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REGULATORY AUTONOMY OF DEVELOPING COUNTRIES IN THE INTERNATIONAL TRADE LEGAL SYSTEM: NORMATIVE AND INSTITUTIONAL CHALLENGES

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Abstract

This study examines the legal relationship between trade liberalization commitments within the framework of the *World Trade Organization* (WTO) and the right of developing countries to regulate. The expansion of the WTO's scope into domestic jurisdictions has legal implications for the *policy space* of developing countries in the process of formulating national legislation, particularly in the sectors of public health and environmental protection. Using a doctrinal legal research methodology, this study examines general exceptions, Special and Differential Treatment (S&DT), and the jurisprudence of the Dispute Settlement Body (DSB). The research findings outline three key points. First, legal recognition of regulatory autonomy is subject to certain normative limitations. The necessity test and empirical standard of proof under the SPS and TBT Agreements create an imbalance in the burden of proof for developing countries, which has the potential to affect the sustainability of the national legislative process (regulatory chill). Second, the S&DT principle, formulated to accommodate differences in economic capacity, tends to be declaratory in its application. This results in limitations on the binding force of the instrument as a legal basis for defense in dispute resolution. Third, legal interpretations by dispute settlement bodies have direct legal consequences for domestic autonomy. Furthermore, administrative constraints at the Appellate Body level and the implementation of the *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA) also affect the fulfillment of the principle of legal certainty at the appellate stage. This study concludes that the formulation of national legislation requires the fulfillment of a pre-formulation feasibility review (*ex-ante assessment*). Additionally, multilateral harmonization efforts are needed to fundamental legal justification.

Keywords: Regulatory Autonomy; Policy Space; Developing Countries; Dispute Resolution.

INTRODUCTION

The international trading system codified through the Marrakesh Agreement Establishing the World Trade Organization (WTO) in 1994 serves as the cornerstone of global economic governance (Kusumaatmadja, 1996). Replacing the 1947 *General Agreement on Tariffs and Trade* (GATT), the WTO not only regulates cross-border tariff provisions but also extends its scope of authority into the realm of domestic policy (*behind-the-border measures*) (Kusumaatmadja, 1996). This expansion of scope encompasses regulations in the fields of health, environmental conservation, industrial subsidies, technical standards, the protection of public morals, and the protection of intellectual property (Johnson, 2016). Such jurisdictional broadening raises normative issues regarding the tension between member states' commitments to global trade liberalization and their sovereignty in formulating public policies for domestic interests (Adu, 2022). In the discipline of international economic law, this manifestation of sovereignty is conceptualized as the right to regulate or regulatory autonomy (Adu, 2022). For developing countries and Least Developed Countries (LDCs), the protection of the right to regulate is an instrument inherent to state authority. Functionally, it serves as a prerequisite for fostering economic development and investment (Dotzauer et al., 2024), ensuring the fulfillment of basic rights (Wu, 2021) and responding to external dynamics such as climate change (Nahruddin et al., 2024). However, structural inequalities in the global economic order place developing countries in a vulnerable position, where the rigid application, where the rigid and unconditional application of legal norms—often identified as "WTO-plus" obligations—has the potential to constrain the policy space for formulating national legislation necessary for industrial and social development (Johnson, 2016).

The present research analyzes WTO legal provisions in relation to the limitations on the authority and policy space of developing countries. Through a review of legal doctrine, an examination of rulings by the Dispute Settlement Body (DSB), and a review of relevant literature, this inquiry seeks to examine the extent to which the international trade order balances market integration with the protection of domestic values (Howse & Langille, 2023). The scope of analysis encompasses the formulation of general exemption provisions, the legal status of Special and Differential Treatment (S&DT), the impact of intellectual property regimes, and the legal implications of the WTO institutional crisis that led to the establishment of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) (Hegde & Wouters, 2021; Mitchell, 2023).

