tr>
<td>Brazil</td>
<td>30</td>
<td>16</td>
<td>106</td>
<td>152</td>
</tr>
<tr>
<td>Mexico</td>
<td>23</td>
<td>14</td>
<td>80</td>
<td>117</td>
</tr>
<tr>
<td>Thailand</td>
<td>13</td>
<td>4</td>
<td>72</td>
<td>89</td>
</tr>
<tr>
<td>Turkey</td>
<td>3</td>
<td>9</td>
<td>71</td>
<td>83</td>
</tr>
<tr>
<td>Guatemala</td>
<td>9</td>
<td>2</td>
<td>36</td>
<td>47</td>
</tr>
<tr>
<td>Ecuador</td>
<td>3</td>
<td>3</td>
<td>33</td>
<td>39</td>
</tr>
<tr>
<td>Indonesia</td>
<td>10</td>
<td>14</td>
<td>17</td>
<td>41</td>
</tr>
<tr>
<td>Honduras</td>
<td>8</td>
<td>0</td>
<td>26</td>
<td>34</td>
</tr>
<tr>
<td>Peru</td>
<td>3</td>
<td>5</td>
<td>19</td>
<td>27</td>
</tr>
<tr>
<td>Philippines</td>
<td>5</td>
<td>6</td>
<td>14</td>
<td>25</td>
</tr>
<tr>
<td>Vietnam</td>
<td>3</td>
<td>0</td>
<td>25</td>
<td>28</td>
</tr>
</tbody>
</table>

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21 In the past two decades, the contribution of foreign trade to GDPs in middle income countries has increased substantially. From 20% of GDP in 1970, it has grown to an astonishing 56% in 2011 (The World Bank Database 2016, accessed 21 January 2017).

22 The data is compiled from World Bank Database and WTO website (accessed 21 January 2017). It includes the number of times these middle income countries have acted as complainant, respondent and third party at WTO DSU from 1 January 1995 to 19 January 2017.
also indicates that MICs, including the larger ones, have been relatively more comfortable in joining the disputes as third parties, as compared to participating as complainants or respondents. This reflects, to some extent, that the top three users of DSU too have their reasons to avoid the costly system of litigation; however, their continuing interest in DSM is evident from their striking rate of participation as third parties.

Third parties to WTO disputes enjoy substantial rights of participation: (i) they can be physically present in substantive meetings at consultative, Panel and Appellate stage; (ii) they can deliver written and oral submissions during the first round of litigation; (iii) they can receive the first submissions filed by the complainant(s) and respondent(s); and (iv) they can also be granted additional rights on a case-by-case basis. The provision allows Member States to comprehensively observe dispute settlement proceedings, and they can utilise this experience of observation to expand their understanding of WTO laws and dispute settlement system in a cost-effective manner. Along with many other MICs, BIC countries have clearly realised these benefits, as they have participated frequently as third party participants to improve their understanding of the system by ‘learning through observation’. Given this enthusiasm, it is an opportune time to evaluate the strategies MICs, particularly large MICs, have employed to develop in a cost-effective way their WTO dispute settlement capacity.

3.1 PARTICIPATION CHALLENGES AT WTO DSU: DEVELOPING COUNTRIES

Academics, lawyers, economists and political scientists have written extensively about the participation challenges faced by various developing countries at WTO DSM. The developing countries have faced problems in monitoring foreign trade practices and identifying or investigating foreign trade barriers. They have struggled in negotiating a settlement or conducting successful bilateral or multilateral consultations. They have also faced obstacles in litigating trade barriers at WTO DSU. Moreover, on several notable occasions, developing countries have found it difficult

