

# Introduction

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## 1.1 INTRODUCTORY REMARKS

Trade across borders affects our lives in many disciplines. The selection of international foods and beverages that we enjoy, the variety of competitively priced clothing, footwear, accessories and cosmetics available at shops next door, the education and training we receive, the services we provide and avail, and the technology that impacts the way we work, travel and live – are all conditioned upon international trade. The World Trade Organization (WTO), an instrument of international trade governance, facilitates as well as regulates the international trade. It promotes free trade and open markets through multilaterally negotiated trade agreements. With its near-universal membership, impressive reduction of tariff and nontariff barriers to trade, and enforceability of rules through a dispute settlement forum, the WTO has emerged as the biggest achievement of the multilateral trading system.

Over the past two decades of its operation, the WTO Dispute Settlement Understanding (DSU)<sup>1</sup> has played a vital role in the protection and enforcement of rights under the multilateral trading system. By providing a consultative as well as litigatory forum to resolve foreign trade conflicts amongst its Member States, it has established itself as one of the most successful dispute resolution mechanisms at the international level. Yet, it has been a subject of criticism since its very inception. The system has been criticised for various reasons, including the poor enforcement mechanisms provided under the WTO DSU, its ambiguous special and differential treatment provisions seen as paying lip service to the concerns of developing country members, and the asymmetrical use of WTO DSU provisions by developed and developing Member States.<sup>2</sup> This book is concerned

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<sup>1</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes ('Dispute Settlement Understanding') (15 April 1995) LT/UR/A-2/DS/U/1.

<sup>2</sup> For details, see Robert R Baldwin, *Doha and Beyond: The Future of the Multilateral Trading System* (Cambridge University Press 2004) 46; Andrew D Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 5(3) *World Trade Review* 445; Christina L Davis and Sarah

with the last-mentioned point of criticism; that is, the utilisation of the WTO Dispute Settlement Mechanism (DSM) by the developing Member States of the WTO.

In particular, four characteristics of WTO DSU introduce and define the focus of this book. *First*, the WTO DSM is a costly avenue for dispute resolution and it is therefore not equally affordable to all WTO Member States. In contrast to developed country members, developing countries have faced considerable problems while invoking WTO DSU provisions because they do not possess sufficient resources to monitor and enforce their international trade rights. Due to resource constraints, they have faced problems in monitoring foreign trade practices and identifying or investigating trade barriers. They have also struggled in negotiating a settlement, challenging trade barriers, defending trade interests or ensuring compliance even after a favourable ruling is given by the Panel or Appellate Body (AB). The book, in the following chapters, discusses these challenges as it is broadly concerned with how developing countries can overcome the participation challenges they currently face at WTO DSU.

The *second* characteristic is that, in practice, WTO DSM is a two-tier mechanism. The *first* tier is domestic handling of trade disputes and the *second* tier is international adjudication. Both tiers are interdependent and interconnected. A case that is poorly handled (perhaps because the impugned trade barrier is insufficiently investigated or the arguments are not examined by experienced litigators or the claims are poorly substantiated) at the domestic level will stand a relatively lower chance of success at the international level.<sup>3</sup> Hence, in practice, the outcome of WTO litigation is partially predetermined by the way it is handled at the domestic level. With this ethos in mind, the book focuses on the first tier; that is, 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 tier; that is, at WTO DSU.

The *third* feature of the dispute settlement system is that every trade disagreement which grows into a formal legal action at WTO

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Blodgett Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication' (2009) 71(3) *The Journal of Politics* 1033.

<sup>3</sup> Marie Wilke, 'Practical Considerations in Managing Trade Disputes' (December 2012) ICTSD Information Note 11, at 1, accessed 27 March 2017 at <http://ictsd.org/downloads/2013/02/practical-considerations-in-managing-trade-disputes.pdf>. (The author notes that '...countries can take advantage of the rule of law only if they can effectively pursue their rights in this complex legal regime, which largely depends on having an adequate number of experienced legal, economic, and diplomatic staff and a well informed and active private sector.')

