

Old Dominion University

ODU Digital Commons

Graduate Program in International Studies
Theses & Dissertations

Graduate Program in International Studies

Summer 2017

Empty Chair at the Table: Bargaining, Costs and Litigation at the World Trade Organization

Felicia Anneita Grey

Old Dominion University, felicia.grey@fulbrightmail.org

Follow this and additional works at: https://digitalcommons.odu.edu/gpis_etds



Part of the [Economics Commons](#), [International Law Commons](#), and the [International Relations Commons](#)

Recommended Citation

Grey, Felicia A.. "Empty Chair at the Table: Bargaining, Costs and Litigation at the World Trade Organization" (2017). Doctor of Philosophy (PhD), Dissertation, Political Science & Geography, Old Dominion University, DOI: 10.25777/f269-1765
https://digitalcommons.odu.edu/gpis_etds/18

This Dissertation is brought to you for free and open access by the Graduate Program in International Studies at ODU Digital Commons. It has been accepted for inclusion in Graduate Program in International Studies Theses & Dissertations by an authorized administrator of ODU Digital Commons. For more information, please contact digitalcommons@odu.edu.

**EMPTY CHAIR AT THE TABLE: BARGAINING, COSTS AND LITIGATION AT THE
WORLD TRADE ORGANIZATION**

by

Felicia Anneita Grey

BSc. September 2004, The University of the West Indies

MSc. January 2011, The University of the West Indies

A Dissertation Submitted to the Faculty of
Old Dominion University in Partial Fulfillment of the
Requirements for the Degree of

DOCTOR OF PHILOSOPHY

INTERNATIONAL STUDIES

OLD DOMINION UNIVERSITY

August 2017

Approved by:

David C. Earnest (Director)

Jesse T. Richman (Member)

David Selover (Member)

Kurt T. Gaubatz (Member)

ABSTRACT

EMPTY CHAIR AT THE TABLE: BARGAINING, COSTS AND LITIGATION AT THE WORLD TRADE ORGANIZATION

Felicia Anneita Grey
Old Dominion University, 2017
Director: Dr. David C. Earnest

This study examines the WTO to test how, if at all, its Dispute Settlement Body (DSB) serves the needs of its members. More specifically, it probes why countries would join the institution but do not use it if a trade dispute arises. To test this expectation, the study hypothesizes that exorbitant dispute settlement costs can inhibit litigation. This occurs, however, across all dyads and not just when developing and developed countries litigate.

The project uses mixed methods comprising an extensive form game, case studies and the information theory approach for comparative case analysis. The cases selected have power disparities, and variation in the dependent variable, since not all of them are litigated. Additionally, they all feature cement as the contested good and invocation of the Anti-Dumping Agreement for reprieve. These disputes are *China – Cement* (between China and Jamaica); *Guatemala – Cement I and II* (between Guatemala and Mexico); and *United States – Cement* (between the United States and Mexico).

The formal model shows that with the same litigation costs, there is a pure subgame perfect Nash equilibrium where both states will engage in protectionism and avoid filing. In situations where one state has a higher burden to seek recourse, its trading partner will protect as its dominant strategy. The affected state is then forced to continue

with free trade and not use the DSB, or respond with protectionism and then acquiesce since it cannot afford the full litigation process.

The case studies highlight how legal capacity and other associated costs can catalyze DSB participation, or induce non-involvement. Countries that have membership in other dispute settlement organizations, DSB experience, as well as domestic and international experience with the Anti-Dumping Agreement are more likely to litigate. The likelihood of litigation also increases if the contested good contributes significantly towards GDP and if the country expects to win. The information theory approach tests these results under conditions of reduced uncertainty and validates some of these findings.

Generally, the study shows that non-participatory membership is relative to the timing of the dispute, the countries involved, and their calculations of the costs against the projected benefits.

© Copyright, 2017, by Felicia Anneita Grey, All Rights Reserved.

This dissertation is dedicated to Mother:

“These all died in faith, not having received the promises, but having seen them afar off were assured of them, embraced them and confessed that they were strangers and pilgrims on the earth.”

Hebrews 11 v 13, New King James Version, Holy Bible.

Thank you for believing with me that this day would come. I celebrate this dream with you most of all.

To my father Letel and siblings Sharon, Demetrie, Clyde, Phillip, Theodene and Rosanne:

Thank you for your gifts of love, laughter and encouragement.

To my prayer partners Angela, Charmaine, Denise, Georgia, Heather, Sophia and Susan:

For the past four years, you have been a tower of strength. I do not know how I would have made it without each of you.

To my Jamaican predecessors in GPIS and at ODU – Omar, Jody-Ann, David and to Joedian who joined later:

Thanks for the advice, support and times of togetherness.

To my GPIS colleagues Jamila, Maurizio, Nurullah, Samuel, Ahmed, J.R., Sandis, Niloufar and Dawn:

Thanks for sharing your culture with me. It has been a very enriching experience.

ACKNOWLEDGEMENTS

This dissertation has materialized because of the kind and consistent support of so many persons. I am therefore grateful to them for their investments of time, talent and thought into my project. I extend special thanks to my advisor, supervisor and mentor, Dr. David Earnest. You have an unmatched patience, intellect and diligence that have helped this study to blossom in significant ways. Dr. Jesse Richman also provided invaluable support to me. I am very appreciative of his thoughtfulness, scholastic rigor and encouragement to engage in professional development activities. I am also indebted to Dr. Kurt Taylor Gaubatz, who has remained committed to my academic and professional development since I began my studies at Old Dominion University. My committee would have been incomplete if it were not for the astute contribution of Dr. David Selover. Thank you for bringing your econometrician's perspective to my research and for offering a wide array of suggestions for moving forward.

My project has been enriched by participating in numerous conferences and training opportunities. I therefore thank participants at the Midwest Political Science Association (MPSA) and the International Studies Association (ISA) conferences. Special thanks to Dr. Jon Pevehouse for pointing me to a body of scholarship that has greatly enhanced my work. The professors at the 2016 Empirical Implications of Theoretical Models (EITM) also helped me hone my trade model. I am especially grateful to Dr. John W. Patty who provided insight on how the game might better represent strategies under conditions of uncertainty.

I would not have been able to do this project if I did not have background training in the international political economy. I am forever grateful to Dr. Lucy Eugene who taught me the World Trade System and International Economic Law. Special thanks also to Mrs. Tara Marie

Evans-Rose and the staff of the Jamaica Anti-Dumping and Subsidies Commission for answering my questions and making case materials available. Thanks also to the WTO Secretariat for answering my queries about costs and DSB usage. Support in these tangible and intangible ways have made this study what it is. I am indebted to you all.

ABBREVIATIONS

ACP	<i>African, Caribbean and Pacific</i>
ACWL	<i>Advisory Centre on WTO Law</i>
AD	<i>Anti-Dumping</i>
APEC	<i>Asia-Pacific Economic Cooperation Forum</i>
APTA	<i>Asia Pacific Trade Agreement</i>
ASEAN	<i>Association of South-Eastern Asian Nations</i>
ASTM	<i>American Society for Testing and Materials</i>
CACM	<i>Central American Common Market</i>
CAFTA-DR	<i>Dominican Republic - Central America - United States Free Trade Agreement</i>
CARICOM	<i>Caribbean Community</i>
CARIFORUM	<i>Forum of the Caribbean Group of African, Caribbean and Pacific (ACP) States</i>
CCCL	<i>Caribbean Cement Company Limited</i>
CCJ	<i>Caribbean Court of Justice</i>
CEMEX	<i>Cementos Mexicanos</i>
CIA	<i>Central Intelligence Agency</i>
CSME	<i>CARICOM Single Market and Economy</i>
DSB	<i>Dispute Settlement Body</i>
DSU	<i>Dispute Settlement Understanding</i>
EC	<i>European Communities</i>

EPA	<i>Economic Partnership Agreement</i>
EU	<i>European Union</i>
FANs	<i>Friends of A-D Negotiations</i>
FoFs	<i>Friends of Fish</i>
GATS	<i>General Agreement on Trade in Services</i>
GATT	<i>General Agreement on Tariffs and Trade</i>
GDP	<i>Gross Domestic Product</i>
HFCS	<i>High-Fructose Corn Syrup</i>
ICJ	<i>International Court of Justice</i>
ITLOS	<i>International Tribunal for the Law of the Sea</i>
LAIA	<i>Latin American Integration Association</i>
LDCs	<i>Least-developed Countries</i>
MFN	<i>Most Favored Nation</i>
NAFTA	<i>North American Free Trade Agreement</i>
NAMA	<i>Non-Agricultural Market Access</i>
OAS	<i>Organization of American States</i>
OPC	<i>Ordinary Portland Cement</i>
PTA	<i>Preferential Trading Agreement</i>
PTN	<i>Protocol on Trade Negotiations</i>
RTA	<i>Regional Trade Agreement</i>
SVEs	<i>Small, Vulnerable Economies</i>
TPRM	<i>Trade Policy Review Mechanism</i>
TRIMS	<i>Trade-Related-Investment Measures</i>

TRIPS	<i>Trade-Related Aspects of Intellectual Property Rights Agreement</i>
UN	<i>United Nations</i>
US	<i>United States</i>
WTO	<i>World Trade Organization</i>

TABLE OF CONTENTS

	Page
LIST OF TABLES	xiv
LIST OF FIGURES	xvi
 Chapter	
I. INTRODUCTION	1
RESEARCH BACKGROUND	1
RESEARCH RATIONALE	4
RESEARCH QUESTIONS	7
NON-PARTICIPATORY MEMBERSHIP	8
II. LITERATURE REVIEW	16
INTRODUCTION	16
AVAILABILITY OF ALTERNATIVE FORUMS	18
PREFERENCE FOR THE STATUS QUO ANTE	24
EXPECTED UTILITY	31
INTERDEPENDENT PAYOFFS	41
ASYMMETRIC INFORMATION	50
COMPLAINANT VERSUS RESPONDENT UTILITIES	55
CONCLUSION	59
III. RESEARCH DESIGN	62
MIXED METHODS APPROACH: THE NEED FOR COMPLEMENTARITY	63
QUANTITATIVE METHODS: STRENGTHS AND LIMITATIONS	70
QUALITATIVE METHODS: STRENGTHS AND LIMITATIONS	74
HYPOTHESES	77
IV. DOES THE WTO'S DISPUTE SETTLEMENT BODY TEMPER DEFECTION BETWEEN TRADING PARTNERS WITH ASYMMETRIC INTERESTS?	80
THE PREMISE OF PRISONER'S DILEMMA	82
A MODEL OF TRADE AND DISPUTE RESOLUTION	87
EMPIRICAL IMPLICATIONS OF THE MODEL	96
CONCLUSION	100

Chapter	Page
V.	TO FILE OR NOT TO FILE? THE ANTI-DUMPING AGREEMENT AND ORDINARY PORTLAND GREY CEMENT 103
	INTRODUCTION 103
	JUSTIFICATION FOR THE CASES SELECTED 103
	THE CONTESTED GOOD: ORDINARY PORTLAND GREY CEMENT 107
	DUMPING AS A TRADING STRATEGY 109
	DUMPING AT THE WORLD TRADE ORGANIZATION 111
	THE ANTI-DUMPING AGREEMENT AND ITS AMBIGUITIES 114
	LIKE PRODUCTS: HOW ALIKE SHOULD THEY BE? 116
	CONCLUSION 138
VI.	ESTIMATED LEGAL CAPACITY AND ITS EFFECTS ON PARTICIPATION IN THE DISPUTE SETTLEMENT BODY 139
	INTRODUCTION 139
	MEMBERSHIP IN WTO NEGOTIATION GROUPS 143
	MEMBERSHIP IN OTHER INTERNATIONAL DISPUTE RESOLUTION ORGANIZATIONS 147
	COUNTRIES' WTO/DSB EXPERIENCE AT THE TIME OF THEIR DISPUTES 158
	COUNTRIES' DOMESTIC EXPERIENCE WITH THE ANTI-DUMPING AGREEMENT AT THE TIME OF THEIR DISPUTES 173
	SUPPORT FROM THIRD PARTIES 176
	"QUANTIFYING THE QUALITATIVE": HOW DO LEGAL CAPACITY COSTS AFFECT PARTICIPATION IN THE DISPUTE SETTLEMENT BODY? 184
	CONCLUSION 189
VII.	CALCULATED COSTS AND THEIR EFFECTS ON PARTICIPATION IN THE DISPUTE SETTLEMENT BODY 193
	INTRODUCTION 193
	CONTESTED GOOD'S CONTRIBUTION TO AFFECTED COUNTRIES' GROSS DOMESTIC PRODUCT 196
	COUNTRIES' EXPECTED UTILITY CALCULATIONS 201
	ABILITY TO ENFORCE COUNTERMEASURES 211
	REPUTATIONAL COSTS / BENEFITS 216
	DOMESTIC AUDIENCE COSTS 220
	INTERDEPENDENT PAYOFFS / PRECEDENT SETTING 227
	EXPECTATION TO WIN 230
	AVAILABILITY OF ALTERNATIVE FORUMS 232
	EXISTING PREFERENTIAL AND REGIONAL TRADE AGREEMENTS 234
	COMPLEX INTERDEPENDENCE 238

Chapter	Page
“QUANTIFYING THE QUALITATIVE”: HOW DO DISPUTE SETTLEMENT COSTS AFFECT PARTICIPATION IN THE DISPUTE SETTLEMENT BODY?.....	243
CONCLUSION.....	246
VIII. THE PUZZLE OF NON-PARTICIPATORY MEMBERSHIP – DISCUSSIONS AND CONCLUSIONS	249
INTRODUCTION	249
WHY DID GUATEMALA’S CASE PROCEED TO THE DSB WHILE CHINA’S DID NOT?	251
THIRD PARTIES AND THEIR STRATEGIC PARTICIPATION IN THE TRADE DISPUTES.....	255
CONTRIBUTIONS TO THE EXTANT LITERATURE.....	260
OUTCOMES PREDICTED BY THE FORMAL MODEL	261
RESULTS OF THE COMPARATIVE CASE ANALYSIS	263
HYPOTHESES.....	265
RESEARCH QUESTIONS	267
LIMITATIONS OF THE STUDY.....	270
RECOMMENDATIONS.....	272
NEXT STEPS	274
REFERENCES	277
APPENDICES	
I. FACTS ABOUT THE CASES	293
II. COMPARATIVE CASE ANALYSES RESULTS.....	305
VITA.....	308

LIST OF TABLES

Table	Page
4-1: General Prisoner's Dilemma	82
4-2: The Strategic Interaction of a Free Trade and a Protectionist State	83
4-3: Breakdown of Choices and Outcomes for States A and B	84
4-4: The Nash Equilibrium of Strategic Interaction Between a Free Trade and Protectionist State	86
5-1: Status of Cases Brought Before the WTO	104
6-1: Summary of Membership in WTO Negotiation Groups	147
6-2: Summary of Membership in International Dispute Settlement Organizations at the Time of the Dispute	151
6-3: Summary of Membership in Regional Dispute Settlement Organizations at the Time of the Dispute	153
6-4: Estimated Maximum ACWL Charges for a Complainant or Respondent Services (in Swiss Francs)	155
6-5: Estimated Maximum ACWL Charges for Third-Party Services (in Swiss Francs)	156
6-6: Summary of Membership in the Advisory Centre on World Trade Organization Law at the Time of the Dispute	157
6-7: Summary of Third Party Support in the Disputes	182
6-8: Legal Capacity Variables and Participation in the Dispute Settlement Body	183
6-9: Truth Table for Legal Capacity Costs and their Effects on Participation in the Dispute Settlement Body	184
6-10: Joint Probabilities of Legal Capacity Costs and Participation in the Dispute Settlement Body	186
6-11: Uncertainty Measures of Legal Capacity Costs and Participation in the Dispute Settlement Body	188

Table	Page
7-1: Summary of Contested Goods as Significant GDP Contributors for the Countries.....	201
7-2: Summary of Availability of Alternative Markets.....	211
7-3: Summary of Ability to Enforce Countermeasures	216
7-4: Summary of Reputational Costs / Benefits in Each Dispute	220
7-5: Summary of Domestic Audience Costs at the Time of the Disputes	226
7-6: Summary of Interdependent Payoffs	229
7-7: Summary of Expectation to Win	232
7-8: Summary of Availability of Alternative Forums.....	234
7-9: Summary of Existing PTAs / RTAs at the Time of the Disputes.....	238
7-10: Summary of Complex Interdependence between the Disputants.....	241
7-11: Summary of Dispute Settlement Costs and their Effects on DSB Participation	242
7-12: Truth Table for Legal Capacity Costs and their Effects on Participation in the Dispute Settlement Body	243
7-13: Joint Probabilities of Legal Capacity Costs and Participation in the Dispute Settlement Body	244
7-14: Uncertainty Measures of Legal Capacity Costs and Participation in the Dispute Settlement Body	245
8-1: Summary of Litigation Costs that China and Guatemala Faced to Use the DSB	252

LIST OF FIGURES

Figure	Page
4-1: A Model of Trade and Dispute Resolution	89
4-2: Subgame Perfect Nash Equilibrium When Delta is 2.5	92
4-3: Subgame Perfect Nash Equilibrium When State A's Delta is .5 and State B's is 2.5.....	94
5-1: 2015 Top Cement Exporting Countries	108
6-1: China's WTO / DSB Experience.....	158
6-2: Jamaica's WTO / DSB Experience	160
6-3: Guatemala's WTO / DSB Experience	161
6-4: Mexico's WTO / DSB Experience	163
6-5: United States' WTO / DSB Experience	166
6-6: Summary of Countries' DSB Experience at the Time of Their Disputes	168
6-7: Summary of Countries' Domestic Experience with the Anti-Dumping Agreement.....	172
6-8: Summary of Countries' Domestic Experience with the Anti-Dumping Agreement.....	176
7-1: China's 2015 Top Cement Exporting Countries	202
7-2: Jamaica's 2015 Top Cement Exporting Countries.....	204
7-3: Guatemala's 2015 Top Cement Exporting Countries	205
7-4: Mexico's 2015 Top Cement Exporting Countries.....	207
7-5: United States' 2015 Top Cement Exporting Countries	210

CHAPTER I

INTRODUCTION

Research Background

The extant literature on institutions¹ focuses on reasons for their creation and design. Scholars have given far less attention to the reasons why states use – or choose not to use – institutions once they have been created. The presumption is that material benefits are sufficient for rational actors. Benefits, however, are a necessary cause, but not a sufficient one. The decision by states to coalesce in international institutions is a distinguishing feature of the international trading system². This speaks volumes about the perceived benefit of participating in these mechanisms. Concurrently, however, this also highlights a voluntary abnegation of some state power to supranational organizations to at least effectuate the desired outcomes. Achieving universal consensus and satisfaction in an organization replete with diverse members is onerous. Yet, since inception, the World Trade Organization (WTO) aims to accomplish this feat and has had considerable success in doing so. What then is the WTO and what is its scope and main functions?

The World Trade Organization is the main international framework for regulating trade among countries. It was established by the Marrakesh Agreement of April 15, 1994 and aims to

¹ For the purposes of this study, Krasner's definition of institutions is applicable. Krasner (1983) conceives of institutions as "implicit or explicit norms, principles and decision-making procedures around which actors' expectations can converge in a particular issue area."

² Much of this is due to the perceived efficacy of institutions that liberalism purports. International institutions are said to matter in the international system because they create norms around which behaviors converge, set the rules and so facilitate predictability, and reduce transaction costs (legal, transportation, dispute). They are responsible for setting the agenda, increase transparency because of mechanisms whereby actors can "look in," act as a forum for positions and platforms, and lengthen the shadow of the future. All of these are facilitated because corporation becomes necessary in a world of increased interconnectivity and interdependence. See for example, Robert O. Keohane in *After Hegemony: Cooperation and Discord in the World Political Economy*. (New Jersey: Princeton University Press, 1984).

ensure that trade flows as smoothly and as predictably as possible³. It came into existence on January 1, 1995 and has a membership of 164 countries⁴. This is noteworthy since there are about 191 recognized countries in the world. Article II of the Marrakesh Agreement delineates the WTO's scope. It is firstly mandated to "provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements" and associated legal instruments included in the Agreement's Annexes.⁵ In a broader sense, this means that the institution administers WTO trade agreements, provides a forum for trade negotiations, handles trade disputes, monitors national trade assistance and training for developing countries, and cooperates with other international organizations.⁶

The WTO's functions are outlined in Article III of the Marrakech Agreement. It is legally bound for example, to "facilitate the implementation, administration and operation" of the Marrakech Agreement itself, the Multilateral Trade Agreements⁷ and to provide the framework within which the same operations can take place for the Plurilateral Agreements.^{8,9} Generally however, the WTO functions primarily by five central principles. These include

³ "What is the WTO?" https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

⁴ See "Understanding the WTO: The Organization, Members and Observers."

https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

⁵ *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*. (The WTO Secretariat: Geneva Switzerland, 2002), 4. <https://www.hse.ru/data/2011/11/14/1272847001/LEGAL%20TEXTS%20ENG.pdf>

⁶ "What is the WTO?" https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

⁷ These are binding on all Members. Annex 1A encompasses the Multilateral Agreements on Trade in Goods, Annex 1B deals with the General Agreement on Trade in Services, while Annex 1C covers the Agreement on Trade – Related Aspects of Intellectual Property Rights. Annex 2 is the Understanding on Rules and Procedures Governing the Settlement of Disputes, while Annex 3 is titled, Trade Policy Review Mechanism. *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*. (The WTO Secretariat: Geneva Switzerland, 2002), 5. <https://www.hse.ru/data/2011/11/14/1272847001/LEGAL%20TEXTS%20ENG.pdf>

⁸ See for example, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*. (The WTO Secretariat: Geneva Switzerland, 2002), 5. <https://www.hse.ru/data/2011/11/14/1272847001/LEGAL%20TEXTS%20ENG.pdf>

⁹ These are outlined in Annex 4. They include the Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement and International Bovine Meat Agreement. These Agreements however, are binding only on those Members who have accepted them.

nondiscrimination¹⁰, reciprocity¹¹, enforceable commitments¹², transparency¹³, and safety valves¹⁴.

Many countries become Members of the WTO because of the reprieve that they have in the event of a trade violation. This is embodied in the three main trade remedies that are available as recourse for disputes over trade in goods. These include countervailing duties¹⁵, safeguards¹⁶ and antidumping¹⁷, of which, antidumping has been the one most frequently used.

¹⁰ This is embedded in the main WTO rules on goods, services and intellectual property and includes the Most Favoured Nation (MFN) rule and the National Treatment principle. “The MFN rule requires that a product made in one member country be treated no less favorably than a “like” (very similar) good that originates in any other country.” Conversely, “national treatment ensures that liberalization commitments are not offset through the imposition of domestic taxes and similar measures.” It stipulates that foreign products should “be treated no less favourably than competing domestically produced products.” See Bernard Hoekman’s chapter, “*The WTO Functions and Basic Principles*” in Bernard Hoekman, Aaditya Mattoo and Phillip English, eds. 2002. *Development, Trade, and the WTO: A Handbook*. (Washington, D.C.: The World Bank, 2002), 41 -49.

¹¹ This is a guiding principle in the negotiations process and is used as a preventative measure against “free – riding, which may result because of the MFN rule.” It seeks to facilitate specific quid pro quo concessions. See Bernard Hoekman’s chapter, “*The WTO Functions and Basic Principles*” in Bernard Hoekman, Aaditya Mattoo and Phillip English, eds. 2002. *Development, Trade, and the WTO: A Handbook*. (Washington, D.C.: The World Bank, 2002), 41 -49.

¹² The fact that commitments made by Members are legally binding, promotes compliance. This is supported by reprieve at the Dispute Settlement Body.

¹³ The principle of transparency is delineated in Article X of the GATT and Article III of the GATS. “WTO members are required to publish their trade regulations, to establish and maintain institutions allowing for the review of administrative decisions affecting trade, to respond to requests for information by other members, and to notify changes in trade policies to the WTO. These internal transparency requirements are supplemented by multilateral surveillance of trade policies by WTO members, facilitated by periodic country-specific reports (trade policy reviews) that are prepared by the secretariat and discussed by the WTO General Council.” See Bernard Hoekman’s chapter, “*The WTO Functions and Basic Principles*” in Bernard Hoekman, Aaditya Mattoo and Phillip English, eds. 2002. *Development, Trade, and the WTO: A Handbook*. (Washington, D.C.: The World Bank, 2002), 41 -49.

¹⁴ This principle provides that in specific instances, governments should be able to restrict trade. “Articles allowing for the use of trade measures to attain noneconomic objectives,” those “aimed at ensuring “fair competition”; and “other provisions permitting intervention in trade for economic reasons” all facilitate this principle. See Bernard Hoekman’s chapter, “*The WTO Functions and Basic Principles*” in Bernard Hoekman, Aaditya Mattoo and Phillip English, eds. 2002. *Development, Trade, and the WTO: A Handbook*. (Washington, D.C.: The World Bank, 2002), 41 -49.

¹⁵ Article VI of the GATT 1994 explains that countervailing duties are actions taken by the importing country, usually in the form of increased duties to offset subsidies given to producers or exporters in the exporting country.

¹⁶ The WTO defines safeguard measures as “‘emergency’ actions with respect to increased imports of particular products into its territory by an exporter, where such imports have caused or threaten to cause serious injury to the importing Member’s domestic industry.” This is pursuant to Article XIX of the GATT 1994.

¹⁷ Article VI (1) of the GATT 1994 explains that, “dumping is the process by which products of one country are introduced into the commerce of another country at less than the normal value of the products.” This is further clarified with the clause - “if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.” It can take place as sales below cost or international price discrimination whereby the product is exported at “an unduly low price to drive out competition in the importing country”; or the product is exported

An aggrieved party may therefore use the Dispute Settlement Body (DSB) which evokes a process of consultation, adjudication, and implementation to get redress for trade violations.¹⁸

Research Rationale

There is much debate about institutions and their role in international affairs. Robert Keohane for example, explicates the assumptions of neoliberal institutionalism in *After Hegemony: Cooperation and Discord in the World Political Economy*. Here, the positive-sum logic of neoliberalism is advanced. Multilateral institutions arguably cause voluntary cooperation, which in turn effectuates utility gains for each cooperating state or government. Realism proponents like Waltz, Grieco, Mastaduno and Mearsheimer however, attack these tenets. In their estimation, “cooperation under anarchy” is problematic because decentralized enforcement, national interests, and relative gains impede the efficiency of institutions.¹⁹ Multilateralism supporters point to the general membership and success of the WTO as evidence for their theory. This optimism, however, has been countered by the seemingly disparities in how developed and developing countries use the DSB for trade recourse. The paucity of cases from developing countries suggests that the system may be inherently biased against them and so they are to some extent disenfranchised. Scholars who explore the extent to which the DSB functions in satisfying the needs of its developing country Members highlight power asymmetries,

“from a country where wages are extremely low (and therefore, where the export price is low), or where the level of working conditions is far below that of advanced countries.” Usually both markets are relatively isolated and arbitrage takes place. See Mitsuo Matsushita and Thomas Schoenbaum in *The World Trade Organization: Law, Practice and Policy*. (New York: Oxford University Press, 2003), 302-303.

¹⁸ See Constantine Michalopoulos in *Development, Trade, and the WTO: A Handbook* (2002), 61. Edited by Bernard Hoekman, Aaditya Mattoo and Phillip English.

¹⁹ See for example, Lloyd Gruber in *Ruling the World: Power Politics and the Rise of Supranational Institutions* (New Jersey: Princeton University Press, 2000), 18 – 32, for a debate between neoliberal institutionalism and realism.

initiation and retaliation costs, start-up expenses and low domestic, institutional capacity as possible impeding factors.²⁰

Every conflict within the DSB is fundamentally a dyadic / relational grievance. Highlighting solely the variance in usage between developing and developed countries is therefore intellectually myopic. If participation in this mechanism is taken as the dependent variable and power asymmetries an independent variable, then there is an implicit assumption that trade violations follow only a unidirectional path. This reasoning takes it for granted that only large states are violators, that they exploit weaker states, and that weaker states do not contravene WTO provisions. How then would one account for trade disputes between developing countries and also those between developed ones? Moreover, if economic and institutional capabilities are directly related to a state's tendency to file a dispute, what explains the fact that not all wealthy countries litigate although they may have the ability to do so? Moreover, some affluent nations are more frequent users of the DSB than others. What explains this?

General participation in the DSB is taken as an indication that its provisions are accessible to all its Members. A state's usage as a complainant or a defendant therefore indicates its ability to at least file or respond to a dispute. Participation by itself however, does not account for the calculated opportunity cost of participation versus nonparticipation. In essence, several factors outside of those mentioned may precipitate participation and conversely,

²⁰ See for example, "Power Plays and Capacity Constraints: the Selection of Defendants in World Trade Organization Disputes" by Guzman and Simmons (2005), "Who Files? Developing Country Participation in GATT/WTO Adjudication" by Davis and Bermeo (2009), and "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector" by Bown and Hoekman (2005). Of the three articles, Guzman and Simmons (2005), examine power and capacity as possible inhibiting factors to developing country participation in the Dispute Settlement Body. The other two authors deal specifically with the low levels of developing country cases. Davis and Bermeo (2009), argue that while cost could be a factor, it is really the cost to begin the process in the first instance that is overwhelming, as economies of scale are achieved with continuous use. The final article by Bown and Hoekman (2005), highlights the fact that though inequalities are evident, poorer countries can offset this deficit by working in tandem with the private sector at home and abroad.

nonparticipation, even if the state is able to do so. If the world trading system is an international chess board upon which moves and countermoves are weighed based on preferences, perceived options and payoffs, then participation in the DSB needs to be revisited. Under conventional views of the DSB, nonparticipation could indicate that a state:

- a. Has no trading rights that are being violated.
- b. Has been violated but is unable to file a dispute proceeding.
- c. Has been violated but is fearful that litigation may make it worse off *ex ante*.

Less examined are the possibilities that a violated state may:

- a. Choose not to file although it is able to do so.
- b. Choose not to file because it is fearful of retaliation
- c. File outside of the WTO.
- d. Retaliate.

Many Members of the WTO are simultaneously bound in bilateral and regional arrangements. What therefore explains their choice to proceed with the formal dispute settlement arrangements within the WTO versus informal means, or even the selection of multilateral over bilateral and regional mechanisms and vice versa? Examining this phenomenon may add value to the debate about the (in) efficacy of the WTO generally, and the Dispute Settlement System specifically, since states have other options at their disposal and may therefore choose the one that gives the best payoff at the moment in question. As one tries to make a conclusion about the usefulness of institutions in facilitating cooperation, the example of the DSB which is embedded in an interwoven international trading system may also help to explain state behaviour in other dispute resolution mechanisms and especially their ability to opt in and out at will.

Research Questions

While this project nests in the general theoretical debate about the independence and clout of institutions, the intention is to utilize formal models, statistical analyses and case studies to explicate the decision- making process behind filing. In essence, this study does not intend to regurgitate the archaic discussion on the efficacy of institutions. Debates about whether and how institutions matter have been explored *ad nauseam*. This study will therefore go beyond those arguments to contemplate the possibility that there are robust institutions that are sometimes underutilized. Since neoliberal institutionalists do not give sufficient acknowledgement of this phenomenon, findings from this research can therefore be used to fill this important gap in the literature. This will deflect the attention away from institutions to states, their consideration of what type of trading partners they are interacting with, and the consequent choices that they need to make when a trade dispute emerges.

The primary interrogative that this research hopes to answer is, why do countries choose to (not) litigate within the WTO's Dispute Settlement Body? This question zones in on the fact that states have options and as a result, some deliberations inform their choice.

There are however, several secondary questions that are also critical to this study. These include:

1. What effect does participation or nonparticipation have on states' trading relations?
2. Does the DSB create opportunities for trading partners to exploit members?
3. Does the DSB influence state behaviour? Does the DSB control undesirable state behaviour?
4. Does the DSB mitigate defection between trading partners with asymmetric interests?

5. To what extent is the DSB representative of dispute resolution mechanisms in institutions generally?
6. Why do institutions ossify?

Realism contends that states are naturally self-interested. In the toughest cases for cooperation, it is therefore useful to probe trade relations in a context in which cheating / defecting is the dominant strategy. In order to do this, the study employs both quantitative and qualitative elements including formal models, statistical analyses and case studies. This mixed methods approach provides for a more comprehensive analysis of the dynamics of interstate trade disputes, state decision making and the role of the WTO.

Non-Participatory Membership

It is very important to outline from the onset, what non-participatory membership means in the context of this research. It is not expected, for instance, that states be parties to disputes just because they can, even if they have no real reason to do so. That is not the purpose of this research. Consequently, the ideal situation whereby trading partners engage in free trade and avoid the DSB is an example of non-participatory membership, but is not under consideration in this study. Instead, emphasis is on those situations where a country has a reason to be either a complainant or respondent in a trade dispute and opts not to do so for a variety of reasons. This study contends that non-participatory membership can manifest in three main ways. These include:

1. Pure Non-Participation
 - a. In this scenario, states pay no attention to the institution and try to provide for themselves what the institution purports to provide. Examples of these can be seen in the collective action whereby it is difficult to elicit cooperation and solutions in large groups. Capable

states that are frustrated by this may simply solve these problems on their own instead of being stymied by institutional weaknesses. In the context of trade disputes, some affected countries may agree on amicable solutions without seeking help from their mutual institutions. Others may not compromise, but instead, engage in trade wars outside the institution. Regardless of the path taken, these countries choose to stay outside the institutional framework for recourse because they can afford to do so.

- b. Pure non-participation can also take place because countries are unable to afford the costs associated with the dispute settlement process. This is one of the main types of non-participatory membership that this study emphasizes. Here, countries have legitimate cases, but consider the financial, reputational, audience and potentially retaliatory consequences of using the institution and choose to stay outside. It should be noted, however, that different costs affect countries differently. Some may therefore not participate in dispute settlement because the possible reputational costs from losing are too high, while others may avoid the institution because of the financial burdens. As a result, costs vary across cases and be a reason for pure non-participation in the DSB.

2. Strategic Bargaining

Strategic bargaining occurs when countries do not use the institution, but evoke its authority to force concessions or signal resolve. In this regard, the presence and clout of the institution serve as bargaining tools. Countries may therefore have no intention to use the institution, but threaten to use it in order to change the outcome of the dispute. There are many instances at the WTO where one trading partner formally requests consultations with the other party and the dispute is squashed. In other cases, the potential defendant accepts the challenge and the complainant withdraws its case. In these instances, the countries do not truly intend to

litigate, but use the recourse that they have at the institution as a threat in order to change the equilibrium solutions.

3. Free Riding

Institutions provide material benefits that in most cases, accrue to all members. In the case of the WTO, some countries may therefore have an interest and even be affected by trade disputes, but opt not to participate. In these instances, the countries hope to free ride by having others pay the costs of the litigation process and they enjoy the benefits. Free riders therefore gain from the trade liberalization that may come from the case rulings, and also avoid the acrimony that sometimes come from disputes. This is often a win-win situation for free riders if the results of the disputes are not limited to the litigants.

One counterargument to these types of non-participatory membership is that countries mostly adhere to the system of governance that the World Trade Organization provides. By doing so, they are technically participating in the institutional norms, principles and beliefs, even if they do not litigate. Consequently, there are countries that may never use the DSB, but that does not mean that they are inactive members in the WTO generally. This argument is meritorious. It should be noted, however, that this study is not focused on what countries do with their WTO membership broadly speaking. Instead, it examines only those cases where countries have trade disputes and need institutional recourse, but do not use it. Again, the expectation is not that all countries should be suing. Indeed, states join the WTO with the expectation that communal norms of free and fair trade will prevail. This, however, is not a realistic expectation. The same institution that promotes these ideals therefore has litigating process in place in the event that they are breached. This study therefore examines those instances of violation and the options that states pursue at those times. This is an important phenomenon to study because if

institutions have agency and are efficacious, then we should see more litigation when states are aggrieved. If, however, there are barriers to DSB usage, then steps need to be taken to make the process less cumbersome.

In order to probe the puzzle of non-participation, the study proceeds as follows. Chapter Two provides a discussion on institutions, but only as they relate specifically to participation. Previous studies are predominantly focused on developing countries and the challenges that they face in using the DSB (Bown; Davis and Blodgett Bermeo; Busch et al.) While acknowledging the value of these studies, the chapter takes the stance that any two countries in a dispute will have to weigh the costs of using the institution and this determines whether they will participate. It therefore argues that states may avoid institutional recourse because they prefer the status quo ante (Gruber 2000), or have options in other forums (Busch 2007; Fang 2010). Countries may also be frustrated in their efforts to litigate because of asymmetric information (Collins-Williams and Wolfe 2010), and the fact that both winners and losers gain and suffer when they litigate. (Fischer 1982; Collins-Williams and Wolfe 2010; Leal-Arcas 2007; Hoekman and Mavroidis 2000). Participation in the DSB is the result of strategic calculations by states. States therefore deliberate on how much they will have to pay in material and immaterial ways, consider how much benefit the litigation will be to their interests, and their odds of winning. (Fischer 1982; Pauwelyn 2000; Maggi 2015; Reinhardt 2001). A key concern is also interdependent payoffs, i.e., how might the results of one case be used as a precedent in future cases (Davis 2012; Leal-Arcas 2007; Pauwelyn 2000; Reinhardt 1999). These authors help to lay the foundation for the study's discussion of estimated legal capacity and calculated costs as determinants of participation in the DSB.

Chapter Three outlines the methodology for this research. It uses a mixed methods approach which includes an extensive form game and case studies, which are assessed comparatively by using the information theory framework. This extensive game models trade and dispute settlement between two trading partners and is explored in Chapter Four. Formal models have empirical implications. These give rise to case selection. The study therefore analyzes four cases that involve the same product – Ordinary Portland Cement, the same WTO provision – the Anti-Dumping Agreement, and have variations in power and outcomes. These cases include *China – Cement* (a non-litigated dispute between China and Jamaica); *Guatemala Cement I* and *II* (two disputes between Guatemala and Mexico); and *United States – Cement* (a long standing dispute between the United States and Mexico). Before the cases are discussed, Chapter Five provides justification for their selection, and discusses the technicalities and ambiguous nature of the Anti-Dumping Agreement as a possible impediment to using the DSB. By doing this, the study contributes to the extant literature by discussing how the specific provision can inhibit participation and not just the general WTO rules for dispute settlement.

Chapter Six examines how estimations of legal capacity can affect DSB usage. It builds on the work of Busch et al. and Davis and Blodgett Bermeo to define and discuss the concept. It includes Busch et al.'s conceptualization that experience promotes legal capacity, but broadens that experience to include membership in other WTO negotiation groups, as well as other regional and international dispute settlement organizations. As a departure from Davis and Blodgett Bermeo, the case studies also measure whether the affected countries actually file, and not just the likelihood that they will file. The chapter is also distinct from these and other works in that it evaluates legal capacity up to the point of the disputes, and not the countries' general capability. The chapter therefore includes assessments how whether the states had used the DSB

as a complainant, respondent or third party when their disputes emerged. Since all the cases include an invocation of the Anti-Dumping Agreement, the research also discusses whether the countries had any domestic or DSB experience with the Agreement. It reveals that domestic usage of the Agreement and even participation as a third party may not easily translate to participation as a complainant as in the case of China. On the other hand, the opposite happens with Guatemala where it had no previous experience with the Agreement domestically or multilaterally, but defended itself against Mexico and won. This demonstrates that legal capacity is a necessary, but not sufficient condition for DSB participation. In all these ways, the study departs from previous studies.

Chapter Seven features a discussion on calculated costs and these may inform litigation. It builds on Bown's work on how market share, expected benefit from the litigation and other political economy costs may affect the chances that an exporter will participate as a complainant or third party. As a distinction from Bown, however, it also analyzes how evaluations of cost can influence importing countries to be defendants as in the case of Guatemala and the United States. The study also includes thoughts from Chaudoin, Busch, Fang, Davis and Brewster to discuss how reputational costs and benefits, domestic audience costs, the expectation to win, as well as alternative forums can affect the choice to litigate. By doing this, the study uses a composite measure for costs and does not focus on a single factor. The cases therefore show that financial costs are not the only consideration that states make. In the case of China, for example, it did not file against Jamaica, arguably because that market share was small. Mexico, however, filed against Guatemala. Based on conventional arguments, it should have been too expensive for Guatemala to defend itself and so it should have acquiesced. Guatemala's case therefore exemplifies how interdependent payoffs domestic audience costs can supersede those associated

with retaliation fears and vulnerability interdependence. These are rich discussions that emphasis on a few variables cannot provide.

Chapter Eight ends with concluding remarks on the puzzle of non-participatory membership. It examines the Central American countries and why some like El Salvador, Honduras and Ecuador formally supported Guatemala, while those like Belize, Costa Rica and Panama stayed outside. It highlights free riding, fear of retaliation, low DSB experience as possible reasons for non-participation. On the other hand, the countries that were also affected by the dumped product and had closer ties to Guatemala joined. These incidences demonstrate that no single reason can be advanced as to why non-participatory membership occurs. Each country weighs what is in its best interest and makes the choice relative to the dispute. The four cases in this study, however, add important ideas to the literature because they defy the expectations of power dynamics. Specifically, the study contributes to the literature by highlighting how the Anti-Dumping Agreement itself can be an impediment to recourse for those states that evoke it. By examining legal capacity costs, the project also enhances its conceptualization by measuring it at the particular times of the disputes, experience in other dispute settlement organizations, and experience with the particular Agreement. In regards to other dispute settlement costs, this research complements other scholars by modeling costs as a composite variable. When this is disaggregated, the findings show that countries will only litigate if the good is a significant GDP earner, and if they expect to win. Importantly, the study shows that developing countries can and will also be sued, and measures their inclination to participate in dispute settlement based on their assessment of the associated costs. It is also the first known study to use the information theory approach to find the strength and direction of relationships under conditions of reduced uncertainty. These conclusions can therefore be built on to look at a larger N to see if the results

hold. For now, non-participatory membership remains a phenomenon that can be seen when developing and developed countries alike have trade disputes, and especially as countries evaluate what they expect to pay, relative to the projected benefits

CHAPTER II

LITERATURE REVIEW

Introduction

The international system is replete with specialized regional and multilateral institutions that cater to the common and diverging needs of their members. It is therefore expected that the coalescence of states in these bodies would be because of the public goods that are provided and the succour that is available in times of distress. The global political economy is structured in such a way that conflicts over the gains from cooperation frequently occur. The potential for emerging conflicts is also present. This makes it critical for states to have specific “sets of implicit or explicit principles, norms, rules and decision-making procedures” around which their expectations can converge.¹ This necessitates the role of organizations like the World Trade Organization with its governance of trade policies and disputes as they emerge. One of the assumptions, of course, is that states cannot unilaterally regulate the world system of trade and therefore need a mechanism through which they can make binding commitments to each other.

This study uses the World Trade Organization (WTO) as an exemplar for institutions. Many countries accede to it because of its influence and governance of the world trading system. Specifically, the WTO is designed in such a way that it is theoretically possible for any Member that has been violated in the ordinary course of trade to bring its grievances before the Dispute Settlement Body (DSB). On a more practical level, not all countries that have legitimate cases have sought reprieve at the DSB. Additionally, there is a discrepancy in the types of goods that frequently contested. What explains this?

The extant literature on institutions is vast. Dispute settlement at the WTO and especially the variance in usage between developing and developed countries make up a substantial portion

¹ Stephen D. Krasner. *International Regimes*. (Ithaca: Cornell University Press, 1983), 2.

of these writings. Yet, this study finds an important deficiency in the previous scholarship. While work on the WTO has delved into possible reasons for filing, not many have explored costs beyond the advanced/third world dynamic.² This study therefore uses dispute settlement costs at the DSB as the independent variable, and postulates that these affect the choice to pursue cases (dependent variable). The intention of this project is to investigate whether there is a minimum cost threshold for the threat to use the DSB to be credible, and a maximum level beyond which institutional recourse becomes irrelevant as countries will find it too expensive. In essence, while industrialized countries may be better able to afford DSB procedural costs, this study focuses on the strategies of the two states in the dispute and their preferences relative to costs. Two advanced as well as two developing countries could therefore be caught in this predicament and would have to make similar choices based on what they have to pay. The intention, then, is to answer the question of non-participatory membership and examine the instances in which litigation costs could inhibit legitimate participation in the DSB/WTO.

The main puzzle that this research probes is the often-overlooked fact that membership in institutions does not necessarily equate to participation. It therefore argues that there are specific reasons why states join institutions.³ If, however, some specific reasons informed the choice for institutional membership, then we should see active participation, especially when those reasons are evoked. If, however, the opposite occurs, then induced participation based solely on membership becomes a *non sequitur*. Participation may therefore not be an automatic process. What factors, then, could account for non-participatory membership in robust institutions?

² See for example, Chad Bown in Bown in “*Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*.” The World Bank Economic Review. Vol. 19, No. 2, pp. 287- 310. Here, by examining WTO trade litigation trends between 1995 – 2000, he finds that the organization generates an implicit “institutional bias” through its rules and incentives. This has the effect of discouraging developing country participation in the dispute settlement process. Their low retaliatory and legal capacities also impede their involvement in the institution.

³

There are six major explanations for the underutilization of multilateral institutions for reprieve. These include availability of alternative forums, preference for the status quo ante, expected utility, interdependent payoffs, asymmetric information and complainant versus respondent utilities. While there may be other possible explanations for the avoidance of dispute settlement mechanisms within institutions, I find these to be the most compelling and pertinent to this study. This chapter will therefore explore each of these points, in order to highlight the strategic use or avoidance of multilateral institutions.

Availability of Alternative Forums

What explains a state's decision to respond singlehandedly, use a bilateral or regional arrangement, seek help in a multilateral institution or simply do nothing if there is a trade violation? If the rational choice thesis holds true for example, then it could mean that the timing, type of goods contested and the institution selected for relief are all calculations made by the strategic state. This section will therefore explore the debate about why and when states use multilateral institutions for reprieve.

Busch explicates how forum shopping, i.e. availability of alternative mechanisms for resolving the dispute may influence state decision-making in the event of a trade violation. From his perspective, complainants often have overlapping memberships in various institutions, and this helps them to "strategically discriminate" among them to meet their objectives.⁴ Using a two-dimensional spatial model with applicability to Mexican brooms and Canadian periodicals disputes, Busch contends that "the key to forum shopping is not simply which institution is likely to come closest to the complainant's ideal ruling against the defendant."⁵ On the contrary, his studies find that the medium selected for litigation will be one "where the resulting precedent

⁴ Marc L. Busch. "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade." International Organization, Volume 61, Number 4. (Autumn, 2007), pp. 735.

⁵ Ibid

will be more useful in the future, enabling the complainant to bring litigation against other members.”⁶ In essence, states choose to use institutions successfully, to offset possible cases against them in the future. A state is therefore very deliberate in selecting a bilateral, regional or multilateral organization to file its grievances because the institutional findings have implications for its future trading relations and possible litigations.⁷ This has a two-fold effect in that case settlement may temper the defendant’s protectionism, and also set a precedent whereby other members of the institution can be forced into acquiescence based on the results of the complainant’s case.

Busch’s argument is compelling, both for its originality and logic. It is often conceived that aggrieved states will choose institutions based on how they serve their interests now. With that thought in mind, countries would therefore consider which forum gives it the best payoff and choose accordingly. Busch says that this is not so. In his mind, there are some cases that states would want to settle bilaterally, regionally or multilaterally, not for the immediate benefits, but for how this can increase its bargaining advantage later on. Implicit in Busch’s assumptions is the expectation that institutions have clout and that their findings are binding on all members, or at least that they generate norms for future behaviour. Consequently, institutional deliberations and judgments affect state behaviour and bargaining tools. This would make it critical as Busch suggests, for states to not just pick an institution for instant reprieve, but also to litigate in the one whose findings will give it the greatest advantage when it deals with others.

Fang examines bilateral and multilateral institutions and comes to conclusions similar to those of Busch. While her work does not model precedent specifically, she uses a formal model with the assumptions of Rubinstein’s bargaining model to explicate why countries locked in a

⁶ Ibid

⁷ Ibid, 736

bilateral dispute would evoke the multilateral structure.⁸ Based on the model's equilibrium, high capacity institutions can induce cooperation, but low capacity ones do not.⁹ Countries therefore moderate their actions based on the type of institutions that they are dealing with.¹⁰ Since Fang's work specifically examines dyadic disputes, her model shows that the choice of international succour is only attractive to one party. Arguably, this could be based on expectations about the outcome, as well as perceived calculations about financial costs, time, reputation and effects on the trading relationship.

One important finding that Fang highlights is the fact that a country's bargaining position can be strengthened by an institution, even if that institution is not directly involved in the dispute settlement.¹¹ In Fang's words, "given a prior belief, the country with a lower noncompliance cost is more likely to have a credible threat of appealing to an institution, thus more able to extract concessions at the bargaining table."¹² This is a counterintuitive result since one would expect that higher noncompliance costs would make the threat to go to the institution even more credible. This is especially true since evoking the institution is one way in which a state can signal its resolve to litigate to its domestic audiences, the responding party, as well as to the world.¹³ If, however, a country has less to lose if it does not implement an institution's findings, then the state that has a higher noncompliance cost could indeed be cajoled to acquiesce and avoid the institution as Fang intimates. In this case, noncompliance costs affect the

⁸ See for example, Wolfgang Alschner in *"Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System"* for a counter argument. Alschner reasons that because the WTO sanctions Mutually Agreed Solutions (pursuant to Article 3 of the Dispute Settlement Understanding), countries may simply resort to settle their disputes bilaterally instead of the potentially prolonged multilateral process. In this sense, the countries may initiate the dispute at the DSB, but come to an amicable solution outside. By doing this, they show that having the bilateral alternative available, they may forego the longevity of the DSB process and choose a quicker resolution.

⁹ Songying Fang. *"The Strategic Use of International Institutions in Dispute Settlement."* Quarterly Journal of Political Science, 2010. Volume 5, pp. 107.

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Ibid, 108.

equilibrium that is formed and determines whether states locked in a bilateral dispute will settle or use an international institution.

Allee and Huth add their spin to the debate on the strategic use of international institutions for dispute settlement. Using multivariate analyses of 348 territorial disputes across all regions from 1919-1995, they show that there are specific domestic situations where states leaders would prefer to use an international institution than to settle their disputes through bilateral negotiations. In this sense, the availability of the international forum would take precedence over the bilateral arrangement and serve as an explanation for its usage. Allee and Huth call this phenomenon “political cover.” What they mean by this is that state leaders often use the legitimacy of an international institution to offset the possible negative repercussions of a controversial dispute settlement.¹⁴ This occurs in cases where leaders believe that there could be huge domestic political consequences if they make concessions through negotiations at the bilateral level.¹⁵ The international institution, however, provides “political coverage” whereby the state can use it to take some blame for the result, or point to its judgment as the unbiased resolution of the conflict.

The study by Allee and Huth is very pertinent to this research because it highlights how domestic actors can influence a state’s foreign policy. It also peels away at the notion of the state being a unitary actor, and instead demonstrates how a country’s constituents can force the state to forego the recourse that it has in bilateral arrangements and participate in international institutions. If this argument is valid, then states would not only consider their chances of winning, financial cost, or even the precedent that they want to set when they use international

¹⁴ Todd L. Allee and Paul K. Huth. “*Legitimizing Dispute Settlement: International Legal Rules as Domestic Political Cover.*” *The American Political Science Review*, Volume 100, Number 2 (May 2006), pp. 219.

¹⁵ Ibid

institutions as opposed to bilateral ones. Instead, their intention may be to avert large domestic political costs. This is different from what Fang argues.

The interplay of the domestic and international levels runs parallel to Putnam's arguments and also as a possible explanation for which forum is used when trade disputes arise. According to him, an interaction of domestic and national interests determines what a country's win-set is when it sits at the negotiating table. A combination of regime type, institutions, preferences, power and rules at the domestic level plus the negotiator's skill relative to an interlocutor therefore helps to determine the outcome.¹⁶ While the decision to use an international institution for dispute settlement may not be a negotiation in the way that Putnam characterizes it, his arguments also have applicability here. In a sense, states are calculating what the domestic populace wants and how this coincides with its international goals. The "win-set" to go to the DSB would therefore be contingent upon whether it has strong national support (or at least a weak / non-existent opposition to do so), or needs the backing of the institution to reduce the effects of possible domestic dissent and backlash. These factors then, help to create national consensus, which tips the balance in favour of formal, multilateral litigation versus alternative avenues for resolution.

Audience features is another argument that has been postulated in support of how domestic constituents can affect the strategic use of international institutions. This theory is posited by Chaudoin. Chaudoin questions, for example, why WTO members wait so long to object to their trading partners' illegal trading practices. For him, evoking the DSB is synonymous with sounding an alarm, but this "alarm" is raised discriminately.¹⁷ This is because

¹⁶ Robert Putnam. *"Diplomacy and Domestic Politics: the Logic of Two – Level Games."* International Organization. (Summer, 1988) Volume 42, Number 3.

¹⁷ Stephen Chaudoin. *"Audience Features and the Strategic Timing of Trade Disputes."* International Organization, Volume 68, (Fall 2014), pp. 877.

governments are aware that there are variations in the preferences and strength of the audience that hears the alarm. As a corollary, sounding the alarm is strategic.¹⁸ Consequently seeking institutional recourse may be dependent on not just precedent setting as Busch intimates, or even on its projected effect on the outcome as Fang argues. Additionally, while Chaudoin's view coincides with Allee and Huth's thinking about the impact of level two actors, his treatise is more focused on the calculated litigation timing. To substantiate this claim, Chaudoin uses WTO disputes against U.S. tariff barriers and the critical role that timing plays in the use of the institution. He shows, for instance, that election years are more likely to feature trade disputes since during these times, macroeconomic indicators reveal broader support for free trade.¹⁹ As a result, the frequent litigation by the U.S. during election years would not mean that trade violations are prevalent only during those times. On the contrary, they would indicate periods in which leaders feel that electors are more in favour of addressing trade violations, even if they were tolerated at other times.

Chaudoin's examination of how domestic audiences affect DSB litigation is relevant to this study because it firstly explains why we do not see more filing at the DSB. It also explains, to some extent, the specific types of goods that are contested and the frequency with which litigants appear before the Body. While his focus is not on how institutions provide "political cover" as Allee and Huth articulate, the clout that domestic audiences have is central to understanding the strategic use of international institutions. It shows, for instance, that states read and tap into the political will and preferences of the electorate, and use this knowledge to their advantage. DSB litigation is therefore not haphazard, but instead is done at times where governments perceive that they have the most domestic support.

¹⁸ Ibid

¹⁹ Ibid

Davis also explores the strategic use of international institutions in her book, *Why Adjudicate? Enforcing Trade Rules in the WTO*. She too underscores how domestic politics can help to determine the cases that appear before the DSB. While she allows for the influence of international politics in her delineations, she finds that industry lobbying and legislative demands also have a decisive input in a state's decision to litigate. To validate her claims, she uses high profile U.S. trade disputes with China over intellectual property rights and the numerous challenges that the Japanese made to American protectionism. Davis's main argument is that evoking the DSB is a potent signal of a country's intentions and can ultimately mitigate imminent trade wars. In her estimation, formal dispute settlement enables governments to indicate their resolve to address the issues that are important to interest groups and this can affect how policy makers respond. This would be similar to what Allee and Huth argue, except that they would see the "political cover" as the end result while Davis, based on her cases, would see it as the first critical step for leaders. In essence then, states operate at both the international and domestic levels. They have multiple avenues in which to pursue trade litigation and they use this knowledge to their advantage. The goal can be to signal resolve, to set a precedent, tip the bargaining scales in favour of the outcome, or to seek political cover. The timing is also important. In the end, whatever strategy is chosen reveals calculations about the choices and a combination of domestic and international factors determines which of the available forums is used, and when.

Preference for the Status Quo Ante

All states have to think about their economic and political survival in the global political economy. Membership in multilateral institutions is one means of safeguarding their survival. In this section I will therefore use the work of Gruber and other scholars to argue that states may

join institutions to protect their international bargaining position, but become inactive users of those same organizations to express their preference for the status quo ante.

Gruber writes explicitly about why states may choose to join supranational organizations. For him, “institutionalized cooperation by one group of actors (the winners) can have the effect of restricting the options available to another group of actors (the losers), altering the rules of the game such that members of the latter group are better off playing by the new rules despite their strong preference for the original, pre-cooperation status quo.”²⁰ In essence, even in the face of being potentially worse off, a coopted state may find it rational to accede to a new regime because it knows that its counterparts can afford to unite and benefit without it.²¹ Since the status quo changes when the new regime is formed, the state may therefore find it more prudent to become a member rather than suffer the exclusion costs.²² If Gruber’s arguments are valid, it would therefore mean that non-participatory membership allows a state to express its preference for the pre-cooperation status quo while sparing it the costs of exclusion. In other words, the avoidance of costs (exclusion) and the realization of benefits (inclusion) are separate calculations for states. Gruber’s postulation helps disentangle these calculations.

Gruber’s arguments help to explain the near universal participation in the WTO. China’s accession in 2001, for example, was a means of benefiting from the special and differential treatment that is available to WTO members but is inaccessible to non-members. China therefore weighed the costs and benefits and felt that it had more to gain within than without. This thinking may serve as a counter to the widely held view that the WTO is the most successful international

²⁰ Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (New Jersey: Princeton University Press, 2000), 7.

²¹ Ibid, 90

²² Ibid

institution because of its membership. Based on Gruber's surmising, the exclusion cost may be far greater than accession, and so states join even though they may prefer the status quo *ex ante*.