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23 For information on the rights of third parties, see DSU Agreement, arts 4, 10 and 17.
24 For details, see Busch & Reinhardt, ‘The WTO Dispute Settlement Mechanism and Developing Countries’ (n 17); Michael Ewing-Chow, ‘Are Asian WTO Members Using the WTO DSU “Effectively”? (2013) 16(3) Journal of International Economic Law 669; Shaffer, ‘Developing Country Use of the WTO Dispute Settlement System’ (n 3) 182–185.
to ensure compliance even after a favourable ruling has been given by the Panel or Appellate Body (AB). The key reasons behind these obstacles that have impeded developing countries’ access to WTO DSU are as follows:

i) First and foremost, developing countries lack the monitoring capacity that is required to monitor foreign trade practices, identify trade barriers and ensure compliance by offending Member States.

ii) Paucity of in-house legal and economic expertise and experience in WTO law further impedes their effective access to WTO DSU, as these resources are essential to investigate a trade barrier, conduct consultations and adjudicate a WTO case.

iii) Insufficient financial resources also constrain their capacity as such resources may be required for the hiring of overseas trade lawyers and economic consultants to assist during the consultation, litigation and implementation stages (especially in the absence of domestic expertise and experience).

iv) Another striking constraint is the paucity of political, diplomatic and subject-matter expertise within the government, as that may be required to gather information and coordinate tasks with the affected industry, overseas governments and various WTO divisions. Political expertise and efficient bureaucracy is also required to make appropriate determinations in respect of bilateral/multilateral actions that are required to be undertaken in cases of infringements.

v) Poor information channels and ineffective governance structures lead to problems in gathering evidentiary documents relating to trade barriers, their impact, nature and magnitude of injury and their WTO-inconsistency.

vi) Inadequate powers of retaliation and bargaining lead to difficulties during negotiations or in ensuring compliance after a favourable ruling is adopted by the Dispute Settlement Body (DSB).

vii) Fears of adverse diplomatic and economic retaliation from stronger market powers and powerful trade partners further persuade the governments to stay away from any confrontation in the shape of formal consultation or litigation.

viii) Insufficient knowledge and awareness about the benefits of WTO DSU provisions among government officials and business entities further constrain developing countries’ ability to manoeuvre and utilise the DSU provisions for their legitimate trade interests.

Bohanes and Garza confirm that the main challenges which various developing countries have faced in the process of enforcing international trade rights are the lack of legal capacity, weak domestic governance,
Developing countries at WTO Dispute Settlement Understanding

insufficient retaliatory powers and fears of political consequences and pressures. Shaffer succinctly describes these challenges as ‘...constraints of legal knowledge, financial endowment, and political power, or, more simply, of law, money, and politics.’

Multiple participation challenges, as listed above, are central to the most common problem that most developing countries have faced: the problem of capacity constraint. The term ‘capacity’ in this book has a broad connotation as it includes a country’s political, legal and financial power, and it generally refers to a country’s overall ability to utilise the WTO dispute settlement provisions. Capacity, in the context of WTO DSU, should not be measured on purely economic indicators (such as a country’s per capita income) as a country can have low per capita income but large export markets and, therefore, advanced expertise and experience of participation at WTO DSU.

India, for example, has low indexed per capita income, but it is a major emerging economy which has participated actively at WTO DSU and has demonstrated the capacity to mobilise the required resources to monitor and enforce its WTO rights. Hence, the dispute settlement capacity should be measured by taking systemic account of a country’s ability to mobilise resources, as and when required, for monitoring and enforcing its WTO rights. The problem of ‘capacity constraint’ refers to a situation where a country is unable to effectively and fully utilise the WTO DSU provisions due to lack of required resources and expertise. Insufficient capacity therefore impedes a country’s ability to utilise the remedies available under WTO DSM, be it in litigating or defending a dispute, conducting formal or bilateral consultations with foreign governments, or ensuring proper implementation and compliance.