DSU (if not resolved or diffused by way of negotiations or consultations) generally emanates from cross-border commercial relationships between exporters and importers or business entities and public-sector authorities. Violation of WTO rules, in essence, directly affects business interests of exporters, importers, manufacturers and producers. Moreover, business entities are suitably placed to identify trade barriers and provide the required information to investigate a foreign trade measure or prepare a legal case. Exporters and importers can gather information, evidence and documents concerning foreign trade measures and their impact during the course of conducting their everyday business activities. In light of these observations, read together with the *first* and *second* characteristics mentioned above, one can infer that the engagement of affected industries is an enabling element for any government action that is undertaken to safeguard or expand business interests.

The *fourth* characteristic is that WTO dispute settlement is an inter-governmental process and the exclusive authority to file or respond to WTO litigations is conferred on the governments of Member States. This positions the government as the key participant of WTO DSM. This characteristic of DSU, when read together with the *third* characteristic, logically indicates that the governments should handle WTO disputes in close coordination with the affected industries. The book accordingly focuses on how governments can manage disputes by engaging the affected private stakeholders and what problems, if any, the governments can face in doing the same. In doing so, it analyses the approach of public private partnership (PPP), which in the context of this book, refers to the synergy of resources between a government and an industry during the conduct of WTO dispute settlement proceedings.

The underlying argument of this book is two-fold: *First*, the participation problems that developing countries face at WTO DSU should be addressed at domestic level, and *second*, an effective PPP arrangement can enable developing countries to mobilise resources at domestic level and thereby better enable them to utilise the provisions of WTO DSU. Effective utilisation of the provisions of WTO DSU can further lead to better protection and enforcement of WTO rights, improved market access conditions for the developing world, and enhanced integration of developing countries into the world trading system. Better integration of developing countries into the world trading system will positively affect the legitimacy of WTO as an institution of global trade governance and a forum for the settlement of foreign trade disputes. These arguments, read together with the above-mentioned characteristics of WTO DSU, introduce and define the focus of this book.

The book seeks to bring out the challenges, experiences and best practices of certain successful users of DSM, and thus enlighten the deliberation and debate over what can be done by developing countries for improved access to WTO DSM. To achieve this purpose, the author reflects on the dispute settlement partnership experiences of the European Union (EU), the United States of America (US), Brazil, China and India as they are the top DSU users from the developed and the developing world. With this experience-driven analysis, the book enables developing countries to consider and critically evaluate a diverse range of PPP strategies, and determine individual approaches towards the future handling of foreign trade disputes.

## 2.1 SELECTED WTO MEMBERS: THE EU, THE US, BRAZIL, CHINA AND INDIA

Mavroidis, Horn and Johannesson have categorised WTO members into five groups, depending upon their level of WTO DSU experience, level of development and foreign trade interests.<sup>4</sup> These groups are as follows:

1. G2 (the European Union and the United States): The group includes the US and the Member States of the EU.<sup>5</sup>
2. IND (other industrialised countries): It includes OECD members and non-OECD members that have a very high per capita income.<sup>6</sup> Countries under this group are classified as high-income countries by the World Bank.

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<sup>4</sup> Henrik Horn, Louise Johannesson & Petros C Mavroidis, 'The WTO Dispute Settlement System 1995–2010: Some Descriptive Statistics' (2011) 45(6) *Journal of World Trade* 1107, 1138.

<sup>5</sup> In the paper, '[t]he EU is taken to be EU-15, since the enlargements came relatively late. . .' (Horn et al, 'The WTO Dispute Settlement System' (n 4) 1138). However, this book treats G2 as comprising the US and the 28 Member States of the EU as on 14 January 2017.