There are, however, some challenges to Gruber's thesis. He contends, for example, that it is the fear of exclusion and not the possibility of mutual gains that generates regime membership. This is a subtle relative gains argument because the outside state that is really concerned about power contemplates how its exclusion will allow the included members to increase their power positions relative to it. Joining this regime would therefore eliminate this disadvantaged situation. By emphasizing how power serves as an impetus for regime formation, however, Gruber does not give enough credence to the role of prevailing norms that constructivism advocates. It could be that states are socialized to be functionally similar and so since norms of institutionalization have ossified in the international system, states join these supranational institutions because they have come to believe that these are good for their welfare and not because of any calculation about relative power configurations. If this is true, then states would institutionalize as a "rite of passage" and not for the reasons that Gruber suggests. If, however, one should consider the near universal participation in institutions like the United Nations and the WTO, and especially the countries that are moderating their policies to accede to the latter, then Gruber's summations are meritorious. Exclusion costs, real or imagined, may therefore be a motivational factor for institutional membership, with some states simply unwilling to stay outside when they can join and potentially enjoy all the benefits.

Conversely, some countries are sufficiently capable of retaliating against a violating state and do not appear to need to use the DSB. Additionally, many find reprieve in regional trade agreements as recompense. Along with non-participatory membership, this suggests that the DSB is neither necessary nor sufficient for the resolution of trade disputes, at least for some

states. This makes the use, or non-use, of the DSB all the more problematic theoretically.

Regionalism is therefore one of the ways that states coalesce in institutions as a counterbalance to multilateralism. While there are many reasons for economic regionalism, Gilpin surmises that “it is also driven by the dynamics of an economic security dilemma.”²³ His argument is that states fear exclusion from certain blocs and form their own as a counterbalance.²⁴ This argument is parallel to Gruber’s in that states believe that they have more to gain by joining than staying outside. On a comparative level, it therefore can be posited that the propagation of regional trading agreements may be due to calculations by states that these may yield greater payoffs than the multilateral structure that the DSB entails. This thinking may coincide with Olson’s resolution of the collective action problem where he asserts that smaller groups are better equipped to deal with the free rider problem than larger ones.²⁵ In this regard, trade liberalization would be a public good, with not many nations willing to pay the price for it by acquiescing to the wishes of other traders, especially in a context where they can gain more in the short term through protectionism.²⁶ In regional groupings, however, this problem may be more easily curtailed because there are stronger checks and balances, with the cost of defection being much higher. In this sense, regionalism and simultaneous non-participatory membership in multilateral institutions may therefore be ways in which states demonstrate their predilection for the status quo ante.

Calculations about institutional design can also help us understand why states may join, but use their nonparticipation to express their preference for the pre-institutional status quo.

²³ Robert Gilpin. *Global Political Economy: Understanding the International Economic Order*. (New Jersey: Princeton University Press, 2001), 360.

²⁴ Ibid

²⁵ See Mancur Olson in *The Logic of Collective Action: Public Goods and the Theory of Groups*. (Cambridge, Massachusetts: Harvard University Press, 1965.)

²⁶ Ibid

Downs, Locke and Barsoom, for instance, posit that many multilateral organizations start out with “substantially smaller memberships and expand over time.”²⁷ They use a rational choice treatise to support the claim that these organizations do not form an “inclusive” agreement at the onset. On the contrary, these smaller groups are able to sequentially select potential members based on their own preferences, and this perpetuates a path-dependent process whereby the institution is able to become progressively deeper in facilitating cooperation than it would be if it had been fully inclusive from the onset. The articulations of Downs, Locke and Barsoom are similar to what Gruber contends. Here, both works agree that the “winners set and entrench the new status quo” in the international system. The only difference here is that whereas Gruber predicts a contagion effect whereby C and D as rational actors will want to join the institution that A and B as winners form, Downs, Locke and Barsoom show the winners actively choosing the additional members based on their perceived preferences for cooperation.

The trajectory of the General Agreement on Tariffs and Trade (GATT) seem to substantiate the arguments that Downs, Locke and Barsoom present.²⁸ The GATT was founded by twenty-three countries, whose major issue was tariffs.²⁹ Tariffs continued to be the main

²⁷George W Downs, David M. Locke and Peter N. Barsoom. 1998. “*Managing the Evolution of Multilateralism.*” International Organization, Vol. 52, No. 2 (Spring 1998), pp. 397.

²⁸ The clout that the winners/initial members have in selecting additional members is seen in the disparity in accession terms for each prospective member. Pursuant to Article XII of the WTO Agreement, “Any state or customs territory having full autonomy in the conduct of its trade policies is eligible to accede to the WTO.” Accession, however, is based “on terms to be agreed” between the acceding government and the WTO. It is therefore based on negotiation between the two parties and is not an automatic process. See for example, *Accession: Explanation – How to Become a Member of the WTO.*” https://www.wto.org/english/thewto_e/acc_e/acces_e.htm Pelc also addresses this inconsistency in his work, “Why Do Some Countries Get Better WTO Accession Terms Than Others?” For him, existing members use their domestic export interests to elicit favorable accession terms from new members. Countries that have larger markets are therefore required to give more and vice versa. In this case, the institutional design would determine the different accession terms, and ultimately, who is allowed to join. See Krzysztof J. Pelc. “*Why Do Some Countries Get Better WTO Accession Terms Than Others?*” International Organization, Vol. 65, No. 4 (Fall, 2011), pp. 639.

²⁹ The founding 23 members of the GATT were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States. See for example, “*Press Brief – Fiftieth Anniversary of the Multilateral Trading System.*” https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm

course on the agenda until the Kennedy Round when antidumping measures were included.³⁰ As more and more countries, and especially developing countries, acceded, the flaws of the GATT became more glaring. This precipitated the formation of the World Trade Organization (WTO). Arguably, the very large membership that the WTO now has may be one of the reasons the Doha Round, which has been happening since 2001, has vacillated, ebbed and flowed without any successful conclusion.³¹ Importantly, even with the increased membership that the WTO has, some countries have remained inactive participants in the dispute settlement process, while others are frequent litigants. This disparity in usage could be an indication of the separate considerations that states make to stay outside versus joining but not adjudicating.

Escape clauses are another means by which states join institutions but use it strategically to reflect their preferences for a world without them. Rosendorff and Milner investigate and clarify this claim. Based on the findings of a two-stage game, they reason that, “escape clauses are an efficient equilibrium under conditions of domestic uncertainty.”³² For Rosendorff and Milner, “the greater the uncertainty that political leaders face about their ability to maintain domestic compliance with international agreements in the future, the more likely agreements are to contain escape clauses.”³³ They caution, however, that “for escape clauses to be useful and efficient, they must impose some kind of cost on their use.”³⁴ This caveat convincingly submits

³⁰ See for example, “*The GATT Years: From Havana to Marrakech*.”

https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm

³¹ The Doha Round is unique in that it has 157 countries participating in the talks. It began in November 2001, and to date, has not come to a successful end. Some of the issues that have been negotiated include agriculture, non-agricultural market access (NAMA), services, trade facilitation, rules that cover anti-dumping, subsidies and countervailing measures, fisheries subsidies and regional trade agreements, the environments, geographical indications: multilateral register for wines and spirits, other intellectual property issues and dispute settlement, with a view of improving and clarifying the Dispute Settlement Understanding. For more on the Doha Round, see “*Doha Round: What are They Negotiating?*” https://www.wto.org/english/tratop_e/dda_e/update_e.htm

³² Peter B. Rosendorff and Helen V. Milner. 2001. “*The Optimal Design of International Trade Institutions: Uncertainty and Escape*.” International Organization, Vol. 55, No. 4, The Rational Design of International Institutions (Autumn 2001), pp. 831.

³³ Ibid

³⁴ Ibid

that institutional agreements can be vitiated if members frequently evoke escape clauses with no penalty. An exorbitant cost, however, mitigates against frequent use and signals intent to stick with the institutional rules in the future.³⁵

The inclusion of escape clauses in institutional arrangements highlights the calculations by states of not only how the institution should be designed at conception, but also how such a structure may support their interests in the future. Importantly, states seeking to join institutions may be reluctant to become parties to agreements that would restrict their actions if the need for change comes up. As Rosendorff and Milner aptly indicate, however, escape clauses should have some significant cost if they are to keep states committed to the institution, but at the same time, give them some amount of flexibility. Other prospective states, for example, may worry how others can use escape clauses to take advantage of them and would be disinclined to join if the institution makes it too easy. In the same vein, this flexibility could be states' way of expressing their preference for the status quo ante. The only difference would be that in this regard, they would use the same institutions to sanction their non-participatory membership.

It should be noted, however, that writers like Pelc challenge the assertion that escape clauses have to be costly for them to be effective. He argues that on the contrary, in organizations like the GATT/WTO, members can "appeal to exception" whereby they can use domestic circumstances to justify their request for temporary escape.³⁶ This would be based on the "institution's ability to verify the severity and exogeneity of the domestic circumstances of states seeking temporary escape."³⁷ While both arguments are meritorious, both of them highlight the fact that states are more incentivized to join institutions if there are possibilities to

³⁵ Ibid

³⁶ See Krzysztof J. Pelc in *"Seeking Escape: The Use of Escape Clauses in International Trade Agreements."* *International Studies Quarterly* (2009), Volume 53, pp. 349 – 368.

³⁷ Barbara Koremenos, Charles Lipson and Duncan Snidal. *"The Rational Design of International Institutions."* *International Organization*, Vol. 55, No. 4, *The Rational Design of International Institutions* (Autumn 2001), pp. 365

circumvent the rules that they sign on to.³⁸ This amounts to minimizing exclusion costs and maximizing inclusion benefits. Conversely, however, significantly costly escape clauses may also induce non-participatory membership. This could occur in cases where the costs of escape/derogation may be too high, while costs of litigation are also exorbitant. For the affected states, inaction (nonuse) may be the least costly alternative. This would therefore see them avoiding the institution so as to avoid both potentially high costs.

Expected Utility

Expected Utility and Probability of Success

There are other reasons outside of the tensions between domestic and international interests that inform the strategic use of multilateral institutions. Fischer for one examines the pre-litigation phases of four cases to explicate the rationale for using the International Court of Justice.³⁹ These cases shed light on factors that the applicant states considered, as well as the deliberations that the respondent states made in light of the imminent proceedings, which ultimately help us to answer why states choose to use multilateral institutions.

There are three factors that Fischer says the applicant states considered as they prepared to use the International Court of Justice. These include time and diplomacy, dispute and context, and probability of winning/losing. In regards to time and diplomacy, Fischer posits that “all the applicant states felt that they had exhausted all other peaceful methods of dispute settlement before turning to the Court”, with some of the cases being unsuccessfully resolved for many

³⁸ See for example, Jeffrey Kucik and Eric Reinhardt in “Does Flexibility Promote Cooperation? An Application to the Global Trade Regime.” International Organization, Volume 62, Number 3, (Summer 2008), pp. 477-505. They argue that countries that are able to take advantage of the WTO’s flexibility on antidumping whereby they can have their own domestic laws, are more likely to join.

³⁹ The cases include nuclear tests as evidenced by Australia v. France and New Zealand v. France; The United Kingdom of Great Britain and Northern Ireland v. Iceland, and The Federal Republic of Germany v. Iceland in fisheries jurisdiction cases; disputes regarding the North Sea continental shelf involving the Federal Republic of Germany v. Denmark and the Federal Republic of Germany v. The Netherlands; and Pakistan v. India in the trial of Pakistani prisoners of war. See Dana D. Fischer. “Decisions to Use the International Court of Justice: Four Recent Cases.” International Studies Quarterly, Vol. 26, No. 2 (June 1982), pp. 253.

years.⁴⁰ While not all disputes take a considerable amount of time before they are brought before an international tribunal, it is reasonable to assert that when they finally do, that states have exhausted all possible means for an amicable resolution. This would mean that attempts at diplomacy have failed and the Court is evoked as a last resort. The WTO, for instance, allows for consultations and mediation between the two parties as the first step in dispute settlement.⁴¹ It is only after the two countries are unable to resolve their differences that a panel is set up for adjudication.⁴² This would also mean that during the time when attempts are being made to resolve the dispute in other forums, at the WTO level, this would be seen as examples of non-participatory membership.

In regards to “dispute and context,” Fischer postulates that not only had the countries exhausted all avenues for the pacific settlement of their disputes, but all felt that there were broader implications for their foreign policy objectives.⁴³ New Zealand, for example, felt that the intervention of the Court was needed to isolate the case from its otherwise harmonious relationship with France,⁴⁴ while in the North Sea continental dispute, Germany, Denmark and the Netherlands were of the view that the matter required legal clarification and therefore favoured international judgment over a political solution.⁴⁵ The idea of “dispute and context” highlights the fact that institutions are issue-specific and that states trade more than one good simultaneously. As a result, a dispute in one particular area does not mean that states do not continue to cooperate in other critical areas. Having the institution as a mediation forum, however, would allow the states to continue their relationship in other areas while the institution

⁴⁰ Ibid, 255.

⁴¹ See for example, “*Understanding the WTO: A Unique Contribution.*”
https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm

⁴² Ibid

⁴³ Dana D. Fischer. “*Decisions to Use the International Court of Justice: Four Recent Cases.*” *International Studies Quarterly*, Vol. 26, No. 2 (June 1982), pp. 258.

⁴⁴ Ibid

⁴⁵ Ibid, 259

deliberates over the vexing issue. Additionally, seeking legal clarification on matters could be similar to what Busch argues in that the Court's ruling would set a precedent for future cases involving similar issues. This would have greater traction and apply to a much broader audience than would have happened if the grievance were to be settled bilaterally or regionally. Arguably, however, states may choose not to litigate fearing that a precedent would affect a different dispute it has with another party. In other words, the interdependence of outcomes and payoffs may dissuade use of an institution in a given context.

Fischer surmises that one of the most important reasons that an applicant state would consider the International Court of Justice is the probability of winning/losing. Since litigation places a huge financial, technical and legal burden on the states involved, then it makes sense that countries would calculate their chances of winning before applying and also responding to a case. For the applicant state, losing is even more expensive because there are reputational costs as well. For the respondent state, it too would be better off if it capitulates at the onset rather than pursuing the litigation knowing what the odds are and then losing. Conversely, some states may view acquiesce as a form of weakness and would prefer to have the matter settled in Court. Another counterargument is that some states actually want to go before the Court and lose because they may be opposed to the groups that pressure them to file, but want the institutional support to say no. This coincides with the "political cover" argument that Allee and Huth raise.

There are, however, challenges in enforcing decisions made by international institutions since many lack the capability to do so. In this regard, enforcement costs may be a critical consideration for states that decide not to pursue recourse in multilateral institutions. In all the cases that Fischer explores, for example, "all of the respondents refused to accept the jurisdiction

of the Court.”⁴⁶ Since participation in the Court is voluntary, none of the parties could be coerced to comply with its rulings. There are, however, other strategic reasons that countries would choose to use an international institution, even if its enforcement mechanism is weak. In the nuclear tests, for instance, New Zealand and Australia were not surprised by France’s refusal to avoid the Court.⁴⁷ They saw, however, application to the Court as one means by which they could get France to stop the tests and opted for that strategy.⁴⁸ Where the fisheries jurisdiction cases are concerned, the United Kingdom and Germany used the Court to signal their position to Iceland and the observing world.⁴⁹ In doing so, the Court became strategic as an international bargaining tool. This is similar to what Fang and Busch assert. In essence, even if respondents do not accept the rulings of the international institutions, applicant states can still use them to leverage their positions and also to bring international pressure on the noncompliant state. On looking countries that foresee this potential institutional clout may therefore choose not to use the institution in certain instances. How then, does this relate to the WTO specifically?

Enforcement and Litigation Costs

The extent to which the WTO has any enforcement capacity is the subject of many scholarly debates.⁵⁰ While academics are divided on the issue, one puzzle remains: why would states bother to litigate in a multilateral institution that has no real power to bind disputants to its findings? Indeed, why would countries not only file, but also invest so much money, time and legal and technical expertise to increase their chances of winning? One argument is that while

⁴⁶ Ibid, 261

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid, 266

⁵⁰ See for example, Michael M. Bechtel and Thomas Sattler. “*What is Litigation in the World Trade Organization Worth?*” International Organization, (2015), Volume 69, pp. 375 – 403, Giovanni Maggi. “*The Role of Multilateral Institutions in International Trade Cooperation.*” The American Economic Review, Vol. 89, No. 1 (March, 1999), pp. 190-214 and Mark L. Movsesian. “*Enforcement of WTO Rulings: An Interest Group Analysis.*” Hofstra Law Review, Faculty Publications, Volume 32, Number 1 (Fall, 2003), pp.1 -23.

the Dispute Settlement Body by itself may be limited in its enforcement capacity, norms of compliance have solidified in this institution and so members see the results of deliberations as their legal obligations, even if they delay and modify the extent to which they do so. Conversely, it could also be that the institution is designed in such a way that it is difficult for parties simply not to adhere to its provisions. This could be because the repercussions are just too costly. This section therefore examines the extent to which the WTO's enforcement mechanisms work, and consequently whether their lack of efficacy may explain why members sometimes do not avail themselves of the DSB.

Pauwelyn explicates the different ways in which the WTO executes its enforcement function. All WTO rules fall under the ambit of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁵¹ Through this mechanism, all Members can seek redress for trade violations. For example, if the established panel finds that a WTO provision has been breached, pursuant to Article 19.1, the DSB will recommend that the culpable state bring that measure into conformity.⁵² The panel and Appellate Body also have the right to make suggestions on how the wayward Member can implement their recommendations.⁵³ As Article 21.1 of the DSB stipulates, the expectation is that rulings and recommendations should be implemented immediately.⁵⁴

There is, however, allowance for the losing party to have a "reasonable period of time" to make the proposed adjustments if it is unable to institute them promptly.⁵⁵ If this time expires, the rule is that it should provide compensation to both the winning party and all Members by

⁵¹ See for example, Joost Pauwelyn. "Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach." *The American Journal of International Law*, Volume 94, Number 2 (April 2000), pp. 336.

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid, 336 -337

⁵⁵ Ibid, 337

lifting trade barriers.⁵⁶ In the absence of an agreement of what this compensation should look like, the DSB can authorize bilateral countermeasures that are equivalent in nature to the first offence.⁵⁷ Additionally, in order to elicit compliance, the implementation process is continuously monitored by the DSB.⁵⁸ Based on the terms of Article 21.5 of the DSU, litigants can ask the original panel to determine if compliance of its rulings has occurred.⁵⁹ Lastly, in accordance with Article 22.6 of the DSU, arbitration can be used to mediate between parties that disagree on countermeasures or similar issues.⁶⁰ Generally, these regulations are in place to eliminate uncertainty when trade disputes arise, and also to facilitate implementation after panels have deliberated. What then might be some of the problems regarding enforcement at the WTO?

While Pauwelyn identifies the many efforts that the legal framework of the WTO has made to improve from its predecessor the GATT, he highlights some inherent weaknesses in the DSU which complicate its enforcement efforts and consequently, why states would forego their recourse there. One of his criticisms of the legalized nature of dispute settlement is the fact that weaker states sometimes have to grapple with the repercussions of seeking recourse against their more powerful, noncompliant trading partners. For him, this can ignite power politics which can make negotiations regarding compensation and countermeasures difficult.⁶¹ Additionally, any implementation of countermeasures could cause the more powerful state to retaliate in other

⁵⁶ Ibid

⁵⁷ Ibid, See the Articles of the Dispute Settlement Unit for more details: “*Understanding on Rules and Procedures Governing the Settlement of Disputes*.” Annex 2 of the WTO Agreement. https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

⁵⁸ This is pursuant to Article 21.3 and 21.6 of the DSU. See Joost Pauwelyn. “*Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*.” The American Journal of International Law, Volume 94, Number 2 (April 2000), pp. 337 and “*Understanding on Rules and Procedures Governing the Settlement of Disputes*.” Annex 2 of the WTO Agreement. https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

⁵⁹ Joost Pauwelyn. “*Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*.” The American Journal of International Law, Volume 94, Number 2 (April 2000), pp. 337

⁶⁰ Ibid

⁶¹ Ibid

areas such as foreign aid and make the weaker state worse off.⁶² This point hints at two insights. First, by insisting on countermeasures, the WTO puts weaker states in a precarious position because they may not have the wherewithal to do so, or their response may not sufficiently punish the guilty state. Secondly, because of the overlap of state relations, a vulnerably interdependent state may have little bargaining power when negotiating compensation as it fears retaliation in other areas. In this way, enforcement in principle works, but in practice, it does not consider power dynamics, or the fact that some states may simply be unable to implement countermeasures, even if they are authorized. These considerations can catalyze nonparticipation in the DSB, even in cases where states have legitimate cases.

In furtherance to the point about countermeasures, Pauwelyn delineates another issue with enforcement in the WTO. Based on the DSU's rules, compensation only happens if the "reasonable period of time" has elapsed and the losing party has not brought its measures into compliance. Pauwelyn, however, is of the view that with this system in place, the WTO overlooks "the remedy of cessation" whereby there is no recompense to the affected party for losses suffered in the past.⁶³ To fix this, he opines that the obligation to compensate should persist, "even during the period when countermeasures are imposed." Without this adjustment, Pauwelyn argues that the violating state can end up better off for breaking the rules than upholding them.⁶⁴ This observation is valid. If violating states pay only after they lose at the DSB and do not have to make restitution for the harm caused to the other party, then countries that can afford to suffer losses temporarily, may deliberately cheat, with a view of changing their trading policy when brought before the DSB. Additionally, if after losing they face countermeasures as the only penalty without having to compensate the aggrieved member, then

⁶² Ibid, 338

⁶³ Ibid, 344

⁶⁴ Ibid

again, the structure of the DSB may make it too easy for capable states to manipulate its provisions without being critically affected. With this in mind, states that stand to lose more may simply opt not to use the DSB, while those that expect to benefit even with culpability, may still decide to use the institution.

A final observation that Pauwelyn makes about the inefficacy of WTO enforcement strategies is the fact that only the winning complaining party is authorized to impose countermeasures against the violating state.⁶⁵ This means that the complainant faces double costs by using the DSB because it has to pay the litigation costs as well those associated with the countermeasures.⁶⁶ Pauwelyn posits that a more efficient form of punishment would be for the DSB to suspend some of the obligations that benefit the culpable state as well as to allow other Members to suspend some of the concessions equitable to the damage that the aggrieved state faced.⁶⁷ By doing this, collective enforcement could help weaker states that are simply unable to impose countermeasures on a bilateral basis.⁶⁸ These are sage suggestions because they would take the burden of filing and retaliating from one state that may not have the capacity to adequately punish the defector. Importantly, if states knew that the entire membership could take action against violators, then this could temper the extent to which provisions are breached and also increase use of the DSB.

Brewster also identifies some challenges with enforcement at the WTO subsequent to a DSB ruling. While like Pauwelyn she is concerned about countermeasures, her focus is on the duration of dispute settlement and the damage that is done to the complaining state before it gets

⁶⁵ Ibid, 345

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid. For more discussion on how enforcement within the WTO can be improved, see William J. Davey, "Compliance Problems in WTO Dispute Settlement," *Cornell International Law Journal*, Volume 42, Issue 1, Article 5 (Winter 2009), pp.119 – 128.

redress. She laments, for example, that recourse at the DSB is “conditional and prospective” because it is only after completion that there is any relief.⁶⁹ In her estimation, this delay creates a “de facto escape clause” by allowing “states to violate WTO law without providing any way for injured states to respond by suspending trade concessions.”⁷⁰ Based on Brewster’s assertions, there are two other negative implications for the lengthy delay that is associated with dispute settlement at the WTO. In regards to the culpable state, she shows that because nothing can be done to it until the panel has ruled, it has little incentive to settle in the pretrial consultations.⁷¹ This is because doing so would shorten the time that it has to continue cheating and consequently, unless it gets some form of compensation, it might be unwilling to settle.⁷² When this point is combined with the one that Pauwelyn makes about no penalty for losses incurred up to adjudication, then litigating and waiting for due process has advantages for the violating state. For the aggrieved party that is aware of the losses that it can continue to suffer as it waits on the dispute settlement process, Brewster reasons that this could be the impetus for it to avoid the DSB and retaliate outside.⁷³ This, in essence, is a case for non-participatory membership.

Brewster’s arguments offer two rival hypotheses to mine about how states strategically choose to use or avoid the DSB. For the complaining state, I argue that if litigation costs are reasonably affordable, it will use the multilateral institution for recourse. Brewster shows, however, that if the state anticipates that it will be seriously affected by the delays in the process, it will forego that alternative. In the case of the defendant, my hypothesis is that if it can afford the process, or finds it more lucrative than defecting, it will litigate. If not, it will acquiesce. If,

⁶⁹ Rachel Brewster. “*The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement.*” The George Washington Law Review, Volume 80, Number 1 (November, 2011), pp. 103.

⁷⁰ Ibid, 104

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

however, costs are too high, it will continue cheating and engage in tit-for-tat strategies outside the DSB. With the prospect of a long settlement, Brewster raises a trenchant argument. She contends that the violating state may use the procedure to its advantage by allowing itself to be sued, but continuing to keep its restrictive measures in place until the panel rules against it. To prevent this type of manipulation, Brewster suggests that there should be an allowance for complainants to seek preliminary injunctions against the respondents.⁷⁴ This should be done based on the merit of the plaintiff's case. If it is likely to win, the panel should give the guilty state a reasonable time period to remove its trade barriers or to be retaliated against if it fails to do so.⁷⁵ This, she believes, can promote greater compliance and conversely, more participation in the dispute settlement process.

Reinhardt also has some thoughts about the GATT and the choice to litigate even when its enforcement is weak. Basing his work on Carr's thinking that "adjudication under anarchy is unenforceable," Reinhardt uses a game of incomplete information to show why states bother with legal procedures whose results they can "spurn with impunity." In his model, the plaintiff seeks to alter some policy in the defendant's state, but has the option of worsening the situation by responding unilaterally, or seeking redress through adjudication.⁷⁶ The caveat is that both states face uncertainty. In the case of the defendant, it does not know what the plaintiff's retaliation costs are. It is therefore not clear whether the plaintiff prefers to retaliate or to accept the status quo.⁷⁷ The plaintiff in turn does not know what the defendant's costs for noncompliance of an unfavourable ruling are. In essence, the defendant faces one set of costs if it

⁷⁴ Ibid, 106

⁷⁵ Ibid

⁷⁶ Eric Reinhardt. "Adjudication Without Enforcement in GATT Disputes." *Journal of Conflict Resolution*, Volume 45, Number 2, (April 2001), pp. 175.

⁷⁷ Ibid

is indifferent towards an unfavourable ruling, and another if it does not adhere to the judgment.⁷⁸ Reinhardt's findings are that with uncertainty, an early settlement can be induced, even for defendants that will not be worse off if they do not comply with the court's decisions. This is to avoid retaliation.⁷⁹ Additionally, he finds that if a defendant will suffer noncompliance costs, this can promote more compromise than in cases that it would not.⁸⁰ The plaintiff can therefore maintain its stance, while the defendant in anticipation of an adverse ruling, will concede.⁸¹

Reinhardt's work is different from Brewster's and Pauwelyn's in that the states in question are more concerned with manipulating each other rather than the institution. His work is important because it shows the irrelevance of strong enforcement to the choices that states make to adjudicate. Incidentally, this is also the position that my study takes where institutional capacity does not figure significantly in the tactics that states use. What Reinhardt's project highlights is that the multilateral structure provides a forum that is necessary and sufficient to induce settlement. This is because although there is incomplete information about the resulting costs, it is within the institutional framework that the states choose adjudication. Additionally, once the institution is evoked, uncertainty about what each side will have to pay after a ruling is what catalyzes the equilibrium solutions. In this regard, Reinhardt argues for participation irrespective of the enforcement costs and not against it.

Interdependent Payoffs

States sometimes use multilateral institutions because they are concerned about interdependent payoffs. Countries, for example, may wish to signal their intent to others, get a bargaining advantage for future cases, as well as to strategize based on perceptions about power

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Ibid

asymmetry. In this section, I will therefore discuss how calculations about interdependent payoffs can affect participation in the WTO's Dispute Settlement Body.

Signaling to Others, Bargaining and Reputational Costs

A threat to use the DSB often precedes the actual filing. Legitimacy plays a great role in the extent to which these threats are perceived as credible. Pelc addresses this issue by examining U.S. trade policy measures from 1975 to 2000. He finds that state threats that are disseminated multilaterally are more likely to be seen as legitimate, while those issued “in the presence of a multilateral option are not.”⁸² States have therefore resorted to use multilateral institutions to make their threats more legitimate,⁸³ and by doing this, help us to understand why some states choose to use these mechanisms while some do not. To test his hypothesis, Pelc analyzes how “the legitimacy of threats” affected how the targeted states responded to the United States. He does this by examining Section 301 which authorizes the U.S. to retaliate against foreign measures that affect its interests or violates extant agreements and the dispute settlement procedures in the GATT/WTO.⁸⁴ He finds that the perceived legitimacy of the threat influences the extent to which the target makes concessions. Since those states that acquiesce to illegitimate threats suffer reputational losses, targets tend to resist those ones and surrender only to legal ones.⁸⁵ In the case of the sender states, they prefer to coerce targets without the constraints of the

⁸² Krzysztof J. Pelc. “*Constraining Coercion? Legitimacy and Its Role in U.S. Trade Policy, 1975–2000.*” International Organization, Volume 64, Number 1, (Winter, 2010), pp. 66.

⁸³ Ibid

⁸⁴ Ibid. In regards to trade sanctions which the U.S. could attempt to unilaterally impose, several steps would be required to make them credible. These include the sender's ability to “divert sanctioned exports to other markets, the price impact of such diversion, and the time required for the diversion to take place.” See for example, Daniel V. Gordon, Rögnvaldur Hannesson and William A. Kerr. “*Of Fish and Whales: The Credibility of Threats in International Trade Disputes.*” Journal of Policy Modeling, Volume 23, (2001), pp. 83 -98.

⁸⁵ Krzysztof J. Pelc. “*Constraining Coercion? Legitimacy and Its Role in U.S. Trade Policy, 1975–2000.*” International Organization, Volume 64, Number 1, (Winter, 2010), pp. 66.

multilateral structure, but will opt to use it if past actions show that material power is insufficient to cajole targets.⁸⁶

Pelc's study has implications not only for the immediate, strategic use of the DSB, but also for future bargaining between states. One of the highlights of his work is that there are high payoffs for resisting illegitimate threats. For example, if the targets believed that U.S. trade threats were illegitimate, this perception reduced the probability that they would concede by 34 percent.⁸⁷ Additionally, for countries that did not surrender to these illegitimate, unilateral measures, this reduced the likelihood that they would face similar actions over the next five years by 25 percent.⁸⁸ What this shows is that the U.S. cannot afford to make threats that are ignored because this reduces its credibility and reputation in the international system. To avoid this possibility, the United States would be more inclined to use the DSB rather than act alone. For the targets of such threats, they too would be incentivized not to acquiesce to the United States outside of the multilateral option because doing so could give them some reputational advantages for resisting. If taken before the DSB, however, it is a different ball game. Use of the DSB shows that even great economic powers struggle with issues of legitimacy and therefore prefer to use this alternative simultaneously to signal their resolve and to protect their reputation and future bargaining power.⁸⁹ In this case, reputational and signaling costs⁹⁰ could induce participation in

⁸⁶ Ibid

⁸⁷ Ibid, 65

⁸⁸ Ibid

⁸⁹ See also Andrew T. Guzman in "*The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution.*" *The Journal of Legal Studies*, Volume 31, Number 2 (June, 2002), pp. 303 – 326. He argues that because reputational costs are so high when countries negotiate, they are more likely to be found in multilateral rather than bilateral agreements. Additionally, because of the losses incurred, states calculate the benefits of credibility and compliance against the punishments for violations. Because of this, many states include dispute settlement clauses in their agreements, only when the penalty for violation is small. Evoking multilateral recourse would therefore signal potential great reputational losses for the culpable state, and this would make the threat to use it credible. See also Susanne Lohmann. "*Why Do Institutions Matter? An Audience Cost Theory of Institutional Commitment.*" *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 16, No. 1, (January, 2003) pp. 95–110. She argues that audience costs make the threat to use international institutions more credible, but that institutions have sufficient flexibility clauses to cover for unforeseen circumstances.

the DSB, while states that are less concerned about these or unable to afford the procedure would avoid it.

Audience Costs

Guisinger and Smith have a different perspective on reputation and how it might affect threat credibility. For them, credibility has less to do with resolve, power and strength, and more to do with “the expectation of future, continued gains from retaining an honest record.”⁹¹ Hence, it is the diplomatic record that a country has for doing what it says it will do that determines its credibility, and not measures of its capability.⁹² Guisinger and Smith challenge Fearon’s 1997 work on why domestic audiences punish leaders. For Fearon, citizens punish governments if they overcommit to attack or resist in an effort to get a greater payoff for the state and then do the opposite.⁹³ Guisinger and Smith contend that for Fearon’s postulations to hold, then nationals should expect their leaders to bluff to get better deals and therefore not vote them out of office. Their thinking is that domestic audiences react stronger against leaders that mislead their bargaining partners because they damage the country’s honest record.⁹⁴ This, they believe, jeopardizes the future benefits that the state might have to communicate its position in other international crises.⁹⁵ It is unclear however, how these scholars think about first-time users in an international crisis or dispute. These users would not have established any record for resolve and

⁹⁰ See for example, James D. Morrow. “*Alliances, Credibility, and Peacetime Costs.*” *Journal of Conflict Resolution*, Volume 38 (June, 1994), pp. 270 – 297 and James D. Fearon. “*Signaling Policy Interests: Tying Hands versus Sinking Costs.*” *The Journal of Conflict Resolution*, Volume 41, Number 1, New Games: Modeling Domestic-International Linkages (February, 1997), pp. 68 – 90.

⁹¹ Alexandra Guisinger and Alastair Smith. “*Honest Threats: The Interaction of Reputation and Political Institutions in International Crises.*” *Journal of Conflict Resolution*, Volume 46, Number 2 (April, 2000), pp. 175.

⁹² *Ibid*, 177

⁹³ *Ibid*, 179 and James D. Fearon. “*Signaling Policy Interests: Tying Hands versus Sinking Costs.*” *The Journal of Conflict Resolution*, Volume 41, Number 1, New Games: Modeling Domestic-International Linkages (February, 1997), pp. 68 – 90.

⁹⁴ *Ibid*, 179

⁹⁵ *Ibid*

may need other trappings to convince targets that that they will follow through with their promises or threats.

By showing how reputation can be maintained in the international system, Guisinger and Smith also highlight the fact that democratic countries may be better able to signal their resolve to act than autocracies are able to do.⁹⁶ Since governments feel that their political career is at stake if they do not keep their word or their state's reputation, then they will think carefully before making commitments and not easily renege on their promises. This means that we should see more democracies using the DSB than autocracies. While Guisinger and Smith deal with war specifically, their analysis can also be applied to the WTO's dispute settlement process. If countries signal their intent to file and back down without getting comparable concessions from the violating state, then this damages their reputation and ultimately, their credibility. The observing constituents which may also have vested interests in the case will move to punish the non-credible state both for not acting on their behalf, and also for lessening the chances that future threats will be credible. In this sense, while a country's power and strength add to its credibility, making a threat and not executing it also affects its reputation.⁹⁷

Power Asymmetry

In thinking about power asymmetry and how this affects DSB usage, Kim highlights the increased legalization of the WTO as potentially inhibiting factor. Kim argues, for example, that

⁹⁶ Ibid, 198

⁹⁷ See also Lisa L. Martin. "*Credibility, Costs, and Institutions: Cooperation on Economic Sanctions.*" World Politics, Volume 45, Number 3 (April, 1993), pp. 406 – 432. Martin argues that audience costs can affect credibility is that they make it too costly for senders to renege on the commitments that they make. In her estimation, governments have to go through great lengths to convince the legislature and executive branches to impose the initial sanctions. Because some of these come at great political costs, it is difficult for the senders to backslide of these commitments without facing significant backlash. Additionally, sender states increase the audience costs of reneging if they make their threats or promises within an institution. In this way, by appealing to domestic as well as international audiences, senders make their threats more credible because the costs to default are too high. With this thought in mind, high audience costs make it more likely that senders will execute their threats, and this over time, increases their reputation to act on their word.

whereas legalization promotes clarity within the institution, it simultaneously imposes costs on Member states by making procedures more complex and difficult to use.⁹⁸ For him, only the countries that have the administrative capacity to manoeuvre these intricacies benefit. Consequently, when the GATT and WTO eras are compared, countries that are endowed with greater capacities such as advanced nations, are more frequent users of the mechanism than developing countries are.⁹⁹ In this case, relative economic capability can affect participation in the DSB.

Sattler and Bernauer contemplate the disparity in DSB usage subsequent to increased legalization and come to different conclusions than Kim does. Using the findings of all WTO initiated disputes across member state dyads from 1995 – 2003, they posit that it is a gravitational issue rather than a discriminatory one.¹⁰⁰ Based on their thinking, countries that have larger economies are more appealing to potential litigants. Additionally, these countries, just by the sheer size of their markets, trade more and have more diversified economies. The consequence is that they are more likely to be involved in trade disputes than countries with smaller, less diversified markets.¹⁰¹ Sattler and Bernauer highlight a serious implication of this finding. In their minds, there is a resulting “preponderance effect” whereby dyads that include a more powerful litigant either as a complainant or defendant are more likely to have settlement outside the WTO than within it.

Sattler and Bernauer’s arguments are noteworthy because they show that market size and diversification matter in the volume and frequency of trade litigation within the WTO. An

⁹⁸ Moonhawk Kim. “Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures.” *International Studies Quarterly* (2008) 52, p. 657.

⁹⁹ Ibid

¹⁰⁰ Thomas Sattler and Thomas Bernauer. 2011. “Gravitation or Discrimination? Determinants of Litigation in the World Trade Organisation.” *European Journal of Political Research* (2011) 50, p. 143.

¹⁰¹ Ibid

interesting application of their findings would be that countries that are less powerful will be more inclined to settle their grievance outside the institution and forego their alternative there.¹⁰² This could mean that they are less able to afford the process, or fear repercussions from the more powerful state. Both are possible explanations for non-participatory membership. However, since the more capable states also use the DSB more, then this could also mean that states that have comparable economic size may prefer to litigate, but once there are stark differentials in capability, the DSB choice may not be pursued.

Shaffer and Nordstrom add their thoughts to this discussion. They argue that since trade disputes are about the commercial value of the good, small states may find it too costly to litigate since their claims would be about “small stakes.”¹⁰³ This view is corroborated by Kokko, Tingvall and Videnord who postulate that an upper middle-income country is the typical WTO complainant, with challenges against a high-income country over unfair protection.¹⁰⁴ In relationship to the power asymmetry thesis, this means that smaller states may have legitimate cases, but may be unable to use the DSB because they would be filing against their more powerful trading partners in a process where the costs of litigating may be more than the claims that they are making. If, however, the country is middle-income, it would recognize the power disparities, but would be in a better position to afford the costs of the institution. While these arguments are valid, they do not account for the small states that manage to file in spite of the

¹⁰² See also, Kara Reynolds in *Why Are So Many WTO Disputes Abandoned?* Reynolds argues that developing countries are less likely to use the DSB to resolve their disputes. She cautions, however, that this may not be a capability problem as developing countries successfully completed 85.5 percent of the cases that they initiated against their more powerful counterparts. At the same time though, cases that were filed by developing countries, or those from large economies against developing countries, were more likely to continue indefinitely in the DSB than others against high income countries. “*Why Are So Many WTO Disputes Abandoned?*” p. 11.

<http://fs2.american.edu/reynolds/www/Consultations.pdf>

¹⁰³ Hakan Nordstrom, Hakan and Gregory Shaffer. 2008. “*Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?*” *World Trade Review* 7: 4, 587 -640.

¹⁰⁴ Ari Kokko, Patrik Gusravsson Tingvall and Josefin Videnord. 2017. “*Which Antidumping Cases Reach the WTO?*” Ratio Working Paper No. 286.

http://ratio.se/app/uploads/2017/03/ak_pt_jv_which_antidumping_cases_reach_the_wto_286.pdf

costs and power differentials. Other variables may therefore inform state participation in the DSB.

The extent to which costs can affect participation in the DSB can also be seen in the settlement or discontinuance of a dispute after initiation. Pervez tackles this issue. For him, complainants may opt not to continue with cases because of an onslaught of countersuits from the respondent. This has the effect of making the dispute settlement process more costly, and hence the plaintiff succumbs to the pressure.¹⁰⁵ If Pervez's arguments are valid, then power dynamics are also at play in these countersuits. Filings are expensive. Only countries that have substantial economic might and adequate trade with the complaining country could therefore afford to bring so many cases before the DSB. The discontinuation of the initial cases would also mean that the complaining country is the lesser power or it stands to lose more by keeping the case than withdrawing. Power asymmetry in this regard, could therefore explain limited participation in the Dispute Settlement Body.

Legal capacity is another way in which power asymmetry manifests itself in WTO dispute settlement. Perceptions about a country's legal capacity can affect the extent to which a country's threat to sue is seen as credible. This is because disputes require that parties firstly understand the provisions and the breaches to make their case. It is also this capability that helps countries not to succumb to bullying and offers of side payments at the consultations and press forward to formal litigation. Disparities in legal capacity can therefore help some countries to be taken seriously and force concessions, or lead both to the DSB. While this may be a function of the countries' economic strength, legal capacity when examined discretely is an important part of the credibility of threats to litigate or suffer from trade violations, which essentially is about (non) participation in the DSB.

¹⁰⁵ Fouad Pervez. 2015. "Countersuits and the Politics of Abandoned WTO Trade Disputes," p. 2.

Busch, Reinhardt and Shaffer write about this phenomenon based on their survey on WTO members. While they articulate the view that legal capacity is important, they opine that previously used proxies like per capita GDP do not adequately represent the concept. Their conceptualization of “legal capacity” is therefore based on members’ responses to questions about five critical areas. These include “professional staff, bureaucratic organization at home, bureaucratic organization in Geneva, experience handling general WTO matters, and involvement in WTO litigation.”¹⁰⁶ Their study shows that WTO members generally, and developing countries specifically, identify legal capacity or its lack thereof, as the chief inhibiting factor of formal dispute settlement.

There are, however, some possible challenges to these arguments and Busch, Reinhardt and Shaffer identify and respond to them. They show, for example, that private lawyers and the Advisory Centre on WTO Law (ACWL) are available for countries that may need help understanding the legal and technical provisions of the organization.¹⁰⁷ Their respondents say, however, that competent legal capacity is needed in the first place to avail themselves of these resources, and that there is often no continuity in the capacity that is built up.¹⁰⁸ This is important because while countries may have help available to them, they still need some minimum competencies and financial resources to avail themselves of that assistance.

One potent argument that Busch et al. raise is the possible endogeneity of legal capacity.¹⁰⁹ This means that the more experience that a country has with the DSB, the more legal capacity it will have. This argument is meritorious. There are, however, limitations to how these authors measure legal capacity in the first place. If, for example, experience, personnel at

¹⁰⁶ Marc L. Busch, Eric Reinhardt and Gregory Shaffer. “Does Legal Capacity Matter? A Survey of WTO Members.” *World Trade Review*, Volume 8, Number 4 (2009), pp. 560.

¹⁰⁷ *Ibid*, 574

¹⁰⁸ *Ibid*

¹⁰⁹ *Ibid*, 575

home and in Geneva are indicators of legal capacity, then countries with no experience at the DSB may still struggle when a dispute arises. This is true up to a point. While the DSB remains the main training ground for building legal capacity, countries can build these skills in other ways. For example, the WTO has negotiation groups that feature collective bargaining on common interests. Countries can use these avenues to become more familiar with the WTO provisions and how they can articulate their cases. Similarly, while not all skills are transferable, countries can use their involvement in other international and regional dispute settlement organizations to build their legal competencies. Importantly, Busch et al. measure legal capacity by looking at the countries' overall capability to litigate. A state's circumstances, however, change over time. It is therefore more appropriate to ascertain what this capacity looked like at the point of the dispute. This can be done by examining experience at the DSB, as well as history with the WTO provision domestically.

Asymmetric Information

States need information to litigate in the DSB. For any state to successfully bring a case, it must be firstly cognizant of the WTO provisions, and secondly, be able to articulate how its trading partner's practices breach those regulations. This implies that trading partners must be able to observe each other with some amount of certainty and bring supporting evidence to the DSB. In other words, there is a direct relationship between the amount of information a complainant state has and the extent to which it will participate in the dispute settlement process. Since the WTO has certain norms and obligations for the availability of information, this section will therefore discuss the monitoring and surveillance roles and how these can lead to asymmetric information. This has consequences for DSB usage.

Transparency is a GATT obligation.¹¹⁰ The stipulation is that all Members should meet the domestic and national requirements regarding a plethora of notifications, publications and transparency.¹¹¹ Most of the WTO's monitoring and surveillance are conducted through "standing committees, reviews of notifications, examination of individual policies against the relevant WTO Agreements, and other procedures of control."¹¹² It therefore follows that for these to be done, Members first have to meet their obligations, publish their measures domestically, and then notify the WTO of what measures are in place. Failing that, monitoring and surveillance can be impeded because the information is not readily available for Members that may request it. If this information is not available, then countries have little substantiating evidence to bring their cases before the DSB and this can limit its usage.

In addition to the right that all Members have to request information from others, some agreements have explicit stipulations whereby Members can ask for clarity on "any trade-related law, regulation or measure in place domestically." Some of these include the Agreement on Trade-Related-Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS).¹¹³ These are important features of the WTO because they allow for monitoring and surveillance at the organizational level through the committees that are set up, and also for Members to do their own transparency and compliance checks on each other. Of course, with

¹¹⁰ See for example, "Monitoring and Surveillance: The Rising Agenda of the WTO." WTO NEWS: SPEECHES – DG Pascal Lamy. 22 October 2007. https://www.wto.org/english/news_e/sppl_e/sppl78_e.htm

¹¹¹ These guidelines are outlined in Article X of the GATT which states that Members should promptly publish any measures that fall within the purview of the GATT, as well as those agreements that affect trade policy at the international level. Adherence to this requirement can help "governments and trading entities" to familiarize themselves with the organization's stipulations. In addition to the provisions of Article X of the GATT, all laws and regulations that have general applicability to WTO matters should also be reported. The WTO also allows for "cross-notifications" whereby a Member can notify the organization about a measure that another Member has in place, but has not reported. This promotes the transparency initiative because the culpable state is forced to justify its position on the measure not notified. See "Monitoring and Surveillance: The Rising Agenda of the WTO." WTO NEWS: SPEECHES – DG Pascal Lamy. 22 October 2007. https://www.wto.org/english/news_e/sppl_e/sppl78_e.htm

¹¹² Ibid

¹¹³ Ibid

Members having to do some of these transparency checks on their trading partners, some may find the process too cumbersome and opt not to participate in the institution. Additionally, if the requested information is not forthcoming, Members can appeal to the institution for compliance from the requested state, but that state cannot be compelled to comply; it can only be encouraged to do so. This makes asymmetric information a vexing issue for WTO Members, especially because it can stymie potential cases.

Collins-Williams and Wolfe also highlight the challenges of asymmetric information in the WTO. In their estimation, the WTO's provisions on transparency are disproportionately cloudy. For them, monitoring and surveillance work well in some areas, but in others, they are disappointingly opaque.¹¹⁴ They challenge, for example, the "right to know" privilege that all WTO Members have. They are dubious about how information gathering can actually change behaviour. In their minds, a mere acquisition of knowledge of a country's policies does not deter non-compliance.¹¹⁵ Moreover, countries may not be aware of what they need to find out before they have the information; neither might they know what to make of the information that they have until it is discussed.¹¹⁶ In this way, though the right to request information can promote transparency (and litigation), the requested state may not readily or accurately provide the information in the first place. In the second place, it does not necessarily follow that since countries have this right that they will seek information; without it they may not know that there are problems to begin with. Having the right as the antecedent to information therefore does not necessarily translate to greater transparency nor increased participation.

¹¹⁴ Terry Collins-Williams and Robert Wolfe. "*Transparency as a Trade Policy Tool: the WTO's Cloudy Windows.*" *World Trade Review* (2010), Volume 9, Number 4, pp. 552.

¹¹⁵ *Ibid*, 559.

¹¹⁶ *Ibid*, 560

In regards to monitoring and surveillance, there is one WTO body that is worth mentioning. This is the Trade Policy Review Mechanism (TPRM)¹¹⁷ that came out of the Uruguay Round. The Trade Policy Review Mechanism is strategic in that the frequency in which Members are reviewed is based on their economic might in the global political economy. This is in an effort to increase the availability of information on these economies and their trading practices. As a result, the world's four largest economies—the European Union, the United States, Japan and China—are reviewed every two years.¹¹⁸ The next 16 biggest holders of world trade in goods and services are examined every four years.¹¹⁹ The other countries, which are mainly developing countries and economies in transition, are reviewed every six years.¹²⁰ Collins-Williams and Wolfe assert, however, that there are some fundamental flaws with the Trade Policy Review Mechanism. They show, for example, that it simply provides a commentary on countries' practices and does not in any way interpret the rules.¹²¹ Here again, they challenge the assumption that more information can induce changes in behavior. While it is true that information by itself is useless in eliciting change, countries do rely on their "good name" in the international political economy. Having a reputation for violating agreements can negatively affect trading partnerships and future bargaining. Conversely, a country that has a reputation for trading fairly can promote trustworthiness and new partnerships. Since the

¹¹⁷ The Trade Policy Review Mechanism focuses on the extent to which WTO members have complied in "transparency of trade policies; non-discrimination in treatment of trading partners; the degree of stability and predictability of trade policies; the pattern of protection and the extent to which tariffs only are used as measures of protection in trade in goods; restrictions used in trade in services; the record of adherence to the multilateral trading system; and participation in dispute settlement." See *"Surveillance in the WTO: Dispute Settlement & Trade Policy Review Mechanism."* Module 10, p.33.

https://ecampus.wto.org/admin/files/Course_382/Module_1234/ModuleDocuments/eWTO-M10-R1-E.pdf

¹¹⁸ Ibid, 34

¹¹⁹ Ibid. These countries include Argentina, Australia, Brazil, Canada, France, Germany, India, Indonesia, Italy, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, and the United Kingdom. See https://www.wto.org/english/news_e/news16_e/trdev_09nov16_e.htm for more on the G20 countries and their trading practices within the WTO.

¹²⁰ *"Surveillance in the WTO: Dispute Settlement & Trade Policy Review Mechanism."* Module 10, p.34. https://ecampus.wto.org/admin/files/Course_382/Module_1234/ModuleDocuments/eWTO-M10-R1-E.pdf

¹²¹ Ibid

findings of the Trade Policy Review Mechanism are public knowledge, to the extent that the information is available, current and accurate, it is a useful tool for monitoring and surveillance and also for those countries that want to proceed with litigation.

Hoekman and Mavroidis echo similar sentiments about the transparency function of the WTO. While they laud the attempts to improve monitoring and surveillance such as the TPRM, they believe that more needs to be done to enhance the process. In their view, greater efforts are needed to allow developing countries to take advantage of the provisions that are available to them and to enforce their market access rights.¹²² Some of this can be done by revising the dispute settlement process.¹²³ In terms of monitoring, some developing countries do not have the resources to make their notifications in a timely manner; neither are they fully conversant with WTO provisions to make requests for information from potentially violating trading partners.¹²⁴ These could be inhibiting factors for developing country participation in the DSB. Hoekman and Mavroidis also opine that independent regulatory bodies should be set up for surveillance purposes. While these should be parallel to the WTO, they could involve the private sector and nongovernmental organizations.¹²⁵ One of the concerns they have is that only governments have legal standing before the WTO. This can complicate the dispute settlement process since private groups usually are the ones most affected by WTO provisions and the measures that countries put in place.¹²⁶ Hoekman and Mavroidis are of the view that independent bodies with vested

¹²² Bernard M. Hoekman and Petros C. Mavroidis. *WTO Dispute Settlement, Transparency and Surveillance*. (Oxford: Blackwell Publishers, Ltd., 2000), 529.

¹²³ Ibid

¹²⁴ See for example, Pascal Lamy's speech in "Monitoring and Surveillance: The Rising Agenda of the WTO." WTO NEWS: SPEECHES – DG Pascal Lamy. 22 October 2007. https://www.wto.org/english/news_e/sppl_e/sppl78_e.htm

¹²⁵ Bernard M. Hoekman and Petros C. Mavroidis. "WTO Dispute Settlement, Transparency and Surveillance." (Oxford: Blackwell Publishers, Ltd., 2000), 529.

¹²⁶ Ibid. For a discussion on how private firms are affected and can influence trade policies, see Helen V. Milner and David B. Yoffie. "Between Free Trade and Protectionism: Strategic Trade Policy and a Theory of Corporate Demands." International Organization, Volume 43, Number 2. (Spring, 1989), pp. 240.

interests in the WTO's agreements can examine not just the surveillance function, but also how alternative methods compare in terms of costs and benefits. In their estimation, if this information about the possible economic effects of implementing other policies and rules becomes available, this could facilitate increased relevance and members' stakes in the WTO's provisions.¹²⁷ This could also help to increase participation in the DSB.

Complainant Versus Respondent Utilities

One of the ironies about dispute settlement in any type of organization is that there are costs and benefits to both the plaintiff and defendant state. As a result, the choice to litigate or to allow oneself to be sued has far reaching applications beyond a win or loss. Consequently, countries engaged in a formal trade dispute calculate how they expect to far at each step of the process and this helps to determine their level of participation. This section will therefore discuss the advantages and disadvantages to complainants and respondents and how these may induce participation in dispute settlement.

Leal-Arcas uses the WTO and NAFTA Chapter 20 to argue that there are advantages for both the complainant and defendant in regional and multilateral institutions. This in turn determines which forum is used. Here, in like manner as Fischer argues and contrary to what Busch posits, Leal-Arcas contends that whenever forum shopping is possible, states are going to choose the venue where they are most likely to win.¹²⁸ What then are the advantages and disadvantages to litigants in these settings?

Under NAFTA Chapter 20, losing respondents and complainants alike experience frustrations and benefits from losing and winning. For the losing respondent, it gains from such a

¹²⁷ Ibid

¹²⁸ I Rafael Leal-Arcas. "Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?" The Robert E. Hudec Article on Global Trade. Minnesota Journal of International Law, (2007), Volume 16, Number 1, pp. 7.

ruling in that though it is bound by the “arbitral panel with regard to nullification and impairment, it is not bound by a recommendation to bring its measures into conformity.”¹²⁹ Additionally, the panel gives it thirty days to implement the recommendations in good faith. This losing state, however, even in showing progress in doing so, theoretically can take as long as it wants.¹³⁰ This in turn can exasperate the winning state that is waiting on the culpable party to come into compliance. This consideration could therefore precipitate non-participation in NAFTA’s dispute settlement procedures, especially if a winning state expects to get immediate relief.

Another advantage that a country in NAFTA has even if it loses, is that the institution’s punitive capacity is limited based on overlaps with WTO obligations.¹³¹ Consequently, WTO tariff rules or other obligations cannot be breached by a complainant that seeks “compensation for a ruling under a NAFTA panel.”¹³² Essentially, even in seeking reprieve, the applicant state has to be mindful of its commitments under the WTO because this may limit the extent to which NAFTA can be used to punish the wayward state. With this in mind, it is easy to see why some NAFTA countries would forego their recourse there if they have concurrent membership in the WTO. In this sense, the institutional overlap can help to explain non-participatory membership in NAFTA’s dispute settlement. One disadvantage of losing, however, is that once this happens, a country cannot appeal the decision that was made.¹³³ All it can do is exhaust the diplomatic channels at its disposal, with a view of getting some mitigation of the panel’s findings.¹³⁴ The WTO allows for an appeal of panel determinations. These points make it likely that reprieve in

¹²⁹ Ibid, 50

¹³⁰ Ibid, 51

¹³¹ Ibid

¹³² Ibid, 51

¹³³ Ibid

¹³⁴ Ibid

NAFTA could be overlooked in favor of recourse at the WTO. If, however, NAFTA procedures are used, they highlight the fact that this alternative could be pursued because of the utilities that even losing states expect to get.

A winning respondent has a similar fate under NAFTA Chapter 20 in that it gains and suffers setbacks from having the panel rule in its favour. One benefit, for example, is the fact that it can use diplomacy to come to a quicker solution that it would otherwise have achieved.¹³⁵ Hence, whereas it is possible for the losing state to stall implementation, if diplomatic channels are used effectively, this can be averted. Additionally, since NAFTA is a trilateral relationship with the United States, Canada and Mexico, the closeness of the partnerships that has been fostered over the years can promote swifter implementation and fewer delays.¹³⁶ This is more difficult to achieve in a larger institution. This reality could induce participation in NAFTA and not the WTO; especially if the country expects to win.

One of the drawbacks to NAFTA, however, is the fact that its rules are less detailed when compared with the WTO.¹³⁷ This presents challenges for the winning state to bring a dispute to resolution since the guidelines are not very explicitly stated.¹³⁸ Importantly, since NAFTA so heavily emphasizes diplomacy, changes in the diplomatic climate may affect the extent to which resolution can be made.¹³⁹ The choice to use a regional institution like NAFTA would therefore pivot on whether a state prefers settlement by diplomatic means, with less stringent rules for the timing and implementation of rulings, or if the countries simply feel that the matter at hand does not warrant multilateral attention.

