TRIUMPHANT UNDERDOGS?

THE HAVES NOT AHEAD IN THE FIRST DECADE OF THE WTO DISPUTE SETTLEMENT SYSTEM

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ABSTRACT

There is a common misconception that developing countries come out "behind" in their relationship with the World Trade Organization (WTO). While studies show that litigation between parties in the United States often result in the "haves coming out ahead," this is not true (yet) in the case of WTO litigation. Based on data from the first decade of cases in the WTO Dispute Settlement system, it appears that countries with lower economic levels tend to win WTO disputes more often than their richer and more experienced counterparties. This study also shows that while developing countries have low participation levels, insofar that their reasons for not participating has to do with a fear of bias toward economic levels, such a reason is unfounded.

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ACKNOWLEDGEMENTS

A project like this is not something that can be done at the last minute.

From the very beginning John Leubsdorf was the professor who read the various iterations of my dissertation over and over without complaint. In addition to his unwavering interest, I would like to thank him for introducing me to Marc Galanter's work.

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INTRODUCTION

WHY ARE YOU DOING THIS?

During my legal studies, I was introduced to a fascinating piece of scholarship: "Why the Haves Come Out Ahead" by Marc Galanter (1974). It was his seminal piece, a work that "launched a thousand ships" so to speak.[1] There have been hundreds of studies trying to prove or disprove his theory, namely, that the domestic legal system favors the rich. To no cynic's surprise, in almost every Galanter-based study it has been shown that those with more resources do come out ahead in legal battles. This is because wealthy parties have the resources and the

[1] From Christopher Marlowe, in *Doctor Faustus* (variously dated between 1590 and 1604), referring to Helen of Troy as "the face that launched a thousand ships."

interest to litigate strategically, shaping the law to their own advantage in the process.

But does Galanter's theory hold true for international trade disputes? Finding no satisfactory answer, I set out to discover it myself. I chose to study the Dispute Settlement System of the World Trade Organization (WTO). Why the World Trade Organization? Well, it has been accused of being part of the "Unholy Trinity," the third pillar of the "Washington Consensus," and a tool of the west to oppress the poor. I assumed that just like domestic litigation, the WTO would favor the rich and those with more money would come out ahead in the disputes.

The results surprised me. Time and time again, in almost every single category, the "winner" seemed to be the underdog by a slight amount. Most notably, the average winner had a lower gross domestic product (GDP) relative to its opponent as well as less experience litigating within the WTO. However, because developing countries are practically absent from the dispute settlement process, I am unwilling to interpret these results to mean that the "haves" came out ahead against the "have-nots" nor will I say that the "poor" countries won against the "rich" countries. Instead I am saying that the "underdog" – that is, the country with less experience, a lower GDP, GDP per capita and GDP using purchasing power parity (PPP) relative to its WTO opponent – won more often than the "have" – the country with more experience, the higher GDP, GDP per capita and GDP using purchasing power parity (PPP) relative to its WTO opponent.

These findings are significant for three reasons. First, it defies the patterns previously established for domestic litigation, where the wealthier and more experienced parties have been shown to win more often than less wealthy and less experienced opponents. Secondly, it shows that the WTO panels did not appear to be swayed by the wealth of the "haves" in adjudicating the disputes. Finally, insofar that developing countries choose not to participate in WTO disputes, it shows that any reasoning for non-participation which is based on the fear of loss due to wealth bias is unfounded.

I do not expect my reader to be an expert in any field, though to be clear, my training is in international law. However, as with everything, this study must be read with open eyes. I have been careful to alert my reader of the many assumptions and premises that informed the design of this project. Case in point, this study assumes that the wealth of a country necessarily translates into enhanced WTO litigation, which may or may not be true.

Regardless, the nascent state of WTO litigation prevents me from claiming that the underdogs will continue to come out ahead in the future. The WTO is a fairly new entity with only 335 cases filed between 1995-2005. While statistical analysis allows any dataset over 50 variables to be predictive, the evolution of international law is far too slow to make any claims about the likely makeup of future WTO dispute participants. This is because (1) individual disputes take several years to resolve; (2) resulting changes in international law take years to negotiate; and (3) implementation of new international laws into domestic laws also

takes years to occur. It would thus be impractical to make broad predictions about the future of international trade litigation using only ten years of legal disputes.

Furthermore, the studies regarding wealth and experience in domestic litigation show that legal systems evolve over time to favor the wealthier and more experienced litigants. Since the WTO dispute settlement system is so young, it is not only possible, but likely, that the richer countries are currently in the process of shaping the law of international trade to their benefit, the results of which will not be visible until later. To confirm this hypothesis of "evolving bias," this study must be reproduced for the 2005-2015 decade, the 2015-2025 decade, and so forth and so on.

Also, the noticeable lack of participation by developing countries in the dispute settlement process poses significant hurdles to any future predictions. This is because much of the rulemaking and negotiation over trade law occurs outside the scope of the dispute settlement system, making it impossible to quantify the true impact wealth may have on the overall "fairness" of the system.

None of these facts, however, detract from the significance of the findings. The haves did not come out ahead in the first decade of the WTO dispute settlement system. In addition to being the first measurement of its kind, this dissertation provides a unique collection data in the four attached appendices. While there is ample information about the disputes themselves, the countries involved, and of course, general economic and trade statistics, there has never before been a dataset comprising specific economic data for the individual parties in trade disputes for the

year of the disputes. Future scholars will therefore be able to manipulate this data to create a new body of knowledge about the WTO and international trade.

THE HAVES VERSUS THE UNDERDOGS

In order to describe how I ultimately concluded that the haves did not come out ahead in the first decade of WTO disputes, it is necessary to provide a solid background of all the assumptions, definitions, and methods that went into developing this dataset. In other words, my dissertation uses the following roadmap. First, I provide background on the WTO to put the study in context with the existing scholarship. Second, I explain the methodology of my study. Third, I discuss some basic data I found in the process of preparing for my study. Fourth, I analyze the results of the study, concluding, ultimately, that the haves do not come out ahead in the first decade of WTO disputes. Finally, I conclude with a discussion about the missing participants in WTO disputes. Now that the reader has a general

sense of the organization of this paper, it is useful to provide even further detail as to my thought process and reasoning for organizing the study the way that I did.

The first order of business in proving or disproving this theory was to select a subject of study. While I could have looked at a whole host of international judicial bodies, I selected the WTO for two reasons: first, it had a manageable data sample (it has only been in existence for thirteen years, and I further limited the study to the first decade) and second, the parties of the disputes are not individuals or companies, they are countries. This meant there was an ample amount of data that had been collected over the past decade that I could easily gather to compare the average "winner" with the average "loser."

My theory was that if the "winner" had a higher statistic than the average "loser" in the first decade (be it GDP, GDP per capita, or GDP per capita, PPP), then one could conclude that the "haves" came out ahead. In contrast, if the average "loser" had a higher figure, one could conclude that the "underdogs" came out ahead. It is a simple concept in theory, but the process of gathering, categorizing, and quantifying the data, as well as running statistical significance for all the above, required far more than a calculator; it required considerable decision-making.

In order to ensure that the reader will have a full appreciation of this decision-making, I must first give a solid explanation of the WTO, where it came from, what it does, and how it works. And because my reader will need a somewhat sophisticated understanding of international trade law to appreciate this study, I

start *Part 1* of *Chapter One* at the very beginning, with a detailed history of the creation of the WTO and its intended purpose.

From there I outline the mechanics of a WTO dispute in *Part 2* of *Chapter One*. This is necessary because a WTO dispute is not analogous to a domestic lawsuit. While it is akin to a trial in that both parties present their cases before a panel of judges, the process is much closer to a tribunal or arbitration where each side has negotiating power when it comes to the procedure of the dispute, including the selection of judges. Secondly, the enforcement of WTO panel decisions – as with all international agencies – is precarious. Consider this: if a country is found to be in violation of international law, what can the rest of the world do to force it into compliance? Certainly there is no "jail" for offending countries, and even if there were a "fine" associated with a given violation, to whom would it be paid and how would such a penalty be enforced?

Put simply, it has taken centuries of diplomacy and human evolution to fashion the system of international law into its current shape, and the reader will have to be armed with this knowledge before he or she can fully appreciate the scholarship and academic criticism I will discuss in *Parts 3* and *4* of *Chapter One*. For now, however, I will simply say this: most people – and I really mean most people – believe that the system of international trade cooperation has been inherently unfair to developing countries. If for some reason this seems like a false claim, take a look at agencies like the United Nations Conference on Trade and Development (UNCTAD), the International Trade Centre (ITC), or the U.N.

Development Programme (UNDP). These institutions were born out of the perception that the international trade regime failed and continues to fail developing countries from the start (Damrosch, 2001).

However, here is where I draw an important distinction. I am *not* claiming that developing countries have nothing to worry about as far as international trade law is concerned. It would be silly to make such a broad statement based on only 335 disputes from an organization that is practically in its infancy. Furthermore, it is clear that developing countries are blatantly not participating in the dispute settlement process. Out of the 335 cases, only 16 involved an official United Nations least developed country (LDC), only of one of which participated as a main as a main party (Bangladesh, in DS306). Instead, I am suggesting that the results of my study show that if developing countries justify their non-participation based on a belief that the WTO dispute settlement system is biased toward the "haves," such reasoning is, so far, unfounded.

Once the significance of this paper has been properly positioned in context with the current scholarship, it will be time to discuss methodology in *Chapter Two*. Here is where I will detail my thought process in selecting and organizing data. I define important terms and lay out the ground rules I follow for the technical aspects of the study. Then I summarize for the reader Marc Galanter's initial scholarship, "Why the Haves Come Out Ahead," and explain how it relates to WTO disputes.

Finally, I will both explain and justify my methodology in developing the study. For example, how did I go about categorizing each dispute? How did I define a "winner" compared to a "loser?" What, exactly, is an "underdog?" Even more importantly, what statistics did I collect to ascertain a country's "wealth?" Case in point, is it fair to say that a country is "richer" just because it has a GDP? What about income distribution? Can one say that a country with a low GDP is "poor" even if its average citizen makes over $35,000 year? Put simply, there is a difference between small countries and poor countries that must be distinguished in this study.

In my opinion, the most important part of *Chapter Two* is that I alert the reader to the potential problems with the statistical decisions I made. For example, the data surrounding "Europe" or the European Union is questionable. While the European Union was established two years before the data from this study begins (1993), it gained new members within the 1995-2005 time period.

Case-In-Point #1: Winners and Losers in the WTO

DISPUTE NUMBER: DS285

COMPLAINT DATE: March 13, 2003

RESOLUTION DATE: May 22, 2007

COMPLAINANT: Antigua and Barbados (GDP $720 million)

RESPONDENT: United States (GDP $10 trillion)

THIRD PARTIES: Canada; Chinese Taipei; European Communities; Japan; Mexico; China

SITUATION:

The U.S. federal government as well as some of the individual states passed laws outlawing online gambling. Antigua and Barbados complained, arguing that this violated the U.S.'s obligations under WTO law.

The Panel listened to both sides and issued its ruling, but both parties claimed a victory!

Who is the winner here? It was cases like these that required a very clear definition of "winning" and "losing" that could not be based on perception or even reality, but instead had to rely on pure legal analysis.

The WTO is even careful to refer to the European Union as the "European Communities" because in addition to being members in their own right, all 27 members of the European Union can participate in the dispute process collectively with the European "Communities" or on their own, depending on the situation (WTO Website).

The reason this is significant is because when I pulled economic data for the European "Communities" I had to use the closest possible dataset, which, in the World Development Indicators (WDI) Database was either the "Euro Area" or "Europe and Central Asia." The category for "Euro Area" was not ideal because widespread use of the Euro was not officially required until 1999 (when only 11 of the then 15 members of the European Union changed their currency). Likewise, "Europe and Central Asia" was not appropriate because it included economic data for countries (e.g. Russia) that were not technically WTO members.

Faced with a decision between the two, I considered the option of finding data from an alternative, non-WDI database. By doing this, however, I would be opening up my study to further corruption, as the method of calculating data from a competing source may be different from the method used by the WDI Database. Plus, with new members joining between the 1995-2005 time period, what would be the appropriate "group" to use anyway: only European countries which had an interest in the outcome? The countries in the Euro zone? The countries that were listed officially as third parties? Would it be better to average these economies or just take the official numbers of the European Union for that given year?

The point is that for better or for worse, I decided to use economic data for the "Euro Area" from the WDI Database when analyzing disputes involving the "European Communities." Does this mean the entire study is garbage? No. It means this study is an interpretation – a way of looking at the data – that functions as a guide for future scholarship. My deepest hope is that future scholars will rerun the data using a whole host of alternative statistics, methods and interpretations. Either way, my goal in *Chapter Two* is to put the reader on notice, so that he or she will raise an eyebrow when certain results come up.

From here we get to *Chapter Three*, which I call "Freakonomics and the WTO."[2] Though technically this information is not essential to the thesis of the paper, I included it because it was useful. It is a collection of facts I discovered in the process of gathering data for the rest of the project, some of which may also spur deeper exploration. For example, there is data on the overall use of the WTO Dispute Settlement System, the amount of time it takes for a case to be resolved, the percentage of cases that are settled, the percentages of cases are appealed (and the average results of these appeals). I also looked at the compliance process and attempted to quantify how often compliance issues come up to what result.

From here we get to the heart of the paper. *Chapter Four* seeks to provide a final answer to Galanter's question: "Do the Haves Come Out Ahead?" in the first

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[2] I am indebted to Stephen Dubner and Steven Levitt for inventing yet failing to trademark the term "Freakonomics" from their book, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING (Morrow, 2005). As both a lawyer and a big fan, however, I found it almost impossible not to give credit where credit is due.

decade of WTO Disputes. The answer, by the way, is no, but just to be sure, I reran the numbers in as many different ways as I could muster, attempting to remove any distortions in the process. One obvious distortion was apparent immediately: the U.S. was involved in practically every WTO dispute! Realizing this fact was skewing the data, I spend *Part 2* of *Chapter Four* attempting (though arguably failing) to remove distortions caused by the U.S.'s high participation level. In doing this I found that the haves still failed to come out ahead in WTO disputes.

I spend *Part 3* of *Chapter Four* determining whether the average winner was an underdog more often. By looking at the actual instances of underdogs winning, I conclude that the underdogs win more often, coming out ahead more than 56% of the time. Finally, in *Part 5* of *Chapter Four*, I took a different tack, focusing instead on experience levels. Once again I found that the less experienced parties – the "underdogs" – came out ahead as well.

Having explored the economic data between winners and losers exhaustively, I conclude the paper with a look at the "missing" participants in the WTO Dispute Settlement process. This is because of the 153 WTO members, there were only 86 countries who actually participated in a WTO dispute between 1995-2005. In this chapter I explore the possible reasons for their stark absence and discuss whether they are really doomed to the hypothesis set forth in Galanter's model.

In the end, I hope my reader will enjoy learning about the World Trade Organization, but most importantly, that he or she will walk away with a clear

understanding of how the Dispute Settlement System worked in its first decade. I also hope the inherent "grayness" of international trade law, politics, and even statistics will be clearly visible, so future research will take these distinctions into account.

CHAPTER ONE: WHAT DOES THE WORLD TRADE ORGANIZATION DO ANYWAY?

IT'S THE INTERNATIONAL BODY CHARGED WITH ORGANIZING WORLD TRADE.

Perhaps you associate the WTO with scenes of tear gas and riot police in the normally peaceful city of Seattle, Washington in 1999. If you are younger, perhaps you associate it with the "bad guys" in Stuart Townsend's movie, *The Battle in Seattle*, starting Charlize Theron, Woody Harrelson and Ray Liotta. Either way, the WTO is one of the most misunderstood entities in modern history. It has been thoroughly demonized, vilified and tossed into a bucket of rotten Western agencies along with the International Monetary Fund (IMF) and the World Bank. Together they are referred to as the "Bretton Woods Institutions," and their policies often coined as "The Washington Consensus," suggesting that the United States and other powerful countries are secretly in control of the world economy.

These perceptions are not completely unwarranted (which will be discussed later); however, in order to understand the argument underlying this dissertation, it is necessary to see the WTO for what it is intended to be and not as it has been manipulated to represent in the last ten years. To start at the most basic level, the WTO is an international institution charged with overseeing the world trading system. It functions as a central organization that hosts meeting places for negotiations, stores all of the international trade agreements, and most notably, functions as a place where agreements can be enforced.

Though the concept of an international trading authority had been in the works for decades, the WTO itself is a relatively new entity in the arena of international trade. After the stock market crash of 1929, the United States passed the Smoot-Hawley Tariff Act, which was a protectionist measure to raise tariffs (international taxes) on certain products that were imported into the United States. While the idea behind this measure was to "protect" the American economy from competing foreign goods, the problem was that the rest of the world retaliated by raising their tariffs for goods from the United States.

The resulting tension was partly responsible for the Great Depression and, after World War II, painfully highlighted the need for international cooperation on matters of trade. Representatives of all 44 of the nations comprising the newly formed United Nations gathered in Bretton Woods, New Hampshire, to discuss ways to prevent future international economic and political meltdowns. It was here that the IMF and World Bank were created, two entities that were intended to coordinate

the reconstruction of Europe and the development of a supranational monetary policy.

Though there were initially hopes of developing an International Trade Organization at the Conference, the talks instead culminated in the General Agreement on Tariffs and Trade (GATT), which went into force January 1, 1948. The goal of the GATT was to promote trade *liberalization*. Liberalization (also called *liberalism*) is a very specific term, and often confused with the American political designation of "liberal." However, for purposes of this dissertation, when I use the word "liberalization" I am referring to a specific economic theory of free markets.

To provide some context, there were traditionally three theories of economics that guided the international politics of trade and financial commerce: *mercantilism*, *liberalism* and *Marxism*. Mercantilism was the belief that a national government should function like a salesperson, trading only if it added to the government's overall balance sheet. Most prevalent during the 17th and 18th centuries, this theory was later challenged by liberal economists such as Adam Smith and David Ricardo, who are often considered to be the founders of modern capitalism. These liberals argued that markets should be allowed to fluctuate freely, without the intervention of any government. The third traditional economic model, Marxism, came from Karl Marx, who concluded that labor, and not goods, was the source of all value.

Of these theories, Ricardo's law of comparative advantage is perhaps the most useful in explaining why the WTO strives to liberalize world trade. Using the

example of Portugal and England in a two-commodity world, Ricardo described the benefits of trade in terms of comparative advantage. While it may be easier for Portugal to manufacture both commodities than England (i.e. it has an absolute advantage), it still makes sense for Portugal to spend its time producing what it is best at producing and allow England to produce what it is moderately good at producing and then engage in trade. Ricardo found that, while one country will certainly benefit more from trade than the other, they both ultimately gain from the opportunity costs associated with shifting their energies to the commodity they produce well.

Put simply, if countries traded freely, there would be gains on both sides and also for the whole world. At the same time, following such a model requires mutual coordination because if only one of the countries opened its economy the other could take unfair advantage of it. The GATT system, therefore, was an attempt by world leaders to invest in Ricardo's theory by opening their economies together in hopes that overall wealth would increase. This meant that tariffs on foreign products as well as unfair governmental propping of weak industries needed to be phased out, and the GATT members worked tirelessly to make this goal a reality.

One of the major problems, however, was that the enforcement system under the GATT was weak. While countries could hail each other into a judicial body on claims of unfair tariffs or other GATT violations, the GATT Panel reports had to be adopted unanimously. This essentially meant that any one member could veto the results, which caused the GATT system to lack any real teeth to enforce the rules.

Finally in the early 1990's during what is known as the Uruguay Round of negotiations, world leaders met in the picturesque beach town of Punta Del Este, Uruguay, where they put the final touches on the long-anticipated Marrakesh Agreement Establishing the World Trade Organization. In order to join the WTO, countries had to agree to hard-fought rules and regulations on issues such as tariffs, agriculture, safety standards, textiles, the service industry, intellectual property, anti-dumping, subsidies and many more. As of May 2009, there are 153 permanent members of the WTO, 31 Observer Governments and hundreds of intergovernmental organizations given Observer Status during negotiations.

While the Marrakesh Agreement along with the other founding documents reaffirmed the members' commitment to liberalizing the economy, the true "jewel

Case-In-Point #2: Weak Enforcement Under the GATT

DATE: The Panel Report was issued in 1991 but never adopted.

COMPLAINANT: Mexico (GDP $430 billion)

RESPONDENT: United States (GDP $7 trillion)

THIRD PARTIES: There was a follow up complaint by the European Union in 1992.

SITUATION: In response to the public's concern with dolphins being captured in tuna fishing nets, the U.S. adopted strict tuna fishing standards for its own industry and insisted that any imported tuna must meet the same standards.

Mexico complained that this was an unfair barrier to free trade and, and, in what was considered to be a blow to environmentalists, the GATT Panel agreed.

However, under the then-existing GATT rules, a Panel report was only adopted with unanimous consent of all GATT members.

Afraid that a "win" under GATT might result in a "loss" of the hopeful future passage of the North American Free Trade Agreement (NAFTA), Mexico did not push for unanimous consent and the Panel report never entered into force.

in the crown" of the WTO was, by far, the Dispute Settlement system (Ostry, 1998, 21). When the 123 charter countries signed the Dispute Settlement Understanding ("DSU"), for the first time in history, a supranational governing body had the authority to adjudicate trade disputes between the countries independently. This meant that once a nation agreed to become a WTO member, it had the ability to "sue" or "be sued" within the WTO for unlawful trade practices and would not have the ability to veto the outcome of the dispute.

Thus, in its simplest form, the WTO Dispute Settlement System is a court of law for trade disputes between countries. While there are certainly other enforcement features associated with the WTO – most notably the fact that the WTO is in charge of doing periodic "Trade Policy Reviews" of different countries – for the most part, the Dispute Settlement system is the feature that gives the WTO "power" to enforce the rules that promote trade liberalization.

THE MECHANICS OF A WTO DISPUTE

In addition to understanding what the WTO really is, it is important to understand how the Dispute Settlement System works. First of all, there are rules. These rules are negotiated and agreed upon by all members in what are referred to as "Rounds." So far there have been eight completed rounds (see chart, below), including the Uruguay Round, which resulted in the creation of the WTO.

FIGURE 1: GATT TRADE ROUNDS (Understanding the WTO, 2008)

Year	Place/name	Subjects covered	Countries
1947	**Geneva**	Tariffs	23
1949	**Annecy**	Tariffs	13
1951	**Torquay**	Tariffs	38
1956	**Geneva**	Tariffs	26
1960-1961	Geneva **Dillon Round**	Tariffs	26
1964-1967	Geneva **Kennedy Round**	Tariffs and anti-dumping measures	62
1973-1979	Geneva **Tokyo Round**	Tariffs, non-tariff measures, "framework" agreements	102
1986-1994	Geneva **Uruguay Round**	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc	123

For all intents and purposes, the existing "laws" that the WTO is enforcing are laws that every member has agreed to in advance. Since the WTO functions entirely by consensus, all 153 members must agree with a particular rule before it becomes enforceable (Understanding the WTO, 2008). Thus, if a country does not agree with the laws of the WTO then it is under no obligation to become a WTO member. If a country is already an existing WTO member, it has the power to block the addition of any proposed rule. So far the WTO has had five major meetings, one of which was cancelled due to protests (Seattle), and all of which have failed to make any new breakthroughs in international trade law. This is mostly because of the standard of "explicit consensus": not a single law can be passed until all 153 members agree to it (Doha Declaration, 2001).

FIGURE 2: WTO MINISTERIAL MEETINGS

Conference	Year	Location
1st Ministerial Conference	1996	Singapore
2nd Ministerial Conference	1998	Geneva
3rd Ministerial Conference	1999	Seattle
4th Ministerial Conference	2001	Doha
5th Ministerial Conference	2003	Cancun
6th Ministerial Conference	2005	Hong Kong

Because consensus is so difficult to reach, the WTO functions legally under the guise of "broken promises:" if the members spent all this time trying to agree to these rules, then they should be held to their promises to each other (Understanding the WTO, 2008, 55).

The system is also self-policing: if one member is harmed by another member who is breaking the rules, that member has a right to invoke the provisions

of the Dispute Settlement Understanding ("DSU"). This process begins when a country officially requests consultations with the Dispute Settlement Body ("DSB"), alleging in writing which WTO Articles the offending party is violating. Every case thus starts with a "complainant" and a "respondent." The complainant is the WTO member "complaining" about an alleged violation; the respondent is the WTO member who is "responding" in defense. Together, they are "parties" in the dispute, and after the initial request for consultations, the parties enter into what is called consultations, which is essentially a 60-day period of mediation (DSU Article 4.3). If nothing happens after 60 days, then the case is considered resolved. However, if the consultation fails to settle the dispute, the process for creating a Panel begins.

A Panel consists of three to five independent "experts" who review the evidence and evaluate the legal arguments (DSU Article 8, 9-10). The requirements for these so-called experts is the following: they must be (1) "well-qualified governmental and/or non-governmental individuals;" (2) they must be from all different countries, and (3) they must not be a national of any of the parties in the dispute, including third parties (DSU Article 8.2). By setting these restrictions on the process for panelist selection, the membership of the WTO has attempted to ensure unbiased enforcement of their promises.

