



Advisory Centre on WTO Law

Centre Consultatif sur la Législation de l'OMC

Centro de Asesoría Legal en Asuntos de la OMC

The WTO Dispute Settlement Process and Developing Countries: Issues and Challenges

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What are the legal provisions governing developing countries' participation in WTO dispute settlement proceedings?

- Generally, developing countries are subject to the same rules and procedures governing dispute settlement (known as the "DSU") as other WTO Members.
- However, several provisions of the DSU provide for special and differential treatment of developing countries in dispute settlement proceedings.
- These include the right to invoke alternative procedures (Art. 3.12); a requirement that Members give special attention to the needs of developing countries (Art. 3.10).



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- Under Art. 8.10, a developing country Member in a dispute against a developed country is entitled to have one panelist (of three) come from a developing country.
- A defending developing country Member is entitled to have "sufficient time" to prepare and present its argumentation (Art. 3.10).
- If the dispute involves provisions of a covered agreement that provide for special and differential treatment, the panel must indicate in its report how these have been taken into account (Article 3.11).



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- Other provisions permit the DSB to take into account developing country status with respect to implementation (Arts. 21.7 and 21.8).
- Article 24 provides special procedures for disputes involving least developed countries. These have not been used – a LDC has been a complainant or respondent in only one dispute (Bangladesh against India).



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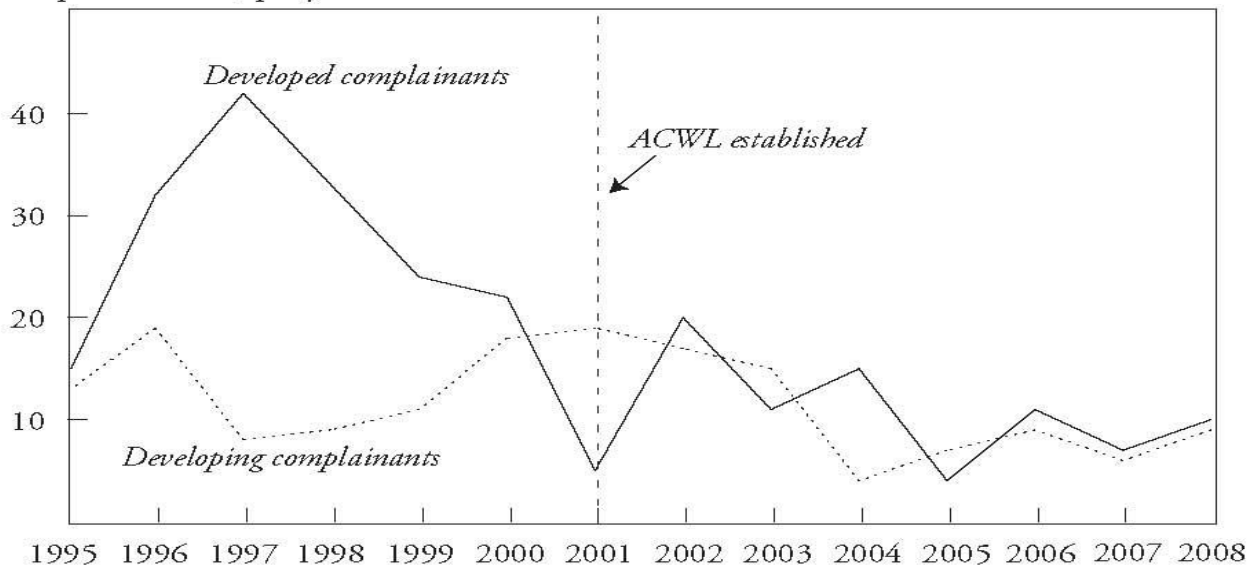
How have developing countries participated in WTO dispute settlement proceedings?

- 40 of the 96 panel proceedings completed by 2005 involved developing-country complainants.
- 164 of the 415 consultations requests made by 2008 were from developing countries.
- The Appellate Body Annual Report from 2009 notes that 89 of the 141 appearances before the Appellate Body that year were from developing countries.