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid, 52

¹³⁸ Ibid

¹³⁹ Ibid

The WTO's Dispute Settlement Understanding functions in similar and distinct ways from NAFTA Chapter 20. These factors inform the calculated decisions that states make as they contemplate the options that they have in regional and multilateral arrangements. As with NAFTA, however, both complainants and respondents gain as well as experience delays whether they win or lose. In the case of the losing defendant, one advantage is that the institution is designed in such a way that there are numerous possibilities to delay compliance.¹⁴⁰ This comes into play especially when more developed countries litigate among themselves or against lesser developed countries. The more advanced states are normally very highly cognizant of WTO stipulations and can use many tactics to stymie full implementation of rulings when they lose. This would explain why a country would allow itself to be sued, even in the face of losing. Additionally, sometimes the dollar amount of the DSB's sanction for retaliation is negligible.¹⁴¹ From an economic standpoint, this can benefit the losing party because it does not have to pay much. It may also be able to afford compensation to its domestic producers that may be affected by such a ruling.¹⁴² Leal-Arcas is also of the view that by complying with the WTO's rulings, the losing party has the opportunity to reinforce the credibility of the institution, and also set an international example for its future involvement.¹⁴³ In these ways, a state gains even in losing at the WTO, thereby making a case for its participation in the DSB.

The winning and losing complainant faces potential wins and losses just like the responding state does. If it wins, for example, international pressure as well as the rules of the system ensures that it gets some form of recompense.¹⁴⁴ This benefit works even for weaker states which outside of the multilateral structure, would have been incapable of getting redress

¹⁴⁰ Ibid, 41

¹⁴¹ Ibid, 44

¹⁴² Ibid

¹⁴³ Ibid, 45

¹⁴⁴ Ibid, 46

from their more powerful trading partners.¹⁴⁵ This makes it important for weaker states to firstly join the WTO, and to use it when they have legitimate cases. Importantly, DSB rulings help the winning state by publicly vindicating it and providing material that it can use to file against other states in the future.¹⁴⁶ This makes participation in the dispute settlement process even more necessary. Even in winning however, a complainant cannot get any redress for as long as the respondent stalls its compliance.¹⁴⁷ Indeed, other states can put pressure on the losing litigant to bring its measures into compliance, but since there are so many ways that it can be delayed, until it actually happens the winning state has to wait even though it may have the psychological and reputational gains from winning.¹⁴⁸ These considerations therefore allow for use and avoidance of the DSB, which as the above arguments show, has advantages and disadvantages whether states win or lose.

Conclusion

In the final analysis, the decision to join multilateral institutions does not necessarily mean that member states will use them whenever trade disputes arise. This chapter therefore examined this conundrum by discussing the possible reasons for non-participatory. While it acknowledges that a myriad of reasons could explain the strategic use, underuse and on use of the WTO's Dispute Settlement Body, six of these are most relevant to this study. These include the availability of alternative forums, preference for the status quo ante, expected utility, interdependent payoffs, asymmetric information, and complainant versus respondent utilities.

In regards to the availability of alternative forums, the chapter argues that states are utility maximizing, and will therefore choose the one that serves their best interests at that

¹⁴⁵ Ibid, 47

¹⁴⁶ Ibid

¹⁴⁷ Ibid, 49

¹⁴⁸ Ibid

particular time. States, for example, may need the multilateral institution to set a precedent, to increase their bargaining power, or for political cover. On the other hand, states that are concurrently in efficacious bilateral or regional institutions, may at times find multilateral recourse to be too time consuming and costly. In those instances, these states may use their alternative forums and not the multilateral structure.

Some states join multilateral institutions because they fear exclusion costs. Scholars like Gruber therefore posit that such membership does not negate the fact that some countries prefer the pre institutional status quo. Non-participatory membership may therefore be one way in which states join these institutions, but demonstrate their preference for the *ex ante* state. In other words, states may reduce their exclusion costs, but not take advantage of their inclusion benefits through litigation if they have legitimate cases. Some features of the institution such as escape clauses also help states to have membership, but express an affinity for the status quo ante.

States decide to litigate based on how much they expect to gain compared with the potential losses. In this regard, expected utility is a serious calculation by states. This consideration includes the costs for litigation, as well as those for enforcement. This is because there is a huge burden to litigate and the WTO sanctions countermeasures, but leaves the onus on the complainant to impose them. Countries therefore have to determine whether it is worthwhile to adjudicate. In addition to the expected utility strategies, there are interdependent payoffs that countries also consider. There are, for example, reputational and audience costs, as well as possible retaliation in other areas. These all factor in the decision to participate or not in the dispute settlement process.

States litigate in the DSB relative to the amount of information that they have. Some countries are therefore better able to observe their trading partners' practices than others.

Asymmetric information is therefore a determinant of participation in the DSB because countries need information to substantiate and respond to filing claims. Additionally, all countries win and lose regardless of the outcome of a trade dispute. This explains why a country, even in the face of losing, will allow itself to be sued, or why a state that wins encounters frustrations to get redress. Knowledge of these realities inform participation in dispute settlement.

Most of the literature on non-participatory membership explores the disparities between developing and developed countries. There is a gap, however, in explaining how dyads of developed and developing countries strategize relative to costs. This research intends to address this by examining how the costs associated with dispute settlement affect all types of countries, and especially their decision to use or avoid the DSB when a trade dispute arises.

CHAPTER III

RESEARCH DESIGN

There are many modes of social enquiry, with each lending itself to advantages and limitations. The method used is therefore based on the particular question at hand and the researcher's judgment of how that technique investigates and illuminates what he or she hopes to find out.¹ The main question of this study is, why do states choose to litigate within the WTO's Dispute Settlement Body? The WTO is one of the world's largest multilateral organizations. Participation in it therefore facilitates wide scale reification of norms, principles and beliefs through its provisions, obligations and rulings. When it comes on to disputes however, even though all its Members are regulated by the same guiding principles, the dynamics of such are played out between the two states that are involved in the particular case at hand. Modeling this type of interaction through an extensive form game of complete and perfect information therefore highlights the strategic decision- making that underpins state behaviour.

Game theoretic models are a parsimonious and efficient way of summarizing reality. Parsimony however, can sometimes oversimplify intricate relationships. In order to compensate for this possible lacuna in the formal analysis, this study supplements the research design by incorporating comparative case studies. The discussion that ensues is an explanation of, and justification for the use of quantitative and qualitative methods at separate sections in the study, but how each by itself is inadequate in elucidating the complexity of trade litigation. The nexus of these two templates that inform the mixed methods approach is therefore advanced. The

¹ See for example, Barbara Geddes in *Paradigms and Sandcastles: Theory Building and Research Design in Comparative Politics*, (Michigan: University of Michigan Press, 2003), 176. Here, Geddes opines that, "Decisions about what approach to take to particular research questions should be based on assessments of what kind of leverage different approaches offer for answering the question of interest." In her estimation, "Research approaches are not religions or parties to which we owe lifelong loyalty." Instead, "they are tools we should pick up as needed and lay down when they do not suit the task at hand [because] all have strengths and weaknesses." See also Amy R. Poteete, Marco A Janseen and Elinor Ostrom in *Working Together: Collective Action, the Commons, and Multiple Methods in Practice*. (Princeton & Oxford: Princeton University Press, 2010), 4 -5.

research question is probed from different angles, with the strengths of each method overlapping and compensating for the weaknesses of the other.

Mixed Methods Approach: The Need for Complementarity

In the words of Creswell and Plano Clark, mixed methods research design has philosophical assumptions as well as methods of inquiry. They postulate that, “as a methodology, it involves philosophical assumptions that guide the direction of the collection and analysis of data and the mixture of qualitative and quantitative approaches in the research process.”² They further posit that, “as a method, it focuses on collecting, analyzing, and mixing both quantitative data in a single study or series of studies.”³ They contend that the central premise of the mixed methods technique is that, “the use of quantitative and qualitative approaches in combination provides a better understanding of research problems than either approach alone.”⁴ Johnson and Onwuegbuzie add their voice to the debate. In their estimation, mixed methods research is “a class of research where the researcher mixes or combines quantitative and qualitative research techniques, methods, approaches, concepts or language into a single study.”⁵ Creswell and Plano Clark clarify their assertions however, by arguing that, “a study that includes both quantitative and qualitative methods without explicitly mixing the data from each is simply a collection of multiple methods.”⁶ In their view, “a rigorous and strong mixed methods design addresses the decision of how to mix the data, in addition to timing and weighting.”⁷ Since this project uses the

² See John W. Creswell and Vicki L. Plano Clark in *Designing and Conducting Mixed Methods Research*. (Thousand Oaks, California: Sage Publications, Inc., 2007), 5. See also Abbas Tashakkori and Charles Teddlie. eds. 2003. *Handbook of Mixed Methods in Social and Behavioral Research*. (London: Sage Publications Ltd., 2003), 711 for a definition of the mixed methods approach and designs.

³ Ibid

⁴ Ibid. See also Jennifer C. Greene’s chapter, “*Mixing Methods on Purpose*,” in *Mixing Methods in Social Inquiry*. (California: John Wiley & Sons Inc., 2007), 95 – 111.

⁵ R. Burke Johnson and Anthony J. Onwuegbuzie. “*Mixed Methods Research: A Research Paradigm Whose Time Has Come*.” *Educational Researcher*. 2004. Volume 33, Number 7. October: pp. 14 – 26.

⁶ Ibid, 83.

⁷ Ibid

findings from the formal models to guide case selection, which are then probed through the information theory approach, then it is not simply “a collection of multiple methods,” but a mixed methods study in its purest sense.

There is, however, a counter argument for the use of multiple methods, which some authors use as a synonym for mixed methods. Poteete, Janssen and Ostrom, for instance, caution that employing multiple methods “does not guarantee methodological superior social science research.”⁸ They use the work of several authors to assert the view that there are concerns about “the extent to which formal, qualitative, and quantitative research methods are actually complementary.”⁹ This is based on the thinking that different methods have varied assumptions about the nature of causality and this poses ontological as well as feasibility challenges.¹⁰ While it may be true that different methods have diverging approaches for studying phenomena, defining from the onset what is meant by a “mixed methods” study helps to refute some of the claims advanced by Poteete, Janssen and Ostrom. For the purposes of this study, mixed methods is distinguishable from “multiple methods,” or even “a collection of multiple methods” as Creswell and Plano Clark insinuate. “Multiple methods” suggests a possibly disjointed *ad hoc* use of various methods within a research project. This is not what this study purports to do. Indeed, while it is cognizant of the ways in which formal, qualitative and quantitative methods are fundamentally distinct, they can in fact complement and inform each other in a single study and even promote an active research agenda.

By using a mixed methods approach, this project is therefore not suggesting methodological superiority. Instead, it recognizes the limitations of each of the methods

⁸ Amy R. Poteete, Marco A Janssen and Elinor Ostrom. *Working Together: Collective Action, the Commons, and Multiple Methods in Practice*. (Princeton & Oxford: Princeton University Press, 2010), 13.

⁹ Ibid

¹⁰ Ibid

identified, and intends to use the strengths of each to compensate for those weaknesses. Each method will therefore be conversant with the other so as to interweave a continuous analysis of why aggrieved Member countries may choose not to use the WTO's Dispute Settlement Body. This, of course, underscores the need for strong theoretical underpinnings about the nature of institutions and state behaviour within them. In what ways, then, do qualitative and quantitative methods differ?

Quantitative and qualitative researches are often distinguished by the types of questions that they can answer.¹¹ Qualitative questions for example, are often exploratory in nature, while quantitative questions are confirmatory.¹² With this thought in mind, quantitative research has historically been used for "theory verification," while qualitative studies have been used for "theory generation."¹³ Punch, however, warns that this dichotomization is not a fixed divide. On the contrary, theory generation and verification can also be derived from quantitative and qualitative research, albeit in different ways.¹⁴ While the stereotype of what each method can be used for persists in academia, Tashakkori and Teddlie advance the utility of mixed methods research. For them, "a major advantage of mixed methods research is that it enables the researcher to simultaneously answer confirmatory and exploratory questions, and therefore verify and generate theory in the same study."¹⁵ In essence, while one goal may be achieved by using either method, combining both ensures that a research project is maximized by answering

¹¹ See for example, James Mahoney and Gary Goertz in *"A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research"*. Political Analysis. 2006. Volume 14: pp. 227 – 249. Here, they contrast qualitative and quantitative research traditions across ten areas. These include approaches to explanation, conceptions of causation, multivariate explanations, equifinality, scope and causal generalization, case selection, weighting observations, substantively important cases, lack of fit and concepts of measurement. They opine that if these "cultures" are better understood, it can promote "more productive 'cross-cultural' communication in political science."

¹² See for example, Abbas Tashakkori and Charles Teddlie. eds. *Handbook of Mixed Methods in Social and Behavioral Research*. (London: Sage Publications Ltd., 2003), 15.

¹³ K.F. Punch. *Introduction to Social Research: Quantitative and Qualitative Approaches*. Thousand Oaks, California: Sage Publications Ltd., 1998), 16 -17.

¹⁴ Ibid

¹⁵ Abbas Tashakkori and Charles Teddlie. eds. *Handbook of Mixed Methods in Social and Behavioral Research*. (London: Sage Publications Ltd., 2003), 15.

different types of questions and consequently, test and create theories concurrently. This study therefore intends to achieve both outcomes. By starting at the widely used institutionalist literature, it hopes to confirm the neoliberal institutionalist summations about membership. The study intends however, to make its own contribution to the literature by examining the fact that membership is not synonymous to participation. Examining non-participatory membership can therefore generate theories about why and when repressive institutions are used versus when it is avoided.

In thinking about this research and the appropriate methods to use, I find the thoughts of Katzenstein and Okawara very useful. While their reflections are specifically about paradigmatic debates, their arguments are also applicable here. These authors reason that instead of an “approach-driven analysis,” research should be “problem-driven.”¹⁶ This gives rise to analytical eclecticism, which broadens our view of world dynamics by illuminating puzzles, and concurrently eliminates the often fundamentally rancorous and inconclusive results of the contest for paradigmatic supremacy.¹⁷ In their view, “Such debates detract scholars and graduate students from the primary task at hand: recognizing interesting questions and testing alternative explanations.”¹⁸ I see this project in the same way. While the research question under examination can be examined through several different research methods, it is the question itself that has given rise to the methods used and not the other way around. I also believe that why states choose to use institutions generally and the WTO’s Dispute Settlement Body specifically is a very intriguing and apposite question that can lead to many fecund explanations. Merging several tools for analysis through a mixed methods approach therefore enrich an already intriguing

¹⁶ Peter J. Katzenstein and Nobuo Okawara, “*Japan, Asian – Pacific Security, and the Case for Analytical Eclecticism.*” *International Security*. Volume 26. 2001/02, Winter: pp. 183.

¹⁷ Ibid

¹⁸ Ibid

question. This can make a meaningful contribution to the extant literature on the strategic interaction between trading states and their subsequent calculated use of institutions for reprieve.

In general, the choice to use a combination of a formal model and case studies that are comparatively assed offsets the rigid bifurcation of quantitative versus qualitative methods. Instead, it promotes a rich blend of the two forms of social science enquiry. Emanating from this discussion is also the fact that there are four major concerns that a researcher must address and prioritize if he or she hopes to have a robust project. Combining research methods, however, helps to bridge the divide and promote a more comprehensive and rigorous examination of the data.

Some of the considerations when choosing a research method include:

1. *Specificity vs. generality* – Here, qualitative studies seem to better analyze the specificity of particular cases, while quantitative research has more potential for general application. A mixed methods approach would address this divergence since formal and statistical methods can be used to derive conclusions about state behaviour within institutions. Case studies can then probe these findings to see how well they hold across cases. General postulations can therefore be assessed in light of their application in specific instances.
2. *Explanation vs. prediction* – Qualitative research methods are very efficient in explaining social phenomena. Since however, cases are often unique relative to their context, timing and other endemic factors, it is difficult to use the results of these studies to make predictions about other situations. Quantitative studies on the other hand, are parsimonious, with the conditions for outcomes well defined. While some

quantitative methods can be misused and lead to spurious relationships as well as Type I¹⁹ and Type II errors,²⁰ they are good techniques for prediction. This is not to say however, that qualitative studies cannot be used for prediction or that quantitative methods have little explanatory function. The point is that even in situations where qualitative studies forecast what we should expect in similar scenarios, the reference case is often so historically and contextually distinct that replication is problematic. Conversely, quantitative studies can explain to some extent, the puzzle that the researcher is trying to probe. Usually however, the data is parsed to numerical and mathematical logic which abstracts away from the context in which the figures occur. Consequently, there is much scope to do robust checks, validate and replicate findings and make projections about similar cases. What is missing is an in depth understanding of the relationship between the variables and how they affect each other and other things in the environment. Qualitative studies would better address this. In essence, the researcher has to be clear whether he or she wants to explain or predict an outcome, or if achieving both is desirable. This in turn will affect the choice of research method and the specific role that it will play in the project.

3. *Theory testing vs. theory building* – Different research methods have varied functions. Since theory is the foundation upon which all studies are built, it is therefore important to ascertain which method better lends itself to theory testing and / building and how these meet the researcher's goals. As aforementioned, qualitative methods as

¹⁹ A Type I error is a false rejection of the null hypothesis. See for example, Jim Granato and Frank Scioli. "Puzzles, Proverbs, and Omega Matrices: The Scientific and Social Significance of Empirical Implications of Theoretical Models." Symposium. Two Paths to a Science of Politics. Perspectives on Politics. Volume 2, Number 2. June 2004: pp. 316.

²⁰ A Type II error is a false acceptance of the null hypothesis. See for example, Jim Granato and Frank Scioli. "Puzzles, Proverbs, and Omega Matrices: The Scientific and Social Significance of Empirical Implications of Theoretical Models." Symposium. Two Paths to a Science of Politics. Perspectives on Politics. Volume 2, Number 2. June 2004: pp. 316.

exemplified by case studies, are useful for verifying theory. Poteete, Janssen and Ostrom support this thinking by arguing that a case study “puts complex relationships under a magnifying glass so that the closely interwoven strands can be teased apart.”²¹ This function, however, can also be carried out by quantitative studies. Formal models and statistical analyses for example, are potent ways of testing if and under what circumstances the assumptions of a theory hold.

Traditionally, quantitative research methods have been more successful in both testing and developing new theories. Poteete, Janssen and Ostrom opine that in principle, case studies should be able to do the same. They concede however, that “a lack of synthesis of findings across case studies limits their theoretical contributions.”²² This study recognizes the strengths and limitations that both types of research methods have for theory verification and generation. The first intention is to therefore test the conjectures about non-participatory membership in international institutions. All the techniques used will be to meet that objective. In order to make a meaningful contribution to the literature however, it is also anticipated that some new theories will be created about how states use the Dispute Settlement Body, and as a result, the patterns that we can expect if countries interact with free traders and protectionists.

4. *External validity vs. internal validity* – Understanding how quantitative and qualitative studies work makes it imperative that there is not an overdependence on one without considering the value of the other. Qualitative research methods for instance, are weak on external validity. This is due to the fact that it is challenging to replicate findings across time and populations. On the other hand, though internal validity refers largely to experimentation with distinction between the treatment and

²¹ Amy R. Poteete, Marco A Janssen and Elinor Ostrom. *Working Together: Collective Action, the Commons, and Multiple Methods in Practice*. (Princeton & Oxford: Princeton University Press, 2010), 35.

²² Ibid, 38.

control variables, qualitative methods have many useful procedures which can validate their findings. Quantitative methods by comparison, can be strong in both external and internal validity if executed properly. This is an important point because it is easy for one to use sophisticated techniques which can be “reliable and valid,” but which overlook the theoretical assumptions of the research or make false claims about the relationships being tested. Whatever method being used must therefore address the theoretical concerns, be rigorously tested and make credible conclusions about the phenomenon being probed.

In sum, the different concerns that a researcher has to contemplate and address when embarking on a project are many. Some of these challenges can be mitigated if the social scientist is aware of the potential pitfalls and guard against them. For me, this makes it all the more necessary to use a mixed methods approach for this study. This will help to make the project both reliable and valid, present specific as well as general claims, explain and predict, and verify and generate theory. These are ambitious goals. It is hoped, however, that by having formal models and case studies informing each other throughout the study, that these objectives will be realized.

Let us now discuss the different methods that are used, the advantages and disadvantages of using them, and as a result, the need for a mixed methods approach.

Quantitative Methods: Strengths and Limitations

“Quantitative methods emphasize objective measurements and the statistical, mathematical, or numerical analysis of data collected through polls, questionnaires, and surveys, or by manipulating pre-existing statistical data using computational techniques.”²³ While several options are available to the researcher who wants to use these methods, this project employs

²³ Earl Babbie, *The Practice of Social Research*. 12th ed. Belmont, California: Wadsworth Cengage, 2010

computational techniques in Excel to determine factors that have the most information scores on the variables in the cases under examination.

Game theory “is a theory of interdependent decisions – when the decisions of two or more individuals jointly determine the outcome of a situation.”²⁴ As a branch of the rational choice approach, it argues that individuals are rational actors, that they have preferences, and that these preferences are ranked in order of utility. While it cannot tell where these preferences come from, they are taken as given, with the choices made seen as an indication of those that provide the highest utility for the chooser.²⁵ Additionally, game theory “cannot tell us whether certain theories are accurate descriptions of the world.”²⁶ It can however, “tell us what behaviour we should expect as a consequence of those theories.”²⁷ This project is largely about the inclination of states to cheat to maximize their interests, even within institutional frameworks that supposedly foster cooperation. Hence, while the models used do not explain why countries exhibit this type of behaviour, they exemplify what we can expect from two states with those propensities.

Morrow outlines some of the advantages of using models in research. For him, the fundamental benefit of modeling is that doing so requires rigour and precision of arguments.²⁸ The modeler must therefore clearly articulate his or her argument and also what the assumptions of that argument are.²⁹ With that being done, “formal models allow us to see exactly why the

²⁴ James D. Morrow, *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 1.

²⁵ See for example, Barbara Geddes in *Paradigms and Sandcastles: Theory Building and Research Design in Comparative Politics*. (Michigan: University of Michigan Press, 2003), 206 and Gary W. Cox in “*Lies, Damned Lies, and Rational Choice Analyses*” in *Problems and Methods in the Study of Politics*. (New York: Cambridge University Press, 2004), 167 – 184.

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid, 6.

²⁹ Ibid

conclusions of a model follow from its assumptions.”³⁰ This in turn provides a logical structure upon which other models can be built and also for a determination about consequences that emanate from our arguments.³¹ These advantages of modeling are especially useful for this study. With trade disputes being largely between two countries, they allow the researcher to succinctly represent the strategic interaction of these states with Prisoner’s Dilemma-like payoffs. These payoffs reflect the assumptions that “cheat, cheat,” “cheat, cooperate,” “cooperate, cheat,” and “cooperate, cooperate” are all possible outcomes, with different payoffs for each. Since the WTO allows for the affected party to impose counter measures, the models also take this into account and this is seen in the payoff scale. Instantiations of the model can also probe the validity of findings as some of the assumptions are relaxed.

While the study uses modeling generally, extensive form games are the main mechanisms utilized. This is done to reflect the fact that trade disputes are sequential. What then is an extensive form game?

In the words of Morrow, “an n-person game in extensive form is:

1. A finite game tree composed of nodes and branches where each node of the tree is one move of the game or an endpoint of the game and the branches connect the nodes;
2. A division of the nodes over the players, Chance, and the endpoints of the game, with one and only one player, Chance, or an endpoint assigned to each node (this division is called a partition of the nodes);
3. A probability distribution for each chance move;
4. A refinement of the partition of the nodes into the player sets into information sets for each player;

³⁰ Ibid

³¹ Ibid, 6 -7

5. A set of outcomes and an assignment of those outcomes to each endpoint of the tree so that each endpoint has one and only one outcome; and
6. A set of utility functions such that each player i has a utility function, u_i , over the outcomes.”³²

The assumption, however, is that all of the above is common knowledge to all players.³³

The models that are used in this study have both common and private information, as well as perfect and imperfect information. This is done to aptly represent the uncertainties that sometimes characterize trading relations and disputes. Most of this is accommodated by information sets which signify that the players have incomplete and imperfect information.

Notwithstanding the many uses of game theory, there are also limitations. This makes an overreliance on it imprudent and analytically insufficient. Geddes, for instance, opines that, “A shortcoming of many theoretic studies is that, because of the great complexity of interactions among strategic players, they are heavy on mathematical theorizing and short on credible empirical results.”³⁴ Additionally, some rational choice models have been dismissed on the grounds that, “they simplify reality to such a degree that the model bears no resemblance at all to the real world.”³⁵ In essence, they “can easily cross the line from simple to simplistic.”³⁶

While “credible empirical results” and expectations can be garnered from the models that are used in this study, formal models remain abstractions of reality. The strategic interactions are parsed to highlight what happens in a dyadic relationship, but in the real world, trade is far more multilayered, with third parties making potent contributions to the disputes. Complicating this is

³² James D. Morrow, *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 58-59.

³³ Ibid, 59.

³⁴ Barbara Geddes, *Paradigms and Sandcastles: Theory Building and Research Design in Comparative Politics*. (Michigan: University of Michigan Press, 2003), 204.

³⁵ Ibid, 206.

³⁶ Ibid. See also Jim Granato and Frank Scioli in “Puzzles, Proverbs, and Omega Matrices: The Scientific and Social Significance of Empirical Implications of Theoretical Models.” Symposium. Two Paths to a Science of Politics. Perspectives on Politics. Volume 2, Number 2. June 2004: pp. 313 – 323.

the fact that multiple goods and services are traded between parties at any given time. It is therefore difficult to represent the tussling over one commodity when others may be simultaneously affecting the trading relationship. The models also make general projections about what will happen in sequence when there is a trade violation. While these provide fodder for analysis, what happens in the real world is dependent on the states in question and what their needs are. Formal analyses in isolation therefore do not fully represent the scope and dynamics of trade disputes. To cover this short coming, qualitative methods are also incorporated.

Qualitative Methods: Strengths and Limitations

The qualitative template is one of the methodologies that this study uses. “Qualitative researchers deploy a wide range of interconnected interpretive practices, hoping always to get a better understanding of the subject matter at hand.”³⁷ The rationale for the inclusion of qualitative methods is therefore that greater understanding is needed of the unique interactions between states that are locked in a trade dispute. Formal and statistical studies by their very nature cannot provide this.

Case study is one of the five main traditions of the qualitative methodology. Creswell articulates the view that “a case study is an exploration of a bounded system, or a case / multiple cases over time through detailed, in-depth data collection involving multiple sources of information rich in context.”³⁸ The case study method can also be seen as “a research strategy of focusing intensively on individual cases to draw insights about causal relationships in a broader

³⁷ Norman K. Denzin and Yvonna S. Lincoln, eds. *The Sage Handbook of Qualitative Research*, 4th ed. (Sage Publications: London, 2005), 4. See also Uwe Flick in *An Introduction to Qualitative Research*, 3rd ed. (Sage Publications: London, 2006), 30.

³⁸ John W. Creswell, *Qualitative Inquiry and Research Design: Choosing Among the Five Traditions*. (Sage Publications: London, 1998), 61. See also Linda Mabry’s chapter, “Case Study in Social Research” in *The SAGE Handbook of Social Research Methods*. (Sage Publications: London, 2008), 214-227.

population of cases.”³⁹ This method is reputed to be very useful because it helps “to develop concepts and theory, identify the limits of general relationships and disprove deterministic hypotheses, control for confounding effects through within-case comparisons, and disentangle causal processes.”⁴⁰

The United States, China, Guatemala, Mexico and Jamaica have all used the DSB with varying levels of frequency. Examining their trade disputes on a case by case basis is therefore appropriate for this research design because they fall within a particular period of time and meet the empirical expectations derived from the formal models. They also allow for detailed analysis through the use of the documents that are available. Each country’s annual trade reports, their Semi-Annual reports on Article 16.4, case materials, WTO Panel and Appellate Body reports, books, journals and scholarly articles are therefore used to examine these trade disputes and the deliberations that inform their actions. Process-tracing as well as litigation patterns can be gleaned through this method. All of these therefore provide a comprehensive understanding of trade violations and the strategic use or avoidance of the WTO’s Dispute Settlement Body.

There are, however, potential challenges in relying solely on case studies. For example, though they “provide detailed information about the steps by which events occur,” “they sometimes focus too much on the idiosyncratic details of rare and influential events.”⁴¹ This has implications for how much generalization, and consequently, theory formation can be done from these observations. Additionally, case studies have limited external validity,⁴² indeterminacy

³⁹ Amy R. Poteete, Marco A Janssen and Elinor Ostrom. *Working Together: Collective Action, the Commons, and Multiple Methods in Practice*. (Princeton & Oxford: Princeton University Press, 2010), 33.

⁴⁰ Ibid

⁴¹ Jim Granato and Frank Scioli. “Puzzles, Proverbs, and Omega Matrices: The Scientific and Social Significance of Empirical Implications of Theoretical Models.” Symposium. Two Paths to a Science of Politics. Perspectives on Politics. Volume 2, Number 2. June 2004: pp. 314.

⁴² “External validity refers to the generalizability of findings from a study, or the extent to which conclusions can be applied across different populations or situations.” Internal validity on the other hand, is “the extent to which an experimenter can be confident that his or her findings result from experimental manipulations.” The intention is

problems, and are difficult to replicate.⁴³ This study hopes to mitigate these potential problems by examining the information theory comparative approach to see how each variable affects DSB usage and avoidance.

The information theory approach was proposed by Drozdova and Gaubatz. It is a mechanism that allows for the comparative assessment of case studies. It does this by “quantifying the qualitative” so that case study findings can be represented and analyzed in a precise and parsimonious way.⁴⁴ This is done in a four-step guide whereby a data matrix is set up to represent binary outcomes of the independent variables, which are then counted and calculated for their joint probabilities. These uncertainty measures are then calculated, with emphasis on the direction of the relationship. These results allow for comparison to see how the information scores hold against each other.⁴⁵

The information theory method is very useful for this study. While the cases selected will help to test the empirical implications of the model, the addition of this method provides a “systematic and rigorous way to identify the most and least informative factors”⁴⁶ that include DSB participation. Importantly, case studies are often not replicable and therefore have generality problems. This method therefore allows for this study to be replicated elsewhere. This adds to its impact because the findings can be easily verified, and potentially improved upon.

In sum, no single method can adequately probe the complex world trading system. This study recognizes this challenge and attempts to address the main research question by combining an extensive form game, its empirical results and cases that include aspects of participation and

therefore to demonstrate causation as being distinct from intervening variables. See for example, Rose McDermott’s chapter in *Cambridge Handbook of Experimental Political Science*, pp. 27 – 37.

⁴³ Amy R. Poteete, Marco A. Janssen and Elinor Ostrom. *Working Together: Collective Action, the Commons, and Multiple Methods in Practice*. (Princeton & Oxford: Princeton University Press, 2010), 33.

⁴⁴ See Katya Drozdova and Kurt Taylor Gaubatz. *Quantifying the Qualitative: Information Theory for Comparative Case Analysis*. (London: Sage Publications, 2017).

⁴⁵ Ibid, 74 – 75.

⁴⁶ Ibid, 75.

non-participation at the DSB. WTO reports, case materials, books, scholarly articles and country reports are used to evaluate how these countries made their decision. These variables are then comparatively assessed by using the information theory approach. This provides a parsimonious evaluation of which variables have greater information scores on participation in the DSB. Importantly, these findings can be easily checked and replicated in other studies, thereby adding to the transparency and value of the study.

Hypotheses

There are some *a priori* expectations that this study has. These are informed by the anarchical nature of the world trading system, costs to pursue a case at the World Trade Organization and the assumptions of Prisoner's Dilemma. The different methods will investigate the extent to which they are true and if so, the degree to which they hold across cases.

Main Research Question:

Why do aggrieved Member countries choose not to participate in the WTO's Dispute Settlement Body?

Independent Variable: Cost of litigation (this includes all the legal, financial, reputational, audience, expected utilities and interdependent payoffs associated with the process).

Dependent Variable: The choice to litigate (use the DSB as a complainant or respondent)

Hypothesis 1 – the lower the litigation costs, the more credible is the threat to use the DSB when a dispute arises.

The expectation is that a country's response to its trading partner's threat to sue it is based on the extent that it believes the trading partner will truly act. Here, the postulation is that if litigation costs are too expensive, it is difficult to convince others about pursuing dispute settlement in the

DSB. If, however, litigation costs are relatively affordable, this can potentially signal a country's resolve to use the DSB.

Hypothesis 2 – the higher the litigation costs, the less likely it is that states will use the DSB when a trade dispute arises.

This hypothesis addresses feasibility and expected utilities. It projects that as litigation costs increase, countries will find the DSB process prohibitively expensive and not pursue recourse there. This will be based on their calculations of the benefits of using the institution versus staying outside. The expectation is that with high litigation costs, states will be less incentivized to use the DSB.

Hypothesis 3 – the higher the litigation costs, the less likely it is that trading partners will engage in free trade.

The WTO aims to promote free trade. Countries, however, decide the extent to which they will adhere to the governance functions of the institution. This hypothesis anticipates that if litigation costs are moderate, states will be more willing to use the DSB, which can punish guilty trading partners. As dispute settlement costs increase, however, this lessens the likelihood of pursuing recourse in the DSB. The consequent effect is that countries will be less threatened by an institution that is inaccessible, and simply engage in more protectionism outside.

Hypothesis 4 – the more confident a state is that it has observed a trade violation, the more likely it is that it will use the DSB when a trade dispute emerges.

States act relative to the amount of information that they have. The projection is therefore that the better able states are to observe their trading partners and identify specific breaches of the WTO's provisions, the greater are the chances that they will litigate. Conversely, even if

countries suspect that trading partners are cheating in some regard, the extent to which they are certain about what they perceive will determine whether they go through with adjudication.

Hypothesis 5 – countries that expect to lose will not litigate.

There are high reputational costs to go before the DSB and lose. The postulation is therefore that states that anticipate adverse rulings will stay outside the institution, while those that expect a favorable judgment will litigate.

Hypothesis 6 – countries with membership in other dispute settlement organizations are more likely to use the DSB when a trade dispute arises.

As expounded in the literature review, legal capacity can be built in other institutions that provide opportunities for competency building. The conjecture is therefore that the more organizations like these that a country is in, the more likely it is that they will litigate

Hypothesis 7 – countries with experience at the DSB are more likely to participate as a complainant or respondent when a trade dispute emerges.

This hypothesis projects that legal capacity skills are gathered during litigation. The expectation is therefore that the more a country participates, the more it will continue to participate in the DSB.

Hypothesis 8 – countries with experience with the specific WTO provision are more likely to participate as a complainant or respondent when that provision is evoked.

Cases at the DSB are specific to provisions. The conjecture is therefore that history of using the Agreement that is evoked at the time of the dispute will induce participation.

CHAPTER IV

DOES THE WTO'S DISPUTE SETTLEMENT BODY TEMPER DEFECTION BETWEEN TRADING PARTNERS WITH ASYMMETRIC INTERESTS?

This chapter examines the WTO to test how, if at all, its Dispute Settlement Body serves the needs of its members. In an ideal world, all trading partners avoid protectionism and engage in free trade. In reality however, this is not always true. Countries frequently flout the principles and provisions to which they have agreed to be bound. Some affected parties are able to unilaterally retaliate, others find recourse through bilateral and regional arrangements, while some find reprieve through case settlement at the WTO. Since the WTO seeks to promote and facilitate free trade, it is therefore useful to explore if the presence of a Dispute Settlement Body inhibits states' inclination to cheat. For the purposes of this research, delta (Δ), the costs associated with litigation is the independent variable, while the choice to litigate (either as a complainant or respondent) is the dependent variable.

The test whether the DSB's presence mitigates protectionist tendencies, this chapter uses an extensive form game with complete and perfect information, costs for litigation and Prisoner's Dilemma-like payoffs. These investigate and elucidate the complex deliberations that occur as states contemplate when and why they should cheat or cooperate, use the DSB or avoid it, litigate or acquiesce. Consequently, each version of the model employed highlights situations in which global welfare is maximized by cooperation at free trade, but with individual states having incentives to cheat. The conditions affect the sequential moves that players make and the consequent equilibria that are formed. Prisoner's Dilemma is therefore the starting place for this model, but since trade relations are sequential and not static, the same logic is used to develop iterations of a stage game.

The chapter is divided into three sections. Part One outlines the main underpinnings of Prisoner's Dilemma. These include the players, their strategic choices and payoffs, as well as the Nash Equilibrium. This serves as the foundation for all subsequent versions of the model that probe the research question. Part Two considers a world in which all trading partners have complete and perfect information about each other's trading practices. The costs of litigation, designated δ , are modulated to see if variations in DSB litigation costs affect the choices that a state makes if it is the victim of a trade violation. There are iterations with both states having the same δ , or a greater cost for either country. The key result of all the instantiations is that the states oscillate between playing free trade and protectionism, evoking the DSB or avoiding it and litigating or acquiescing. These cases with information symmetry show that litigation costs do not inhibit DSB usage, provided the costs do not exceed the potential gains from trade. This happens even in cases where the aggrieved party has a more exorbitant cost. In all instances, trade is transparent, with the culpable state correctly identified and punished at the multilateral level. Since in equilibrium the guilty state admits to wrongdoing and abandons protectionism when brought before the DSB, then in situations where there is no symmetrical information, even with different costs to litigate, the DSB curtails the propensity to cheat and is used by trading partners to ensure that free trade outcomes are achieved.

There have been cases, however, where the procedural costs for dispute settlement are prohibitively expensive, at least for one party. Part Three therefore examines how extremely high costs can make the institution irrelevant, or susceptible to manipulation from countries that pay less. If for example, both players find the cost to go before the DSB too high, they will choose to be protectionists and stay outside the institution. If however, one player has a very high cost when compared with the other player, the one with the lower cost will find playing protectionism a

more attractive strategy. The other player, because of the expensive filing costs, will find it prudent to choose free trade and avoid the DSB. If however, the State with the higher DSB costs responds with protectionism, the other player will take it to the DSB, with the only feasible option being to not pursue full scale litigation. This shows that beyond a certain limit, high costs will lock countries out of protecting themselves through protectionism, or make them suffer at the hands of more capable states if the institution is evoked.

The Premise of Prisoner's Dilemma

Prisoner's Dilemma is a classic "two – person, non-zero-sum game."¹ In this scenario, both players have options of cooperating (C) or defecting (D).² Additionally, "the payoffs are T, for temptation, R, for Reward, P, for punishment, and S, for sucker."³ The premise of this game is that:

$$\begin{aligned} T &> R > P > S \\ \text{and} \\ R &> (S + T) / 2 .^4 \end{aligned}$$

Table 4 -1: General Prisoner's Dilemma⁵

		Player 2	
		Cooperate (c)	Defect (d)
Player 1	Cooperate (C)	(R , R)	(S , T)
	Defect (D)	(T , S)	(P , P)

¹ See for example James D. Morrow in *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 78 for a discussion on Prisoner's Dilemma. The name of the game comes from one story told to describe its strategies and payoffs, narrative involving two detained criminals. Without the opportunity to consult with each other, their choices and outcomes are contingent upon the other's response. The uncertainty of what the other might do makes cheating the dominant strategy.

² James D. Morrow in *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 263.

³ Ibid

⁴ Ibid

⁵ James D. Morrow. *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 263.

For this game, the dominant strategy equilibrium⁶ is (D;d), which is Pareto dominated⁷ by (C;c).⁸

Table 4-2: The Strategic Interaction of a Free Trade and a Protectionist State

(Adaptation of the Prisoner's Dilemma)

		State B	
		Free Trade	Protectionism
State A	Free Trade	1 , 1	-1 , 2
	Protectionism	2 , -1	0 , 0
Payoff Scale: 2 ^{Best}		1 ^{Good}	0 ^{Bad}
			-1 ^{Worst}

The game theoretic model allows for an exploration of the different strategies and payoffs that are available to both states. This section therefore discusses the different choices that each state has and the corresponding payoffs for those strategic options *vis-à-vis* how the other player simultaneously selects.

⁶ A strategy S_1 is said to “strongly or strictly dominate another strategy S_2 for Player 1 iff $M_1(S_1; s_j) > M_1(S_2; s_j)$ for all s_j .” If however, S_1 strongly dominates all other strategies S_i , then S_1 is classified as a dominant strategy. The dominant strategy equilibrium is the result when both players have dominant strategies. See James D. Morrow. *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 77 and Nolan McCarthy and Adam Meirowitz in *Political Game Theory: An Introduction*. (New York: Cambridge University Press, 2007), 94 – 100.

⁷ “An outcome x Pareto dominates an outcome y iff for all players i , $u_i(x) \geq u_i(y)$ and for some player j , $u_j(x) > u_j(y)$. Outcome x strictly Pareto dominates outcome y iff for all players i , $u_i(x) > u_i(y)$.” See James D. Morrow 1994. *Game Theory for Political Scientists*. (New Jersey: Princeton University Press), 95.

⁸ James D. Morrow. *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 263.

Table 4-3: Breakdown of Choices and Outcomes for States A and B

State A's Choices	State B's Choices	State A's Payoffs	State B's Payoffs
Free Trade	Free Trade	(1) Good	(1) Good
Protectionism	Free Trade	(2) Best	(-1) Worst
Free Trade	Protectionism	(-1) Worst	(2) Best
Protectionism	Protectionism	(0) Bad	(0) Bad

States A and B have the possibility for both to engage in free trade, yielding a payoff of (1, 1). As depicted in the matrix above, if this results, then the payoff would be mutually beneficial. This however, does not produce the highest individual outcome. Its likelihood though, is something that both would welcome in abstract terms since with some concessions, both can have the assurance of free trade in a world where there are worse payoffs.

State A could choose to be protectionist while State B is a free trader (2, -1). This could mean that State B would have little or no barriers to trade and not engage in other unfair trading practices, with the expectation that State A would follow suit. State A however, could flout these expectations, imposing high tariffs on imports from State A, and also dump “like products” into the State B’s markets, thereby threatening or causing “material injury” to State B’s domestic producers or running them out of business altogether.⁹ State A could also engage in state-sponsored industrial espionage to steal trade secrets from firms in State B, manipulate currency values to make production costs in one country artificially high and costs in the other artificially low, impose non-tariff barriers that unreasonably restrict access to its market. The result would be a best case scenario for State A, but the worst possible outcome for State B.

⁹ See for example, the WTO’s provision on dumping.

State B, as a rational player, could opt to be protectionist while State A trades fairly, (-1, 2). This would countenance the reverse situation whereby State B would obtain its best possible outcome, while State A would get its worst. This has the potential of leading State A into balance of payment deficits, loss of comparative advantage, or other losses, with State B benefiting from gains from trade.

Prisoner's Dilemma also allows for both sides to cheat, which means that they simultaneously act as protectionists. (0, 0). This, however, would precipitate a bad payoff for both sides. According to the game theory matrix, this is not the worst possible individual outcome. They could however, be better off if they choose to concurrently engage in free trade. Why then is this often the result? Let us now discuss the question of to protect or not to protect. Here, we will see that despite the range of possibilities available to each player, the Nash equilibrium often becomes the deciding factor in how they proceed.

In game matrices where there are two players and the game is not iterated, everyone tries to avoid the "sucker" situation. This is where one party chooses to cooperate, but the other defects from the assurances made. The anarchic nature of the international trading system makes it difficult for any state to trust the other completely. In a world where there is no regulatory body for international trade, as this model assumes, there is therefore no recourse if a state is cheated.

In accordance with realism's tenets, the self- help nature of international politics therefore prompts each state to arm itself in order to ensure its survival. Since economic might is a key determinant in power dynamics,¹⁰ it is therefore more prudent in state craft to cheat rather

¹⁰ Proponents of power transition theory postulate that, "national power is a function of population, economic productivity, and the political capacity to extract resources from society and transform them into national power." For these thinkers, "national power = population* GDP/capita*political capability." See for example, Jack S. Levy,

than to cooperate. This offsets the possibility of the next trading state becoming wealthier and more prosperous, and consequently, increasing its clout relative to the next. The cheater / protectionist state in contemplation of this outcome, therefore takes a chance at getting the best possible result by wagering that the other state cooperates / free trades while it cheats. With both players opting for this strategy, the outcome is “protectionism; protectionism.”

Table 4-4: The Nash Equilibrium of Strategic Interaction Between a Free Trade and Protectionist State

State B

State A		Free Trade	Protectionism
	Free Trade	1 , 1	-1 , 2
	Protectionism	2 , -1	0 , 0

Payoff Scale: 2^{Best} 1^{Good} 0^{Bad} -1^{Worst}

A Nash equilibrium is “the result when two players make best replies to each other and none has an incentive to unilaterally deviate from that strategy.”¹¹ This, however, does not mean that it is the best possible outcome for either player. It is instead, “a minimal condition for a solution to a game if the players can correctly anticipate each other’s strategies.”¹² In this game,

Power Transition Theory and the Rise of China, ed., Robert S. Ross and Zhu Feng (New York: Cornell University Press, 2008), 18.

¹¹ See for example, James D. Morrow, *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 80 – 81. Here, Morrow explicates the fact that “a pair of strategies S_i and S_j forms a Nash equilibrium iff the strategies are best replies to each other.” He also demonstrates that “a pair of strategies forms a Nash equilibrium iff $M_1(S_i; s_j) \geq M_1(S_i; s_j)$ for all $S \neq S_i$ and $M_2(S_i; s_j) \geq M_2(S_i; s)$ for all $s \neq s_j$.”

¹² Ibid. See also and Nolan McCarthy and Adam Meirowitz in *Political Game Theory: An Introduction*. (New York: Cambridge University Press, 2007), 107 – 112.

both states are better off playing “free trade, free trade.” This however, is not a stable equilibrium since state A has an incentive to play protectionism in that row, while state B can be lured to follow suit in its column. In essence, “free trade, free trade” is strictly dominated by “protectionism, protectionism.” Since no strictly dominated strategy can be a part of a Nash equilibrium, both countries will play their dominant strategy which is to protect. These options however, obtain in a world where there is no mechanism for dispute settlement. Let us now consider a world where the DSB exists and moves are sequential, to see if the strategies, payoffs and outcomes change, if any at all.

A Model of Trade and Dispute Resolution

This game builds on the common model of trade as a Prisoner’s Dilemma¹³ and adds the complex interplay of trade at the WTO / DSB. Using an extensive form game, there are two main branches which outline all the possibilities and payoffs that player B must contemplate as it interacts with either a free trading or protectionist State A.

In both branches, State B moves in sequence after State A and decides if it will engage in free trade or protectionism. State A, whose turn it is to move, chooses between filing a case in the Dispute Settlement Body and foregoing that choice. If State A proceeds with the DSB alternative, State B, selects between acquiescence and litigation. If, however, State A does not pursue a case, State B may opt to file or avoid doing so. If the DSB is chosen, State A now selects between acquiescing and litigating. These options are consistent for both free trade and protectionism.

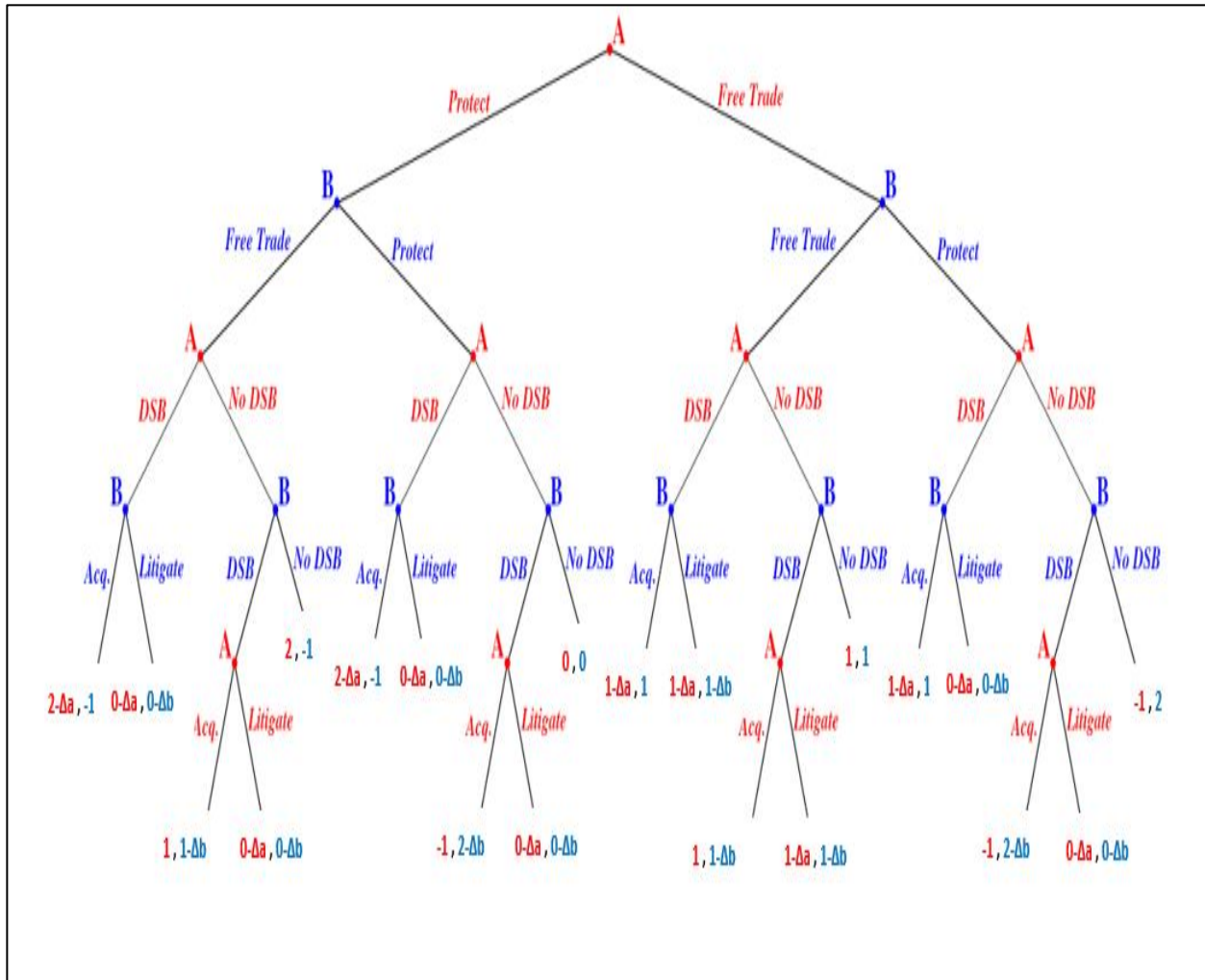
¹³ See for example, Meredith Kolsky Lewis in *"The Prisoners' Dilemma Posed by Free Trade Agreements: Can Open Access Provisions Provide an Escape?"* Chicago Journal of International Law. 2011. Volume 11, Number 2, Article 24. Available at: <http://chicagounbound.uchicago.edu/cjil/vol11/iss2/24> for a discussion on the paradoxical nature of trade. Here, she reasons that trade liberalization would lead to mutual benefits, but defecting remains the dominant strategy. This has implications for when the WTO is pursued versus the options available in free trade agreements.

There are twenty possible payoffs, which all fall under mutual cooperation, mutual defection and “sucker” situations. There are two additional dynamics, however, to this game. Upon successful litigation, the WTO allows the complainant to impose countermeasures.¹⁴ This is accommodated in the game by making it synonymous to “cheat, cheat.” The thinking is that if a country is protectionist, then the free trader now has the WTO’s permission to also protect its trading entities. There are costs, however, for all filing. As a result, a penalty, δ , is used to capture all the costs associated with the dispute settlement process. Here, δ is treated as a composite cost, with all the included variables disaggregated in Chapter Seven. In this chapter, it simply refers to the quantitative and qualitative burdens that states when they initiate or respond to a dispute.

It should be noted, however, that δ may not be the same for both parties. Some scholars also contend that it is the initial cost for filing that is cumbersome, but this often becomes negligible once a culture of litigation has been formed.¹⁵ It is therefore possible for States A and B to be regular DSB users and this may make δ less of an inhibiting factor. Exploring δ could therefore illuminate how the DSB functions. In essence, this model probes how the different costs of filing regardless of what the other state pays affects the tendency to use the DSB versus engaging in tit-for-tat strategies. It is hoped that deductions from variations of this game can answer the broader question of whether (and when) the WTO’s Dispute Settlement Body tempers defection between trading partners with asymmetric interests.

¹⁴ See for example, Lisa L. Martin in “*Interests, Power, and Multilateralism.*” International Organization. Volume 46, Number 4. (Autumn 1992) pp. 765 – 792.

¹⁵ See for example, Christina L. Davis and Sarah Blodgett Bermeo in “*Who Files? Developing Country Participation in GATT/ WTO Adjudication.*” The Journal of Politics. 2009. Volume 71, Number 3: 1033 – 1049

Figure 4-1: A Model of Trade and Dispute Resolution

Proposition 1: In a game with symmetric information and the same delta (δ), the presence of the DSB will mitigate the tendency to defect if $\delta < 1$, but the state that moves first has an advantage.

Proof:

In an extensive form game, the sequence of operations can be garnered through backward induction. There are two subgame perfect Nash equilibria in pure strategies, one in which the DSB is never used, and another in which the DSB is used regularly by State B.

“Protect, No DSB, Acquiesce; Free Trade, DSB, Acquiesce”¹⁶ is a possible equilibrium.¹⁷ This would give a payoff of **1**, **1- δ** .¹⁸ What this equilibrium shows is that State A is more inclined to be protectionist. Remarkably, in response to a trade violation by State A, State B’s strategy is to still be a free trader. It does, however, seek reprieve at the DSB. Once it reaches that stage, State A acquiesces and both end up better off even with the delta that State B pays for initiating the litigation.

The DSB institution eliminates the mutual-protectionism equilibrium. “Protect, No DSB; Protect, No DSB” is not an equilibrium if $\delta \leq 1$. The payoff for choosing this route is **0**, **0**. However, after State A has selected “protect,” State B can do better by choosing “free trade” and then bringing a DSB case. As discussed above, the payoff for State B from that strategy is **1- δ** . Therefore, if delta is less than 1, the mutual protection equilibrium is no longer viable.

The second equilibrium enables State A to be a free trader and for State B to reciprocate accordingly: “Free Trade, No DSB; Free Trade, No DSB.” The payoffs for this strategy are **1**, **1**. This is a stable equilibrium because neither has an incentive to deviate from this strategy. If State B for example deduces that State A is inclined to be a free trader and avoid using the DSB, then State B could change its strategy from free trade to protectionism. State A however, would take State B to the DSB where B would acquiesce because the payoffs for acquiescence are greater than those for litigation. The resulting outcome would be “Free Trade, DSB, Acquiesce; Protect,

¹⁶ For purposes of interpretation, State A’s strategies are listed first and State B’s follow.

¹⁷ A Nash equilibrium is the result when two players make best replies to each other and none has an incentive to unilaterally deviate from that strategy. This however, does not mean that it is the best possible outcome for either player. It is instead, “a minimal condition for a solution to a game if the players can correctly anticipate each other’s strategies.” See for example, James D. Morrow, *Game Theory for Political Scientists*. (New Jersey: Princeton University Press, 1994), 80 – 81. Here, Morrow explicates the fact that “a pair of strategies S_i and S_j forms a Nash equilibrium iff the strategies are best replies to each other.” He also demonstrates that “a pair of strategies forms a Nash equilibrium iff $M_1(S_i; s_j) \geq M_1(S; s_j)$ for all $S \neq S_i$ and $M_2(S_i; s_j) \geq M_2(S_i; s)$ for all $s \neq s_j$. See also and Nolan McCarthy and Adam Meirowitz in *Political Game Theory: An Introduction*. (New York: Cambridge University Press, 2007), 107 – 112.

¹⁸ In all payoffs, State A’s are listed first.

DSB, Acquiesce.” This would provide payoffs of .95, 1 for States A and B respectively, so B would be no better off selecting Protect, and hence has no incentive to deviate. Moreover, if State A perceives that State B will be protectionist, then it will also play protectionism in the first instance. This would force State B to choose between free trade and protectionism, both of which provide outcomes that are less than the 1, 1 payoffs.

This, in principle, is how the DSB and all other dispute resolution mechanisms aim to function. The DSB’s presence constrains defection if litigation costs are small. Regardless of what δ is, provided it is less than 1 for both parties, an aggrieved party will seek reprieve at the DSB and that the guilty party will surrender. Proposition 1 showed that with $\delta \leq 1$ violators are clearly identified and recourse at the DSB is sought accordingly. Culpable states in turn acquiesce when brought to trial. The equilibrium at mutual protectionism is eliminated, and the remaining equilibria provide both states with payoffs associated with relatively free global trade.

In the context of trade therefore and with Prisoner’s Dilemma-like situations very possible and probable, the DSB is a sufficient arrangement for inducing participation and mitigating unfair trading practices. This however, occurs only when costs are not prohibitively expensive. It is therefore prudent to examine how the strategies, payoffs and outcomes change when the conditions under which trade must ensue include an expensive dispute settlement process.

