

## **Are Asian WTO Members Using the WTO DSU ‘Effectively’?**

By Michael Ewing-Chow, Alex W. S. Goh, and Akshay Kolse Patil

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A Review by Dany Channraksmeychhoukroth

The World Trade Organization (WTO) dispute settlement system, governed by the Dispute Settlement Understanding (DSU) has a central role in the enforcement and implementation of WTO commitments. It serves as a central pillar of the multilateral trading system, with the contribution to stability of the global economy.<sup>1</sup> However, WTO members, especially developing countries in Asia, are not equally positioned to access and use it effectively. A number of studies have attempted to assess several explanations of the ineffective use of WTO DSU by the WTO Asian members.<sup>2</sup> Chow, Goh, and Patil recent journal, *Are Asian WTO Member Using the WTO DSU ‘Effectively’*, answers one important question “Are Asian developing countries not using the DSU effectively comparing with corresponding use by the United States of America (USA), the European Union (EU), Brazil, and Mexico?”<sup>3</sup> The authors based their finding by examining the existing literatures and data to show the complexity of the interactions between those explanations.

Generally, in WTO scholarship, there is no consensus on the particular factor that affect the ineffectiveness of Asian countries used of WTO DSU. Several scholars showed that the lack of legal capacity has impeded developing countries, especially Asian countries’ ability to participate fully in WTO DSU.<sup>4</sup> On the other hand, Shaffer believed that the factors of trading stakes and litigation costs are interrelated and contributed to the issue.<sup>5</sup> Nonetheless, there seems to be a general understanding among Chow, Goh, and Patil that none of the explanations alone satisfactorily explain the current situation.<sup>6</sup> Thus, they argued for a combination of some alternative explanations might help to deal with the question.

The article began with the introduction of WTO DSU, pointing out the different between WTO DSU and General Agreement on Tariffs and Trade dispute settlement. They explained why the non-participation of developing countries is a problem. They also mentioned their research methodology and acknowledged the limitation of their study. The authors included Brazil and Mexico

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<sup>1</sup> Understanding WTO, available from [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)

<sup>2</sup> Gregory C. Shaffer and Ricardo Melendez Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience*, April 2012, 3.

<sup>3</sup> Michael Ewing Chow, Alex W. S. Goh, and Akshay Kolse Patil, “Are Asian WTO Members Using the WTO DSU ‘Effectively’?,” *Journal of International Economic Law* 16, no. 3 (September 2, 2013): 672.

<sup>4</sup> Marc L. Busch, Eric Reinhardt, and Gregory C. Shaffer, *Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO*, December 2008.

<sup>5</sup> Gregory C. Shaffer, “Developing Country Use of the WTO Dispute Settlement System: Why It Matters, the Barriers Posed, and Its Impact on Bargaining,” (Sao Paulo, Brazil, 2005), 23.

<sup>6</sup> Chow, Goh, and Patil, “Are Asian WTO Members Using the WTO DSU ‘Effectively’?,” 669.

in their analysis since they are a major trading nations and their role as one of the most active users of the DSU.

Then, the authors presented the facts and figures necessary for their analysis. These include five tables and its descriptions, namely (1) the number of initiations made by countries/regions across selected time periods, (2) yearly rate of initiations made by countries/regions, (3) requests for empanelling by complainant countries/regions, (4) number of initiations made against parties across selected time periods, and (5) number of empanelled disputes and responding parties. There are two significant remarks drawn by the authors. First, as complainants, Asian member request for panel establishment more often than the USA and the EU, which means that Asian members have been less successful in attaining negotiated settlements. Second, complaints against Asian countries have led to establishment of fewer panels as compared to complaints against the USA. From this finding, the author of this review wonders about the reason behind the request for the panel establishment by Asian member? Does Asian members have less bargaining power compared to the USA and the EU?

Next, the paper showed the possible theories to see if they can explain why Asian countries initiate fewer disputes and have higher conversion rate as complainants and lower conversion rate as respondent. The theories mentioned in this paper are: Culture of non-litigiousness, Legal capacity, Monetary cost, Political power, Democracy, Self-understanding, Trading stakes, and Production networks.