The first order of business in a dispute, therefore, is to negotiate which Panelists will hear the case. This process can be highly political as sometimes a member will suggest a Panelist from a country who may be neutral in theory, but biased in the sense that the country from which the Panelist comes has interests

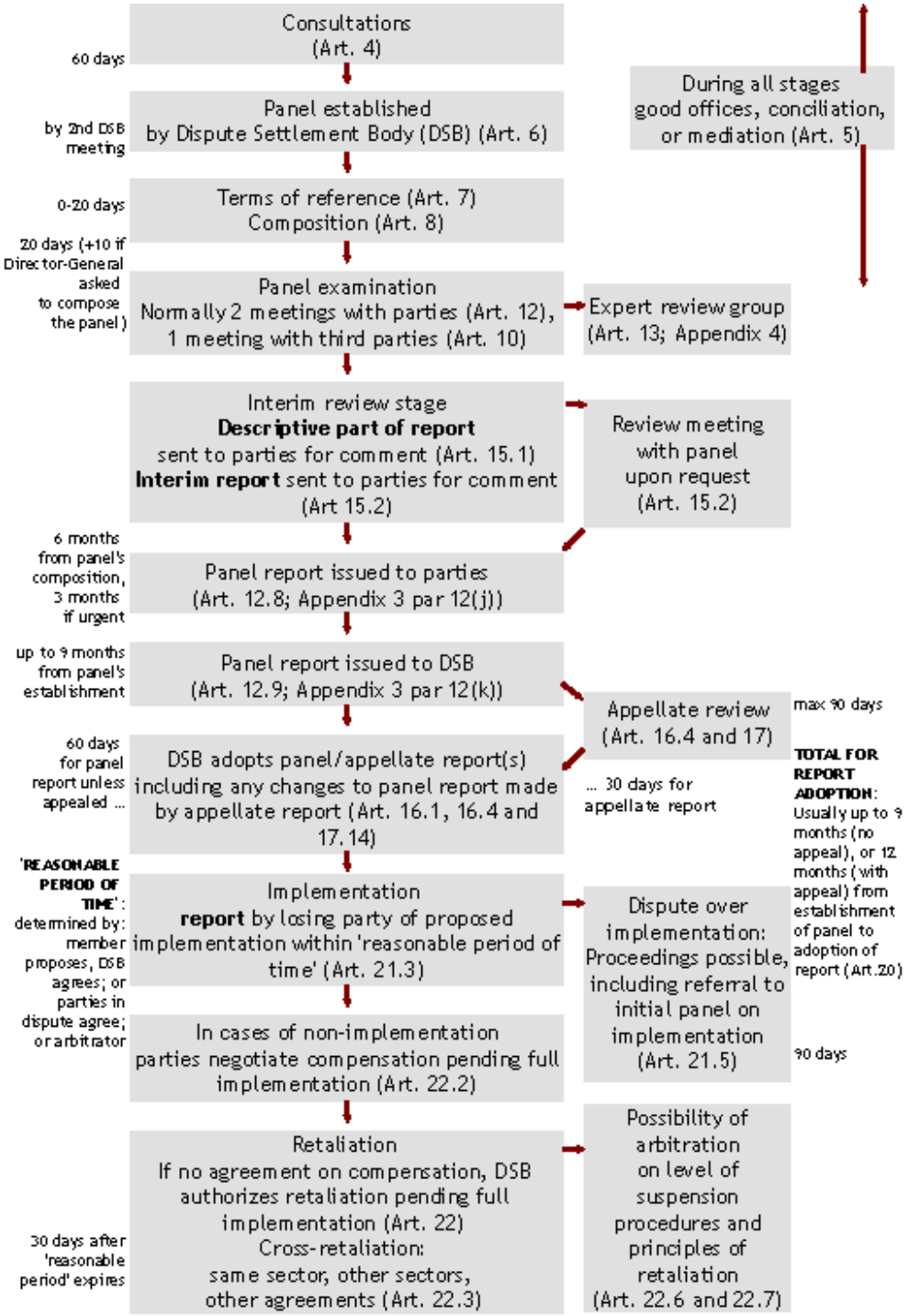
aligned with one disputing party over the other. Foreseeing the possibility of irreconcilable disagreement in this area, the members added a provision in the DSU clarifying that if the parties cannot agree on the Panelists, the Secretary-General of the WTO will appoint one for them (DSU Article 8.7).

Once the Panel has been established, it will hear written and oral arguments, rebuttals from both sides, and will ultimately issue a ruling. The ruling, however, is not final until it is passed through the DSB for approval (DSU Article 11). The DSB can reject the Panel's finding only if there is complete consensus, which is nearly impossible as the DSB consists of all 153 WTO members (DSU Article 17.14). This is in marked contrast to the GATT, where legal rulings had to be *adopted* by consensus. Now instead of any member having the power to block a ruling, the entire membership must disagree with a panel decision for it to be rejected.

While this essentially makes the Panelists' decision a definitive ruling, it is still not the final recourse for disputing members. At that point, either disputing party (but not third parties) may appeal the case to the Appellate Body (DSU Article 174). The Appellate Body consists of seven permanent members that are selected by the DSB, though only three reside during an appeals case (DSU Article 17.1). Since these experts are selected by the 153-member DSB, their nationality, training and experiences are varied (DSU Article 17.1, 17.3). Furthermore, their terms are limited to four years and they must be "individuals with recognized standing in the field of law and international trade, not affiliated with any government" (DSU Article

17.3). This is yet another check on the Dispute Settlement process that ensures unbiased results in trade disputes.

FIGURE 3: FLOW CHART OF THE DISPUTE SETTLMENT PROCESS (Understanding the WTO, 2008)



As carefully as this process has been constructed, there are further checks on the system once the Appellate Body has issued its report. The report is again sent to the DSB for final approval where the DSB may vote to adopt the Panel Report *as is*, or *as modified by the Appellate Body* (DSU Article 17.4). Again, the decision of the Appellate Body can be overturned with complete consensus of the DSB, but since that is such a difficult standard to meet, most often the Panel Reports are adopted *as modified by the Appellate Body*.

The final step in the Dispute Settlement process is implementation where, presumably, the "losing" party will comply with the WTO ruling (DSU Article 21.1). If the complainant "wins" the dispute, the respondent's trade policies are determined to be illegal by the WTO and the respondent must change the offending law or practice. In contrast, if the complainant fails to prove its case of being injured by the respondent's illegal trade policies, then the complainant has "lost" the dispute.

Here is where a nuanced understanding of international diplomacy is crucial. The success of the WTO process is entirely dependent on the willingness of its members to abide by the result of these rulings. Thus, if the consequences for noncompliance are too soft, countries may be tempted to "cheat" on their promises; if they are too stiff, countries could ignore the results of the disputes altogether. Knowing this, the DSU negotiators added a provision whereby the disputing parties must *agree* on an appropriate form and level of compensation in the event that the

losing party doesn't comply (DSU ar. 22.1). If they cannot agree, an independent arbitrator may be appointed to decide a reasonable level (DSU Article 22.6).

This means that the winner must take the additional step of initiating a compliance dispute to show that the loser failed to implement the ruling. Compliance disputes, which will be discussed more thoroughly later, are where the crux of the effectiveness problem lies with the current WTO system. However, for now it is sufficient to say that if the losing party does not change its offending behavior, the winning party can earn the legal right to impose penalties, which are often referred to as *countermeasures*, *concessions,* or *countervailing duties* (DSU Article 21-22). Penalties come in two basic forms: retaliation or compensation. Retaliation is the right by the winner to raise tariffs on products coming in from the losing country;

Case-In-Point #3: Compliance Disputes

DISPUTE NUMBER: DS162

COMPLAINT DATE: February 10, 1999

RESOLUTION DATE: TBD

COMPLAINANT: Japan (GDP $4 trillion)

RESPONDENT: United States (GDP $9 trillion)

THIRD PARTIES: European Communities; India

SITUATION: Japan complained and won a dispute against the United States for one of its laws regarding imports.

The U.S. stated its intention to comply with the Panel ruling but couldn't manage to pass a revision to the law through Congress within a reasonable time.

When the U.S. failed to revise its law after three years, Japan had no choice but to request concessions.

The U.S. disagreed with the amount of concessions Japan proposed, so the two countries entered arbitration.

The arbitrator decided that the U.S. would have to repay any foreign company that was damaged by its law until an appropriate revision was passed through Congress.

compensation is when the loser agrees to lower tariffs on alternative products that are not at issue in the dispute.

It is estimated that the average price tag for a dispute making it all the way through the appeals process is approximately $500,000 (Mosoti, 2006). Additionally, the average dispute – appealed or not – lasts over two and a half years. For this reason, both parties are encouraged to settle their differences at any point in the process. As it turns out, this was a fairly common way of handling trade disagreements, since 57% of the disputes that occurred between 1995 and 2005 resulted in some form of settlement. Regardless, the possible outcomes to actual WTO disputes vary to a great extent, and, as the reader will soon see, can create problems when it comes to categorizing the data.

WTO ≠ EVIL

Now that the purpose and process of the World Trade Organization is clear, it is important to evaluate the nature of the WTO criticism out there. While the complaints take various forms, there is one overarching perception that has been highly prevalent from the beginning: specifically, the notion that developing countries come out "behind" in their relationship with the World Trade Organization. Websites dedicated to uncovering the WTO as a tool of oppression against the poor have not only appeared, but proliferated.

For example, Global Exchange, one of the major organizers of the protest against the 1999 WTO talks in Seattle, produced a pamphlet called the, "Top Ten

Reasons to Oppose the World Trade Organization." Its listed reasons for protesting WTO activities included:

1. The WTO Is Fundamentally Undemocratic
2. The WTO Will Not Make Us Safer
3. The WTO Tramples Labor and Human Rights
4. The WTO Encourages Privatization of Essential Services
5. The WTO Is Destroying the Environment
6. The WTO is Killing People
7. The WTO is Increasing Inequality
8. The WTO is Increasing Hunger
9. The WTO Hurts Poor, Small Countries in Favor of Rich Powerful Nations
10. The WTO Undermines Local Level Decision-Making and National Sovereignty

While it is hard to believe that such a simple system of consensus and enforcement is actually responsible for such dramatic accusations, the perception is very real.

In fact, the belief that developing countries are "losing" in their relationship with the WTO have so permeated common culture that many world leaders have included it in their political rhetoric. Prime Minister Laisenia Qarase of Fiji, for instance, once announced: "[The] WTO is trying to impose equality of trade in an unequal world, but for developing countries like Fiji there is no level playing field, just a slippery slope" (Press Release, Fiji Government, 2005). Even developed countries are not exempt from this belief: "Do what you think is necessary with the Bretton Woods institutions," insisted Paul Martin, former Prime Minister of Canada, "but for heaven's sake, stop keeping half the world out of them!" (Dickenson, Interview, 2008).

Indeed, developing countries are almost entirely absent from the Dispute Settlement process. Some scholars argue that this is because they do not stand to gain anything from a fair trading system (Holmes, Rollo, & Young, 2003). In Africa, for example, trade amounts to only 2% of its GDP, so even if a country "wins" a WTO dispute it does not affect it to a degree that justifies the trouble. Other scholars argue that lack of legal expertise is to blame: until there is better access to technical assistance and legal training, developing countries are not capable of participating to the extent that they should and are, in fact, underutilizing the process (Larson, 2003). Others, however, point to the difference between the "idyllic picture of the DSU" and the practice, where "powerful WTO members each have a unilateral veto over the selection of Appellate Body members," suggesting that there is a biased outcome in favor of these "powerful" WTO members (Ragosta, Joneja & Zeldovich, 2003).

How did such a seemingly good-willed example of international cooperation ultimately became characterized as a foe to developing countries? As the reader may recall, the rules that world leaders agreed to within the WTO support liberal trade policies. This means that the goal is for products to flow freely between countries without any intervention by the government. Of course the WTO rules allows the government to intervene in certain situations, such as blocking the import of tainted meat or passing laws to protect the safety and health of its inhabitants. However, other than in those specific instances of protection, member governments no longer have the power to shield their businesses from international competition.

This gives rise to very loud and often emotional discontents by the citizens living inside these borders because their businesses and jobs can no longer be protected from outsiders. Workers in developed countries, for example, complain about their jobs being "shipped to India" while small businesses in developing countries complain that they can't compete with well-established Western companies. These small but highly organized special interests lobby the national governments to reverse policies on free and open trade so their industries will be protected from worldwide competition.

Third World Network is a consortium of individuals and non-profits who research issues related to developing countries and the international community. One of its scholars, Chakravarthi Raghavan, explains the dual nature of free trade:

> On one side are the proponents of "free markets" and "free trade", who invoke models based on Ricardian comparative-advantage theories that conjure up a vision of everyone benefiting from liberalization and free trade, with win-win situations within and among nations. The proponents of this view have over the last few decades been busy putting add-ons to the theory to explain away the contradictions, with the result that the patchwork quilt that has emerged is more full of holes and stitches than cloth.
>
> The other view that is spreading is that there is no level playing field in international trade; that free trade is producing, within and among countries, winners and losers; that such trade is impoverishing and marginalizing the developing world, and increasing inequalities and inequities everywhere and straining and tearing apart the fabric of societies; and that there is rising corporate power that is corrupting and influencing, non-transparently, governments and international institutions to further corporate monopolies and oligopolies at public and consumer expense (2002).

This dichotomy gives rise to very healthy debate between both sides. Scholarship – sometimes even from the same source – shows how trade liberalization can both

increase and decrease developing country growth (*compare, e.g.* World Bank, 1989 and World Bank, 1994).

Since no one – neither citizens of developing countries nor citizens of developed countries – seemed to be happy with the changes to the GATT, a rising outcry against "sweatshops," "environmental degradation," and the overall "race to the bottom," became part of the common parlance surrounding the WTO debate. Student activists and social justice-minded groups alike felt they needed to lead the charge in protecting the suffering workers in developing countries. Ironically, however, when the United States attempted to include labor standards in the WTO agreements, the biggest objection came from developing countries who did not want to lose their competitive advantage in cheap labor!

Case-In-Point #4: The Double-Sided Nature of So-Called "Sweatshops"

SITUATION: Robert* was an American businessman working his way up the corporate ladder of success.

On his first trip to Shanghai, his job was to take a look at the company's factory and identify areas that could be improved for business efficiency.

Upon arriving to the campus, Robert found 75 workers bent over the lawn, cutting each individual blade of grass with a table knife.

When he suggested to the Chinese executives that they purchase a lawn-mowing system, all objected: "We will have to fire these people if you do that. Please let them keep their jobs."

Realizing these people were paid only $1.50 a day plus a rice allowance, Robert had to make a decision: allow them to continue their work or save the company a few thousand bucks.

What should Robert do? If he allows them to cut the grass by hand, is he running a "sweatshop"? If he gets a lawnmower and reduces the grounds staff so they can be paid better, is he really "helping" the workers?

** Based on a true story, though "Robert," now a high-level executive at a multinational corporation, has requested to remain anonymous.*

Fearing developing countries were going to get the short end of the stick, the DSU negotiators took pains to ensure

there would be "special and differential" treatment for developing countries when it came to joining the WTO (Larson, 2003). This included, most notably, a five year grace period for developing countries to bring their laws in conformity with the agreed upon WTO rules.

Furthermore, permanent provisions for developing countries were included in the final DSU agreement. For example, Article 4.10 of the DSU explicitly states that "[d]uring consultations Members should give special attention to the particular problems and interests of developing country Members." Likewise, Article 8.10 allows developing countries involved in a dispute the option to choose panelists from a fellow developing country. Finally, Article 12:10 allows time extensions for disputes when developing countries are involved. Unlike the "special and differential" provisions, there is no grace-period for these, which will remain in the DSU until all 153 DSB members agree to change it.

Though special provisions were being made for developing countries, some academics felt it was the developed countries that needed to be put in check. "The ink was hardly dry on the W.T.O. agreement setting up the D.S.B. before scholars began debating whether its output would be 'binding' in a legal sense," explains one international law textbook (Damrosch et al., 2001). This is because – while compliance with WTO rulings was supposedly "compulsory" – no one would be surprised if the powerful countries still managed to weasel their way out of implementing the rulings some way or another.

Thankfully for the WTO, its poster child for success came early. In its second dispute ever, the DSB Panel found that the United States had unfairly discriminated against foreign competition because it required higher standards for imported gasoline than it did for its own gasoline industry (DS2). The United States agreed to change its policy within 15 months, and by August of 1997, it reported that the laws had been changed. While this was a true underdog success story (Venezuela and Brazil made the initial claim), academics reserved judgment lest it turned out to be an anomaly.

Scholarship alleging foul play in the WTO persisted. As one critic put it: "The WTO has, since its inception, functioned through murky backroom deals and arm-twisting by developed countries. This has often made a mockery of the supposed democratic decision making process in the WTO, where technically each country has one vote" (Gupta, 2006). As sinister as this description sounds, this process was and is still not a secret. Academics and even the WTO itself regularly refer to the big players in the WTO as the "Quadrilateral Group" or the "Quad," consisting of the U.S., the E.U., Canada and Japan. This is necessary, argues the WTO, as "some of the most difficult negotiations have needed an initial breakthrough" in these smaller circles (WTO Website).

Oftentimes, however, perception is more powerful than reality. When an overwhelming surge of anti-WTO protests completely shut down talks in Seattle, the WTO accepted it had a major public relations crisis on its hand. It began publishing the "10 Common Misunderstandings about the WTO," a document intended to clear

up, once and for all, the general misunderstandings about the WTO and its role in liberalization:

FIGURE 4: TYPICAL COMPLAINT AND WTO RESPONSE (10 Common Misunderstandings, 2008)

Typical Complaint	WTO Response:
1. The WTO dictates policy.	1. The WTO does not tell governments how to conduct their trade policies. Rather, it's a "member-driven" organization.
2. The WTO is for free trade at any cost.	2. The WTO is not for free trade at any cost. It's really a question of what countries are willing to bargain with each other, of give and take, request and offer.
3. Commercial interests take priority over development …	3. The WTO is NOT only concerned about commercial interests. This does NOT take priority over development. The WTO agreements are full of provisions taking the interests of development into account.
4. … and over the environment	4. In the WTO, commercial interests do NOT take priority over environmental protection. Many provisions take environmental concerns specifically into account.
5. … and over health and safety.	5. The WTO does NOT dictate to governments on issues such as food safety, and human health and safety. Again commercial interests do NOT override. The agreements were negotiated by WTO member governments, and therefore the agreements reflect their concerns.
6. The WTO destroys jobs, worsens poverty.	6. The WTO does NOT destroy jobs or widen the gap between rich and poor. The accusation is inaccurate and simplistic. Trade can be a powerful force for creating jobs and reducing poverty. Often it does just that. Sometimes adjustments are necessary to deal with job losses, and here the picture is complicated. In any case, the alternative of protectionism is not the solution. Take a closer look at the details.
7. Small countries are powerless in the WTO.	7. Small countries are NOT powerless in the WTO. Small countries would be weaker without the WTO. The WTO increases their bargaining power.
8. The WTO is the tool of powerful lobbies.	8. The WTO is NOT the tool of powerful lobbies. The WTO system offers governments a means to reduce the influence of narrow vested interests.
9. Weaker countries are forced to join the WTO.	9. Weaker countries do have a choice, they are NOT forced to join the WTO. Most countries do feel that it's better to be in the WTO system than to be outside it. That's why the list of countries negotiating membership includes both large and small trading nations.

10. The WTO is undemocratic.	10. The WTO is NOT undemocratic. Decisions in the WTO are generally by consensus. In principle, that's even more democratic than majority rule because no decision is taken until everyone agrees.

While this type of public relations work has alleviated some of the mistrust of the WTO as an agent of liberalization, the debate is far from over.

In 1999, the five year grace period for developing countries to conform to the WTO rules was up. An internal WTO committee report critiqued the inadequacy of the technical assistance program, fearing that the WTO would not be able to meet the growing demand for support, nor would it be able to finance the program (Larson, 2003). It wasn't until the 4th Ministerial Conference in Doha that donor countries finally committed to funding a more comprehensive technical assistance program (Commission on Trade and Development, 2001). Since then the WTO has developed an "Integrated Framework" where it participates alongside other international agencies such as the IMF, the ITC, UNCTAD, the UNDP, and the World Bank to provide training for least developed countries. Of course, only time will tell if these programs are successful in increasing participation by developing countries in the dispute settlement process.

FROM NAYSAYERS TO NUMBER CRUNCHERS: THE CHANGING SHAPE OF WTO CRITICISM

Now that the first decade of the WTO's existence has passed and some of the economic data and statistical dust has settled, scholars have turned to the numbers to ascertain whether the Dispute Settlement system has been successful. The first comprehensive report that came out was a study by the World Bank, where the authors found a strong correlation between a country's trade share and its likelihood to participate in the Dispute Settlement system (Holmes, Rollo, & Young, 2003). The authors used lack of trade volume to explain why developing countries were not participating heavily in the disputes. Since the non-participants had such a low volume of trade in comparison to the participants, trade volume, rather than a country's lack of wealth, appeared to be the "key" to participation. For this reason,

concluded the authors, there did not appear to be a bias against developing countries *per se.* However, with less than a decade under the WTO's belt, it was too early to make any predictive conclusions.

The next numerical contribution to the WTO Dispute outcome discussion was husband and wife team, Kara Leitner and Simon Lester, co-founders of WorldTradeLaw.net. Since 2005, they have published a yearly scorecard of the WTO disputes. While they do provide critical analysis of the individual disputes as the Panel reports are issued, the authors aim to provide data that is as "objective as possible." Thus, the quantitative information they provide is very basic, such as the number of complaints, the income classifications of the members involved, the percent of cases appealed, etc.

The third existing article on the subject was by two economists who attempted to uncover how litigation costs are keeping developing countries from participating in the disputes (Chad & Hoekman, 2005). Without denying the possibility of alternative causes for market participation, the authors concluded that "a country will file a complaint if the legal fees are lower than the discounted gain in profits the complainant would receive from increased market access due to the removal of the WTO-inconsistent measure." In other words, countries would participate when the benefits of winning outweighed the cost of the dispute. If the cost of litigating was too high, developing countries would be less likely to participate.

Finally there was another empirical look at settling versus litigating in the WTO dispute settlement system (Guzman & Simmons, 2002). The authors concluded that settling within the WTO was more likely to occur when the subject matter of the dispute was "continuous," where cash or something more fluid could solve the problem (e.g. level of tariffs); whereas litigating was more likely to occur in an "all-or-nothing" dispute, where there was little room for compromise (e.g. whether a complete ban of genetically modified food is permissible under WTO law).

It was at this point in time where I first started looking for the answer to my question, whether the "haves came out ahead" in WTO disputes. While the World Bank study was close to my interest level and Leitner and Lester had collected data in a manner that was similar to what I wanted, neither answered my questions. Furthermore, while both economists' theorems were a useful way of looking at missing litigants and settling parties, they both failed to measure the actual outcomes of disputes. Thus, I was officially navigating uncharted waters, and had to invent a database of my own.

In creating this database, I kept the words of renowned economist Jagdish Bhagwati in mind:

> In what sense . . . could one argue that the WTO pushes for excessively speedy trade liberalization? As it happens, the WTO itself does not. The appropriate question is: do the negotiating rich countries manage to impose on the negotiating poor countries haste in the trade liberalization that is negotiated?

In other words, the WTO is merely the referee, and not the maestro, of international trade agreements. Thus, if I was going to investigate whether the "haves were coming out ahead," I was really asking whether the WTO panelists were being even-handed in meting out their decisions. Again, assuming a higher GDP translated into a bigger budget for a country's WTO litigation teams, I would discover whether the wealth and experience of these litigation teams actually swayed the panelists' decisions.

Put simply, I was measuring the "success" of the WTO like it was a business, its "clients" being the international community. Had it provided the promised "service" of an unbiased dispute settlement system that the members had so painstakingly negotiated for? My theory was that if the GDP statistics for the average winner and the average loser were close, the WTO had been successful in providing an unbiased service. However, if the GDP statistics for the winner were higher than the loser, then the "haves" were coming out ahead. Similarly, if the GDP statistics for the winner were lower than the loser, then the "underdogs" were coming out ahead.

After spending four years reading and categorizing each of the 335 cases from the years 1995-2005, as well as collecting economic data for each complainant and respondent for the given dispute year, I concluded – for better or for worse – that if there was a bias in the first decade of the Dispute Settlement system, it tended to be in favor of the underdogs. My methodology was simple: I added up the GDP of all the winners in one column and compared them to the GDP of all the losers in the

other column. The average winner had a lower GDP both in the actual quantity of money, but also in number of disputes. This was true for GDP, GDP per capita, and GDP per capita, PPP. I then developed a manner of quantifying a country's experience level, and found that the average winner had less experience than the loser as well.

In addition to contradicting my initial hypothesis, these results defied all scholarship regarding domestic litigation in general. Ever since Marc Galanter's piece, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," was published in 1974, almost every related study has concluded that he was indeed right. In a 1987 study, for example, a team of scholars looked at one hundred years' worth of U.S. Supreme Court cases (1870 to 1970, with a total of 5,904 cases) and concluded that well-established, financially stronger parties tended to prevail more often than their weaker counterparts (Wheeler et al., 1987). Similarly, a 1996 study looked at cases where the complainants were individuals bringing suit against a defendant corporation and found that their win rates were lower than the average win rates (Eisenberg & Farber, 1996).

Secondly, my results showed that panel decisions did not appear to be influenced by GDP or experience levels. This meant that the WTO was, in fact, providing the unbiased service the countries had negotiated for. This finding should be distinguished, however, from any implication that the rules themselves are unbiased. This is because the WTO rules are clearly biased toward trade liberalization, which may help or harm certain countries, depending on their

situation. Thus, the results of this study do not imply that the rules themselves are unbiased, nor that the negotiation or rulemaking procedures within the WTO is unbiased; they merely show that the WTO performed its duties in the first decade without appearing to favor parties with a higher GDP.

Finally, the results of this study dismantle any excuse for nonparticipation that is based on fear of pro-GDP adjudication. While there are several reasons that developing countries may not be participating in the WTO – from lack of trade volume to lack of financial support – if that their reasoning is based on an alleged GDP bias, such a reason would be unfounded. Thus, this study advances the theory that developing countries are actually underutilizing the Dispute Settlement system, and should not consider their low GDPs to be a hindrance to their ability to successful win WTO disputes.

It wasn't until 2008 – when the official economic statistics for 2005 were finally released – I realized I wasn't alone. The World Bank published an observational study on the WTO Dispute Settlement system where the authors concluded with three main points: (1) least developed countries are almost completely absent in the Dispute Settlement process; however, (2) developing countries are "much more active, and much more successful than the authors would have expected;" and (3) the United States and European Union "dominate less than expected, being much more often the subject of complaints, than a complaining party, and they have a very low share of all panellists" (Horn &. Mavroidis, 2008). A few months later, another study appeared where the authors concluded that despite

the obvious disadvantages posed by their position within the world economy, developing countries "manage to survive [WTO Disputes] quite successfully" (Abedin & Tareq, 2008). These authors also saw that (1) developing countries were markedly absent in the disputes; however they found that (2) developed countries were more often the target of disputes and that (3) the rate for winning disputes were higher for developing countries when they did participate.

Unlike my study, the results of both of these inquiries focused on win percentages, and, in the case of the World Bank study, panel selection, as the determining factor of measuring bias within the WTO. I, on the other hand, looked to wealth statistics and the experience levels of the given complainant and respondent to determine if there was an adjudicatory bias toward the "haves." While this paper reports only on these factors (GDP and experience), I consider the bulk of my contribution to be the creation of a master database, which houses the statistics for each complainant and respondent for the given year of the dispute. Using this database, I was able to generate the reports located in the four appendices of this dissertation, all of which are merely samples of thousands of possible reports that could be run. I look forward to the future research that will hopefully stem from this new data set.