METHOD

This study is a normative legal study that examines legal rules, principles, and concepts within the international trade system. The methodological framework incorporates treaty-based, jurisprudential, and conceptual analyses. Primary legal sources are drawn from the texts of World Trade Organization (WTO) agreements, including GATT, GATS, the SPS Agreement, TBT, TRIMs, TRIPS, the Dispute Settlement Understanding (DSU), the Model Provisional Arbitration Agreement (MPIA), and decisions of the WTO Dispute Settlement Body. Secondary legal materials consist of legal literature, academic journals, and official documents of international organizations related to the policy space of developing countries. Data collection was conducted through a systematic desk-based review, categorizing relevant legal instruments, dispute rulings, and supporting literature. The collected legal materials were then analyzed using qualitative legal analysis. The analysis involves outlining applicable positive legal norms, examining legal interpretation practices in dispute adjudication processes, and linking them to the legal standing of developing countries. Conclusions are drawn deductively to formulate legal implications and policy directions for safeguarding the regulatory authority of developing countries within the international trading system.

RESULTS AND DISCUSSION

The Normative Construction of the Right to Regulate and the Limits of Authority Under General Exceptions in World Trade Organization Legal Instruments

The legal construction of the right to regulate indicates that this term has definitional ambiguity in the literature of international economic law (Adu, 2022). This concept is rarely formulated as an absolute right rarely expressly formulated as an absolute right within the texts of World Trade Organization (WTO) agreements (Mitchell, 2023). Without a static definition, the *Right to Regulate* constitutes a principle of regulatory autonomy derived implicitly from the preamble of the agreements, the provisions on exceptions, and the interpretive practices of the WTO's *Appellate Body* (AB) (Adu, 2022). Historically, during the early stages of the institution's formation, there was a debate that the WTO's dispute settlement body might prioritize market openness at the expense of domestic policies (Howse, 2016). However, over time, the dispute settlement mechanism has accommodated this perspective through a pluralist approach (Howse & Langille, 2023). This approach acknowledges that the goal of the global trading system is not the standardization of member states' governance structures, but rather a balance that allows for the application of domestic regulations, provided they do not arbitrarily conflict with the principle of open markets (Howse & Langille, 2023). Dispute settlement institutions affirm that member states inherently have the right to determine their own legislative objectives and are free to set their chosen level of protection(Howse & Langille, 2023). This fundamental authority forms the basis for the exercise of regulatory rights.

Beyond general exceptions related to morality and public health, the exercise of state sovereignty is also facilitated through mechanisms for national interest exceptions, such as safeguard measures and national security exceptions (GATT Article XXI). The existence of these conditional barrier instruments indicates that compliance with international trade rules still allows states to implement protective measures when national security stability or domestic industrial structures are threatened, even though such actions may affect economic efficiency (Nasution, 2021). However, the exercise of such rights—particularly regarding their impact on the cross-border movement of goods—is subject to international legal restrictions to prevent disguised discriminatory practices (Howse, 2016). At the implementation level, legal recognition of the right to regulate is consistently confronted by the phenomenon of regulatory chill in developing countries. Although the sovereignty to regulate is legally recognized, legislative bodies in developing countries face structural constraints that impact the legislative process, a condition often identified as a form of excessive compliance (Land, 2012). Studies indicate that the potential for litigation in dispute resolution forums—which require high litigation costs and specialized legal expertise—often leads to the withdrawal of proposed legislation by governments in developing countries (Land, 2012). As a balancing mechanism against such restrictions, the international trade legal system provides a legal framework for general exceptions, based on the