<sup>6</sup> 'Economic Cooperation and Development (OECD) members, the non-OECD members among the twelve countries that most recently became members of the EU, those that are currently at an advanced stage of their accession negotiations, as well as countries that are not OECD members but have a very high per capita income, such as Singapore.' (Horn et al, 'The WTO Dispute Settlement System' (n 4) 1138). This book follows the same composition for IND, except for the fact that it excludes the 12 countries that are now EU Member States and hence included in the G2.

3. BIC (Brazil, India, and China): The group comprises Brazil, India and China, who are developing yet emerging market economies with a distinctly high rate of participation at WTO DSU. China and Brazil are upper middle income countries, and India is a lower middle income country.
4. DEV (developing countries other than least developed countries): 'The DEV group consists of all countries that do not fit into either of the above mentioned categories and are not BIC countries either.'<sup>7</sup> These countries are classified as upper middle, middle or lower middle income countries by the World Bank.
5. LDC (least developed countries): This group comprises the list of LDCs prepared by the United Nations. These countries are classified as low income countries by the World Bank.

The book actively focuses on the experiences of two groups: G2 and BIC. The chapter on G2, which is presented after the chapter on conceptual analysis, will provide an extension of the theoretical review as it will further clarify the conceptual underpinnings of the PPP approach in the context of WTO DSU. Moreover, it will introduce and examine an arrangement of government-industry coordination which is based on a system of 'rights and obligations' often referred to as a formal PPP system. With formal systems of PPP in place almost since the creation of WTO, their governments and industries have gained a wealth of dispute settlement partnership experience to share with the developing world.

The chapters on BIC will provide detailed case studies, and these case studies will build upon the previous chapters with the help of empirical fact-finding and analysis. BIC countries have certain things in common. All three countries are among the most active developing country users of WTO DSM. They have made use of effective dispute settlement strategies and are therefore better enabled to litigate and defend their trade interests at WTO. They are important international trade players with certain common economic and strategic interests.<sup>8</sup> They are members of BRICS, which is a trading alliance of major emerging market economies.<sup>9</sup> They have collaborated to form BASIC, which is a geopolitical alliance of newly

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<sup>7</sup> Horn et al, 'The WTO Dispute Settlement System' (n 4) 1138.

<sup>8</sup> In China, from 5% of GDP in 1970, exports and imports have expanded to 55% of GDP 2011. In India, from 8% in 1970, exports and imports have increased to 46% of GDP in 2011. In Brazil, from 14% in 1970, it has expanded to 25% of GDP in 2011 (The World Bank DataBank 2015).

<sup>9</sup> Namely Brazil, Russia, India, China and South Africa. For more information, see The BRICS Post, accessed 10 March 2017 at <<http://thebricspost.com>>.

industrialised and developing country superpowers.<sup>10</sup> They are members of Group of 77 (G-77), which is a coalition of developing nations at the United Nations.<sup>11</sup> They have also come together under Group of 20, which is an international alliance of economies that collectively accounts for almost 80 per cent of world trade.<sup>12</sup> Hence, they are emerging powers with certain common interests but hugely different domestic circumstances and global ambitions.

At the same time, Brazil, China and India continue to be (self-) designated as 'developing countries' under the WTO agreements, as they face many problems that the developing world shares.<sup>13</sup> For example, India has low standards of living, poor health and sanitation conditions and an acute problem of high population growth. Brazil faces the problem of governmental ineffectiveness and weak regulation. China faces high population growth and dependency burden, rapid urbanisation and challenges to environmental sustainability. They all, in common with other developing countries, face high levels of corruption, low GDP per capita, wide inequality of income, and lack of transparency and free flow of information.<sup>14</sup>

Similar to other developing countries, BIC countries have also faced multiple challenges while litigating or defending actions at WTO DSU. These participation challenges can directly be linked to their common domestic conditions, which include, but are not limited to, resource-constrained governance, lack of transparency and information flow, unorganised, under-represented and disengaged industries, poor observance of the rule

<sup>10</sup> Karl Hallding, Marie Olsson, Aaron Atteridge, Marcus Carson, Antto Vihma & Mikael Roman, 'Together Alone: Brazil, South Africa, India, China (BASIC) and the Climate Change Conundrum' (August 2011) Stockholm Environment Institute (SEI), accessed 15 June 2016 at <<http://www.sei-international.org/mediamanager/documents/Publications/Climate/sei-basic-preview-jun2011.pdf>>.