CHAPTER TWO: SETTING UP THE ANALYSIS

SPECIAL ANNOUNCEMENT TO STATISTICIANS, ECONOMISTS, LAWYERS AND OTHER ACADEMICS

And now, a few disclaimers: first of all, I have deliberately written this study with the cross-disciplined person in mind. I do not expect my reader to be a lawyer, a statistician, an economist, a political scientist or even complete with his or her undergraduate studies. For that reason I will be careful to define jargon like "regression," and "p-value" to a degree that may seem elementary to some learned scholars.

Second: I am not a statistician nor am I an economist; I am a lawyer. Despite my academic inadequacies, I was careful to consult with both economists and

statisticians alike to ensure that my methodology was sound. As I suspected, these friends (who I am very grateful for) confirmed that major regressions, p-values and the likes are applicable only in situations when one is using a sample to make an observation about the whole. Since I am in no way claiming that the data from this decade of disputes is predictive of future cases (and in fact argue to the contrary), such high-level analysis is not necessary. So I can say with 100% confidence, for example, that of the 153 WTO members, only 86 countries participated in the disputes between 1995-2005, which means only 56% of the members have participated in the dispute settlement process. Since I am not claiming that the participation rate will remain at 56% for the next ten years, I do not require regression models to cite that percentage. I am merely stating it as a fact: only 56% of the WTO members participated in the dispute settlement process for the first ten years. However, to please those statisticians and economists, I have indicated if any of the results of my analysis happened to be statistically significant and provided a corresponding p-value for all data.

In keeping my promise to non-statistically oriented readers, a p-value is a number between zero and one (in other words, a percentage) that statisticians historically have used to determine if there is a significant difference between two averages. For example, in a sample of 100 WTO disputes, there will be 100 complainants and 100 corresponding respondents – in other words, 100 winners and 100 losers. If I take the GDP of all the winners and find the average and I take

the GDP of all the losers and find the average, the p-value is the number which tells us if the likelihood that those averages are actually different from each other.

The method of deriving this number is highly complicated and arguably out of date;[3] however, if a given p-value is below 0.05, I am 95% confident that the data is statistically significant. If it is above 0.05, I am 95% confident that the data is statistically non-significant. That does not mean it isn't interesting; it just means it doesn't show a strong enough trend to claim that there is a certain pattern that will last in the future. And one last note to statisticians: I did not bother to calculate using an alternative alpha because it seemed futile with such a small data sample.

For the lawyers and other citation sticklers out there, I will simply be referring to cases by their informal "DS number." So while the official citation of a case may be: Panel Report, United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS of One Megabit or Above from Korea), WT/DS99 /R (January 29, 1999), I will simply refer to it as "DS99." For the reader's convenience, I have included in Appendix I an appropriate citation for all cases with their corresponding DS number.

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[3] Paul Trowbridge, my resident statistics expert says:

> There is a method of inference called Bootstrapping whereby you use a computer program to re-sample your data, which produces simulated alternative datasets that have the same structure and properties as the data you observed. You then test whether or not your observed data fits the profile of the simulated data, which will produce a p-value on the goodness-of-fit. Now this may sound like some serious voo-doo, but it is one of the counter-intuitive-but-works results from statistics, and as a matter of fact produces more accurate p-values.
>
> Now, you want to treat these data as complete population data, and consequently classical inference doesn't seem to apply, but yet you (and your advisors) still want some sense of magnitude of difference amongst the winners/losers etc. If you take a bootstrapping approach you can still maintain you've got population data and present p-values on the differences that exist. It's almost giving you the best of both worlds." Email dated March 6, 2009 (on file with author).

Table of Contents for Appendices

And since we are speaking of Appendices, this is a good time to mention that there are four of them associated with this paper. They comprise four years of work on my part, collecting and gathering data about every single WTO dispute in hundreds of possible categories. Due to their size (some are over 600 pages) it may be more practical for interested researchers to contact me for the original Excel files.

My third disclaimer is that I cannot attest to the accuracy of the underlying data used in this study. I gathered all statistics from the World Bank's World Development Indicators (WDI) Database. I ran the final report on February 2, 2009 and any changes that are made between now and then are not accounted for in my study. Occasionally, statistics in a given area were available for most but not all countries. In those situations, I removed that entire case from that particular analysis. Where it was practical to do so, I have alerted my reader of these deletions. Likewise, I have gathered all the data regarding the outcome of the

cases from the WTO's website. Though I have checked it regularly in the last three years, the most recent date that I have information for is February 7, 2009.

Another major statistical decision I had to make related to dates. For each given dispute, I needed to ascertain a given "wealth level" for each party. I chose to run the corresponding economic statistic based on the year the dispute was *filed*. This means that if a country's wealth did have something to do with its ability to win or lose a WTO dispute, the country's wealth was prominent at the *beginning* of the dispute. Put simply, this study does not take into account any changes in income which may have occurred throughout the dispute.

On that note, I must also explain how I dealt with third parties. Third parties are neither the complainant nor the respondent in a given dispute, but elect to participate anyway. When this occurs, the third party acquires the right to listen to the arguments before the panel, read the corresponding documents as well as present its own viewpoint during the panel hearing. The only right the third party does not acquire is the right to appeal a panel decision. Thus, there are multiple reasons a country would choose to join as a third party. For one, it may be injured by the respondent's allegedly illegal measure, but for some reason – perhaps the cost of litigation was too expensive or perhaps the injury was not great – the country opted not to pursue a separate dispute. In the alternate, a country may reserve its third party rights because it has a law similar to the one at issue and it would like to either prepare itself for the possibility for being hailed in a separate dispute or perhaps to argue for the respondent that the law is legal.

While the WTO has increased transparency and access to the results of its panel disputes, there is very little information available regarding the participation of third parties. Therefore, I made the statistical decision to ignore third parties in my analysis of the haves and the underdogs. However, in Chapter Six ("Freakonomics and the WTO") I do share some interesting data I collected about third parties in the process.

For similar reasons, I opted to remove all cases with multiple complainants from my analysis. If my goal was to identify the haves versus the underdogs I had two choices: (1) I could aggregate the statistics for all the complainants, quantifying their combined "power" into a conglomerate of "haves," or (2) I could find the "average" statistic of all the parties and use that number for comparison with the respondent. When I realized out of 335 cases there were only eight with multiple complainants, I opted instead to remove them from the study entirely. Perhaps future scholars will chose to include those cases in their research,

Case-In-Point #5: Third Parties

DISPUTE NUMBER: DS27

COMPLAINT DATE: February 5, 1996

COMPLAINANTS: Ecuador, Guatemala, Honduras, Mexico, United States

RESPONDENT: European Communities

THIRD PARTIES: Belize; Cameroon; Canada; Colombia; Costa Rica; Dominica; Dominican Republic; Ghana; Grenada; India; Jamaica; Japan; Nicaragua; Philippines; St. Lucia; St. Vincent; Senegal; Suriname; Venezuela; Côte d'Ivoire; Brazil; Madagascar; Panama

ISSUE: With 29 members involved, this case had the most parties of any WTO disputes so far.

STATISTICAL DECISION: While I could guess that all the third parties were participating in support of the complainants, I could not be certain, nor could I ascertain the amount of financial or legal support each party contributed.

I therefore made the decision to ignore third parties in my analysis of haves and underdogs.

but for now the following cases remain unassessed with the whole: DS16, DS27, DS29, DS35, DS58, DS158, DS217, and DS234. Thus, the results of my study only reflect disputes with singular complainants and respondents.

My final disclaimer is more of a warning. Quantifying data about legal cases is not a simple task. Defining the term "winner" versus "loser," for example, presents a statistical fork in the road where the designer of the study (me) must make a decision that will affect the entire outcome of the study. For example, if the threshold for "winning" is too low, it will inappropriately skew the results toward complainants; if the threshold for "winning" is too high, it will skew the results toward the respondents.

Case-In-Point #6 Cases with Multiple Complainants

DISPUTE NUMBER: DS58

COMPLAINT DATE: October 8, 1996

COMPLAINANTS: India, Malaysia, Pakistan, Thailand

RESPONDENT: United States

SITUATION: Four lower income countries complained about a U.S. law that banned the import of shrimp using fishing methods that endangered turtles.

To analyze this case in terms of haves and underdogs I had two choices:

1. Add up their combined GDPs to reflect the fact that many of them were investing in a dispute against the U.S.
2. Average the GDP of all four countries, which would make them essentially an underdog against the U.S.

STATISTICAL DECISION: Since neither method was ideal plus there were only eight out of 335 disputes with multiple complainants, I chose to remove them from the study altogether. This means that the results of my study only reflect disputes with singular complainants and respondents.

In the end, I defined "loser" as a party who was required to change a WTO-violating practice. Even if it was convenient for the violator to change its practice,

even if the party was only required to change one practice out of many allegedly harmful practices, I still considered this submission to the WTO to be a "loss."

As expected, this decision had a significant impact on the results of my study. For one thing, when a country requests consultations within the WTO, there are usually a number of violations being alleged all at once. Thus, the Panel and/or Appellate Body can grant a win on one claim but not the others. For example, in a case between the United States and Indonesia, the U.S. complained that Indonesia's special tax breaks for national cars was in violation of seven different obligations under four different WTO treaties (DS59). They were:

1. Article I:2 of GATT 1994
2. Article II:2 of GATT 1994
3. Article 2 of the Trade-Related Investment Measures (TRIMs) Agreement
4. Article 5(c) of the Subsidies and Countervailing Measures (SCM) Agreement
5. Article 28.2 of the SCM Agreement
6. Article 3 of the Trade-Related Aspects of Intellectual Property (TRIPs) Agreement
7. Article 65.5 of the TRIPS Agreement

The WTO Panel found that Indonesia was in violation of the first five obligations, but not the last two. However, Indonesia was required to change its tax policy, which it did. Thus, I categorized Indonesia as "loser" in this case and the United States as a "winner."

In other cases, the loser may "lose" the case, but not be penalized for their policy because the issue solved itself. For example, in another case, India

complained that a U.S. policy was in violation of its WTO obligations (DS33). Despite the fact that the U.S. had ended its policy before the conclusion of the Panel's investigation, the Panel determined that the U.S. had indeed been violating Articles 2, 6 and 8 of the Agreement on Textiles and Clothing (ATC) Agreement. Regardless of the fact that the entire case was a moot point by the time the decision was issued, I categorized the U.S. as a "loser" and India a "winner" because the U.S. was legally obligated to change its policy.

The third way the definition of "winner" and "loser" impacted my study were cases that arguably should have been consolidated. For example, there was a whole series of individual cases filed against the U.S. for the same violations having to do with safeguards the U.S. placed on the import of steel (DS248, DS249, DS251, DS252, DS253, DS254, DS258, DS259, and DS274). From here on forth, I will refer to all of these cases as "The Steel Safeguard Cases," and remind the reader repeatedly, that said cases occurred in the year 2003. The website explains the peculiar nature of these disputes on its website:

> Although all complaints made by the eight co-complainants were considered in a single panel process, the United States requested the issuance of eight separate panel reports, claiming that to do otherwise would prejudice its WTO rights, including its right to settle the matter with individual complainants. The complainants vigorously opposed this request, stating that to grant it would only delay the panel process. The Panel decided to issue its decisions in the form of "one document constituting eight Panel Reports". Thus, for WTO purposes, this document is deemed to be eight separate reports, relating to each of the eight complainants in this dispute. The document comprises a common cover page, a common descriptive part and a common set of findings. However, the document also contains conclusions and recommendations that are "particularized" for each of the complainants, with a separate number (symbol) for each individual complainant. In the

Panel's view, this approach respected the rights of all parties while ensuring the prompt and effective settlement of the disputes.

As one could imagine, determining how to categorize these required extra thought.

FIGURE 5: U.S. STEEL SAFEGUARD DISPUTES

Case	Name of Case	Date Filed	Complainant	Respondent	Third Parties	Total Parties
DS248	Definitive Safeguard Measures on Imports of Certain Steel Products	7-Mar-02	European Communities	United States	Brazil; Canada; China; Chinese Taipei; Japan; Korea; New Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela	14
DS249	Definitive Safeguard Measures on Imports of Certain Steel Products	20-Mar-02	Japan	United States	Brazil; Canada; China; Chinese Taipei; European Communities; Korea; Mexico; New Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela	15
DS251	Definitive Safeguard Measures on Imports of Certain Steel Products	20-Mar-02	Korea	United States	Brazil; Canada; China; Chinese Taipei; European Communities; Japan; Mexico; New Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela	15
DS252	Definitive Safeguard Measures on Imports of Certain Steel Products	26-Mar-02	China	United States	Brazil; Canada; Chinese Taipei; Cuba; European Communities; Japan; Korea; Mexico; New Zealand; Norway; Switzerland; Thailand; Turkey; Venezuela	16
DS253	Definitive Safeguard Measures on Imports of Certain Steel Products	3-Apr-02	Switzerland	United States	Brazil; Canada; China; Chinese Taipei; Cuba; European Communities; Japan; Korea; Mexico; New Zealand; Norway; Thailand; Turkey; Venezuela	16
DS254	Definitive Safeguard Measures on Imports of Certain Steel Products	4-Apr-02	Norway	United States	Brazil; Canada; China; Chinese Taipei; Cuba; European Communities; Japan; Korea; Mexico; New Zealand; Switzerland; Thailand; Turkey; Venezuela	16
DS258	Definitive Safeguard Measures on Imports of Certain Steel Products	14-May-02	New Zealand	United States	Brazil; Canada; China; Chinese Taipei; Cuba; European Communities; Japan; Korea; Mexico; Norway; Switzerland; Thailand; Turkey; Venezuela	16
DS259	Definitive Safeguard Measures on Imports of Certain Steel Products	21-May-02	Brazil	United States	Canada; Chinese Taipei; Cuba; Mexico; Thailand; Turkey; Venezuela	9

There were three ways I could have handled this group of cases with three separate outcomes. If I followed the same procedures as I had with other cases, the

U.S. would be counted as a "loser" eight separate times, skewing the results against the U.S. If I consolidated these cases into one, I would have to calculate the average GDP of all of the complainants, creating "1/8th" of a win for all of them. If I removed all of these cases from the study, I would lose eight major data points of information in my already small data set. For better or for worse, I decided to go with the first option and follow the same procedures as I had for other cases, promising myself to remind the reader whenever this information could have skewed the results of a particular outcome.

Finally, the reader must understand that these disputes are largely between the Quad. Case in point, there are only 13 cases that do not involve the U.S., the E.U., Canada or Japan as a main party. Furthermore, the "average" winner and loser have GDPs around 4 trillion dollars. I was thus careful to use the term "underdog" instead of "have not" to describe the resulting economic bias toward those litigants with lower GDPs and experience levels.

GALANTER'S HYPOTHESIS

Evidence shows that low income levels are correlated with losing law suits within the domestic legal system,[4] but does this maxim hold true on an international level? In searching for the answer to this question, my research naturally led me to Marc Galanter's famous piece, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change." In this groundbreaking article, Galanter posits the concept of repeat players and "one-shotters" within the American legal system. A repeat player is an entity that litigates regularly, thus following a different pattern of legal

[4] For a wonderful symposium on empirical studies of Marc Galanter's work, take a look at the 1999 Law and Society Law Review, volume 3, starting at page 799. There are a series of relevant articles following the editor's opening remarks.

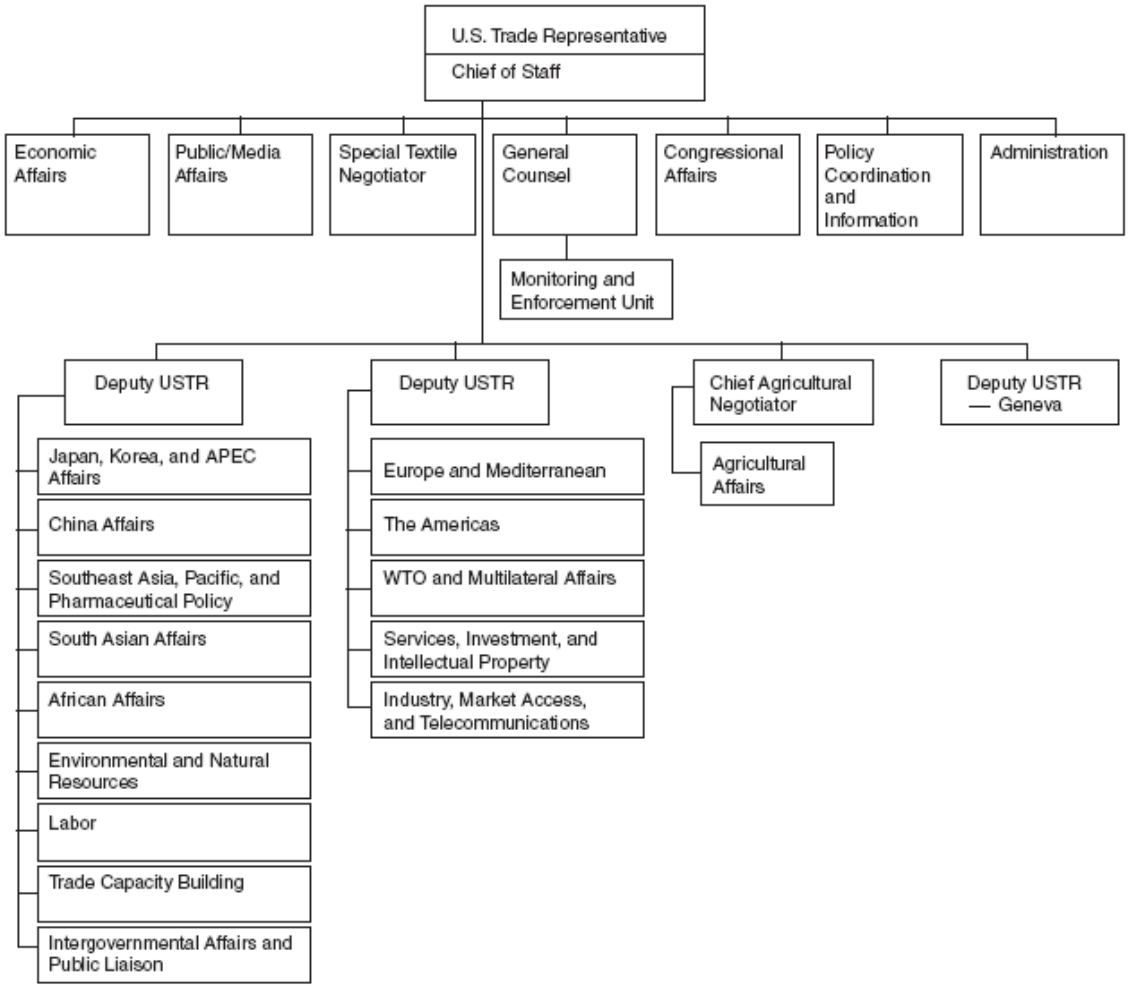
strategy than its counterpart, a "one-shotter," who litigates rarely but (typically) has more at stake in the case. For example, if a victim is seriously injured in a car accident and files suit against the driver at fault, the victim is actually suing the insurance company of the driver. Thus, when it comes time for the lawsuit, the accident victim – who has no experience litigating and does not expect to be litigating again anytime soon – is a "one-shotter" or "OS" for short), and the insurance company – with its already-dedicated resources for defense against accident victims – is a "repeat player" (or "RS") for short.

Galanter hypothesized that because repeat players litigate more often, they tend to have more experience, more resources, and a better strategy for winning than their counterparts. Because of these and other advantages, argues Galanter, repeat players are in a "position of advantage" and are thus more likely to win lawsuits against one-shotters. This is certainly a logical conclusion. The government, for example, has legal departments employing hundreds of lawyers who prosecute criminal cases on a regular basis. One would imagine that these dedicated resources, as well as their comfort with the system produces a higher win rate for prosecutors over time in comparison to first-time criminal offenders, who have no experience litigating and much to lose if the case does not go their way.

This theory can be easily analogized to the WTO. The United States Trade Representative (USTR), for example, is the arm of the United States government that handles WTO litigation. Only a brief glance at the organization chart gives the reader

an idea about the level of sophistication American negotiators have in comparison to developing countries.

FIGURE 6: USTR ORGANIZATION CHART (U.S. GAO, 2005)



In 2006, for example, the President authorized a budget of roughly $43 million for the USTR, or approximately 0.0004% of its then-$10 trillion GDP. If Bangladesh – a WTO member who is on the United Nations list of Least Developed Countries (LDC's) – were to spend the same percentage of its GDP on a similar institution, it could only spend $250,000. This doesn't mean it wouldn't be worth it to do so; the returns Bangladesh could receive from winning a dispute would provide additional

income in perpetuity. The point is, however, that Bangladesh simply does not have the resources to compete with the United States' $43 million dollar trade budget, especially when the average appealed WTO dispute costs $500,000 from start to finish (Mosoti, 2006).

Despite this obvious disparity in income, scholars have noted that developing countries "are well equipped with legal talent, are well briefed by export interests, and have a worldwide network of commercial and diplomatic representation that feeds their systems with relevant data" (Hoekman & Mavroidis 2000). This is because donor countries, who have an interest in a well-regulated body of international trade law, and are willing to pay a price for stability and predictability for its businesses (Hudec, 1999). Does this added financial and legal support convert developing countries to "haves that come out ahead" in Galanter's scenario? Not necessarily.

While "[i]n the American setting most [repeat players] are larger, richer and more powerful than are most [one-shotters]," Galanter specified, the repeat players "are [not] to be equated with 'haves' (in terms of power, wealth and status) or [one-shotters] with 'have-nots' [and] these categories overlap but there are obvious exceptions." An equally well-funded public defender, for example, is supposed to be the check-and-balance against the all-powerful government prosecutor, and the accident victim, presumably, finds an experienced attorney to defend her dispute against the insurance company. Despite these countermeasures, argues Galanter, the repeat players will still come out ahead.

So if the success of the repeat-players is not necessarily about access to wealth, why are they more likely to come out ahead? Careful to make this distinction, Galanter took his hypothesis one step further. In addition to having more resources, repeat players have the incentive to take litigation in stride, focusing always on the long term benefits of doing well rather than the short term win. As Galanter explains, repeat players will forgo immediately tangible benefits in order to prevail on rule-making issues, while one-shotters typically have incentives to do the opposite. In other words, even if a repeat player knows it will ultimately lose on appeal, it will appeal anyway, hoping the underlying law will be interpreted, long term, is in its favor. In contrast, a one-shotter who wins at the trial level is unlikely to appeal in order to change the law because his or her incentives are short term and typically too urgent to await a lengthy appeal, even if the law is on its side. Thus, repeat players not only win more often than one-shotters because of their resources and skill, they also shape legal outcomes to ensure future victories.

The reader must therefore understand this study in context with the evolution of law. It may be true that the underdogs are coming out ahead right now while the trade dispute system is still in the process of being developed. Over time, however, it is likely that these so-called "repeat players" will ultimately shape the law to their advantage. It is too early to measure whether this phenomenon is occurring; however, I did notice that cases which were appealed involved WTO members with higher economic averages than cases which were not appealed.

FIGURE 7: GDP STATISTICS FOR APPEALED AND NOT APPEALED DISPUTES

	GDP (constant 2000 US$)		**GDP per capita** (constant 2000 US$)		**GDP per capita, PPP** (constant 2005 international $)	
Dispute Outcome	Appealed	Not Appealed	Appealed	Not Appealed	Appealed	Not Appealed
Average Participant	$4.5 trillion	$3.9 trillion	$20,675	$18,234	$25,133	$23,039
Difference	$598 billion		$2,441		$2,094	

This could indicate that the "richer" countries are already in the process of appealing cases to shape the law to their future benefit. Therefore, it is not only plausible, but likely that each decade of WTO disputes will uncover a shift in economic statistics. Only time – and a second look – will tell whether this is indeed the case.

SELECTING STATISTICS AND DEFINING THE OUTCOMES

Ironically Galanter's article was rejected by all the leading legal and academic journals until he published it himself as editor of the Law and Society Review. Since then hundreds of studies, dozens of books and countless articles have attempted to measure the uneven outcomes of legal battles in the United States and elsewhere, but no one had yet used his ideas to look at WTO Dispute Settlement System.[5]

[5] *See, e.g.,* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect,* 1 EMP. RTS. & EMP. POL'Y J. 189 (1997); Donald R. Songer, *Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 LAW & SOC'Y REV. 811 (1999); Kathryn Hendley, *Do Repeat Players Behave Differently in Russia? Contractual and Litigation Behavior of Russian Enterprises,* 33 LAW & SOC'Y REV. 833 (1999); Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies,* 33 LAW & SOC'Y REV. 911 (1999).

Inspired by Galanter's work, I decided to look at the data in terms of haves and underdogs. My theory was that if the "winner" had a higher GDP than the average "loser" in the first decade of WTO disputes, then the "haves" came out ahead. In contrast, if the average "loser" had a higher figure, one could conclude that the underdogs came out ahead.

Regardless of the outcome of my GDP analysis, my goal for this study was much broader. I wanted to create a comprehensive database of multiple statistics associated with each respondent and complainant in the WTO for a given dispute year. I hoped by doing this I would be contributing to the current tools with which we advance our knowledge about the dispute settlement system. However, while my database began with over 100 statistics that seemed "interesting to look at," some of these statistics had to be deleted for various reasons. For example, the figure for "taxes on international trade (% of revenue)" would have been fascinating to compare between parties. Unfortunately, most governments do not yet report these figures to the World Bank, and since the data was "n/a" down most of the columns, I had to throw it out. In the end however, I collected information for 47 different statistics which I divided into four basic categories: (1) general economic statistics, (2) GDP-related statistics, (3) population statistics, and (4) trade statistics. I will not report on all of these results, but I will share the results of my GDP-related analysis.

I also developed a way of quantifying and measuring the "experience level" of each country at a given time to determine if more experienced countries win more

than less experienced countries. If a country was involved in a WTO dispute as a complainant or respondent, I gave it one "experience point." If a country was involved in a WTO dispute as a third party, I gave it ½ of an "experience point." I did this for every country, for every WTO dispute so that I could derive an average "experience level" for the winner and loser at any given moment of time in the 1995-2005 period.