Culture of non-litigiousness is described as one of the reason behind the reluctant of China and East Asian countries since they believed in Confucianism. There is a belief in Confucianism that “litigation causes irreparable harm to relationships and should be pursued only as a last resort or avoid entirely.” However, the data on China and Korea presented by the authors suggested that culture theory is not the appropriate one to explain this phenomenon. China and Korea escalate disputes through WTO DSU even if they believe in Confucianism.

As described in the second explanation, legal capacity is the ability of a country to mobilized legal and human resources to participate in the dispute settlement system. The authors raised up the case of China to show the shifting of China’s attitude from a reluctant country to a confident country in making use of the WTO dispute settlement system. The shift of China’s attitude coincided with the Chinese government’s decision to expand China’s legal capacity at the WTO plus its previous activity of participating as third party in every panel established from August 2003 to early 2007.<sup>7</sup> Thailand was used as another case to show the lack of legal capacity of Asian developing country. Thailand had been reluctant to participate in WTO DSU as both complainant and respondent unless it received support from ACWL or working in a team as co-complainant.<sup>8</sup>

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<sup>7</sup> Ibid., 679.

<sup>8</sup> Lida Keisuke, “Is WTO Dispute Settlement Effective?,” *Global Governance* 10 (2004): 681.

Monetary cost characters as one of the explanation for the less participation of less developed Asian members under the WTO DSU. Most of the developing countries in Asia do not have adequate finance to support their standing legal team since it may not make sense for them to do so. Personally, the author of this review believes that developing countries in Asia prioritize other field to spend their money on. The paper mentioned that Asian developing countries could not afford the expensive legal service provided by private firm since it might cost double or triple of that operating by ACWL.<sup>9</sup> Since 2001, ACWL's support has allowed some Asian developing countries to actively involve in WTO DSU. For instance, Thailand and Philippines has obtained ACWL's legal assistance for almost the cases they had escalated since 2001.<sup>10</sup> One criticism about ACWL's support is that it does not help Asian developing countries at a broader level as an only selected group of Asian countries had seek for their assistance. Besides ACWL's assistance, financial support from private sector features as an additional contribution of the use of WTO DSU. However, it may be difficult to get the support from private sectors if the disputed policy does not benefit them directly. All of these criticism show that the monetary cost is not the sole explanation behind the less participation of Asian developing countries.

The forth explanation is political power, which affect a country's decision on whether or not to initiate a dispute. This theory explains that a less powerful country is not likely to initiate a dispute against powerful country for fear of cutting foreign aids, attracting retaliations through trade, or other areas of international relations.<sup>11</sup> However, this theory might not explain the context of Asian countries. For example, Bangladesh, Japan, Singapore and South Korea dare to initiate dispute against their powerful counterpart like India, USA and Malaysia.

The article raised democracy as a fifth explanation. According to Christina Davis, there is a positive correlation between democracy and trade complaints. A country with more democratic system is likely to initiate more disputes than the one that is not democracy. However, the authors had shown that there is no relation between a country's degree of democracy and its tendency to escalate complaint. For instance, Japan has a perfect score for the degree of democratic governance, but Japan is not an active user of WTO DSU. Thus, the authors believe that there are two additional factors added to the democracy theory. First, there should be a presence of private industries to influence the government's engagement at the multilateral trading system.<sup>12</sup> Second, even in the absence of pressure from private sectors, the presence of political considerations are needed to compel the government to convert the dispute.<sup>13</sup>

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<sup>9</sup> Chow, Goh, and Patil, "Are Asian WTO Members Using the WTO DSU 'Effectively'?", 684.

<sup>10</sup> Ibid., 685.

<sup>11</sup> Ibid., 687.

<sup>12</sup> Ibid., 692.

<sup>13</sup> Ibid., 694.

Next, self-understanding finds its path in the list of explanations by the authors. Officers from Asian developing countries lack adequate internal administrative processes to examine the compliance of their regulations with existing trade obligations.<sup>14</sup> On the other hand, for USA and EU, trade lawyers are the person responsible for checking compliance of the existing regulations. This theory is also one of the plausible explanations for the lack of confidence of Asian developing countries to escalate the dispute since developing countries have less confidence in the consistency of their regulations and its compliance with WTO obligations.