<sup>11</sup> For information on the G-77, see the Group of 77 of the United Nations, accessed 15 March 2017 at <<http://www.g77.org/>>.

<sup>12</sup> For information on G-20, see John J Kirton, *G20 Governance for a Globalised World* (Ashgate 2013) 1.

<sup>13</sup> A development economist, Michael P Todora, has devised a list outlining the common characteristics of developing countries. The characteristics are as follows: (i) Low standards of living, characterised by low incomes, inequality, poor health and inadequate education; (ii) Low levels of productivity; (iii) High rates of population growth and dependency burdens; (iv) High and rising levels of unemployment and underemployment; (v) Substantial dependence on agricultural production and primary product exports; (vi) Prevalence of imperfect markets and limited information; (vii) Dominance, dependence and vulnerability in international relations. (Jocelyn Blink & Ian Dorton, *Economics* (Oxford University Press 2007) 314–320).

<sup>14</sup> The World Bank DataBank 2015.

of law, limited knowledge and expertise of WTO law on the part of government officials, lack of legal expertise, and language barriers.<sup>15</sup> Hence, to see how their peers have overcome, at least to some extent, similar capacity problems which they are confronting today at WTO DSU can be an effective way of learning for other developing countries. As developing country superpowers and the most active DSU users among developing countries, BIC countries can provide some practical insights and motivation on capacity-building measures to their peers; that is, DEV countries.

### 3.1 RESEARCH METHODOLOGY

This book is based on five years of investigation which was carried out with the help of pragmatic empirical methods, extensive review of literature, reports and surveys. Moreover, a case study approach was used to conceptualise and propose generalisations about the PPP mechanism, its best practices and effective elements. These methods were used to gain an in-depth and comprehensive understanding of the issues, to investigate and develop the presumptions, and to check and cross-check the validity of the findings gathered from different sources.

For the original empirical investigation, the author conducted semi-structured interviews and discussions with the help of selectively designed and individuated sets of questions. The interviewees were identified using a purposive snowball sampling approach as it enabled the author to make an 'initial contact with a small group of people' that were related to the area under investigation and then utilise these to establish further related contacts.<sup>16</sup> With this approach, it became possible to identify those officials who, in various capacities, have been engaged in the process of WTO dispute settlement, and could therefore share their first-hand experiences and provide practical insights into this work.

Different perspectives from government officials, private sector representatives, lawyers, academics and diplomatic officials were taken into account. The claims made by government officials were verified and cross-checked against the observations provided by private sector representatives, and vice versa. Their claims and perceptions were further corroborated, endorsed or refuted in the statements received from lawyers, academics and officials from international and intergovernmental organisations.

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<sup>15</sup> Gregory C Shaffer, Marc Busch & Eric Reinhardt, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 *World Trade Review* 559, 561.

<sup>16</sup> Alan Bryman, *Social Research Methods* (Oxford University Press 2012) 202.

For the case study of India, additional empirical research methods were employed as the information was also sought through written applications filed by the author and responses received from the Government of India under India's Right to Information Act 2005. Moreover, additional facts were gathered from accessing and surveying the official documents (relating to WTO disputes) available at the offices of the Ministry of Commerce and the Permanent Mission of India to WTO.<sup>17</sup> These additional methods were employed only for the case study of India because the author (as an Indian national) has the right to inspect documents and seek information on issues concerning public welfare.