In the end, the statistics I was able to incorporate into my database are the following:

General Economic Statistics:

1. Agricultural land (% of land area)
2. Agriculture, value added (% of GDP)
3. Arable land (% of land area)
4. Foreign direct investment, net inflows (% of GDP)
5. Foreign direct investment, net outflows (% of GDP)
6. Gross domestic savings (% of GDP)
7. Gross savings (% of GDP)
8. Industry, value added (% of GDP)

GDP-related Statistics:

9. GDP (constant 2000 US$)
10. GDP per capita (constant 2000 US$)
11. GDP per capita, PPP (constant 2005 international $)
12. GDP per person employed (constant 1990 PPP $)
13. GDP, PPP (constant 2005 international $)
14. GNI (current US$)
15. GNI per capita, PPP (current international $)
16. GNI, PPP (current international $)

Litigation Experience:

17. "Experience points" (self-derived)

Population Statistics:

18. Households with television (%)
19. Internet users (per 100 people)
20. Population ages 0-14 (% of total)
21. Population ages 15-64 (% of total)
22. Population ages 65 and above (% of total)
23. Population growth (annual %)
24. Rural population (% of total population)
25. Urban population (% of total)

Trade Statistics:

26. Energy imports, net (% of energy use)
27. Exports of goods and services (% of GDP)
28. Exports of goods and services (constant 2000 US$)
29. Exports of goods and services (current US$)
30. Food exports (% of merchandise exports)
31. Food imports (% of merchandise imports)
32. Fuel exports (% of merchandise exports)
33. Fuel imports (% of merchandise imports)
34. Goods exports (BoP, current US$)
35. Goods imports (BoP, current US$)
36. High-technology exports (% of manufactured exports)
37. Imports of goods and services (% of GDP)
38. Imports of goods and services (constant 2000 US$)
39. Manufactures exports (% of merchandise exports)
40. Manufactures imports (% of merchandise imports)
41. Manufacturing, value added (% of GDP)

42. Service exports (BoP, current US$)
43. Service imports (BoP, current US$)
44. Services, etc., value added (% of GDP)
45. Services, etc., value added (constant 2000 US$)
46. Trade (% of GDP)
47. Trade in services (% of GDP)

One of the data points I was regrettably unable to attain with any sort of ease was statistics for trade volume between the individual litigants during the year the dispute was filed. Considering strong correlations between trade volume and WTO participation have already been established, such an analysis would be enlightening (Holmes, Rollo, & Young, 2003). I expect, therefore, that I will ultimately incorporate these details into my database from another, non-WDI source, the results of which will be published at a later time.

Once I had a complete listing of all 335 cases, along with all the relevant dates, parties and corresponding economic data for the complainant and respondent, it was time to look at the outcome of the cases. From there I could ascertain which cases were appealed, which cases resulted in compliance disputes, which cases resulted in a win for the complainant, which cases resulted in a win for the respondent and so on and so forth.

While the WTO provides categories of outcomes on its website, I found that sometimes these categories were out of date or were more properly categorized in other ways. Regardless, the WTO provides the following six possible outcomes on its website:

(1) **Consultations requested — no panel established nor settlement notified**, which refers to cases where a suit was filed but no official Panel has been established (or in some cases, no Panel will ever will be established because the 60 day consultation period has passed with no request for a Panel);

(2) **Panels established by DSB/reports not yet circulated**, which refers to cases where a Panel was officially established, yet the case is still being heard or was otherwise dropped;

(3) **Panel Reports circulated but not yet adopted by the DSB** (also categorized as "Panel Reports currently under appeal"), which refers to cases that are currently on appeal;

(4) **Mutually Agreed Solutions notified under Article 3.6 of the DSU**, which are cases officially settled under Article 3.6 of the DSU Agreement);

(5) **Other settled or inactive cases**, which refers to cases that appear to have been settled elsewhere, but the WTO was not formally alerted; and finally,

(6) **Appellate Body and Panel Reports Adopted**, which are fully litigated and finalized cases.

Using these categories as a framework,

I began the process of mining through

Case-In-Point #7: "Other Settled or Inactive Cases"

DISPUTE NUMBER: DS57

COMPLAINT DATE: October 7, 1996

COMPLAINANTS: United States

RESPONDENT: Australia

SITUATION:

The United States requested consultations with Australia over subsidies Australia was providing to its leather makers.

In November of 1996, an official USTR release indicated that the case had been settled, however, no notice was ever given to the WTO.

Eventually, the 60 day time period lapsed.

STATISTICAL DECISION:

If the time had merely lapsed, the WTO would have categorized the case under "Consultations requested — no panel established nor settlement notified."

However, because of the USTR notification, the WTO categorized it as "Other settled or inactive cases."

I chose to list it simply as "settled."

the cases to determine the actual outcome. In doing this, I developed my own method of labeling outcomes:

(1) Settled Cases = "Never Made it to the Panel Stage"

a. Officially settled (corresponds with WTO category 4, above)

b. Other settled (settled elsewhere but not confirmed with WTO)

c. Complainant withdrew request

d. Time lapsed (60 days of consultations passed with no request for a Panel)

(2) Pending Cases = "Made it to the Panel Stage; Awaiting Outcome"

a. Awaiting Panel Decision

b. On Appeal

(3) Litigated Cases* = "Made it to the Panel Stage; Legal Outcome Finalized"

** Further breakdown will be addressed later.*

What I found by merely quantifying this data was fascinating, and, now that the reader is fully armed with the awareness of my many assumptions, it is time to unveil some of the results.

CHAPTER THREE: FREAKONOMICS AND THE WTO

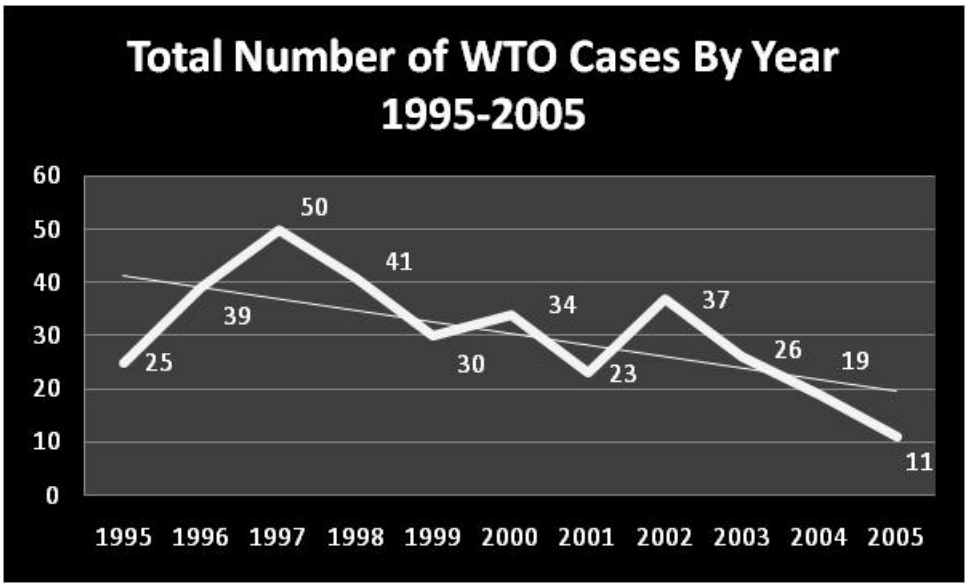
THE CHANGING SHAPE OF WTO DISPUTES

While the inspiration of Galanter's theory certainly informed the design of my study, it did not control it. I found so many fascinating data points along the way that it seemed cruel not to publish them. To this end, I provided a number of data tables in the appendices that will hopefully save future scholars much trouble in gathering the information.

The first and simplest information I wanted to know about the dispute settlement system was related to volume: how much is this system used? Has it

increased or decreased over time? To do this, I counted the number of cases filed in each year and plotted them on a graph. Before I show the results, however, I would like remind the readers two things: (1) I am no way suggesting that WTO use will go down further in the future, and (2) I would to like take this opportunity to remind readers that "The Steel Safeguard Cases" took place in 2003 (where the U.S. "lost" eight times on the same issue):

FIGURE 8: USE OF THE WTO DISPUTE SETTLEMENT SYSTEM BY YEAR



As you can see in the above graph, it appears based on the trendline that usage of the WTO dispute settlement system decreased between 1995 and 2005. And to clarify, a trendline in Microsoft Excel is a linear regression using the following equation to calculate the least squares fit for a line: $y = mx + b$, where m is the slope and b is the intercept.

I see four possible explanations for the decrease of WTO disputes being filed: (1) countries could be "getting along" better in relation to international trade; (2) countries are settling trade disputes privately; (3) countries are being more discerning about the benefits of using the dispute settlement system; and/or (4) individual WTO cases are becoming less frequent but more consolidated, with a higher number of parties participating in each case.

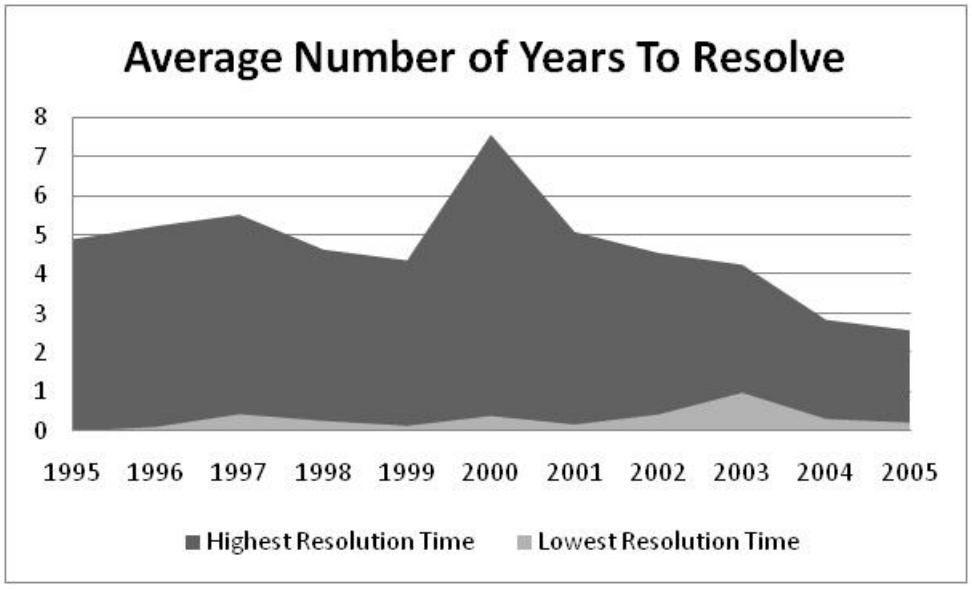
The first possiblity, that countries are "getting along" better in relation to international trade, is not as silly as it sounds. Since the inception of the Dispute Settlement system, the WTO has heard hundreds of cases and laid down official legal frameworks to world trade, which is often incorporated into national laws and treated by national courts as persuasive authority at a minimum. Because the rules of international trade are becoming clearer and more reliable, countries have had time to set up their internal trading systems to be compliant with WTO law, thus reducing the necessity to bring a dispute.

The second explanation, that countries are settling trade disputes elsewhere, is also a possible reason. The International Court of Justice, for example, is an alternative international adjudication body where countries can go to settle their disputes, which could compete with the WTO because is it a court of general jursidiction, meaning it can hear a case between two countries on practically any subject matter. Also, according to the International Court of Arbitration Dispute Resolution Services, Arbitration under the International Chamber of Commerce in Paris has increased every year in the last ten years (ICC website, 2009). Despite the

fact that ICC disputes are mostly between private parties, the widespread availability of private international arbitration may ease the need of countries to involve themselves in WTO disputes to protect the interests of their citizens.

The third explanation, that countries are being more discerning of the benefits of the WTO dispute settlement system, is also a possibility. The average number of days it takes for a WTO dispute to be resolved from the panel process is 763 days, which is over two years.

FIGURE 9: AVERAGE RANGE OF YEARS TO RESOLVE A WTO DISPUTE (IN YEARS)



Please note, in the world of both domestic and international litigation, two years is not very long. If however, the disputes is over a law that is tying up the export of say, apples, a country may not have two years of rotten apples to wait. Despite the expeditious procedures avialble in cases like these, the WTO may not be the best place to resolve a short-term problem. However, if the claim is strong enough and the outcome of the inconsistent measure is severe enough, a WTO dispute may be

the best avenue for a more permanent and long term resolution. Because the data ranges in the resolution times were so extreme, no trend was detectable. However, for those interested in seeing the raw data to calculate trends in the future, I provide the following table.

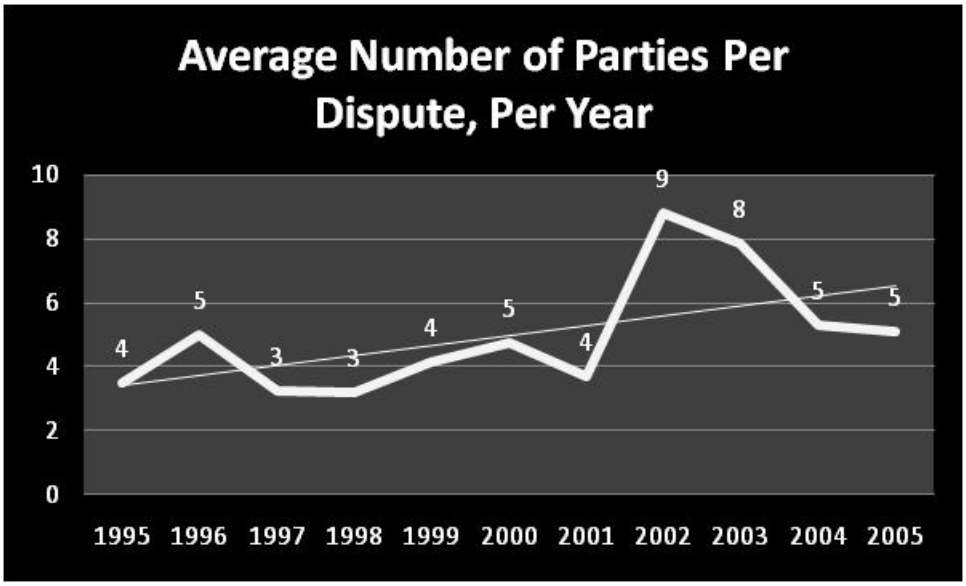
FIGURE 10: HIGHEST AND LOWEST RESOLUTION TIMES FOR WTO DISPUTES (IN DAYS)

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Total cases	25	39	50	41	30	34	23	37	26	19	12
Percent of Cases at Final Resolution	92%	85%	96%	93%	83%	76%	87%	86%	62%	63%	91%
Highest Resolution Time (in days)	1781	1905	2011	1687	1587	2754	1851	1656	1546	1035	937
Lowest Resolution Time (including lapsed consultations)	0*	40	60	60	50	60	60	60	60	60	60
Lowest Resolution Time (once Panel is established)	0*	40	156	95	50	139	62	153	351	112	79

* DS6 WAS SETTLED ON THE SAME DAY THE CASE WAS FILED.

The final theory I have for the decrease in WTO litigation is that the disputes are consolidating to become larger, longer, and further complicated with third parties. To confirm this, I created another graph:

FIGURE 11: AVERAGE NUMBER OF PARTIES BY YEAR



As you can see from the graph above, it appears that the number of parties increased from 1995-2005, as shown by the trend line. This supports my fourth theory that the number of disputes are decreasing because they are actually consolidating into larger disputes. Another reminder, of course: "The Steel Safeguard Cases" occurred in 2003, which may have skewed these results.

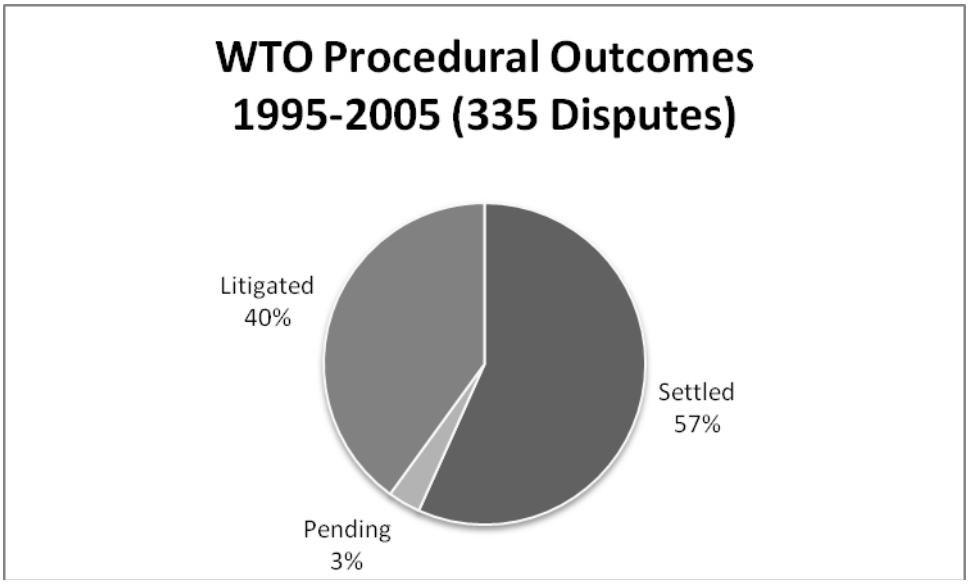
SETTLING VERSUS LITIGATING

Once I gathered all the data, I was also able to calculate information about cases that were settled compared to cases that were litigated. Once again, I defined "settled cases" as cases which never made it to the panel stage, so, my settlement data included the following: (1) official and (2) unofficial settlements, (3) withdrawals, and (4) cases where the 60 day time period for consultations lapsed. Using this definition, I was able to surmise that exactly 57% of disputes (190 cases) settled between 1995-2005.

FIGURE 12: WTO PROCEDURAL OUTCOMES, 1995-2005 (335 DISPUTES)

WTO Procedural Outcomes 1995-2005 (335 Disputes)	Total Cases	Percentage
Settled	190	57%
Pending	11	3%
Litigated	134	40%

FIGURE 13: WTO PROCEDURAL OUTCOMES, GRAPH, 1995-2005 (335 DISPUTES)

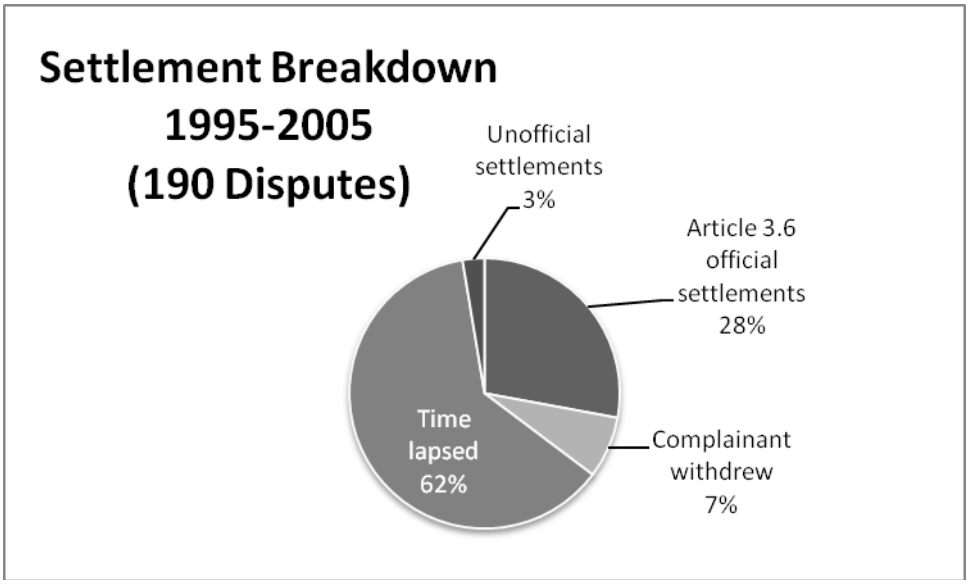


In a further breakdown, it is clear that most of these "settled" cases were resolved within the 60 day consultation period:

FIGURE 14: SETTLEMENT BREAKDOWN, 1995-2005 (190 DISPUTES)

Settlement Breakdown 1995-2005 (190 Disputes)	Total Cases	Percentage
60 Day Consultation Period Lapsed	118	62%
Article 3.6 official settlements	53	28%
Complainant withdrew	14	7%
Unofficial settlements	5	3%

FIGURE 15: SETTLEMENT BREAKDOWN, GRAPH, 1995-2005 (190 DISPUTES)



I decided to compare these statistics over time to see if there were any patterns or unusual years where the statistics appeared abnormal. In the chart below, I have indicated any standout data, underlining both the highest and lowest figures in each column.

FIGURE 16: LITIGATION BY YEAR

Total Number of WTO Cases By Year						
	All Cases	Litigated		Settled		Pending
Total	335	134	40%	190	57%	11
1995	25	8	32%	17	68%	0
1996	39	17	44%	22	56%	0
1997	**50**	17	34%	**33**	66%	0
1998	41	13	32%	28	68%	0
1999	30	16	53%	13	43%	1
2000	34	12	35%	19	56%	3
2001	23	7	30%	16	**70%**	0
2002	37	**22**	**59%**	13	**35%**	2
2003	26	14	54%	11	42%	1
2004	19	**4**	**21%**	11	58%	4
2005	**11**	**4**	36%	**7**	64%	0

The late Robert E. Hudec argued in 1999 that the increase of litigation in the first few years of the DSU was attributable to the optimism level of the countries involved that their disputes would result in the decrease of trade barriers. It is unclear what he would have to say about the subsequent drop.

Since I had little insight on the anomalies over the complete ten year period, I graphed the results – both by number and by percentage (see next page). It was evident from the results of both that litigation and settlement figures have followed

each other pretty steadily in the last ten years, especially in 1999 and 2002, when litigated cases surpassed settled cases.

FIGURE 17: SETTLED VERSUS LITIGATED CASES BY NUMBER

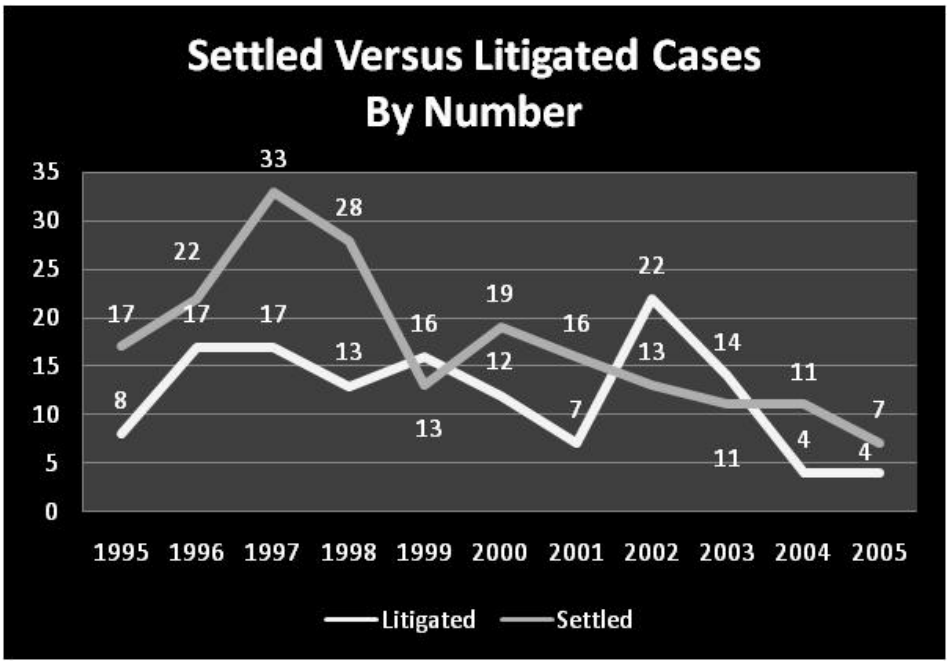
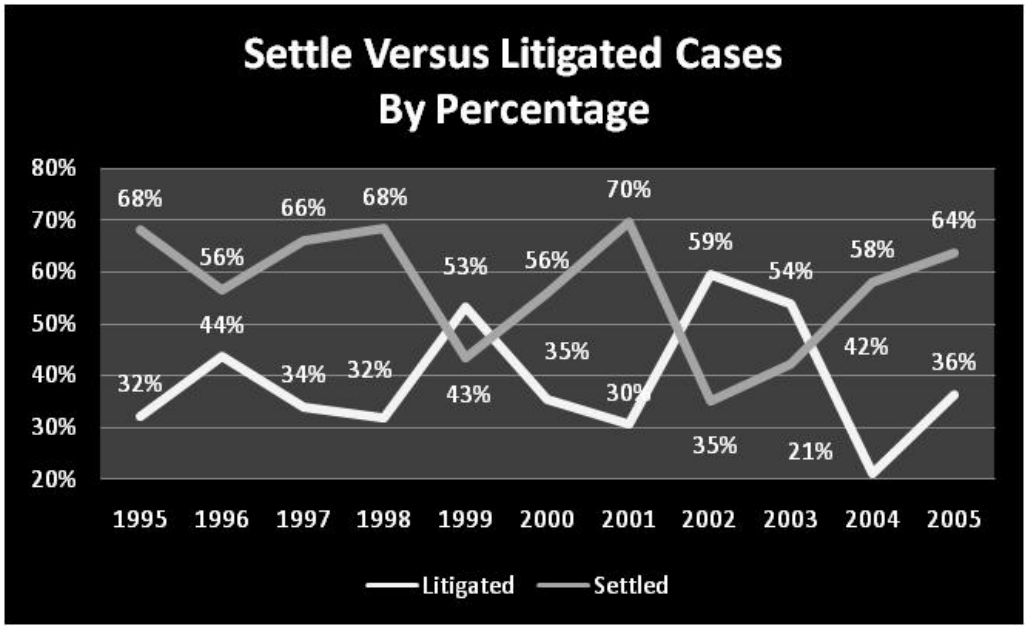


FIGURE 18: SETTLED VERSUS LITIGATED CASES BY PERCENTAGE



One suggestion I have for the decrease and then subsequent increase of litigation in 2001 and 2002 has more to do with panel industriousness than international trade strategy itself. Possibly the World Trade Center attacks on September 11, 2001 caused a delay in the panel process, which was made up for in 2002. Likewise, the sharp increase in 1999 cases may have been an attempt to speed up the panel process to avoid any issues that would have resulted from the Y2K crisis (when people feared that the changeover to 2000 would cause serious computer problems). However, these are but wild stabs in a (very small) sea of data.