provisions of Article XX of the GATT for trade in goods and Article XIV of the GATS for trade in services (Mitchell, 2023). These provisions are designed as a legal basis allowing member states to exempt themselves from the obligations of the underlying agreements, provided such actions are necessary to protect non-trade public interests (Paine, 2021). The application of this exemption framework is not absolute but requires the fulfillment of a two-tier test and a necessity test (Thapa, 2012). Indications of policy formulation that could potentially be interpreted as disguised trade restrictions can be examined in the implementation of the European Union Deforestation Regulation (EUDR). Although this policy is based on environmental conservation grounds in accordance with the exception under Article XX(g) of the GATT, it may fail to meet the preliminary requirements (*chapeau*) because it is applied unilaterally, lacks flexibility, and contains provisions that discriminate against commodities from developing countries (Nasution et al., 2024). The complexity of this assessment becomes more specific within the realm of sectoral agreements, particularly the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS). These two legal instruments regulate the standards for rulemaking at the national level; thus, their intersection with the regulatory authority of developing countries has direct implications for domestic policy space (Thapa, 2012). The SPS Agreement requires member states to base import restriction policies related to biosafety on measurable scientific risk analysis (Thapa, 2012). On the other hand, the TBT Agreement does not explicitly include a public interest exception clause as found in Article XX of the GATT.

As an empirical illustration of the TBT Agreement's provisions, the implementation of Law No. 33 of 2014 on Halal Product Assurance in Indonesia has sparked legal discourse at the global trade level. The requirement mandating halal certification for products entering and circulating within Indonesia is categorized by some foreign trading partners as a technical barrier to trade (TBT) or a non-tariff barrier (NTB). Although the basis for the enactment of this law was intended to accommodate the protection of domestic consumers through legislative mechanisms—and was not established as an instrument of national industrial protectionism—the requirement for mandatory audits of production processes in the country of origin is viewed as having legal vulnerabilities regarding the provisions of the TBT Agreement. These domestic regulatory arrangements are potentially subject to legal challenge on the grounds of creating de facto discrimination under Article 2.1 of the TBT Agreement. Furthermore, the aspect of meeting the necessity test may also be challenged under Article 2.2 of the TBT Agreement, given that exporting countries generally argue regarding the availability of alternative regulatory instruments deemed less likely to distort trade. In addressing the absence of an exception clause in the TBT Agreement, rulings by the dispute settlement body in previous cases have interpreted that de facto discriminatory effects are not automatically classified as legal violations, provided they are based on a legitimate regulatory distinction to protect the public interest (Howse & Langille, 2023).

The following table presents a comparison of policy space protection instruments under these two sectoral legal frameworks:

Table 1. Comparison of Regulatory Parameters in the SPS and TBT Agreements

Regulatory Parameters	SPS Agreement	TBT Agreement
Evidentiary Burden of Proof	Requires strict proof based on empirical scientific risk assessment.	Provides flexibility in scientific proof, focusing on the rationality of the regulation's contribution to achieving policy objectives.
Trade Restrictiveness Test	Assessed based on the availability of less trade-restrictive alternative measures.	Evaluated to ensure measures are not more trade-restrictive than necessary to fulfill a legitimate objective.
Capacity to Determine the Level of Protection	Provides a firmer legal basis for member states in establishing their Appropriate Level of Protection (ALOP).	Grants more limited recognition of autonomy, thus rendering it vulnerable to legal disputes regarding the obligation to harmonize with international standards.
Jurisdictional Implications	Vulnerable to becoming the object of disputes due to the high standard of scientific burden of proof for the responding state.	Frequently utilized as an alternative basis for disputes (shifting from the SPS regime) by the complaining state, although it potentially reduces legal certainty in the evidentiary process.

Source: Compiled from Howse & Langille (2023) and Downes (2015).

The complexity of legal proof, whether in general exception mechanisms or in sectoral regime regulations (SPS and TBT), highlights the high standard of proof that developing countries must meet to defend their regulatory autonomy. The obligation to provide empirical evidence and the strict requirement to comply with the principle of non-discrimination imply limitations on the exercise of the right to regulate amidst efforts to expand market access. The legal position of developing countries is rendered vulnerable if the protection of this policy space relies solely on standard exception clauses. Therefore, safeguarding regulatory autonomy requires an affirmative legal framework beyond general exceptions, which is doctrinally realized through the legal recognition of asymmetric economic capacities among nations.

