

**THE PARTICIPATION OF DEVELOPING COUNTRIES IN THE  
DISPUTE SETTLEMENT SYSTEM OF THE WTO**

**SALEH AL.SHRAIDEH**

LL.B, LL.M

**A THESIS SUBMITTED IN FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF DOCTOR OF  
PHILOSOPHY**

**SCHOOL OF LAW  
MACQUARIE UNIVERSITY**

**OCTOBER/2010**

# Contents

Contents .....	ii
Abstract .....	v
Candidate's Certificate .....	vi
Acknowledgements .....	vii
Abbreviations .....	viii
Chapter 1: Establishing the Linkage: Multilateral Trade Liberalisation, International Dispute Settlement, Developing Countries and Special Treatment .....	1
1.1. Introduction .....	1
1.2. The Integration of Developing Countries into a Free Multilateral Trading System .....	2
1.2.1. The Issue of Special and Differential Treatment for Developing Countries .....	6
1.2.2. Dispute Settlement and the Integration of Developing Countries into the System: Establishing the Link .....	7
1.2.3. The Dispute Settlement Understanding as a Tool for Achieving a Better Integration of Developing Countries into the WTO .....	8
1.3. The Methodology of the Thesis and the Definition of 'Developing Countries' Concept .....	13
1.4. The Organisation of the Thesis .....	16
Chapter 2: The Dispute Settlement System under GATT .....	20
2.1. Introduction .....	20
2.2. The Creation of GATT .....	21
2.3. Dispute Settlement in GATT .....	24
2.3.1. Remedies under Article XXIII of GATT .....	32
2.3.2. The Defects of the GATT Dispute Settlement System and Their Effect on the Participation of Developing Countries in the System .....	38
2.3.2.1. <i>The Bias of the GATT's Dispute Settlement Mechanism against the             Interests of Developing Countries</i> .....	40
2.3.2.2. <i>Special Treatment for Developing Countries in the GATT Dispute             Settlement System</i> .....	52
2.4. Conclusion .....	62
Chapter 3: The Dispute Settlement System of the WTO and the Participation of Developing Countries .....	64
3.1. Introduction .....	64
3.2. Changes and Improvements in the New WTO DSU .....	67
3.2.1. The DSU as a Single Integrated System .....	68
3.2.2. The DSU as a Mandatory Rule-oriented System .....	71
3.2.3. The Strong Judicial Character of the DSU .....	73
3.2.3.1. <i>The Negative Consensus Rule</i> .....	73
3.2.3.2. <i>The Interim Review</i> .....	76
3.2.3.3. <i>The Appellate Review</i> .....	79
3.2.3.4. <i>Surveillance: Implementation of Rulings and Recommendations</i> .....	82
3.3. Developing Countries in the WTO Dispute Settlement System .....	85
3.3.1. Developing Countries' Issues in the Initiation of Disputes .....	90
3.3.1.1. <i>Developing Countries' Capacity to Absorb Litigation Costs</i> .....	93

