

Abstract: **The “Rule of Law” in the World Trade Organization:  
Do the “Haves” Come Out Ahead?**

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The legalized dispute settlement system of the World Trade Organization (WTO) has been hailed as a new development in international economic relations in which law, more than power, might reign. Nowhere has the international “rule of law” advanced more than in trade law. Such optimistic declarations beckon the question of who predominantly uses this legal system and who prevails. Do the “haves” come out ahead under an increasingly sophisticated WTO legal regime? Can the legal system work for smaller countries, and, in particular, small developing countries? To what extent has legal capacity—the ability to mobilize legal resources to prepare and litigate a WTO case—replaced the premium provided by market power? What steps could developing countries take to mobilize legal resources to participate more effectively? How could changes in the legal system’s design, or in the application of WTO rules by the system’s judicial bodies, facilitate small countries’ ability to pursue legal claims? This study examines why certain WTO members and certain of their constituents use (or fail to use) WTO law and thereby give (or fail to give) WTO law meaning. Only at the study’s end do we turn to how WTO procedures and the WTO’s rules on remedies could be modified in order to facilitate the cost-effective representation of weaker parties and thereby alter (somewhat) the dynamics of the WTO legal process.

The study is divided into three parts. Part I reviews the legalization of the WTO system, its costs, and its analogies and differences with domestic legal systems. It examines how the WTO legal system operates in practice, both in terms of litigation and of bargaining in its shadow, how it does so to the advantage of large wealthy countries, and why most developing countries decide not to use it. Part II assesses a number of strategies that some developing countries have used, and others could consider deploying, to mobilize legal resources and overcome some of the legal, financial, and political challenges that they confront. Part III examines how WTO procedures and remedies might be modified so that the legal system could facilitate the representation of a greater number of developing countries.

The project builds from over one hundred interviews with key participants in, and observers of, the WTO dispute settlement system in Geneva, Switzerland, the WTO’s home, as well as in a number of national capitals. Those interviewed include representatives from over thirty developed and developing country missions to the WTO, private lawyers and trade association representatives, over a dozen members of the WTO secretariat, seven members of the Advisory Centre on WTO Law, and multiple representatives from the United Nations Conference on Trade and Development (UNCTAD) and other Geneva-based organizations. These interviews complement a review of statistical data on WTO disputes, WTO judicial decisions, dispute-related documentation, and studies of domestic dispute settlement systems. The study’s title plays off Marc Galanter’s classic essay on the U.S. legal system, “Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change.”

*Background note: (1) My presentation will focus primarily on Parts I and II.*

*(2) An early version of the project was written for a Geneva-based WTO audience in spring 2003. It was published by the International Centre on Trade and Sustainable Development and is available at [http://www.ictsd.org/pubs/ictsd\\_series/resource\\_papers/DSU\\_2003.pdf](http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf).*

*(3) This work will be supplemented by that resulting from a U.S. National Science Foundation project that I will be conducting with two political scientists (Marc Busch and Eric Reinhardt). We will examine the relation of legal capacity and participation and success under the WTO dispute settlement system. The NSF project will include a survey of all WTO members regarding issues of legal capacity and a quantitative analysis of WTO formal complaints and “non-disputes” as compiled in a WTO data base. The project will result in a separate related paper.*

*(4) I am also PI on a major grant for a Geneva-based organization, ICTSD. We have obtained funding for three regional symposia on these issues in Thailand, Brazil, and South Africa. These symposia will bring together academics, government officials and private representatives from the region and result in an edited volume. We have already held a number of symposia with delegates in Geneva.*

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