The Legal Validity of *Special and Differential Treatment* (S&DT) and the Implications of Sectoral Harmonization for Policy Space

The complexity of legal proof, both in general exemption mechanisms and in sectoral regime regulations (SPS and TBT), highlights the high standards that developing countries must meet to maintain their regulatory autonomy. The obligation to provide empirical evidence and the strict adherence to the principle of non-discrimination imply restrictions on the exercise of the *right to regulate* amid efforts to expand market access. The legal position of developing countries is structurally compromised if protection for such policy space relies solely on standard exception clauses. Therefore, safeguarding regulatory autonomy requires an affirmative legal framework beyond general exception provisions, which is doctrinally realized through legal recognition of economic capacity disparities among nations.

Furthermore, the legal recognition of economic capacity disparities among nations is manifested in the principle of Special and Differential Treatment (S&DT). Conceptually, the international legal system acknowledges that developing countries have different economic foundations (Kleen & Page, 2005). Therefore, the S&DT principle was established to provide time for adjustment, flexibility in implementation, and policy space (Hegde & Wouters, 2021). The Enabling Clause serves as the doctrinal basis legitimizing such asymmetric trade arrangements (Howse & Langille, 2023). Nevertheless, a normative review of S&DT provisions reveals limitations in their legal binding force. The majority of S&DT formulations tend to be declaratory in nature without containing legally binding (*imperative*) consequences, and only a small fraction establish legally binding obligations to protect the autonomy of developing countries (Howse & Langille, 2023). The following table presents the legal classification and effectiveness of S&DT instruments within the international trading system:

Table 2. Typology of the Legal Force and Implications of S&DT Provisions

Classification of Legal Force	Proportion of S&DT Provisions	Juridical Implications for the Exercise of the Right to Regulate by Developing Countries
Binding obligations *(Confer Rights & Duties)*	21%	Serves as a legal basis in dispute settlement proceedings to substantiate the adjustment in the fulfilment of obligations, facilitates asymmetrical tariff concessions, and provides juridical protection for infant industries within specific timeframes.
Declaratory Provisions *(Best-Effort Endeavours)*	79%	Possesses limited juridical binding force, given the absence of coercive sanctions or compensation mechanisms for the non-fulfilment of obligations to facilitate economic assistance for Least Developed Countries (LDCs). This condition results in the absence of a legal defence basis during the dispute examination phase.

Source: Hegde & Wouters (2021).

The distribution of cases as outlined in the table above implies that the application of S&DT has not yet been effective during the dispute adjudication phase. Dispute adjudication panels tend not to comprehensively consider the macroeconomic indicators of developing countries, resulting in the implementation of the principle of special treatment often failing to be reflected in the final rulings (Tania et al., 2024). Furthermore, the legal framework regarding the self-declaration mechanism for developing country status is currently being proposed for reform by developed countries under the argument of proportional compliance (Yanai, 2013; Yap, 2024). These developments indicate that the function of S&DT provisions has the potential to shift into a negotiating instrument that could limit the regulatory autonomy of developing countries (Hegde & Wouters, 2021).

These limitations on legislative authority become more complex when examining the intersection between investment regulations, intellectual property, and the right to development within the framework of the TRIMs and TRIPS Agreements. These sectoral regulations relate to aspects of economic sovereignty that have direct implications for the national industrial legal framework. The prohibition on applying domestic content requirements under the TRIMs Agreement has the potential to conflict with industrialization agendas aimed at technology transfer, thereby limiting developing countries' capacity to strengthen their domestic production sectors (Kuntze & Moerenhout, 2012). The complexity of legal protection is also evident in the provisions of the TRIPS Agreement, which includes obligations to harmonize intellectual property protection without proportional adjustments to the medical resilience capacity of developing countries (Correa, 2002). This conflict of regulatory authority was subsequently reconciled through the Doha Declaration, which reaffirmed states' rights by stating that patent protection does not preclude governmental authority to implement public health policies. This document provides a legal basis for the implementation of compulsory licensing without requiring external approval (Hoen, 2022). This direction of protection is reinforced by the practice of dispute settlement bodies, whose jurisprudence establishes the legal rationale that patent protection is not absolute when confronted with the applicability of laws and regulations in the field of public health protection within a domestic jurisdiction (Hoen, 2022).