The problem of insufficient capacity becomes even more severe if a developing country challenges a measure or if its measure is challenged by a developed country. Busch and Reinhardt observe that ‘the WTO has exaggerated the gap between developed and developing complainants with respect to their ability to get defendants to liberalize disputed policies. In short, wealthy complainants have become significantly more likely to secure their desired outcomes under the WTO, but poorer complainants have not.’ This situation can be more appropriately described as the

25 Bohanes & Garza (n 13) 69.
problem of ‘capacity gap’ between the developing and the developed world.

‘Capacity gap’ here refers to a situation where developing countries lack the capacity to identify a potential trade barrier, arrive at a negotiated settlement, conduct WTO litigation, defend their practices or ensure compliance due to paucity of resources required for each task, as against a sufficiently resourced and developed country in opposition. ‘Equal access to justice is a measure of the legitimacy of any legal order’\(^{28}\) and the WTO’s international adjudicatory mechanism therefore ‘must ensure that inequalities between its members do not grow too large’.\(^{29}\) An obvious response to this situation would be to raise the following questions: Can this resource gap between developed and developing country members be bridged? How can developing countries enhance their capacity to resolve trade disputes through WTO DSM? These issues are addressed in the following section.

4.1 OVERCOMING THE PARTICIPATION CHALLENGES

Broadly, there are two options that can be explored for addressing the capacity-related challenges. The first option is to introduce changes at the international level (which can include changing WTO rules), and the second option is to find solutions at the domestic level. The first option can be explored through proposals presented by developing countries, and by academics and organisations committed to the notion of WTO reform. The second option can be explored by making use of the first-hand experiences of certain upper middle, middle and lower middle income countries that have employed varied strategies to mobilise resources for the utilisation of DSU provisions.

4.1.1 Options for Overcoming Participation Challenges

4.1.1.1 First option: what can be done at international level?
The WTO has introduced certain favourable provisions for enabling its developing country members to participate effectively at WTO DSM. These provisions include, but are not limited to, the requirement of non-reciprocity in trade negotiations between developed and developing countries.

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\(^{28}\) Bohanes & Garza (n 13) 48.

\(^{29}\) Ibid.
Developing countries at WTO Dispute Settlement Understanding

countries, grant of extra time to fulfil commitments, legal assistance extended by the Secretariat and the Advisory Centre on World Trade Organization Law (ACWL), improved and greater market access opportunities, requirement to safeguard developing countries’ interests by WTO membership, and additional technical assistance. However, in practice, these provisions are far too limited and inadequate to provide developing countries with an effective DSU access. The reasons behind this claim are discussed at length in various scholarly works.\(^3\) Hence, we should now turn our attention to those changes that are currently proposed at the multilateral level.

Developing countries have submitted multiple proposals aimed at level- ling the playing field at WTO DSU. These proposals, amongst others, include introduction of retrospective and mandatory financial compensation in place of suspension of concession\(^3\) and/or collective suspension of concession as powerful remedies for developing countries.\(^3\) Developing Member States have also requested the creation of a fast track, simplified procedure for the adjudication of cases with established precedents.\(^3\) Another suggestion which has occupied some prominence in WTO Ministerial Conferences is the strengthening of special and differential treatment provisions in order to make them precise, effective and operational.\(^3\)

Academics have also proposed several changes to WTO DSU rules. These proposals, amongst others, include the appointment of a special WTO prosecutor for developing countries, introduction of an additional provision for technical and administrative assistance, and training of adjudicators on special and differential treatment provisions contained in the WTO agreements. Scholars have also argued in favour of allowing


direct applicability of WTO law in national courts for enabling developing countries to self-enforce favourable awards. They have also proposed the establishment of additional provisions for differential and more favorable time frames and evidential requirements during dispute settlement proceedings for developing country participants.