3.3.1.2. <i>The Expected Benefits for Developing Countries from Formal Participation</i> .....	99
3.3.1.3. <i>Developing Countries' Likelihood of Success in Disputes</i> .....	100
3.3.2. <i>Developing Countries' Issues in the Consultation Stage</i> .....	105
3.3.3. <i>Developing Countries' Issues in the Litigation Stage (the Panel and Appellate Body Stages)</i> .....	114
3.3.3.1. <i>The Cost and Legal Complexity of the Litigation Stage</i> .....	116
3.3.3.2. <i>The Achievement and Attainment of the WTO Development Objectives in the Litigation Stage</i> .....	121
3.3.3.3. <i>Developing Countries' Representation in Panels and in the Appellate Body</i> .....	124
3.3.3.4. <i>The WTO Panels and the Appellate Body's Interpretation of WTO Law</i> .....	126
3.3.4. <i>Developing Countries' Issues in the Implementation Stage</i> .....	138
3.3.4.1. <i>The Order to Comply</i> .....	141
3.3.4.2. <i>Remedies for Past Damages</i> .....	148
3.3.4.3. <i>The Follow-up to Recommendations</i> .....	151
3.4. <i>Conclusion</i> .....	167
Chapter 4: <i>Implications of the DSU Provisions on Special and Differential Treatment for Developing Countries</i> .....	171
4.1. <i>Introduction</i> .....	171
4.2. <i>S&amp;D Treatment for Developing Countries under the DSU: An Overview</i> ....	174
4.3. <i>Critical Analysis of S&amp;D Treatment for Developing Countries under the DSU</i> 175	
4.3.1. <i>S&amp;D Treatment in the DSU Procedure</i> .....	176
4.3.1.1. <i>Choice of Procedure: DSU or the 1966 Decision (Article 3.12)</i> .....	176
4.3.1.2. <i>Consultations (Article 4.10)</i> .....	181
4.3.1.3. <i>Composition of Panels (Article 8.10)</i> .....	181
4.3.1.4. <i>Time Periods (Article 12.10)</i> .....	183
4.3.1.5. <i>Panel Reports (Article 12.11)</i> .....	186
4.3.1.6. <i>Implementation (Articles 21.2, 21.7 and 21.8)</i> .....	189
4.3.1.7. <i>Treatment of Least-developed Countries (Article 24)</i> .....	194
4.3.1.8. <i>Technical Assistance (Article 27.2)</i> .....	199
4.3.2. <i>The Substantive Application of S&amp;D Treatment in the DSU</i> .....	204
4.3.2.1. <i>The Interpretation of S&amp;D Provisions</i> .....	205
4.3.2.2. <i>Developed Countries' Restrictive Attitude against the S&amp;D Provisions</i> .....	210
4.3.3. <i>The Ongoing need for Reform for S&amp;D Treatment in the DSU</i> .....	212
4.4. <i>Conclusion</i> .....	218
Chapter 5: <i>Reforms in the WTO Dispute Settlement System</i> .....	222
5.1. <i>Introduction</i> .....	222
5.2. <i>The Pre-Doha Negotiations</i> .....	223
5.3. <i>The Post-Doha Negotiations</i> .....	226
5.3.1. <i>The US and the EC Proposals</i> .....	226
5.3.2. <i>Developing Countries' Proposals</i> .....	228
5.3.3. <i>The Failure to Conclude a DSU Review</i> .....	230
5.4. <i>Critical Analysis of Some Proposed Reforms of Particular Interest for Developing Countries</i> .....	232
5.4.1. <i>Trade Retaliation</i> .....	235
5.4.2. <i>Trade Compensation</i> .....	237

5.4.3. Possible Reforms of the Current DSU Remedies from a Developing Country Perspective .....	240
5.4.3.1. <i>Collective Retaliation</i> .....	240
5.4.3.2. <i>Mandatory Trade Compensation</i> .....	244
5.4.3.3. <i>Monetary Compensation</i> .....	246
5.4.3.4. <i>Retroactivity</i> .....	255
5.4.3.5. <i>Developing Countries' Special and Differential Treatment</i> .....	259
5.4.4. Suggested Reforms to Deal with Developing Countries' Issues Outside the Scope of DSU Reforms .....	265
5.4.4.1. <i>The Need for Public-private Collaboration in WTO Litigation</i> .....	266
5.4.4.2. <i>The Need for Cost-effective Legal Resources</i> .....	269
5.4.4.3. <i>Countering Developed Countries' Bilateral Pressure: The Need for North-south Alliance</i> .....	277
5.5. Conclusion.....	279
Chapter 6: Conclusion and Recommendations .....	282
6.1. The Model DSU .....	290
6.2. Concluding Remarks .....	322
Selected Bibliography .....	324