Interpretative Practices of the Dispute Settlement Body and the Implications of WTO Institutional Transformation for Policy Space

The evolution of the limits on the authority of international trade institutions over developing countries can be examined through the interpretive practices of the Dispute Settlement Body. Through these rulings, the necessity test and recognition of policy space are applied to assess the validity of domestic legal regulations. Regarding environmental protection, the *Brazil–Retreaded Tyres* dispute examined restrictions on the import of used tires. The interpretive practice in that dispute recognized environmental conservation as a legitimate public interest under GATT's exception provisions, providing a legal basis for states to protect public health from hazardous materials (Trachtman, 2017). Nevertheless, Brazil's policy was deemed to violate the non-discrimination provision because it granted exceptions to member states of its regional cooperation bloc, rendering the regulation inconsistent with WTO principles (Bown & Trachtman, 2009). This jurisprudence indicates that import restrictions formulated in a non-discriminatory manner possess legal validity; however, such validity may not be recognized if their application conflicts with the principle of equal treatment due to the existence of unilateral exceptions (Qin, 2007).

In the *Thailand–Cigarettes* dispute, health protection policies conflicted with the principle of using the least trade-restrictive alternative. Although international health standards acknowledge the negative impacts of tobacco products, Thailand's blanket import ban was ruled not to meet the necessity principle because other policy alternatives—such as adjusting excise tax rates and standardizing labeling—were available and deemed to have equivalent levels of effectiveness (Drope & Lencucha, 2014). Differences in interpretation were also evident in the *India–Solar Cells* dispute, where renewable energy transition policies were constrained by provisions prohibiting mandatory use of local components. The dispute panel ruled that the provision of incentives contingent on domestic assembly violated the principle of national treatment, setting aside the ecological conservation objectives underlying the policy (Karttunen & Moore, 2018). This interpretive practice has implications for limiting the policy space of developing countries in formulating pro-environmental regulations (Bansal & Deshpande, 2017).

On the other hand, in the *Indonesia-Chicken* case regarding halal certification standards, the primary legal issue did not focus on testing moral or religious values in the context of national consumer protection (Ahamat & Rahman, 2018; Ruhaeni & Aqimuddin, 2023). Conceptually, the establishment of halal product assurance regulations in developing countries represents the fulfillment of society's non-material rights, accommodated through legitimate constitutional procedures, rather than being intended exclusively as an instrument for protecting the domestic industry. Nevertheless, the dispute settlement panel's ruling finding these provisions inconsistent with WTO obligations was primarily based on the import licensing framework, which was deemed to contain administrative barriers lacking procedural certainty and adequate transparency, thereby qualifying as a form of disguised restriction on international trade (World Trade Organization, 2017). This ruling reflects a tendency among international dispute settlement institutions to assess certification requirements from developing countries solely as procedural technical barriers, without comprehensively considering the normative validity of such regulations as a manifestation of fulfilling public interests at the domestic level. Nevertheless, the effectiveness of law enforcement through this dispute settlement mechanism currently faces obstacles due to institutional stagnation at the level of the Appellate Body. The delay in filling Appellate Body vacancies has resulted in a structural halt to adjudicative functions (Ismail, 2020). This situation allows a party found to have violated the provisions by the first-instance