## 4.1 BENEFITS TO READERS

The book is an interdisciplinary work that draws on relevant literature and empirical findings, with an argumentative and analytical framework that extends to the pragmatically informed study of varied dispute settlement experiences. The author hopes that the topical area of this book and its unique insiders' driven approach will benefit its readers in multiple ways. It will interest readers who are keen to learn about the DSU experiences of developing countries and the impact of private sector engagement in the intergovernmental process of WTO DSU. It will also invoke interest in the academics, policymakers, government officials, business officials and lawyers who contribute to the management of foreign trade disputes in developed as well as developing countries. In particular, the benefits that different categories of readers can expect to achieve from this book are the following:

### 4.1.1 Policy Audience

This book aims to influence the policy review and reform in developed as well as developing country users of WTO DSM. The book will be of importance to the policymakers in the US and the EU. With expanding volumes and complexity of trade and investment, disputes in these areas will continue to rise, generating major conflicts that will require a joint management approach. Hence, with a critical evaluation of the dispute

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<sup>17</sup> For example, the author browsed through the internal files with India's Ministry of Commerce including the written memorandum of request that was filed by the private steel companies in India before the *US-Carbon Steel* case was launched by India at WTO.

settlement partnership approach, this text can influence the review of dispute management practices and policies currently employed by the United States Trade Representative and the European Commission in the US and the EU respectively.

The text will particularly be appealing amongst the policy audience in developing countries. The policy experts in China, Brazil and India can use this text to review the performance and effectiveness of their dispute settlement practices and identify some key challenges and even suggestions for improving their trade defence performance. It will also be useful for the policymakers and advisers in other similarly developed countries (such as Mexico, Argentina, Chile, Turkey and Thailand which also are active DSU users among developing countries) to assess the relevant experiences of their peers and hence gain practical insights.

The book will enable the policy audience from developing countries to consider and critically evaluate a diverse range of capacity-building strategies for the management of trade disputes. It will also allow them to observe the benefits of engaging the private sector in the intergovernmental process of WTO dispute settlement, and to identify the reforms that will be needed for devising a workable domestic framework for handling trade disputes. Additionally, the book highlights for them the important issues, concerns and possible challenges that need consideration by developing countries in general before any legal, institutional, regulatory and procedural reforms related to dispute settlement and capacity building are carried out.

#### **4.1.2 Government Officials**

The book will also benefit readers from various government departments that deal directly with the management of foreign trade disputes. The book will answer some difficult questions for these government officials, such as the following:

- i) What role can industries play in building the WTO dispute settlement capacity of developing countries?
- ii) When and how will an affected industry be willing to invest its resources for the settlement of disputes?
- iii) How can industries be approached when a dispute that needs industry's intervention arises?
- iv) What actions can government officials take to help industries better organise themselves and hence coordinate with governments?
- v) How have governments and industries coordinated their efforts and resources towards the successful resolution of certain landmark WTO disputes in various developed and developing countries?

- vi) What are the downsides of partnering with industries during settlement of international disputes, and how are other DSU users coping with such problems?

By answering these difficult questions that government officials dealing with trade disputes commonly face, the text will act as a practical guidebook for national trade gateways such as the United States Trade Representative in the US, Director General for Trade at European Commission in the EU, Ministry of Commerce in China, Trade Policy Division in India and Dispute Settlement Unit in Brazil.

#### **4.1.3 Industry Officials**

Industry representatives from private companies, export promotion councils, trade association and confederation of industries will also find this book useful as various chapters will guide them on several systemic issues. Such issues, amongst others, include the following:

- i) Which informal strategies and formal avenues can industries use to approach the relevant public officials to discuss foreign market access issues?
- ii) What kind of issues are at stake when a government is considering initiating a dispute with an offending government, and in light of that, how can the affected industries convince their government to initiate a dispute at the earliest opportunity?
- iii) How can industries weigh the anticipated cost and benefits of approaching the government with a trade concern and the subsequent possibility of multilateral consultations or a fully-blown WTO litigation triggered by this communication?
- iv) How and in what ways can industries assist the government during pre-litigation, litigation and post-litigation stages of dispute settlement?
- v) What type of problems can industries, especially in developing countries, confront while coordinating with the government during the settlement of trade disputes, and how can such problems be overcome?