## **ABSTRACT**

International trade relations have become much more legalised under the World Trade Organization (WTO) than under the former international trade system created pursuant to the General Agreement on Tariffs and Trade (GATT). The Dispute Settlement Understanding (DSU) of the WTO clearly represents a shift toward a rule-oriented, legalistic and adjudicative approach, which is intended to enhance that status of, and confidence in, the WTO dispute settlement system. The approach is likely to ensure greater stability and predictability in the system by encouraging precise decisions on the merits of disputes and discouraging infractions. Its greater binding effect serves as a powerful disincentive to those Members who have a propensity to favour unilateral measures to solve international trade disputes. This is particularly beneficial for developing countries that sought a system which recognises their disadvantaged position compared to the greater bargaining and retaliatory power of developed countries. However, despite the positive assessment of the WTO dispute settlement system, the functioning of the system is working against the interest of developing countries in having an efficient dispute settlement system that considers their needs and deals fairly with their disputes.

This thesis examines the participation of developing countries in the dispute settlement system of the WTO, and argues that they are in a disadvantageous position compared to their developed counterparts. The system's failure to effectively address or efficiently deal with this position is an evidence of its bias against and deficiency towards developing countries' participation. The thesis focuses on the problematic issues developing countries face throughout their use of the system. It also considers the role that the DSU has played in addressing these issues and the efficiency of that role in restraining and limiting their effect on developing countries' participation in the system. The thesis analyses some ideas on the reform of the DSU that have been proposed through WTO negotiations or literature, and discusses their applicability on the current dispute settlement system. Finally, the thesis employs these proposals along with its discussion on the subject to introduce a reformed model of the DSU which is more sensitive to developing countries' concerns in the system in order to help providing an understanding of how such modifications could be carried out in future reforms on the DSU.

## **CANDIDATE'S CERTIFICATE**

This is to certify that I, Saleh Al. Shraideh, have not submitted this research work for a higher degree to any other university or institution other than Macquarie University. This thesis, to the best of my knowledge and belief, contains no copy or paraphrase of work published by another person, except where duly acknowledged in the text.

Saleh Al. Shraideh

## ACKNOWLEDGEMENTS

This thesis could never have been produced without the assistance of my principal supervisor, Associate Professor Natalie Klein, who guided me with important ideas, constructive criticism and ongoing encouragement. What really helped, however, was Dr. Klein's positive, optimistic and down to earth attitude, which played a huge part in easing the pressure and stress throughout my candidature. I'm very grateful to Dr. Klein not only as a supervisor, but also as a person. I also owe special thanks to Professor Rafiqul Islam for his very thoughtful input and support throughout my candidature, and my appreciation for the role that he played as a secondary supervisor.

I also want to thank my family and dedicate this work to my parents for their constant support and unlimited love. I also owe so much to my wife Dale, who believed in me and showed overwhelming love and support throughout my candidature.

## TABLE OF ABBREVIATIONS

AB	Appellate Body
AD	Anti Dumping
ACWL	Advisory Centre on the WTO Law
ATC	Agreement on Textiles and Clothing
CVD	Countervailing Duties
EC	European Community
ECJ	European Court of Justice
EU	European Union
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATT	General Agreement on tariffs and Trade
GATS	General Agreement on Trade in Services
GNI	Gross National Income
GSP	Generalised System of Preferences
ICITO	Interim Commission for the ITO
ICJ	International Court of Justice
IMF	International Monetary Fund
ITO	International Trade Organisation
LDC	Least-Developed Country
MFN	Most-Favoured Nation
NGOs	Non-Governmental Organisations
PPA	Protocol of Provisional Application
S & D	Special and Differential
SCM	Subsidies and Countervailing Measures
TMB	Textiles Monitoring Body
TRIMS	Trade-Related Investment Measures

TRIPS	Trade-Related Aspects of Intellectual Property Rights
UR	Uruguay Round
US	United States
WB	World Bank
WTO	World Trade Organisation