Petersmann, with a ‘bottom-up approach’ towards WTO law, proposes that private parties should be granted direct litigation rights so that ‘corporations and other private actors may enforce WTO law through national courts’. Nordstrom and Shaffer, on the other hand, maintain a ‘top-down approach’ as they put forward a different proposal for granting easier WTO access to developing countries. They propose that developing countries with small trading stakes and market size (amidst high litigation cost) can benefit significantly from a small claims procedure established at WTO. They argue that a small claims procedure, which can be made available for a specific monetary value of non-complicated claims (with established precedents) and limited to a well-defined group of developing country governments, can result in prompt and cost-effective settlement of trade disputes.

Other academics, as well as policymakers, have criticised these proposals. One of the criticisms posed by academics is that not all developing country members require financial or legal aid; all developing members do not have similar financial needs. For instance, the financial needs and conditions of Brazil and China with respect to the utilisation of WTO DSM will be very different from those of Bangladesh. In order to implement proposals which seem to indiscriminately favour all (self-classified) developing country members, the WTO members would need to better define and categorise the term ‘developing countries’. Other critiques come from

36 Ibid.
the fact that adopting these (and other similar) proposals would require multilateral re-negotiations and complex trade-offs between more than 164 WTO Member States (as of 20 January 2017), all of which have ‘varying interests, values, levels of development, and priorities’.40

The WTO’s long-standing ineffectiveness in striking multilateral agreements makes the first option less feasible and somewhat unachievable in the present circumstances. Moreover, changing WTO rules to favour developing countries is an option that has been resisted and challenged by developed countries throughout the GATT and WTO era. A trade policy advisor confirms that any endeavour to achieve a consensus among WTO members for changing WTO rules would be similar to ‘finding a needle in a haystack’.41 However, developing countries can possibly influence the WTO jurisprudence through active participation in WTO Ministerial Meetings, its Committee System and Dispute Settlement Proceedings. As Michalopoulos observes: ‘The capacity of the developing countries to promote changes to the system of rules governing international trade that will benefit their development depends very much on the effectiveness of their participation in the WTO.’42 This observation brings the discussion back to its original concern; that is, the need to explore an attainable solution to help developing countries enhance their WTO DSU participation capacity.

There are other proposals which may not require changes to WTO rules, but would nevertheless call for action at international level. For example, Bown has proposed that an international institution should be established to monitor compliance on behalf of developing countries and generate requisite information for the government and private sector.43 It is also proposed that dispute settlement funds should be created at international level, and developed countries and international financial institutions should contribute to the building up of these funds. The proposed funds could be utilised to strengthen the legal aid mechanism for developing countries. Shaffer suggests that the ambit of the ACWL should be expanded and, in coordination with international non-governmental

42 Constantine Michalopoulos, Developing Countries in the WTO (Palgrave 2001) 152.
43 Chad P Bown, Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement (Brookings Institution Press 2009) 208.
organisations (NGOs) and intergovernmental organisations, it should extend enhanced legal, informational, monitoring and technical support to developing countries.\textsuperscript{44}

Certain scholars have extended support to changes proposed at international and multilateral levels with the argument that increased participation of developing countries at WTO will result in better integration of developing countries into the world trading system, thereby creating new trade opportunities for the entire world.\textsuperscript{45} Some have also argued that the institution of WTO can only be more acceptable and credible if all WTO members participate effectively.\textsuperscript{46} On the other hand, these proposals are opposed on multiple grounds by the developed world. Developed countries have argued that it is not fair to extend favourable treatment to all developing Member States without making any distinction or establishing parameters based on their level of development and size of economy. It is also argued that implementing these proposals at international level, especially if they also favour emerging market economies such as China and Brazil, would generate external benefits that would go beyond (and sometimes against) the interests of developed countries.\textsuperscript{47} These divergent views can cause undue delay in the consideration and implementation of these proposals. Moreover, all proposals discussed under this first option have a common limitation; that is, they require developing countries to seek intervention from external agents that are beyond their control and influence. On the other hand, the second option discussed in the following section does not attract such points of criticism.