Regardless, the report shows that 43% of cases result in the panel process ("litigation") and 57% never make it to the panel ("settlement"), and this appeared to be a fairly consistent ratio throughout the first decade of disputes. Now we can ascertain whether it is the haves or the underdogs who are settling. In looking at the economic data for settling parties compares to litigating parties, I took the eligible cases (i.e. cases that did not have multiple complainants or respondents,) and compared the averages between each party for each statistic. In the end, there were 29 data sets out of the 49 data points that were statistically significant, i.e. the p-value between the two averages was less than 0.05.

I found the following facts to be particularly interesting:

Settling parties have more . . .

1. Agriculture, value added (% of GDP)
2. Exports of goods and services (% of GDP)
3. Food exports (% of merchandise exports)
4. Foreign direct investment, net inflows (% of GDP)
5. Imports of goods and services (% of GDP)
6. Trade (% of GDP)
7. Trade in services (% of GDP)

. . . than litigating parties.

However, settling parties have less:

1. Experience in WTO Disputes
2. Exports of goods and services (current 2000 US$)
3. GDP (constant 2000 US$)
4. GDP per capita (constant 2000 US$)
5. GDP per capita, PPP (constant 2005 international $)
6. Goods imports (BoP, current US$)
7. High-technology exports (% of manufactured exports)
8. Imports of goods and services (constant 2000 US$)
9. Manufactures exports (% of merchandise exports)
10. Service exports (BoP, current US$)
11. Service imports (BoP, current US$)
12. Services, etc., value added (constant 2000 US$)

. . . than litigating parties.

Since the balance sheet weighs heavier on the side of settlers having "less" than litigating parties, one could theorize that settlers choose to settle to preserve what little they have, rather than pay the costs of a full-blown WTO dispute to determine the outcome.

As for the statistics where settlers have "more," one could extrapolate that in these instances, a respondent has "more to lose" and will choose to settle rather than enter a full-blown WTO dispute, where their practices may be deemed illegal forever. This seems especially apropos in the areas where the respondent has a high level of imports and exports in goods and services, overall trade, and trade in services: if the respondent relies heavily on international trade, it may not want to bear the risk of having its practices deemed illegal. This would explain, therefore, why the average settler has *more* imports and exports in goods and services, overall trade and trade in services.

Likewise, we can imagine that a typical complainant who settles is more "desperate" and will therefore take the first offer made by the WTO member to resolve the case. This seems especially relevant in the area of agriculture where the settling party had a higher average in agricultural land, agriculture, and food exports. This is likely because the country is in urgent need of a resolution before its perishable products go to waste. Additionally, if a country has a high level of foreign direct investment inflows and/or young populations, it may simply be so desperate for concessions that it will take the first offer in order to ease whatever financial burden it is undergoing.

To conclude this section on settling versus litigating, I have provided the numerical results of these data points, below. The complete report of all 49 statistics is located in Appendix II.

FIGURE 19: AVERAGE ECONOMIC STATISTICS FOR SETTLING PARTIES VERSUS LITIGATING PARTIES

Settling Parties Versus Litigating Parties	World Average	Category	WTO Party Average	Difference: (Shaded = settling party has less, i.e. underdogs settle)	P-value (Shaded = Statistically Significant)
Agriculture, value added (% of GDP)	4	Settler	6	1	0.02
		Litigator	5		
		Litigator	59		
Exports of goods and services (% of GDP)	23	Settler	27	3	0.01
		Litigator	23		
Exports of goods and services (constant 2000 US$)	$7,675,080,838,358	Settler	$619,054,868,095	-152,364,585,715	0.01
		Litigator	$771,419,453,809		
		Litigator	$835,851,021,047		
Food exports (% of merchandise exports)	8	Settler	15	3	0.02
		Litigator	13		
		Litigator	7.3		
Foreign direct investment, net inflows (% of GDP)	2	Settler	3	1	0.04
		Litigator	2		
		Litigator	2		
		Litigator	10.6		
GDP (constant 2000 US$)	$31,479,023,440,818	Settler	$3,301,786,033,273	-$1,030,880,205,838	0.001
		Litigator	$4,332,666,239,111		
GDP per capita (constant 2000 US$)	$5,185	Settler	$15,767	-4148	0.00004
		Litigator	$19,915		
GDP per capita, PPP (constant 2005 international $)	$7,726	Settler	$20,454	-4029	0.0001
		Litigator	$24,483		
		Litigator	$21,619		
		Litigator	$636,384,611,447		
Goods imports (BoP, current US$)	$6,555,284,837,799	Settler	$574,263,619,116	-$132,662,806,296	0.02
		Litigator	$706,926,425,412		
		Litigator	20.5		
High-technology exports (% of manufactured exports)	21	Settler	19	-2	0.02
		Litigator	21		
		Litigator	90		

Settling Parties Versus Litigating Parties	World Average	Category	WTO Party Average	Difference: (Shaded = settling party has less, i.e. underdogs settle)	P-value (Shaded = Statistically Significant)
Imports of goods and services (% of GDP)	23	Settler	27	4	0.001
		Litigator	23		
Imports of goods and services (constant 2000 US$)	$7,639,191,689,321	Settler	$656,986,267,830	-$186,219,588,558	0.004
		Litigator	$843,205,856,387		
		Litigator	22		
Manufactures exports (% of merchandise exports)	76	Settler	68	-4	0.03
		Litigator	72		
		Litigator	19.0		
		Litigator	28		
Service exports (BoP, current US$)	$1,671,393,473,075	Settler	$156,800,480,382	-$34,232,231,874	0.03
		Litigator	$191,032,712,256		
Service imports (BoP, current US$)	$1,639,861,670,769	Settler	$141,071,740,594	-$31,693,745,833	0.04
		Litigator	$172,765,486,427		
Services, etc., value added (% of GDP)	67	Settler	65	-2	0.02
		Litigator	66		
Services, etc., value added (constant 2000 US$)	$19,575,415,500,722	Settler	$2,204,927,229,564	-$724,265,673,656	0.001
		Litigator	$2,929,192,903,220		
Trade (% of GDP)	47	Settler	54	7	0.003
		Litigator	47		
Trade in services (% of GDP)	10	Settler	11	1	0.02
		Litigator	9		
		Litigator	72		

APPEALED DISPUTES

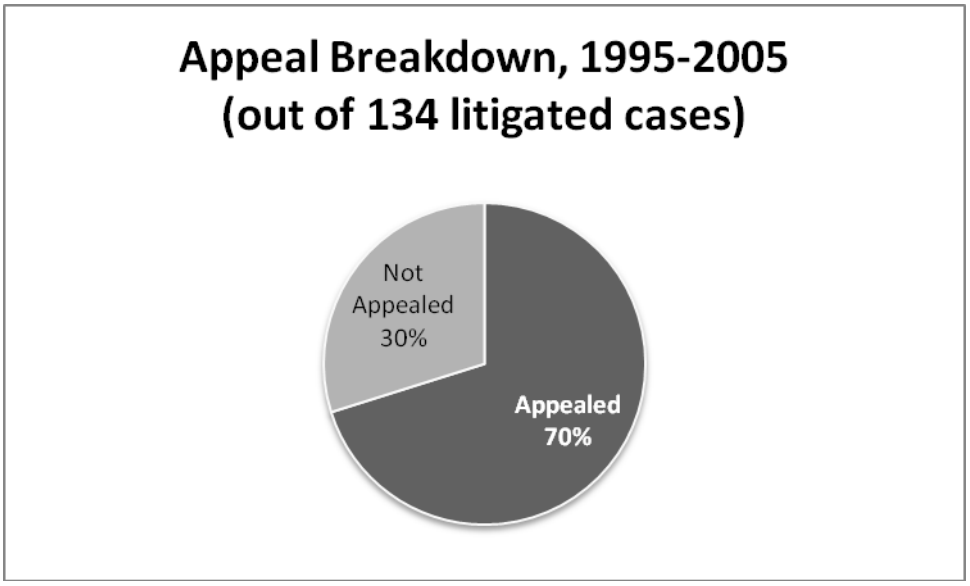
My next step of analysis was to take a deeper look at the 134 litigated cases. Obviously these would be the bread and butter of my study, where I would determine who were the "winners" and who were the "losers," but the more I looked at the different outcomes that could result from WTO disputes, the more I realized what sort of statements could be made about the WTO Dispute Settlement system. If many of the Panel disputes were appealed, for example, it could suggest that that certain parties were not satisfied with the outcome.

To that end, I broke down the litigated cases into "Appealed" and "Not Appealed" and discovered that 70% of all Panel findings are appealed.

FIGURE 20: APPEAL BREAKDOWN, 1995-2005 (OUT OF 134 LITIGATED DISPUTES)

Appeal Breakdown 1995-2005 (out of 134 litigated disputes		
	Total Cases	Percentage
Appealed	94	70%
Not Appealed	40	30%

FIGURE 21: APPEAL BREAKDOWN, GRAPH, 1995-2005 (OUT OF 134 LITIGATED DISPUTES)

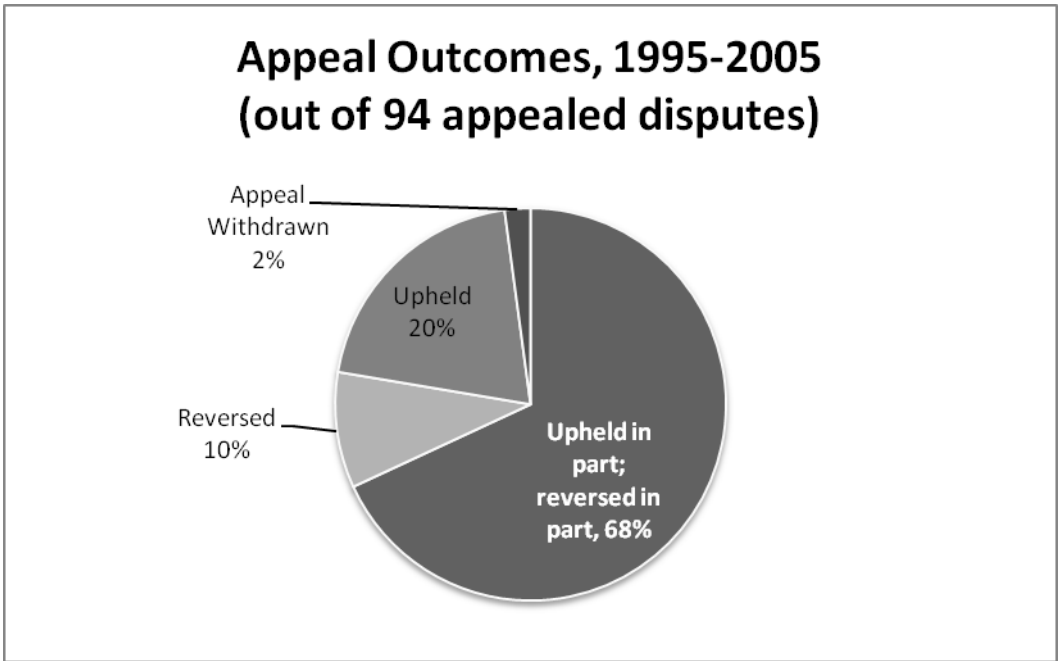


Further curious about the implications of such a high appeal rate, I decided to look even deeper into the outcomes. I found that 77% of the time, the Appellate Body reversed some or all of the Panel's findings.

FIGURE 22: APPEAL OUTCOMES, 1995-2005 (OUT OF 94 APPEALED DISPUTES)

Appeal Outcomes 1995-2005 (out of 94 appealed disputes)		
	Total Cases	Percentage
Upheld in part; reversed in part	64	68%
Reversed	9	10%
Upheld	19	20%
Appeal Withdrawn	2	2%

FIGURE 23: APPEAL OUTCOMES, GRAPH 1995-2005 (OUT OF 94 APPEALED DISPUTES)



This was not too surprising. As mentioned earlier, the selection of Panelists can be a contentious part of the debate. However, not many people realize it can be just as stressful, if not more, for the Panelists themselves.

In an informative article, the Wall Street Journal described the harrowed life of a WTO Panelist:

> WTO judges essentially moonlight in their roles while juggling day jobs and frequently complain they don't have sufficient time to devote to their cases. Often, they say, the cases involve thousands of pages of briefs the judges don't have time to read and are based on precedents that sometimes are so thin they leave panels virtually without legal or historical guidance (Miller, 2005).

One would assume this high rate of reversal make sense because the appellate judges, who have a higher level of experience and presumably more insight into the mechanics of the WTO would be inclined to overturn confused Panelists. However, that is not necessarily the case either. The issue is often the vague wording of international trade law, which doesn't provide the judges much concrete rules to go by. In one case, recalled a former chairman of the WTO's Appellate Body, "the appeals group spent weeks wrestling over shades of meaning of 'and/or'" (Miller, 2005).

This is not altogether uncommon in the world of international trade law, however. Unlike a *common law* system, where each case is binding on all future cases, international law, as well as WTO law, generally follows a *civil law* system. Under a civil law system, each panelist or judge focuses on the original language of the law itself rather than on the precedent set before it by earlier courts. Thus, the language of the DSU can be reinterpreted so it fits with whatever modern challenges come its way.

Regardless, it was noticeable that the appealing parties had a higher GDP than the non-appealing parties by about $600 billion dollars.

FIGURE 24: GDP STATISTICS FOR DISPUTES THAT WERE APPEALED VERSUS DISPUTES THAT WERE NOT APPEALED (REPRISE)

	GDP (constant 2000 US$)		**GDP per capita** (constant 2000 US$)		**GDP per capita, PPP** (constant 2005 international $)	
Dispute Outcome	Appealed	Not Appealed	Appealed	Not Appealed	Appealed	Not Appealed
Average Participant	$4.5 trillion	$3.9 trillion	$20,675	$18,234	$25,133	$23,039
Difference	$598 billion		$2,441		$2,094	
P-Value	0.26		0.14		0.22	

I am unwilling to draw any major conclusions that this supports or does not support Galanter's theory. This is not only because the p-values are statistically non-significant, but also because the results of the following data regarding average experience levels contradicted any claim that the "haves" are appealing:

FIGURE 25: EXPERIENCE LEVELS FOR DISPUTES THAT WERE APPEALED VERSUS DISPUTES THAT WERE NOT APPEALED

	Experience Level	
Dispute Outcome	Appealed	Not Appealed
Average Participant	58 experience points	61 experience points
Difference	3 experience points, but the p-value is 0.76, so it is also not statistically significant	

As the above chart shows, the average appealer has less experience than the average non-appealer. Perhaps this fails to support Galanter's theory that the "haves" are more likely to appeal cases based on their long term strategic interests. On the other hand, perhaps veterans of the WTO dispute settlement system realize that appeals are useful in only certain instances, and indeed are appealing, but only when they are most likely to win. Regardless, future research on this subject is desirable.

DOES THE DISPUTE SETTLEMENT PROCESS WORK?

The reader may recall that there are four possible steps to a WTO dispute. Step one is consultations (DSU Article 4). If those fail, the parties move onto step two, which is a panel hearing (DSU Article 6-16). If the outcome of the panel hearing is disputed, either one of the parties can move onto step three, which is to file an appeal (DSU Article 17-19). Ideally, WTO disputes are resolved after an appeal, but oftentimes, the fourth procedural step is invoked: a compliance dispute (DSU art 21-23). Since my initial inquiry was into the effectiveness of the WTO as a "business," this was an area that was particularly interesting to me. How effective was the WTO in holding the members to their agreed-upon rules?

Before we look at the data, allow me to elaborate on the compliance process. Once it has been concluded that the responding party has indeed breached (or is breaching) its WTO obligation, the losing member must give a report to the DSU about its intent to comply with the ruling (DSU Article 21.3). If the member cannot comply immediately, it is allowed a "reasonable period of time in which to do so." The reasonable period of time is defined as:

> (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,
>
> (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,
>
> (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

To summarize the above, there are three ways in which a "due date" can be determined: a DSB-approved request by the respondent, mutual agreement between the disputing parties, or, if they cannot agree, arbitration with an independent arbiter.

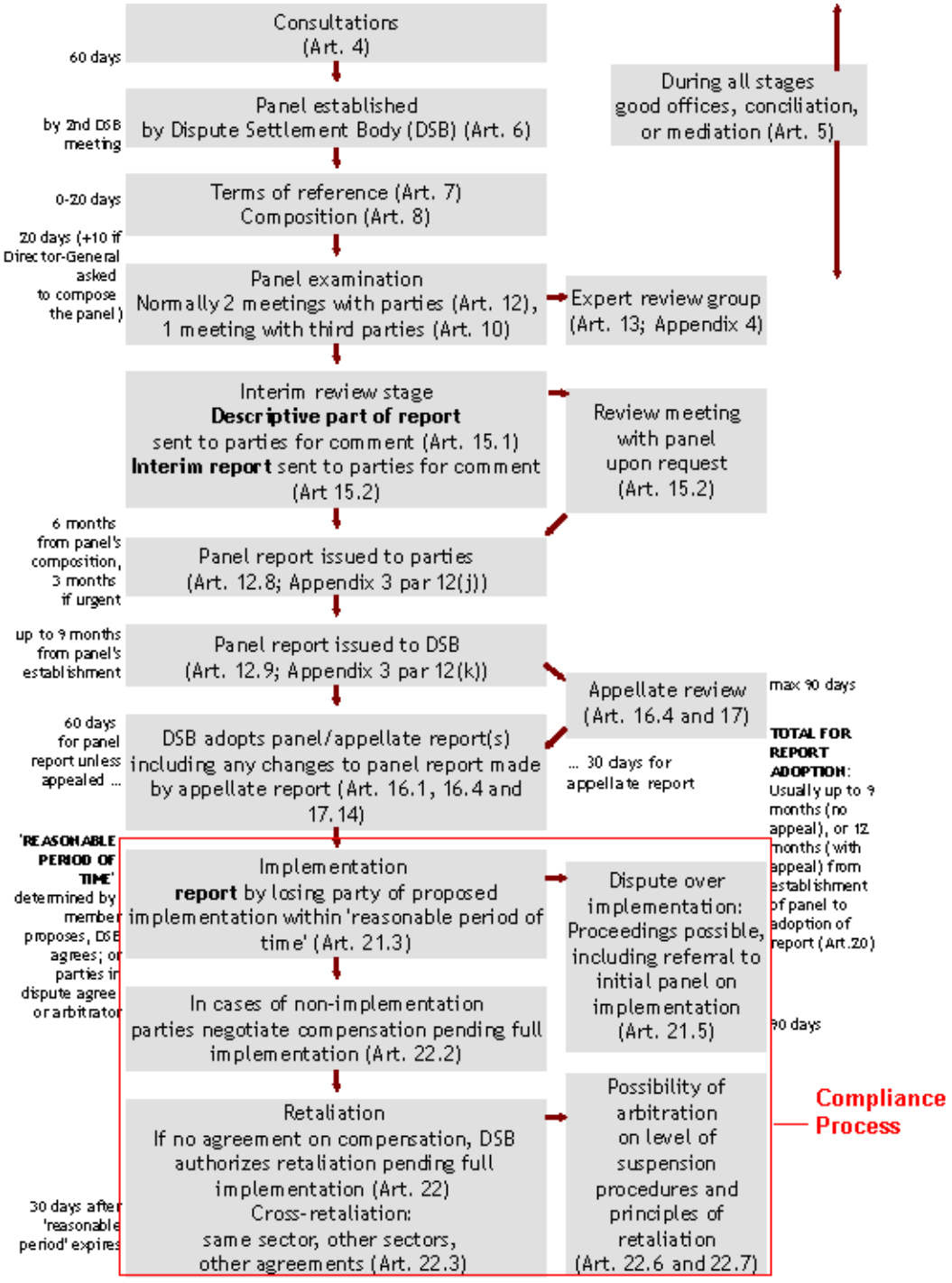
No matter how it has been determined, once the official due date has been set, three things can happen: implementation, arbitration (round two), or a compliance dispute. Sometimes the respondent implements the Panel's recommendations immediately with no complaint, in which case the books are shut

and the case is closed. However (as I am sure the reader could imagine), passing a piece of legislation – especially in democratic societies –can require a lot of time, lobbying, and political will. There were a few instances, for example, when the United States promised to implement the WTO rulings as soon as possible, but it ended up taking Congress years to agree upon and pass an appropriate bill (*see*, for example, DS136, DS162, DS217, some of which are still active.)

This is where Article 22, Compensation and the Suspension of Concessions, comes into play. The parties may mutually agree on an appropriate "punishment," the kind of which I will address at a later time. However, as parties often fail to agree on issues of self-inflicted damages, an arbitrator typically makes the ultimate decision. When this ruling is made, the respondent is bound to suffer these consequences until its laws are in conformity with the WTO ruling.

However, in some cases, the respondent will neither implement nor fail to implement the ruling: it will instead pass a law that purports to comply with the rulings, but the complainant disagrees that the new law is compliant. In this case, the complainant may file what is known as an Article 21.5 Compliance Dispute. Once again, the parties argue their case in front of the Panel (typically the same Panel that heard the first case) and the Panel will make another determination about whether or not the respondent has complied with the ruling. And yes, the Panel decision can be appealed – again – to the Appellate Body, which will either uphold or reverse the Panel's findings.

FIGURE 26: FLOW CHART OF THE DISPUTE SETTLMENT PROCESS - REPRISE



Hopefully this clarifies why the resolution times can be so long. The longest possible case could be endless: (step 1) consultations; (step 2) Panel hearing; (step 3) Appellate Body Hearing; (step 4) arbitration over reasonable time; (step 5) failure to implement and thus arbitration over concession levels; (step 6) a "change" in the respondent's laws; (step 7) a compliance dispute to determine if the change is enough to make the respondent in compliance; (step 8) an appeal to the compliance dispute; (step 9) arbitration over reasonable time; (step 10) a second failure to implement and thus arbitration over concession levels; (step11) another "change" in the respective law; (step 12) another compliance dispute . . . and so on and so forth.

As one would imagine, a respondent could manipulate this process in order to delay compliance with a particular ruling. This is what arguably has happened with the so-called "Softwood Lumber" cases between the U.S. and Canada (DS236, DS257, DS264, DS277), the Boeing/Airbus disputes between the U.S. and the E.U. (DS222, DS316, DS317, DS347, DS353) and the "Bananas" cases between South America and the E.U. (DS16, DS27, DS105, DS158, DS361, DS364). Some of these disputes are well over ten years old and appear to have no end in sight because the respondent made token "changes" to its policies, and allowed the complainant to continue litigating the issue over and over until it made another token "change."

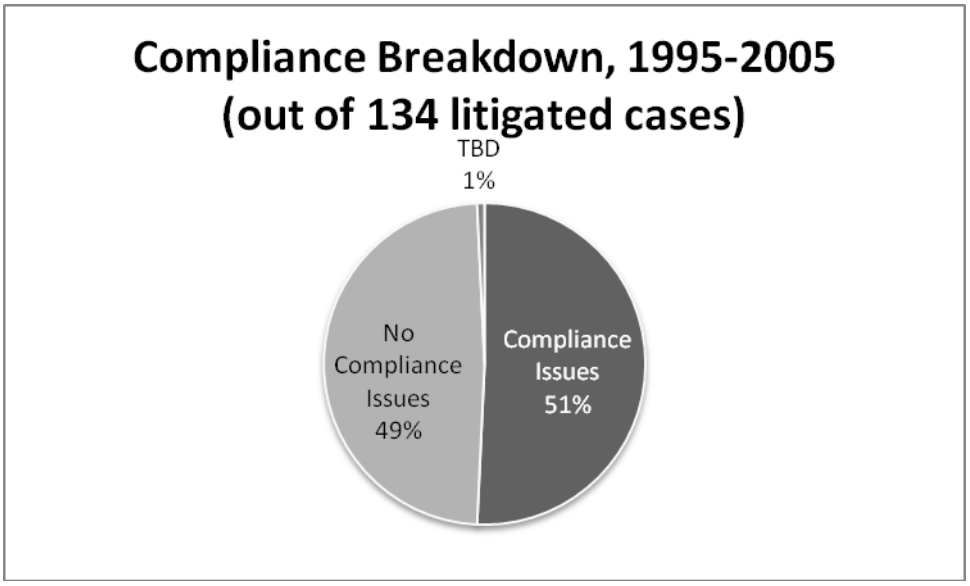
Because of these possible outcomes, I had to look at compliance in a myriad of ways. My first level of analysis was simply to categorize "compliance issues," meaning, there was some sort of discussion related to compliance, be it arbitration over the "reasonable time," concessions, or even mere complaint with no resulting

action taken by the complainant. Once again, I was surprised by the results. I found that when it came to compliance, roughly 50% of the disputes had no compliance issues at all.

FIGURE 27: COMPLIANCE BREAKDOWN, 1995-2005 (OUT OF 134 LITIGATED DISPUTES)

Compliance Breakdown 1995-2005 (out of 134 litigated disputes)		
	Total Cases	Percentage
Compliance Issues	68	51%
No Compliance Issues	65	49%
TBD	1	1%

FIGURE 28: COMPLIANCE BREAKDOWN, GRAPH, 1995-2005 (OUT OF 134 LITIGATED DISPUTES)



Some may be disheartened with the thought that compliance issues arose over 50% of the time, but please remember that my threshold for "compliance issue" was so low it included even the smallest of objections. It is also important to keep

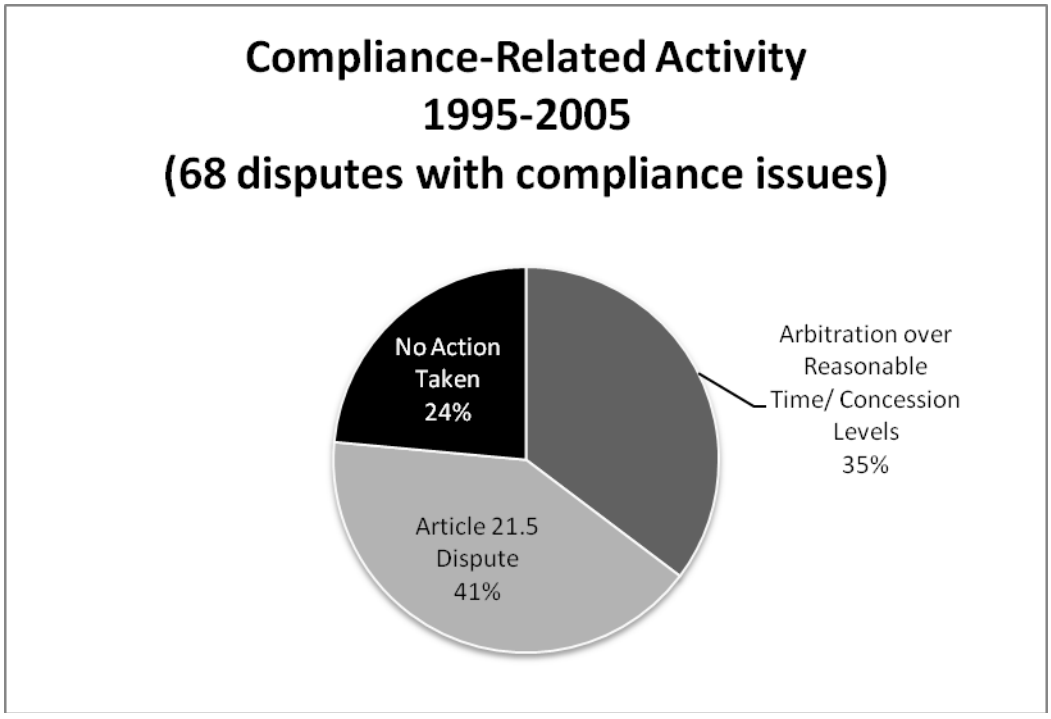
everything in perspective: almost 50% of the time, the losing member implemented the ruling immediately, with no delay or comment.