panel to file an appeal, resulting in a procedural vacuum (*appealing into the void*), thereby delaying the right of the aggrieved state to implement lawful countermeasures (Pramudyawati, 2024). In response to this institutional stagnation, the *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA) mechanism was established as a transitional alternative dispute resolution instrument. Based on the arbitration mechanism under Article 25 of the Dispute Settlement Understanding (DSU), the establishment of the MPIA is grounded in the principle of voluntary participation (*opt-in*), wherein its final award carries the same legally binding force as that of the conventional appellate review mechanism (Salsabila, 2023). This institutional change carries fundamental legal implications for how member states defend the validity of their legislation at the appellate level. The following table presents a comparison of the authority structures between the conventional Appellate Body and the post-2020 MPIA arbitration mechanism:

Table 3. Comparison of Legal Authority Between the WTO's Conventional Appellate Body and the MPIA

Parameters of Legal Authority	**Conventional WTO Appellate Body (AB)**	**Multi-Party Interim Appeal Arbitration Arrangement (MPIA) Mechanism**
Nature of Jurisdiction	Compulsory and institutionally binding upon all WTO member states.	Applies plurilaterally based on a voluntary (opt-in) principle. Jurisdiction is legally binding only if the disputing parties expressly agree to submit to this procedure.
Legally Binding Force of Rulings	The Appellate Body Report (AB Report) requires a formal adoption procedure during a session of the Dispute Settlement Body (DSB).	The Arbitral Award is notified directly to the DSB and possesses binding force and possesses binding force pursuant to the provisions of Article 25(3) of the DSU.
Rules on Recusal	Upholds the principle of the independence of tribunal members; objections to a member's appointment cannot be based solely on the grounds of shared nationality with a disputing party on the grounds of shared nationality with a disputing party.	Procedural rules facilitate the right of the parties to raise objections against the appointment of an arbitrator possessing the nationality of a disputing party.
Time Limits for Examination and Rules of Procedure	In practice, the 90-day examination time limit is frequently exceeded, resulting in delays that undermine the legal certainty of the dispute settlement process.	Mandates strict compliance with the 90-day time limit for proceedings and restricts the volume of legal documents to ensure the efficiency of the arbitral proceedings.

Source: Adapted from Pramudyawati (2024), Salsabila (2023), Bohanes (2020).

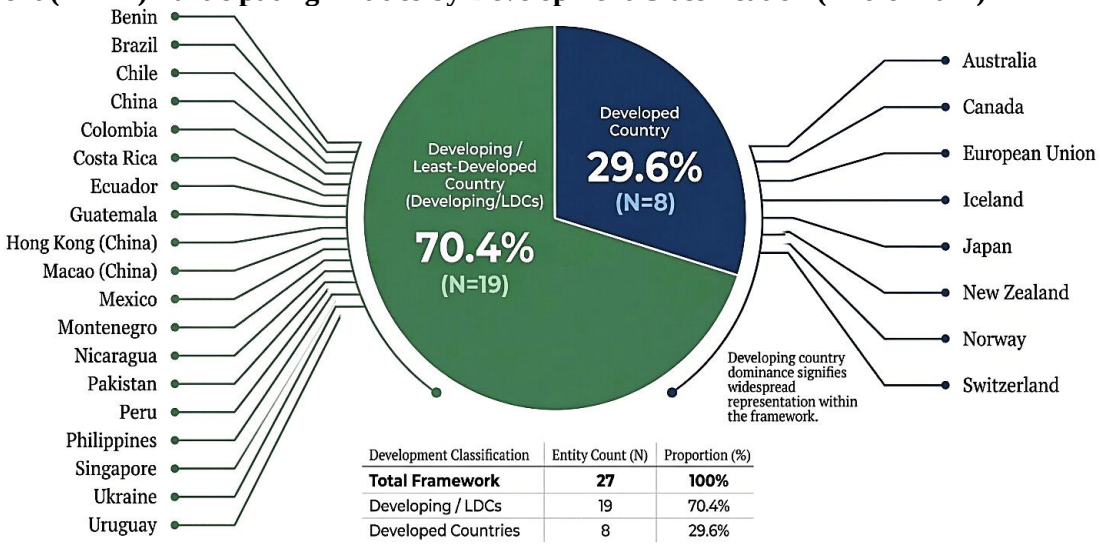
Institutional changes through the MPIA mechanism, which is based on the principle of voluntary participation (*opt-in*), have direct implications for jurisdictional representation within the current dispute settlement system. To examine the implications of this transitional mechanism for the legal standing of developing countries, an empirical review of its membership structure is required. Based on an analysis of official WTO notification documents (JOB/DSB/1/Add.12 and its supplements through the end of 2024), entities subjecting themselves to this arbitration jurisdiction exhibit a specific membership structure. As shown in Figure, entities from the group of developing and least developed countries dominate with a proportion of 70.4% (19 entities), compared to 29.6% (8 entities) from the group of developed countries.[1]