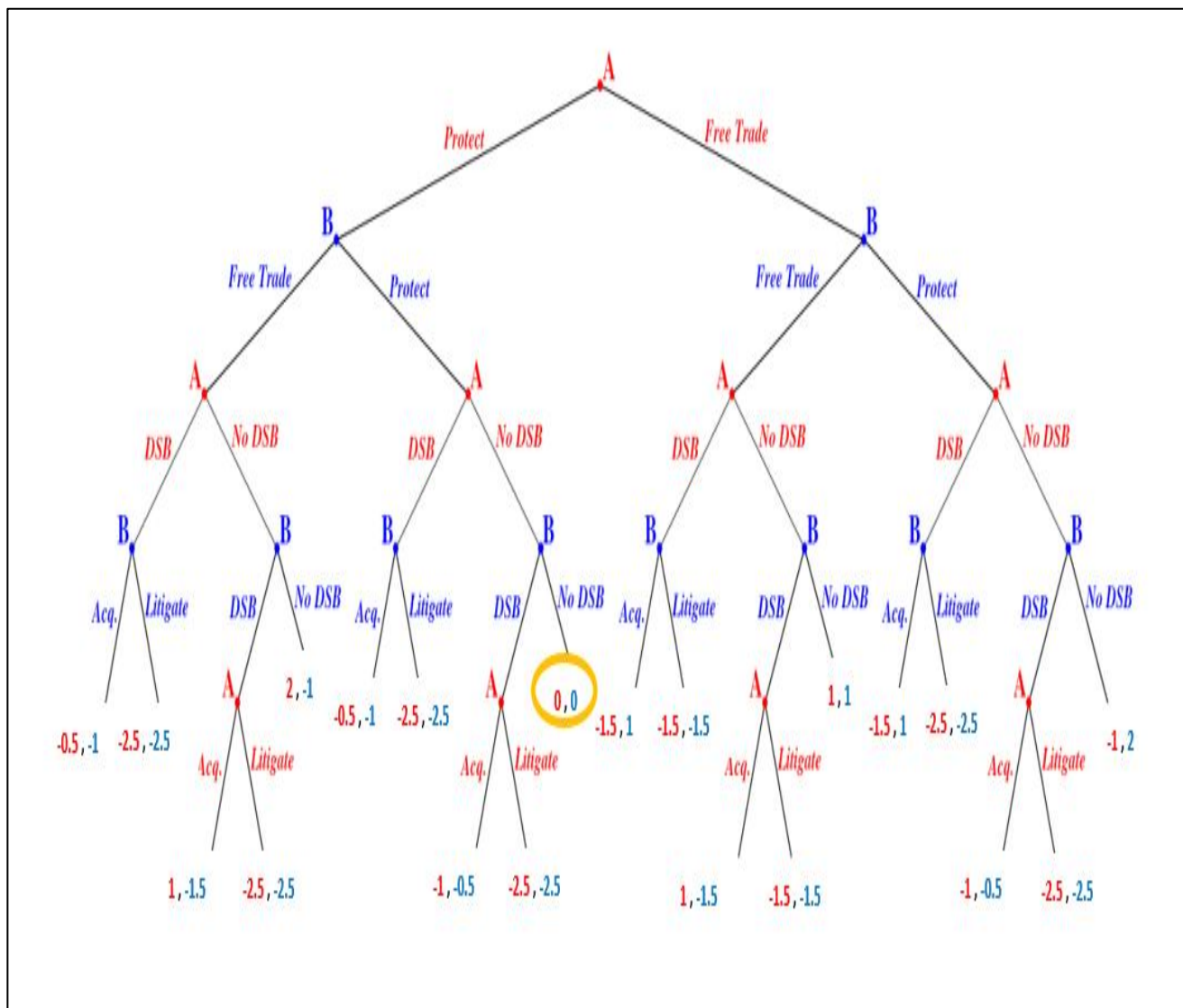


Figure 4-2: Subgame Perfect Nash Equilibrium When Delta is 2.5.

Proposition 2: If dispute settlement costs become too expensive ($\delta \geq 1$), countries will avoid the DSB and engage in protectionism outside the institution.

Proof:

Suppose that A has selected Protect. In this context, the best response by B is to select Protect as well. If B selects protect, the payoff for both players is 0. If B selects Free Trade and then files with the DSB, A will acquiesce, but since $\delta \geq 1$, the payoff for B in this scenario of $1-\delta$ is less than the payoff (0) from simply selecting Protect. Hence, B will not use the DSB. A will also never select Free Trade with $\delta \geq 1$. If A has chosen free trade, and B has then chosen protect, A could choose DSB which would induce B to acquiesce, but the cost of bringing the case to the DSB render this option unappealing. Because $\delta \geq 1$, the payoff $1-\delta$ that A receives is worse than the payoff of 0 associated with selecting Protect initially.

The only subgame perfect Nash Equilibrium is “Protect, No DSB; Protect, No DSB.” This gives a payoff of 0, 0. A consideration is for the states to play “Free Trade, No DSB; Free Trade, No DSB.” This would give both countries a payoff of 1, 1. This however, is not a stable equilibrium. This is because if State B knows that State A will choose free trade, as the second mover, it can quickly opt for protectionism. This would result in the “sucker” situation whereby State A would get -1 and State B would get the much larger payoff of 2. To avoid this possibility, both players will avoid the institution and use tit-for-tat strategies. This case of a prohibitively expensive DSB therefore shows that when dispute settlement costs are too high for both states, the presence of the WTO is irrelevant. This is because neither state is willing to bear the institutional costs and is willing to simply engage in protectionism.

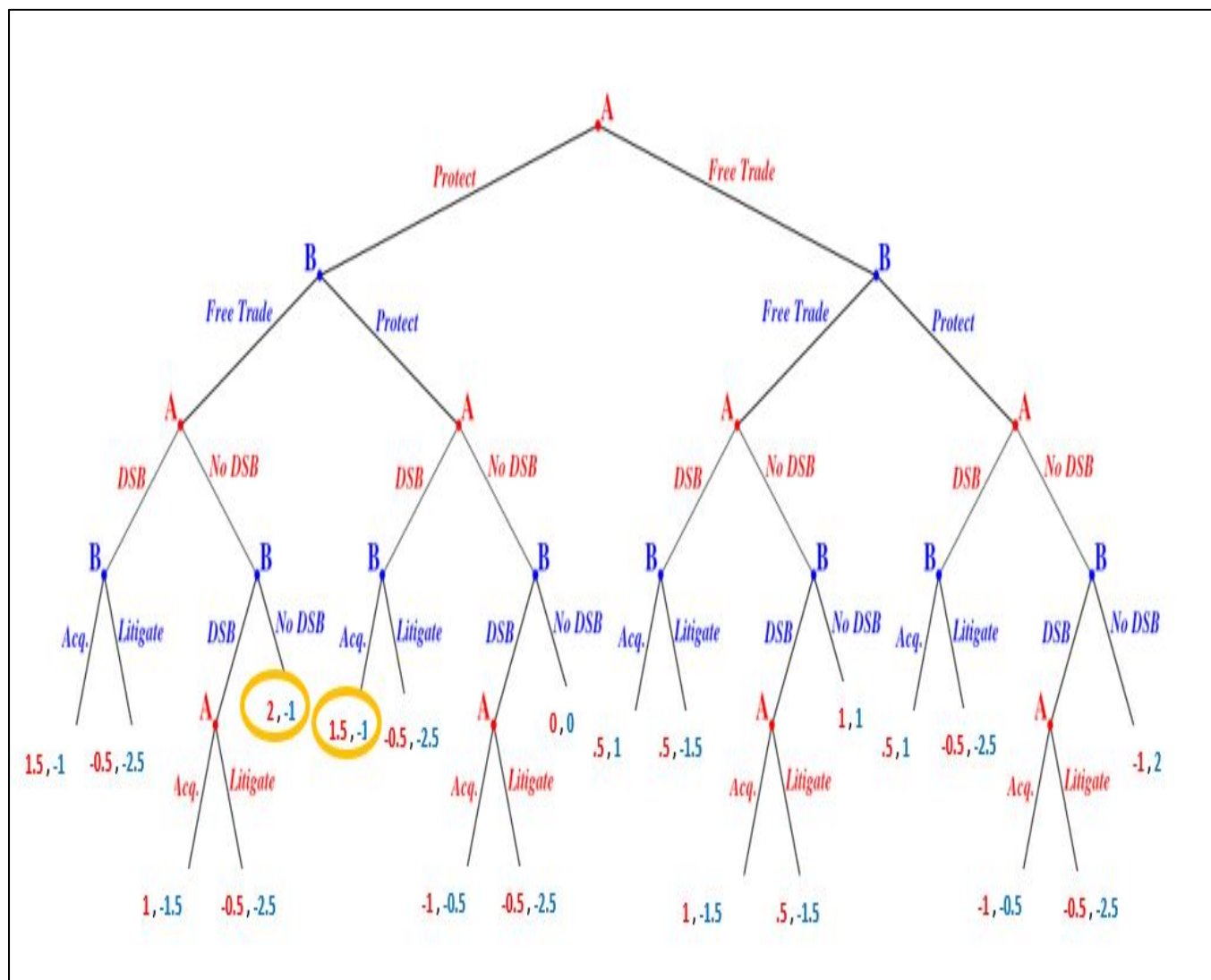


Figure 4-3: Subgame Perfect Nash Equilibrium When State A's Delta is .5 and State B's is 2.5.

Proposition 3: In cases where Player A has a significantly lower cost ($\delta_A \leq 1$) than Player B ($\delta_B \geq 2$) to use the DSB, Player A will use protectionism to simultaneously force concessions from Player B and make it worse off than it would be in a world where the DSB does not exist.

Proof:

There are two equilibria, both of which place B at a substantial disadvantage. One equilibrium is “Protect, No DSB; Free Trade, No DSB.” In the first scenario where State B responds to State A’s protectionism with free trade, the equilibrium path shows that both states will avoid the DSB. This would lead to an equilibrium of “Protect, No DSB; Free Trade, No DSB.” The payoffs for this strategy are for **2** for State A and for **-1**. State B. This equilibrium is noteworthy because though State A is the culpable party, State B, because of its cumbersome litigation costs, avoids the institution and ends up worse than State A. This is a case of double exploitation by State A in that it firstly trades unfairly with State B. Secondly, since State B finds the DSB process too expensive, it ends up with a payoff that is far worse than State A’s. B will not defect from this equilibrium by filing with the DSB because even though A will acquiesce, yielding B a payoff of $1 - \delta$, since $\delta \geq 2$, this payoff is worse than the sucker payoff of -1.

A second equilibrium has state B retaliate with protectionism, only to have that retaliation curtailed by the DSB. On the equilibrium path the moves selected by each state are “Protect, DSB; Protect, Acquiesce.” State B’s retaliation with protectionism ultimately comes to nothing. What we see here is that State A, as a frequent user of the DSB, or a country with greater resources, would simply take State B before the DSB because it can afford to do so. State B is now forced to choose between litigation which gives it a payoff of **$-\delta$** and acquiesce, which yields **-1**. Since $\delta > 1$ for state B, litigation provides worse utility than acquiescing and receiving

a payoff of -1. This equilibrium highlights some of the shenanigans that State A can use to exploit the trading relationship that it has with State B. Notice for example that, because State B cannot access the DSB but State A can, A can exploit that institution to deny B the recourse to a protect-protect equilibrium. What this means is that in the case where B has an exorbitant cost to go to the DSB, the inclusion of the institution in the trading dynamics makes B worse off than B would be in the absence of the WTO/DSB.

Empirical Implications of the Model

This chapter has utilized several iterations of a stage game to probe whether the presence of the WTO's Dispute Settlement Body tempers the tendency to cheat if trading partners have asymmetric interests. These were done under conditions of certainty as well as uncertainty, with variations in litigation costs. The following are some empirical implications that have held constant across the models. These will inform case study selection as well as statistical analyses for the rest of the study.

1. Countries consider the cost of litigation when determining whether to utilize the DSB mechanism.

All countries that face a trade dispute have several alternatives. A vulnerably interdependent state, for example, may choose to ignore the grievance because it is either unable to retaliate, or seeking recourse may make it worse off *ex ante*. A state with a relatively comparable economy, however, may consider two possible options. One may be to engage in tit-for-tat strategies outside the DSB, or to pursue its case formally. Since there is a cost attached to filing, countries will weigh the costs and benefits of litigation versus unilateral retaliation and will act accordingly.

2. Sufficiently high costs can lock a country out of enjoying the benefits of the international institution.

The World Trade Organization is a multilateral institution. Most countries accede to it because of the perceived benefit. If however, there are costs to litigation, some of which being prohibitively expensive, then Members will be unable to access the very provisions that they hope to evoke in need of need. If costs are too high as demonstrated by delta, then limited participation when catalyzed by procedural costs would mean that not all countries can freely access the institution. In this way, sufficiently high costs can impede some countries from enjoying the benefits of the institution.

3. Lower costs make the threat to utilize the DSB more credible. Hence countries with lower costs will be more likely to successfully resolve disputes they initiated prior to full DSB consideration.

Since countries are more likely to pursue the DSB if the filing costs are moderate, then it is also follows that lower costs would make the threat to use the institution more credible. Consequently, a culpable state that is threatened with DSB litigation would be more likely to settle with the aggrieved party. This is because with no foreseen barrier to the DSB in terms of costs, filing would be sufficient to signal the affected country's intent to get recourse. Since based on the models employed the guilty party is exposed and counter protectionism sanctioned, lower costs would make the threat of DSB usage credible and could propel settlement prior to full engagement in the dispute settlement process.

4. Lower costs make litigation more available. Hence, countries with high costs will be more likely to settle disputes initiated by trading partners prior to full DSB consideration.

Whenever the DSB is evoked, the defendant has the opportunity to litigate or acquiesce. With lower costs, a respondent, especially a free trader, would be more likely to pursue the case to the fullest extent and get redress. If however, the litigation costs are too high, then continuing would become more expensive than “protect, protect” and would leave both states worse off. Additionally, litigation would mean that both countries have to pay some cost and not just the party that initiates the process. With these considerations, only lower costs would make litigation attractive and countries knowing that they face great expenses to engage the DSB, could be induced to settle and not go through the whole process.

5. Free trade with no recourse to the DSB will only occur when uncertainty is low. This suggests that variables which reduce uncertainty (e.g. both democracies, common language, geographical proximity or contiguity, etc.) should diminish the recourse to the DSB.

The iterations of the model show that there are two subgame perfect Nash Equilibria. These are “Free Trade, No DSB; Free Trade, No DSB” and “Protect, No DSB; Protect No DSB.” With common knowledge and anticipated moves, both countries therefore correctly identify what type of state they are interacting with and act accordingly. However, in the instantiations of the model where there are information sets, things are a little different. “Protect, No DSB; Protect No DSB” remains a subgame perfect Nash Equilibrium. The next possibility is “Free Trade, DSB, Litigate; Free Trade, DSB, Litigate.” The stiff constraints under which free trade occurs under uncertainty at the DSB makes it counterproductive. This is because with opacity in place, both countries can only force each other to be free traders by going to the DSB. Also, δ has to be so negligible that it is almost equal to zero for states to consider this alternative. Since the role of the DSB is adjudicate unfair trading practices, having two free traders appearing before it

believes that purpose. Additionally, with more information sets in place, the dominant strategy is always to protect. This suggests that with any amount of uncertainty and absence of reprieve at the DSB, chances of playing free trade are low.

6. With certainty, the presence of the institution prevents full-scale litigation because the guilty party acquiesces.

The iterations of the model show that the presence of the DSB is sufficient to curtail unfair trading practices. This happens regardless of the costs associated with dispute settlement. These instantiations highlight how transparency affects state behaviour. Since it is obvious who is a free trader and who is not, the guilty party acknowledges culpability and does not pursue any litigation. Both states therefore have all the information they need to converge around equilibrium paths of joint free trade or joint protectionism.

7. Under certainty, the presence of the institution is sufficient to generate an equilibrium with both sides playing free trade, even though the full process is never utilized.

Prisoner's Dilemma is the game from which this model is generated. Based on its premises, moves are simultaneous and cheating is the dominant strategy. In an extensive form game version however, moves are sequential and the players have complete and perfect information about each other's strategies and payoffs. Since concurrently playing free trade both a greater payoff than joint protectionism, we see that the presence of the institution serves as a credible monitor of state behavior. Here, while the process is never fully utilized, both states being fully cognizant of the mechanism and their choices still form an equilibrium with free trade and avoid full litigation.

8. At the goods level, goods for which the cost differential between the free trade and sucker payoffs are larger will typically have a smaller delta relative to potential gains from trade.

Not all goods are the same. This becomes apparent when one considers the fact that some goods are more frequently contested than others at the DSB. Much of this is due to the integral role that certain goods play in the domestic economies of countries and the potential gains from trade in the global political economy. Some types of clothing for example, may not attract the same type of attention in the United States trade litigation sphere than agricultural produce and military arsenal would. This implies that it would cost more to pursue a case that has little economic prospects than it would for a good that is expected to generate more capital and clout. This obtains regardless of whether the country in question is a free trader or feels it has been violated. Delta then, is to some extent hinged upon how much the state feels it has to gain from the good versus how much it stands to lose. Filing and litigating therefore depends on the potential of the good and not only whether the state feels it has a case to pursue. In essence, many more incidences of trade violation occur than are observed in the cases brought before the DSB. What occurs at the DSB are those cases over which there are large prospects or demonstrations of gains from trade. This factor affects states' consideration of what to actively pursue and what to ignore.

Conclusion

In the final analysis, this chapter sought to test whether the WTO's Dispute Settlement Body mitigates defection between trading partners with varied interests. This question forms part of the larger debate in international politics about the efficacy of institutions. In an attempt to answer the research question, several instantiations of a formal model are used, each of which has the players moving sequentially, both with certainty and uncertainty. Each version has Prisoner's Dilemma-like payoffs and the inclusion of delta, the cost for litigation, which varies across the iterations.

In order to lay the foundation for analysis, the chapter begins with an outline of the main assumptions of Prisoner's Dilemma. These include the players, their strategic choices and payoffs, as well as the Nash Equilibrium that is formed. Part Two then examines how information symmetry and sequential moves affect the strategies and outcomes of the game. Delta is varied so that there are instances when it is the same, or either state alternately has a higher cost. Implicit in these iterations is also the fact that the states deliberate between playing free trade and protectionism, using the DSB or avoiding it, and litigating or acquiescing. These cases are important because they demonstrate that delta has little effect on the decision to use the DSB. This happens even for cases where the affected country pays more. Instead, trade relations are straight forward whereby each player is able to see where it is in the game, where the other player is and also the consequences of each move. This makes it easy to determine if one party is in breach of a WTO provision. The guilty state in turn acknowledges its guilt and accepts punitive countermeasures.

Part Three analyzes how extremely high costs can made the institution irrelevant, or susceptible to manipulation from countries that pay less. If for example, both players find the cost to go before the DSB too high, they will opt to protectionists and avoid the institution. If however, one player has an extremely high cost in relation to the other player, the player with the lesser cost is incentivized to be play protectionism. The other player, because of the expensive filing costs, will continue to choose free trade and avoid the DSB. If however, the State with the higher DSB costs retaliates with protectionism, the other player will take it to the DSB, with the only feasible option being to not pursue full scale litigation. This shows that beyond a certain limit, high costs will lock countries out of protecting themselves through protectionism, or make them suffer at the hands of more capable states if the institution is evoked.

There are, however, limitations to these findings. The first is that the model has complete and perfect information. In the real world, this does not obtain. Versions of the model with asymmetric information may therefore provide information on not just how cost calculations affect DSB usage, but inequitable amounts of information as well. Additionally, in some cases, a developing country that wins a dispute may be unable to initiate WTO sanctioned countermeasures because of inequitable volumes of trade flow. The outcome would be that resources are spent filing the dispute, but the complainant loses in the end if it is unable to truly singly punish the defector. These possibilities make the decision to litigate a serious matter, which many countries pursue, only if they believe the odds of winning and punishing are very high. Those that are unable to secure these outcomes may choose to respond outside the DSB, or do not act at all.

In general, however, the employment of these extensive form games with complete and perfect information are useful in analyzing the strategies, outcomes and payoffs that are available to countries as they alternate between states of free trade and protectionism. If the variations hold across cases, they therefore can feature in the debate about non-participatory membership; that is, if and under what conditions do institutions matter and especially, what makes states use them versus finding recourse elsewhere.

CHAPTER V

TO FILE OR NOT TO FILE? THE ANTI-DUMPING AGREEMENT AND ORDINARY PORTLAND GREY CEMENT

Introduction

Participation in the WTO's Dispute Settlement Body is a conundrum. The most capable states sometimes do not litigate, or pursue litigation vociferously; while less capable states often endure unfair trading practices or wrangle over goods that are critical to their economy. What explains this divergence in DSB usage? Moreover, if participation by itself is so strategic and methodical, how might we observe and make summations about its absence? This chapter aims to do this by examining four trade disputes that involve Ordinary Portland Grey cement and the Anti-Dumping Agreement. These cases are *China – Ordinary Portland Grey Cement*¹ (hereafter referred to as *China – Cement*²), *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* (hereafter referred to as *Guatemala – Cement I*), *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico* (hereafter referred to as *Guatemala - Cement II*), and *United States – Anti-Dumping Measures on Cement from Mexico* (hereafter referred to as *United States – Cement*³).

Justification for the Cases Selected

As at June 2017, 525 disputes have been brought before the WTO.⁴ Below is an outline of the status of these cases.

¹ In all WTO cases, the respondent is listed first in the case name.

² The designation, *China – Cement* is the author's, not the WTO's.

³ The designation, *United States – Cement* is the author's, not the WTO's.

⁴ See “Current Status of Disputes.” https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm

Table 5-1: Status of Cases Brought Before the WTO

Number of Cases	Status
156	In consultations
28	Panel established, but not yet composed
21	Panel composed
0	Panel report circulated
5	Panel report under appeal
0	Appellate Body report circulated
29	Report(s) adopted, no further action needed
42	Report(s) adopted, with recommendation to bring measure(s) into conformity
89	Implementation notified by respondent
23	Mutually acceptable solution on implementation notified
7	Compliance proceedings ongoing
2	Compliance proceedings completed without finding on non-compliance
6	Compliance proceedings completed with findings of non-compliance

Source: “*Current Status of Disputes.*”

https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm

Specifically in the area of goods, six cases have been filed at the DSB. These are DS60, between Guatemala and Mexico; DS156, also between Guatemala and Mexico; DS182 and 191, both between Ecuador and Mexico; DS281, between the United States and Mexico, and DS500, between South Africa and Pakistan.⁵ Of these cases, the ones featuring Ecuador and Mexico, as

⁵ See “*Index of Disputes Issues.*” https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm

well as South Africa and Pakistan are still in consultations.⁶ The study therefore examines the three cases that were litigated, as well as a similar cement case that did not progress to the DSB, to see how they these disputes help to explain non-participatory membership. How then do these cases overlap and diverge?

China – Cement features a trade dispute between China and Jamaica. Jamaica imposed an antidumping duty on the importation of Ordinary Portland Grey Cement made in or originating from China. China objected to this finding, but the case did not proceed to the WTO.⁷ In *Guatemala – Cement I*, Mexico complained to the WTO about Guatemala’s imposition of an anti-dumping duty on its Portland Grey Cement. Guatemala won on technicalities.⁸ In the case of *Guatemala – Cement II*, Mexico revisited the antidumping duty that Guatemala levied and won⁹. In the final case, *United States – Cement*, the United States imposed an antidumping duty on cement from Mexico. This case was filed under GATT, NAFTA and later WTO. The countries came to a mutually agreed solution whereby the duty was withdrawn and other concessions were made¹⁰. In all of these cases, the product contested is Ordinary Portland Grey Cement, and the WTO provision evoked for reprieve is the Anti-Dumping Agreement. Importantly, however, three of the cases end up at the DSB, while one does not. Additionally, of the DSB adjudicated cases, one results in victory for the complainant and respondent respectively, while the last one

⁶ Ibid

⁷ See Appendix I (a) for a full discussion on the facts about this case.

⁸ See Appendix I (b) for a full discussion on the facts about this case. See also, “DS60: Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico.”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds60_e.htm

⁹ See Appendix I (c) for a full discussion on the facts about this case. See also, “DS156: Guatemala - Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds156_e.htm

¹⁰ See Appendix I (d) for a full discussion on the facts about this case at the WTO. See also, “DS281: United States - Anti-Dumping Measures on Cement from Mexico.”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds281_e.htm

results in a mutually agreed solution. Three of these cases also feature third parties that calculate the extent to which they will participate in the proceedings.

The dependent variable that this study probes is the choice to litigate at the DSB. This includes formally complaining or defending. These cases therefore reflect variation in the dependent variable since some disputants take their case to the international forum, while some do not. When this is coupled with the controls for type of good contested and the WTO provision evoked, it provides ample fodder for a discussion on the factors that may inform non-participatory membership in the DSB, even when countries have legitimate cases. An important consideration for the cases selected is that they also reflect diverse power disparities and the outcomes are not ones that such power based dynamics would predict. In the case of Jamaica and China, for example, Jamaica accuses its more powerful trading partner of a violation and imposes the duty, but China does not retaliate nor pursue litigation though it has the capacity to do so. In *Guatemala – Cement I*, Guatemala believes that its industries are being harmed by Mexico's dumping of cement and imposes an antidumping duty. Mexico, the more powerful state, takes Guatemala to the DSB, but Guatemala wins; albeit on technicalities since the Appellate Body overturns the ruling of the Panel. In *Guatemala – Cement II*, Guatemala keeps the antidumping duty against Mexican Portland Grey Cement in place and Mexico again takes it to the DSB. This time, Mexico wins. In *United States – Cement*, Mexico takes the United States to the DSB and both come up with a solution and then inform the institution. In the Guatemala cases, we see a weaker state trying to protect itself with the available WTO provisions, but being challenged by a more capable state. The expectation would be that Guatemala would back down, but it litigates and wins in one instance and loses in the next. In the case with the United States and Mexico, Mexico seeks institutional succour after years of facing this levy. In this instance,

with both countries having relatively comparable capabilities, they could have engaged in tit-for-tat strategies outside of the DSB. They evoke the institution and then decide to settle after years of deliberations. These cases, therefore, can provide insight into the decision making behind filing or avoidance of the DSB whenever a trade dispute arises.

The Contested Good: Ordinary Portland Grey Cement

Before an assessment can be made of the cases, it is important for there to be a discussion of the good that is being contested. Portland cement is the main ingredient in concrete.¹¹ It is made from a combination of calcium, silicon, aluminum, iron, and other chemicals.¹² Clinker, a by-product of the manufacturing process, is also used in construction.¹³ The American Society for Testing and Materials (ASTM) International divides Portland cement into five categories, Types I – V. This is based on their concentration of carbon and aluminum, how quickly they hydrate and their resistivity to sulphates.¹⁴ Type I is used in general construction, II on structures that have been exposed to sulphate ions, III for cold weather and rapid construction, IV on large structures such as dams, and V on surfaces that have high sulphate ions exposure.¹⁵ “Ordinary Portland cement,” or OPC is the term that is used for these types of cement, which is basically normal cement. In addition to these categories that are grey in colour, there is also White Portland cement, which is used for decorative purposes.¹⁶

¹¹ “*How Cement is Made.*” PCA: America’s Cement Manufacturers. <http://www.cement.org/cement-concrete-basics/how-cement-is-made>

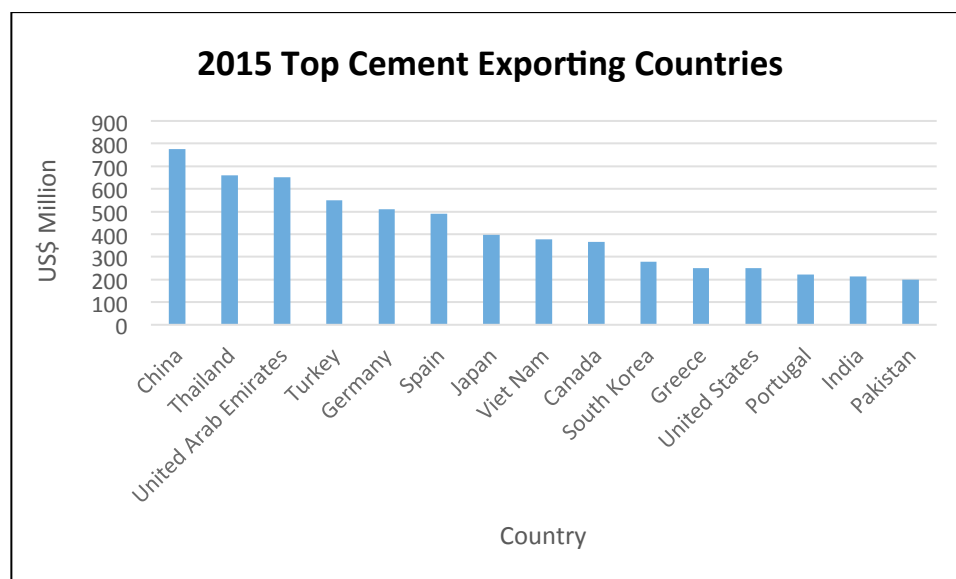
¹² Ibid

¹³ Ibid

¹⁴ Jeff Thomas and Hamlin Jennings. “*Types of Portland Cement.*” The Science of Cement. <http://iti.northwestern.edu/cement/aboutTheAuthor.html>

¹⁵ Ibid

¹⁶ Ibid

Figure 5-1: 2015 Top Cement Exporting Countries

Source: “Top Cement Exporting Countries.” <http://www.worldstopexports.com/top-cement-exporting-countries/>

Figure 5-1 illustrates the countries that exported the most cement in 2015. Of this set, China had the largest market share which generated US\$776.2 million. This constituted 8% of the world’s total exported cement.¹⁷ Thailand’s global market share was 6.8%, followed by the United Arab Emirates, Turkey and Germany with 6.7%, 5.7% and 5.2% respectively.¹⁸ Canada’s US\$367.4 million made up 3.8%, while the United States’ \$249.4 million was 2.6%.¹⁹ Since cement is involved in almost all areas of construction, the expectation is that countries that both export and import it will want to ensure that their markets are being protected. Understanding why some of these cases were litigated and others not, is therefore a puzzle.

In order to probe these cases and highlight the factors that promote participation or its opposite at the DSB, this chapter will briefly discuss dumping as an unfair trading practice. This

¹⁷ Daniel Workman. “Top Cement Exporting Countries.” 2 April 2017. <http://www.worldstopexports.com/top-cement-exporting-countries/>

¹⁸ Ibid

¹⁹ Ibid

will be followed by an examination of the Anti-Dumping Agreement and how it works. After this, a discussion will ensue on the rather ambiguous and contentious aspects of the Agreement. This is in order to highlight the fact that with sufficient legal capacity and financial resources, countries can have reasonable cause to pursue anti-dumping litigations at the DSB. When they choose not to, then the reasons for non-participatory membership are instructive. Chapters 6 and 7 will continue the analysis by examining the four cases from each country's perspective. This will be done by using the independent variables outlined in the literature review. Since this part of the study is largely qualitative, the information theory approach as proposed by Drozdova and Gaubatz will be used to represent the arguments quantitatively.²⁰ This is in order to succinctly tabulate the findings for quick and parsimonious discussions on which variables promote non-participatory membership in the DSB.

Dumping as a Trading Strategy

There are many writings on the ways in which dumping can occur. Generally, however, there is consensus that dumping is done to maximize profits in an industry. For scholars Matsushita et al., dumping can take place in two main ways. These include sales below cost and international price discrimination. Sales below cost is sometimes selected as a firm's operational strategy if there is strong competition in the market. This sometimes results when there is more than one company vying for dominance of the product's market shares.²¹ The best way to attract the buyers would therefore be to lower the prices. One specific way in which sales below cost can occur is through forward pricing. Here, early in the product's life cycle, companies price the

²⁰ Katya Drozdova and Kurt Taylor Gaubatz. *Quantifying the Qualitative: Information Theory for Comparative Case Analysis*. (London: Sage Publications, 2017).

²¹ Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn. *The World Trade Organization: Law, Practice and Policy*. (New York: Oxford University Press, 2003), 303.

goods below cost in order to maximize profitability over the full life cycle.²² This strategy can be used to explain the market strategies of many firms from when they enter the market to their behavioural patterns over the long term. In regards to the trade disputes at hand, this can be used to describe, for example, the entrance of Chinese cement into the Jamaican markets in a bid to compete with the domestic producer, Caribbean Cement Company Limited (CCCL). The allegation was that the entrance price of the Chinese good was far below that of the Jamaican competitor. With adequate market shares, this product could gain profitability in the long run.

Sales below cost can also occur through predatory pricing. This, according to Matsushita et al., is done to gain monopolistic control of the market.²³ Weisman opines that traditionally, predatory pricing works in two stages. In the first instance, the product is priced below some measure of economic cost by the predator to drive out the prey from the market. In the second stage, prices are readjusted in the absence of the competitor to recover the losses incurred.²⁴ Whatever the strategy, for Jamaica, Guatemala and the United States, all felt that their trading partners were selling their cement with a view of creating a niche market in their domestic territories. This had the potential to drive their domestic producers out of business.

Dumping can also be categorized as a form of international price discrimination. This occurs when a company “sells the same product at different prices in different areas or to different customers.”²⁵ In some cases, international price discrimination happens when the markets of the exporting country and the importing country are not closely linked.²⁶ “High tariffs, quotas, private restrictive business practices such as exclusive dealing arrangements, tie-

²² Ibid

²³ Ibid

²⁴ Dennis L. Weisman. “*Notes on Predatory Pricing*.” 2006. United States of America: Kansas State University. <http://www.k-state.edu/economics/staff/websites/weisman/courses/815/homework/Notes%20On%20Predation.pdf>

²⁵ Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn. *The World Trade Organization: Law, Practice and Policy*. (New York: Oxford University Press, 2003), 304.

²⁶ Ibid

in contracts, boycotts or other forms of anti-competitive practices” are some of the ways in which this can occur.²⁷ Variation in the elasticity of demand between countries can also give rise to international price discrimination.²⁸ Brander and Krugman support this thinking by arguing that dumping arises for systematic reasons associated with oligopolistic behaviour. They posit that, “if a profit maximizing firm believes it faces a higher elasticity of demand abroad than at home, and it is able to discriminate between foreign and domestic markets, then it will charge a lower price abroad than at home.”²⁹ If the international price discrimination theory were to be validated by the facts of the cases at hand, then it would mean that China and Mexico were able to distinguish between their foreign and domestic markets and as a result, varied their cement prices for local and international consumers. All of the affected countries responded with an investigation and later imposition of antidumping duties. It is therefore useful to now outline why dumping is seen as an unfair trading practice at the WTO and the provisions that are in place for Members to respond if they feel they have been violated.

Dumping at the World Trade Organization

Dumping, broadly speaking, is a violation of WTO principles. Members of the WTO can therefore take steps to address this dumping if it can be determined to have occurred and is harming, or threatening to harm a domestic industry, or the establishment of one.³⁰ But, was it always like this? When did dumping become a problem? Antidumping regulation has its origin in Canada in 1904 as it tried to protect its steel industry.³¹ Soon after Canada’s antidumping laws

²⁷ Ibid

²⁸ Ibid

²⁹ James Brander and Paul Krugman. 1983. *A ‘Reciprocal Dumping’ Model of International Trade*. Journal of International Economics, Volume 15, p. 313.

³⁰ See the WTO Analytical Index: The Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_e.htm

³¹ J. M. Finger and Nellie T. Artis. *Antidumping: How It Works and Who Gets Hurt*. (Michigan: University of Michigan Press, 1993), 15.

were instituted, Australia, and New Zealand also passed theirs. By 1921, other countries including the United States, France, Great Britain and most of the British Commonwealth had dumping laws in place.³² Prior to this time, dumping was not a new issue. The implementation of antidumping laws by Canada, however, was an innovative way of doing things, and that this provided the political will for many other countries to follow.³³

In the first two decades of the General Agreement on Tariffs and Trade (GATT), which is the predecessor of the WTO, dumping was a minor issue.³⁴ This changed in 1958 when antidumping laws were effectuated in thirty-seven GATT countries.³⁵ Scholars like Jackson contend that it is the Article VI provision that was made for dumping cases when the GATT was being negotiated in 1947 that opened the door to antidumping litigations.³⁶ By the time of the Kennedy Round of 1964 - 1967, antidumping became a significant issue.³⁷ From then onwards, the antidumping provisions have been negotiated, renegotiated and modified to Codes, and finally to the Agreement on the Implementation of Article VI, or as it is more commonly called, the Anti-Dumping Agreement.³⁸ The high level of interest that has been placed on antidumping regulation under the GATT / WTO shows that it is a controversial, yet widely used mechanism to combat unfair trade³⁹. The use of this procedure by developing countries^{40, 41} also shows that

³² Ibid, 16.

³³ Ibid, 16 -17.

³⁴ Ibid, 25.

³⁵ Examples include Australia, Belgium, Brazil, Chile, India and Sri Lanka, Canada, New Zealand and France.

³⁶ John Jackson. *The World Trade System: Law and Policy of International Economic Relations*. 2nd ed. (Boston: The MIT Press, 1997), 225.

³⁷ See for example, John Jackson. *The World Trade System: Law and Policy of International Economic Relations*. 2nd ed. (Boston: The MIT Press, 1997), 226 and J. Michael Finger and Nellie T. Artis. *Antidumping: How It Works and Who Gets Hurt*. (Michigan: University of Michigan Press, 1993), 26.

³⁸ See for example, "Anti-Dumping: Technical Information."

https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

³⁹ Vandenbussche and Zanardi for instance, write that between 1980 and 2003, the number of countries with an Anti-Dumping Law increased from thirty six to ninety seven. See "What Explains the Proliferation of Antidumping Laws?" Core Discussion Paper 2007/66. Universite Catholique de Lovain and Tilburg University and CentER.

⁴⁰ For example, Finger and Zlate argue that since the Uruguay Round, the trade remedies have been increasingly used by developing countries more than developed ones. See "WTO Rules that Allow New Trade Restrictions: The

this is a provision that many countries can afford and one that they feel offers them a level of protection from predatory market practices. Consequently, the focus of this study is on dyadic relationships and not on country type generally.

According to Hoekman, “GATT principles apply only insofar as the option is invoked.” The implication of this statement is that whereas the GATT / WTO provides the regulatory framework for world trade governance, the onus is on the individual countries to become cognizant of these provisions, skilled in understanding them and applying them correctly in the event of a trade violation. In the cases at hand, it is the invocation of the Anti-Dumping Agreement that gives us some indication of an ongoing trade dispute. This does not mean that countries that do not invoke it have no grievances. Indeed, the non-invocation of these principles, especially at the international level, is the fundamental puzzle of this research. Since antidumping is a trade remedy that can be instituted domestically, its usage highlights some measures that an affected country uses to protect itself. The extent to which it is contested and exacerbates to a formal dispute at the DSB is therefore a quantifiable assessment of participation in the DSB. Examining what happens domestically and the extent to which it is pursued therefore provides insight into the strategic use of the DSB generally, and non-participatory membership specifically.

Public Interest is a Bastard Child.” UN Millennium Project Task Force on Trade.

<http://fordschool.umich.edu/rsie/acit/TopicsDocuments/Finger030421.pdf>

⁴¹ Examples of the use of antidumping measures by developing countries include Trinidad and Tobago which at June 30, 2010 had measures imposed against air conditioning equipment from China and Portland Grey Cement from Thailand; South Africa, which at June 30, 2010 had imposed measures against imports from Brazil, China, France, Germany, India, Korea, Malaysia, Sweden, Chinese Taipei, Thailand, Turkey, United Kingdom and United States; and Malaysia, which at June 30, 2016, had measures against imports from China, Indonesia, Korea, Chinese Taipei, Thailand and Viet Nam. See “*Semi-Annual Reports under Article 16.4 of the Agreement - Trinidad and Tobago.*” G/ADP/N/202/TTO. 9 July 2010. World Trade Organization, “*Semi-Annual Reports under Article 16.4 of the Agreement - South Africa.*” G/ADP/N/202/ZAF. 12 July 2010. World Trade Organization “*Semi-Annual Reports under Article 16.4 of the Agreement - Malaysia.*” G/ADP/N/286/MYS. 31 August 2016. World Trade Organization.

The Anti-Dumping Agreement and Its Ambiguities

The WTO provides guidelines on how member countries can legally respond to dumping. Article VI of the GATT and the Anti-Dumping Agreement are therefore the benchmarks for how affected members should proceed.⁴² Without these stipulations in place, antidumping duties would contravene the fundamental GATT principles of non-discrimination⁴³ and tariff binding.^{44,45} All WTO Members are required to notify the Anti-Dumping Committee about any new and existing procedures that relate to their anti-dumping investigations or reviews. This is in pursuance to Article 18.5 of the Anti-Dumping Agreement, as well as a Committee decision that was made in February 1995.⁴⁶ Members that have no legislation or regulations in place are also expected to report that to the Committee.⁴⁷ These reports are usually made through semi-annual reports as stipulated by Article 16.4 of the Anti-Dumping Agreement.

In accordance with Article 17 of the Dispute Settlement Understanding (DSU), antidumping disputes can be brought before the DSB where they are “subject to binding dispute settlement.”⁴⁸ Here, Members have the opportunity contest preliminary and definitive anti-dumping duties that are imposed, as well as compliance with the Anti-Dumping Agreement.

⁴²See “*Understanding the WTO: The Agreements. Anti-dumping, Subsidies, Safeguards: Contingencies, etc.*” https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm and “*Anti-Dumping: Technical Information.*” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

⁴³ The principle of nondiscrimination means that WTO members should equally accord most-favoured-nation (MFN status) to all its trading partners. There should also be no discrimination between a country’s products, services or nationals. These should all be given what the WTO calls, “national treatment.” See *Understanding the WTO: Principles of the Trading System.* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#bind

⁴⁴ The principle of “binding” a commitment refers to the ceilings on customs tariff rates that countries agree to for their goods and services. The WTO reports that in many developing countries, tax imports are usually lower than the bound rates. In developed countries, however, tax imports are usually applied at the same rate as the bound commitments. The bound rates can also be changed after negotiations with trading partners, some of whom usually request compensation for trade losses. See *Understanding the WTO: Principles of the Trading System.* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#bind

⁴⁵ “*Understanding the WTO: The Agreements. Anti-dumping, Subsidies, Safeguards: Contingencies, etc.*” https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm

⁴⁶ “*Report (2016) of the Committee on Anti-Dumping Practices.*” G/L/1158. G/ADP/23. 1 November 2016. World Trade Organization.

⁴⁷ Ibid

⁴⁸ “*Anti-Dumping: Technical Information.*” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

Since the WTO allows for national governments to interpret these provisions and institute laws accordingly, anti-dumping trade disputes may also include reviews of how Members have applied these measures on their trading partners.⁴⁹ The WTO reports that there has been a spike in the number of anti-dumping measures that are being used. For example, in the April 27, 2017 WTO's Committee on Anti-Dumping Practices, Japan highlighted the high number of new anti-dumping investigations for 2014 and 2015, zoning in on the fact that the first half of 2016 featured 154 new investigations.⁵⁰ This, Japan attributed to countries' response to overcapacity in steel and other sectors from emerging market producers.⁵¹ The Committee corroborated this assertion by revealing in its November 1, 2016 report that between mid-2015 and 2016, the new anti-dumping investigations reached 267, and were initiated by 45 WTO countries.⁵² Of this number, India topped the list with 66, followed by the United States with 51, Pakistan with 21 and Australia with 18.⁵³ For the same period, 151 definitive anti-dumping duties were levied. Here, the top users were India, the United States, Mexico and the European Union, with 38, 19, 15 and 10 measures respectively.⁵⁴

The increase in anti-dumping investigations and the fact that it is already the most frequently used trade remedy necessitate a discussion on some of the often contested aspects of the Anti-Dumping Agreement. Scholars like Bown, for instance, decry its prevalence and misuse by countries.⁵⁵ This section, however, concentrates on attempts to correctly use the Agreement, and highlights how its complexity and ambiguity can frustrate WTO Members that seek

⁴⁹ Ibid

⁵⁰ *Anti-Dumping: WTO Members Exchange Views on Rise in Anti-Dumping Actions.* "https://www.wto.org/english/news_e/news17_e/anti_10may17_e.htm

⁵¹ Ibid

⁵² Ibid. See also, "Report (2016) of the Committee on Anti-Dumping Practices." G/L/1158. G/ADP/23. 1 November 2016. World Trade Organization.

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Chad P. Bown. "Antidumping Against the Backdrop of Disputes in the GATT/WTO System." *Journal of Economic Literature*. 2002. No. F13. http://people.brandeis.edu/~cbown/papers/ad_theory.pdf

recourse. The chapter therefore analyzes the provisions on like products, determination of dumping, material injury, causation and domestic industry. This will demonstrate how the abstruse nature of the Agreement can promote trade disputes, and consequently, why those countries that are more adroit with these provisions may be more frequent litigants than those that are not. By doing this, the study turns attention to how the specific Agreement for reprieve can inhibit participation in the DSB and not just the WTO guidelines for dispute settlement generally.

Like Products: How Alike Should They Be?

Article 2.1 of the Anti-Dumping Agreement stipulates that:

a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.⁵⁶

The requirement, however, is that countries must first determine what a *like product* is under the chapeau of the Agreement. This is clarified by Article 2.6 which states that:

Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.⁵⁷

Pursuant to Article 2.6, a like product is firstly distinguishable by the fact that it is “alike in all respects to the product under consideration.” This would mean that when the alleged

⁵⁶ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 147.

⁵⁷ *Ibid*, 150.

product is being compared with the one from the supposedly affected domestic industry, then every possible feature that would be used as criterion should consistently reflect the same level of similarity. This requirement, *prima facie*, seems to be a comprehensive one as it speaks to the compared product being completely identical to the “product under consideration.” This clause, however, is misleading. This is due to the fact that at face value it seems to cover everything that should be considered when determining how alike a product should be. Upon examination, however, it becomes evident that Article 2.6 of the Anti-Dumping Agreement does not delineate in anyway, the exact aspects that should be assessed when seeking to make a judgment. Does this, for example, include size, shape, colour or intended purpose? And if so, what if one of the characteristics such as size should be dissimilar, would that in accordance with the provisions of the Agreement make it unidentical and therefore not “alike in all respects?” This seemingly very broad stipulation therefore needs to be more specific as to what characteristics should be used so that determinations of a like product can be replicated when done by external parties. Scholars like Matsushita et al. believe that the *like product* definition in Article 2.6 seems to be designed to allow for variation in application and to allow national antidumping authorities to utilize their discretion.⁵⁸ This ambiguity, however, can also be a potential source of conflict since the two parties may not agree on the conclusion of likeness.

Article 2.6 of the Anti-Dumping Agreement provides that in the absence of an identical product, a like product can be determined by “another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.”⁵⁹ Arguably, the negotiators of this Agreement felt based on their experience with trade laws that

⁵⁸ Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn. *The World Trade Organization: Law, Practice and Policy*. (New York: Oxford University Press, 2003), 315.

⁵⁹ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 150.

the mechanism though stringent, should also be worded to allow for unique circumstances in each Member's domestic industry. This, however, gives rise to other pertinent questions and controversies. Does the Article, for instance, suggest by making this allowance, that "*being identical to*" and "*having a close resemblance of*" can be equated and used interchangeably? Moreover, how many characteristics should this other product have that "closely resembles the product under consideration?" Should the fact that it says "characteristics" mean that since it is a plural word, as long as it has more than one then it has met the standard for being a like product? In addition, how does one quantify "closely resembling" and use it as a standard? The provisions for determining a like product are therefore ambiguous and can lead to controversial findings among Members of the WTO. How then has the WTO/ DSB in its own deliberations determined what a like product should be interpreted as in accordance with the stipulations of Article 2.6?

In *US – Lumber V*,⁶⁰ the Panel held that Article 2.6 has to be the premise upon which the "like product" under consideration is determined.⁶¹ The US Department of Commerce had used "narrative description and tariff classification" to define the softwood lumber products.⁶² The decision of the Panel was that this approach by the US Department of Commerce was not inconsistent with Article 2.6.⁶³ Significantly, however, the Panel ruled that whereas Article 2.6 is the bench mark from which like products are to be determined, it also found that this Article "does not provide any guidance on the way in which the "product under investigation" is to be

⁶⁰ This ruling is DS264 and was adopted on August 31, 2004. The complainant was Canada and the respondent, the United States of America, with the product at issue being certain softwood lumber products from Canada. Articles 1, 2, 4, 5, 6, 9 and 18 of the Antidumping Agreement were used to determine the case. The measure at issue was US final anti-dumping duties. See "*DS264: United States - Final Dumping Determination on Softwood Lumber from Canada.*" https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds264_e.htm

⁶¹ "WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)." Paragraph 151.

https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_01_e.htm#general

⁶² "*United States – Final Dumping Determination on Softwood from Canada.*" (WT/DS264/R). Paragraph 7.156.

⁶³ Ibid

found.”⁶⁴ This ruling by the Panel reveals another issue with Article 2.6 and that is, its failure to express to Members of the WTO, how “the product under consideration” is to be found. Since this product is the one that is to be compared with the “like product,” then it points to the fact that other provisions within the WTO, if they exist, will have to be identified as based on the communication from the Panel, no guidance could be found within the Anti-Dumping Agreement that speaks to it. Generally, however, in addition to the precedent set in *US – Lumber V* and countries can also use the judgments of *EC- Salmon (Norway)*⁶⁵ and *EC – Fasteners (China)*⁶⁶ to help them determine if they have a “like product” to compare with the “product under investigation.” Given the ambiguities highlighted in Article 2.6, the onus is therefore on national governments to be systematic and transparent in their application of this Article, and to bring supporting evidence when challenged. Complainants, on the other hand, will also need to be vigilant and meticulous when articulating their positions before the DSB. Importantly, the level of complexity involved in determining a like product may simply deter some countries from using the DSB.

Article 2.1 to 2.5 outline how dumping is to be determined. This section, however, will focus on the determination of the normal value and how such relates to finding the export price and making a “fair comparison” between them. All of these technical stipulations can lead to variation in country findings, and consequently, legal wrangling at the DSB.

⁶⁴ “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” Paragraph 151.

https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_01_e.htm#general

⁶⁵ “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” Paragraph 152.

https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_01_e.htm#general

⁶⁶ In this case, the Panel rejected the reasoning that in accordance with Articles 2.1 and 2.6, only products that are “like” as outlined in Article 2.6 should be included in defining the product under consideration. In the Panel’s view, the purpose of Article 2.6 is to define a “like product” within the context of the Anti-Dumping Agreement and not to lead to the problematic nuanced treatment of different categories of the same product as potentially separate like products. See “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” Paragraph 153.

https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_01_e.htm#general

The normal value is conceived of as, “the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market.”⁶⁷ Countries must therefore determine whether sales are made “in the ordinary course of trade,”⁶⁸ or to use other calculations if there are insufficient volumes of sales.⁶⁹ The framers of the Anti-Dumping Agreement recognized, however, that it may not be possible to determine the normal value of the product, especially when there are no sales in the domestic market. Some alternative methods are provided to circumvent this problem.⁷⁰ For example, Members may use “the price at which the product is sold to a third country,” or the product’s “constructed value,” which includes an evaluation of production costs, expenses relating to the selling, general and administrative procedures, as well as the profits.⁷¹ In situations where the product comes from an intermediate country and not where the product is manufactured, countries should use the price of the product in the country of origin to calculate the normal value and not the exporting country’s price.⁷² Additionally, since non-market economies make it difficult for an assessment to be made of the home market prices compared with the price at which the importing country is being sold the

⁶⁷ “Anti-Dumping: Technical Information.” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

⁶⁸ To determine if sales are made “within the ordinary course of trade,” “sales must be made at prices that are below per unit fixed and variable costs plus administrative, selling and general costs, they must be made within an extended period of time (normally one year, but in no case less than six months), and they must be made in substantial quantities.” These sales are considered to be in “substantial quantities if, “(a) the weighted average selling price is below the weighted average cost; or (b) 20% of the sales by volume were below cost.” When determining the “normal value,” countries may disregard sales that are below cost if “they do not allow for recovery of costs within a reasonable period of time.” Additionally, for those sales that are “above the weighted average cost over the period of investigation,” but fall below cost, Members should “allow for recovery of costs within a reasonable period of time.” See “*Finding the Normal Value*.” “Anti-Dumping: Technical Information.” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

⁶⁹ The Anti-Dumping Agreement acknowledges the fact that insufficient volumes of sales can prevent an accurate comparison between “home market and export prices.” In those cases, market sales in the home market are deemed “sufficient if home market sales constitute 5 per cent or more of the export sales in the country conducting the investigation, provided that a lower ratio ‘should’ be accepted if the volume of domestic sales nevertheless is ‘of sufficient magnitude’ to provide for a fair comparison.” See “*Insufficient Volume of Sales*.” “Anti-Dumping: Technical Information.” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

⁷⁰ “Anti-Dumping: Technical Information.” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

⁷¹ See “*Alternative Bases for Calculating Normal Value*.” “Anti-Dumping: Technical Information.” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

⁷² Ibid

product, importing countries have broad allowance to determine the normal value of the investigated product.⁷³ The many proposed methods to find the normal value make it difficult to say definitely what the procedure is. While it is clear that the method used will depend on the case at hand, the fact that there are so many alternatives also increases the likelihood that affected countries will challenge the particular method that is chosen. What guidance, then, might we find in the WTO's deliberations?

Article 2.1 outlines four conditions which must be met for sales transactions to be used to calculate the normal value.⁷⁴ These are outlined in the *US – Hot-Rolled Steel*⁷⁵ to be:

1. “The sale must be ‘in the ordinary course of trade’
2. Of the ‘like product’
3. Destined for consumption in the exporting country
4. The price must be comparable.”⁷⁶

What then does “in the ordinary course of trade” mean as purported by Article 2.1 of the Anti-Dumping Agreement? There is no definition for this term in the Anti-Dumping Agreement. This thinking is supported by the Appellate Body in *US — Hot-Rolled Steel*. This suggests that the provision is limited to national interpretations, thereby creating future obscurity. How then should WTO Members treat this deficiency in the Article? In *US – Hot-Rolled Steel*, the definition presented by the US was that generally, “sales are in the ordinary course of trade if

⁷³ Ibid

⁷⁴ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 147.

⁷⁵ The determination for *US – Hot-Rolled Steel* (DS184), was adopted on August 23, 2001. The complainant was Japan and the respondent, the United States of America, with the products at issue being the imports of certain hot – rolled steel products from Japan. The articles from the Anti-Dumping Agreement that were used to determine the case are articles 2, 3, 6 and 9. The measure at issue was US definitive anti-dumping duties. See “*DS184: United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*.”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds184_e.htm

⁷⁶ “*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*.” WT/DS184/R. 28 February 2001. Paragraph 7.113.

made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product.”⁷⁷ Japan, the complainant, agreed with this definition and the Appellate expressed its contentment with it, based on the purpose of the appeal.⁷⁸ Based on the premise set by the Appellate Body in this case, it can be inferred that whereas the Anti-Dumping Agreement does not outline what “in the ordinary course of trade means,” a mutually agreed definition by the complainant and respondent does not seem to be a contravention of the anti-dumping provisions. The implication is therefore that once litigants use a definition that reflects the spirit and practice of the WTO, they may not take their dispute to the international level. If, however, they fail to agree on the interpretation and application of this stipulation, challenges may be made at the multilateral level.

Determining the Dumping Margin

Determining the dumping margin is another point of contention when using the Anti-Dumping Agreement. To calculate the dumping margin, the Agreement provides that “a fair comparison” should be made between the export price and the normal value.⁷⁹ Members, however, sometimes find this provision abstruse. In *Egypt – Steel Rebar*⁸⁰, the Panel held that, “Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value.”⁸¹ This “fairness” is to be judged by considering “the level of trade and timing of sales on both the

⁷⁷ “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” Paragraph 27.

⁷⁸ Ibid

⁷⁹ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 149.

⁸⁰ In *Egypt – Steel Rebar* (DS211), the complainant was Turkey and the respondent Egypt, with the product at issue being steel rebar imported from Turkey. The measure at issue was Egypt’s definitive antidumping measures. The findings were adopted on October 1, 2002 with articles 2, 3, 6 of the Anti – Dumping Agreement used to make a determination. See “DS211: Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds211_e.htm

⁸¹ “Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey.” WT/DS211/R. 8 August 2002.

normal value and export price sides of the dumping margin equation,” and also all the other issues that may affect price comparability.^{82, 83}

Article 2.4 also outlines mechanisms that are available for the conversion of currencies for the “fair comparison” to be made and other calculations for determining the dumping margin. Following the dictates of Article 2.4, the fair comparison feature seems to be an intricate one. The procedures to be implemented are so vast and technical that one wonders if they can be manipulated by trade experts to their own advantage. If this is the case, then the expected outcome of fairness might not be so readily challenged by respondents to an antidumping dispute, who because of the technicalities involved, may be uncertain of how the findings were determined but accept them nevertheless.

Another point that can be raised is that, based on the many procedures that are available, it seems almost inevitable that a dumping margin can always be established from the figures that are available, thus leading to a dumping final determination. Suffice it to say, however, that even with the complicated conditions attached to finding the normal value, the Anti-Dumping Agreement provides that a dumping margin can be established by finding both the normal value and the export price based on transactions done mainly in the ordinary course of trade. The consequence is probable squabbling over what national governments do in pursuance of this provision, for trading partners to simply not bother with the dispute settlement process.

Article 3 of the Anti-Dumping Agreement has guidelines on how injury should be determined within the context of the WTO. This is what Article 3.1 says:

⁸² “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 80.

⁸³ One factor that may affect price comparability is a difference in physical characteristics. In *Argentina – Ceramic Tiles*, however, the Panel held that, “due allowance (should be made) in each case on its merit for differences in physical characteristics affecting price comparability.” See “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 88.

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.⁸⁴

There are many emanating issues to be discussed when one closely examines the provisions of Article 3.1. The clause requires, for instance, clarification on what exactly ‘injury’ should be taken to mean. Footnote 9 of the Article attempts to explain its intentions. It declares:

Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.⁸⁵

Following the dictates of the footnote, injury under the purview of Article 3 can therefore be interpreted as:

1. Material injury to a domestic industry
2. Threat of material injury to a domestic industry, or
3. Material retardation of the establishment of such an industry.

The conditions given seem to give adequate room for an injury determination. This is affected by the fact that the type of injury is qualified three times by the use of the adjective, “material.” What then should “material” be interpreted as? The first hint that the footnote gives is

⁸⁴ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 150.