That being said, I moved on to the next level of analysis, which was to quantify the actual action taken by the complainant. In doing this, I found that in 16 cases, the parties took no further measures to enforce compliance.

FIGURE 29: COMPLIANCE-RELATED ACTIVITY, 1995-2005 (OUT OF 68 DISPUTES WITH COMPLIANCE ISSUES)

Compliance-Related Activity, 1995-2005 (68 disputes with compliance issues)		
Action Taken	Total Cases	Percentage
Arbitration over Reasonable Time/ Concession Levels	24	35%
Article 21.5 Dispute	28	41%
No Action Taken	16	24%

FIGURE 30: COMPLIANCE-RELATED ACTIVITY, GRAPH, 1995-2005 (OUT OF 68 DISPUTES WITH COMPLIANCE ISSUES)

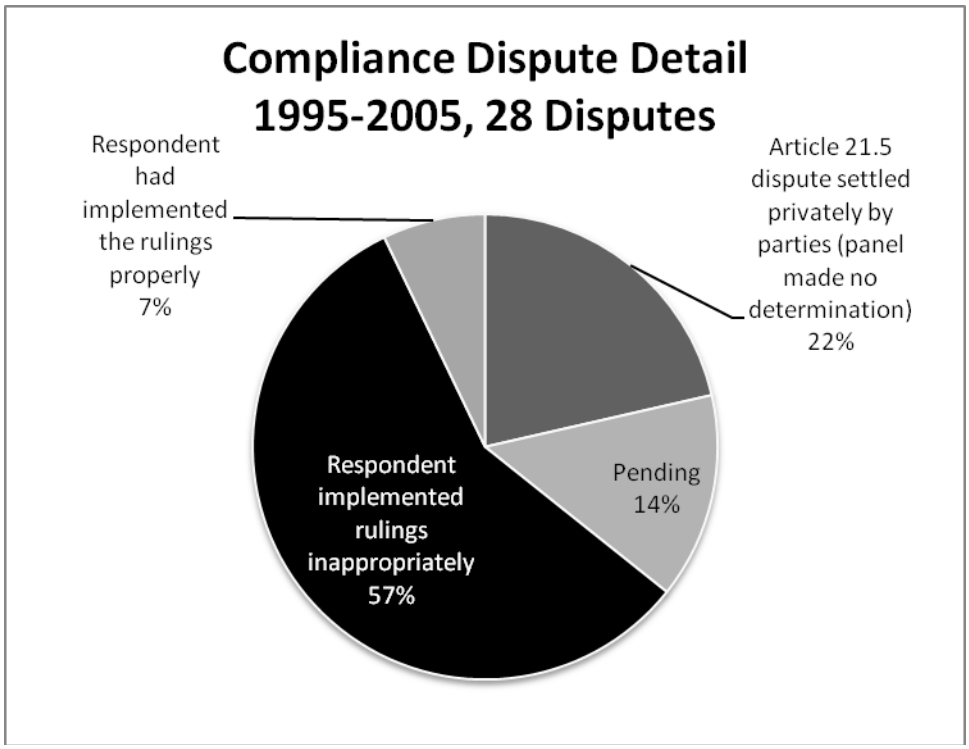


My next level of inquiry was into the 28 remaining cases that resulted in Article 21.5 Compliance Disputes. Specifically, I determined how frequently the respondent failed to implement the Panel and/or Appellate Body's initial recommendation.

FIGURE 31: COMPLIANCE DISPUTE RESULT, 1995-2005 (OUT OF 28 ARTICLE 21.5 DISPUTES)

Compliance Dispute Detail 1995-2005 (28 Article 21.5 disputes)		
	Total Cases	Percentage
Article 21.5 dispute settled privately by parties (panel made no determination)	6	21%
Pending	4	14%
Respondent implemented the rulings properly	2	7%
Respondent implemented rulings inappropriately	16	57%

FIGURE 32: COMPLIANCE DISPUTE RESULTS, 1995-2005 (OUT OF 28 ARTICLE 21.5 DISPUTES)



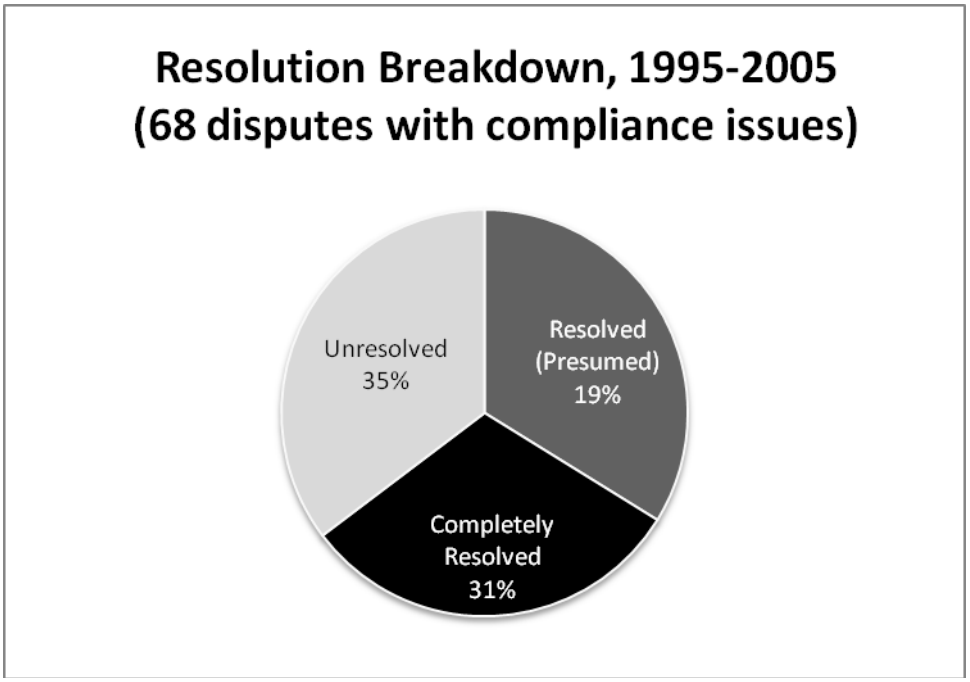
Based on the above results, I found that there were really only 16 cases out of the 335 where a country appeared to manipulate the compliance system in order to delay implementation. Keep in mind of course, that while some of these 16 disputes may have been willful manipulation of the compliance system; some may have been inadvertent mistakes. Either way, looking at it from this perspective, one can see that, at most, less than 5% of the WTO disputes had willful compliance issues.

Regardless, while all these charts measure certain compliance-related behaviors, they still do not quantify my initial question: how effective is the compliance process? Thus, I made one last attempt to determine which of the cases were completely resolved. This was a difficult task because many of these disputes are on their second round of compliance appeals. However, I found that roughly one-third of these cases are still being evaluated for full compliance, another third are clearly resolved, and the last third are what I call "Resolved (Presumed)" because a number of years have passed with no official objection to the method of implementation (i.e. the complainant hasn't filed a 21.5 Compliance Dispute yet, but it still could).

FIGURE 33: RESOLUTION BREAKDOWN, 1995-2005 (OUT OF 68 DISPUTES WITH COMPLIANCE ISSUES)

Resolution Breakdown 1995-2005 (68 disputes with compliance issues)		
	Total Cases	Percentage
Resolved (Presumed)	23	34%
Completely Resolved	21	31%
Unresolved	24	35%

FIGURE 34: RESOLUTION BREAKDOWN, GRAPH 1995-2005 (OUT OF 68 DISPUTES WITH COMPLIANCE ISSUES)



Again, putting this in perspective with the whole, there are 24 out 335 cases that still appear to be unresolved, which is only 7%.

Regardless, it is far too early, in my opinion, to draw any definitive conclusions about compliance with the first decade of WTO disputes, so future inquiry is desired. For this reason I chose not to compare economic data between disputes with compliance issues and disputes without compliance disputes. However, I would consider this data to be crucial to any future assessment of the WTO's effectiveness.

CHAPTER FOUR: DO THE HAVES COME OUT AHEAD?

HOW DOES ONE "COME OUT AHEAD"?

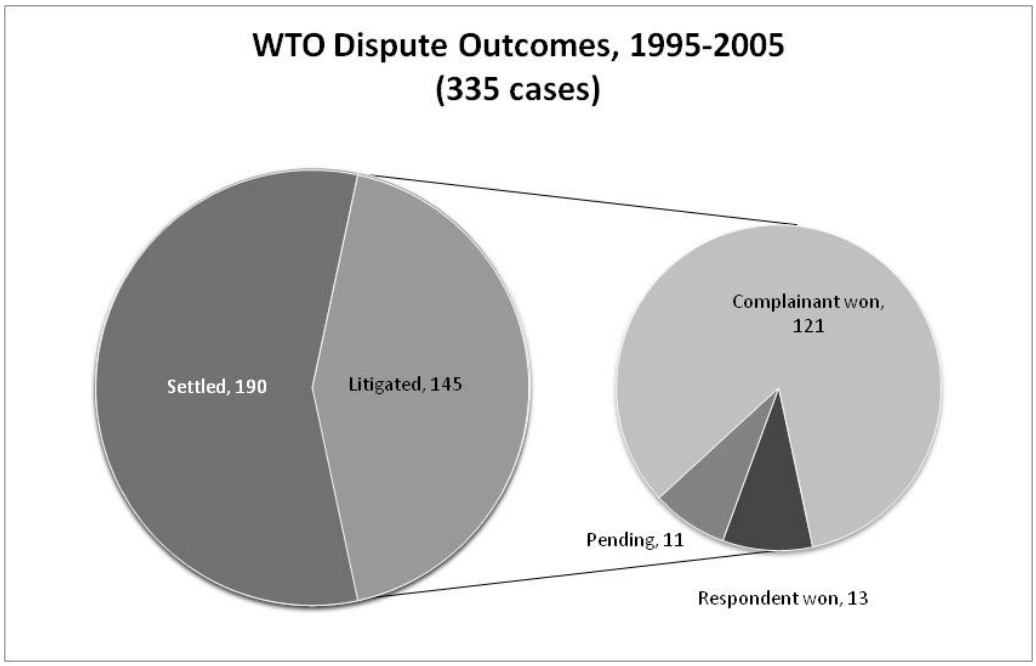
As I discussed thoroughly in earlier parts of this paper, my definition of "winner" and "loser" would have a major impact on the outcome of the study. For better or for worse, however, I defined "loser" as a party who was legally obligated to change a WTO-violating practice. Even if it was convenient for the violator to change its practice, even if the party was only required to change one practice out of many allegedly harmful practices, I still considered this submission to the WTO to be a "loss."

I discovered in cases that were litigated, the complainant won 90% of the time:

FIGURE 35: WINNER/LOSER DISTRIBUTION (OUT OF 134 ELIGIBLE CASES)

Winner/Loser Distribution 1995-2005 (out of 134 eligible litigated cases)		
Complainant Won	121	90%
Respondent Won	13	9%
Pending	11	8%

FIGURE 36: DISPUTE OUTCOMES, 1995-2005



At first I thought this may have been an error caused by my low threshold for winning, but the results were not that far off from other similar studies. Holmes, Rollo, & Young, for example, used the exact same definition in their 2003 study and found the win rate to be 88% of cases (they were reporting on the disputes from 1995-2002). This is also a good time to remind the reader that the Steel Safeguard cases involving the United States added eight extra cases where the complainant

prevailed, though it hardly makes a difference (the win rate would instead drop to 114 out of only 127 litigated cases, which is still an average of 89.8%).

So with such a huge success rate, why are there not more complaints? Well, first of all, it is possible that with each "win," countries around the world are changing their policies to comply with the finding, thus decreasing the available pool of offenders to sue. More likely, however, countries are just being judicious: they bring the most egregious of offenses to the WTO because it is very likely to find an injury. Typically, this occurs when all other avenues have failed and the impact is so great to their economy that it is worth the extra cost to litigate.

It is also possible that the cost of litigation is a deterrent. It has been estimated that the average price tag for a WTO dispute that makes it all the way to the Appellate Body is approximately $500,000 (Mosoti, 2006). Depending on the amount of trade at issue, a WTO dispute could be an unwarranted waste at the expense of vital governmental services, tax dollars and other necessary welfare expenditures, especially for developing countries. Because so many of these potential underdogs are failing to address their trade injuries within the WTO, I am unwilling to make the blanket statement that the "have-nots" came out ahead in the WTO.

Instead, I am willing to say, simply, that the haves did not come out ahead in the first decade of the WTO Dispute Settlement process. More specifically, the average winner had a lower GDP and experience level than the average loser

(though that is not to say the average winner's GDP levels were all that "low").

Regardless, I found the following:

FIGURE 37: GDP-RELATED STATISTICS, WINNER VERSUS LOSER

GDP-Related Statistics		
The average winner had *less* than the loser in (i.e. the underdogs won in) . . .	***…but…***	**…the average winner had *more* than the loser in (i.e. the haves won in) . . .**
• GDP (constant 2000 US$) • GDP per capita (constant 2000 US$) • GDP per capita, PPP (constant 2005 international $) • Experience levels		*None of the GDP or experience-related statistics!*

As you can see from the above chart, in every single GDP-related statistic, the average winner had a lower economic statistic than the loser. At first sight, this was particularly surprising to me, and it verified that Galanter's theory that the "haves come out ahead" had not yet taken effect in the WTO.

But before I provide you with the "real" numbers, I would like to take a moment to define some terms. Specifically, the statistics I selected to analyze are the following:

1. ***Gross Domestic Product (constant US$):*** Gross domestic product ("GDP") is a measurement of a country's volume of production within its borders.

2. ***GDP per capita (constant 2000 US$):*** Gross domestic product per capita is a measurement of the total GDP divided by the population.

Case-In-Point #8: GDP and "Wealth"

DATE: 2005 Statistics

COUNTRY 1: New Zealand (GDP $60 billion)

COUNTRY 2: Bangladesh (GDP $61 billion)

COMPARE: Both New Zealand and Bangladesh have a GDP of roughly $60 billion in 2005, but according to the World Bank country classification system, New Zealand is listed as a high-income economy while Bangladesh is considered a low-income economy.

This is because the World Bank uses per capita statistics to determine a country's classification.

Therefore, if you were to divide the country's GDP evenly between each population, the average person in Bangladesh gets $400 a year while the average person in New Zealand gets $14,500.

STATISTICAL DECISION: Aware of this important distinction, I ran both overall and per capita statistics and found that the average winner had lower statistics, in both types, though only the GDP comparisons came out statistically significant.

3. ***GDP per capita, PPP (constant 2005 international $)***: Gross domestic product per capita in terms of purchasing power parity is a measurement of the total GDP in terms of the country's relative ability to purchase items in 2005, divided by the population.

Per capita statistics often say more about a country's population and theoretical distribution policies than its overall wealth. However, since it is similar to the statistic used by the World Bank to classify the difference between low income and high income economies, it was important to look at the results of winners and losers in terms of this distinction. Purchasing power parity is likewise a useful statistic because it shows the measurement of a country's currency in relation to the ability of its citizens to purchase like items. For example, if an item costs ten dollars in Country A but five dollars in Country B, this results in a ratio, which is useful to compare the general wealth of countries in terms of their ability to purchase goods. Thus, the statistic of GDP per capita PPP is a

measurement of the individual inhabitant's ability to purchase the same amount of goods in that currency and an equally helpful way of distinguishing a "have" from an "underdog.

For those who like to see the numbers in a more manageable format, I have provided the following rough estimate of the differences:

FIGURE 38: INCOME STATISTICS FOR AVERAGE WINNERS AND LOSERS

Income Statistics for Average Winners and Losers (134 litigated, but not pending cases)	Average Winner Statistics	Average Loser Statistics	Difference
GDP (constant 2000 US$)	3.8 trillion	4.8 trillion	-1.0 trillion (p-value=0.047)
GDP per capita (constant 2000 US$)	$19,000	$21,000	-$2,000 (p-value=0.141)
GDP per capita, PPP (constant 2005 international $)	$23,500	$25,500	-$2,000 (p-value=0.15)

While only the results for GDP were statistically significant, the average winner had a smaller GDP statistic than the loser in every category. The average GDP was over one trillion higher in the loser and both per capita results showed the average loser had over $2,000 per capita income than the winner. Taken at face value, these results show that the haves did not come out ahead in the first decade of WTO disputes. In fact, it is the underdogs who won.

REMOVING DISTORTIONS

While it appears that the average winner in WTO disputes is typically the economic underdog, there are some obvious issues with the numbers that must be explained. For example, how is it possible that the *average* WTO dispute involves economies valued in the trillions? The answer to this has more to do with the WTO members who choose to participate in WTO disputes than the average income level of the WTO members themselves. Specifically, the United States, the European Union, Canada, and Japan, commonly known as the "Quad," represent the "repeat players" within the WTO. Case in point, the United States was involved either as a complainant, respondent or third party in approximately 70% of all WTO cases.

FIGURE 39: PARTICIPATION LEVELS OF THE "QUAD"

Country	U.S.	E.U.	Japan	Canada
as Complainant	81	70	12	26
as Respondent	90	53	14	13
as a Third Party	63	72	73	59
Total	**234**	**195**	**99**	**98**
Total WTO Cases (1995-2005):	335			
Percentage of Involvement	**69.9%**	**58.2%**	**29.6%**	**29.3%**

While the U.S. level of involvement as a third party may seem unusual (63 cases), this is relatively "normal" for repeat players. Canada, for example, has participated as a third party in 59 cases, and the E.U. and Japan almost tied for the highest number of third party suits at 72 and 73, respectively.

Moving on to litigated cases, however, the U.S. was involved in almost *every* case that went into litigation.

FIGURE 40: PERCENTAGE OF U.S. INVOLVEMENT IN LITIGATED CASES

U.S. as Complainant	34
U.S. as Respondent	54
U.S. as a Third Party	53
Total Litigated Cases with U.S. as party	**141**
Total Litigated Cases in the WTO, 1995-2005, includes pending disputes	145
Percentage U.S. Involvement in Litigated Cases	**97.2%**

Originally I had hoped to remove the U.S. from the study to avoid any distortion it caused, but due to its extensive involvement, this seemed almost impossible. There were only four cases where the U.S. wasn't an official participant: DS8, DS10, DS75, and DS146. However, DS8 and DS10 were disputes where Canada and the European

Communities went after Japan for its unequal tax treatment for imported alcohol. The only reason the U.S. wasn't involved in these suits is because it filed one of its own, DS11!

This meant that without the United States, the WTO was virtually non-existent. That being said, the reader must now be on official alert that the country with the highest economic levels in the world is involved in so many cases that it skews the numbers much higher than would be normal. Acknowledging this fact in their 2003 World Bank study, Holmes, Rollo, & Young said it would be "nonsense" to exclude the U.S. because it was an accurate portrayal of the WTO system, which was dominated by the U.S. and European Communities. Thus, any skewing it caused was technically not a "distortion."

However, I was still determined to see how the first decade of WTO disputes looked without the United States, so I removed all cases in which the U.S. was a complainant or respondent, and recalculated the differences based on the remaining 54 cases.

FIGURE 41: INCOME STATISTICS - U.S. CASES REMOVED

Income Statistics Cases with U.S. as Complainant or Respondent Removed (54 cases)	**Average Winner Statistics**	**Average Loser Statistics**	**Difference**
GDP (constant 2000 US$)	2.25 trillion	2.28 trillion	- 30 billion
GDP per capita (constant 2000 USD)	$12,920	$13,104	-$185
GDP per capita, PPP (constant 2005 international $)	$17,811	$18,281	-$469

As above chart shows, the difference in GDP between the winners decreased from levels in the trillions to the billions, and difference in per capita levels dropped from the thousands to the hundreds. However, the numbers clearly show that the average winner still had lower wealth levels than the average loser.

Intrigued by this decrease in income gaps, I decided to further narrow the source data by cutting other possible distortions in the data. First, I looked at the "The Quad versus The Quad," or, in other words, the cases that involved only the U.S., the European Communities, Canada and Japan against each other. Then I looked at the "underdogs," or more specifically, the cases that did *not* involve the Quad as a main party. Interestingly, the underdog cases amounted to a very short list: only 13 cases did not have a member of the Quad participating as a complainant or respondent.

Using all four of these categories, I found the differences to be the following:

FIGURE 42: DIFFERENCES BETWEEN WINNERS AND LOSERS

Income Statistics for Average Winners and Losers (130 litigated, but not pending cases)	**All cases**	**U.S. Removed**	**Repeat Players Only** (The "Quad")	**Underdogs only** (no "Quad")
	(130 cases)	(54 cases)	(49 cases)	(13 cases)
GDP (constant 2000 US$)	-1.0 trillion	- 30 billion	-694 billion	**+16 billion**
GDP per capita (constant 2000 USD)	-$2,000	-$185	-$3,500	-$427
GDP per capita, PPP (constant 2005 international $)	-$2,000	-$469	-$3,500	-$509

The chart above shows the average income statistics for winners minus the average income statistics for losers. When the resulting number is negative, it means the

average winner was less wealthy in comparison to the average loser, presumably disproving Galanter's theory that the haves come out ahead. When the resulting number is positive, it means the average winner is wealthier compared to the average loser, supporting Galanter's theory.

As it turns out, the only instance where the winner appears to be wealthier than the loser is in the cases of non-Quad participants only. Thus, one could argue that in a world consisting exclusively of "underdogs" or "one-shotters," the haves *do* come out ahead. However, I decline to draw any such conclusion based on this sample not only because it is comprised of only 13 cases, which is clearly not enough data to make any definitive claims, but because a member of the Quad was still involved as a third party in every single one.

FIGURE 43: LIST OF CASES WITH UNDERDOGS ONLY (BUT AT LEAST ONE MEMBER OF THE QUAD WAS INVOLVED AS A THIRD PARTY)

Dispute ID Number	Date of Complaint	Outcome	Winner	Loser
DS22	30-Nov-95	Respondent prevailed	Brazil	Philippines
DS34	21-Mar-96	Complainant prevailed	India	Turkey
DS60	17-Oct-96	Respondent prevailed	Guatemala	Mexico
DS122	6-Apr-98	Complainant prevailed	Thailand	Thailand
DS156	5-Jan-99	Complainant prevailed	Mexico	Guatemala
DS169	13-Apr-99	Complainant prevailed	Australia	Korea
DS207	5-Oct-00	Complainant prevailed	Argentina	Chile
DS211	6-Nov-00	Complainant prevailed	Turkey	Egypt
DS238	14-Sep-01	Complainant prevailed	Chile	Argentina
DS241	7-Nov-01	Complainant prevailed	Brazil	Argentina
DS302	8-Oct-03	Complainant prevailed	Honduras	Dominican Republic
DS312	4-Jun-04	Complainant prevailed	Indonesia	Korea
DS331	17-Jun-05	Complainant prevailed	Guatemala	Mexico

One final note: most if not all of the previous literature makes mention of the lack of participation in the WTO by developing countries (*e.g.* Holmes, Rollo, & Young, 2003, Brown & Hoekman, 2005). While I will not address the subject here, I will mention that the results of this study confirm the observations of many regarding the missing players in WTO disputes. The *average* GDP of a complainant is over $3.8 trillion USD and the *average* GDP of a respondent is $4.8 trillion USD. Thus, one can conclude that these cases are not made of up countries with developing economies.

FREQUENCY OF WINNING VERSUS AMOUNT

Based on the above research, it appears the commonly held belief that the "haves come out ahead" did not hold true for the first decade of WTO disputes. Of course there are always cases where the underdog beats the repeat player,[6] but I also wanted to determine if it was more *common* for the underdog to beat the repeat player.

To do this, I tested whether the winner had lower income statistics than the loser in a higher *number* of cases. In the next chart, I provide the results of (1) the average winner and loser for each category as well as (2) the number of instances where the winner and loser had "more" in a given category.

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[6] In 2002, for example, New Zealand, with a GDP of only $56 million, took on the United States with its then $10 trillion dollar GDP, and won (DS258). The case with the largest disparity in GDP levels (a difference of over $10 trillion) is a current case against the United States by Antigua and Barbuda. The U.S. lost the case but failed to comply with the DSB recommendations, which led to a long series of compliance negotiations (DS285). As of May 2009, the U.S. still had not changed its WTO-violating law.