[1] The legal classification of "Developed Countries" and "Developing Countries" in this dataset is not based on static macroeconomic parameters, such as the World Bank's per capita income thresholds, but is subject to the legal framework of the World Trade Organization (WTO). The determination of this status is based on the principle of self-declaration, which grants member states the authority to define their economic status to obtain Special and Differential Treatment (S&DT).

In practice, the validity of this status is divided into two membership tracks. The first track applies to founding members (original members) under Article XI of the WTO Agreement (covering entities such as Singapore, Malaysia, Brazil, Mexico, Colombia, Costa Rica, Macau, Hong Kong, the Philippines, Peru, and Uruguay). This status is a carry-over from GATT 1947 practices and is evidenced by the ratification of the Schedule of Concessions without requiring a separate declaration document."

The second track is the accession route (acceding members) under Article XII of the WTO Agreement for countries that joined after 1995. In this process, the recognition of status is formally recorded in the Working Party Report and the Protocol of Accession, as demonstrated

Figure. Distributive Analysis of Word Trade Organization (WTO) Multi-Party Interim Appeal Arbitration Arrangement (MPIA) Participating Entities by Development Classification (End of 2024)



Development Classification	Entity Count (N)	Proportion (%)
Total Framework	**27**	**100%**
Developing / LDCs	19	70.4%
Developed Countries	8	29.6%

(a) The European Union, comprising 27 Member States, is Participating and Counted as a single legal entity within the MPIA framework;
(b) Souce note: Data compiled and synthesized from official Word Trade Organization (WTO) notification documents, specifically JOB/DSB/1/Add.12/Suppl.1 Throught JOB/DSB/1/Add.12/Sub.11, as of 2024.

Normatively, this high level of participation indicates the institutional commitment of developing countries to upholding a rules-based dispute resolution system. However, from an institutional governance perspective, this membership composition also confirms the fragmentation of the arbitration system. The absence of commitment from a number of developed and developing countries with dominant trade shares indicates that this alternative arbitration mechanism has not yet fully encompassed the key actors of the global economy. This fragmented membership structure has a direct correlation with the vulnerability of policy space in the formulation of national legislation. Without a comprehensive, binding multilateral jurisdictional framework, developing countries face the likelihood of legal asymmetry. If a dispute regarding the validity of the *right to regulate* involves a trading partner outside the MPIA framework, the dispute resolution mechanism may shift to a bilateral approach. Such an approach generally relies more on economic bargaining power than on safeguarding the principle of legal certainty in international trade.