Overall participation as complainants is illustrated in this table from C. Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement*, Brookings Institution 2008.

Figure 6-1. *WTO Dispute Initiations, by Category of Complainant, 1995–2001 and 2002–08^a*

Disputes initiated per year



Source: Author's compilations from WTO (2009).



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How have developing countries participated in WTO dispute settlement proceedings?

However, this participation is not evenly dispersed among developing countries:

- The most active 6 developing countries account for 60% of cases (Brazil, Mexico, India, China, Thailand and Argentina); the 14 most active developing country users account for 90% of cases involving developing countries.
- Thus, the majority of developing countries have not been involved in WTO dispute settlement proceedings. This is particularly the case for LDCs, with Bangladesh the only LDC to have requested consultations to date.



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How has Chinese Taipei participated in WTO dispute settlement proceedings?

Chinese Taipei has participated as a complainant in three disputes and has never been a respondent:

- *EC – IT Products* (DS377) (2009-2010) (Chinese Taipei and co-complainants were successful before the panel; in July 2011, the EU notified that it had implemented the panel rulings).
- *India – Anti-dumping Measures on Certain Products from Chinese Taipei* (DS318) (2004) (Chinese Taipei requested consultations, no further action was taken) (Practical solution reached?).
- *US – Steel Safeguards* (DS274) (2003-2004) (Chinese Taipei and co-complainants were successful before the panel and Appellate Body; the measures were eventually removed).



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How has Chinese Taipei participated in WTO dispute settlement proceedings?

Chinese Taipei has participated increasingly as a third party in various disputes:

- This enables Chinese Taipei to keep informed as to developments in the jurisprudence, such as in the recent cases on the TBT Agreement.
- This also enables Chinese Taipei to develop legal capacity to draft submissions and present arguments to panels and the Appellate Body (sometimes with the assistance of the ACWL).
- Participation of developing countries as third parties also enables panels and Appellate Body to benefit from views of other countries.



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Why do developing countries not participate more frequently in WTO dispute settlement proceedings?

- It should first be noted that many developed countries also do not participate very frequently.
- For example, Australia has participated as a complainant only 7 times.
- Overall dispute settlement activity has declined in recent years
- (However, developing countries are increasingly initiating cases against each other).
- Developing countries face resource constraints, although the ACWL has helped to remedy these.

Chinese Taipei has participated as a complainant in three disputes and has never been a respondent:

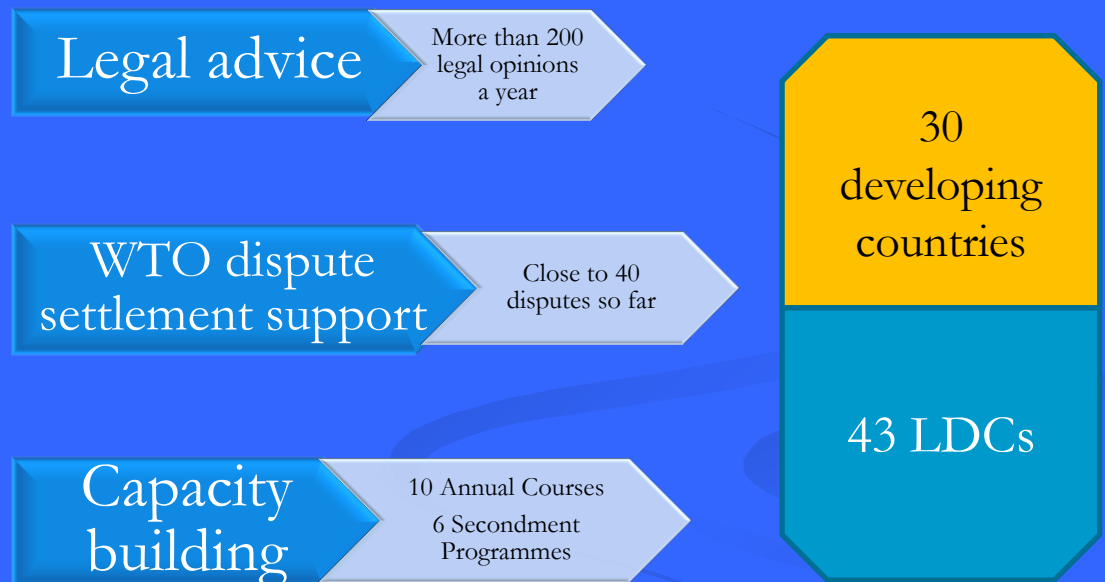


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WHAT IS THE ACWL?

- Intergovernmental organisation created in 2001 with a mandate:

To provide developing countries and LDCs with the legal capacity necessary to enable them to take full advantage of the opportunities of WTO membership.

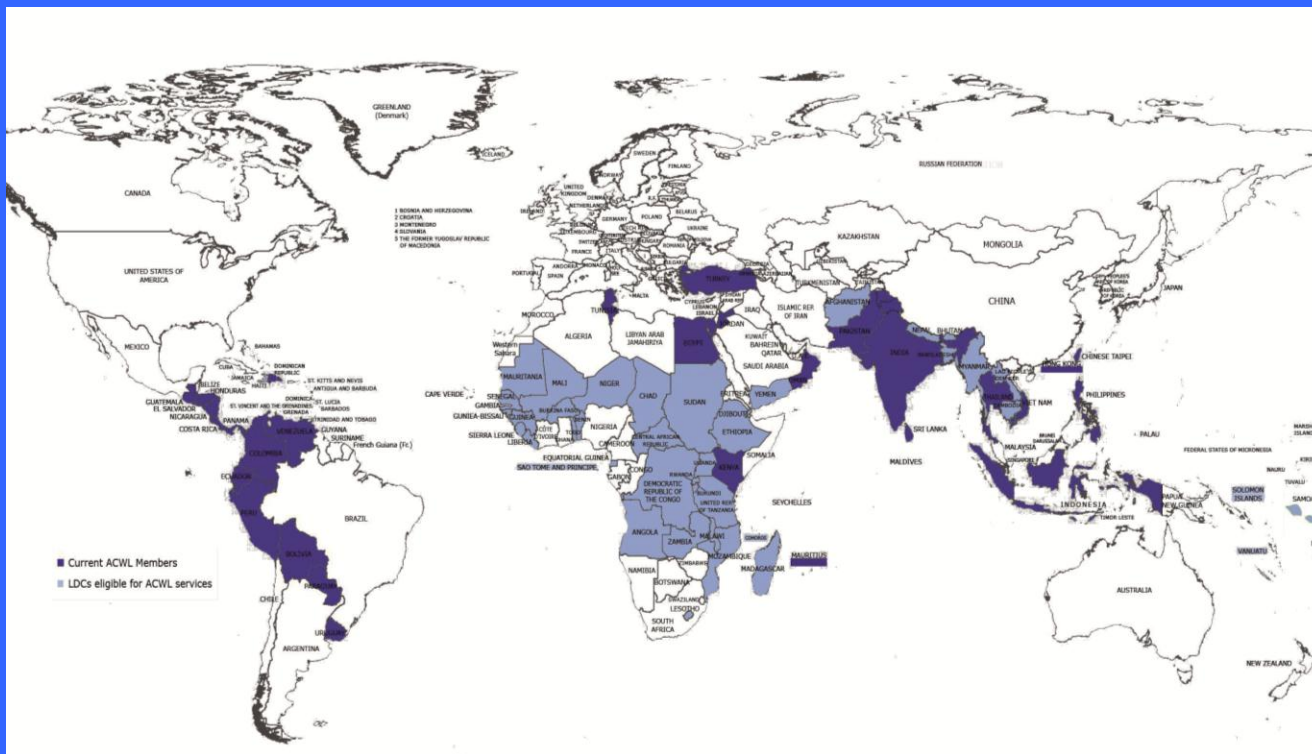


- The ACWL is not part of the WTO – different treaty, membership, mandate, administration and budget.