#### **4.1.4 Private Lawyers**

The book will also interest private law firms and practitioners. The discussions on legal services and legal expertise in the chapters on BIC experiences are of commercial relevance to private law firms as these

chapters draw on the lawyers, government officers and industry officials' experiences on the following issues:

- i) How can the government and industry officials hire trade lawyers for matters relating to trade disputes and disagreements?
- ii) What kind of services can they be hired for?
- iii) What kind of expertise and skills are required for working on such international cases?
- iv) How can law firms ambulance-chase the governments and industries to expand their practice and attract more business?
- v) How can lawyers and law firms expand their experience and expertise in the field of international trade law without significant cost repercussions?
- vi) How can lawyers communicate the market access concerns of their industry clients to the relevant government officials?

#### **4.1.5 Academics, Students and Researchers**

The book will be of great interest to academics, researchers and students in many disciplines including international trade law, development studies, political science, economics, international relations, and international dispute settlement. Researchers from these fields can work together, and in light of the proposed guidelines, prepare an adaptation plan of the proposed dispute settlement partnership model for a specific developing country. Moreover, the book identifies other promising areas of investigation that the readers will discover throughout in the subsequent chapters. The book can also be a useful teaching aid for the many specialist courses that are currently blossoming around the world in the areas of WTO dispute settlement and developing countries participation in the WTO legal regime.

## **5.1 OUTLINE OF THE BOOK**

The book contains eight chapters. Chapter 1 provides a conceptual background on the WTO DSU participation benefits, participation challenges that developing countries face at WTO DSU, and how these challenges can be overcome. In doing so, it outlines various capacity-building solutions that can be employed at the international as well as domestic levels, with a special focus on strategies that can be employed at the domestic level. Chapter 2 provides a conceptual framework for this book. By identifying, describing and analysing the important concepts and issues, the chapter seeks to prepare a benchmark against which the theoretical and

empirical findings presented in the following chapters should be assessed and analysed by the reader. Most importantly, it conceptualises PPP in the context of WTO DSM.

Chapter 3 deals with the dispute settlement partnership experiences of the two most active users of WTO DSU: the US and the EU. They have established a substantial set-up for public-private interaction during dispute settlement, which is built on a system of 'rights and obligations'. The US and the EU are therefore important examples useful for understanding and examining the benefits and weaknesses of a formalised PPP arrangement. Chapter 4 focuses on China's dispute settlement experience. It throws light on certain capacity-building strategies that have strengthened the dispute settlement capacity of this relatively new and developing Member State of the WTO. The combination of China's expanding foreign trade, its developing nature, the creation of a formal system of 'rights and obligations' closely following the one in the US, and the overall evolution of its dispute management approach makes this chapter a very interesting read.

Chapter 5 presents a distinct PPP arrangement, as it introduces and examines a PPP framework built and operated on the basis of specialised and dedicated institutions, intergovernmental institutional coordination and pre-defined procedures. This chapter examines the capacity-building strategies that Brazil has employed to manage foreign trade disputes with a coordinated approach. Chapter 6 focuses on the dispute settlement partnership experience of India. This chapter reviews and analyses the characteristics, weaknesses and capacity-building potential of a purely informal, ad hoc PPP approach. A review of India's dispute settlement partnership experience in this chapter therefore introduces a fresh dimension to this investigative work as it examines a different form of dispute settlement partnership arrangement.

Deriving lessons from the dispute settlement experiences of the selected developed and developing countries, Chapter 7 puts forward certain practical suggestions on how developing countries can enhance their dispute settlement capability and thereby defend their trade interests by harnessing the resources and expertise possessed by affected industries. Chapter 8 concludes the book.