Although these transitional instruments are considered effective in resolving initial cases through the efficiency of the review process, the functional application of these alternative mechanisms implies systemic fragmentation of the legal standing of developing countries (Morgan, 2023). The non-participation of developed countries with large trade shares has the potential to result in an imbalance in the procedural parity during the dispute resolution process. Without the certainty of jurisdictional unity, dispute resolution risks reverting to bilateral mechanisms reliant on asymmetrical bargaining positions, which in turn weakens legal protection for the regulatory rights of developing countries. In addressing this institutional complexity and fragmentation, reforms to the legal framework in developing countries are necessary, along with the formulation of measurable strategic policy directions. Balance in the international trade legal system will not be achieved if the existing framework restricts the scope for national legislative policy-making. To strengthen legal protection, the legislative drafting process requires a comprehensive ex-ante assessment. Legislative bodies in developing countries need to integrate empirical data analysis regarding benefits and explicitly formulate the objectives of exceptions within the provisions of the law (Harris & Moon, 2015). At the sectoral level, policy consolidation that accommodates environmentally sound subsidy exemptions must be renegotiated through multilateral cooperation forums to align the direction of sustainable development with legal certainty. As a follow-up step, systemic transformation requires judicial institutions to incorporate indicators of macroeconomic vulnerability into the legal reasoning (*ratio decidendi*) (Tania et al., 2024). Normative recognition of these special treatment rights is an essential instrument for maintaining a balance between market integration and the legitimacy of regulatory sovereignty (Hegde & Wouters, 2021).

in the legal instruments of Ecuador (WT/L/77), the Republic of Moldova (WT/L/400), China (WT/L/432), Vietnam (WT/L/662), Ukraine (WT/L/718), and Montenegro (WT/L/841)."

CONCLUSION

The protection of developing countries' regulatory autonomy (*policy space*) within the international trade law system still faces normative and institutional challenges that result in restrictions on the scope for domestic lawmaking. The main conclusions of this study are formulated into three key findings: First, the normative recognition of the right to regulate in international trade law instruments is not absolute but is subject to limitations through a framework of general exception tests. The application of the necessity test in core treaty instruments, as well as the burden of proof based on empirical risk assessments in sectoral agreements (SPS and TBT), imposes an asymmetrical legal burden of proof on developing countries. This has the potential to result in a reluctance to enact legislation (*regulatory chill*), where a state's autonomy to protect fundamental public interests—such as environmental conservation and national health standards—often conflicts with the principle of the the free movement of goods across borders.

Second, the principle of Special and Differential Treatment (S&DT), which is conceptually intended to accommodate differences in economic capacity among countries, in practice lacks sufficient legally binding force. The majority of S&DT provisions are declaratory in nature (*best endeavours*) without the implication of enforceable sanctions, making it difficult to use this instrument as a basis for an effective legal defense in dispute settlement proceedings. This policy space is further constrained by the harmonization obligations under the TRIMs and TRIPS frameworks, which limit developing countries' flexibility in regulating local investment governance and ensuring public health resilience. Third, the legal interpretation practices of dispute settlement institutions apply strict standards of review to the laws and regulations of developing countries, which often result in the i findings of inconsistency regarding of domestic policies on the grounds of non-compliance with administrative governance and procedures (violation of the principle of non-discrimination).

Furthermore, structural constraints at the level of the Appellate Body and the application of the MPIA alternative dispute resolution mechanism lead to fragmentation of legal certainty. This transitional framework, based on the principle of voluntariness, risks reverting dispute resolution processes to bilateral negotiations reliant on asymmetrical bargaining positions, thereby potentially weakening developing countries' legal position in safeguarding the existence of their legislative products. To address these legal challenges, the continuity of protection for the legislative sovereignty of developing countries requires an adjustment in the strategy for formulating legal instruments. The formulation of legislation must not merely be based on standard formulations but must be preceded by a comprehensive obligation to conduct a pre-formulation feasibility review (*ex-ante assessment*). Furthermore, future reforms of the international trade legal framework require legal diplomacy to integrate the principle of protecting asymmetric capacities as a binding legal basis (*ratio decidendi*) for adjudicating bodies, in order to restore a proportional balance between the principle of market integration and the exercise of regulatory sovereignty at the national level.

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