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ENTITLED TO THE SERVICES OF THE ACWL: 73 COUNTRIES



■ Countries designated by UN as LDCs that are WTO Members or are in the process of acceding the WTO.

■ Developing countries that have become Members of the ACWL and have contributed to its Endowment Fund.



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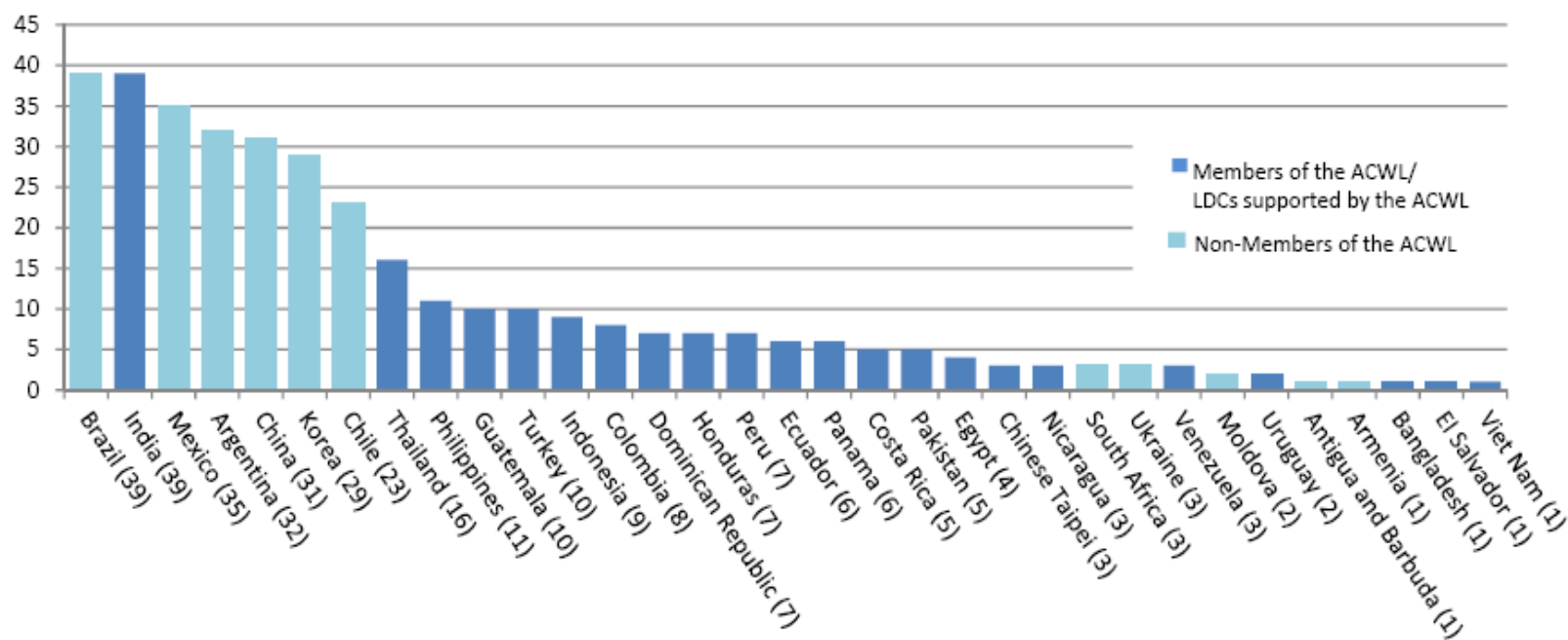
WHICH OF THE DEVELOPING COUNTRIES HAVE BECOME MEMBERS OF THE ACWL?

Except for some of the most experienced participants in WTO dispute settlement proceedings (Brazil, Mexico, Argentina, Korea, Chile and China), almost all remaining developing countries that have participated in these proceedings since 2001 have joined the ACWL (with the exception of Antigua and Barbuda, Armenia, South Africa and Ukraine).