Trading stakes is another theory used to explain the phenomenon in Asian developing countries. Based on trading stakes theory, a country with higher export volume is more likely to initiate a complaint.<sup>15</sup> In contrast, bigger export markets are more likely targets of complaints.<sup>16</sup> This theory fits with the situation of USA and EU, where they are the two big exporters and they encounter many trade obstacles, which is inconsistent with WTO rules. However, this theory does not explain the situation of Asian developing countries since China, Japan, and Korea initiate fewer disputes than Brazil and Mexico even though they have substantially higher export figures than Brazil and Mexico. From this, the authors concluded that the trading stakes theory does not fit the situation of Asian developing countries.

The last theory used to describe the trends in Asian developing countries is production networks. Asian members, who are more integrated into production networks, are less likely to initiate complaints since less trade conflicts arise and even if there is a conflict, they are willing to settle complaints rather than defending it through litigations.<sup>17</sup> For example, Japan and South Korea have a high exportation of capital goods and sophisticated intermediate goods, which are welcomed by less developed countries that do not have the technology to produce such goods. Since the goods are highly welcomed by less developed countries, there is no need for Japan and South Korea to lodge complaints at the WTO. In the event that there is a dispute, they might find it easy to adjust their policies to facilitate the continued growth of the network as a win-win situation.

Finally, the article ended with the conclusion that there is no single factor, which can alone explain the behavior of the WTO Asian members. The authors believe that the support from well-organized industry groups, self-understanding, and production networks explain the behavior of Asian members more than other theories.

After going through this journal article, there are several questions that come up to the author of this review. First, why Chow, Goh, and Patil stressed the term “effectively” in the heading of the journal? Second, why the authors began their explanation from culture of non-litigiousness to

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<sup>14</sup> Ibid., 695.

<sup>15</sup> Ibid., 696.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., 698.

production networks? Does that suggest a ranking of its contribution of the ineffective use of WTO DSU by Asian countries? Are there any other factors contributing to the ineffective use of WTO DSU by Asian developing countries?

Moving to the first question, the term “effectively” has been defined differently due to its context in problem solving, legal, economic, normative, and political; however, “effectively” in problem solving is the most intuitive.<sup>18</sup> The author of this journal review believes that “effectively” in this journal is not one-dimensional and it is hard to access what the authors really refer to when they used the term “effectively”. One possible meaning of the word “effectively” here is “an achievable result”.

In response to the second question, the author of this review thinks that the authors do not have any substantive reason behind the ranking of the explanations. The culture of non-litigiousness, political power, democracy, and trading stakes are irrelevant explanations to describe the condition of Asian developing countries' use of WTO DSU. However, these explanations are not listed next to each other. The authors mixed up the irrelevant and relevant explanations, which confuse the reader.

The journal would be better for the reader to follow if the possible explanations are categorized in such a way to make a reader have a clear picture of what are the explanations that really describe the situation in Asian developing countries. For instance, the journal can begin with the irrelevant explanation to the most dominant one. It should be noticed that in the conclusion part, the authors did categorize the possible explanation into different groups: domestic governance, international relations and political concerns, and economic explanation. However, in these three groups, culture of non-litigiousness is not in any of the group, which shows that the authors negligently ignore this factor.

The author of this review agrees with the conclusion that production networks, self-understanding, and support from the industrial groups are the most relevant contribution for the ineffective use of WTO DSU. On the other hand, the author of this review believes that the lack of financial support plays a significant role than the other factors. If the Asian developing countries have sufficient finance needed to strengthen their capacity and ability, then they do not need to worry about other factors, which barred them from actively involved in the WTO DSU. Furthermore, the existence of institutional bias against smaller exporting countries, in particular the inability to make credible retaliatory trade threats against powerful respondent and the unwillingness to participate in dispute against respondent on whom exporters are reliant for bilateral aid posted as a contribution to the problem.

Overall, the eight theories presented are a valuable source of lessons that are part of the possible explanations of the ineffective use of WTO DSU by Asian developing countries. In

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<sup>18</sup> Keisuke, “Is WTO Dispute Settlement Effective?,” 207.

addition, the analysis on each countries scenario is a valuable contribution to the understanding of how country like China, and Thailand, despite significant resource constraints, Asian developing countries may make good and effective use of the WTO dispute settlement mechanism. The rich explanation in the journal makes the journal a necessary reference for those who are interested in understanding all of the explanations why Asian WTO members do not benefit effectively from the WTO DSU. It is undoubtedly deepen the reflection of all those who desire to stay abreast of such economic globalization.

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