FIGURE 44: INCOME STATISTICS FOR AVERAGE WINNERS AND LOSERS (BY AVERAGE AND BY INSTANCE)

Income Statistics for Average Winners and Losers (Actual Numbers)	Data Category	All Cases (134 cases)	U.S. Removed (54 cases)	Repeat Players Only (The "Quad") (49 cases)	Underdogs Only (no "Quad") (13 cases)
GDP (constant 2000 US$)	Winner Average	$3,838,071,531,642	$2,248,795,591,557	$5,510,518,979,417	$271,968,588,406
	Loser Average	$4,803,971,072,321	$2,276,056,063,488	$6,204,540,690,192	$255,110,335,094
	Instances of Haves Winning	57	28	20	7
	Instances of Underdogs Winning	73	26	29	6
GDP per capita (constant 2000 US$)	Winner Average	$18,795	$12,920	$24,974	$4,557
	Loser Average	$21,053	$13,104	$28,535	$4,984
	Instances of Haves Winning	58	27	19	6
	Instances of Underdogs Winning	72	27	30	7
GDP per capita, PPP (constant 2005 international $)	Winner Average	$23,387	$17,811	$29,407	$8,363
	Loser Average	$25,590	$18,281	$32,905	$8,873
	Instances of Haves Winning	57	27	18	6
	Instances of Underdogs Winning	73	27	31	7

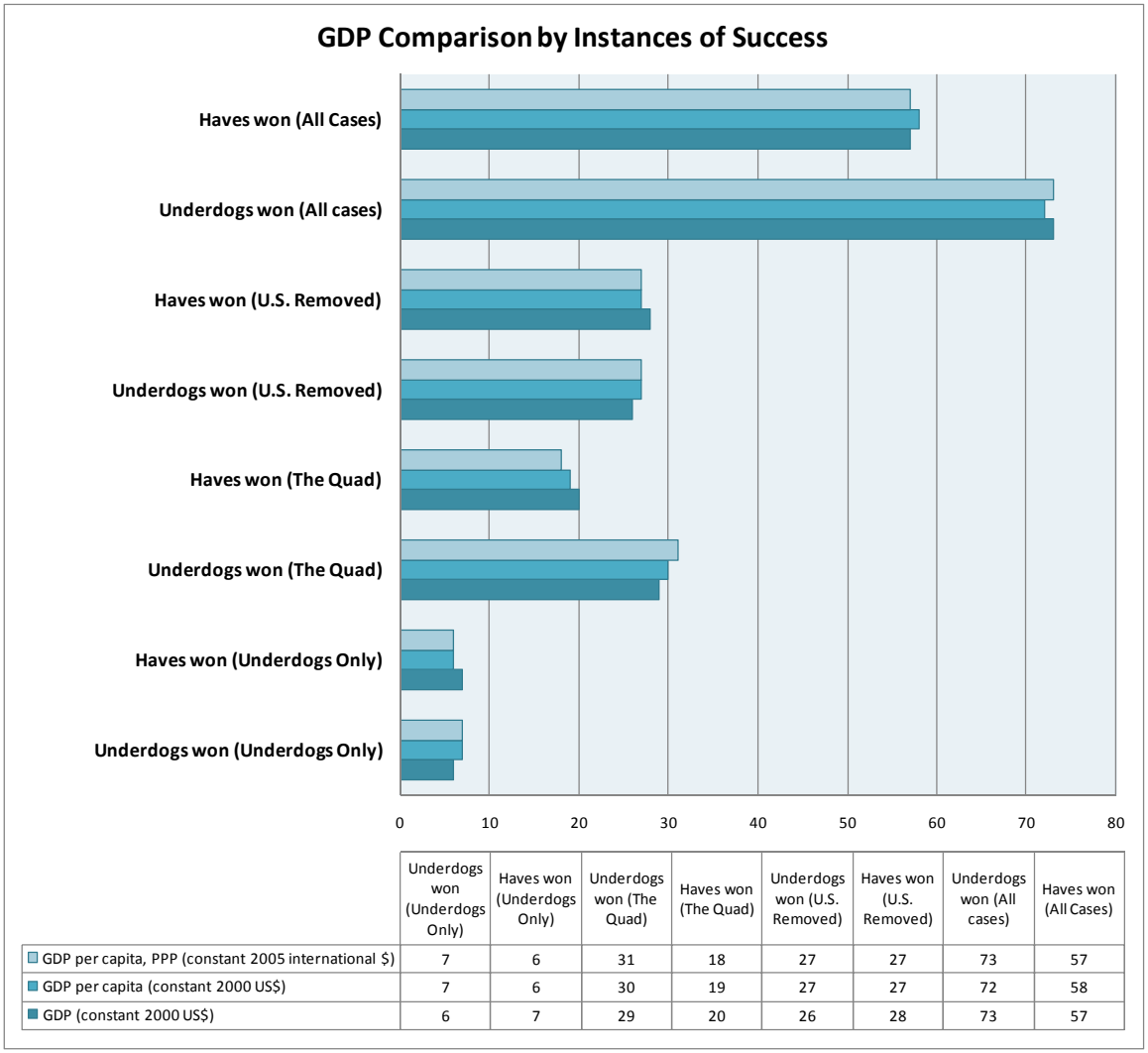
In the following chart I use the data from Figure 44 to calculate the difference between each series of cases, both by average and the number of instances. If the underdogs came out ahead in a particular category, the field is shaded. If the haves came out ahead in a particular category, the field remains unshaded.

FIGURE 45: DIFFERENCE IN INCOME STATISTICS FOR AVERAGE WINNERS AND LOSERS (BY AVERAGE AND BY INSTANCE)

Differences in Average Winners and Losers (Shaded = Underdogs win)	Difference, Winner/Loser by average and by instance (shaded=underdogs win)	All Cases (134 cases)	U.S. Removed (54 cases)	Repeat Players Only (The "Quad") (49 cases)	Underdogs Only (no "Quad") (13 cases)
GDP (constant 2000 US$)	Average Difference	-$965,899,540,679	-$27,260,471,931	-$694,021,710,775	$16,858,253,312
	Instance Difference	-16	2	-9	1
GDP per capita (constant 2000 US$)	Average Difference	-$2,259	-$185	-$3,561	-$427
	Instance Difference	-14	0	-11	-1
GDP per capita, PPP (constant 2005 international $)	Average Difference	-$2,203	-$469	-$3,499	-$509
	Instance Difference	-16	0	-13	-1

In doing this, I discovered that in the majority of the litigated cases, the underdogs come ahead. This is both true for all cases together as well as cases with members of the Quad only. However, when I removed distortions from the U.S. and the Underdogs, the haves and underdogs came out as winners in approximately the same amount of instances.

FIGURE 46: INCOME STATISTICS BY NUMBER OF CASES



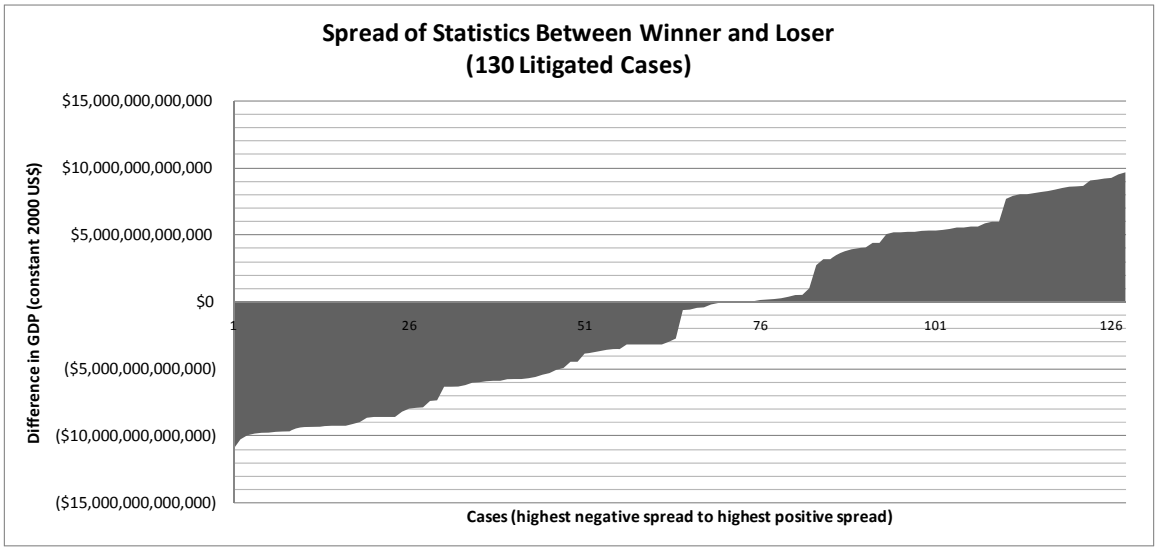
	Underdogs won (Underdogs Only)	Haves won (Underdogs Only)	Underdogs won (The Quad)	Haves won (The Quad)	Underdogs won (U.S. Removed)	Haves won (U.S. Removed)	Underdogs won (All cases)	Haves won (All Cases)
GDP per capita, PPP (constant 2005 international $)	7	6	31	18	27	27	73	57
GDP per capita (constant 2000 US$)	7	6	30	19	27	27	72	58
GDP (constant 2000 US$)	6	7	29	20	26	28	73	57

As Figure 46 shows, the underdogs won more often than the haves. This was true for all the disputes as well in disputes between members of the Quad. However, when

the U.S. was removed, the haves and underdogs came out ahead an equal amount of time. This was true for 13 cases without involvement of the Quad as well. Because of these two instances where the haves came out ahead, I am unwilling to claim that the underdogs triumphed in the first decade of disputes. However, I am willing to say with full confidence that that haves did not come out ahead.

The second graph I constructed was a spread of the incomes from lowest to highest to determine if the opponents in the cases tend to be at a high spread versus a low spread:

FIGURE 47: SPREAD OF INCOMES (HIGHEST NEGATIVE SPREAD TO HIGHEST POSITIVE SPREAD)



The cases on the far left of the graph are the cases where the winner had much lower income statistics than the loser. The cases on the right are cases where the loser had much higher income statistics than the winner. The cases in the middle are cases where the winner and loser had somewhat similar statistics.

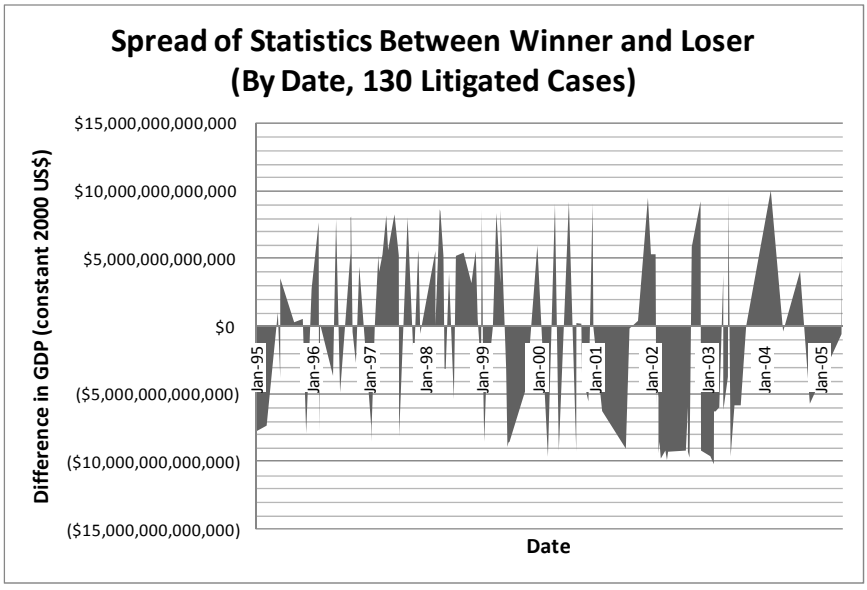
It is evident that the spreads are somewhat even on both sides, but there is a larger triangle in the negative section (left side), showing that the winners tend to have lower income statistics than the losers more than 56% of the time. The following chart provides both the instances where underdogs and haves won as well as the volume of the income spread for each side. While I did calculate the areas of each side to confirm, I was functioning in "quadrillions."

FIGURE 48: SPREAD OF GDP FROM LOWEST TO HIGHEST (NEGATIVE TO POSITIVE)

	GDP (constant 2000 US$)
Instances of Underdogs Winning	73
Instances of Haves Winning	57
Underdogs Win By:	16 instances, or 56% of the cases
Total spread amount with underdogs winning	$319 trillion
Total spreads amount with haves winning	$302 trillion
Difference (weighing on the underdog side)	$17 trillion

In my final analysis, I looked at the spread in cases based on time, to see if the overall litigation pattern was changing.

FIGURE 49: SPREAD OF INCOMES BY DATE



As the graph shows, the shape of litigation has evolved slightly over the past 10 years. On the left side of the graph, the cases where the winners have lower income statistics appear sparse. On the right side of the graph, the cases where the winners have lower income statistics appear to thicken, showing that in the latter portion of the decade, it is became more common for winners to have lower income statistics.

While the data sample of WTO litigation is small, it appears to be consistent. The economic underdogs came out ahead in the first decade of WTO disputes. This defies the first part of Galanter's hypothesis that the haves in terms of economic wealth will come out ahead. However, because Galanter was careful to point out that "haves" do not exclusively coincide with "wealthy" parties, the next section necessarily focuses on his second point, that experience helps parties come out ahead as well.

EXPERIENCE

One of the other ways I looked at WTO disputes was through the eyes of a "repeat player." Though I have already provided the some of the details for this data in earlier chapters, I felt it was a crucial enough portion of Galanter's hypothesis to warrant a separate chapter. Do experienced parties tend to litigate more? When they do litigate, do they win?

My first order of business was to develop a way of quantifying and measuring the "experience level" of each country at a given time to determine if more experienced countries win more than less experienced countries. To do this, I

created a system whereby country could earn "experience" points over the ten year period. This way I could take the average experience of a settler versus litigator and a winner versus loser.

My method was simple: if a country was involved in a WTO dispute as a complainant or respondent, I gave it one "experience point." If a country was involved in a WTO dispute as a third party, I gave it ½ of an "experience point." I did this for every country, for every WTO dispute so that I could derive an average "experience level" for the winner and loser at any given moment of time in the 1995-2005 period.

In the end, I found that the average participant in a WTO dispute had approximately 47 experience points under its belt in the first ten years. However, as you can see in the below chart, the experience levels varied to a statistically significant degree when it came to settling/litigating and winning and losing.

FIGURE 50: AVERAGE EXPERIENCE POINTS FOR WTO PARTICIPANTS

Category	Settling Parties	Litigating Parties	Average Winner	Average Loser	Appealed Cases	Not Appealed Cases
Average Experience Level	39	59	50	68	58	61
Difference: (shaded = winning party has less experience)	-20		-18		-3	
P-value (shaded = statistically significant)	0.000001		0.007		0.759135	

It appeared that less experienced parties were more likely to settle, which possibly could relate to some of the earlier suggestions about economically struggling

countries being "desperate" to settle. However, it could also mean that certain members are simply culturally averse to litigation and generally prefer to settle disputes rather than litigate.

The real standout in this data, however, is the fact that, when it comes to winning and losing, it is evident that the underdogs come out ahead yet again. The average winner had 19 less experience points than the loser, showing that heavy participation did not guarantee a win. To further unravel this phenomenon, I decided to look at the United States, which, with 234 cases under its belt, had the largest experience level of any WTO member.

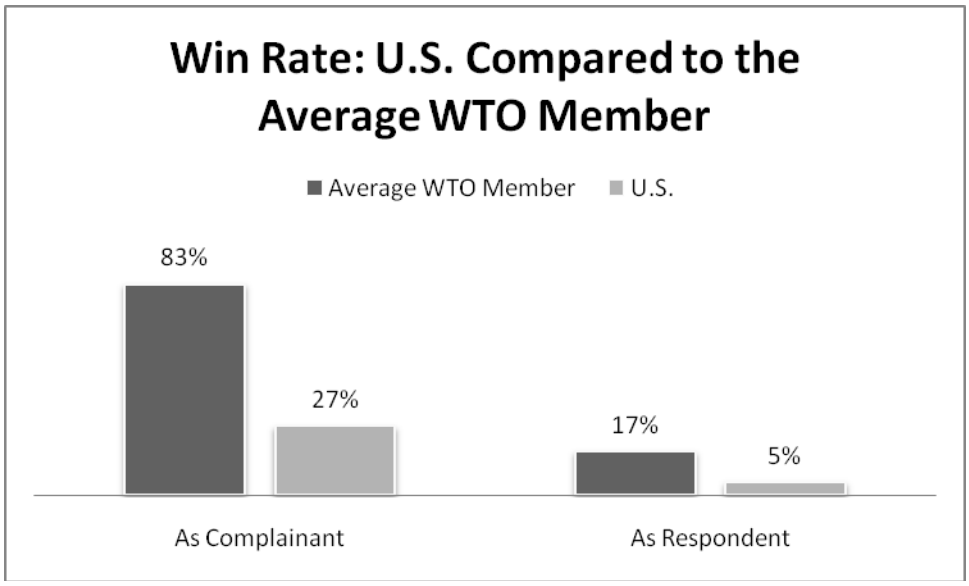
First of all, while the U.S. was the complainant 81 times, it was brought in as a respondent 91 times. This means the U.S. is being sued more often than it itself is suing. Once again, this is a crucial time to consider the effect of the Steel Safeguard Cases, in which the U.S. was brought in as a respondent for the same claim in eight separate disputes and proceeded to lose all of them. However, this distinction does not detract from the fact that it has been hailed into a WTO dispute at least as much as it has hailed others into a dispute. Horn and Mavroidis use this as evidence to show that the U.S. "dominate[s] less than expected, being much more often the subject of complaints, than a complaining party" (2008). However, Horn and Mavrodis also use the fact that the U.S. has a very low share of its citizens being selected as panelists to back up their claim.

To their findings and mind, I add the following information: while the average rate a complainant prevails in a WTO dispute is 83%, the U.S. won only 25 out of 91 cases, which is only a 27% win rate. Additionally, while the average rate of the respondent winning is 17%, the U.S. managed to defend itself successfully in 5 out of 91 cases, which is only a 5% defense rate.

FIGURE 51: WIN RATES FOR THE UNITED STATES

Win Rate	Average WTO Member	**United States** (including Steel Safeguard Cases)	**United States** (excluding Steel Safeguard Cases)
As Complainant	83%	27%	30%
As Respondent	17%	5%	6%

FIGURE 52: WIN RATES FOR THE UNITED STATES, GRAPH



Therefore, it is clear that experience does not equal success in WTO disputes (at least not yet). It also shows that any claims that the U.S. is "controlling" the WTO dispute settlement system is patently untrue.

CONCLUSION: ROUND ONE FOR THE UNDERDOGS, BUT SO WHAT?

THE MISSING PARTICIPANTS IN THE WTO DISPUTE SETTLEMENT SYSTEM

No matter how I went about analyzing my data on the Dispute Settlement system, I couldn't help but notice the stark absence of developing countries in the process. Furthermore, with the average GDP statistics resting in the trillions, I realized it would be inappropriate of me to claim that my results showed that the "have nots" came out ahead in the first decade of disputes. I instead used the term "underdogs" to capture the phenomenon whereby the winner had a lower GDP and experience level than the loser.

However, I wanted to measure precisely *how* absent developing countries were in the first decade so that their participation could be compared over time. To

do this, I had to reorganize my database in terms of WTO membership instead of WTO disputes, which meant I recompiled information about all 153 members, including member name, date of accession, number of cases as respondent, complainant, third party, whether it is categorized by the United Nations as an LDC, and whether it has a high, upper-middle, lower, or low income economy based on World Bank definitions.

While the WTO does not define which of its members are developing countries, it acknowledges that 32 of its members are on the United Nations official LDC list. Per the WTO's website: "There are no WTO definitions of 'developed' or 'developing' countries. Developing countries in the WTO are designated on the basis of self-selection although this is not necessarily automatically accepted in all WTO bodies." Thus, the first and most obvious step was to look at the number of cases these 32 LDC countries were involved in.

The results were bleaker than I expected: of the 335 total WTO cases, LDC countries were only involved in 16 of the disputes, which is less than 5%. Furthermore, there was only one case (DS306) where an LDC member (Bangladesh) was involved as a main party; all the rest involved LDC members as third parties only. Further curious to measure developing countries' absence, I decided to look at WTO participation in terms of the country classification system as defined by the World Bank. Under this system, the World Bank uses gross national income per capita (GNI per capita) to label individual countries as high income economies,

upper-middle income economies, lower-middle-income economies and low-income economies.

Using this information, I created a chart which quantified the number of disputes between each classification of country. The darker shading indicates a higher volume of disputes between those categories. The lighter shading indicates a lower volume of disputes between those categories.

FIGURE 53: WTO PARTICIPATION BY WORLD BANK COUNTRY CLASSIFICATIONS

Dark = High Volume Light = Low Volume	High-income economies	Upper-middle-income economies	Lower-middle-income economies	Low-income economies
High-income economies against…	148	41	25	2
Upper-middle-income economies against…	37	13	12	0
Lower-middle-income economies against…	23	16	7	0
Low-income economies against…	1	0	2	0
Totals*	209	70	46	2

** out of 327 eligible cases, not including cases with multiple complainants*

As the chart above shows, the bulk of disputes occurred between high-income economies while the least amount of disputes occurred between lower-middle-income and low-income economies. Once again, it is evident that the large majority of countries using the WTO system are ones with higher economic indicators.

Put simply, developing countries are hardly participating in the WTO Dispute Settlement System. If that is not enough to illuminate the phenomenon, below is a list of all the WTO members in order of their participation in the system. It should only take a brief glance through these pages to realize that hardly 50% of the WTO members have participated in disputes (56.8%, to be exact).

FIGURE 54: WTO MEMBERS IN ORDER OF PARTICIPATION

WTO Member/ Accession Date	World Bank Country Classification	LDC?	Number of Cases to Date	as Complainant	as Respondent	as Third Party
1. United States 1 January 1995	High-income		234	81	90	63
2. European Communities 1 January 1995	High-income		195	70	53	72
3. Japan 1 January 1995	High-income		99	12	14	73
4. Canada 1 January 1995	High-income		98	26	13	59
5. India 1 January 1995	Lower-middle-income		80	16	17	47
6. Brazil 1 January 1995	Upper-middle-income		75	22	13	40
7. China 11 December 2001	Lower-middle-income		73	4	11	58
8. Korea, Republic of 1 January 1995	Low-income		68	12	13	43
9. Mexico 1 January 1995	Upper-middle-income		67	15	13	39
10. Australia 1 January 1995	High-income		54	7	9	38
11. Thailand 1 January 1995	Lower-middle-income		43	11	1	31
12. Argentina 1 January 1995	Upper-middle-income		41	9	16	16
13. Chile 1 January 1995	Upper-middle-income		37	10	10	17
14. New Zealand 1 January 1995	High-income		33	6	0	27
15. Chinese Taipei 1 January 2002	n/a		32	2	0	30
16. Norway 1 January 1995	High-income		27	2	0	25
17. Turkey 26 March 1995	Upper-middle-income		26	2	8	16
18. Colombia 30 April 1995	Lower-middle-income		21	4	1	16
19. Guatemala 21 July 1995	Lower-middle-income		18	6	2	10

20. Venezuela (Bolivarian Republic of) 1 January 1995	Upper-middle-income		18	1	2	15
21. Honduras 1 January 1995	Lower-middle-income		17	6	0	11
22. Paraguay 1 January 1995	Lower-middle-income		15	0	0	15
23. Ecuador 21 January 1996	Lower-middle-income		14	3	3	8
24. Peru 1 January 1995	Lower-middle-income		14	2	4	8
25. Philippines 1 January 1995	Lower-middle-income		13	3	4	6
26. Pakistan 1 January 1995	Low-income		13	3	2	8
27. Costa Rica 1 January 1995	Upper-middle-income		13	4	0	9
28. Cuba 20 April 1995	Upper-middle-income		13	0	0	13
29. Switzerland 1 July 1995	High-income		12	4	0	8
30. Indonesia 1 January 1995	Lower-middle-income		12	4	4	4
31. Hong Kong, China 1 January 1995	High-income		10	1	0	9
32. Hungary 1 January 1995	High-income		9	5	2	2
33. El Salvador 7 May 1995	Lower-middle-income		9	0	0	9
34. Nicaragua 3 September 1995	Lower-middle-income		9	1	2	6
35. Egypt 30 June 1995	Lower-middle-income		7	0	4	3
36. Jamaica 9 March 1995	Upper-middle-income		7	0	0	7
37. Uruguay 1 January 1995	Upper-middle-income		7	1	1	5
38. Iceland 1 January 1995	High-income		6	0	0	6
39. Dominican Republic 9 March 1995	Lower-middle-income		6	0	3	3
40. Singapore 1 January 1995	High-income		5	1	0	4
41. Panama 6 September 1997	Upper-middle-income		5	2	1	2
42. Poland 1 July 1995	Upper-middle-income		5	3	1	1
43. Barbados 1 January 1995	High-income		4	0	0	4
44. Sri Lanka 1 January 1995	Lower-middle-income		4	1	0	3
45. Côte d'Ivoire 1 January 1995	Low-income		4	0	0	4
46. Madagascar 17 November 1995	Low-income	Yes	4	0	0	4
47. Belize 1 January 1995	Upper-middle-income		4	0	0	4
48. Malaysia 1 January 1995	Upper-middle-income		4	1	1	2

49. Mauritius 1 January 1995	Upper-middle-income		4	0	0	4
50. Belgium 1 January 1995	High-income		3	0	3	0
51. Czech Republic 1 January 1995	High-income		3	1	2	0
52. Ireland 1 January 1995	High-income		3	0	3	0
53. Israel 21 April 1995	High-income		3	0	0	3
54. Slovak Republic 1 January 1995	High-income		3	0	3	0
55. Guyana 1 January 1995	Lower-middle-income		3	0	0	3
56. Swaziland 1 January 1995	Lower-middle-income		3	0	0	3
57. Kenya 1 January 1995	Low-income		3	0	0	3
58. Malawi 31 May 1995	Low-income	Yes	3	0	0	3
59. Tanzania 1 January 1995	Low-income	Yes	3	0	0	3
60. Dominica 1 January 1995	Upper-middle-income		3	0	0	3
61. Fiji 14 January 1996	Upper-middle-income		3	0	0	3
62. Saint Kitts and Nevis 21 February 1996	Upper-middle-income		3	0	0	3
63. Saint Lucia 1 January 1995	Upper-middle-income		3	0	0	3
64. France 1 January 1995	High-income		2	0	2	0
65. Greece 1 January 1995	High-income		2	0	2	0
66. Trinidad and Tobago 1 March 1995	High-income		2	0	0	2
67. Bangladesh 1 January 1995	Low-income	Yes	2	1	0	1
68. Senegal 1 January 1995	Low-income	Yes	2	0	0	2
69. Romania 1 January 1995	Upper-middle-income		2	0	2	0
70. South Africa 1 January 1995	Upper-middle-income		2	0	2	0
71. Antigua and Barbuda 1 January 1995	High-income		1	1	0	0
72. Denmark 1 January 1995	High-income		1	0	1	0
73. Netherlands 1 January 1995	High-income		1	0	1	0
74. Portugal 1 January 1995	High-income		1	0	1	0
75. Sweden 1 January 1995	High-income		1	0	1	0
76. United Kingdom 1 January 1995	High-income		1	0	1	0
77. Bolivia 12 September 1995	Lower-middle-income		1	0	0	1