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ACWL Membership and Participation in Dispute Settlement Proceedings





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SERVICES PROVIDED BY THE ACWL

Legal opinions on questions of
WTO law

Support to parties and third parties in WTO
dispute settlement proceedings

Training of government officials in WTO law
through courses, seminars
and Secondment Programme.



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Table 6-6. *Value of Market Access at Stake in ACWL versus Non-ACWL WTO Disputes, AD Cases Involving Developing Country Complainants, 2001–08*

| <i>WTO dispute (developing country complainant)</i> | <i>Average value of complainant exports in three years before AD measure^a (U.S. dollars)</i> | <i>Estimated value of lost exports due to AD measure^b (U.S. dollars)</i> |
|---|---|---|
| Non-ACWL client cases | | |
| <i>Argentina–Poultry Anti-Dumping Duties</i> (Brazil) | 41,464,128 | –25,128,358 |
| <i>Peru–Provisional Anti-Dumping Duties on Vegetable Oils from Argentina</i> (Argentina) | 11,000,726 | –9,720,227 |
| <i>South Africa–Definitive Anti-Dumping Measures on Blanketing from Turkey</i> (Turkey) | 5,906,750 | –5,766,517 |
| <i>EC–Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India</i> (India) | 39,868,190 | –8,481,772 |
| <i>India–Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu</i> (Taiwan) | 3,072,471 | –1,432,583 |
| <i>Brazil–Anti-Dumping Measures on Resins</i> (Argentina) | 71,215,545 | –69,672,704 |
| Mean value in non-ACWL cases: | 28,754,635 | –20,033,693 |
| ACWL client cases | | |
| <i>India–Anti-Dumping Measure on Batteries from Bangladesh</i> (Bangladesh) | 315,430 | –315,430 |
| <i>Korea–Certain Paper</i> (Indonesia) | 42,136,886 | –3,853,435 |
| <i>Egypt–Matches</i> (Pakistan) | 2,608,283 | –2,453,799 |
| <i>Mexico–Steel Pipes and Tubes</i> (Guatemala) | 2,693,535 | –2,242,200 |
| <i>South Africa–Anti-Dumping Measures on Uncoated Woodfree Paper</i> (Indonesia) | 844,778 | –802,930 |
| Mean value in ACWL cases: | 9,719,782 | –1,933,559 |

Source: Author's compilations. To make samples comparable, all disputes are over recently imposed AD measures against developing countries eligible for membership in the Advisory Centre on WTO Law (ACWL). Complainant exports are of six-digit Harmonized System (HS) products subject to the AD import restriction; HS export data taken from World Integrated Trade Solution (WITS), software developed by the World Bank, in close collaboration with the United Nations Conference on Trade and Development (UNCTAD).

AD = antidumping.

a. Average annual value in the three years before the AD investigation.

b. Value of lost exports calculated as value of exports two years after the AD investigation minus the average annual exports in the three years before the AD investigation.

ACWL has enabled developing countries with smaller trade shares to pursue dispute settlement proceedings that it would not d.

Countries with smaller trade shares can now justify WTO dispute settlement



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What other factors affect developing country participation in WTO dispute settlement proceedings?

- Many developing countries feel that the remedies available are inadequate. While Article 22 of the DSU envisages a right of retaliation through the suspension of trade concessions, DCs with small domestic markets are not able to impose sufficient economic or political losses within the respondent Member to generate the requisite pressure to induce compliance.
- In reality, practice demonstrates that losing defendants comply in 85% of disputes and for a variety of reasons.



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What other factors affect developing country participation in WTO dispute settlement proceedings?

- "There may be little that a small developing country can do to counter threats to withdraw preferential tariff benefits or foreign aid ... were a country to challenge a trade measure."

G. Shaffer, "The Challenges of WTO Law", 2006 WTR 5(2). C. Bown and B. Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases", 2005 JIEL 8(4)).

- It is difficult to determine the extent of this constraint in practice.