4.1.1.2 Second option: what is being done at domestic level?

The second option for developing countries is to explore possible ways to build their in-house WTO participation capacity by introducing changes at the domestic level. This book embraces the domestic approach because most of the capacity-related challenges faced by developing countries are deeply rooted in the domestic context of these countries and therefore solutions can best be found at the domestic level. For example, paucity of lawyers and government officials trained and experienced in WTO law can, to some extent, be blamed for high litigation costs as the lack of


\textsuperscript{45} Bohanes & Garza (n 13) 50.


\textsuperscript{47} Page & Kleen (n 39) 45, 79.
domestic legal expertise necessitates hiring expensive overseas lawyers. In accord with this, an Indian trade lawyer observes the following:

With more number of cases being litigated by and against India mainly from the year 2001, the government has decided to expand its legal expertise. It is not feasible and economically viable to hire expensive Geneva based lawyers, especially in the cases where India is challenged. The government therefore has started to rely more on domestic expertise for cutting down the high litigation cost.48

Likewise, paucity of information and evidential documents with a complaining or responding government is mainly due to lack of inter-ministerial coordination and disengaged private stakeholders, and it sometimes results in increasing the litigation cost as data is purchased from overseas agencies. In EC – Export Subsidies on Sugar (Thailand), for example, the sugar industries in Brazil, Australia and Thailand had to get together and jointly purchase the evidential data from LMC International for substantiating and updating their litigation briefs and responses. This led to a massive increase in the litigation costs for the complainants.49 It is therefore important that these constraints are directly dealt with at the domestic level.

This option can be explored practically with the help of first-hand dispute settlement experiences of certain developing Member States. Certain MICs have made significant progress in overcoming the participation challenges, as they have learnt to utilise WTO DSM more effectively than other WTO members from the developing world. Most notably, Brazil, China and India, all emerging yet developing economies, have rigorously explored the second option as they have employed different domestic strategies for overcoming the challenges they have faced during identification of barriers, settlement of disputes and enforcement of awards. These Member States are the top three developing country users of WTO DSU, and hence, their experience of managing trade disputes can motivate and guide other developing countries to meaningfully consider the in-house remedies.

After the US, the EU and Canada, Brazil is the fourth most active complainant at WTO DSU, and its successful performance at WTO DSU, especially in strategically important cases won against the EU and the

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48 Interview with a trade lawyer, Luthra & Luthra, Delhi, India, 21 June 2013.
US (such as *EC – Export Subsidies on Sugar (Brazil)*\(^{50}\) and *US – Upland Cotton*\(^{51}\)), is recognised nationally and internationally. China, the world’s fastest growing economy, after its accession to WTO in December 2001, has promptly established itself as a prominent DSU user by successfully litigating and defending cases against powerful trading partners such as the US and the EU. India, again an ambitious emerging economy, has joined the club of active and successful DSU users by presenting strong litigation and defence in significant WTO cases against developed as well as developing Member States. The nature and extent of their participation exhibits their continuing commitment towards expanding their in-house ability to further utilise DSU provisions.

At the same time, it is important to note that these ambitious economies too have faced various capacity-related problems in accessing WTO DSM. For example, the *Canada – Aircraft*\(^{52}\) and *Brazil – Aircraft*\(^{53}\) cases exhibited the emergent need to expand the dispute settlement capacity in Brazil. During these disputes, the government realised that an institutional reorganisation, additional financial and information resources and legal expertise were required for successful litigation and compliance proceedings.\(^{54}\) Similarly, China, during the initial WTO litigations, faced high litigation costs due to insufficient domestic trade law expertise and lack of litigation experience.\(^{55}\) India has also faced multiple difficulties in identifying trade barriers, locating in-house expertise, gathering information and ensuring compliance.\(^{56}\) However, Brazil, China and India have learnt from their past dispute settlement experience and, to some extent, from the enormous experience of the US and the EU. As will be seen in the following chapters, they have evolved distinct capacity-building strategies at the domestic level.