⁸⁵ Ibid

that injury should be interpreted in accordance with the provisions of the Article.⁸⁶ Since Article 3 is the overarching and fundamental stipulation for the determination of injury, it would be helpful to ascertain whether the meaning and mention of “material” occurs elsewhere in the Article. It does reoccur. No meaning, however, is given for it. Can “tangible” or “significant” therefore be used as substitutes? Since the proposition is that the interpretation should be made in accordance with the provisions of the Article then it would be useful to examine as contained in Article 3, other terms such as “positive evidence,” “objective examination,” “significant increase” and “all relevant economic factors” as they when examined, could give an understanding of what this “material” determination of injury is. The key point, however, is that there is a steep learning curve for new users of this Agreement, and even for regular users, there remains multiple sources of vagueness which can precipitate trade disputes. The result is therefore apathy or active participation in the DSB, depending on the country’s capability.

Article 3.1 explicates that a determination of injury should be based on “positive evidence,” in accordance with the principles of the GATT Article VI.⁸⁷ Since the word “evidence” is illuminated by the adjective, “positive,” then it stands to reason that this is a deliberate inclusion by the Article’s composers so that it has a specific meaning. In *Thailand – H-Beams*,⁸⁸ the Appellate Body in addressing the scope of “positive evidence” held that since “antidumping investigation involves the commercial behaviour of firms,” then the investigating

⁸⁶ Czako et al. agree with this reasoning. For them, material injury must be understood within the context of the factors listed in Articles 3.4 and 3.7. See Judith Czako, Johann Human and Jorge Miranda. 2003. *A Handbook on Anti- Dumping Investigations*. (United Kingdom: Cambridge University Press, 2003), 275.

⁸⁷ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 150.

⁸⁸ In *Thailand – H-Beams* (DS122), the complainant was Poland and the respondent being Thailand, with the product at issue being H-Beams from Poland. The measure at issue was Thailand’s definitive anti-dumping determination. The findings were adopted on April 5, 2001, with Articles 2, 3, 5 and 17. 6 of the Anti – Dumping Agreement used to determine the outcome of the case. See “*DS122: Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*.”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds122_e.htm

authorities should collect and assess “both confidential and non-confidential information.”⁸⁹ This should include not just those that are “disclosed to, or discernible by the parties to the investigation.”⁹⁰ In the Appellate Body’s estimation, Article 3.7 provides contextual support for this interpretation of Article 3.1.⁹¹ Here, Article 3.7 elucidates that a threat of material injury must be “based on facts and not merely on allegation, conjecture or remote possibility.”⁹² This is buttressed by Article 5.2 which outlines that, “an application for initiation of an anti-dumping investigation may not be based on simple assertion, unsubstantiated by relevant evidence.”⁹³ It is very important for there to be a distinct explanation for what “positive evidence” should be interpreted as, especially in the absence of an explicit definition for “material injury.” This therefore sets the stage for an examination of the cases at hand and why some countries did not bother to pursue the DSB alternative, while others did.

Article 3.1 of the Anti-Dumping Agreement stipulates that the determination of injury “should involve an objective examination of both (a), the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b), the consequent impact of these imports on domestic producers of such products.”⁹⁴ Here the phrase, “objective examination” comes to the fore as a matter for consideration in the material injury debate. In *US – Hot-Rolled Steel*, the Appellate Body found that that the term relates specifically

⁸⁹ “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” Paragraph 185.

⁹⁰ Ibid

⁹¹ Ibid, paragraph 186.

⁹² *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 151. See also, “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” Paragraph 186.

⁹³ Ibid, 153. “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” Paragraph 186.

⁹⁴ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 150.

to the investigative process⁹⁵ and not with the supporting facts used to determine injury.⁹⁶

“Objective examination” therefore requires the impartial investigation of the domestic industry and how it has been affected by the dumped products. This should be done without bias to any party or parties that may have an interest in the investigation.⁹⁷ The guidelines set forth by the Appellate Body in determining “objective examination” are important for all WTO Members of the WTO. This, if done well, promotes replicability when calculating material injury.

Disagreement on the procedures and the extent of objectivity, however, can give rise to trade disputes, or dissuade usage based on the level of complexity.

Article 3.2 of the Anti-Dumping Agreement continues on the premise set by Article 3.1 by outlining what changes should be analyzed when determining injury *vis-a-vis* a like product. The word “significant” is used repeatedly to refer to the increase in dumped products and also of price undercutting by the dumped products.⁹⁸ How then does the WTO interpret this provision? In *Thailand – H-Beams*, the Panel postulates that “Article 3.2 does not require that the term “significant” be used to characterize a subject increase in imports in the determination of an investigating authority.”⁹⁹ This reasoning is based on the Panel’s analysis of the Article which states that, “with regard to the volume of the dumped imports, the investigating authorities shall *consider* whether there has been a significant increase in dumped imports...”¹⁰⁰ The Panel

⁹⁵ This includes the gathering, inquiry and evaluation of the case. See “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 193.

⁹⁶ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 193.

⁹⁷ Ibid

⁹⁸ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 150 -151.

⁹⁹ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 224.

¹⁰⁰ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 150 -151. See also, “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 224.

concluded that Article 3.2's use of the "consider" is not a requirement for there to be "an explicit finding or determination by the investigating authorities."¹⁰¹ Instead, it held that it obliges that in order to reach a decision, authorities should "give attention to," "reckon with," or "take into account" whether there has been a significant increase in dumped imports.¹⁰² This "consideration" however, should be included in the relevant documents.¹⁰³

Pursuant to the findings of *Thailand – H-Beams*, it can be argued that investigating authorities are not duly obligated in their anti-dumping proceedings to make a determination about whether the increase in dumped imports is significant, as such a characterization is outside the scope of the provisions. Instead, in accordance with the stipulations of Article 3.2, investigating authorities are required *de jure* to make a *de facto* statement in their documentation of the case on whether there has been a *significant* increase in dumped imports, either in absolute or relative terms. This ruling by the Panel is an important one as it focuses the intention of the Article by outlining that where an increase in dumped imports is concerned, the onus is on the investigating authorities is to simply make deliberations on whether there has been a significant increase of such, and not to make a judgment on the extent of significance. This nuanced approach is again, a potential source for conflict between trading partners.

There are, however, provisions in Article 3.2 for the investigating authorities to make a determination on the significance of price undercutting. This view is supported by the Panel in *EC – Tube or Pipe Fittings*.¹⁰⁴ This is so, as even with the use of the same word "consider," the

¹⁰¹ Ibid

¹⁰² "WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)." Paragraph 224.

¹⁰³ Ibid

¹⁰⁴ In *EC- Tube or Pipe Fittings* (DS219), the complainant was Brazil and the respondent, European Communities, with the product at issue being malleable cast iron tube or pipe fittings imported from Brazil. The measure at issue was EC Regulation imposing anti-dumping duties on certain imports. The findings were adopted on August 18, 2003, with articles 1, 2 and 3 of the Anti-Dumping Agreement used to make final judgments for the case. See

Article goes on to say that a comparison should be made with “the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.”¹⁰⁵ What the Panel found, however, was that the scope of Article 3.2 is limited in that whereas it “requires the investigating authorities to consider whether price undercutting is “significant,” it does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration.”¹⁰⁶ By implication, the non-existence of a specific requirement for the margin of undercutting to be calculated means that governments may develop their own standards. This may result in differences in practice among Members. In addition, with there being no set formula to calculate the margin of undercutting, dubious mechanisms may develop whose legality others may not be able to challenge, since the Article in question though recommending that one be found, does not delineate how it should be done and what variables should be used.

Article 3.4 of the Anti-Dumping Agreement gives a very detailed account of how the impact of the dumped imports on the domestic industry should be examined. It indicates that there should be an “evaluation of all relevant economic factors and indices having a bearing on the state of the industry.”¹⁰⁷ *EC – Bed Linen*¹⁰⁸ demonstrates that countries are legally bound to

“DS219: European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds219_e.htm

¹⁰⁵ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 150 -151.

¹⁰⁶ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 231.

¹⁰⁷ These include “actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.” See *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 151.

¹⁰⁸ In *EC- Bed Linen*, the complainant was India, the respondent, European Communities, with the product at issue being cotton type linen imports from India. The measure at issue was definitive antidumping duties imposed by the European Communities including the European Communities’ zeroing method used in calculating the dumping

use all the factors outlined in Article 3.4 as the list is mandatory and not illustrative.¹⁰⁹ How therefore does one reconcile the fact that Article 3.4 closes by saying that, “this list is not exhaustive, nor can one or several of these factors necessarily give guidance?”¹¹⁰ The Panel addresses this issue by acknowledging that the Article makes allowance for the impact of other factors on the domestic industry to be also considered.¹¹¹ It concludes its judgment in *EC – Bed Linen*, however, by stating that, “each of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned.”¹¹² Investigating authorities, however, are expected to both use the prescribed list and to record such in their judgment. This point is supported in *Mexico – Corn Syrup*¹¹³ where the Panel purported that, “the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.”¹¹⁴ What this means in particular reference to this research is that Article 3.4 can be a source for discontent among disputants, especially if anti-dumping determinations do not include

margin. The provisions that were used to make a determination are articles 2, 3, 5, 12 and 15 of the Anti-Dumping Agreement and article 6.2 of the Dispute Settlement Understanding. The findings were adopted on March 12, 2001. See “*DS141: European Communities - Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India.*” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds141_e.htm

¹⁰⁹ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).*” Paragraph 247.

¹¹⁰ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 151.

¹¹¹ “*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India.*” WT/DS141/R. 30 October 2000. Paragraph 6.156. See also, “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).*” Paragraph 253.

¹¹² *Ibid*, paragraph 6.159.

¹¹³ In *Mexico – Corn Syrup*, the complainant was the United States of America, the respondent, Mexico, with the product at issue being high fructose corn syrup (“HFCS”) from the US. The measure at issue was Mexico’s definitive anti-dumping duty measure. The findings were adopted on February 24, 2000 based on the provisions of Articles 3, 5, 6, 7, 10 and 12 of the Anti-Dumping Agreement. See “*DS132: Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States.*” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds132_e.htm

¹¹⁴ “*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India.*” WT/DS141/R. 30 October 2000. Paragraph 6.161. See also “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).*” Paragraph 248.

all the factors listed in the Article. For the uninitiated, however, these requirements may be insurmountable and hence a deterrent to filing at the DSB.

Ironically, however, the Appellate Body in reporting on *EC – Tube or Pipe Fittings* revealed that there are certain discrepancies in the recommendations of Article 3.4. It found, for example, that while it mandates that all “relevant economic factors” should be evaluated for their impact on the dumped products, “it does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted.”¹¹⁵ This means that national governments can choose how they set out the results of their evaluation and cannot be compelled to present evidence in a particular way before a panel. This gap in the provisions of Article 3.4 may very well allow countries to not be very thorough in their reports of injury determination, or may lead to a variety of documentation based on the many investigating authorities, and therefore non-uniformity in the WTO/DSB as a collective.

The Anti-Dumping Agreement requires that in addition to countries finding that dumping is occurring within their domestic territories, they must also establish that this dumping is causing or threatening to cause “material injury.” Article 3.5 of the Anti-Dumping Agreement speaks to the issue of causation and explains that there should be a demonstration that the “dumped imports are, through the effects of dumping as set forth in paragraphs 2 and 4, causing injury within the meaning of [the] Agreement.”¹¹⁶ What Article 3.5 implies is the fact that dumping may be taking place in a domestic industry, but that the same dumping is not causing any “material” injury to that same industry. The establishment of causation is therefore very

¹¹⁵ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).*” Paragraph 263.

¹¹⁶ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 151.

important. The Article therefore recommends that all evidence before the authorities should be examined in order to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry.¹¹⁷ Since it is possible that other factors other than the dumped imports may materially injure the domestic industry, Article 3.5 mandates that, “the authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.”¹¹⁸

It should be noted, however, that Article 3.5 does not place a burden on the countries involved to find all the other factors that may be causing injury to the domestic industry. This view is supported by the findings of the Panel in *Thailand – H-Beams* where it held that, “known factors” would include factors “clearly raised before the investigating authorities by interested parties in the course of an AD investigation” and that, “investigating authorities are not required to seek out such factors on their own initiative.”¹¹⁹ This information when placed in context means that anti-dumping litigations can only be pursued based on the facts that are presented at the time of the investigation. Other information, though pertinent to the case, if not submitted at that time, cannot be used as supporting arguments. This stipulation requires affected countries to be as thorough as possible when determining dumping, but also gives them the opportunity to declare that newly available facts were just not known to them at that time.

For causation to be determined, the impact of “other factors” must be separated from the effects of the dumped imports on the domestic industry.¹²⁰ This point is supported by the Appellate Body in *US — Hot-Rolled Steel* where it acknowledged the practical difficulty of

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).*” Paragraph 279.

¹²⁰ Ibid, paragraph 275.

separating and distinguishing “the injurious effects of different causal factors,”¹²¹ but reiterated the fact that, “Article 3.5 requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.”¹²² This determination by the Appellate Body highlights the fact that all other anti-dumping proceedings must show a clear distinction between the injury caused by the dumped products on the domestic industry, and the injury caused by other “known factors.” Whether this in fact happens is cause for litigation in many countries.

Threat of Material Injury

Article 3.7 of the Anti-Dumping Agreement outlines how a determination of a threat of material injury should be made. In *Egypt — Steel Rebar*, the Panel ruled that the text of Article 3.7 clearly shows that the central question in a threat of injury investigation is whether there will be a “change in circumstances” that would cause the dumping to begin to injure the domestic industry.¹²³ This change is contextualized by Article 3.7 to be, that which is “clearly foreseen and imminent.”¹²⁴ The Panel noted, however, that the factors listed in Article 3.7 are insufficient in determining the threat of material injury. This is because they deal with issues such as “the likelihood of increased imports,” “the effects of imports on future prices and likely future demand for imports, and inventories.”¹²⁵ The Article does not, however, consider how the domestic industry is affected by the dumped products.¹²⁶ In considering the requirements that investigating authorities must meet in the determination of a threat of material injury, the Panel

¹²¹ “*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*.” WT/DS184/AB/R. 24 July 2001. Paragraph 283.

¹²² Ibid

¹²³ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 291.

¹²⁴ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 152.

¹²⁵ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.” Paragraph 297.

¹²⁶ Ibid, 298.

on *Mexico – Corn Syrup* therefore held that other factors other than those set out in Article 3.7 should be considered. It recommends, for example, that the conditions outlined in Articles 3.1 and 3.4 be used in conjunction with Article 3.7.¹²⁷ This, it said would be necessary, in order to prove that in the absence of protective action, the dumped exports would wreak further damage on the domestic industry.¹²⁸

The provisions for the determination of injury all point to the fact that credible and tangible evidence must be presented to support the claims brought forward. These, of course, must follow a number of prescribed steps. Two things should be noted, however, as this section concludes. Firstly, Article 3's footnote requires that injury should demonstrated by "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry."¹²⁹ The overarching Article 3, however, goes on to explain what material injury to a domestic industry and the corresponding threat should be interpreted as, albeit without defining the word material, but does not in any way say how a determination of "material retardation of the establishment of such an industry" should be made. Secondly, all the stipulated conditions for the determination of dumping are separated by the word "or" and not "and." This is a very important observation as one seeks to examine dumping cases that have been concluded, for it could be inferred that the clause requires that just one condition must be met and not all. The Panel in its deliberation on in *Thailand — H-Beams*, determined that in guidelines such as Article 3.4, the obligation for the presence of all the factors listed is not obviated by the word, "or."¹³⁰ This adds to the complexity and obscurity of the Anti-

¹²⁷ Ibid

¹²⁸ Ibid, 299. See also, *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 152.

¹²⁹ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 150.

¹³⁰ "WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)." Paragraph 250.

Dumping Agreement, and helps to explain the incidences of non-participatory membership in the DSB.

Article 4.1 of the Anti-Dumping Agreement mandates that within the context of the GATT/WTO, a domestic industry refers to “the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.”¹³¹ It provides two exceptions, however. The first one applies to when producers are related to the exporters or importers,¹³² and secondly, to when the territory under consideration can be “divided into two or more competitive markets” and the producers in those markets can be evaluated “as a separate industry.”¹³³ All determinations of what a “domestic industry” is, however, must be in accordance with Article 4.1.¹³⁴

A close inspection of Article 4.1 shows that the domestic industry is defined in the plural with the use of the words, “domestic producers,” or “those of them.” This suggests that pursuant to Article 4.1, only plural entities can be examined as the Article does not in any way make reference to a single firm. Can this argument, however, hold as a matter of law? In *EC – Bed*

¹³¹ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 152.

¹³² “Related to the exporters or importers” in this instance means that “(a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.” See footnote 11 of Article 4.1 of the Anti-Dumping Agreement in *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 152.

¹³³ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations.* (Geneva: The World Trade Organization Secretariat, 2002), 152.

¹³⁴ This point is supported by the Panel, which, in *Mexico – Corn Syrup* held that, “the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1.” See “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).*” Paragraph 325.

Linen, the Panel acknowledged that the definition of the domestic industry according to Article 4.1 was in the plural.¹³⁵ It argued, however, that:

Article 4.1 of the AD Agreement defines the domestic industry in terms of ‘domestic producers’ in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the AD Agreement, and that the provisions concerning domestic industry under Article 4 continue to apply in such a factual situation.¹³⁶

The “indisputable” consideration by the Panel that a single domestic producer can be taken to embody the concept of the domestic industry is instructive, but not easily discernible from the wording of Article 4.1. Since the Articles have legal status and are usually interpreted literally, then measures should be put in place to have Article 4.1 reworded to include the fact that it can be considered in both a singular and plural sense. *Ad interim*, however, what this ruling has done is that it has set a premise upon which any investigating authority which regards the domestic industry in a plural or singular manner cannot be said to have breached the provisions as outlined in Article 4.1. Undoubtedly, though, these stipulations which are open to discretion and interpretation can induce non-participation in the DSB.

The Anti-Dumping Agreement frequently uses qualifying adjectives which themselves need to be clarified. One such example is the “collective output of the products” which Article 4.1 says should constitute “a *major* proportion of the total domestic proportion of the total domestic production of those products...”¹³⁷ The use of the word “major” in this sense can give rise to controversy. This is so as, where as it is usually understood in an abstract manner to mean

¹³⁵ Ibid, paragraph 327.

¹³⁶ “*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*.” The Report of the Panel. WT/DS141/R. Paragraph 6.72.

¹³⁷ *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. (Geneva: The World Trade Organization Secretariat, 2002), 152.

the most of something, in concrete terms it is still not clear. For example, would two thirds of the total domestic production of those products suffice? Would a 75% rating be allowed? What should a “major proportion” be taken to mean? In *Argentina – Poultry Anti-Dumping Duties*¹³⁸, the question was raised about “whether the phrase “a major proportion” implies that the “domestic industry” refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production.”¹³⁹ The Panel held that, “an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible.”¹⁴⁰ This determination therefore means that within the provisions of Article 4.1, the word “major” can be interchanged with the words “important,” “serious,” or “significant.” This clarification remains vague. This is so because these alternative words are qualitative terms that are subjective in their use. The Panel therefore in failing to put a quantitative measure to the interpretation of the word “major” has arguably left the users of the provision in doubt when executing anti-dumping cases. What this means in essence is that achieving consistency with the principles of the WTO is really for the legally and economically adroit countries. Those that fail to meet this mark may simply endure trade violations, often without being fully cognizant of the recourse that is available. Frequent users too, may find that the provisions are ambiguous and that navigating them is often confusing and frustrating.

¹³⁸ In *Argentina – Poultry Anti-Dumping Duties* (DS 241) the complainant was Brazil and the respondent Argentina, with the product at issue being poultry from Brazil imported into Argentina. Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement were used to make a determination. The measure at issue was definitive anti-dumping measures, in the form of specific anti-dumping duties, imposed by Argentina on imports from Brazil for a period of three years. The findings were adopted on May 19, 2003. See “*DS241: Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil.*” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds241_e.htm

¹³⁹ “*WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).*” Paragraph 329.

¹⁴⁰ Ibid

Conclusion

In sum, the imposition of anti-dumping laws continues to be a matter that is subject to much debate in the international system. The prevalence of anti-dumping lawsuits in spite of the many ambiguities in the WTO's Anti-Dumping Agreement indicates that many countries still find it a very useful mechanism in protecting themselves from unfair trading practices. This section has evaluated the Anti-Dumping Agreement by analyzing the provisions on like products, determination of dumping, material injury, causation and domestic industry. The other Articles, of course, are also important. These, however, are the fundamental and most often contested portions of the Agreement. An evaluation of them reveal that the stipulations are often obscure, with even determinations from the Panel or Appellate Body doing little to clarify the ambiguities. Utilizing the Anti-Dumping Agreement therefore requires competent legal capacity. It does not, however, necessarily follow that all countries with strong legal capacity will be regular users of this WTO provision. At the same time, though, some legal capacity is the minimum threshold to use this mechanism. The strategic calculations of when to use and what to contest, are separate considerations. For this chapter, the main point is that the Anti-Dumping Agreement itself may be a hindrance to participation in the DSB. Let us now examine the four cases to see how legal capacity and other associated costs may have impeded or facilitated participation in the DSB.

CHAPTER VI

ESTIMATED LEGAL CAPACITY AND ITS EFFECTS ON PARTICIPATION IN THE DISPUTE SETTLEMENT BODY

Introduction

The issue of how legal capacity affects the tendency and ability of countries to participate in the WTO's Dispute Settlement Body is widely studied. In previous studies, many scholars used GDP as a proxy or indication of a country's capability to afford legal capacity.¹ Other works have examined "capacity" more broadly to mean "the resources available to identify, analyze, pursue, and litigate a dispute."² These studies, however, do not adequately address legal capacity. GDP, for example, may be a good indication of the resources available for litigation, but it does not necessarily mean that all WTO Members that can afford this expertise do so. Additionally, having legal and technical experts in place does not always mean that they are the most trained and skilled. Numbers by themselves, therefore, are just a part of the consideration.

Busch et al. agree with these postulations. As outlined in Chapter Two, their definition is based on survey responses to countries' "professional staff, bureaucratic organization at home, bureaucratic organization in Geneva, experience handling general WTO matters, and involvement in WTO litigation."³ While I find that Busch et al. provide a meticulous and direct method of ascertaining legal capacity through their survey, their work is a general assessment of

¹ See for example, Chad Bown in *"Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders."* The World Bank Economic Review. 2005. Vol. 19, No. 2, pp. 287- 310. Here, Bown uses GDP as a proxy for a country's ability to afford legal services. This, he argues, is also a determinant of a country's willingness to be a complainant or third party in a trade dispute.

² Andrew T. Guzman and Beth A. Simmons. *"Power Plays and Capacity Constraints: the Selection of Defendants in World Trade Organization Disputes."* Journal of Legal Studies. 2005. Volume 34, Number 2: 557-598. Guzman and Simmons argue that poorer countries are incapacitated by low "financial, human and institutional resources," and so they will file fewer cases at the WTO. See also, Thomas Sattler and Thomas Bernauer in *"Gravitation or Discrimination? Determinants of Litigation in the World Trade Organisation."* European Journal of Political Research, 2011. 50: 143-167.

³ Marc L. Busch, Eric Reinhardt and Gregory Shaffer. *"Does Legal Capacity Matter? A Survey of WTO Members."* World Trade Review, 2009, Volume 8, Number 4, pp. 559.

this variable and not as it relates to specific cases. Consequently, legal capacity as measured reflects a country's ability to file and respond to filings broadly speaking, but it does not capture particular timelines in the affected country's trade trajectory and how prepared or underprepared it may have been to respond. I concur, however, with their sentiments that DSB experience matters. For this chapter, I therefore assess legal capacity by measuring it up to the point of the trade disputes' initiation. Here, initiation is taken to mean when a country formally requests consultation for those cases that go to the DSB, or when a national investigating authority begins its consideration of the matter for those cases that remain domestic. Since other organizations that feature dispute settlement procedures can bolster a country's legal capacity, I also take into consideration concurrent membership in other international and regional dispute resolution organizations, as well as membership in WTO negotiation groups.

As a parallel to Busch et al.'s study, this research also evaluates each Member's experience at the DSB as a complainant, respondent and third party. As a departure, however, these are tallied only up to the point of the dispute to determine the country's level of preparedness to file or respond. Additionally, Davis and Blodgett Bermeo also concur that DSB experience can predict future tendencies to litigate. They do this by showing that participation in the DSB either as a complainant or respondent can help a country overcome the initial challenges of using the institution.⁴ However, whereas Davis and Blodgett Bermeo assess a country's *propensity to file* and not whether it actually files,⁵ this study measures actual choices to formally complain or respond to the trade disputes that emerge. Davis and Blodgett Bermeo also do not evaluate how joining as a third-party can provide learning opportunities for countries to use the institution later. Conti's arguments are also important here. He posits that, "More experienced

⁴ See Christina L. Davis and Sarah Blodgett Bermeo in "Who Files? Developing Country Participation in GATT/WTO Adjudication." The Journal of Politics. 2009. Volume 71, Number 3: 1033 – 1049.

⁵ Ibid, 1040.

complainants tend to achieve settlements, while more experienced respondents tend to refuse conciliation.”⁶ His thinking is also that more experienced litigants are more unlikely to pursue cases that will end unfavourably.⁷ While this study investigates participation primarily, the cases have varied outcomes. It is therefore important in evaluating experience to see how the relative experience of the disputants affected their choice to litigate and also what resolution they agreed to.

Legal capacity is also assessed by taking into account the involved country’s history of using the Anti-Dumping Agreement at the DSB and also domestically. This is because the Anti-Dumping Agreement is the WTO provision that is evoked in all the four cases that this study probes. It is therefore useful to see if when the disputes began, the Members had any history of using these provisions. This therefore narrows the assessment of DSB experience to look at a state’s history with specific relevant provisions. The WTO provides legal assistance to countries through its Advisory Centre on World Trade Organization Law (ACWL). The study therefore probes whether these countries availed themselves of this legal aid as a means of bolstering their capabilities.

The type of countries that join a trade dispute as a third-party matters. These nations, with their own legal competency, can enhance a case and affect the odds of a country winning or losing. The study therefore analyzes the Panel and Appellate Body Reports of each dispute to see whether the litigants were supported by third party summations, and how this aligns with the outcome of the case. While there is no definite and all-encompassing way to measure legal capacity, the intention is to see if these variables differ for the countries in the disputes that are examined, and if they produced diverging results as to participation and non-participation in in

⁶ Joseph A. Conti. “*Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization.*” *Law & Social Inquiry*. (Summer, 2010) Volume 35, Issue 3, 625.

⁷ Ibid

the DSB. Importantly, they add to the literature on legal capacity measurement by taking the focus off GDP and number of personnel and turns it to membership in groups that facilitate the building of legal capacity in different, but related forms, and to specific measures of experience to coincide with the timing of the disputes. This is not to say, however, that by checking off variables for each country that they all have equitable amounts of legal capacity. That is not the intention nor focus of this research. Some countries do have more sophisticated and numerically abundant sources of legal capacity. This study therefore measures the minimum levels that are expected to be in place to litigate at the DSB. How this varies across countries after they meet that standard is beyond this study. The emphasis is therefore on ascertaining how countries position themselves through membership and experience to meet the demands of DSB adjudication. Moreover, since this study is interested in the disconnection between membership and participation, these findings can illuminate how membership in legal competency building institutions may or may not induce active participation in the DSB.

As mentioned in Chapter Five, five countries are included in this study. These are China, Jamaica, Guatemala, Mexico and the United States. These, however, are examined dyadically based on the cases. The cases at hand are *China – Cement* (initiated by the Jamaica Anti-Dumping and Subsidies Commission on December 16, 2003) *Guatemala – Cement I* (initiated by Mexico at the DSB on October 17, 1996), *Guatemala - Cement II* (initiated by Mexico at the DSB on January 5, 1999), and *United States – Cement* (initiated by Mexico at the DSB on January 21, 2003). The conditions that precipitate each case are different for each country and also vary across cases. For example, the reasons that propelled Mexico to file against Guatemala in 1996 are different than the ones that catalyzed litigation in 1999. Hence, while it is the same two countries that are being analyzed, the factors that informed filing are different. The study

acknowledges these intricacies by looking at each dyad relative to the timing and context of the dispute. By doing this, the study probes how countries weigh their legal capacity as a measure of their ability to “afford” the dispute settlement process, and consequently, how this calculation informs their decision to participate or avoid the DSB when a trade dispute emerges.

Membership in WTO Negotiation Groups

China – Cement (December 16, 2003)

China became a member of the WTO on December 11, 2001.⁸ It has since joined six negotiating groups that advocate collectively in WTO matters. These include Asian developing members,⁹ Asia-Pacific Economic Cooperation Forum (APEC),¹⁰ Article XII Members,¹¹ G-20,¹² G-33¹³ and “W52” sponsors.^{14,15} These groups negotiate general WTO issues, agriculture, intellectual property rights, as well as the market liberalization requirements for China. While the

⁸ “Member Information: China and the WTO.” https://www.wto.org/english/thewto_e/countries_e/china_e.htm

⁹ This has 21 members and was officially announced as a negotiating group on March 27, 2012. Bahrain, Kingdom of, Bangladesh, Brunei Darussalam, Cambodia, China, Hong Kong, China, India, Indonesia, Jordan, Korea, Republic of, Kuwait, the State of, Kyrgyz Republic, Lao People’s Democratic Republic, Macao, China, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Kingdom of, Singapore, Sri Lanka, Chinese Taipei, Thailand, Turkey, United Arab Emirates and Viet Nam are the other members. See “Groups in the Negotiations.” https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

¹⁰ This group has 21 members. They include Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, China, Indonesia, Japan, Korea, Republic of, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Singapore, Chinese Taipei, Thailand, United States, Viet Nam and the Russian Federation. See “Groups in the Negotiations.” https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b China became a member November 12 – 14, 1991. See “Member Economies.” Asia-Pacific Economic Cooperation. <http://www.apec.org/About-Us/About-APEC/Member-Economies>

¹¹ These are “countries that negotiated and joined the WTO after 1995.” Since their membership agreements required extensive liberalization of their economies, they seek “lesser commitments in the negotiations.” This group does not include least-developed countries or the EU members. See “Groups in the Negotiations.” https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

¹² This group focuses on agriculture and is different from the G-20 group that includes the world’s largest economies. Argentina, Bolivia, Plurinational State of, Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, Bolivarian Republic of and Zimbabwe make up the list of its 23 members. See “Groups in the Negotiations.” https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

¹³ This is a 47 member group that is also called, “Friends of Special Products” in agriculture. See “Groups in the Negotiations.” https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

¹⁴ This group has a membership of 109 members. It is interested in the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). See “Groups in the Negotiations.” https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

¹⁵ “Member Information: China and the WTO.” https://www.wto.org/english/thewto_e/countries_e/china_e.htm

WTO does not give a date for China's membership in all of these organizations, it was at least a member of the Asia-Pacific Economic Cooperation Forum before acceding to the WTO. This means that upon WTO membership, it would at least have some negotiation history in other organizations.

Jamaica is the other party to the *China - Cement* dispute. It joined the WTO on March 9, 1995.¹⁶ Prior to this, it was a member of the GATT since December 31, 1963.¹⁷ It therefore has had a much longer history in the WTO than China, though China has surpassed it in terms of litigation activity. In terms of WTO negotiation groups, Jamaica is a member of the African, Caribbean and Pacific (ACP) group;¹⁸ G-90;¹⁹ small, vulnerable economies (SVEs);²⁰ and G-33.²¹ While there are power differences between Jamaica and China, both are members of G-33. The variation in development between these countries highlights a problematic issue whereby the WTO does not classify countries, but instead, allows them upon accession to state what their status is.²² Suffice it to say, however, that the members of each group have shared interests and have benefited from participation in this group. In assessing legal capacity building in these groups, Jamaica and China would therefore have opportunities to become more familiar with the

¹⁶ "Member Information: Jamaica and the WTO."

https://www.wto.org/english/thewto_e/countries_e/jamaica_e.htm

¹⁷ Ibid

¹⁸ This group deals with agricultural preferences in the EU. It comprises 62 WTO Members, 8 WTO observers, and 9 non-WTO Members and observers. See "Groups in the Negotiations."

https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

¹⁹ This groups deals with general WTO issues. It is made up of the African Group, ACP and least-developed countries. "Groups in the Negotiations."

https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

²⁰ This group focuses on "flexibilities and enhanced special and differential treatment for small, vulnerable economies in the negotiations." Antigua and Barbuda, Barbados, Belize, Bolivia, Plurinational State of, Cuba, Dominica, Dominican Republic, El Salvador, Ecuador, Fiji, Grenada, Guatemala, Honduras, Jamaica, Mauritania, Nicaragua, Panama, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Sri Lanka, Tonga and Trinidad and Tobago are its members. Bahamas has observer status. See "Groups in the Negotiations." https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

²¹ "Member Information: Jamaica and the WTO."

https://www.wto.org/english/thewto_e/countries_e/jamaica_e.htm

²² "Who are the Developing Countries in the WTO?" https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm

WTO provisions that are specific to their interests in these areas. This is necessary if they are to litigate around any of these issues later on.

Guatemala – Cement I and II (October 17, 1996 and January 5, 1999)

Guatemala acceded to the WTO on July 21, 1995.²³ It also had membership in the GATT, dating back to October 10, 1991.²⁴ It has since then become party to six negotiation groups. These include small, vulnerable economies (SVEs); Cairns group;²⁵ Tropical products;²⁶ G-20; G-33; and Joint proposal (in intellectual property).²⁷ Mexico also has a history of involvement in WTO negotiation groups. Its accession to the WTO occurred on January 1, 1995 when the institution came into existence.²⁸ Mexico, however, had been a contracting party to the GATT since August 24, 1986.²⁹ Mexico's involvement in negotiation groups include the Asia-Pacific Economic Cooperation Forum (APEC); the G-20 (that focuses on agriculture); Friends of A-D Negotiations (FANs),³⁰ and the Joint proposal.³¹ In this sense, Mexico has had a longer history in both the GATT and WTO than Guatemala. Since membership, however, both countries have availed themselves of the forums for discussing their interests with other countries. This can

²³ "Member Information: Guatemala and the WTO."

https://www.wto.org/english/thewto_e/countries_e/guatemala_e.htm

²⁴ Ibid

²⁵ This is a group of countries that export agriculture. They lobby for increased trade liberalization in this area. Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Uruguay and Viet Nam are its members. See "Groups in the Negotiations." https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

²⁶ This is a "coalition of developing countries seeking greater market access for tropical products." Its members are Bolivia, Plurinational State of, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama and Peru. See "Groups in the Negotiations." https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

²⁷ This is a group of countries that is proposing a voluntary TRIPS GI Register. Its members are Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Israel, Japan, Korea, Republic of, Mexico, New Zealand, Nicaragua, Paraguay, South Africa, Chinese Taipei and the United States. See "Groups in the Negotiations."

https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

²⁸ "Member Information: Mexico and the WTO." https://www.wto.org/english/thewto_e/countries_e/mexico_e.htm

²⁹ Ibid

³⁰ This is a "coalition seeking more disciplines on the use of anti-dumping measures." Its members are Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Republic of, Mexico, Norway, Singapore, Switzerland, Chinese Taipei, Thailand and Turkey. See "Groups in the Negotiations."

https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

³¹ "Member Information: Mexico and the WTO." https://www.wto.org/english/thewto_e/countries_e/mexico_e.htm

promote cohesion and sharing of legal capacity since countries negotiate collectively in these groups.³²

United States – Cement (January 31, 2003)

The United States and Mexico are the parties involved in the *United States – Cement* case. Since the WTO does not report any Mexican withdrawal from the negotiation groups that it was involved in at the time of the Guatemalan cement disputes, this section will only outline the groups that the United States has been involved in. The United States is one of the founding figures of the organized world trading system. It became a member of the GATT on January 1, 1948, and translated this to WTO membership on January 1, 1995.³³ These include the Asia-Pacific Economic Cooperation Forum (APEC); Friends of Ambition (NAMA)³⁴; Friends of Fish (FoFs)³⁵; and Joint proposal.³⁶

The types of negotiation groups that the countries are in overlap as well as diverge. They do, however, represent participants' core interests. Working with different countries on specific issues can increase legal capacity since negotiations require ample knowledge of the WTO's provisions in a bid to advocate for change. Importantly, these groups are indicative of key

³² See "Groups in the Negotiations."

https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

³³ "Member Information: United States of America and the WTO."

https://www.wto.org/english/thewto_e/countries_e/usa_e.htm

³⁴ This is group that wants to "maximize tariff reductions and achieve real market access in [their] non-agricultural market access (NAMA) negotiations. Members include Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, European Union (formerly EC), Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, United Kingdom and the United States. See "Groups in the Negotiations." https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

³⁵ This is an informal 11 member group that works to significantly reduce the subsidies for fisheries. Its members are Argentina, Australia, Chile, Colombia, Ecuador, Iceland, New Zealand, Norway, Pakistan, Peru and the United States. See "Groups in the Negotiations."

https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b

³⁶ "Member Information: United States of America and the WTO."

https://www.wto.org/english/thewto_e/countries_e/usa_e.htm

economic generators in the individual countries, and these goods are often the sources of disputes that may escalate to the DSB.

Table 6-1: Summary of Membership in WTO Negotiation Groups

Country	WTO Negotiation Group
China	Asian developing members; Asia-Pacific Economic Cooperation Forum (APEC); Article XII Members; G-20 (that focuses on agriculture); G-33; and “W52” sponsors.
Jamaica	African, Caribbean and Pacific (ACP) group; G-90; small, vulnerable economies (SVEs); and G-33.
Guatemala	Small, vulnerable economies (SVEs); Cairns group; Tropical products; G-20 (agriculture); G-33; and Joint proposal (in intellectual property)
Mexico	Asia-Pacific Economic Cooperation Forum (APEC); the G-20 (agriculture); Friends of A-D Negotiations (FANs); and the Joint proposal.
United States	Asia-Pacific Economic Cooperation Forum (APEC); Friends of Ambition (NAMA); Friends of Fish (FoFs); and Joint proposal.

Membership in Other International Dispute Resolution Organizations

Countries can supplement their legal capacity through membership and participation in other international dispute settlement institutions other than the WTO. On a comparative level,

there are two other courts that are of similar magnitude and focus on inter-state disputes. These are the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS).³⁷ It is therefore useful to see if the disputants in the cases under examination also have involvement in these courts.

The International Court of Justice came into being in June 1945 through the Charter of the United Nations (UN).³⁸ It is the UN's main judicial organ and aims "to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies."³⁹ The Court hears "contentious cases," which are inter-state legal disputes that the affected states submit to it; and "advisory proceedings," which are requests from the United Nations and specialized agencies to provide its opinion on legal questions.⁴⁰ The Court mandates, however, that for contentious cases, only "States Members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions may be parties."⁴¹ Additionally, the Court will only hear these disputes if the affected states have accepted its jurisdiction.⁴² States can do this through at least one of the following options:

1. "By entering into a special agreement to submit the dispute to the Court;
2. By virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;
3. Through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. A number of these declarations,

³⁷ See Sean D. Murphy's chapter, "International Judicial Bodies for Resolving Disputes Between States" in Oxford Handbook on International Adjudication. Cesare Romano et al. eds., (Oxford: Oxford University Press, 2014).

³⁸ "The Court." International Court of Justice. <http://www.icj-cij.org/court/index.php?p1=1>

³⁹ Ibid

⁴⁰ "How the Court Works." International Court of Justice. <http://www.icj-cij.org/court/index.php?p1=1&p2=6>

⁴¹ Ibid

⁴² Ibid

which must be deposited with the United Nations Secretary-General, contain reservations excluding certain categories of dispute.”⁴³

All “Member States of the United Nations are *ipso facto* parties to the Court's Statute.”⁴⁴

China, Jamaica, Guatemala, Mexico and the United States have therefore by virtue of their membership in the United Nations, agreed to become parties to the Court's Statute.⁴⁵ All of these memberships predate their WTO disputes.⁴⁶ In terms of contentious cases, “*Avena and Other Mexican Nationals (Mexico v. United States of America)*” is an example. In this instance, the Court found that “the United States of America [had] breached its obligations to Mr. Avena and 50 other Mexican nationals and to Mexico under the Vienna Convention on Consular Relations.”⁴⁷ This therefore is an example of Mexico and the United States litigating in another forum, which points to legal capacity in other multilateral organizations.

Although Jamaica has never had a contested case before the ICJ, its jurist, Patrick Robinson, was elected to a nine-year term at the Court, beginning in February 2015. He is the only Jamaican and second Caribbean national to have this appointment in the history of the Court.⁴⁸ China has also had judges elected to the Court,⁴⁹ while in 1955, the Court ruled against Liechtenstein in its case that it brought against Guatemala.⁵⁰ All of these countries therefore have

⁴³ Ibid

⁴⁴ “*Basic Documents*.” International Court of Justice. <http://www.icj-cij.org/documents/index.php?p1=4>

⁴⁵ One important distinction is the fact that China has not submitted an ICJ jurisdiction declaration. See “*CIA World Factbook: China*.” <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>

⁴⁶ China joined the UN on October 24, 1945; Guatemala on November 21, 1945, Jamaica on September 18, 1962; Mexico on November 7, 1945 and the United States on October 24, 1945. See “*Member States*.” United Nations. <http://www.un.org/en/member-states/index.html>

⁴⁷ “*Avena and Other Mexican Nationals (Mexico v. United States of America)*” Press Release 2004/16. 31 March 2004. <http://www.icj-cij.org/docket/index.php?pr=605&code=mus&p1=3&p2=3&p3=6&>

⁴⁸ “*Election of Judge Robinson to ICJ a Proud Moment for all Jamaicans*.” The Jamaica Observer. 18 November 2014. http://www.jamaicaobserver.com/editorial/Election-of-Judge-Robinson-to-ICJ-a-proud-moment-for-all-Jamaicans_17970036

⁴⁹ For example, on November 10, 2011, the United Nations General Assembly and Security Council reelected Chinese judge Xue Hanqin to the ICJ for a nine year term starting on February 6, 2012. See “*United Nations General Assembly and Security Council Elect Four Members of the Court*.” International Court of Justice. Press Release. Unofficial. No. 2011/34. 11 November 2011. <http://www.icj-cij.org/presscom/files/9/16769.pdf>

⁵⁰ See “*Nottebohm (Liechtenstein v. Guatemala)*.” International Court of Justice. Judgment of 6 April 1955. <http://www.icj-cij.org/docket/index.php?sum=215&p1=3&p2=3&case=18&p3=5>

some involvement with the Court, which though varied, provides a multilateral forum to develop and strengthen legal capacity.

The International Tribunal for the Law of the Sea is the next international dispute settlement organization that has a similar size and authority to the WTO. It was established by the United Nations Convention on the Law of the Sea. It therefore adjudicates “disputes arising out of the interpretation and application of the Convention.”⁵¹ It was opened for signature in Montego Bay, Jamaica on December 10, 1982 and came into force on November 16, 1994.⁵² The Tribunal is available to “States and international organizations which are parties to the Convention.”⁵³ State enterprises and private entities may also use the Tribunal as long as the cases are submitted in pursuance to its Statute, article 20.⁵⁴

Notably, the United States has not ratified the Convention on the Law of the Sea.⁵⁵ In the case of Jamaica, not only has it ratified the treaty, but it also serves as the headquarters for the International Seabed Authority.⁵⁶ Evidence of participation by China and Mexico include their written statements in Case No. 17,⁵⁷ and for Guatemala, its attendance at the Ninth Regional Law of the Sea Workshop in Mexico City.⁵⁸ Assessing legal capacity here is two-fold. On the one hand, it can be argued that Jamaica, Guatemala and Mexico have used their membership in this organization to better understand their rights and responsibilities under the Law of the Sea Convention. Ironically, it is the United States’ understanding of the legal ramifications of signing

⁵¹ “*The Tribunal.*” International Tribunal for the Law of the Sea. <https://www.itlos.org/the-tribunal/>

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Goodlander, Maggie. “*Is the United States Ready to Approve the Law of the Sea Treaty?*” Council on Foreign Relations. 19 July 2007. <https://www.cfr.org/backgrounder/united-states-ready-approve-law-sea-treaty>

⁵⁶ Ibid

⁵⁷ “*Case No. 17.*” International Tribunal for the Law of the Sea. <https://www.itlos.org/cases/list-of-cases/case-no-17/>

⁵⁸ “*Ninth Regional Law of the Sea Workshop Held in Mexico City.*” International Tribunal for the Law of the Sea. Press Release. ITLOS/Press 195. 7 June 2013. https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_195_E.pdf

on to this Convention and especially how its industries may be affected why it has stayed outside. In this sense, participating in an institution can increase legal capacity, but understanding the issues at stake (through legal competencies) can make some countries avoid membership.

Table 6-2: Summary of Membership in International Dispute Settlement Organizations at the Time of the Dispute

Country	International Court of Justice	International Convention on the Law of the Sea
China	Yes	Yes
Jamaica	Yes	Yes
Guatemala	Yes	Yes
Mexico	Yes	Yes
United States	Yes	No

At the time of the respective disputes, most of the affected countries were involved in at least one regional dispute resolution organization. Prominently, the United States and Mexico have a history in the North American Free Trade Area (NAFTA), dating back to January 1, 1994,⁵⁹ and have recourse there for trade violations.⁶⁰ In regards to Guatemala, it is an original signatory to the Central American Common Market (CACM), which was effectuated on June 3,

⁵⁹ Gruber, Lloyd. 2000. *Ruling the World: Power Politics and the Rise of Supranational Institutions*. (New Jersey: Princeton University Press, 2000), 122.

⁶⁰ Since 1994, Mexico and the United States have litigated at least twenty cases in NAFTA, contesting products such as Oil country tubular goods, porcelain-on-steel cookware, circular welded non-alloy steel pipe and tube, fresh cut flowers and Gray Portland cement and cement clinker. See “North America Free Trade Agreement | NAFTA.” Integrated Database of Trade Disputes for Latin America and the Caribbean.
<https://idatd.cepal.org/tlcan.htm?perform=buscar>

1961.⁶¹ Other members include El Salvador, Honduras, Nicaragua and Costa Rica. Panama and Belize have observer status.⁶² Guatemala has no active litigation in CACM prior to 2003. Since that time, however, it has sought reprieve against El Salvador, Honduras and Costa Rica for products including galvanized lamina, steel pipe, dairy products and drinks.⁶³ Nicaragua, Costa Rica and El Salvador have in turn sued it because of grievances with bovine meat and dairy products, meat, transport service, dairy and drinks.⁶⁴ Guatemala has therefore maintained membership in this regional dispute settlement body, but did not seek any reprieve prior to its cement disputes. This does not mean, however, that Guatemala did not use its inactive years to gather information on how it might use the institution if the need arises.

Jamaica also has a history of membership in regional dispute settlement organizations. It has, for example, been a member of the Caribbean Community (CARICOM), since August 1, 1973.⁶⁵ It is also an integral member of the CARICOM Single Market and Economy (CSME)⁶⁶, as well as the Caribbean Court of Justice (CCJ), which replaced the United Kingdom's Privy Council as the final court of appeal for the country / former British colonies.⁶⁷ The CCJ's Agreement was signed in 2001, but it began operations in 2005.⁶⁸ What this means in strict terms is that at the point of the *China – Cement* dispute in 2003, the Judicial Committee of the Privy Council was Jamaica's highest appellate court and not the regional CCJ.

⁶¹ See "Central American Common Market (CACM)" <http://www.referenceforbusiness.com/encyclopedia/Ca-Clo/Central-American-Common-Market-CACM.html>

⁶² Ibid

⁶³ "Central American Common Market | CACM." Integrated Database of Trade Disputes for Latin America and the Caribbean. <https://idatd.cepal.org/mcca.htm?perform=buscar>

⁶⁴ Ibid

⁶⁵ "Jamaica." <http://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/jamaica>

⁶⁶ The CSME seeks to promote economic integration across the region. Some of its areas of focus include "anti-dumping measures, banking and securities, competition policy, consumer protection, customs and intellectual property rights." For more on the CSME, see "CARICOM Single Market and Economy (CSME)." <http://caricom.org/work-areas/overview/caricom-single-marke-and-economy>

⁶⁷ See the trajectory of the Court's existence at "CCJ: From Concept to Reality." The Caribbean Court of Justice. <http://www.caribbeancourtjustice.org/about-the-ccj/ccj-concept-to-reality>

⁶⁸ Ibid

In the case of China, while there is evidence of its involvement in regional organizations such as Asia-Pacific Economic Cooperation (APEC) and the Association of South-Eastern Asian Nations (ASEAN), there are no records of these being dispute settlement institutions in the litigating sense. APEC, for instance, works to reduce trade and investment barriers, but does not require that members make legally binding obligations.⁶⁹ Because of this, decisions are made through consensus where all members have an equal voice.⁷⁰ In the case of ASEAN, China is not one of its ten members. It has signed, however, several agreements with the organization in order to promote economic, social and cultural cooperation in the region.⁷¹ In this sense, China therefore has a history of regional cooperation generally, but not one of dispute settlement more specifically.

**Table 6-3: Summary of Membership in Regional Dispute Settlement Organizations
at the Time of the Dispute**

Country	Membership in Regional Dispute Settlement Body
China	No
Jamaica	No
Guatemala	Yes
Mexico	Yes
United States	Yes

⁶⁹ "How APEC Operates." Asia-Pacific Economic Cooperation. <http://www.apec.org/About-Us/How-APEC-Operates>

⁷⁰ Ibid

⁷¹ See for example, "Overview of ASEAN-China Dialogue Relations." ASEAN Secretariat Information Paper. April 2017. <http://asean.org/storage/2016/01/Overview-of-ASEAN-China-Relations-April-2017.pdf>

Bown and McCulloch examine the work of the Advisory Centre on WTO Law (ACWL), arguing that it may help developing countries protect their foreign market access. Based on their studies, participation in the ACWL may help developing countries file more cases on their own, be more involved in other cases, and also to initiate claims over smaller trade volumes.⁷² This section will therefore discuss the ACWL and how participation in it can serve as a legal competency building institution for states that intend to use the DSB.

The ACWL began operations in July 2001. It buttresses countries' legal capacity by providing "free legal advice and training on WTO law."⁷³ Training takes the form of annual courses, periodic seminars (sometimes on noteworthy Panel and Appellate Body decisions), and training sessions.⁷⁴ There is also a Secondment Programme for Trade Lawyers in which attorneys from developing and least-developed country spend nine months as paid trainees at the Centre. Here, they work with lawyers that have expertise and experience in dispute settlement and the WTO's provisions so as to improve their competencies in those areas.⁷⁵

In the event of WTO dispute settlement cases, the ACWL provides support to its members at discounted rates.⁷⁶ These services are mainly for developing and least-developed countries (LDCs), though some developed countries are members and serve as its main contributors.⁷⁷ The ACWL's rates, while reduced, still come at a cost to countries. Members are

⁷² Chad P. Bown and Rachel McCulloch. "Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law." 2010. Policy Research Working Paper 5168. The World Bank. Development Research Group. Trade and Integration Team.

⁷³ "Advice, Support and Training to Developing and Least-Developed Countries." ACWL. <http://www.acwl.ch/>

⁷⁴ "Training." ACWL. <http://www.acwl.ch/training-introduction/>

⁷⁵ The ACWL reports that to date, the programme has facilitated 16 developing countries and seven LDCs that have sent 31 government lawyers. Canada, Denmark, Ireland, Norway and Sweden have also made financial contributions to the programme. See "Training." ACWL. <http://www.acwl.ch/training-introduction/>

⁷⁶ "Advice, Support and Training to Developing and Least-Developed Countries." ACWL. <http://www.acwl.ch/>

⁷⁷ Ibid. Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden, United Kingdom, Switzerland and Australia are the 11 developed countries that have joined the ACWL and serve as its main contributors. See "Members." ACWL. <http://www.acwl.ch/members-introduction/>

placed in categories A,⁷⁸ B,⁷⁹ C⁸⁰ and LDCs⁸¹ based on their share of world trade and per capita GDP, and this determines how much they pay.⁸² Below is the ACWL's estimation of the most that each country type will pay for its services based on the projected number of hours that are needed for each proceeding.

Table 6-4: Estimated Maximum ACWL Charges for a Complainant or Respondent
Services (in Swiss Francs)

Country Category	Consultations	Panel Proceedings	Appellate Body Proceedings	Total
A	47,628	143,856	85,212	276,696
B	35,721	107,892	63,909	207,522
C	23,814	71,928	42,606	138,348
LDC	5,880	17,760	10,520	34,160

Source: "Fees" ACWL. <http://www.acwl.ch/fees/>

⁷⁸ Hong Kong, Chinese Taipei and the United Arab Emirates are the members of the ACWL that make up this category. See "Members." ACWL. <http://www.acwl.ch/members-introduction/>

⁷⁹ The members of this category include the Bolivarian Republic of Venezuela, Colombia, Egypt, India, Pakistan, Philippines, Thailand, Uruguay, Oman, Mauritius, Turkey, Indonesia, Viet Nam, Seychelles and South Africa. See "Members." ACWL. <http://www.acwl.ch/members-introduction/>

⁸⁰ Bolivia, Côte d'Ivoire, Dominican Republic, Ecuador, Guatemala, Honduras, Kenya, Nicaragua, Panama, Paraguay, Peru, Tunisia, Jordan, El Salvador, Sri Lanka, Costa Rica and Cuba make up this group. See "Members." ACWL. <http://www.acwl.ch/members-introduction/>

⁸¹ The members of this category are Afghanistan, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, The Gambia, Guinea, Guinea-Bissau, Haiti, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Togo, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia. See "Members." ACWL. <http://www.acwl.ch/members-introduction/>

⁸² See "Members." ACWL. <http://www.acwl.ch/members-introduction/>

Countries that plan to appear before the DSB as third-parties also have to prepare. The ACWL also has projected financial costs for these services. LDCs in this instance, may be exempted from paying in some circumstances.⁸³

Table 6-5: Estimated Maximum ACWL Charges for Third-Party Services (in Swiss Francs)

Country Category	Panel Proceedings	Appellate Body Proceedings	Total
A	20,736	28,836	49,572
B	15,552	21,627	37,179
C	10,368	14,418	24,786
LDC	2,560	3,560	6,120

Source: “Fees” ACWL. <http://www.acwl.ch/fees/>

The ACWL says that it charges a “modest fee” for its dispute settlement services.⁸⁴ Since many countries contract private lawyers, it is difficult to ascertain the exact financial burden of DSB litigation. These may also vary based on the type of case and the specific countries that are involved. This disclosure by the ACWL is useful in that they would be based on current market trends. Since they are significantly reduced charges, they may represent the cheaper, financial costs that countries may pay to use the DSB. One estimate is that it costs anywhere from \$300,000 to \$1 million to use the DSB.⁸⁵ Consequently, a country’s resort to use the ACWL may therefore represent its simultaneous need to cut litigation costs and to be adequately prepared to use the DSB. Which of these countries, then, has used the ACWL to prepare for their cases?

⁸³ See “Fees” ACWL. <http://www.acwl.ch/fees/>

⁸⁴ Ibid

⁸⁵ See Christina L. Davis and Sarah Blodgett Bermeo in “Who Files? Developing Country Participation in GATT/ WTO Adjudication.” The Journal of Politics. 2009. Volume 71, Number 3, p. 1039.

The ACWL came into being in 2001, so Guatemala and Mexico did not have this option at the time of their two cement disputes. The cases between China and Jamaica and the United States and Mexico both occurred in 2003. Neither Jamaica nor China has joined the ACWL. As a developed country, the United States is also absent as one of its contributors.⁸⁶ In this regard, none of the countries under examination has availed itself of the services provided by the ACWL or contributed towards its functioning at the time of their disputes. It is important to note, however, that Guatemala later joined the ACWL and used its services in more than one dispute. The implications of this will be evaluated in the discussion section.

**Table 6-6 Summary of Membership in the Advisory Centre on World Trade
Organization Law at the Time of the Dispute**

Case	Country	Membership
<i>China – Cement</i>	China	No
	Jamaica	No
<i>Guatemala – Cement I</i>	Guatemala	N/A
	Mexico	N/A
<i>Guatemala – Cement II</i>	Guatemala	N/A
	Mexico	N/A
<i>United States - Cement</i>	Mexico	No
	United States	No

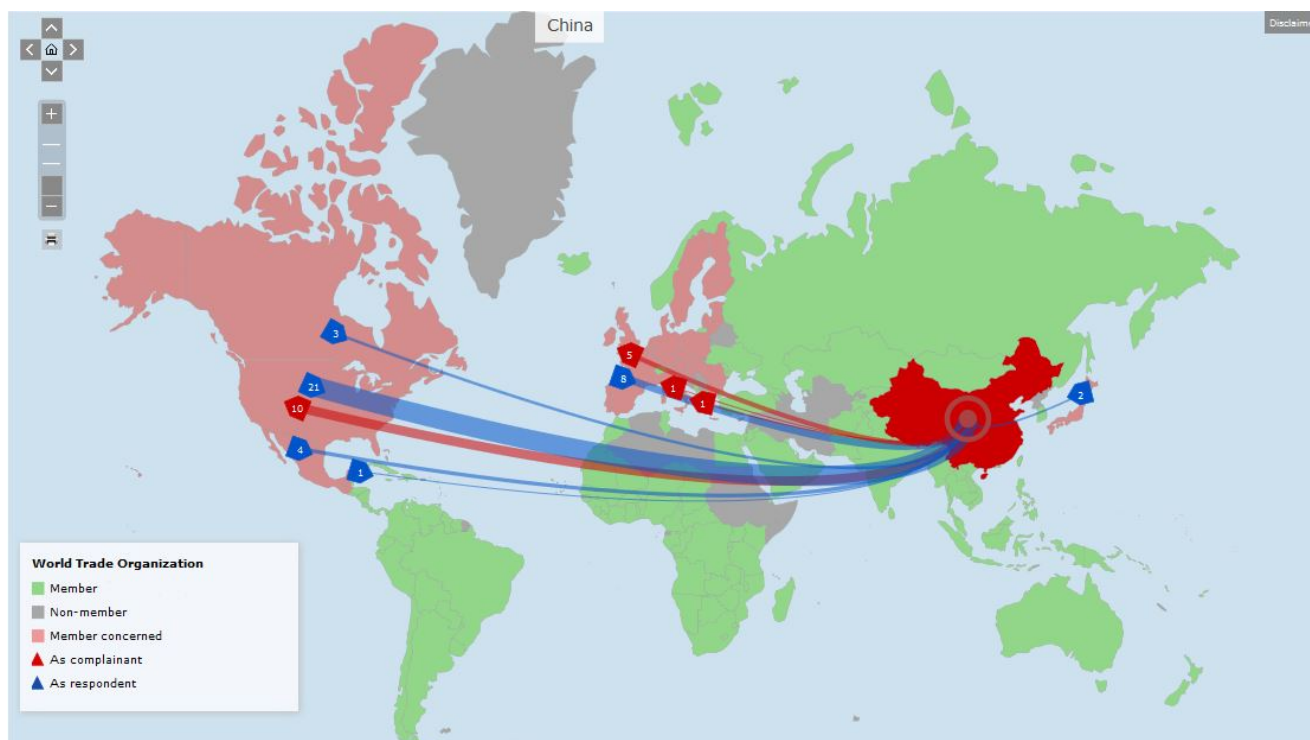
Having examined membership in various institutions that can promote increased legal capacity, let us now look at how participation in the DSB can induce continued participation and improve countries' ability to file and respond to filings.