78. Ghana 1 January 1995	Low-income		1	0	0	1
79. Nigeria 1 January 1995	Low-income		1	0	0	1
80. Zimbabwe 5 March 1995	Low-income		1	0	0	1
81. Benin 22 February 1996	Low-income	Yes	1	0	0	1
82. Chad 19 October 1996	Low-income	Yes	1	0	0	1
83. Croatia 30 vember 2000	Upper-middle-income		1	0	1	0
84. Grenada 22 February 1996	Upper-middle-income		1	0	0	1
85. Saint Vincent & the Grenadines 1 January 1995	Upper-middle-income		1	0	0	1
86. Suriname 1 January 1995	Upper-middle-income		1	0	0	1
87. Austria 1 January 1995	High-income		0	0	0	0
88. Bahrain, Kingdom of 1 January 1995	High-income		0	0	0	0
89. Brunei Darussalam 1 January 1995	High-income		0	0	0	0
90. Cyprus 30 July 1995	High-income		0	0	0	0
91. Estonia 13 November 1999	High-income		0	0	0	0
92. Finland 1 January 1995	High-income		0	0	0	0
93. Germany 1 January 1995	High-income		0	0	0	0
94. Italy 1 January 1995	High-income		0	0	0	0
95. Kuwait 1 January 1995	High-income		0	0	0	0
96. Liechtenstein 1 September 1995	High-income		0	0	0	0
97. Luxembourg 1 January 1995	High-income		0	0	0	0
98. Macao, China 1 January 1995	High-income		0	0	0	0
99. Malta 1 January 1995	High-income		0	0	0	0
100. Oman 9 November 2000	High-income		0	0	0	0
101. Qatar 13 January 1996	High-income		0	0	0	0
102. Saudi Arabia 11 December 2005	High-income		0	0	0	0
103. Slovenia 30 July 1995	High-income		0	0	0	0
104. Spain 1 January 1995	High-income		0	0	0	0
105. United Arab Emirates 10 April 1996	High-income		0	0	0	0
106. Albania 8 September 2000	Lower-middle-income		0	0	0	0

107. Armenia 5 February 2003	Lower-middle-income		0	0	0	0
108. Cameroon 13 December 1995	Lower-middle-income		0	0	0	0
109. Cape Verde 23 July 2008	Lower-middle-income		0	0	0	0
110. Former Yugoslav Republic of Macedonia (FYROM) 4 April 2003	Lower-middle-income		0	0	0	0
111. Georgia 14 June 2000	Lower-middle-income		0	0	0	0
112. Jordan 11 April 2000	Lower-middle-income		0	0	0	0
113. Moldova 26 July 2001	Lower-middle-income		0	0	0	0
114. Mongolia 29 January 1997	Lower-middle-income		0	0	0	0
115. Morocco 1 January 1995	Lower-middle-income		0	0	0	0
116. Namibia 1 January 1995	Lower-middle-income		0	0	0	0
117. Tonga 27 July 2007	Lower-middle-income		0	0	0	0
118. Tunisia 29 March 1995	Lower-middle-income		0	0	0	0
119. Ukraine 16 May 2008	Lower-middle-income		0	0	0	0
120. Angola 23 November 1996	Lower-middle-income	Yes	0	0	0	0
121. Congo, Republic 27 March 1997	Lower-middle-income	Yes	0	0	0	0
122. Djibouti 31 May 1995	Lower-middle-income	Yes	0	0	0	0
123. Lesotho 31 May 1995	Lower-middle-income	Yes	0	0	0	0
124. Maldives 31 May 1995	Lower-middle-income	Yes	0	0	0	0
125. Democratic Republic of the Congo 1 January 1997	Low-income		0	0	0	0
126. Kyrgyz Republic 20 December 1998	Low-income		0	0	0	0
127. Papua New Guinea 9 June 1996	Low-income		0	0	0	0
128. Viet Nam 11 January 2007	Low-income		0	0	0	0
129. Burkina Faso 3 June 1995	Low-income	Yes	0	0	0	0
130. Burundi 23 July 1995	Low-income	Yes	0	0	0	0
131. Cambodia 13 October 2004	Low-income	Yes	0	0	0	0
132. Central African Republic 31 May 1995	Low-income	Yes	0	0	0	0
133. Gambia, The 23 October 1996	Low-income	Yes	0	0	0	0

134. Guinea 25 October 1995	Low-income	Yes	0	0	0	0
135. Guinea Bissau 31 May 1995	Low-income	Yes	0	0	0	0
136. Haiti 30 January 1996	Low-income	Yes	0	0	0	0
137. Mali 31 May 1995	Low-income	Yes	0	0	0	0
138. Mauritania 31 May 1995	Low-income	Yes	0	0	0	0
139. Mozambique 26 August 1995	Low-income	Yes	0	0	0	0
140. Myanmar 1 January 1995	Low-income	Yes	0	0	0	0
141. Nepal 23 April 2004	Low-income	Yes	0	0	0	0
142. Niger 13 December 1996	Low-income	Yes	0	0	0	0
143. Rwanda 22 May 1996	Low-income	Yes	0	0	0	0
144. Sierra Leone 23 July 1995	Low-income	Yes	0	0	0	0
145. Solomon Islands 26 July 1996	Low-income	Yes	0	0	0	0
146. Togo 31 May 1995	Low-income	Yes	0	0	0	0
147. Uganda 1 January 1995	Low-income	Yes	0	0	0	0
148. Zambia 1 January 1995	Low-income	Yes	0	0	0	0
149. Botswana 31 May 1995	Upper-middle-income		0	0	0	0
150. Bulgaria 1 December 1996	Upper-middle-income		0	0	0	0
151. Gabon 1 January 1995	Upper-middle-income		0	0	0	0
152. Latvia 10 February 1999	Upper-middle-income		0	0	0	0
153. Lithuania 31 May 2001	Upper-middle-income		0	0	0	0

In summary, only 86 out of 153 members participated, which means 44% of the WTO membership is completely absent from the Dispute Settlement System.

DEVELOPING COUNTRIES AND GALANTER'S HYPOTHESIS

While it is fairly easy to show that developing countries were absent in the first decade of the Dispute Settlement system, the less obvious task was to determine the reasons why. Presumably, if there is an argument for non-participation that is rooted in the belief that the WTO is biased toward countries with higher GDPs and more experience, developing countries should see from this study that such a belief is erroneous. In fact, they should feel optimistic about their prospects, assuming of course that the past ten years are indicative of their future potential success.

However, this is where a solid understanding of Galanter's theory is highly pertinent. Galanter did not only hypothesize that "haves" would win over time

because of their wealth or experience; he also argued that "haves" would win over time because they litigate strategically in order to shape the law to their ultimate advantage. Let us return for a moment to Galanter's example of the accident victim bringing suit against a driver's insurance company. In addition to defending hundreds of personal injury claims, the insurance company has more legal resources at its disposal than the defendant, plus it feels little to no urgency about this particular victim compared to the many others it has defended itself against. The accident victim, on the other hand, has the resources of only one individual, no experience litigating, and very high stakes: her personal health and livelihood is at issue.

Galanter hypothesized that the insurance company will come out ahead over time not only because it has dedicated resources and plenty of experience trying cases, but also because it will litigate strategically to advance the law in its favor. For example, if the insurance company manages to persuade the jury to award an exceptionally low amount of damages but the court's reasoning would impede its future interests, the insurance company may still be tempted to appeal on legal grounds. In contrast, if an accident victim won an acceptable jury award but the court's reasoning was bad for future accident victims, the victim would not be as persuaded to appeal. This is because the victim is desperate for the award and does not care about future accident victims. The insurance company, on the other hand, knows it will be arguing similar cases in the future, and thus has an incentive to

ensure the court uses sound reasoning that is favorable to its interest, even if it means the insurance company will risk a higher damage award in the instant case.

In analogizing this to the WTO dispute settlement system, it is troublesome that there are a whole series of potential litigants who are not participating in the process at all. If both the "haves" and the "underdogs" in this study are really just the Quad, then it means international trade law is being shaped entirely by the wealthiest and most powerful nations. Following Galanter's logic, does this necessarily mean that the non-participating developing countries will find that the law is completely stacked against them over time?

There are three reasons that one might disagree that developing countries are analogous to Galanter's accident victim. First and most obviously, developing countries get a lot of help. Despite the $500,000 pricetag for a dispute from start to appeal (Mosoti, 2006), developing countries are "well equipped with legal talent, are well briefed by export interests, and have a worldwide network of commercial and diplomatic representation that feeds their systems with relevant data" (Hoekman & Mavroidis, 2000). In fact, one of the lures enticing developing countries to join the WTO in the first place was the promise of free legal and economic advice, known as "technical assistance." While some scholars argue that meaningful technical assistance has been a major failing of the WTO, the subject has been under discussion in every WTO Ministerial Meeting (Larson, 2003). In fact, at the 4th Ministerial Conference in Doha, Qatar, all members – developed countries included – committed to a future overhaul of the technical assistance program which they

called "The New WTO Strategy: Technical Cooperation for Capacity Building, Growth and Integration" (Doha Delcaration, 2001). Whether this promise will improve the participation and performance of developing countries is yet to be seen.

The second reason developing countries may not be analogous to Galanter's accident victim is because the WTO does not follow common law, so the panel decisions are not binding on future panelists. This contrasts the American domestic setting, where Galanter's hypothesis was originally rooted. Because the WTO follows the civil law system, the ability of the Quad to shape the future of international trade law is limited to its prowess in negotiations – not disputes – making it possible that developing countries will still have the opportunity to succeed regularly in future cases.

The third reason developing countries may operate outside Galanter's hypothesis is because, as far as strategic litigation goes, developing countries *do* stick together, and they *do* keep future like-minded litigants in mind. This is most apparent in the debate over *amicus curiae* briefs and their role inside the dispute settlement system. An *amicus curiae* brief is an argument presented to a court by an outside party. In domestic litigation, such briefs are common, such as when a non-profit environmentalist group is allowed to present its opinion before a lawsuit over toxic spills. While the DSU does not explicitly provide for such briefs, one panel determined that they were allowed (DS58). This created an uproar among the developing countries because they did not want the extra time and cost added to the already too-long and too-expensive disputes (Mavroidis, 2001). Furthermore,

developing countries – who have an interest in exploiting their own environmental and labor-rich resources – do not want to defend their actions against well-organized and well-funded organizations from the "rich" countries. While this debate is still alive and well, it is clear that developing countries are more than willing to work alongside each other for long term mutual gain.

Despite these three hope-filled suggestions that developing countries may not be doomed to coming out "behind" in future WTO disputes, it may not matter in the end. This is because, as wonderfully as the system works on paper, the WTO Dispute Settlement system does not operate in a vacuum. Take the already given example under GATT: when Mexico won its GATT dispute fair and square, the reason it did not push for the decision to be adopted was because it was fearful that the United States would pull out of the North American Free Trade Agreement (NAFTA). Put simply, there is a whole world of political pressures, diplomacy, financial obligations, and yes, alternative international agencies, where WTO members have leverage against each other. "The WTO's legal discourse and constitutional rules are nested in politics" says Richard Steinberg, who describes the "real" way the Uruguay round was closed (2004):

> The European Communities and the United States have dominated GATT/WTO decision making since the 1960s. Their capacity to bring about constitutional change is illustrated by the successful EC-U.S. effort to close the Uruguay Round through a legal-political maneuver that imposed various agreements on weaker powers. Closure was achieved by employing the enormous market power of the European Communities and the United States, whose markets make up about 65 percent of the combined gross domestic product of WTO members. Upon conclusion of the round, the European Communities and the United States entered into the Agreement

> Establishing the World Trade Organization, which included the GATT 1994 and its most-favored-nation (MFN) guarantee, and required adherence to all the WTO multilateral agreements, including TRIPS, which most developing countries had previously refused to sign. Shortly thereafter, the European Communities and the United States withdrew from GATT 1947, disengaging from that agreement's MFN commitment to developing countries. This maneuver, which closed the Uruguay Round by means of a single undertaking, presented the developing countries with a fait accompli: either sign onto the entire WTO package or lose the legal basis for continued access to the enormous European and U.S. markets (Steinberg, 2004).

Put simply, there is more to international trade law than the Dispute Settlement System.

In the extensive list of "Bananas Cases," for example, the European Union was found to be illegally discriminating between countries on the imports of bananas (DS16, DS27, DS105, DS158, DS361, DS364). The history of these disputes go back to the days of colonization, when Europe had agreed to give special rights to African, Caribbean and Pacific ("ACP") colonies the right to import bananas and other goods at a cheaper tariff rate than the rest of the world (Matthews, 2001). Since these agreements known as the Lome Conventions were signed in advance of the WTO's creation, the European Communities requested an exception from the GATT to maintain its obligations under these treaties.

Relying on the understanding that the WTO automatically adopted the same exception as the GATT had, the European Communities provided a different tariff rate for ACP-bananas than bananas from elsewhere. However, almost immediately after the DSU went into force, three Latin American countries and the United States filed a dispute against the European Communities. In dispute after dispute, the European Communities have been shown to be in violation of their WTO obligations.

Over 13 years later, the European Communities have not changed their policies, and prefers to negotiate an entirely new deal in the Doha Round rather than comply with the earlier rulings.

What is really going on here? Is this an example of a rich nation strong-arming the poor Latin American countries so it can give a leg up to its former colonized, and equally poor African brethren? The answer is emphatically no. The truth is, the Bananas cases are really a fight between the U.S. and the E.U. How is this possible? Well, two of the biggest banana companies – Dole and Chiquita – are American businesses with operations in Latin America. Fyffes, on the other hand, is a major European competitor, ranking number five worldwide and number one in Europe for importing and distributing fresh fruits, including ACP bananas. It should not take much reading between the lines to understand the real motivations behind this WTO litigation. The U.S. and the E.U. are interested in protecting their market share in bananas, while the developing countries on both sides are protecting their main source of income.

DEVELOPING COUNTRIES AND THE RIGHT TO RETALIATE

Considering the rest of the world still roars outside the walls of WTO Dispute Settlement, why exactly does it matter that developing countries participate or not? This goes to the heart of one of the biggest problems with the DSU as it is currently structured.

Specifically, the "prize" for winning disputes is arguably useless to developing countries. As outlined earlier in this chapter, the "loser" of a WTO dispute is expected to comply with the final ruling by changing its offending practice. If the loser delays compliance, an arbitrator can determine the appropriate suspension or concession levels. Unfortunately, however, this remedy does not

induce participation by developing countries because developing countries, for the most part, do not stand to gain much from the results of WTO disputes.

As Chad & Hoekman suggested in their 2005 study, a country will file a WTO disputes if "the legal fees are lower than the discounted gain in profits the complainant would receive from increased market access due to the removal of the WTO-inconsistent measure." In other words, a developing country will participate if the benefits of filing a dispute outweigh the costs.

Starting with the benefits, a developing country in Africa may acquire less than 2% of its GDP from trade (Mosoti, 2006). Assuming a successful WTO dispute would increase its trade share and its GDP, the question is, what would that added benefit cost the developing country? Well, we already know the physical cost of the dispute is roughly $500,000, but we also know there is financial and technical assistance available to aid in that bill. We also know that if GDP has anything to do with the outcome of the WTO disputes, the underdog comes out ahead, in which case the developing country has a reasonably fair chance of winning despite its low GDP.

However, what are the real costs? By filing a WTO dispute against a more powerful and wealthy country (which is undoubtedly the case with the developing country being the economic underdog), the developing country would risks a whole host of intangible "costs." For example, the respondent country could choose to do business with a competitor; it could refuse to provide alternative forms of assistance, or it could delay the dispute with a truckload of legal acrobatics, making

token changes, and ultimately wiggle its way out of compliance. It could also make equally undesirable moves within alternative international agencies such as the IMF, World Bank, or United Nations.

Once these intangible "costs" are weighed, what then, are the actual benefits acquired by winning the dispute? Herein lies the real problem with developing countries and the WTO Dispute Settlement system: the potential "prizes" for winning a dispute fail to serve the developing country's interests. The two remedies for winners are retaliation and compensation. Retaliation is the right of the winner to temporarily raise tariff barriers on the products of the losing country. Compensation is when the loser temporarily lowers tariff barriers on alternative products.

with the actual benefit. Herein

In other words, countries would participate when the benefits of winning outweighed the cost of the dispute. If the cost of litigating was too high,fart

In Africa, for example, trade amounts to only 2% of its GDP, so even if a country there "wins" a dispute it does not affect it to a degree that justifies the trouble. The form of retaliation and/or compensation, additionally, must follow two rules. First, it must be "equitable" to the harm caused by the illegal act and second, it must follow be offered within the framework of other WTO agreements. Thus, any reduction or increase in tariffs must be on a most-favored nation (MFN) basis, which

means that any advantage the winner derives will be shared with the rest of the WTO members.

Thus, when a developing country takes the time and expense to file, argue, and enforce compliance in a WTO suit, it only amounts to two options: (1) force the violating party to give the whole world a better "deal" or, (2) retaliate by adding a tariff against the violating party, which is not only ineffective, but actually harms the developing country. As the laws of basic international economics have shown, when a small country imposes tariffs on outside products while simultaneously not having the ability to affect world price, it not only fails to impact prices in the other country, but it also hurts itself by artificially raising prices for its inhabitants.

For this reason, some scholars have suggested, and I agree, that it would be preferable to include monetary awards as a potential remedy for winning a WTO dispute (WTO, 2007). Again, including such a remedy must be agreed upon by both parties, which would ensure that compliance would remain voluntary. Some scholars counter, however, that such forms of monetary awards would lead to a situation where wealthy countries could "buy" their ability to place trade barriers around their marketplace (WTO, 2007). In addition to undermining the ultimate goal of free and open trade, this would no doubt become a tool by which the powerful countries could continue to manipulate the WTO to their advantage.

I am inclined to disagree with the latter scholars for the following two reasons. For one, it is imaginable that each party to a dispute could equally desire a monetary award over the other two remedies. Second, if countries are considered

market participants, allowing monetary rewards is merely another incentive that countries can respond to as rational actors.

Say for example, there are two countries: Country Poor and Country Rich. Say both countries produce apples but Country Rich has made a rule that no apples using certain pesticides may enter its borders. Country Poor, which uses these pesticides, argues that this rule violates a WTO policy and none of the exceptions apply. Dispute and appeal ensue, Country Rich is found to be in violation beyond a "reasonable time."

Now it is time for the countries to agree on retaliation measures. Say there are now three options: (1) Country Rich could reduce its tariffs to the whole world on another product, say steel; (2) Country Poor could add an import tax on apples into its country; or (3) Country Rich could pay Country Poor for the amount of apples it would have exported to Country Rich but for its trade policy.

It is possible that neither Country Rich nor Country Poor would desire the outcome resulting from the first option. Perhaps Country Poor doesn't need steel and would reject it as an option, or perhaps steel is something Country Poor desires but Country Rich has an interest in protecting its steel market as well. Either way, if Country Poor and Country Rich find a commodity whereby Country Poor desires a decrease and Country Rich is not protecting that industry, then the parties may select that as an option. Keep in mind, however, that such an arrangement must be equitable to the cost of Country Rich's violating practice with apples. So in addition

to having to agree on a particular product for tariff reduction, the product must be calculated to be equitable.

With the second option, it is also possible the neither Country Rich nor Country Poor would desire such an outcome where Country Poor adds an import tax on apples into its country. Country Poor, if it cannot affect the world price of apples, most certainly would not desire it, as doing so would merely increase the price of apples for its own people. Country Rich may not desire it either because Country Poor's tariff may be enough to affect export revenue from Country Rich's export of apples into Country Poor.

Under the current regime, however, if neither party could agree on the form of retaliation at this point, the arbitrator would pick it for them. Since it goes without saying that any tariff is generally undesirable, and such a "solution" undermines the purpose of the WTO itself, the arbitrator would most likely go with the first option of concessions, as it most often does. But in either case, both Country Rich and Country Poor are dissatisfied because the arbitrator's selection will never be the option of their choosing.

If there was a monetary option, however, Country Rich and Country Poor could argue before the arbitrator about the value of the harm caused (Country Rich arguing it was high and Country Poor arguing it was low) and the arbitrator's award would probably fall somewhere in the middle. To make it the most effective, Country Rich would pay Country Poor the difference in the apples affected by its

trade policy for as long as the trade policy continued to negatively impact Country Poor's ability to export apples to Country Rich.

The benefit of this scheme is threefold. First, a monetary solution is by definition equitable to the harm because it would presumably be an amount equal to the harm. Secondly, it may be an easier and more desirable arrangement by both parties as neither of them would have to work with their legislative bodies to change tariff structures. Thirdly, a violator such as Country Rich would be sufficiently deterred from using its violating trade policies whilst a complainant such as Country Poor would have an incentive to enforce the WTO rules.

As mentioned earlier, some scholars argue it would be unfair to follow such a scheme because rich countries could "buy" their way out of WTO violations. However, if Country Rich desired to protect its people from pesticides to a degree that it was worth it to payoff Country Poor, why not let it? Eventually, Country Poor would either become compliant with Country Rich's laws by not using the pesticides or it would use the income to create other sources of revenue.

Furthermore, Country Rich would be negating any trade advantage it had produced by adding the pesticide law because if the law was unusually ominous – say instead it was banning apples picked by blue-eyed people – Country Rich would not only have to pay Country Poor, but any other country it negatively impacted with such a rule. Thus, at some point, Country Rich's trade barrier would be too costly to enforce and it would come into compliance with the WTO ruling.

THE END SIGNIFICANCE OF UNDERDOGS

In conclusion, while the data sample of WTO litigation is small, it appears to be consistent. Both the economic and experience "underdogs" came out ahead in the first decade of WTO disputes, which provides ammunition for the following claims.

First, Galanter's theory that the haves come out ahead is not yet detectable in this venue. It will be necessary to re-run these tests for 2005-2015 to see if this fact holds true. If future tests result in a shift toward the "haves" then it means that ten years was not enough time for the domestically-proven phenomenon to take shape in the realm of international trade disputes. If future tests stay the same, however, it means that the WTO is biased toward the economic underdogs in the adjudication of

its disputes. Finally, if future tests shift toward a point of equilibrium between the haves and the underdogs, then we will know that (1) the WTO is producing economically unbiased results, and (2) the pattern whereby domestic litigation changes shape over time to favor the haves is not present in international trade disputes.

The second claim these findings refute is any suggestion that larger GDPs necessarily translate into better odds for participants in WTO dispute settlement. While GDP is not an assured measurement of the amount of funding pumped into bringing and defending WTO disputes, panelists were clearly not afraid to decide against the more experienced and wealthier countries' interests. Perhaps this will change as panelists face political repercussions from their unfavorable decisions, but in interim, it is clear that this factor was not persuasive enough to affect their decisions in the first decade of disputes.

Finally, these results show that the odds are in favor of the underdog winning WTO disputes. This may mean that developing countries, who are all but absent in the process, may be underutilizing the system. However, as far as the first decade of disputes was concerned, if developing countries weren't participating because they perceived a bias in the WTO against their low GDPs, such a perception was clearly erroneous.

Of course, non of these conclusions can be digested in a vacuum. The WTO is but one international entity of many and the WTO members have much more than trade on their minds. Until the benefits of filing a dispute outweigh both the

systemic and political cost to developing countries, their absence in the process is likely to persist. Regardless of their presence, however, WTO litigation will undoubtedly change shape in the next decade, and I look forward to measuring it again.

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1996-2000, Santa Clara University, B.A. English and Classical Studies, GPA: 3.45

- PRESIDENT, Phi Phi Chapter, Sigma Tau Delta (English Honor Society)
- PRESIDENT, Epsilon Psi Chapter, Eta Sigma Chi (Classics Honor Society)
- CLASSICS STUDENT OF THE YEAR AWARD (voted for by faculty)
- BUCK BANNAN STUDENT SERVICE AWARD (for Fundraising at Santa Clara)

2004-2008, Rutgers University School of Law, J.D., GPA: 3.29

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- WITTES SCHOLAR, 2007-2008
- PUBLISHED ARTICLE: Robin Hood Versus the Bullies: Software Piracy and Developing Countries, 34 RUTGERS COMPUTER & TECH. L.J. (2007)
- FIRST PRIZE WINNER, 2007 Nathan Burkan Memorial Writing Competition
- MANAGING NOTES EDITOR, Rutgers Computer and Technology Law Journal
- VICE PRESIDENT, Student Bar Association (2007-2008), also served as Secretary (2005-2006) and Class Representative (2004-2005, 2006-2007)

2005-2009, Rutgers University Graduate School, Ph.D., Global Affairs, GPA: 3.80

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Experience

1996-2000, Santa Clara University, Santa Clara, CA

- FUNDRAISER (September 1996-June 1997), Solicited alumni for donations
- DEVELOPMENT WRITER (Summer 1999), Developed direct marketing pieces for alumni; wrote presidential thank you letters to high-end donors
- PROGRAM COORDINATOR/SUPERVISOR (September 1997-June 2000), Managed 20-30 student supervisors and fundraisers; led team in increasing donation percentages

2001-2004, World Vision USA, Federal Way, WA

- CORPORATE TRAINER (January 2001-June 2002), Trained employees business processes, computer software; developed sales training strategy; wrote scripts for phone calls
- OUTBOUND SUPERVISOR (June 2002-June 2004), Managed hundreds of employees, responsible for sales, staff development

Summer 2005, Central International Law Firm, Seoul, Korea

- LEGAL INTERN, Reviewed trademark and patent documents

Summer 2005, International Vaccine Institute, Seoul, Korea

- GRANT WRITER, Researched available grants to make up for budget shortfall

June 2006-December 2006, NJ Office of Administrative Law, Newark, NJ

- LAW CLERK, Supported administrative law judges in public utilities research

June 2007-June 2008, Credit Suisse Securities (USA) LLC, New York, NY

- LEGAL INTERN (Fixed Income Derivatives/Collateralized Debt Obligations Group of the Legal and Compliance Department), Analyzed international credit derivative contracts; helped prepare for the impending financial crisis

December 2006-April 2007, Fragomen, Del Rey, Bernsen & Loewy, New York, NY

- IMMIGRATION LAW CLERK, Prepared visa applications for filing with USCIS

Languages/Travel

- French, Latin (3 years), beginning Spanish, German; novice Hindi, Greek, Korean, Thai
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