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\(^{54}\) Interview with an official, Permanent Mission of Brazil to the WTO, Geneva, Switzerland, 16 September 2013.


\(^{56}\) Interview with an official, Permanent Mission of India to the WTO, Geneva, Switzerland, 13 April 2013; verified in the interview with an official, Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi, Delhi, India, 5 June 2013.
Broadly, Brazil, China and India have strengthened their DSU participation with the help of multiple strategies. These strategies include the following: (i) expansion of DSU understanding and experience with the help of third party participation; (ii) enhancement of domestic legal expertise in WTO law with the help of increased WTO-focused education and training; (iii) creation of dedicated laws, institutions and procedures to manage WTO disputes at the levels of ministries and WTO Mission; (iv) creation of in-house monitoring capacity to better identify and monitor foreign trade barriers with the help of voluntary sector and local law firms; and (v) engagement of business entities for the settlement of trade disagreements and disputes (government-industry coordination). Although the potential of all these strategies cannot be ignored, this book focuses particularly on the last-mentioned strategy; that is, government-industry coordination.

The government departments of certain developed and developing countries have actively coordinated and exchanged resources with industries during the handling of WTO disputes. The available literature presents the EU and the US, the two most active DSU users, as the leaders of this coordination approach. Moreover, Shaffer and Ortiz-Melendez have put forward India, China and Brazil as the most distinct examples of developing countries that have engaged their private sector for the effective conduct of dispute settlement proceedings. By analysing the wealth of their DSU experience, the readers can usefully review and analyse the best practices, weaknesses and capacity-building potential of government-industry coordination.

Government-industry coordination is grounded in the notion of public private partnership (PPP). Grossman observes that ‘special interest groups’, which include private companies, trade associations, chambers of commerce, and unions and confederations, influence and impact almost all areas of government’s policy-making and decision-making endeavours. However, in the area of international trade, they are the frontrunners as cross border transactions of goods and services are mainly carried out by profit-motivated business groups. Hence, some form of coordination between government and industry, in most cases, is embedded in the nature of WTO dispute settlement proceedings as the violation of WTO rules directly affects business interests of exporters, importers,

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58 Gene M Grossman & Elhanan Helpman, Special Interest Politics (The MIT Press 2001) 3 (the authors define ‘special interest groups’ (SIG) as any identifiable group with similar preferences on a subset of policy issues).
Public private partnership for WTO dispute settlement

manufacturers and producers, which in most cases are private companies. Moreover, industries are a vital source of information and evidential documents.

Business entities are best placed to gather information relating to trade barriers for two primary reasons. First, exporters and importers can gather knowledge during the course of conducting their everyday business activities. Second, a member of an industry should have ‘collective action interest’ in gathering and building upon such information. In other words, an exporter should invest in gathering information on market access violations as removal of a trade barrier would not only benefit the special economic interests of that exporter but, more broadly, of its entire industry. Grossman and Helpman also confirm that ‘. . .individuals who have similar policy preferences have much to gain from pooling their resources to pursue common political aims. On the other hand, there is always the temptation to “free-ride”’. This is so because those who share a group’s objectives can benefit from its political efforts even if they refuse to help pay the bills.’59 In other words, business entities may not always capture this “positive externality” argument and may prefer to ‘free-ride’ by enjoying trade benefits generated from the investment of resources by other companies, government, industry associations and NGOs. However, an organised and combined effort by exporters with overlapping trade interests and share of the workload between government and an organised industry can result in better protection of trade interests through effective dispute settlement proceedings.

These arguments, considered together, give rise to the following questions: How should readers conceive the notion of PPP in the context of WTO DSU? What should be the readers’ benchmark for judging the effectiveness of a PPP arrangement? How can PPPs enhance a country’s dispute settlement capacity, and how can resources be exchanged in an effective manner? Chapter 2 responds to these questions, as it conceptualises the PPP mechanism in the context of WTO DSU.

59 Ibid 103.