⁸⁶ See "Members." ACWL. <http://www.acwl.ch/members-introduction/>

Countries' WTO / DSB Experience at the Time of Their Trade Disputes

China – Cement

Figure 6-1: China's WTO / DSB Experience



Source: "China." Map of Disputes Between WTO Members. https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm

Figure 6-1 illustrates China's involvement in the DSB as a complainant or respondent. It has participated in 15 disputes as a complainant and 39 as a respondent. Of this number, China has brought one case against Greece; one against Italy; five complaints against the EU; and ten against the United States. As a respondent, China has had to defend itself against two suits from Japan; eight from the EU; three from Canada; 31 from the United States; four from Mexico; and one from Guatemala. What Figure 6-1 does not show is the number of times that China has been

a third-party to a dispute. To date, that number is 139.⁸⁷ These numbers, however, are for 2017 and do not reflect China's current familiarity and dexterity with the WTO's provisions. How far, then, had China participated in the DSB at the time of *China – Cement* on December 16, 2003?

Experience at the DSB as a Complainant

At the time of *China- Cement*, China had participated in only one trade dispute as a complainant. This was in “DS252: United States — Definitive Safeguard Measures on Imports of Certain Steel Products.” China requested consultations with the United States on March 26, 2002, claiming that American safeguard measures imposed on certain steel products from China were inconsistent with the WTO's provisions. The Panel ruled in favour of China.⁸⁸ Brazil, Canada, Chinese Taipei, Cuba, European Communities, Japan the Republic of Korea, Mexico, New Zealand, Norway, Switzerland, Thailand, Turkey and the Bolivarian Republic of Venezuela had joined as third-parties.⁸⁹

Experience at the DSB as a Respondent

China had no prior experience as a respondent in the DSB at the time of *China-Cement*. The first suit against it was brought on March 18, 2004 by the United States. They later came to a mutually agreed solution.⁹⁰

Experience at the DSB as a Third-Party

By December 2003, China had been involved in twenty-two cases as a third-party litigant. This consideration is important because by solely examining China's history in the DSB as a complainant or respondent, it appears reticent and arguably underequipped with the legal

⁸⁷ “Disputes by Member: China.” https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

⁸⁸ See “DS252: United States — Definitive Safeguard Measures on Imports of Certain Steel Products.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm

⁸⁹ Ibid

⁹⁰ See “DS309: China — Value-Added Tax on Integrated Circuits.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds309_e.htm

facility required to use the institution. This is a feasible argument if one weighs the fact that China had just acceded to the WTO in December 2001. The large number of cases that in participated in as a third-party, however, suggests China was investing in learning the intricacies of the institution. In this sense, China's legal capacity could have developed in part by participation in this way. What then did Jamaica's legal capacity look like at the time of this dispute?

Jamaica

Figure 6-2: Jamaica's WTO / DSB Experience



Source: "Jamaica." Map of Disputes Between WTO Members. https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm

Figure 6-2 shows Jamaica's inactivity in both filing and responding to trade disputes at the DSB. What is missing from this map is the fact that Jamaica has been a third-party participant in eight cases. These include *DS27*, *DS108*, *DS132*, *DS152*, *DS165*, *DS265*, *DS266*

and DS283.⁹¹ At the time of *China – Cement*, Jamaica had already participated in these cases.

These disputes deal mainly with the “importation, sale and distribution of bananas,” subsidies on sugar and other goods that are critical to the Jamaican industry. As in the China case, using the DSB as a third-party is an invaluable source of learning how to navigate the institution, which lends itself to legal capacity building.

Guatemala

Figure 6-3: Guatemala’s WTO / DSB Experience



Source: “Guatemala.” Map of Disputes Between WTO Members. https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm

Figure 6-3 reveals that Guatemala has been involved in nine cases as a complainant and two as a respondent. Of these numbers, Guatemala has filed three cases against the EU; two against Mexico; and one each against China, the Dominican Republic, and Peru. As a

⁹¹ “Disputes by Member: Jamaica.” https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

respondent, Guatemala defended itself against two cases from Mexico. Figure 6-3, however, does not include the fact that Guatemala has participated in 37 trade disputes as a third-party.⁹²

What then, did Guatemala's DSB patterns look like at the onset of *Guatemala – Cement*?

Experience at the DSB as a Complainant

Guatemala had been involved in two DSB cases as a complainant when *Guatemala – Cement I* began. These cases are *DS16: European Communities — Regime for the Importation, Sale and Distribution of Bananas* and *DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*. In both cases, Honduras, Mexico and the United States joined as co-complainants. Ecuador joined as a co-complainant in the second case. Both disputes led to a mutually agreed solution.⁹³

Experience at the DSB as a Respondent

At the onset of *Guatemala – Cement I*, Guatemala had never been a respondent to any case at the DSB. This is important because while filing and responding both require knowledge and skill in the WTO's provisions, defending one's arguments requires an in-depth knowledge, assessment and countering of the litigant's case. Guatemala therefore had no direct experience with this part of the DSB when Mexico filed against it.

Experience at the DSB as a Third-Party

Guatemala had been a third-party participant in one case when Mexico initiated proceedings against it. This was “*DS58: United States — Import Prohibition of Certain Shrimp and Shrimp Products*.” In this case, India, Malaysia, Pakistan and Thailand served as co-complainants against America's ban on imported shrimp from their territories. The Panel ruled in

⁹² “Disputes by Member: Guatemala.” https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

⁹³ See “*DS16: European Communities — Regime for the Importation, Sale and Distribution of Bananas*.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds16_e.htm and “*DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm

their favor.⁹⁴ This case evoked a different agreement than the one Mexico used in its filing against Guatemala. Guatemala's experience with the DSB was therefore very limited at this time. Let us now see how Mexico's state compared with Guatemala's at the start of *Guatemala – Cement*.

Figure 6-4: Mexico's WTO / DSB Experience



Source: "Mexico." Map of Disputes Between WTO Members. https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm

Figure 6-4 highlights Mexico activity in the DSB to date. It reveals that Mexico has filed 24 cases overall. These include nine against the United States; four against China; three against the EU; two against Ecuador and Guatemala; and one against Argentina, Venezuela, Panama and Costa Rica respectively. Figure 6-4 also shows that Mexico has responded to fourteen cases.

⁹⁴ Australia; Canada; Colombia; Costa Rica; European Communities; Ecuador; El Salvador; Hong Kong, China; Japan; Mexico; Nigeria; Philippines; Senegal; Singapore; Sri Lanka; Venezuela, the Bolivarian Republic of Venezuela; Pakistan and Thailand also joined as third-parties. See "DS58: United States — Import Prohibition of Certain Shrimp and Shrimp Products." https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm

These have come from the United States with six; the EU with three; Guatemala with two and Nicaragua, Brazil and Chile with one. Mexico has also participated in 82 trade disputes as a third-party litigant.⁹⁵ These are missing from the Figure. Mexico's results therefore reveal that it has been an active participant in the DSB. Let us now see how these patterns varied at the start of *Guatemala – Cement*.

Experience at the DSB as a Complainant

At the initiation of *Guatemala – Cement*, Mexico had filed four cases at the DSB. These include two trade disputes against the European Communities (now EU), and one each against the United States and Venezuela.⁹⁶ Since it is the one that filed against Guatemala, it by that now had developed substantial legal capacity and familiarity in using the DSB.

Experience at the DSB as a Respondent

On October 17, 1996, Mexico had previously responded to one WTO dispute. This complaint was launched by the European Communities.⁹⁷

Experience at the DSB as a Third-Party

Mexico had participated in three trade disputes as a third-party litigant when it initiated *Guatemala – Cement I*. These include *DS38*, a case that the European Communities filed against the United States; *DS44*, a suit against Japan by the United States; and *DS58*, a joint filing from India, Malaysia, Pakistan and Thailand.⁹⁸

Guatemala – Cement II

As countries increase their participation in the DSB, they can become adept at using it. With the first cement dispute between Guatemala and Mexico in October 1996, it is therefore

⁹⁵ "Disputes by Member: Mexico." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

⁹⁶ Ibid

⁹⁷ See "DS53: Mexico — Customs Valuation of Imports." https://www.wto.org/english/tratop_e/cases_e/ds53_e.htm

⁹⁸ "Disputes by Member: Mexico." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

important to see how their DSB usage had increased January 5, 1999, thereby suggesting an improvement in their legal capacity.

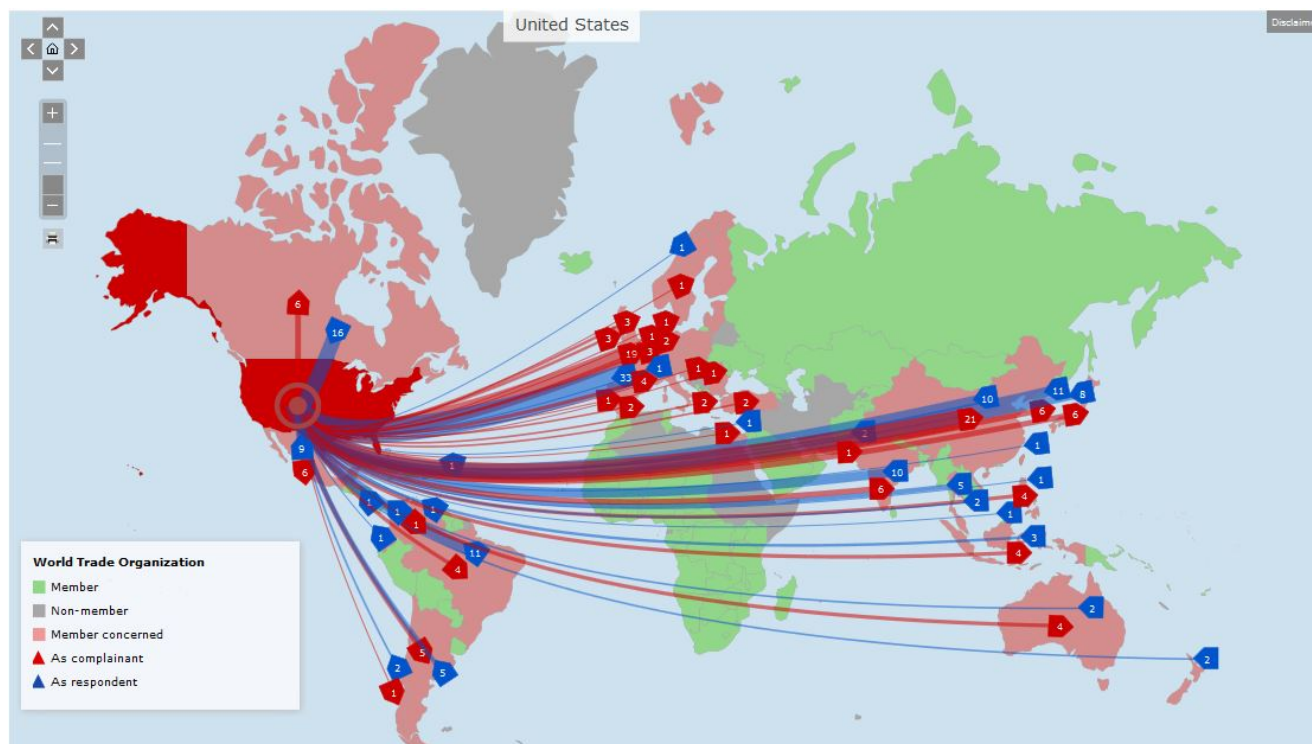
Guatemala

Guatemala's participation in the DSB did not improve much when *Guatemala – Cement II* began. At that time, it had been party to two cases as a complainant, one as a respondent and one as a third-party.⁹⁹ With the exception of its defense against Mexico, its participation at the DSB remained the same. Since, however, *Guatemala – Cement II* was filed by the same complainant (Mexico) over the same good (Ordinary Portland Grey Cement) and by evoking the same Anti-Dumping Agreement, Guatemala's experience as a respondent would have increased its capacity to respond to Mexico the second time around.

Mexico

At *Guatemala – Cement II*, Mexico had gained far more experience in the DSB than Guatemala. It has been involved in five trade disputes as a complainant, three as a respondent and twelve as a respondent. This compares with four, one and three respectively in the first cement case. What this means is that like Guatemala whose first appearance as a respondent after *Guatemala – Cement I* was to answer to Mexico, Mexico's first filing after that case was also to file again against Guatemala. What therefore had changed for Mexico? In contrast to Guatemala that had no other participation in the DSB after the 1996 case, Mexico had responded to two more cases and joined third-party litigations nine more times. In this sense, Mexico's legal team would have had far more opportunities to engage with the DSB and to improve their agility in using the institution. Guatemala therefore went up against a more legally practiced Mexican team. Let us now see what the United States and Mexico looked like against each other in *United – States Cement*.

⁹⁹ "Disputes by Member: Guatemala." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

Figure 6-5: United States' WTO / DSB Experience

Source: "United States." Map of Disputes Between WTO Members. https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm

Figure 6-5 shows the high level of participation that the United States has had in the DSB. Overall, it has filed 114 cases and responded to 130. As a complainant, it has initiated 21 cases against China; 19 against the EU; six each against Mexico, Canada, India, South Korea and Japan; five suits each against Argentina; four each against Philippines, Indonesia, Australia, France and Brazil; three against Belgium, Ireland and the United Kingdom respectively; two each against Turkey, Greece, Spain and Germany; and one each against Pakistan, Egypt, Hungary, Portugal, Romania, Netherlands, Sweden, Chile and Venezuela. Of the countries that have taken the United States to the DSB, we have the EU with 33; Canada with 16; Brazil and South Korea with eleven each; China and India with ten each; Mexico with nine; Argentina;

eight from Japan; Thailand and Argentina that both filed five cases; three from Indonesia; two each from Viet Nam, Australia, New Zealand and Chile; and one each from Chinese Taipei, Philippines, Malaysia, Turkey, Switzerland, Norway, Antigua and Barbuda, Costa Rica, Colombia, Venezuela and Ecuador respectively. The United States has also been involved in 140 cases as a third-party.¹⁰⁰ This information is missing from Figure 6-5.

United States- Cement was filed on January 31, 2003. It is therefore useful to examine not only what the United States' total participation in the DSB is, but to evaluate specifically, its dispute history at that time.

Experience at the DSB as a Complainant, Respondent and Third-Party

When Mexico filed against the United States in *United States – Cement*, the US had a long an active history in the DSB. It had participated in 73 cases as a complainant, 76 as a respondent and 49 as a third-party.¹⁰¹ This demonstrates the fact that not only does the United States have the requisite, minimum skills to use the DSB, but its legal capacity and other resources for litigation far supersede many of the countries that use the institution. How then, did Mexico compare with the United States?

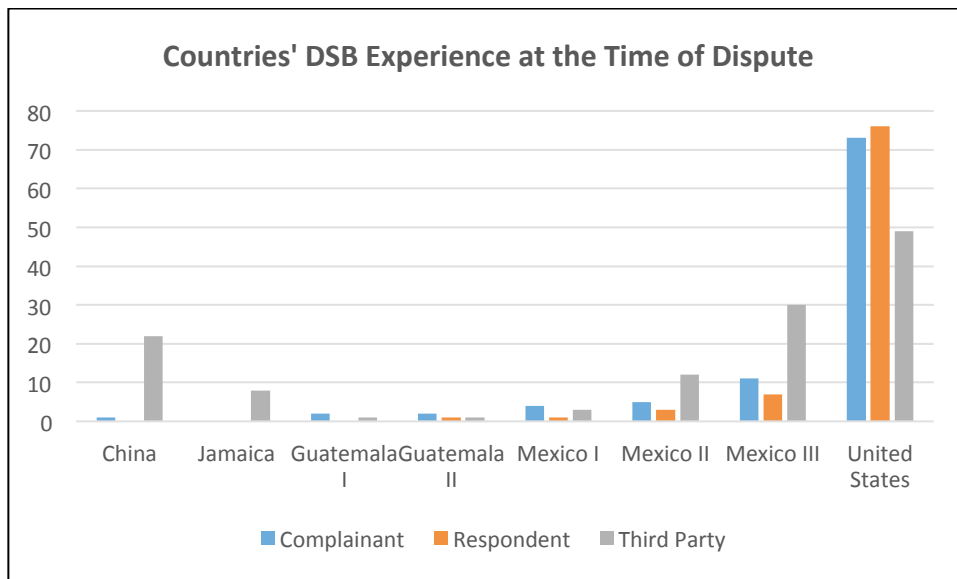
At *United States – Cement*, Mexico had been involved in eleven cases as a complainant, seven as a respondent and 30 as a third-party. At face value, it would seem like Mexico was out of its league and would lose this case. The fact, however, that this case came to a mutually agreed solution is instructive. It indicates, as this study purports, that while legal capacity is important in a quantitative sense, this variable goes beyond numbers. Additionally, other considerations such as domestic audience costs can precipitate settlement at the DSB. This will be discussed more fully in the Chapter 7. Suffice it to say that legal capacity though important is

¹⁰⁰ "Disputes by Member: United States." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹⁰¹ Ibid

but one factor as states determine their strategies in trade disputes. Beyond a certain limit, once states have relatively comparable knowledge and expertise, the benefits accrued from participation may become marginal.

Figure 6-6: Summary of Countries' DSB Experience at the Time of Their Disputes



(Guatemala I and II refer to its two cement cases, while Mexico I and II refer to Mexico's state in the two cases that it filed against Guatemala. Mexico III is Mexico's case with the United States.)

The WTO allows countries to interpret the Anti-Dumping Agreement and to institute domestic laws to reflect its spirit and principles. In this section, I therefore argue that usage of the Anti-Dumping Agreement domestically is an indication of a country's legal capacity. Here, this Agreement is the reference point because all the countries under examination evoked it at the time of their trade disputes. To impose anti-dumping duties therefore means that the countries have some understanding of the provisions first to recognize a violation, and second to have the

wherewithal to investigate, determine and impose countermeasures. Again, the focus is on what the countries did up to the point of the disputes and not on their general history in the institution.

China – Cement

At the start of *China – Cement*, China had reported to the WTO that it had definitive anti-dumping duties in force against products from thirteen countries. These include Belgium, Canada, France, Germany, Netherlands, Indonesia, Japan, South Korea, Malaysia, Russia, Singapore, United Kingdom and the United States.¹⁰² Some of the goods that it had duties on are acrylate; cold rolled stainless steel sheet; caprolactam; newsprint; polyester chip; polyester staple fibre; polyester film; and methylene chloride.¹⁰³ Jamaica, on the other hand, had final anti-dumping measures imposed on goods originating from three countries. These include Dominican Republic for inorganic fertilizer, and Indonesia and Thailand for Ordinary Portland Grey Cement.¹⁰⁴

The wide disparity between the number of domestic, final anti-dumping measures that China and Jamaica had in place is indicative of economic size and diversity. China, for instance, trades with many more countries and also produces more goods. Jamaica's imposition of anti-dumping duties on two countries other than China for Ordinary Portland Grey Cement suggests that cement is a critical domestic industry and that Jamaica has learnt to use the WTO provisions, at least domestically, to protect itself. Notably, China had no measures in place against cement. This implies that China may produce and export far more cement than it imports, and so there is no need to protect its cement industry through anti-dumping duties. Generally, however, both countries have used the Anti-Dumping Agreement domestically. The fact that this case did not

¹⁰² See “*Semi-Annual Report Under Article 16.4. of the Agreement - People's Republic of China.*” G/ADP/N/105/CHN. 22 August 2003. World Trade Organization.

¹⁰³ Ibid

¹⁰⁴ “*Semi-Annual Report Under Article 16.4. of the Agreement - Jamaica.*” G/ADP/N/119/JAM. 21 October 2004. World Trade Organization.

mature to the DSB level therefore means that other factors other than legal capacity at the domestic level may be at play.

Guatemala Cement I and II

At the time of *Guatemala – Cement I*, Guatemala only had one anti-dumping measure in place. This was against Ordinary Portland Grey Cement from Mexico.¹⁰⁵ This is important because not only was Guatemala's first time at the DSB in response to this case, but the case had emanated because of its first domestic invocation of the Anti-Dumping Agreement against Mexican cement. This raises questions about what Guatemala's familiarity and adroitness with the Agreement might have been then and is an important consideration since Guatemala did not back down from Mexico's threat to litigate.

Mexico's domestic use of the Anti-Dumping Agreement looks far different than Guatemala's when *Guatemala – Cement I* began. At that time, Mexico had anti-dumping measures imposed on goods from 31 countries.¹⁰⁶ Some of these products include hot-rolled sheet; corrugated rods; plate in coils; caustic soda; high fructose corn syrup; baby carriages; bicycle tires; toys; bovine meat; and electric power transformers.¹⁰⁷ This extensive experience therefore gave Mexico a vantage position from which it could challenge the legality of Guatemala's measure within the framework of the WTO.

By the time *Guatemala – Cement II* emerged, Guatemala's experience with the domestic use of the Anti-Dumping Agreement had not increased. The anti-dumping measure against the

¹⁰⁵ "Semi-Annual Report Under Article 16.4. of the Agreement – Guatemala." G/ADP/N/22/GTM. 15 May 1998. World Trade Organization.

¹⁰⁶ These countries include Armenia, Azerbaijan, Belarus, Brazil, Canada, China, the European Communities (EC), Estonia, France, Germany, Georgia, Hong Kong, India, Japan, Kazakhstan, Korea, Kyrgyzstan, Latvia, Lithuania, Moldova, Netherlands, Russian Federation, Spain, Taiwan, Tajikistan, Turkmenistan, Ukraine, United States, Uzbekistan and Venezuela. See "Semi-Annual Report Under Article 16.4. of the Agreement – Mexico." G/ADP/N/22/MEX. 21 March 1997. World Trade Organization.

¹⁰⁷ "Semi-Annual Report Under Article 16.4. of the Agreement – Mexico." G/ADP/N/22/MEX. 21 March 1997. World Trade Organization.

cement from Mexico therefore remained the only one that it had in place.¹⁰⁸ Mexico, conversely, had duties imposed on goods from fifteen countries.¹⁰⁹ While this may seem like a reduction compared to the 31 that it had measures against in 1996, it could also mean that the time for some of the older duties had lapsed. Additionally, for those fifteen countries, Mexico had a total of 84 anti-dumping duties in place.¹¹⁰ This requires legal consideration of how Mexico's trade with these countries may be violated through the importation of those goods, and also for an awareness of the applicable provisions. In this sense, Mexico at the time of the two cement disputes therefore appeared to have greater legal experience with the Anti-Dumping Agreement than Guatemala.

United States – Cement

The United States at the initiation of *United States – Cement* had levied anti-dumping duties against products from 48 countries.¹¹¹ These countries had measures on a wide array of products that include barbed wire and barbless wire strand; honey; solid urea; sugar; carbon steel butt-weld pipe fittings; silicon metal; softwood lumber; apple juice: concentrated; non-frozen; folding gift boxes; paper clips; sorbitol and preserved mushrooms.¹¹² Like its activity in the DSB generally, the United States' multiple application of the Anti-Dumping Agreement domestically reflects its strong legal capacity. Comparatively, Mexico, when it filed this case,

¹⁰⁸ "Semi-Annual Report Under Article 16.4. of the Agreement – Guatemala." G/ADP/N/65/GTM. 25 July 2000. World Trade Organization.

¹⁰⁹ "Semi-Annual Report Under Article 16.4. of the Agreement – Mexico." G/ADP/N/53/MEX. 13 August 1999. World Trade Organization.

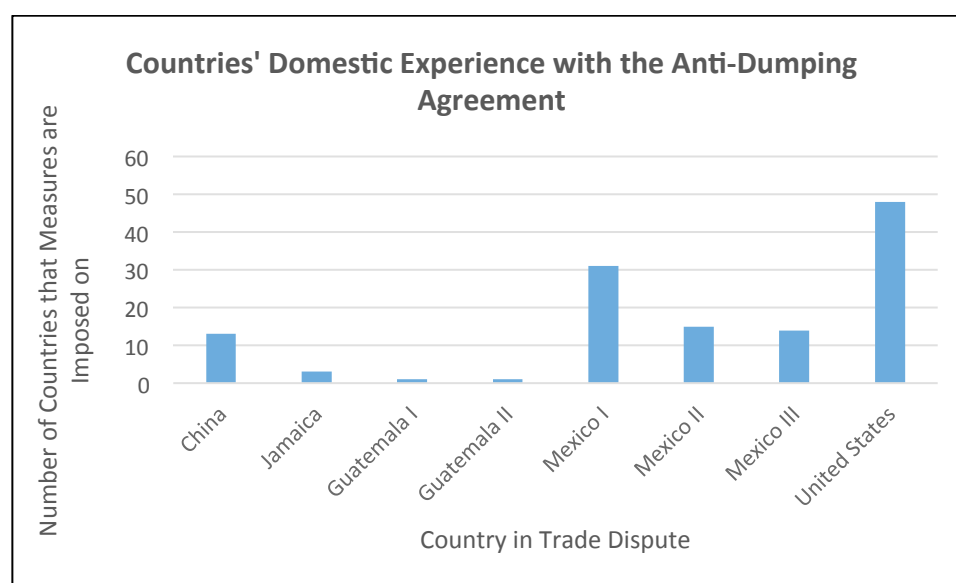
¹¹⁰ Ibid

¹¹¹ Included in the list are Argentina, Australia, Bangladesh, Belarus, Belgium, Brazil, Canada, Chile, China, Czech Republic, Estonia, Finland, France, Germany, Hungary, India, Indonesia, Iran, Italy, Japan, Kazakhstan, Korea, Latvia, Lithuania, Malaysia, Mexico, Moldova, Netherlands, Norway, Philippines, Poland, Portugal, Romania, Russia, Singapore, South Africa, Spain, Sweden, Chinese Taipei, Tajikistan, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan and Venezuela. See "Semi-Annual Report Under Article 16.4. of the Agreement – United States." G/ADP/N/105/USA. 12 September 2003. World Trade Organization.

¹¹² "Semi-Annual Report Under Article 16.4. of the Agreement – United States." G/ADP/N/105/USA. 12 September 2003. World Trade Organization.

had domestic measures against imports from fourteen countries.¹¹³ Here, the difference can be attributed to market size and possibly a comparative advantage in legal capacity. On a base level, however, both countries appear to have had sufficient capability to use the Anti-Dumping Agreement effectively.

Figure 6-7: Summary of Countries' Domestic Experience with the Anti-Dumping Agreement



(Guatemala I and II refer to its two cement cases, while Mexico I and II refer to Mexico's state in the two cases that it filed against Guatemala. Mexico III is Mexico's case with the United States.)

¹¹³ See "Semi-Annual Report Under Article 16.4. of the Agreement – Mexico." G/ADP/N/105/MEX. 25 August 2003. World Trade Organization.

Countries' Domestic Experience with the Anti-Dumping Agreement at the Time of their Disputes

One of the arguments of this study is that participation in the DSB not only increases legal capacity, but also strengthens the possibility that countries will use the institution if another dispute emerges. It therefore tests if these countries actually file and not just their likelihood of doing so. In this section, I therefore examine the countries' DSB trajectories with particular reference to the Anti-Dumping Agreement. Here, as in the rationale for analyzing domestic levies, I posit that countries that have some experience with the Agreement on the multilateral level are better equipped to respond to similar cases when they occur. Let us therefore see whether the litigants in the cases at hand had any history with the Anti-Dumping Agreement at the DSB.

China – Cement

When Jamaica's Anti-Dumping and Subsidies Commission began its investigation of dumped cement from China, China had marginal experience with the Agreement at the DSB. It had never been a respondent or complainant in any case featuring the Agreement, but had been a third-party to four cases.¹¹⁴ These trade disputes are *DS204*, *DS268*, *DS294* and *DS295*.¹¹⁵ Jamaica's DSB participation with the Agreement was also limited. Like China, at that time, Jamaica had never been a respondent or complainant in a case that evokes the Agreement, and had been a third-party litigant in just one case.¹¹⁶ That case was *DS132: Mexico — Anti-Dumping*

¹¹⁴ "Disputes by Member: China." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹¹⁵ Ibid

¹¹⁶ "Disputes by Member: Jamaica." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

Investigation of High-Fructose Corn Syrup (HFCS) from the United States. Here, Jamaica and Mauritius gave joint arguments.¹¹⁷

In trying to ascertain why *China – Cement* did not proceed to the DSB, history with the Anti-Dumping Agreement multilaterally can easily be a consideration. Up to that point, neither country had individually filed or responded to a dispute of that type. Consequently, their experience with the Agreement domestically and even as third-parties did not easily translate to confidence and competence to use the DSB at that time. Arguably, there might be a learning curve where countries have to master domestic impositions, third-party involvement, and then to stand on their own at the DSB. Notably, even in its third-party involvement, Jamaica participated with Mauritius. This collaboration suggests a sharing of resources and could mean that both countries felt they could better advance their views by working together and not separately. China and Jamaica therefore may have not reached the level of maturation in legal capacity to file or defend the case at that time.

Guatemala – Cement I and II

At *Guatemala – Cement I*, Guatemala had no experience as a complainant, respondent or complainant using the Anti-Dumping Agreement at the DSB.¹¹⁸ Mexico, on the other hand, had filed under the Agreement twice,¹¹⁹ but never used it as a respondent or third-party.¹²⁰ By the time *Guatemala – Cement II* was initiated, Mexico had evoked the Agreement three times as a complainant, and once as a respondent and third-party respectively.¹²¹ Guatemala's fortune did

¹¹⁷ "Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States." Report of the Panel. WT/DS132/R. 28 January 2000. p. 164 – 166.

¹¹⁸ "Disputes by Member: Guatemala." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹¹⁹ These are "DS23" and "DS49." See "Disputes by Member: Mexico."

https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹²⁰ "Disputes by Member: Mexico." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹²¹ These cases are "DS101" and "DS136" respectively. See "Disputes by Member: Mexico."

https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

not change much in that it still had zero cases as a complainant or third-party, but one as a respondent since Mexico had filed against it.¹²²

Guatemala's experience is interesting because though it had no prior experience with the Agreement, when called upon to act it accepted the challenge and litigated. The fact that it won is even more remarkable. This gives rise to the possibility that there could be other factors other than legal capacity that catalyzed this case, and also that legal capacity can be garnered in the moment. In the case of Mexico, it too had limited experience with the Agreement at the DSB, but still more than what Guatemala had. It is therefore important to probe how these countries calculated the other costs of going to the DSB for these two cases. This will be discussed in the Chapter 7.

United States – Cement

When Mexico initiated *United States – Cement*, it now had a strong history of using the Anti-Dumping Agreement at the DSB. This speaks to its increased legal capacity in this area. Mexico had participated in seven such cases as a respondent¹²³, four as a respondent¹²⁴ and three as a third-party.¹²⁵ Conversely, the United States had been involved in three as a complainant¹²⁶, twenty as a respondent¹²⁷, and two as a third-party.¹²⁸ In this instance, while Mexico had evoked the Agreement more than the United States, the US had responded to far more than Mexico had.

¹²² "Disputes by Member: Guatemala." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹²³ "DS23," "DS49," "DS60," "DS156," "DS182," "DS191" and "DS234." See "Disputes by Member: Mexico." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹²⁴ "DS101," "DS132," "DS203" and "DS216." See "Disputes by Member: Mexico."

https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm
¹²⁵ "DS136," "DS217" and "DS268." See "Disputes by Member: Mexico."

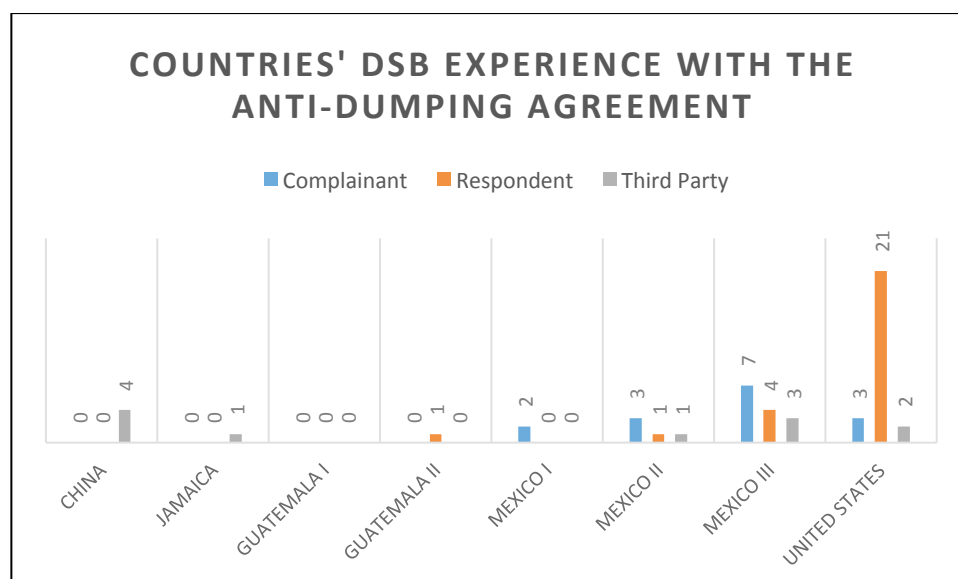
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm
¹²⁶ DS101, DS132 and DS203. See "Disputes by Member: United States."

https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm
¹²⁷ "DS49," "DS63," "DS89," "DS99," "DS136," "DS162," "DS179," "DS184," "DS206," "DS217," "DS221," "DS225," "DS234," "DS239," "DS244," "DS247," "DS262," "DS264," "DS268" and "DS277" are these cases. See "Disputes by Member: United States." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹²⁸ "DS60" and "DS156." See "Disputes by Member: United States." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

The United States' diversified market could make it a likely target for litigations,¹²⁹ but its willingness to respond demonstrates its strong legal capacity. Here, both countries therefore had enough experience with the Agreement to induce participation at the time of the cement dispute.

Figure 6-8: Summary of Countries' Domestic Experience with the Anti-Dumping Agreement



(Guatemala I and II refer to its two cement cases, while Mexico I and II refer to Mexico's state in the two cases that it filed against Guatemala. Mexico III is Mexico's case with the United States.)

Support from Third Parties

The outcome of a trade dispute is sometimes dependent on not just how adept the litigants' lawyers are, but also by the contributions of third parties. In this sense, third parties share the cost of filing by adding their expertise to the deliberations. Their skill and cogency in

¹²⁹ Guzman and Simmons, for example, argue that high-income countries are often targets of complaints from low-income countries because of the expected returns of these litigations. See Andrew T. Guzman and Beth A. Simmons, "Power Plays and Capacity Constraints: the Selection of Defendants in World Trade Organization Disputes," *Journal of Legal Studies*. 2005. Volume 34, Number 2: 557-598.

the cases may therefore aid or derail the case at hand. Importantly, third party involvement is usually an indication of the interest that other countries have in the case being determined, and signals their intent to benefit from the precedent that will be set. Busch and Reinhardt, for example, posit that third parties can affect disputes from as early as the consultations stage and make it unlikely that the disputants will come to an early settlement. They believe, however, that any effect that third parties have on the direction of the outcome should be considered in light of the fact that it is their involvement that made the disputants more intractable, which necessitated a Panel ruling.¹³⁰ Johns and Pelc add to this debate. In their view, since third parties may decrease the chances of settlement and increase the likelihood that countries will litigate, states with material interests in a dispute may not participate for strategic reasons.¹³¹

It is true that third-parties can increase the disputants' resolve to litigate fully. Here, however, I focus on how the countries that actually participated strengthened the legal capacity of the complainants and the defendants in a particular case. Importantly, I consider how these summations coincide with the outcome, arguing that this knowledge can also make countries be more willing to complain or defend in the future if they know they will have this type of support.

Like complainants and defendants, third-party involvement is also the result of strategic calculations. That aspect is discussed in Chapter 8 where I evaluate why some countries joined the disputes, but others chose not to. Here, I focus only on the arguments that were presented and how these augmented or refuted the claims that were being made. *China – Cement* did not make it to the DSB and so it is not included here. Additionally, *United States – Cement* was settled before the Panel could deliberate so there were no third-party arguments even though Canada,

¹³⁰Marc L. Busch and Eric Reinhardt. "Three's a Crowd: Third Parties and WTO Dispute Settlement." *World Politics*, Vol. 58, No. 3 (April 2006), pp. 446-477.

¹³¹ Leslie Johns and Krzysztof J. Pelc. "Fear of Crowds in World Trade Organization Disputes: Why Don't More Countries Participate?" *The Journal of Politics* (2015), Volume 78, Number 1.

China, Chinese Taipei, European Communities and Japan had reserved their third-party rights.¹³² Because of this, only *Guatemala – Cement I* and *II* will be evaluated.

Guatemala – Cement I

Four countries reserved their third-party rights in *Guatemala – Cement I*. These are Canada, El Salvador, Honduras and the United States.¹³³ Canada, however, made no oral or written arguments to the Panel.¹³⁴ El Salvador, in making its submission, stressed the fact that Guatemala was the first Central American country to execute an anti-dumping investigation and that Guatemala had done all it could to be WTO compliant.¹³⁵ It therefore highlighted the precedent that the Panel's ruling would set, and submitted *inter alia*, that the Panel should “refrain from recommending that Guatemala suspend its antidumping measures and refund the corresponding duties.”¹³⁶

Like El Salvador, Honduras also supported Guatemala's case. It evoked Article 17 of the Anti-Dumping Agreement to argue that the Panel did not have a mandate to examine the definitive measure that Guatemala adopted on January 17, 1997.¹³⁷ Honduras also used Article 6.2 of the Dispute Settlement Understanding to contend that Mexico failed to request the establishment of a panel in writing and that it had also not specified the specific measures that were at issue. Its recommendation was therefore that Mexico's complaint should be rejected.¹³⁸

The United States' position in this dispute was about fairness to Guatemala and the inadmissibility of Mexico's complaint. It argued, for instance, that Mexico had requested that a

¹³² “DS281: United States - Anti-Dumping Measures on Cement from Mexico.”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds281_e.htm

¹³³ “DS60: Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico.”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds60_e.htm

¹³⁴ “Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico.” Report of the Panel. WT/DS60/R. 19 June 1998. p. 114.

¹³⁵ Ibid

¹³⁶ Ibid, 115.

¹³⁷ Ibid

¹³⁸ Ibid

panel be established to deliberate on the provisional anti-dumping measure that Guatemala had levied, but was instead seeking deliberations on the final anti-dumping duties that Guatemala had imposed.¹³⁹ By doing this, the United States posited that Mexico was inconsistent with the WTO because it had not requested consultations with Guatemala on the latter issue; neither did it raise Guatemala's imposition of the final antidumping measures when it requested the Panel.¹⁴⁰ Additionally, in accordance with Article 17.4 of the Anti-Dumping Agreement, Mexico had not expressed or demonstrated whether the provisional measures had any "significant" impact on its domestic industry. In this regard, the United States submitted that Mexico had not properly brought the matter before the Panel.¹⁴¹

Essentially, with the exception of Canada that did not make any submissions, all the third parties to *Guatemala – Cement I* argued in support of Guatemala. In the case of the United States, its arguments were not whether Guatemala was right in imposing anti-dumping duties, but instead, challenged how Mexico initiated the case at the DSB. The case is important in assessing how third parties can increase a country's legal capacity because Guatemala was a novice at the DSB on all levels. For example, the Panel ruled that Guatemala had breached Article 5.3 of the Anti-Dumping Agreement. In its view Guatemala did not have "sufficient" evidence of dumping, injury and causal link to initiate its investigation regarding Portland Grey Cement from Mexico.¹⁴² However, on August 4, 1998, Guatemala took this case to the Appellate Body. The Appellate Body in turn, reversed the Panel's decision by highlighting that based on the stipulations of Article 6.2 of the DSU, Mexico had not properly brought the dispute before

¹³⁹ Ibid, 117 -118.

¹⁴⁰ Ibid

¹⁴¹ Ibid

¹⁴² "DS60: *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*." https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds60_e.htm

the Panel because it did not specify what measure was the source of its complaint.¹⁴³ Notably, these are some of the issues that the United States raised in its third-party submissions.

Guatemala's actions in this case are noteworthy because they defy the expectations of a first-time user. It was unfazed by the Panel's ruling against it and went on to appeal and won. This in my view can be partly attributed to the legal support that Guatemala received from Canada, El Salvador, Honduras and the United States. In this regard, legal capacity in the form of support from third-parties can strengthen a country's position and increase the chances that it will participate in the DSB.

Guatemala – Cement II

In *Guatemala – Cement II*, five countries/customs unions reserved their third-party rights. These include European Communities, Ecuador, El Salvador, Honduras and the United States.¹⁴⁴ The European Communities and Ecuador were not parties to the first cement dispute, while Canada did not join the second one. How then did these third-party submissions affect the outcome of the case? Ecuador's arguments to the Panel supported Guatemala's stance. It agreed, for instance, that this case was again not properly brought before the Panel because one of the panelists had deliberated on the first case and this could affect the neutrality of the current judgment.¹⁴⁵ Additionally, it argued against Mexico's view that the precedent set in the first Panel's report should be considered. Ecuador's contention was that the Appellate Body had overturned it so the new Panel was free to consider other arguments.¹⁴⁶

¹⁴³ Ibid

¹⁴⁴ "DS156: Guatemala - Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico" https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds156_e.htm

¹⁴⁵ "Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico." Report of the Panel. WT/DS156/R. 24 October 2000. p. 30 – 31.

¹⁴⁶ Ibid

El Salvador also supported Guatemala in its articulations before the Panel. Its arguments, however, highlighted its strong cultural, commercial and friendship ties with Guatemala through the Treaty on Central American Economic Integration, and the desire to see the WTO's provisions accurately applied to protect their interests.¹⁴⁷ The European Communities did not support either side. Instead, it expressed an interest in the case because it had concerns about the interpretation and application of the Anti-Dumping Agreement. It therefore raised the elements of the dispute that it was interested in, highlighted the contending positions, its own understanding of those issues, as well as the prevailing WTO norms relating to those matters.¹⁴⁸

Honduras reiterated its support for Guatemala in *Guatemala – Cement II*. It mentioned its own vulnerability to dumped cement from Mexico, and its economic interdependence with Guatemala. Honduras therefore felt that Guatemala had correctly applied the anti-dumping measure and supported this measure as a deterrence to future dumping of Mexican products into their domestic territories.¹⁴⁹ The United States, however, disagreed with Guatemala in this instance. While it acknowledged Guatemala's and any other WTO Member's right to levy anti-dumping measures, it stressed the fact that there are specific procedural requirements to do so. In its view, Guatemala had breached some of these stipulations and therefore could not be awarded the case.¹⁵⁰ The Panel agreed and outlined in its report a detailed ruling against Guatemala.¹⁵¹

¹⁴⁷ Ibid, 34.

¹⁴⁸ See the EC's arguments before the Panel in "*Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*." Report of the Panel. WT/DS156/R. 24 October 2000. p. 35 – 40.

¹⁴⁹ Ibid, 41.

¹⁵⁰ See the United States' submissions before the Panel in "*Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*." Report of the Panel. WT/DS156/R. 24 October 2000. p. 48 – 60.

¹⁵¹ See for example, "*DS156: Guatemala - Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*" https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds156_e.htm for a list of all the stipulations that Guatemala breached.

Table 6-7: Summary of Third Party Support in the Disputes

Case	Third Parties	Position
<i>China - Cement</i>	N/A	N/A (case did not go to DSB)
<i>Guatemala – Cement I</i>	Canada	Made no submissions
	El Salvador	Supported Guatemala
	Honduras	Supported Guatemala
	United States	Supported Guatemala
<i>Guatemala – Cement II</i>	European Communities	Supported neither
	Ecuador	Supported Guatemala
	Honduras	Supported Guatemala
	United States	Supported Mexico
<i>United States - Cement</i>	Canada	N/A (litigants settled)
	China	
	Chinese Taipei	
	European Communities	
	Japan	

Table 6-8: Legal Capacity Variables and Participation in the Dispute Settlement Body

Variables	Jamaica	China	Guatemala I	Mexico I	Guatemala II	Mexico II	United States	Mexico III
Membership in WTO Negotiation Groups	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Membership in Int'l Dispute Settlement Organizations	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Membership in Regional Dispute Settlement Organizations	No	No	Yes	Yes	Yes	Yes	Yes	Yes
ACWL Membership	No	No	N/A	N/A	N/A	N/A	No	No
DSB as a Complainant	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
DSB as a Respondent	No	No	No	Yes	Yes	Yes	Yes	Yes
DSB as a Third Party	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Anti-Dumping Agreement Domestically	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
Anti-Dumping Agreement at the DSB (Complainant)	No	No	No	Yes	No	Yes	Yes	Yes
Anti-Dumping Agreement at the DSB (Respondent)	No	No	No	No	Yes	Yes	Yes	Yes
Anti-Dumping Agreement at the DSB (Third Party)	Yes	Yes	No	No	Yes	Yes	Yes	Yes
Third Party Support	N/A	N/A	Yes	No	Yes	Yes	N/A	N/A
Participation	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Result	N/A	N/A	Win	Lose	Lose	Win	Settlement	Settlement

(Guatemala I and II refer to its two cement cases, while Mexico I and II refer to Mexico's state in the two cases that it filed against Guatemala. Mexico III is Mexico's case with the United States.)

“Quantifying the Qualitative”: How Do Legal Capacity Costs Affect Participation in the Dispute Settlement Body?

The discussion above gave a rich examination of legal capacity costs and how they may reduce or increase the burden to use the DSB, therefore catalyzing participation or inducing non-participation. This section broadens the analysis through a quantitative assessment of how knowledge about the independent variables can reduce uncertainty and increase the chances that states will use the DSB. The comparative case analytic method has a “quantify, count, compute and compare” four steps approach.¹⁵² This method will be used to empirically test the assertions about participation in the DSB as a function of legal capacity costs.

Quantify: Setting up the Truth Table for Comparative Case Analysis

Table 6-9: Truth Table for Legal Capacity Costs and their Effects on Participation in the Dispute Settlement Body¹⁵³

	WTO Neg. Groups	Int'l Disp. Orgs.	Reg. Disp. Orgs.	ACWL	DSB Comp.	DSB Resp.	DSB Third	Anti-Dump. Dom.	Anti-Dump. Comp.	Anti-Dump. Resp.	Anti-Dump. Third	Third Party S.	Litigate
Jamaica	1	1	0	0	0	0	1	1	0	0	1	0	0
China	1	1	0	0	1	0	1	1	0	0	1	0	0
Guat. 1	1	1	1	0	1	0	1	0	0	0	0	1	1
Mex. 1	1	1	1	0	1	1	1	1	1	0	0	0	1
Guat. 2	1	1	1	0	1	1	1	1	0	1	1	1	1
Mex. 2	1	1	1	0	1	1	1	1	1	1	1	1	1
U.S.	1	1	1	0	1	1	1	1	1	1	1	0	1
Mex. 3	1	1	1	0	1	1	1	1	1	1	1	0	1

Source: Gaubatz, Kurt Taylor and Katya Drozdova. 2016. *Quantifying the Qualitative Excel Implementation*. June 7, 2017. URL:

<https://study.sagepub.com/drozdova>

¹⁵² Katya Drozdova and Kurt Taylor Gaubatz. *Quantifying the Qualitative: Information Theory for Comparative Case Analysis*. (London: Sage Publications, 2017), 75-76.

¹⁵³ See Appendix 2A for full results of the comparative case analysis with legal capacity costs.

Count: Calculating the Probabilities

In this method, all the independent variables (legal capacity costs) are represented as X , while the dependent variable (choice to litigate), is depicted as Y . Their joint occurrence is written (x, y) .¹⁵⁴ Drozdova and Gaubatz posit that there are four possible ways that the independent and dependent variables can co-occur.¹⁵⁵ These are:

$$x = 1, y = 1$$

$$x = 0, y = 1$$

$$x = 1, y = 0$$

$$x = 0, y = 0$$

The joint probabilities will therefore be calculated to determine each factor (independent variable) and outcome (dependent variable) combination.¹⁵⁶ This is done by using the following matrix¹⁵⁷:

	$X = 1$	$X = 0$
$Y = 1$	a	b
$Y = 0$	c	d

¹⁵⁴ Katya Drozdova and Kurt Taylor Gaubatz. *Quantifying the Qualitative: Information Theory for Comparative Case Analysis*. (London: Sage Publications, 2017), 61.

¹⁵⁵ Ibid

¹⁵⁶ Ibid, 74.

¹⁵⁷ Ibid, 72.

Table 6-10: Joint Probabilities of Legal Capacity Costs and Participation in the Dispute**Settlement Body**

	FACTORS Independent Variables X	$p(x_i = 1, y = 1)$ a	$p(x_i = 0, y = 1)$ b	$p(x_i = 1, y = 0)$ c	$p(x_i = 0, y = 0)$ d
x_1	Membership in WTO Negotiation Groups	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_2	Membership in Int'l Dispute Settlement Organizations	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_3	Membership in Regional Dispute Settlement Organizations	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_4	ACWL Membership	0.00* (0.000001)	0.75	0.00* (0.000001)	0.25
x_5	DSB as a Complainant	0.75	0.00* (0.000001)	0.125	0.125
x_6	DSB as a Respondent	0.625	0.125	0.00* (0.000001)	0.25
x_7	DSB as a Third Party	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_8	Anti-Dumping Agreement Domestically	0.625	0.125	0.25	0.00* (0.000001)
x_9	Anti-Dumping Agreement at the DSB (Complainant)	0.5	0.25	0.00* (0.000001)	0.25
x_{10}	Anti-Dumping Agreement at the DSB (Respondent)	0.5	0.25	0.00* (0.000001)	0.25
x_{11}	Anti-Dumping Agreement at the DSB (Third Party)	0.5	0.25	0.25	0.00* (0.000001)
x_{12}	Third Party Support	0.375	0.375	0.00* (0.000001)	0.25

Source: Gaubatz, Kurt Taylor and Katya Drozdova. 2016. Quantifying the Qualitative Excel Implementation. June 7, 2017. URL:

<https://study.sagepub.com/drozdova>

Joint probability = $p(x, y) = \text{count}(x, y) / n$ ¹⁵⁸

*the negligible value 0.000001 is substituted for pure zero values in order to ensure that logarithms are defined.¹⁵⁹

Compute: Computing the Uncertainty Measures

¹⁵⁸ Ibid, 66.

¹⁵⁹ Ibid

The uncertainty measures are calculated in three steps. The first step measures the uncertainty of the outcome, litigation (Y). This is written as $H(Y)$.¹⁶⁰ Here, in the absence of the knowledge of the x variables (legal capacity costs / factors), the information entropy measures uncertainty about whether the states will litigate.¹⁶¹ $H(Y)$ can be written as:

$$H(Y = y) = -p(y = 1) \log_2 p(y = 1) - (1 - p(y = 1)) \log_2 (1 - p(y = 1))$$

The second step in computing the uncertainty measures is to find the conditional uncertainty, or the conditional information entropy. This is represented as $H(Y/X)$.¹⁶² It measures the amount of uncertainty that we have that states will litigate, given that we have knowledge about the litigation costs variables.¹⁶³ It is calculated by using the following formula:

$$\begin{aligned} H(Y = y | X = x_i) = & -p(x_i = 0) [p(y = 0 | x_i = 0) \log_2 p(y = 0 | x_i = 0) \\ & + p(y = 1 | x_i = 0) \log_2 p(y = 1 | x_i = 0)] \\ & -p(x_i = 1) [p(y = 0 | x_i = 1) \log_2 p(y = 0 | x_i = 1) \\ & + p(y = 1 | x_i = 1) \log_2 p(y = 1 | x_i = 1)]^{164} \end{aligned}$$

After finding the conditional uncertainty, the next step is to find the uncertainty reduction or information gain. This is also called mutual information.¹⁶⁵ This is written as $I(Y; X)$, and “measures the reduced uncertainty in Y due to the knowledge of X.”¹⁶⁶ It is computed as:

$$\begin{aligned} I(Y; X) &= H(Y) - H(Y/X) \\ &= I(Y = y; X = x_i) \\ &= H(Y = y) - H(Y = y | X = x_i)^{167} \end{aligned}$$

¹⁶⁰ Ibid, 68.

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Ibid, 69.

¹⁶⁶ Ibid

¹⁶⁷ Ibid

Table 6-11: Uncertainty Measures of Legal Capacity Costs and Participation in the Dispute Settlement Body

	FACTORS Independent Variables X	H (Y)	H (Y / X)	I (Y; X)	Direction
x_1	Membership in WTO Negotiation Groups	0.8110	0.8110	0.0000	Positive
x_2	Membership in Int'l Dispute Settlement Organizations	0.8110	0.8110	0.0000	Positive
x_3	Membership in Regional Dispute Settlement Organizations	0.8110	0.0000	0.8110	Positive
x_4	ACWL Membership	0.8110	0.8110	0.0000	Negative
x_5	DSB as a Complainant	0.8110	0.5180	0.2930	Positive
x_6	DSB as a Respondent	0.8110	0.3450	0.4660	Positive
x_7	DSB as a Third Party	0.8110	0.8110	0.0000	Positive
x_8	Anti-Dumping Agreement Domestically	0.8110	0.7550	0.0560	Positive
x_9	Anti-Dumping Agreement at the DSB (Complainant)	0.8110	0.5000	0.3110	Positive
x_{10}	Anti-Dumping Agreement at the DSB (Respondent)	0.8110	0.5000	0.3100	Positive
x_{11}	Anti-Dumping Agreement at the DSB (Third Party)	0.8110	0.6890	0.1220	Positive
x_{12}	Third Party Support	0.8110	0.6070	0.2040	Positive

Source: Gaubatz, Kurt Taylor and Katya Drozdova. 2016. Quantifying the Qualitative Excel Implementation. June 7, 2017. URL:

<https://study.sagepub.com/drozdova>

Compare: Understanding the Outcomes

Table 6-9 generates some interesting results. It shows, for example, that there is a positive relationship between Membership in WTO Negotiation Groups (x_1); Membership in International Dispute Settlement Organizations (x_2) and DSB Experience as a Third Party (x_7)

and the likelihood that states will participate in the DSB. Membership in the ACWL (x_4) is shown to have a negative relationship with DSB litigation. The 0.0000 reading for the mutual information, however, reveals that whereas the direction of these relationships is given, they cannot accurately predict that a country will use the DSB if it is aggrieved. What, then, are the variables that this model shows will be good indicators of DSB participation?

Based on Table 6-9, the strongest predictor of DSB usage is Membership in Regional Dispute Settlement Organizations (x_3). This variable has an 81% certainty. The other indicator of DSB participation is DSB Experience as a Respondent (x_6). This has a 47% certainty. Experience with the Anti-Dumping Agreement as a Complainant (x_9) and Respondent are also likely to induce DSB participation, but these have a low expectation of 31%. The positive relationship between these two variables and the outcome are logical since all of the cases involved evoking the Agreement. Finally, Experience at the DSB as a Complainant is also a predictor of litigating, but this has a low forecast of almost 30%.

Conclusion

In concluding, this chapter explores legal capacity costs and how they affect participation in the DSB. As a departure from previous studies, it conceptualizes legal capacity by including membership in regional and multilateral dispute settlement organizations, and experience at the DSB as a complainant, defendant or third-party. These are captured up to the point of the disputes to assess how ready countries were to act upon the cases. Since all the examined cases evoke the Anti-Dumping Agreement, legal capacity is also measured by tracing how much the countries had used the Agreement domestically and internationally when their cases were initiated. Since third parties can also enhance or impede a litigant's position, the

chapter also examines how having third-party legal support affected the outcome and tendency to use the DSB again.

Guatemala – Cement I and *II* reveal the power of legal capacity and the possible influence of the United States as a third-party litigant. In both cases, the ruling of the Panel coincided with the U.S. position. While this may reflect the superb understanding and dexterity that the United States has with the WTO's position, it may also be an indication of its influence in directly affecting the outcome. Arguably, Guatemala could have been emboldened by the third-party support that it got in the first case and so it did not back down when Mexico threatened to file the second time around. This reflects Guatemala's naiveté and underdeveloped legal capacity at that point. Notably, *Guatemala – Cement I* did not make a determination on the substantive issues of the dispute. The Appellate Body simply held that Mexico did not properly bring the matter before the Panel. Mexico therefore had leave to pursue the matter in a new case if it so desired.¹⁶⁸ Guatemala's "victory" in the first case was therefore short lived.

Another important result of *Guatemala – Cement II* is that it did not make a determination on whether Mexico had in fact dumped cement into Guatemala's domestic industry. Rather, the determination was that Guatemala had proceeded wrongfully in what it perceives as dumping. This highlights one of the issues raised in Chapter Five that the Anti-Dumping Agreement itself can be a hindrance to countries seeking recourse, and ultimately, to their participation in the DSB. Mexico, for example, did not argue with Guatemala on whether it had in fact been dumping. Instead, it challenged Guatemala on how it initiated the investigation, determined that "dumping" had occurred and levied the duties. All of these are technical and ambiguous provisions that are outlined in the Anti-Dumping Agreement. Essentially, a country

¹⁶⁸ See "*DS60: Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*." https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds60_e.htm

can have a legitimate case but still lose at the DSB if it does not strictly adhere to its stipulations. Legal capacity, then, can swing a case in either direction if the litigants know what they are doing. In regards to third-party submissions, these can buttress a country's case and promote greater participation in the DSB, or arguably, deter participation. Support in one case, however, does not necessarily forebode the same outcome in the next. Legal capacity is therefore a critical component of any trade dispute, and often helps to secure victory for the WTO astute.

Jamaica and China had the least experience with the Anti-Dumping Agreement at the DSB and their non-participation in *China – Cement* remains puzzling. This is so because Guatemala had no experience but chose to litigate against Mexico and even to appeal the Panel's decision. The United States and Mexico on the other hand, had sufficient experience with the Agreement at all levels and settled after the DSB was evoked. These cases underscore the integral role that legal capacity plays in determining participation in the DSB, and the high costs that countries pay if they dare go before the institution without being sufficiently prepared. Conversely, countries that seek aid through organizations like the ACWL not only reduce the transaction costs of using the DSB, but also get needed legal assistance to increase their chances of litigating and winning. However, since the countries that were examined had different levels of legal capacity and made different calculations about litigating, it means that other types of costs factor in their calculations.

On a systematic, comparative level, the information theory approach reveals that membership in regional dispute settlement organizations is the greatest predictor of litigating at the DSB. Experience in the DSB generally and also with the Anti-Dumping Agreement as a respondent and complainant are also good indicators that countries will participate in dispute settlement. Legal costs, however, are not the only considerations that states make. The next

chapter will therefore discuss the other costs that these countries had at that time and how they affected their decision to use or avoid the institution.

CHAPTER VII

CALCULATED COSTS AND THEIR EFFECTS ON PARTICIPATION IN THE DISPUTE SETTLEMENT BODY

Introduction

This study probes how the costs associated with the WTO litigation process affect a country's decision to file or respond to a filing. As outlined in Chapter Two, many studies have examined costs and their impact on DSB participation. These studies, however, tend to emphasize the disparity in DSB usage between developing and advanced nations and hypothesize that developing countries are incapacitated by the exorbitant costs that are associated with the process. In their view, these refer to the resources states need to contract legal services, the ability to impose countermeasures, as well as to absorb possible retaliatory, punitive actions from their powerful counterparts. I agree with these conjectures. This research argues, however, that focusing on just the burden that developing countries face to litigate assumes that these countries are not sometimes culpable of trade violations. As a result, it is more likely that developing countries will seek redress against larger economies and not vice versa. This thinking does not take into account the cases that developed nations have pursued against weaker states. Highlighting the challenges that developing countries face when they litigate also overlook the fact that not all advanced nations are frequent DSB users. In essence, while costs are an important factor, capability to meet those costs does not necessarily mean that states will litigate. Costs are therefore calculated relative to the benefits, and this determines what countries will do regardless of their capabilities. Instead of focusing on developing countries as they try to get redress against trade violations from their more powerful trading partners, this study therefore looks at dyads and the strategic considerations that states make there.

One of the earliest and most trenchant studies on DSB participation as a function of costs is Bown's 2005 work. Here, Bown uses legal capacity and political economy costs to evaluate an exporter's choice to become a complainant, interested third-party or non-participant in a trade dispute.¹ This study does not refute Bown's findings. It adds, however, to the literature on non-participatory membership by examining not only the exporter's decision to file, but the importer's choice to become a defendant as well. This is done by probing why China chose to avoid the DSB, while Guatemala and the United States accepted their complainants' threat to litigate. Consequently, it addresses why states initiate disputes as well as why states pursue and not back down from threats. As a distinction from Bown's work, it also takes a more inductive approach through the exploratory nature of the cases.

As discussed in Chapter Two, the extant literature has focused on costs in the narrower sense. Studies have therefore looked at the financial, reputational, audience and interdependent payoffs, but hardly in a single study. This project therefore takes a more general approach to costs to test for a wider variety of determinants of non-participatory membership in the DSB. Chapter Four features an extensive form game that models trade and dispute settlement. This game theoretic approach is appropriate because it provides a more general, yet parsimonious emphasis that examines sensitivity to costs in ways that empirical studies struggle to do. It uses delta, for example, to measure all the costs that are associated with the dispute settlement process. These costs affect the strategies, payoffs and outcomes of the game as states consider Pareto-optimal gains from trading. In that chapter, costs are operationalized as delta. In this chapter, I therefore disaggregate delta to show all the different variables that are considered as costs to use the DSB.

¹ Chad P. Bown. "Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders." The World Bank Economic Review. 2005. Vol. 19, No. 2, pp. 287- 310.

As mentioned in Chapter Five, the cases under examination are *China – Cement*, *Guatemala – Cement I and II*, and *United States – Cement*. Chapter Six explored how legal capacity can lower the costs to participation in the DSB through membership in other dispute settlement organizations and experience as a complainant, respondent or third-party. This chapter continues the discussion by evaluating the other variables that are composited in delta. These are also the explanations for non-participatory membership that Chapter Two discusses. They include ability to impose countermeasures, reputational costs and benefits, domestic audience costs, interdependent payoffs, availability of alternative forums, expectation to win, existing bilateral agreements and complex interdependence. Notably, Bown also uses some of these variables in his study. He does not, however, include reputational costs and benefits, domestic audience costs, expectation to win or the availability of alternative forums in his deliberations. These are addressed by other scholars such as Chaudoin, Busch, Fang, Davis and Brewster. Delta is therefore a composite calculation of all the costs that are associated with the process. Importantly, as a distinction from all previous studies, this is the first known study to use the information theory approach to comparatively assess the independent variables' effects on the outcome (litigation) when there are elements of uncertainty.

As in the discussion on legal capacity, the aim of this chapter is to discuss these variables with specific reference to the timing of the disputes. As a result, it will analyze what was happening within the states at the time of the disputes and how they weighed whether it was profitable to litigate or avoid the institution. It should be noted, however, that by presenting a composite definition of costs, that this study does not purport to be the most comprehensive. Indeed, other variables that could be seen as costs are not included here. The choice of these variables are therefore meant to demonstrate that there are quantitative and qualitative utility

calculations that states make as they consider litigation. Broadening the scope of these deliberations through delta allows for this. Admittedly, some factors weigh more than others in the minds of states. This study does not measure this; it simply considers how each factor may contribute to the overall cost assessment. Measuring how each variable figures in the cost deliberations is therefore a good next step for this project since some factors matter more to some states than others. Hence, some costs are more likely to precipitate disputes than others. For now, however, the focus is on how the states in question evaluated what they had to pay for each variable, and how this assessment led to their participation or avoidance of the DSB.

Contested Good's Contribution to Affected Countries' Gross Domestic Product

Trade disputes occur because countries care about the goods that are being contested. This is often due to the gains or projected gains from trade. In an effort to determine why states participate in or avoid using the DSB, it is therefore important to discuss whether the good that is the subject of the dispute is a significant contributor to the country's gross domestic product (GDP). Here, the argument is that states will not wrangle over goods that are minimal economic generators, while they will fight vociferously over products that generate, or have the potential to generate national wealth.² Of course, the observation must be made that not all goods matter equally in all countries. A particular product may therefore be the life line in one country, while in another, it is just an added source of income. This may help to explain why some countries impose protective measures and even initiate filings over some goods, and the other country does not respond in like manner. Understanding therefore, the relevance of cement in the respective countries is critical to any discussion on non-participation in the various cases.

China

² See for example, Chad P. Bown and Bernard M. Hoekman. "Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough." 2007. Policy Research Working Paper 4450. The World Bank. Development Research Group. Trade Team.

China is the world's top producing cement country.³ The U.S. 2015 Geological Survey reports that in 2013, China produced an estimated 2,420,000 tonnes of cement.⁴ This figure increased to 2,500,000 in 2014⁵. Added to this mix is its leading estimated clinker capacity of 1,900,000 tonnes in 2013, and 2,000,000 in 2014.⁶ Cement is therefore a good in which China dominates the world. How then does this translate to its effect on the GDP? China's economy can be divided into primary, secondary and tertiary industries.⁷ Based on this classification, agriculture makes up the primary sector, construction and manufacturing fall within the secondary division, and the service sector comprises the third.⁸ Cement is one of the goods that makes up China's construction and manufacturing industry. Data gathered from 2013 reveal how each sector contributes towards the country's GDP. 46% of its GDP comes from the tertiary industry, 44% the secondary industry, and 10% from the primary industry.⁹ Where the timing of *China – Cement* is concerned, at that time, the secondary industry of which cement is a part, contributed towards 46% of China's GDP.¹⁰ What this means is that cement is a very important good to the Chinese economy, and one that it would want to protect.

The fact that China accepted an antidumping duty on its cement even after protesting some of the procedures can mean one of a few things. China was new to the WTO and may therefore have not yet mastered litigation. Considering its lengthy accession process and the number of trade liberalizations that it had to make, China may have been reluctant to file so quickly. Alternatively, it could mean that Jamaica was simply not one of China's main cement

³ "U.S. Geological Survey, 2015, *Mineral Commodity Summaries 2015: U.S. Geological Survey*." 196 p., <http://dx.doi.org/10.3133/70140094>.

⁴ Ibid, 39.

⁵ Ibid

⁶ Ibid

⁷ Prableen Bajpai. "China's GDP Examined: A Service-Sector Surge." 31 October 2014. <http://www.investopedia.com/articles/investing/103114/chinas-gdp-examined-servicesector-surge.asp>

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

markets and so China could afford the levy. This will be discussed more fully under the *Availability of Other Markets* section. Here, however, we can conclude by saying that cement is a major income generator for China, and under ordinary circumstances, this is a good that it would want to protect, even if it requires litigating in the DSB. The fact that it did not means that other costs were calculated.

Jamaica

Jamaica is not a leading producer of cement. Its manufacturing industry contributes to about one-eighth of its GDP and employs less than one-tenth of the labour force.¹¹ Manufactured products include processed foods such as rum, sugar and molasses, along with textiles and metal products.¹² Cement and chemicals fall within this category.¹³ Jamaica has one cement producing company, Caribbean Cement Company Limited (CCCL). In the July to September quarter of 2003, it produced 149, 084 tonnes, which increased to 186, 752 for the same period in 2004. This output was deemed to be a 2% increase in the manufacturing industry's contribution to the nation's real GDP.¹⁴ While Jamaica's cement production is nowhere near larger markets, its value is prized in a country that relies heavily on services and tourism. There is therefore a lot of national pride associated with this commodity, and this helps to explain why steps like an anti-dumping duty would be used to keep it from collapsing.¹⁵

¹¹ See James A. Ferguson, Clinton V. Black, Patrick Bryan and David J. Buisseret. "*Jamaica*." <https://www.britannica.com/place/Jamaica>

¹² Ibid

¹³ Ibid

¹⁴ "*Increase in GDP for Manufacturing and Processing Sector*." Jamaica Information Service. 6 January 2005. <http://jis.gov.jm/increase-in-gdp-for-manufacturing-and-processing-sector/>

¹⁵ See for example, "*Caribbean Cement Corporate Profile*." <http://www.caribcement.com/about>

Guatemala

The main cement company in Guatemala is Cementos Progreso S.A, which has an estimated annual capacity of 3,000 metric tonnes.¹⁶ Some of its plants in the country include San Miguel, Sanarte and El Progreso.¹⁷ Cement in Guatemala, falls under its industry category, and include items such as food processing, publishing, mining, textiles, clothing, tires and pharmaceuticals.¹⁸ These make 20% of the nation's GDP, which translates to US\$9.6 billion.¹⁹ At the time of the disputes, Cementos Progreso was the largest cement company in Central America²⁰ and was therefore a key component of Guatemala's economy. This underscores why Guatemala would want to have an antidumping duty in place if it felt that this industry was being threatened.

Mexico

Manufacturing is the largest contributor to Mexico's GDP.²¹ Some of the goods produced include cement, glass, pottery, china and earthenware.²² Cementos Mexicanos, or CEMEX, is the largest cement producing company in Mexico. By 1994, it was the fourth largest cement company in the world, with annual profits of US\$3 billion.²³ CEMEX is multinational, with outlets in the United States and twenty-five European, Asian and Latin American countries.²⁴ Merrill and Miró report that in 1993, Mexico's total cement output was 27 million tonnes. This,

¹⁶ Steven T. Anderson. "U.S. Geological Survey Minerals Yearbook 2010: Guatemala." <https://minerals.usgs.gov/minerals/pubs/country/2010/myb3-2010-gt.pdf> Accessed June 2, 2017.

¹⁷ Ibid

¹⁸ "Guatemala." Nations Encyclopedia. <http://www.nationsencyclopedia.com/economies/Americas/Guatemala.html>

¹⁹ Ibid

²⁰ Christiansen, Bryan and Muslum Basilgan. *Economic Behavior, Game Theory, and Technology in Emerging Markets*. (Pennsylvania: Business Science Reference, 2014), 362.

²¹ See Tim L. Merrill and Ramón Miró, eds. "Mexico: A Country Study." Washington: GPO for the Library of Congress. 1996. <http://countrystudies.us/mexico/>

²² Ibid

²³ Ibid

²⁴ Ibid

however, is prefaced by a fall from 4.5 million tonnes in 1988, to 1.4 million tonnes in 1992.²⁵

This decrease is attributed to the high demands for cement, and also the imposition of antidumping duties from the United States.²⁶

At the time of *Guatemala – Cement I*, CEMEX would have been expanding globally and facing challenges with the changes in demand for cement, plus the added burden of the United States' levy on its cement. This means that Guatemala's new anti-dumping duty would have been an added attack on its industry. With this product contributing so significantly to its GDP, this would be a case that Mexico would respond to so as to protect its interests.

United States

The United States is a world leading cement producer, with an estimated installed capacity of 100 metric tonnes per year.²⁷ Its cement industry is a conglomeration of multinational firms such as Lafarge, CEMEX, Holcim and HeidelbergCement, and local companies that include Ash Grove Cement and Texas Industries.²⁸ In 2015, cement sales were about \$9.8 billion, with Texas, California, Missouri, Florida, and Alabama being the top producing states.²⁹ Even with the leading role that the United States has in cement production, it has performed for many years below capacity levels.³⁰ This reality, along with global shocks such economic recessions would precipitate protection of this industry.

²⁵ Ibid

²⁶ Ibid

²⁷ "Cement in the USA." Global Cement. 14 March 2012. <http://www.globalcement.com/magazine/articles/698-cement-in-the-usa>

²⁸ Ibid

²⁹ Hendrik G. van Oss. "Mineral Commodity Summaries 2016." U.S. Department of the Interior: U.S. Geological Survey. <https://minerals.usgs.gov/minerals/pubs/mcs/2016/mcs2016.pdf>

³⁰ Ibid

Table 7-1: Summary of Contested Goods as Significant GDP Contributors for the Countries

Country	Contested Good is a Significant GDP Contributor
China	Yes
Jamaica	No
Guatemala	Yes
Mexico	Yes
United States	Yes

Countries' Expected Utility Calculations

The variables that will be discussed henceforth will evaluate the different factors that may help states determine the payoffs of litigating versus the costs associated with the process.

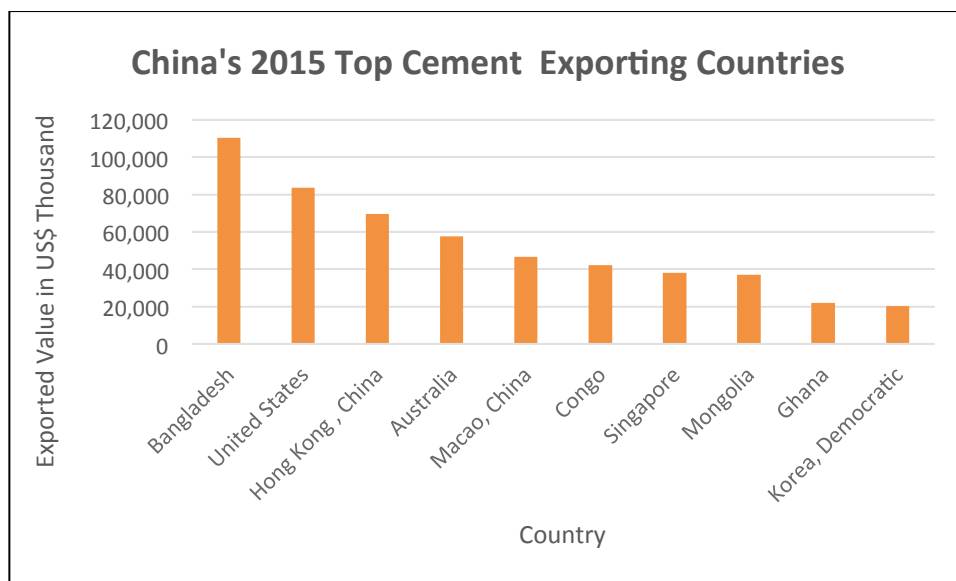
One of the considerations of this research is that if countries have other lucrative markets, this will lessen the chances that they will litigate over some duties. This is because they can afford to lose that revenue and compensate for it in other countries. There are two opposing arguments to this thinking. One is that it depends on the country. If the particular country is a major market, then the other state will want to litigate to protect its interests. Additionally, even if the market is not “significant,” the affected country may fear contagion whereby all its trading partners may institute countermeasures against its products and so it may litigate to deter that type of action. Consequently, availability of markets may make some countries forego litigation with one country, or pursue it with another depending on what the perceived stakes are. It is therefore important to see how calculations about alternative markets informed the decisions to use or avoid the DSB at the time of the disputes. This, however, is not a discussion on

prospective markets that the disputants could divert trade to since there would be startup expenses. It is, instead, an evaluation of the trading partners that were already in place and how calculating the gains from trade in those areas could make countries forego or litigate a pending dispute.

In the figures below, statistics from 2015 are used. These are used in lieu of missing data from the respective years. Here, the intention is to provide information on the different types of countries that buy cement from each disputant. These in turn, are alternative markets in the event that one country loses a trading partner after a dispute

China

Figure 7-1: China's 2015 Top Cement Exporting Countries



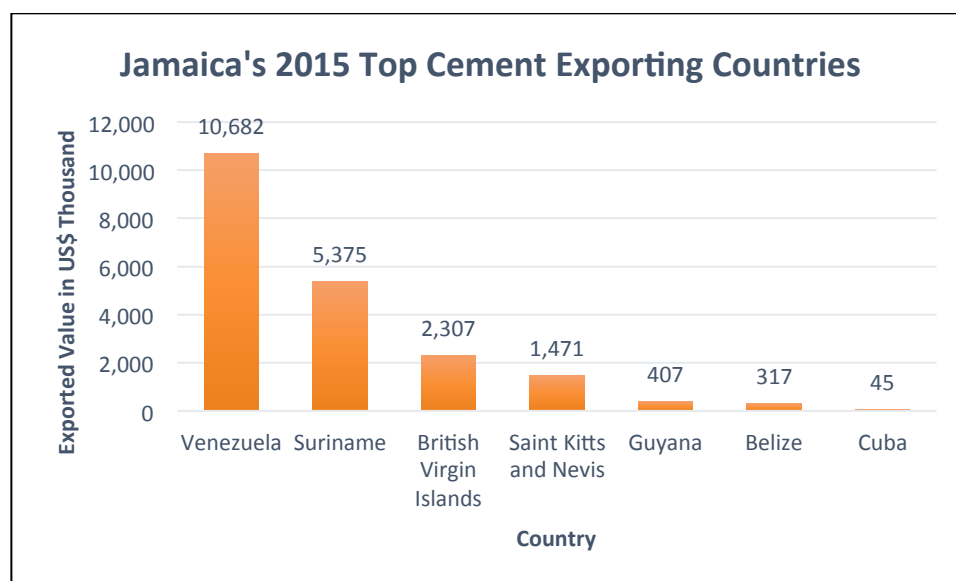
Source: "List of Importing Markets for a Product Exported by China." Product: 2523 Cement, incl. cement clinkers, whether or not coloured. Trade Map – International Trade Statistics.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|156|||2523||4|1|1|2|2|1|2|1|1

Figure 7-1 shows the top ten countries that China supplies with cement. Bangladesh tops the list with US\$110,464,000, while the Democratic People's Republic of Korea is 10th with US\$20,388,000. While the Figure only outlines the main countries that buy cement from China, China exports the commodity to a total of 152 states.³¹ This means that in the event of any trade fallout with Jamaica, there are many countries that can be used as alternative markets; some of which are not overly concerned with the rule of law and WTO rulings. In this regard, then, China's ability to provide the world with cement seems to be a buttress for its continued trade relations with other countries. Any losses incurred from the Jamaican market could therefore be quickly compensated elsewhere.

³¹ *"List of Importing Markets for a Product Exported by China."* Product: 2523 Cement, incl. cement clinkers, whether or not coloured. Trade Map – International Trade Statistics.
http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|156|||2523||4|1|1|2|2|1|2|1|1

Jamaica

Figure 7-2: Jamaica's 2015 Top Cement Exporting Countries

Source: "List of Importing Markets for a Product Exported by Jamaica."

Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|388|||2523||4|1|1|2|1|2|1|1

Figure 7-2 illustrates Jamaica's 2015 export destinations for cement. Of these countries, Venezuela is the main recipient with a value of US\$10,682,000 and Cuba is 7th with \$US45, 000. In previous years, Jamaica has also exported cement to the Cayman Islands, Antigua and Barbuda, Colombia, Dominican Republic, Grenada, Montserrat, Netherlands, Anguilla, Trinidad and Tobago, and the United States. For 2015, however, it did not export cement to any of these countries.³² In terms of importing, the United States, Dominican Republic, Mexico, Belgium, Japan, Turkey, United Kingdom, Trinidad and Tobago, Spain and Canada are Jamaica's main

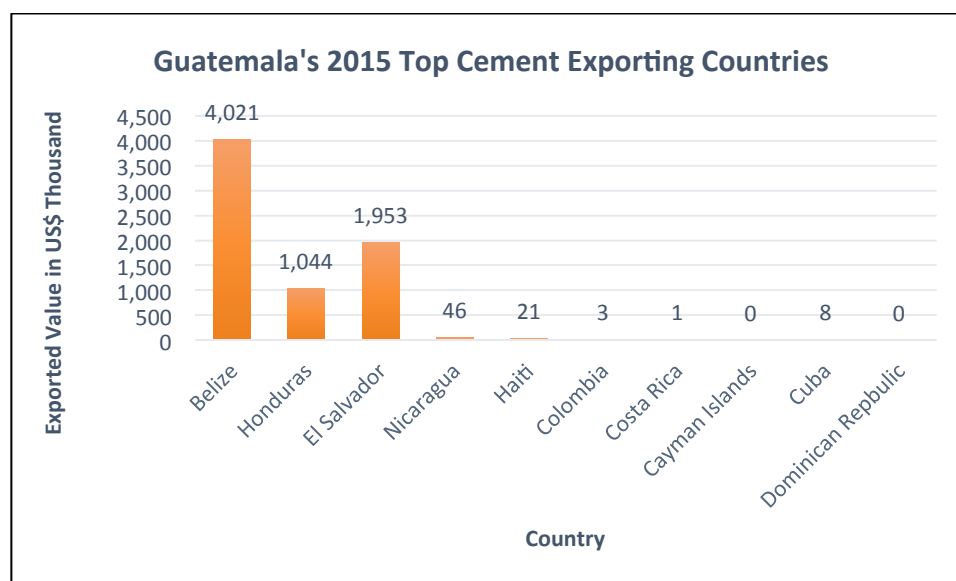
³² "List of Importing Markets for a Product Exported by Jamaica." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|388|||2523||4|1|1|2|1|2|1|1

providers.³³ China is a distant 12th. Additionally, only the top three countries export significant dollar amounts of the product to Jamaica.³⁴ Clearly, Jamaica's has a much smaller cement market when compared with China. It therefore means that it would be easier in this instance, for Jamaica to put a domestic measure in place to protect its fledging cement industry, than for China to formally complain about this measure. Importantly, however, in the absence of any Chinese withdrawal of cement from its market, Jamaica would have other choices which provide even more cement than China does.

Guatemala

Figure 7-3: Guatemala's 2015 Top Cement Exporting Countries



Source: "List of Importing Markets for a Product Exported by Guatemala." Product: 2523 Cement, incl. cement clinkers, whether or not coloured. http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|320|||2523||4|1|1|2|1|2|1|1

³³ "List of Supplying Markets for a Product Imported by Jamaica." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|388|||2523||4|1|1|1|2|1|2|1|1

³⁴ Ibid

In 2015, Guatemala exported cement valued at US\$7,184,000.³⁵ Figure 7-3 shows that of this amount, Belize was the highest buyer, followed by Honduras, El Salvador and Nicaragua. The volumes of cement imported by Belize, Honduras and El Salvador, however, far superseded the others. In 2015, Guatemala also exported cement to Panama and the United States. Panama bought goods valued at US\$72,000, while those consumed by the United States amounted to US\$7,000.³⁶ Historically, Jamaica, Mexico and Venezuela also bought Guatemalan cement. In 2015, however, they did not import any.³⁷ On the importing side, in 2015, Guatemala's top cement sellers were the Republic of Korea, China, Barbados, Japan, Mexico, Honduras, Peru, Spain, Denmark and Nicaragua, in descending order.³⁸ Of these suppliers, the dollar amount from the Republic of Korea was US\$27,116,000 and Mexico, with US\$3,890,000.³⁹ Belize, El Salvador, Costa Rica and Panama also exported cement to Guatemala, but in far lesser amounts.⁴⁰ These figures and countries are important because they demonstrate that Mexico is not the main provider of cement to Guatemala. Consequently, in the event of any withdrawal of cement from Guatemala, it would still be able to find viable alternatives.

The illustration of Guatemala's cement buyers is noteworthy. Belize, El Salvador, Honduras, Nicaragua, Costa Rica and Panama are all Central American countries. In *Guatemala – Cement I and II*, however, only El Salvador and Honduras joined as third parties and supported Guatemala. This is particularly interesting since Belize is a top consumer, yet it took no formal interest in the case. This reoccurrence of non-participatory membership could be an incident of

³⁵ "List of Importing Markets for a Product Exported by Guatemala." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|320|||2523||4|1|1|2|2|1|2|1|1

³⁶ Ibid

³⁷ Ibid

³⁸ "List of Supplying Markets for a Product Imported by Guatemala." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|320|||2523||4|1|1|1|2|1|2|1|1

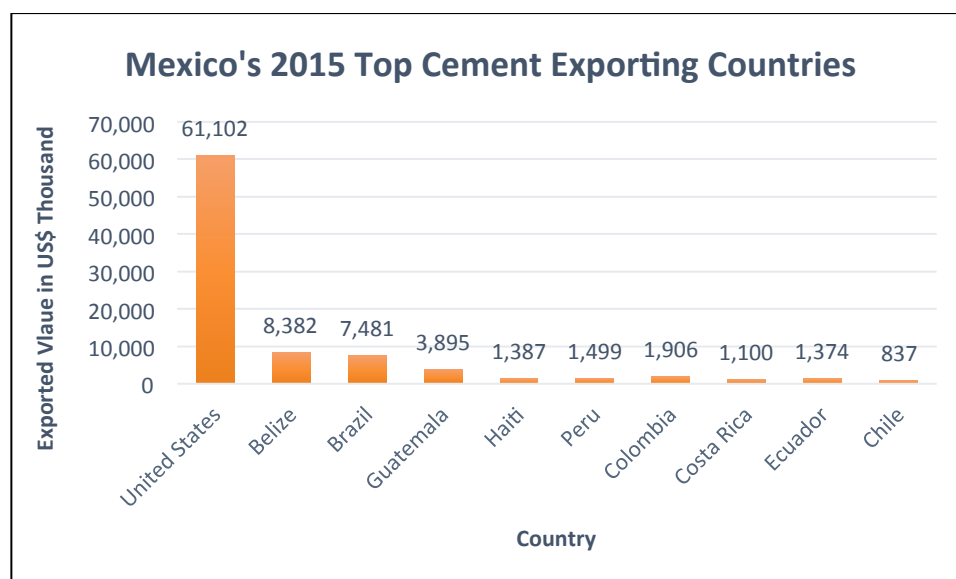
³⁹ Ibid

⁴⁰ Ibid

free riding. This will be discussed more fully in Chapter 8. For here, we can conclude that all the countries in the region trade with Guatemala and this suggests economic interdependence. The extent to which they demonstrate support for Guatemala through the cases is another matter.

Mexico

Figure 7-4: Mexico's 2015 Top Cement Exporting Countries



Source: "List of Importing Markets for a Product Exported by Mexico." Product: 2523 Cement, incl. cement clinkers, whether or not coloured. http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|484|||2523||4|1|1|2|2|1|2|1|1

In 2015, Mexico exported cement valued at US\$93,761,000.⁴¹ Figure 7-4 reveals that of this amount, the United States bought US\$61,102,000 worth. This is followed by Belize, Brazil and Guatemala. El Salvador, Nicaragua, Panama and Honduras also buy Mexican cement.⁴² The

⁴¹ "List of Importing Markets for a Product Exported by Mexico." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|484|||2523||4|1|1|2|2|1|2|1|1

⁴² Ibid

United States is also the main exporter of Cement to Mexico, while Canada is tenth in this category.⁴³

The types of countries that buy cement from Mexico is important for the cases at hand. Guatemala, for example, is the 4th highest importer of Mexican cement. This weighs on the *Guatemala – Cement* trade disputes because it shows that if Guatemala had stopped importing this cement, or continued its levy, Mexico would have lost much revenue. Compounding this issue is also the fact that El Salvador and Honduras also buy Mexican cement. Since, as discussed earlier, they joined the disputes in support of Guatemala, these countries could also stop buying cement from Mexico and continue to import Guatemalan cement. If this resulted, Mexico would have lost much more from the trade disputes than Guatemala.

As in the case of Guatemala, here Belize, Nicaragua and Panama's importation of Mexican cement is also curious since these countries did not participate in the trade dispute. While it could be very likely that they did not want to side with any of the litigants, since they buy cement from both countries, they would likely suffer or benefit from the outcome. The factors that led to their non-participation are therefore worthwhile exploring. Ecuador's stance in these cement disputes is also noteworthy. While not a Central American country, it also imports cement from Mexico. It, however, joined the second case in support of Guatemala, and later imposed anti-dumping duties on Mexican cement. This demonstrates that several countries may have been experiencing predatory trading practices from Mexico. Here, Canada can also be mentioned since it is the 10th largest importer of Mexican cement. This may help to explain its reservation of third party rights in the first Guatemala case since any ruling may affect future cement sales within its territory. It is still not clear though, why Canada did not make any

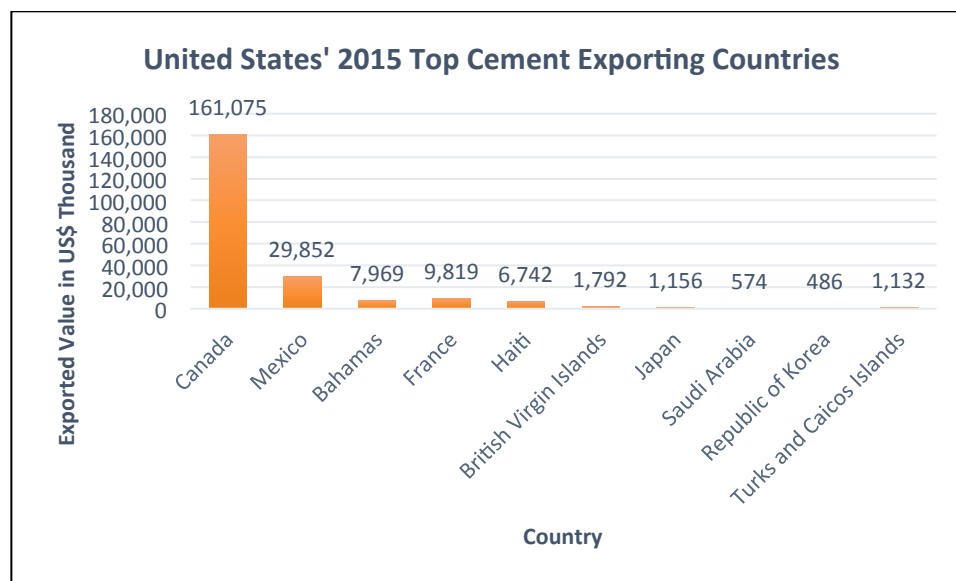
⁴³ "List of Supplying Markets for a Product Imported by Mexico." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|484|||2523||4|1|1|1|2|1|2|1|1

submissions before the Panel, and why it did not participate in the second case. Why some chose to participate and others did not, is interesting and adds value to the study. More of this is discussed in Chapter 8. From the figures, however, we can see that Mexico had other options, but would lose in other ways if it lost Guatemala as a cement trading partner.

The United States' position as the main buyer and seller of cement to and from Mexico is also important. These economies are very closely linked and this forebodes significant repercussions for both if any should withdraw support from the other. In a sense, while they both have alternative vendors and consumers, one can appreciate why they settled at the WTO and not prolong their dispute for much longer. These countries therefore have too much to lose and made the economically practical decision to work out their grievances.

United States

Figure 7-5: United States' 2015 Top Cement Exporting Countries



Source: “List of Importing Markets for a Product Exported by United States of America.” Product: 2523 Cement, incl. cement clinkers, whether or not coloured. http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|842|||2523||4|1|1|2|2|1|2|1|1

For 2015, the United States sold US\$249, 472, 000 worth of cement.⁴⁴ Figure 7-5 illustrates who the top buyers are. Canada tops the list, followed by Mexico, Bahamas and France. Of this list, Canada and Japan reserved their third party rights in *United States – Cement*. China also joined as a third party and is listed as 13th top cement exporter from the United States.⁴⁵ Since this case was settled, it is unclear what their positions would have been. Their formal involvement, however, represents their substantive interest in the case. Specifically as it relates to this section, the Figure shows that Canada consumes more cement from the United

⁴⁴ “List of Importing Markets for a Product Exported by United States of America.” Product: 2523 Cement, incl. cement clinkers, whether or not coloured. http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|842|||2523||4|1|1|2|2|1|2|1|1

⁴⁵ Ibid

States than Mexico does. Mexico's contribution, however, is still significant. The United States therefore has viable options in the event of a falling out with Mexico, but would still lose large amounts of cement revenue if its relationship with Mexico were to disintegrate.

Table 7-2: Summary of Availability of Alternative Markets

Country	Availability of Alternative Markets
China	Yes
Jamaica	Yes
Guatemala	Yes
Mexico	Yes
United States	Yes

Ability to Enforce Countermeasures

One of the main criticisms of the WTO's dispute settlement system is that it has provisions for recourse, but not redress. Essentially, the institution adjudicates cases that are brought before it, but countries must impose countermeasures on their own. As a result, some countries choose not to initiate a dispute in the first place because they cannot afford to punish their aggressors. Pauwelyn's arguments on this are delineated in Chapter 2.⁴⁶ Bown also studies this phenomenon, arguing that exporters with more capacity to withdraw concessions from their respondent's markets are more likely to initiate disputes.⁴⁷ Countermeasures, however, are not the automatic first step after successful litigation. The trade violator is given a "reasonable period of time" to bring its measures into compliance. It is after that period has elapsed that the DSB

⁴⁶ See Joost Pauwelyn. "Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach." *The American Journal of International Law* (April 2000), Volume 94, Number 2.

⁴⁷ Chad P. Bown. "Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders." *The World Bank Economic Review*. 2005. Vol. 19, No. 2, pp. 306 -307.

allows for bilateral countermeasures that are similar and proportional to the offense.⁴⁸ Countries, upon litigating, must therefore be prepared to impose countermeasures in the event that the violator does not bring its measures into compliance in a timely manner. In this section, I will therefore examine each country's trade profile to see if at the time of their disputes, they were also to impose punitive sanctions against their culpable trading partners. The postulation is that the more capable a state is to respond accordingly, the lower the anticipated costs of DSB participation. These "low" costs in turn, increase the chances that an aggrieved party will use the institution, either as a complainant or respondent.

China

If China had initiated the dispute with Jamaica, its role would have been that of a complainant. This case therefore did not materialize because China did not file. Additionally, if litigated, Jamaica would have been required to bring its measures into compliance by removing the duties. After the allotted period of time, China could have the institution's permission to implement countermeasures against Jamaica. What then, did the antidumping duties against China look like and how prepared was China to respond?

Jamaica, in its *Semi-Annual Report of Anti-Dumping Actions for the Period 01 January to 30 June 2004*, outlined to the WTO that it had initiated investigations against the alleged dumping of Chinese cement into its territory. Based on its *Preliminary Determination*, dumping was believed to have occurred and a provisional duty of 96.27% was imposed on March 3, 2004. This was adjusted to 89.79% on June 14, 2004, when the definitive duty was levied. This was to be applied to 112,999 metric tonnes of Chinese cement, which constituted 16% of domestic

⁴⁸ See the Articles of the Dispute Settlement Unit in "Understanding on Rules and Procedures Governing the Settlement of Disputes." Annex 2 of the WTO Agreement. https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

consumption.⁴⁹ China's economic state at the time of the trade dispute shows that it would have been able to impose countermeasures against Jamaica if it had filed and Jamaica failed to remove those measures in a timely fashion. *International Trade Statistics 2003* delineates that in contrast to global trends, China's exports and imports rose by 30% between 2000 and 2002.⁵⁰ By 2002, it was the "fourth largest merchandise trader," and had become the chief supplier for many economies and also an important export destination.⁵¹ China's economic growth and position in the global economy therefore made it very capable to respond to this trade dispute if it had occurred. How then did Jamaica compare?

The nature of the dispute shows that Jamaica, as the aggrieved partner, Jamaica had used the WTO provisions to protect itself domestically. As long as China respected this duty, it had nothing else to do. In the event, however, that China continued to dump products into Jamaican territory, Jamaica could respond by dumping other products in China, or some other form of retaliation. With flagrant, continuous violations, Jamaica could also seek recourse at the DSB. Was it in any shape to retaliate in a similar and proportional manner to China? China does not buy cement from Jamaica so a direct response in that area was not possible.⁵² Jamaica, however, is "China's biggest trading partner in the English-speaking Caribbean."⁵³ China imports cane sugar, aluminum and bauxite from Jamaica, while Jamaica imports textiles, clothing and light industrial products from China.⁵⁴ In 2004, trade volumes between the two countries totaled

⁴⁹ See "Semi-Annual Report under Article 16.4 of the Agreement." G/ADP/N/119/JAM. 21 October 2004. World Trade Organization.

⁵⁰ "International Trade Statistics 2003." World Trade Organization, p. 1.
https://www.wto.org/ENGLISH/res_e/statis_e/its2003_e/its2003_e.pdf

⁵¹ Ibid

⁵² See "List of Importing Markets for a Product Exported by Jamaica."

Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

http://www.trademap.org/tradestat/Country_SelProductCountry_TS.aspx?nvpm=1|388|||2523||4|1|1|2|2|1|2|1|1

⁵³ "China & Jamaica: Bilateral Economic and Trade Relations, Economic and Technical Cooperation."

<http://jm.china-embassy.org/eng/zygx/jmhz/t211230.htm>

⁵⁴ Ibid

US\$395.98 million. This was a 90.8% increase from with the previous year.⁵⁵ Of this amount, Chinese export volume came to US\$126.13 million, while its imports amounted to US\$269.85 million. The importance that China places on Jamaica as a trading partner in the Caribbean region and the amount of trade between the two demonstrate that Jamaica would have been able to impose countermeasures against China.

Guatemala and Mexico

In *Guatemala – Cement I and II*, Guatemala was the aggrieved party. In its *Semi-Annual Report on Anti-Dumping Measures for the Period 1 July -31 December 1996*, it indicated that on August 28, 1996, it had imposed a provisional 38.72% duty on Mexican cement. This was in relation to 67.193 million tonnes² of cement, which represented 10.06 % of domestic consumption.⁵⁶ Guatemala, in its submissions before the Panel, showed that Mexico was well able to retaliate even without going to the DSB, and especially after, if Guatemala did not remove the measures. Guatemala argued, for instance, that “during 1996, exports of grey Portland cement from Mexico to Guatemala represented only 0.016 per cent of Mexican exports of all products to all countries.”⁵⁷ This was calculated by showing that for 1996, Mexico’s cement exports to all countries totaled US\$96 billion, with Guatemala receiving US\$15.6 million.⁵⁸ Moreover, Guatemala contended that in that year, Mexico’s overall exports to Guatemala amounted to US\$360 million. Mexico’s cement exports were therefore just 4.3% of its overall exports to Guatemala.⁵⁹ These arguments by Guatemala highlight the fact that Mexico could easily retaliate against Guatemala outside the DSB. Coupled with this is the observation

⁵⁵ Ibid

⁵⁶ “*Semi-Annual Report Under Article 16.4. of the Agreement – Guatemala.*” G/ADP/N/22/GTM. 15 May 1998. World Trade Organization.

⁵⁷ “*Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico.*” Report of the Panel. WT/DS156/R. 24 October 2000. Paragraph 4.91.

⁵⁸ Ibid

⁵⁹ Ibid

that Guatemala's provision duty was in place for only four months. This suggests that Mexico had not suffered greatly. The fact that it took the case to the DSB could mean that Mexico is invested in institutional governance. Since, however, it did not suffer great losses from the levy and could retaliate but chose not to, means that other costs / benefits were also calculated in Mexico's participation in the DSB.

In the case of Guatemala, if it had been the complainant in this dispute, it too would have been able to impose countermeasures against Mexico. As previously mentioned, Guatemala operates the largest cement company in Central America. In regards to its direct trade with Mexico, Guatemala exports goods such as "sugar, coffee, petroleum, apparel, bananas, fruits and vegetables, cardamom, manufacturing products, precious stones and metals, as well as electricity."⁶⁰ Mexico is its fourth largest recipient of its exports.⁶¹ In this regard, Guatemala would have been trading sufficient volumes of trade with Mexico to be able to impose countermeasures.

United States and Mexico

The United States and Mexico share large volumes of trade. The United States reports for instance, that in 2003, it exported goods valued at US\$97,411.8 million and imported products amounting to US\$138,060.0.⁶² While this shows a trade deficit on the part of the United States, with both countries being major producers of cement and other goods, either would have been able to impose countermeasures within and without the DSB. The fact that both attempted institutional recourse over cement for more than a decade suggests that other factors played into their calculation, and they counted on the influence and authority of the DSB to resolve the conflict.

⁶⁰ *CIA World Factbook: Guatemala*. <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html>

⁶¹ *Ibid*

⁶² "2003: U.S. Trade in Goods with Mexico." <https://www.census.gov/foreign-trade/balance/c2010.html#2003>

Table 7-3: Summary of Ability to Enforce Countermeasures

Case	Country	Ability to Enforce Countermeasures
<i>China - Cement</i>	China	Yes
	Jamaica	Yes
<i>Guatemala – Cement I</i>	Guatemala	Yes
	Mexico	Yes
<i>Guatemala – Cement II</i>	Guatemala	Yes
	Mexico	Yes
<i>United States - Cement</i>	United States	Yes
	Mexico	Yes

Reputational Costs / Benefits

In Chapter Two, several authors are cited for their thoughts on how reputational costs / benefits can induce participation in multilateral institutions. Guzman, for example, opine that often reputational costs are so high that threats to use institutions are often seen as credible.⁶³ Pelc joins the conversation by arguing that threats that are made multilaterally are more likely to be seen as credible. Without this, states suffer reputational losses if their “illegitimate” threats are resisted. Countries therefore use institutions to protect their reputation, and to concurrently signal their resolve.⁶⁴ In the context of this research, all the disputants evoked some aspect of the WTO, yet three were litigated and one was not. This section will therefore discuss what, in a reputational sense, each disputant had to win or lose, and consequently, why they participated or avoided the DSB.

⁶³ Andrew T. Guzman. “*The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution.*” *The Journal of Legal Studies*, Volume 31, Number 2 (June, 2002), pp. 303 – 326.

⁶⁴ Krzysztof J. Pelc. “*Constraining Coercion? Legitimacy and Its Role in U.S. Trade Policy, 1975–2000.*” *International Organization*, Volume 64, Number 1, (Winter, 2010).

China – Cement

China acceded to the WTO in December 2001. Jamaica initiated its anti-dumping investigation against China in December 2003. At that time, China had only filed against one country, which was the United States in *DS252*. It had never been a complainant, and had been a third party litigant in 22 cases. With China's transition from a non-market economy still in progress, there were many speculations about China being an unfair trader. In this regard, China could have filed to correct that stereotype. This would have been a reputational benefit. At the same time, however, this volume of trade may not be worth fighting over, considering the very many alternatives that China has. Bown alludes to this, contending that countries consider the market size that is at stake when they are to litigate. He also posits that states that are able to reciprocate by instituting countermeasures will do so and not litigate.⁶⁵ Here we see however, that China did not consider Jamaica's market share significant, but it not retaliate with an antidumping duty of its own or withdraw bilateral aid. I argue that at this point, China did not use the DSB because if China had filed against Jamaica and lost, this would have done significant damage to the reputation that it was trying to create as a new WTO-compliant Member.⁶⁶ This loss would also have repercussions in other cases. In essence, China had more to lose from litigating than from avoiding the DSB.

In the case of Jamaica, if China had filed and it resulted in victory, the reputational benefits would be great. Jamaica, as a smaller state, being willing to not only take on China, but also win, would create many psychological benefits for a country that had never used the DSB as

⁶⁵ Chad P. Bown. "Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?" 2005. World Bank Policy Research Working Paper 3540.

⁶⁶ See also, Dukegeun, Lee and Park. They argue that WTO Members are less likely to use the DSB is the respondent "is smaller than the complainant, has less reputational concern, and faces less retaliatory capacity of the complainant." Dukgeun Ahn, Jihong Lee and Jee-Hyeong Park. 2013. "Understanding Non-Litigated Disputes in the WTO Dispute Settlement System." [47 Journal of World Trade, \(2013\) Issue 5, pp. 985–1012.](#)

a complainant or respondent. On the cost side, Jamaica would not lose significantly if it lost against China. Since it had never filed, its attempts would have been lauded, and would have even increased its stature as a country that is willing to protect its industry by seeking recourse at the DSB.

Guatemala Cement I and II

In the two cases that Mexico filed against Guatemala, Mexico lost more of its reputational standing in the international political economy, while Guatemala gained. In the first case, Guatemala used the Anti-Dumping Agreement domestically and internationally for the first time. Mexico, however, challenged the imposition of the duty and initiated the dispute. Arguably, by firstly not backing down, and secondly, challenging the ruling of the Panel and winning, Guatemala's reputation soared across Central America and the world. On the other hand, since Mexico was the more powerful state that filed and lost, it suffered tremendous reputational costs. At the same time, Mexico would also have been commended by its constituents for not allowing Guatemala to get away with an "illegal" protective measure. In the second case, Mexico won and Guatemala lost. In this instance, Mexico was able to recover some reputational benefits by being vindicated through the verdict, while Guatemala, suffered some reputational losses. Generally, however, Guatemala emerged from these cases by making a name for itself, while Mexico's standing fluctuated.

United States – Cement

This case ended in a mutually agreed solution.⁶⁷ This settlement was a sage move from both parties since the outcome would have led to significant reputational losses and benefits

⁶⁷ Based on the terms of the agreement, the United States will phase out the restrictions over a three year period, totally eliminating them by 2009. During the transition, the U.S. will allow 3 million tonnes of Mexican cement into its territory, and this cap will increase over the 2nd and 3rd transitional years. Additionally, CEMEX, will receive about US\$1 million in settlement, and will remove about US\$65 million in liabilities. See "*United States and*

depending on the outcome. The great importance that cement plays in both economies impacted on the huge reputational costs that were at stake. Neither party wanted to be proven wrong. For as long as the dispute remained before the multilateral institution however, both countries received reputation benefits. This is because they would have been able to signal commitment to the issue to their domestic audiences, and also to the international observing public. Settling this case was therefore in the best interest of both parties. This is because the case had gone on for so long that to hold out and lose after investing so much in the case could have reputational consequences. (The United States had imposed the anti-dumping duty in August 1990⁶⁸). Conversely, either country could have used this as a benefit since they could claim that they did all that they could to fight the issue, but the institution ruled against it.⁶⁹

Mexico Agree to Resolve Antidumping Order on Mexican Cement. 19 January 2006.

<http://www.CEMEXusa.com/MediaCenter/PressRelease/resolve-antidumping-order-20060119.aspx>

⁶⁸ Gregory Wells Bowman, Nick Covelli, David A. Gantz and Ihn Ho Uhm. 2010. *Trade Remedies in North America*. (The Netherlands: Kluwer Law International, 2010), 614.

⁶⁹ See for example, the arguments about political cover in Todd L. Allee and Paul K. Huth. "Legitimizing Dispute Settlement: International Legal Rules as Domestic Political Cover." *The American Political Science Review*, Volume 100, Number 2 (May 2006).

Table 7-4: Summary of Reputational Costs / Benefits in Each Dispute

Case	Country	Reputational Cost	Reputational Benefit
<i>China - Cement</i>	China	Yes	Yes
	Jamaica	No	Yes
<i>Guatemala – Cement I</i>	Guatemala	No	Yes
	Mexico	Yes	Yes
<i>Guatemala – Cement II</i>	Guatemala	Yes	Yes
	Mexico	No	Yes
<i>United States - Cement</i>	United States	Yes	Yes
	Mexico	Yes	Yes

Domestic Audience Costs

The influence that domestic audience costs have on participation in institutions is discussed in Chapter Two. Scholars like Lohmann posit that audience costs can make the threat to use institutions more credible.⁷⁰ Martin also argues in similar fashion.⁷¹ Consequently, countries that face domestic pressures to protect their interests, will use the formal, legal dispute settlement procedures of the WTO to demonstrate to their constituents that their concerns are being taken seriously.⁷² This part of the study will therefore examine what was going on within

⁷⁰ Susanne Lohmann. “*Why Do Institutions Matter? An Audience Cost Theory of Institutional Commitment.*” Governance: An International Journal of Policy, Administration, and Institutions, Vol. 16, No. 1, (January, 2003) pp. 95–110.

⁷¹ Lisa L. Martin. “*Credibility, Costs, and Institutions: Cooperation on Economic Sanctions.*” World Politics, Volume 45, Number 3 (April, 1993), pp. 406 – 432.

⁷² See also Christina L. Davis in *Why Adjudicate? Enforcing Trade Rules in the WTO.* (New Jersey: Princeton University Press, 2012)

the countries at the time and how this influenced their decision to use the DSB. As with all domestic tensions, more than one “voice” is usually clamoring for the government’s attention. The question then becomes, why do some voices matter and others do not? This is a classic interest groups argument. Hence, when costs are concentrated and benefits are diffused, those who pay the costs are better able to organize and advocate. In analyzing domestic audience costs, this section therefore focuses on the main pressures that were within the state to use or avoid the DSB and not the general debates. The argument is that the greater the audience costs, the higher the chances that the disputants will litigate.

China – Cement

In many anti-dumping investigations, an aggrieved local firm nudges its government to begin proceedings on its behalf. This case is therefore peculiar because no domestic Jamaican company lobbied for reprieve. Instead, the Jamaican Anti-Dumping and Subsidies Commission decided to pursue this matter of its own volition. This is permissible pursuant to the provisions of Section 4 of the Customs Duties (Dumping and Subsidies) Act, 1999. It therefore identified Mainland International Limited, a local company, as the importer of the alleged dumped goods. These products were produced by Longkou Fanlin Cement Company Limited, and exported by Shandong Metals and Minerals, both of which are located in China.⁷³ The affected domestic producer was Caribbean Cement Company Limited.

The Commission reported that Mainland first entered the Jamaican market in 1999, and that since then, there had been an increase in the number of its import sources up to the point of the present investigation. In 1999, for example, of the four countries from which Mainland

⁷³ “*Notice of Affirmative Preliminary Determination.*” REF. No. AD-01-2003. 15 March 2004. Antidumping and Subsidies Commission, Jamaica: Kingston.

imported cement, two had been found to be at dumped prices.⁷⁴ The Commission's actions therefore while serving in the long run to protect Caribbean Cement, seems in my mind, to have been purposed in the first instance to regulate the activities of Mainland by bringing its practices into conformity with the local and international stipulations. China therefore was not the initial target, but became party to the dispute because its companies are both the producer and exporter in this particular case.

It can be argued, however, that the Jamaica Anti-Dumping and Subsidies Commission simply preempted Caribbean Cement and acted before an official complaint could be made. This may be true. What is clear though, it that even with the frictions in the market at that time, no domestic firm prompted the Commission to act. It later, however, faced lawsuits for failing to impose the determined anti-dumping duties on Chinese cement.⁷⁵

In 2003, China was leading the world in “raw coal, steel, cement, color TV and mobile phones.”⁷⁶ Additionally, it was moving towards becoming a full market economy.⁷⁷ China was therefore cooperative with the Jamaican authorities and seemed to want to show that it was in compliance. For example, since it was a non-market economy, it agreed with the use of Indonesia as a surrogate for comparison. It also welcomed the Jamaican investigating authorities to visit the cement companies to see that there was no violation.⁷⁸ These, in my mind, support the thinking that there were no domestic audience costs propelling China to file against Jamaica. On

⁷⁴ *Statement of Reasons*, REF. No. AD-01-2003. June 14, 2004. Anti-Dumping and Subsidies Commission, Jamaica: Kingston.

⁷⁵ See for example, “*Caribbean Cement Company v The Attorney General and the Minister of Finance and Planning et al.*” <http://supremecourt.gov.jm/sites/default/files/judgments/Caribbean%20Cement%20Company%20Limited%20v%20The%20Attorney%20General%20and%20The%20Minister%20of%20Finance%20and%20Planning%20et%20al.pdf>

⁷⁶ “China's Economy in 2003(2004/01/09).” <http://www.china-un.ch/eng/ljzg/shjjtj/t85857.htm>

⁷⁷ Ibid

⁷⁸ See *Statement of Reasons*, REF. No. AD-01-2003. June 14, 2004. Anti-Dumping and Subsidies Commission, Jamaica: Kingston.

the contrary, China's openness to the investigation seemed to be more intended to persuade the Jamaican authorities that they did not in fact have a case.

Guatemala – Cement I and II

Mexico, at the time of this trade dispute was facing a severe recession. This resulted in “excess cement production capacity in 1995.”⁷⁹ Guatemala therefore became a cement destination to offset some of this excess production.⁸⁰ In the case of Guatemala, its local firm Cementos Progreso had monopolistic control of the cement market for most of its years since 1899.⁸¹ In 1995, it was experiencing cement shortages and this is when Mexico's Cruz Azul began exporting to Guatemala.⁸² Within six months of operations, Cruz Azul took over almost a quarter of the Guatemalan market.⁸³ Yocis shows that Cementos Progreso had concerns about its competitiveness in the open market and this led it to seek the government's protection through the Anti-Dumping Agreement.⁸⁴ At that time, Cementos Progreso was the largest cement company in Central America, while Cruz Azul was the second largest cement company in Mexico.⁸⁵

An additional consideration in the Guatemala – Cement I dispute is that Guatemala had just elected a new government the same week that the investigation was launched.⁸⁶ Mexico was therefore of the view that the Guatemalan business elite was using its close ties with the

⁷⁹ “Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico.” Report of the Panel. WT/DS156/R. 24 October 2000. Paragraph 4.92.

⁸⁰ Ibid

⁸¹ David A. Yocis. “Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations.” New York University Law Review. 2001. Volume 76, Number 4, p. 1278.

⁸² Ibid

⁸³ bid

⁸⁴ Ibid

⁸⁵ Bryan Christiansen and Muslum Basilgan. *Economic Behavior, Game Theory, and Technology in Emerging Markets*. (Pennsylvania: Business Science Reference, 2014), 362.

⁸⁶ David A. Yocis. “Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations.” New York University Law Review. 2001. Volume 76, Number 4, p. 1280.

government to protect its interests.⁸⁷ This thinking coincides with Rosendorff and Smith's arguments that countries tend to be more litigious at the WTO when they have new changes in government.⁸⁸ In response to the investigation, Cruz Azul had provided its own data, but this was not verified.⁸⁹ Mexico's contention was therefore that proper protocols were not followed in investigating and levying the antidumping duty, and so it sought recourse at the DSB. In this regard, Guatemala's new competition from Mexican cement as well as the change in the political climate precipitated its antidumping duty. For Mexico, losses from the recession and challenges from the new market that it wanted to get a foothold in made it initiate the dispute. The fact that these two countries are contiguous and have recurrent border clashes would have made it even more likely that they would formalize this dispute.

The stakes in *Guatemala – Cement II* are arguably higher than in the previous case. Guatemala's victory would have shocked Mexico, with possible ricocheting effects on Mexico's other trading relationships. With this loss and Mexico feeling that it had a valid and viable case, domestic sentiments would have been stronger to right this wrong. Guatemala, on the other hand, would feel some sense of vindication for having imposed the antidumping measure against Mexico. If there were strong ties between the business community and the government as Mexico purported, then the government would have scored political points were standing up to its more powerful neighbour and winning. This would have made it even more determined to litigate in the second case. In both instances, domestic audience costs would have therefore catalyzed litigation at the DSB.

⁸⁷ Ibid

⁸⁸ Peter B. Rosendorff and Alastair Smith. 2015. "Domestic Political Determinants of the Onset of WTO Disputes." https://wp.nyu.edu/faculty-rosendorff/wp-content/uploads/sites/1510/2015/06/May28_2015WTOOnset.pdf

⁸⁹ David A. Yocis. "Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations." New York University Law Review. 2001. Volume 76, Number 4, p. 1281.

United States – Cement

In 1989, the Southern Tier Cement Committee filed an antidumping petition to the U.S. Department of Commerce.⁹⁰ This group contended that Mexico was selling cement at below market level prices within the United States and that its producers were being negatively affected. The Department of Commerce then verified that CEMEX was indeed selling cement at less than fair market value prices.⁹¹ On August 30, 1990, the United States instituted an antidumping duty on Grey Portland Cement from Mexico.⁹²

The imposition of this antidumping duty, longevity of the dispute and later settlement, all reveal the strong domestic audience costs in this dispute. As discussed in *Availability of Other Markets*, the United States is the top consumer of Mexican cement. With the large volumes of cement that the United States buys from Mexico, this severe and sustained measure would have had deleterious effects on Mexico's cement industry. The pressures for the government to pursue litigation and fight this measure would therefore have been great. Mexico therefore fought this under GATT, NAFTA, and later the WTO. In 1992, the GATT ruled in favour of Mexico, but this judgment was not upheld by the United States.⁹³ Under NAFTA, Mexico filed 14 times regarding the cement dispute, but still did not get any termination of the duties.⁹⁴ When it filed at the DSB on January 31, 2003, that was therefore its latest attempt to have the levy removed. Mexico's persistence highlights the fact that it felt that it had a case, and needed institutional relief.

⁹⁰ "Fact Sheet: U.S.-Mexico Agreement on Cement." Office of Public Affairs. 6 March 2006.
http://www.ita.doc.gov/media/FactSheet/0306/cement_030606.html

⁹¹ Ibid

⁹² Ibid

⁹³ See for example, Lawrence, Richard. "GATT Rules for Mexico in Dumping Dispute." 15 July 1992.
http://www.joc.com/maritime-news/gatt-rules-mexico-dumping-dispute_19920715.html

⁹⁴ See for example, Gary Clyde Hufbauer and Jeffrey J. Schott. 2005. *NAFTA Revisited: Achievements and Challenges*. (Washington D.C.: Institute for International Economics, 2005), 243.

Within the United States, the influence of the Southern cement producing states is obvious. Consequently, while they were the ones to advocate for the imposition of the duty, they were the ones who also helped the United States to consider its removal. In 2006, the United States was facing cement shortages. This was mainly due to the damage caused by Hurricane Katrina and the need to rebuild. Commerce Secretary Carlos M. Gutierrez in his statement alluded to this by indicating that, "The agreement will help ensure that Gulf Coast communities have the resources to rebuild and it will also help U.S. cement producers access the Mexican market."⁹⁵ Domestic political considerations therefore played an integral part in this dispute, both for the U.S. consumers that now needed cement, and for the Mexican producers that wanted to sell it.

Table 7-5: Summary of Domestic Audience Costs at the Time of the Disputes

Case	Country	Domestic Audience Costs
<i>China - Cement</i>	China	No
	Jamaica	No
<i>Guatemala – Cement I</i>	Guatemala	Yes
	Mexico	Yes
<i>Guatemala – Cement II</i>	Guatemala	Yes
	Mexico	Yes
<i>United States - Cement</i>	United States	Yes
	Mexico	Yes

⁹⁵ "U.S. and Mexico Reach Agreement in Principle on Cement Trade." 19 January 2006. [International Trade Administration, U.S. Department of Commerce. http://trade.gov/press/press_releases/2006/cement_011906.asp](http://trade.gov/press/press_releases/2006/cement_011906.asp)

Interdependent Payoffs / Precedent Setting

Countries often litigate in the DSB because they are concerned about how the institution's rulings can be used as a bargaining tool and precedent in other cases (Davis 2012; Leal-Arcas 2007; Pauwelyn 2000; Reinhardt 1999; Fang 2010). The argument is therefore that if a prospective litigant expects that the payoffs from winning can be used elsewhere, this will increase the likelihood that it will participate in the DSB. This section therefore examines each country embroiled in a trade dispute, and what expectations it had regarding interdependent payoffs.

China – Cement

While this case did not end up at the DSB, the deliberations that the countries made can help us to ascertain whether they were concerned about precedent. On Jamaica's part, the Anti-Dumping and Subsidies Commission's independent move to investigate products from China is insightful. It reveals a national investigative authority that is fully abreast with trends in the local market. It also shows a government that is willing to institute measures to protect its domestic industry, even against a more powerful, yet important trading partner. In this vein, Jamaica therefore wanted to make it clear that it was not afraid of violating trade partners, and would act again if necessary to protect itself.

In China's case, I will argue that it was not concerned about precedent. Countries sometimes litigate against their weaker trading partners because they want to stymie potential bandwagon effects whereby all the smaller, affected economies also want to punish it with domestic, protective measures. The fact, however, that China allowed this measure to go unchallenged therefore means that it did not consider this a battle worthwhile fighting. Arguably, the costs for litigating would have outweighed the benefits of winning.

Guatemala – Cement I and II

Both Guatemala and Mexico were interested in the interdependent payoffs from these disputes. In the case of Guatemala, since it was its first usage of the Anti-Dumping Agreement, if validated through winning, this could propagate future use of the Agreement against other parties. Its victory could also be used as a deterrent against possible suits from other countries since its success would demonstrate accurate understanding and application of the Agreement. Affected countries could therefore believe that Guatemala's experience would make it more likely that it would also win in future. As it relates specifically to Mexico, the victory in the first case gave Guatemala the confidence to initiate and win cases against Mexico. For example, in June 2005, it filed a complaint against Mexico for its antidumping duties on Guatemalan steel pipes and tubes. Guatemala won this case.⁹⁶ This step, for a country that had no previous experience with the Agreement until Mexico's filing, is therefore an instance of precedent setting.

At the time of the first dispute, Mexico had initiated two cases using the Anti-Dumping Agreement. Its case against Guatemala, however, was the first time it was filing over cement. Six cases have been initiated at the WTO involving cement.⁹⁷ Of these cases, Mexico has featured in five.⁹⁸ Its victory in the second Guatemalan cement case could therefore have given it the impetus to file against other countries for imposing duties on its cement. For example, after that case, Mexico initiated two cases against Ecuador which are still in consultations, and one against the United States which was settled.⁹⁹ Mexico, it seems, was therefore bent on retaliating against

⁹⁶ See "*DS331: Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala.*" https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds331_e.htm

⁹⁷ See "*Dispute Settlement: The Disputes – Index of Disputes Issues.*" https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm

⁹⁸ Ibid

⁹⁹ Ibid

Ecuador that joined as a third party supporting Guatemala in the second case, and also to increase its ammunition against the United States. Litigating and winning against Guatemala was therefore important for Mexico.

United States – Cement

The United States and Mexico have a long litigating history in NAFTA as well as the WTO. The fact that these two countries expended so much time and resources in this case suggests that both were interested in what any final determination of the dispute might mean for their future trading relations. Moreover, since cement is so important to both countries and they both buy and sell each other the product, then any determination on who was right and wrong would affect what they did next. In this context, the result of this case was important because of the large volumes of trade that were at stake.

Table 7-6: Summary of Interdependent Payoffs

Case	Country	Interdependent Payoffs
<i>China - Cement</i>	China	Yes
	Jamaica	Yes
<i>Guatemala – Cement I</i>	Guatemala	Yes
	Mexico	Yes
<i>Guatemala – Cement II</i>	Guatemala	Yes
	Mexico	Yes
<i>United States - Cement</i>	United States	Yes
	Mexico	Yes

Expectation to Win

Sometimes the choice to litigate is based on the calculated odds of winning (Fischer 1982; Pauwelyn 2000; Maggi 2015; Reinhardt 2001). Each state therefore had different expectations about the outcome of their disputes and this informed their decision to participate or avoid the DS.

China – Cement

As outlined in Chapter Five, the Anti-Dumping Agreement has specific provisions for determining a like product, that dumping is taking place, causality and domestic industry. China did not protest Jamaica's finding of a like product though the two types of cement had different tariff headings.¹⁰⁰ It also did not contest the designation as a non-market economy and hence the use of Indonesia as a surrogate. It raised, however, objections to Caribbean Cement being treated as the domestic industry since it was also an importer of the alleged dumped product.¹⁰¹ China could have also disputed the "positive evidence" of dumping and also the margin. Additionally, China had submitted documentation about its economy and the steps that were being taken to industrialize. With only one case ever initiated at the DSB and never responding to any, I argue that China was still learning about the litigation process through its third party involvement. Since Jamaica had delineated its case with corroborating evidence, China was not yet confident of its chances of winning, and hence it did not file.

In the case of Jamaica, if China has filed against it, Jamaica's calculated chances of winning were high. In its *Statement of Reasons*, it provides details about the investigation, determination of dumping and its causation of material injury to Caribbean Cement, and also the dumping margin. Information is also given on the steps that it had to take to make a fair

¹⁰⁰ *Statement of Reasons*, REF. No. AD-01-2003. June 14, 2004. Anti-Dumping and Subsidies Commission, Jamaica: Kingston.

¹⁰¹ *Ibid*

determination in light of the known and unknown facts about the Chinese economy. In this sense, though having limited experience at the DSB, the Commission had done due diligence in its case against China.

Guatemala Cement I and II

Mexico is a much larger economy that had more experience at the DSB than Guatemala did. Additionally, Mexico also had evidence that Guatemala did not follow the dictates of the Anti-Dumping Agreement as the Panel ruled in the second case. Based on these facts, Mexico was therefore confident of winning in the first case. Guatemala also calculated that it would have won the first case. This is so because it did not back down from Mexico's filing even though it had less experience. Its estimation of its chances also grew when the third parties joined. This support also increased Guatemala's projection about the second case. The Appellate Body's ruling in the first case was that Mexico had not brought the case properly before the Panel. It did not, however, address Mexico's complaints substantively. In this regard, Mexico was therefore confident that with the matter properly before the Panel, it should win the case.

United States – Cement

States sometimes use institutions to show that they are really interested in their constituents' concerns. In this case, however, both countries were invested in not just the political implications of litigating, but in the outcome as well. Consequently, Mexico's relentless pursuit of this case in alternative forums and the United States' staunch defense of it, means that they both felt that the odds were in their favour. In the case of the United States, its power and position in GATT and NAFTA helped it to undermine rulings and keep the duty in place. Its continued litigation at the WTO therefore means that it felt that it would continue to have its way. For Mexico GATT had ruled in its favour, but the United States vetoed the result. While

NAFTA did not grant Mexico any real recompense, Mexico could have been encouraged by the earlier GATT ruling and also the restructured WTO that this time it would be also to triumph.

Table 7-7: Summary of Expectation to Win

Case	Country	Expectation to Win
<i>China - Cement</i>	China	No
	Jamaica	Yes
<i>Guatemala – Cement I</i>	Guatemala	Yes
	Mexico	Yes
<i>Guatemala – Cement II</i>	Guatemala	Yes
	Mexico	Yes
<i>United States - Cement</i>	United States	Yes
	Mexico	Yes

Availability of Alternative Forums

States strategize not only when to litigate, but also where. Busch links this argument to precedent, explicating that countries will choose the forum whose ruling is most useful in the future.¹⁰² Here, the focus is not on precedent, but on the costs associated with the different options. The thinking is that states will choose the forum that costs the least, but gives the highest payoff. Importantly, countries that have fewer dispute settlement options will find the process more cumbersome, while those with more choices are more likely to litigate. This is because more forums open up more opportunities to pursue the case. This part of the study

¹⁰² Marc L. Busch. “*Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade.*” International Organization (Autumn, 2007), Volume 61, Number 4.

therefore probes whether the disputants had other dispute settlement alternatives and how this affected their decision to use the DSB.

China – Cement

In 2003, Jamaica and China had already established diplomatic ties and bilateral cooperation on trade.¹⁰³ They had also signed several agreements on economic cooperation, though many of them did not occur until 2004 and beyond.¹⁰⁴ In this regard, they could appeal to their budding relationship to resolve this dispute. Outside of this, the WTO was the main dispute settlement organization that was available to hear trade disputes. The fact that they did not use it could mean that they considered it an expensive choice. Notably, at that time China had begun “courting” the Caribbean. Initiating trade disputes would therefore not be in its best interest.

Guatemala - Cement I and II

In 1996 and 1999, Guatemala and Mexico did not have any other forum in place for trade dispute settlement. They were, however, members of regional organizations like the Organization of American States (OAS).¹⁰⁵ It was not until 2001 that the Mexico – Northern Triangle came into force. This is a free trade agreement between Mexico, El Salvador and Guatemala, and later Honduras.¹⁰⁶ This institution’s Chapter XIX governs the dispute settlement mechanism.¹⁰⁷ Up to the point of the two cement disputes, the WTO was therefore the only appropriate forum that Mexico and Guatemala had. Their decision to use it twice suggests that the benefits of litigating were greater than the costs.

¹⁰³ See for example, “China & Jamaica: Bilateral Economic and Trade Relations, Economic and Technical Cooperation.” <http://jm.china-embassy.org/eng/zygx/jmhzt211230.htm>

¹⁰⁴ See “China & Jamaica: Bilateral Political Relations.” <http://jm.china-embassy.org/eng/zygx/zzgx/t211492.htm>

¹⁰⁵ “Member States.” Organization of American States. http://www.oas.org/en/member_states/default.asp

¹⁰⁶ “Mexico – Northern Triangle.” Foreign Trade Information System. http://www.sice.oas.org/TPD/Mex_Norte/MEX_Norte_e.ASP

¹⁰⁷ Ibid

United States – Cement

As discussed earlier, the United States and Mexico are a part of a trilateral agreement in NAFTA. The fact that Mexico filed this case there fourteen times and once under GATT means that there were other options available to them. While Mexico seemed to have exhausted appealing to NAFTA for help when it used the WTO, the fact is that they had alternative forums in which to litigate this dispute.

Table 7-8: Summary of Availability of Alternative Forums

Case	Country	Availability of Alternative Forums
<i>China - Cement</i>	China	No
	Jamaica	No
<i>Guatemala – Cement I</i>	Guatemala	No
	Mexico	No
<i>Guatemala – Cement II</i>	Guatemala	No
	Mexico	No
<i>United States - Cement</i>	United States	Yes
	Mexico	Yes

Existing Preferential and Regional Trade Agreements

This section flows from the previous one, but in a more nuanced way. Here, instead of measuring how more options might lessen the costs to litigate, this part examines the impact that having an existing bilateral agreement may have on litigation. Bown, for instance, argues that exporters in common preferential trade agreements are less likely to initiate disputes or

participate in them as third parties.¹⁰⁸ Li and Qiu also come to similar conclusions.¹⁰⁹ While focusing on armed conflict, Mansfield and Pevehouse offer similar assertions by showing the inverse relationship between commerce and conflict.¹¹⁰ In their estimation, as trade increase between countries in a preferential trade agreement, they less likely they will be to have conflicts.¹¹¹ This section therefore evaluates not just how these types of agreements, if they existed influenced China and Mexico's choices to file, but also Guatemala and the United States' decision to respond.

China – Cement

In 2010, China entered into a “Duty-Free Treatment for LDCs” preferential trading agreement (PTA), with forty-one countries.¹¹² Since Jamaica is not an LDC, it is not included in this list. China also has PTAs with Australia, Japan, Kazakhstan, New Zealand, Norway, Russia, Switzerland and Turkey.¹¹³ China is also involved in many regional trade agreements (RTAs).¹¹⁴ It does not, however, have any PTA or RTA with Jamaica.

On Jamaica's side, it has PTAs with Australia, Japan, Kazakhstan, New Zealand, Norway, Russia, Switzerland, Turkey and the United States.¹¹⁵ The Caribbean Basin Recovery Act and the Commonwealth Caribbean Countries Tariff make up its other PTAs.¹¹⁶ In terms of

¹⁰⁸ Chad P. Bown. “*Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders.*” The World Bank Economic Review. 2005. Vol. 19, No. 2, pp. 307.

¹⁰⁹ See Tan Li and Larry D. Qiu. 2014. “*Free Trade Agreements and Trade Disputes.*” <http://www.freit.org/WorkingPapers/Papers/TradePolicyRegional/FREIT775.pdf>

¹¹⁰ Edward D. Mansfield and Jon C. Pevehouse. “*Trade Blocs, Trade Flows, and International Conflict.*” International Organization Vol. 54, No. 4 (Autumn, 2000), pp. 775-808.

¹¹¹ Ibid.

¹¹² “*Duty-Free Treatment for LDCs.*” Preferential Trade Agreements. <http://ptadb.wto.org/ptaBeneficiaries.aspx>

¹¹³ “*China.*” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=156>

¹¹⁴ These include ASEAN – China; Asia Pacific Trade Agreement (APTA); Asia Pacific Trade Agreement (APTA) - Accession of China; Australia – China; Chile – China; China - Costa Rica; China - Hong Kong, China; China - Korea, Republic of; China - Macao, China; China - New Zealand; China - Singapore; Iceland – China; Pakistan – China; Peru – China and Switzerland – China. See “*China.*” List of RTAs in Force.

<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=156&redirect=1>

¹¹⁵ “*Jamaica.*” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=388>

¹¹⁶ Ibid

RTAs, Caribbean Community and Common Market (CARICOM) and EU - CARIFORUM States EPA are the ones that it is involved in.¹¹⁷ The thesis about shared PTAs reducing the incidences of conflict does not seem to hold in the China / Jamaica case. Both countries do not share any of these agreements, yet they restrained from going to the DSB. Other factors are therefore important in this dispute.

Guatemala Cement I and II

Guatemala has PTAs with Australia, Canada, Japan, Kazakhstan, New Zealand, Norway, Russia, Switzerland and Turkey.¹¹⁸ It is also involved in a number of RTAs.¹¹⁹ Of note is the Mexico – Central America, which was signed between Mexico and El Salvador, Nicaragua, Honduras, Costa Rica and Guatemala. This goods and services agreement, however, entered into force in September 2013, long after the two disputes.¹²⁰

Mexico also shares PTAs with Australia, Japan, Kazakhstan, New Zealand, Russia and Turkey.¹²¹ Like Guatemala, it is also involved in a number of RTAs.¹²² Importantly, however, these countries were not involved in a preferential or regional trade agreement at the time of their disputes. This could have factored into their cost consideration to litigate since there would be no

¹¹⁷ “Jamaica.” List of RTAs in Force.

<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=388&redirect=1>

¹¹⁸ “Guatemala.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=320>

¹¹⁹ These include Central American Common Market (CACM); Central American Common Market (CACM) - Accession of Panama; Chile - Guatemala (Chile - Central America); Colombia - Northern Triangle (El Salvador, Guatemala, Honduras); Dominican Republic - Central America; Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR); EU - Central America; Guatemala - Chinese Taipei; Mexico - Central America; Panama - Guatemala (Panama - Central America). See “Guatemala.” List of Notified RTAs in Force. <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=320&redirect=1>

¹²⁰ Ibid

¹²¹ “Mexico.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=484>

¹²² These include Chile – Mexico; Colombia – Mexico; EFTA – Mexico; EU – Mexico; Global System of Trade Preferences among Developing Countries (GSTP); Israel – Mexico; Japan – Mexico; Latin American Integration Association (LAIA); Mexico - Central America; Mexico – Panama; Mexico – Uruguay; North American Free Trade Agreement (NAFTA); Pacific Alliance; Peru – Mexico and Protocol on Trade Negotiations (PTN). “Mexico.” List of Notified RTAs in Force.

<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=484&redirect=1>

formal regional organization mediating their grievances. The absence of a PTA and RTA also eliminated the threat of regional sanctions, making them free to proceed to the DSB.

United States – Cement

Mexico's PTAs and RTAs are already listed so only those that the United States is involved in will be discussed here. It is party to PTAs such as Generalized System of Preferences – United States, African Growth and Opportunity Act, Andean Trade Preference Act, Caribbean Basin Economic Recovery Act, Former Trust Territory of the Pacific Islands and Trade Preferences for Nepal.¹²³ In all of these, the United States is the provider of the preferences to the countries.¹²⁴ It is also involved in several RTAs.¹²⁵ Even with all these PTAs and RTAs, however, the United States and Mexico only share NAFTA. This shared agreement did not stop them from seeking recourse within that RTA, and also at the DSB. In essence, countries with trading agreements may choose to litigate or avoid participation in the DSB. The particular case at hand, domestic pressures as well as other costs associated with the process are all important considerations as states decide what to do.

¹²³ “United States.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=840>

¹²⁴ Ibid

¹²⁵ These include Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR); Korea, Republic of - United States; North American Free Trade Agreement (NAFTA); United States – Australia; United States – Bahrain; United States – Chile; United States – Colombia; United States – Israel; United States – Jordan; United States – Morocco; United States – Oman; United States – Panama; United States – Peru and United States – Singapore. See “United States.” List of Notified RTAs in Force. <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=840&redirect=1>

Table 7-9: Summary of Existing PTAs / RTAs at the Time of the Disputes

Case	Country	Existing PTAs / RTAs with Disputant
<i>China - Cement</i>	China	No
	Jamaica	No
<i>Guatemala – Cement I</i>	Guatemala	No
	Mexico	No
<i>Guatemala – Cement II</i>	Guatemala	No
	Mexico	No
<i>United States - Cement</i>	United States	Yes
	Mexico	Yes

Complex Interdependence

The international political economy is interconnected. Often, what obtains are instances of asymmetric interdependence whereby one side is needier and more susceptible to manipulation from the less reliant party. Two types of complex interdependence are therefore present – vulnerability and sensitivity. States that are “vulnerable” suffer the costs from a total breakdown in the relationship, while “sensitive” trading partners are affected by changes within the relationship.¹²⁶ In relationship to trade disputes, the more vulnerable a country is, the less likely it is to sue. This is because it fears what it may lose if the more capable state retaliates. Here, I therefore evaluate whether each disputant was “vulnerable” or “sensitive,” and how this informed the decision to litigate or not use the DSB.

¹²⁶ See Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence: World Politics in Transition*, 3rd ed., (Boston: Little-Brown, 1989), 3-32.

China – Cement

In 2017, Jamaica is vulnerably interdependent on aid from China. In 2003, this was also the case. The Chinese government reports, for instance, that in 2004, China exported US\$126.13 million worth of goods to Jamaica. This represented a 23.6% increase from 2003.¹²⁷ In terms of imports, products imported from Jamaica valued US\$269.85 million, which represented a 155.9% growth from 2003.¹²⁸ The context to this trade is that China was undergoing increased trade liberalization and was also in search of new trading partners. Its quest to be a world power would also mean that it would forge agreements with countries that historically received bilateral aid from the United States. Jamaica was therefore an ideal location based on its geopolitical location, and also the types of goods that it produces. By 2012, Jamaica had a trade deficit of US\$755.4 million with China.¹²⁹ Vulnerability interdependence refers to the costliness of foregoing a relationship. Since in 2003 both countries were on the eve of increased, formal relations, I posit that China had sensitivity interdependence, while Jamaica was vulnerably interdependent. This is because though China was importing more than it was exporting, it had more market access and trading partners. It therefore needed Jamaica as a trading partner, but Jamaica would suffer more if the relationship were to be severed than China would.

Guatemala Cement I and II

Guatemala, like in Jamaica's case is vulnerably interdependent on Mexico. This is due to the Mexico – Northern Triangle Free Trade Agreement that was signed in 2001. Mexico is its second leading import country, receiving US\$2.01 billion in goods in 2015.¹³⁰ Mexico, however,

¹²⁷ "China & Jamaica: Bilateral Economic and Trade Relations, Economic and Technical Cooperation." <http://jm.china-embassy.org/eng/zygx/jmhzt211230.htm>

¹²⁸ Ibid

¹²⁹ Julian Richardson. "Jamaica Now Top Caribbean Trading Partner for China." The Jamaica Observer. 23 August 2013. http://www.jamaicaobserver.com/business/Jamaica-now-top-Caribbean-trading-partner-for-China_14928589

¹³⁰ "Guatemala." Observatory of Economic Complexity. <http://atlas.media.mit.edu/en/profile/country/gtm/>

is not one of Guatemala's top exporting countries.¹³¹ Mexico, in 2015, was the world's 10th leading export economy, with the United States, Canada, China, Germany and Japan as its main export markets.¹³² The United States, China, Japan, South Korea and Japan are its top sources for imports.¹³³ Mexico's size and Guatemala's reliance on it for imports therefore make Guatemala vulnerably interdependent. At the time of the trade disputes, however, this was not the case. Mexico was still a powerful economy, but there was not much trade integration until after the disputes in 2001 when the RTA was signed. Guatemala, for example, complained that it was not a traditional market for Mexican cement until Mexico's recession. Guatemala also had its position as the leading economy in Central America and was more reliant on trade from the United States. Consequently, though the nature of their relationship has now changed significantly, at the time of their disputes, these states were sensitivity interdependent.

United States – Cement

The United States and Mexico, at the onset of their dispute and at present, have sensitivity interdependence. With the exception of four years, from 1990 (the date of the antidumping levy), to 2017, the United States has had a trade deficit with Mexico, importing more than it exports.¹³⁴ Mexico in turn, is a top importer of goods such as machinery, vehicles, agriculture, plastics and mineral fuels from the United States.¹³⁵ In this regard, both need each other to be in its best economic shape and are therefore sensitivity interdependent.

¹³¹ Ibid

¹³² "Mexico." Observatory of Economic Complexity. <http://atlas.media.mit.edu/en/profile/country/mex/>

¹³³ Ibid

¹³⁴ "Trade in Goods with Mexico." Foreign Trade. <https://www.census.gov/foreign-trade/balance/c2010.html>

¹³⁵ "Mexico: U.S.-Mexico Trade Facts." Office of the United States Trade Representative. <https://ustr.gov/countries-regions/americas/mexico>

Table 7-10: Summary of Complex Interdependence between the Disputants

Case	Country	Sensitivity Interdependence	Vulnerability Interdependence
<i>China - Cement</i>	China	Yes	No
	Jamaica	No	Yes
<i>Guatemala – Cement I</i>	Guatemala	Yes	No
	Mexico	Yes	No
<i>Guatemala – Cement II</i>	Guatemala		
	Mexico	Yes	No
<i>United States - Cement</i>	United States	Yes	No
	Mexico	Yes	No

Table 7-11: Summary of Dispute Settlement Costs and their Effects on DSB Participation

Variables	Jamaica	China	Guatemala I	Mexico I	Guatemala II	Mexico II	United States	Mexico III
Contested Good Contributes Significantly to GDP	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Availability of Alternative Markets	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Ability to Enforce Countermeasures	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Reputational Costs	No	Yes	No	Yes	Yes	Yes	Yes	Yes
Reputational Benefits	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Domestic Audience Costs	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Interdependent Payoffs	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Expectation to Win	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
Availability of Alternative Forums	Yes	Yes	No	No	No	No	Yes	Yes
Existing PTAs / RTAs	No	No	No	No	No	No	Yes	Yes
Sensitivity Interdependence	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Vulnerability Interdependence	Yes	No	No	No	No	No	No	No
Participation	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Result	N/A	N/A	Win	Lose	Lose	Win	Settlement	Settlement

“Quantifying the Qualitative”: How Do Dispute Settlement Costs Affect Participation in the Dispute Settlement Body?

Chapter Six evaluated legal capacity costs through the information theory method. This chapter picks up this analysis by looking at the other dispute settlement costs by comparing the cases.

Quantify: Setting up the Truth Table for Comparative Case Analysis

Table 7-12: Truth Table for Legal Capacity Costs and their Effects on Participation in the Dispute Settlement Body¹³⁶

Source: Gaubatz, Kurt Taylor and Katya Drozdova. 2016. Quantifying the Qualitative Excel Implementation. June 7, 2017. URL:

	Sig. GDP	Alt. Marks.	Can Enforce	Rep. Costs	Rep. Benefits	Dom. Aud. Costs	Interd. Payoffs	Ex. Win	Alt. Forums	PTAs/RTAs	Sens. Interd.	Vul. Interd.	Outcome
Jamaica	0	1	1	0	1	1	1	1	1	0	0	1	0
China	1	1	1	1	1	1	1	0	1	0	1	0	0
Guat. 1	1	1	1	0	1	1	1	1	0	0	1	0	1
Mex. 1	1	1	1	1	1	1	1	1	0	0	1	0	1
Guat. 2	1	1	1	1	1	1	1	1	0	0	1	0	1
Mex. 2	1	1	1	1	1	1	1	1	0	0	1	0	1
U.S.	1	1	1	1	1	1	1	1	1	1	0	1	1
Mex. 3	1	1	1	1	1	1	1	1	1	1	0	0	1

<https://study.sagepub.com/drozdova>

¹³⁶ See Appendix 2b for full results of the comparative case analysis with dispute settlement costs.

Count: Calculating the Probabilities

Table 7-13: Joint Probabilities of Legal Capacity Costs and Participation in the Dispute

Settlement Body

	FACTORS Independent Variables X	$p(x_i = 1, y = 1)$ <i>a</i>	$p(x_i = 0, y = 1)$ <i>b</i>	$p(x_i = 1, y = 0)$ <i>c</i>	$p(x_i = 0, y = 0)$ <i>d</i>
x_1	Contested Good Contributes Significantly to GDP	0.75	0.00* (0.000001)	0.125	0.125
x_2	Availability of Alternative Markets	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_3	Ability to Enforce Countermeasures	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_4	Reputational Costs	0.65	0.125	0.125	0.125
x_5	Reputational Benefits	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_6	Domestic Audience Costs	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_7	Interdependent Payoffs	0.75	0.00* (0.000001)	0.25	0.00* (0.000001)
x_8	Expectation to Win	0.75	0.00* (0.000001)	0.125	0.125
x_9	Availability of Alternative Forums	0.25	0.5	0.25	0.00* (0.000001)
x_{10}	Existing PTAs / RTAs	0.25	0.5	0.00* (0.000001)	0.25
x_{11}	Sensitivity Interdependence	0.5	0.25	0.125	0.125
x_{12}	Vulnerability Interdependence	0.125	0.625	0.125	0.125

Source: Gaubatz, Kurt Taylor and Katya Drozdova. 2016. Quantifying the Qualitative Excel Implementation. June 7, 2017. URL:

<https://study.sagepub.com/drozdova>

Joint probability = $p(x, y) = \text{count}(x, y) / n$ ¹³⁷

*the negligible value 0.000001 is substituted for pure zero values in order to ensure that logarithms are defined.¹³⁸

¹³⁷ Katya Drozdova and Kurt Taylor Gaubatz. *Quantifying the Qualitative: Information Theory for Comparative Case Analysis*. (London: Sage Publications, 2017), 66.

¹³⁸ Ibid

Compute: Computing the Uncertainty Measures

Table 7-14: Uncertainty Measures of Legal Capacity Costs and Participation in the Dispute Settlement Body

	FACTORS Independent Variables X	H (Y)	H (Y / X)	I (Y; X)	Direction
x_1	Contested Good Contributes Significantly to GDP	0.8110	0.5180	0.2930	Positive
x_2	Availability of Alternative Markets	0.8110	0.8110	0.0000	Positive
x_3	Ability to Enforce Countermeasures	0.8110	0.8110	0.0000	Positive
x_4	Reputational Costs	0.8110	0.7380	0.0730	Positive
x_5	Reputational Benefits	0.8110	0.8110	0.0000	Positive
x_6	Domestic Audience Costs	0.8110	0.8110	0.0000	Positive
x_7	Interdependent Payoffs	0.8110	0.8110	0.0000	Positive
x_8	Expectation to Win	0.8110	0.5180	0.2930	Positive
x_9	Availability of Alternative Forums	0.8110	0.5000	0.3110	Negative
x_{10}	Existing PTAs / RTAs	0.8110	0.6890	0.1220	Negative
x_{11}	Sensitivity Interdependence	0.8110	0.7960	0.0150	Positive
x_{12}	Vulnerability Interdependence	0.8110	0.7380	0.0730	Negative

Source: Gaubatz, Kurt Taylor and Katya Drozdova. 2016. Quantifying the Qualitative Excel Implementation. June 7, 2017. URL:

<https://study.sagepub.com/drozdova>

Compare: Understanding the Outcomes

Table 7-14 contradicts some of the extant literature on DSB participation. It shows, for instance, that with reduced uncertainty, Availability of Alternative Markets (x_2); Ability to Enforce Countermeasures (x_3); Reputational Benefits (x_5); Domestic Audience Costs (x_6); and Interdependent Payoffs (x_7) do not provide any information about when states might use the DSB. All of these have a 0.0000 chance of predicting participation. Table 7-13 shows, however, that there is a negative relationship between Availability of Alternative Forums (x_9) and using the DSB. This means that the more mediatory states are a part of, the less likely they are to use the DSB. This finding, however, is tempered by the fact that it has a 31% chance of predicting DSB litigation. Based on the model, the other two indicators of participation in the DSB are Contested Good Contributes Significantly to GDP (x_1) and Expectation to Win (x_8). While these have a positive relationship with the dependent variable, the predictability power is a weak 29%. The level of certainty is therefore low.

The comparative case analysis is specific to the cases that it probes. Different variables and countries can therefore produce different results. Based on these four cement cases, the model shows general, positive results between many of the variables and expected DSB participation. There is, however, too much uncertainty to say definitively that with these present, there is a high chance that countries will use the DSB.

Conclusion

In the final analysis, this chapter has examined dispute settlement costs and how they influence states' decisions to participate in the DSB or forego that option. The chapter builds on the legal capacity costs outlined in Chapter Six, and evaluates the other costs that are associated with the process. As a starting point, it agrees with Bown's work that international political

economy costs may enhance or impede DSB participation. As a departure from Bown, however, this study considers not just how costs affect filing and third party litigation, but also responding to formal complaints. Costs, as discussed in this chapter, are the aggregation of delta from the formal model in Chapter Four. Delta is therefore disaggregated in order to evaluate DSB usage. Variables such as the value of the good, ability to enforce countermeasures, availability of different markets and forums, reputational costs and benefits, interdependent payoffs, expected utility and complex interdependence are considered.

The choice to use the DSB is relative to the good and the two states that are embroiled in the dispute. The study therefore finds that China failed to litigate against Jamaica because it was cementing their trading relationship, had other viable customers and was not confident of victory. In the case of Guatemala and Mexico, high domestic audience costs, expectations of winning and ability to impose countermeasures factored in their decision making. For the United States and Mexico, the gains from trade for the contested good as well as domestic audience costs catalyzed their participation in multiple forums and the DSB. In all cases, the countries weighed the benefits against the projected costs and chose the option that gave the greater payoff. In regards to China, litigating would have been more costly than accepting the levy. For the other disputants the benefits were vested in litigating and securing a win and so they pursued litigation.

When the cases are comparatively assessed, the information theory model shows that with reduced uncertainty measures, states' expectation to win and the good's contribution to GDP are the likely predictors that they will litigate. The model also shows a negative relationship between alternative forums and DSB participation. This suggests that the more options countries have, the lesser the chances that they will use the DSB. These findings are specific to the cases that were

analyzed. They do, however, provide a parsimonious assessment of how these costs associated with the dispute settlement process are useful relative to the information, as opposed to those that are not.

CHAPTER VIII

THE PUZZLE OF NON-PARTICIPATORY MEMBERSHIP - DISCUSSIONS AND CONCLUSIONS

Introduction

This research probes non-participatory membership in robust institutions. The World Trade Organization's Dispute Settlement Body is the surrogate for institutions. This study has acknowledged that not all countries use the DSB, and that some may never need to. Consequently, they still engage and continue to benefit from the global system of trade governance that the WTO provides. There are, however, cases where countries have legitimate cases, but have refrained from using the recourse that is available to them. Those are the cases that this study focuses on, calling them the puzzle of non-participatory membership.

As outlined in Chapter One, non-participatory membership can take place in three main ways. These are pure non-participatory membership, strategic bargaining and free riding. Pure non-participatory membership can occur in two ways. In the first instance, states avoid institutional dispute settlement because they can afford to resolve the conflict on their own. They may do this through tit-for-tat strategies, or through conciliatory measures with the affected party. Some states, however, engage in non-participatory membership because they simply cannot afford the costs that are associated with the process. Countries may therefore practice non-participatory membership by choice or through circumstance. In strategic bargaining, states avoid the institution, but evoke its authority as a bargaining tool and to elicit concessions from their trading partners. Free riders are those that have authentic cases, but avoid dispute settlement because they want others to bear the costs of litigation while they reap the benefits of rulings. In

this vein, states have varying reasons for opting to stay outside the DSB whenever a trade dispute arises.

This study is primarily focused on those countries that do not use the DSB because they are inhibited by exorbitant costs. It does, however, evaluate the other incidences of non-participatory membership because they form parts of the broader puzzle that the research probes. In an attempt to represent the world system of trade and dispute settlement, the project uses a formal model that depicts the strategies, payoffs and outcomes of two trading partners as they move sequentially and oscillate between free trade and protectionism; DSB and No DSB; and litigate and acquiesce. The empirical implications of the model are then tested with four cases. Variables representing costs are then comparatively assessed through the information theory method to see how well they predict litigation under conditions of reduced uncertainty.

The four cases that are used are *China – Cement*, which is a dispute between China and Jamaica; *Guatemala – Cement I* and *II*, two disputes between Guatemala and Mexico; and *United States – Cement*, a longstanding conflict between the United States and Mexico. These cases were chosen because they feature the same good, which is cement. All the countries also evoked the same WTO provision, the Anti-Dumping Agreement. These countries have power disparities, but their trajectories are not what those dynamics predict. For example, China does not file against Jamaica's anti-dumping duty, though it challenges the procedures for determination. Additionally, it does not retaliate with countermeasures or by withdrawing bilateral aid. Guatemala, too, accepts Mexico's threat to initiate a dispute and wins. The United States and Mexico take their case to the institution and then work out a solution on their own. The choice to litigate or avoid the DSB as well as the divergent outcomes therefore make these cases worth studying. As this study concludes, it is therefore important to discuss some of the

highlights of the cases. I will also discuss the project's contribution to the extant literature, limitations, recommendations and the next step for this research.

Why Did Guatemala's Case Proceed to the DSB While China's Did Not?

Guatemala's participation in the DSB as a response to Mexico's challenge and China's avoidance are two noteworthy observations. Why did these two countries respond differently?

Table 8-1: Summary of Litigation Costs that China and Guatemala Faced to Use the DSB

Dispute Settlement Costs	CHINA	GUATEMALA	Legal Capacity Costs	CHINA	GUATEMALA
Contested Good Contributes Significantly to GDP	Yes	Yes	Membership in WTO Negotiation Groups	Yes	Yes
Availability of Alternative Markets	Yes	Yes	Membership in Int'l Dispute Settlement Organizations	Yes	Yes
Ability to Enforce Countermeasures	Yes	Yes	Membership in Regional Dispute Settlement Organizations	No	Yes
Reputational Costs	Yes	No	ACWL Membership	No	No
Reputational Benefits	Yes	Yes	DSB as a Complainant	Yes	Yes
Domestic Audience Costs	Yes	Yes	DSB as a Respondent	No	No
Interdependent Payoffs	Yes	Yes	DSB as a Third Party	Yes	Yes
Expectation to Win	No	Yes	Anti-Dumping Agreement Domestically	Yes	No
Availability of Alternative Forums	Yes	No	Anti-Dumping Agreement at the DSB (Complainant)	No	No
Existing PTAs / RTAs	No	No	Anti-Dumping Agreement at the DSB (Respondent)	No	No
Sensitivity Interdependence	Yes	Yes	Anti-Dumping Agreement at the DSB (Third Party)	Yes	No
Vulnerability Interdependence	No	No	Third Party Support	N/A	Yes

Table 8-1 contains the summary of the legal capacity and other associated dispute settlement costs for China and Guatemala at the time of their disputes. These states had recently joined the WTO and this makes their decisions instructive. In terms of commonalities, in both countries, the good contributed significantly towards GDP, they had alternative markets, could enforce countermeasures and could use that dispute to set a precedent in other cases. These similarities, however, do not depict the whole picture. We see, for example, that Guatemala was not concerned about reputational costs since it was a first time defendant, while China had to consider the consequences of filing against a weaker state and losing.

In the legal capacity debate, history of using the DSB is seen as indicator that countries will litigate. Here, both countries are fairly even. Guatemala had filed twice as a co-complainant, while China had complained once against the United States. Interestingly, however, China had used the Anti-Dumping Agreement domestically and as a third party at the DSB, while Guatemala had no experience with the Agreement. This is important because if experience should lower legal capacity costs, Guatemala would have had a higher burden to respond than China would have to file. Guatemala's stance therefore means that there were other costs and benefits that were included, which made the choice of going to the DSB advantageous.

One of the arguments in Chapter Seven is that countries that share free trade agreements are less likely to have formal trade disputes against each other. At the time of their disputes, China had no PTAs or RTAs with Jamaica; neither did Guatemala have any with Mexico. If this argument is valid, then we have two opposite findings here. We see the absence of a free trade agreement promoting DSB usage in one case, but inducing non-participation in the other. This means that this factor is insufficient in explaining the variation in outcome. One consideration could be the fact that Guatemala and Mexico had no alternative forum to hear their grievance

since they did not set up their RTA until 2001, while China and Jamaica had been strengthening their relationship with cooperation in economics and trade. In this regard, China and Jamaica may have had an opportunity to resolve their conflict and forego the DSB alternative, while Mexico and Guatemala did not since Mexico had just started to export cement to Guatemala.

Both Guatemala and China had sensitivity interdependence when their disputes emerged. Guatemala was more reliant on trade with the United States, while China had many other trading partners. Countries that do not suffer greatly from foregoing a relationship should have no reservations to litigate. I argue here, as in Chapter Seven, that whereas China had alternative markets, the timing of this dispute lessened the chances that it would file against Jamaica. This is because China was increasing its global partners and found Jamaica to be of geostrategic importance. With it being on the eve of signing several new agreements and deepening its relationship with Jamaica, filing would have been anachronistic.

A possible counter argument is the fact that Jamaica's duty was so small relative to China's market share that it did not make economic sense for China to file. That point is valid. Litigation, however, is not always about the expected gain. Larger states sometimes file against weaker states to punish them and also to deter similar cases. China could therefore have considered filing in light of the reputation that it wanted to create. In 2003, however, China may not have developed a culture of litigation and so it avoided the DSB. It is important though, to balance this point with an observation. China, in the fifteen cases that it has initiated cases at the DSB, has never complained against a low or middle income country. All its grouses have been against the United States and the European Union.¹ These are its two largest markets for exports. This fact suggests that China is not interested in cases that do not have huge trade volumes at stake. If this is the case, then this would be an ironic benefit of being a small state. Since larger

¹ "Disputes by Member: China." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

economies may not pursue litigation against smaller states, these weaker countries may be able to regularly breach the WTO's provisions and get away with it. More capable states do not have this luxury.

Guatemala's decision to respond to Mexico can be largely attributed to domestic politics. With the importation of Mexican cement, its company Cementos Progreso was facing competition. This is compounded by the fact that these countries are contiguous so the effects of the competition would be immediately seen and felt. Additionally, Chapter Seven delineates the political changes and how this increased the country's resolve to litigate. China did not have this type of domestic pressure. The Chinese government was more interested in demonstrating its compliance than in filing. In this regard, when all the variables are considered, domestic tensions plus proximity with Mexico would increase the chances that Guatemala would use the DSB, even with little experience.

Third Parties and their Strategic Participation in the Trade Disputes

Guatemala – Cement I and II

As in the case for countries that engage the DSB as a complainant or respondent, states that become third party litigants also factor in the discussion on non-participatory membership. Chapter Six began this discussion by highlighting the fact that of the Central American countries, only El Salvador and Honduras joined in support of Guatemala. Both countries alluded to their economic and cultural ties, as well as their desire to see their domestic interests protected by the WTO. This suggests that these economies may have felt prone to dumped goods from Mexico, and wanted to protect themselves. In this regard, interdependent payoffs would be a reason for countries participate in the DSB as third party litigants. This could be because they have a

similar industry that is being affected and want to use the ruling of the current case as a deterrent to continued violation.

The United States and Canada also reserved their third party rights. Here, I argue that because of their NAFTA relationship and importance of cement to their economies, both of these countries joined the dispute. The United States, with its levy on Mexico firmly in place at this time, was more invested in the dispute. In this sense, the United States would also be concerned about precedent, but in a different way. In this case, it may have been interested in how a win for Guatemala's antidumping duty on Mexico could be used as validation for its own levy. This makes sense if one considers the fact that the United States argued against Mexico in this first case. Canada's no submission on the other hand, can be seen as posturing. Its reservation of its third party rights indicate that it was making sure that all concessions made in the dispute would also apply to it. Legal capacity costs. Canada's decision to not make any submissions could therefore mean that it assessed the situation and felt that it was in its best interest not to proceed. This may also explain why it did not participate in the second case. Non-participation may therefore be the result of an assessment of whether the third party stands to benefit from the outcome.

Chapter Seven continues the discussion on dispute settlement and costs by showing that Belize, Nicaragua, Costa Rica and Nicaragua all buy cement from both Mexico and Guatemala. Why then did these countries not participate in the two trade disputes while Honduras and El Salvador did? Belize has never been a complainant or respondent at the DSB. It has, however, been a third party to four disputes.² All of these occurred after the two cement disputes under consideration. This means that at *Guatemala – Cement I* and *II*, Belize had never used the DSB in any capacity. In the case of Nicaragua, at the time of both disputes, it had been a third party in

² "Disputes by Member: Belize." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

one dispute, but never as a complainant or respondent.³ Costa Rica had participated in one case as a complainant and 3 as a third party,⁴ while Panama had filed one case and joined as a third party to 3.⁵ How then did these non-participants compare with the states that actually joined as third party litigants?

At the point of the Guatemala – Mexico cement trade disputes, El Salvador had never used the DSB as a complainant or respondent. It had also been a third party in just one case.⁶ Honduras had no respondent or third party experience, but it had been a co-complainant in two disputes (DS16 and DS27). The relative little DSB experience that both the third party participants and non-participants had suggests that this was not the reason why some joined and the others did not. One important observation is that when the first cement case was filed, Guatemala and Honduras had the same amount of experience as a complainant. They had co-complained against the European Communities in protection of their banana regime in DS16 and DS27. While this shared history may have given Honduras an inclination to support Guatemala's causes, it is still not clear why El Salvador joined.

One indication of the support that Guatemala may have received from Honduras and El Salvador is the fact that they are members of the Central American Common Market (CACM).⁷ This organization integrates the economies of these countries. Nicaragua and Costa Rica are also members.⁸ The economic closeness that Guatemala, El Salvador and Honduras have may have therefore prompted the latter two to participate in the disputes. Since Guatemala was the first Central American country to use the Anti-Dumping Agreement, Nicaragua and Costa Rica may

³ "Disputes by Member: Nicaragua." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

⁴ "Disputes by Member: Costa Rica." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

⁵ "Disputes by Member: Panama." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

⁶ "Disputes by Member: El Salvador." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

⁷ "Central American Common Market (CACM)." The Editors of Encyclopædia Britannica. <https://www.britannica.com/topic/Central-American-Common-Market>

⁸ Ibid

have found the process too expensive, or were free riding. Belize and Panama may also have been doing the same.

Ecuador and the European Communities participated as third parties in Guatemala – Cement *II*. Then, Ecuador had participated in the DS27 case as a co-complainant, had been a third party to 2 disputes, but had no respondent experience.⁹ The European Communities, on the other hand, had participated in numerous disputes.¹⁰ This country and customs union participated in the dispute because of interdependent payoffs. In the case of Ecuador, it imported cement from Mexico. By October of 1999, Mexico filed a case against it. Like Guatemala, its first two defended cases were against Mexico for alleged dumped cement.¹¹ In the case of the European Communities, it is a major producer of cement. Figures from 2006, show that its output for that year amounted to 10.5% of total global production.¹² As mentioned in Chapter Six, in its submission to the Panel, the EC was concerned about the correct interpretation and application of Anti-Dumping Agreement. This suggests that with its wide consumer base, the EC wanted to be clear on how the Agreement should be used in order to protect itself from prospective suits.

United States - Cement

In this trade dispute, Canada, China, Chinese Taipei, European Communities and Japan all reserved their third party rights.¹³ Since this case was settled, none of these countries gave any submissions. Their willingness to formally join this dispute, however, gives us some indication of what their interests might have been. Canada is one of the world's leading cement producers.

⁹ "Disputes by Member: Ecuador." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹⁰ "Disputes by Member: European Union (formerly EC)."

https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹¹

¹² "Cement and Lime." European Commission. https://ec.europa.eu/growth/sectors/raw-materials/industries/non-metals/cement-lime_en

¹³ "DS281: United States - Anti-Dumping Measures on Cement from Mexico."

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds281_e.htm

The United States is its top destination for cement exports, while Mexico is at a distant 73rd.¹⁴ As a member of NAFTA, Canada would therefore be fully aware of the longstanding dispute between the United States and Mexico. Importantly, since Canada sells the United States so much cement, it would be concerned about how the ruling in this case might affect its trading of cement with the United States.

China, Chinese Taipei and Japan are also leading cement manufacturers. In China's case, the United States is its second largest cement destination, while Mexico is at 68th.¹⁵ For Chinese Taipei, the United States is its 4th main buyer,¹⁶ while Japan sells more cement to the United States than it does to Mexico.¹⁷ These countries / customs union therefore had major interests in the outcome of this dispute. This was due to their trade with both countries, and especially with the United States.

Notably, El Salvador and Honduras did not join this dispute. This gives credence to the thought that countries are more likely to join as a third party if they share a regional trade agreement with one of the litigants. This shows all the more than these Central American countries had closer ties with Guatemala and not Mexico, and this explains why they participated in the *Guatemala – Cement* disputes. In essence, third party participation may be a function of the good's value to an economy, interdependent payoffs, and closeness with one of the

¹⁴ "List of Importing Markets for a Product Exported by Canada. Product: 2523 Cement, incl. cement clinkers, whether or not coloured." Trade Map – International Trade Statistics.
[http://www.trademap.org/\(X\(1\)S\(1vz4jqa00d550f55bukilgzt\)\)/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|124|||2523||4|1|1|2|2|1|2|1|1](http://www.trademap.org/(X(1)S(1vz4jqa00d550f55bukilgzt))/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|124|||2523||4|1|1|2|2|1|2|1|1)

¹⁵ "List of Importing Markets for a Product Exported by China." Product: 2523 Cement, incl. cement clinkers, whether or not coloured. Trade Map – International Trade Statistics.
http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|156|||2523||4|1|1|2|2|1|2|1|1

¹⁶ "List of Importing Markets for a Product Exported by Taipei, Chinese." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
[http://www.trademap.org/\(X\(1\)S\(1vz4jqa00d550f55bukilgzt\)\)/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|490|||2523||4|1|1|2|2|1|2|1|1](http://www.trademap.org/(X(1)S(1vz4jqa00d550f55bukilgzt))/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|490|||2523||4|1|1|2|2|1|2|1|1)

¹⁷ "List of Importing Markets for a Product Exported by Japan." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
[http://www.trademap.org/\(X\(1\)S\(1vz4jqa00d550f55bukilgzt\)\)/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|392|||2523||4|1|1|2|2|1|2|1|1](http://www.trademap.org/(X(1)S(1vz4jqa00d550f55bukilgzt))/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|392|||2523||4|1|1|2|2|1|2|1|1)

disputants. Non-participation on the other hand, may be due to disinterest, fear of retaliation, or free riding.

Contributions to the Extant Literature

There are several important and unique contributions that this study makes to the field of international relations generally, and to the international political economy literature.

1. From a theoretical standpoint, this research fills a gap between realism and neoliberal institutionalism. These schools of thought challenge the efficacy and agency of institutions. This study shows, however, that both divides do not consider that institutions could be working well, but countries choose not to participate in them. Non-participatory membership is therefore overlooked and is addressed by this project.
2. Chapter Six discusses legal capacity costs and how they are conventionally measured with number of lawyers in Geneva and at home, plus experience at the DSB. This study re conceptualizes legal capacity by adding to those measurements countries' capabilities up to the time of their disputes and not their legal capacity broadly. This specificity to the disputes' time is also used for states' history at the DSB as a complainant, respondent and third party. The assessment of legal capacity also incorporates states' experience with the Agreement that they are evoking, both at the domestic and international levels. An additional consideration is that other institutions can build legal capacity. Incorporating membership in WTO negotiation groups as well as regional and international dispute settlement organizations are therefore unique measurements of legal capacity.
3. The extant literature on DSB participation is mainly focused on disparities in usage between developed and developing countries. Here, the prevailing idea is that smaller economies are not usually complained against. This study, however, assumes that weaker

states can and will be sued, so it measures their participation as both complainants and defendants.

4. Many of the studies on the WTO's dispute settlement process concentrate on how the general provisions for reprieve frustrate countries that want to use them. This study departs from those studies by highlighting the specific Agreement that the countries evoked and how they struggle with its technicalities. Hence, while evaluating the Anti-Dumping Agreement itself and not just general provisions for recourse, this project adds to that literature.
5. Many of the studies on participation in the DSB are longitudinal. By using a case study analysis that is centered on the same good and the same Agreement, this project provides a new look on dyads in a smaller and more focused way.
6. There are several ways in which costs can be measured. This study adds to that methodology by using a formal model that represents costs as a composite variable.
7. An important contribution that this study makes is the methodological assessment of costs. Legal capacity and the other associated costs are therefore assessed through the information theory method. This method measures the likelihood that litigation will occur given knowledge of the variables. The comparative case analysis through the information theory method is therefore a valuable contribution that this study makes. This method can be replicated to determine the chances or outcomes under conditions of reduced uncertainty.

Outcomes Predicted by the Formal Model

The formal model has several equilibrium solutions that illuminate the strategic use of the DSB in light of costs. These are:

- a. Free Trade, No DSB; Free Trade, No DSB
- b. Protect, No DSB; Protect, No DSB
- c. Protect, No DSB, DSB, Acquiesce; Free Trade, No DSB, DSB, Acquiesce
- d. Protect, DSB, Acquiesce; Protect, DSB, Acquiesce
- e. Protect, No DSB; Free Trade, No DSB

Equilibrium *a* is the ideal solution. Since this project examines trade disputes, this solution was not evident in the cases. The mutual protectionism and avoidance of the DSB would have been closest to the China case. Since China did not retaliate, this equilibrium solution was also not observed.

At face value, equilibrium *d* seems to mirror the United States – Mexico trade dispute. This is because they both engaged in some form of protectionism, used the DSB and then came to a mutually agreed solution where the duty was withdrawn. This, however, is one of the limitations of the model – it does not allow for states to change strategies. In the model, litigation and acquiescence are dichotomous choices. In the real life situation, however, both states litigated first, then they decided to acquiesce. In this sense, the model predicts this outcome, but only if states are allowed to change their strategies before they make a final choice.

While equilibrium *d* may be at odds with the outcome of the *United States – Cement* case, the use of the institution here is important. Arguably, these countries faced similar costs to use the institution and could also retaliate outside. The fact that Mexico kept seeking institutional recourse over so many years means that the type of good is important. Additionally, this also means that the domestic audience, economic and reputational costs were so high that both countries felt that the multilateral institution was the best forum to settle their grievances. One could argue though, that the fact that these countries came up with their own solution and then

informed the institution means that they could do without it. This is not the case. In fact, it is the presence of the institution that provided the context for these states to settle and not act outside. In this regard, a significant good can make states more likely to use DSB, even if they do not go through full scale litigation.

Equilibria c and e predict that a country with lower costs to use the DSB will choose protectionism as its dominant strategy. The country with the higher burden to litigate will then be forced to continue as a free trader and avoid the DSB, or retaliate and acquiesce at the DSB. The cases with Guatemala and Jamaica refute these findings. In Jamaica's case, though it would have the greater costs, it returns China's protectionism, but the DSB option is not evoked. In Guatemala's case, if faces higher costs, retaliates, goes to the DSB and litigates. In these two instances, the disputes end differently than what the equilibria predict. This does not mean that other cases do not support these findings. With specific reference to the four cases that are studied, however, the disputes play out in unexpected ways.

Results of the Comparative Case Analysis

The comparative case analysis generated some results that are worth exploring. In relation to legal capacity, the model shows that membership in WTO negotiation groups and other international dispute settlement bodies can tell us nothing about how likely states are to litigate. The same finding holds for using the DSB a third party, and also the negative relationship between the ACWL and litigating. This might mean that some skills are not easily transferable from one institution to the next. The ACWL result is not surprising since none of the countries had used it and it had come into being after two of the cases. Other studies where members had a chance to use it but did not, may therefore produce other results.

The legal capacity results also show that the strongest predictor of DSB participation is membership in regional dispute settlement organizations, followed by DSB experience as a respondent. Experience with the Anti-Dumping Agreement as a complainant is also a positive, but weak indicator. These underscore the importance of experience in the DSB generally, and especially with the Anti-Dumping Agreement if that is the provision that states are going to use for reprieve.

The model results for the other dispute settlement costs are also informative. They reveal that of the twelve variables for cost, only the GDP contribution of the good and the expectation to win are likely to catalyze DSB participation. This suggests that countries are not going to fight over goods that do not make a significant contribution to their economy. Moreover, even with the good having great gains from trade, states are not going to pursue cases where they anticipate adverse findings. This may mean that with dispute settlement costs being high, the benefits must outweigh the costs if countries are to litigate.

Availability of alternative forums is shown by the model to have a negative effect on litigation. The fewer choices that countries have, the more likely they are to use the DSB and vice versa. The cases with Guatemala and Mexico support this finding. Sometimes, however, even with many choices, states opt for an institution if they are concerned about precedent. The United States and Mexico therefore had recourse through NAFTA, but got no reprieve there even though Mexico tried repeatedly. Participation in the DSB therefore occurred in spite of recourse in alternative forums.

Hypotheses

There are several conjectures that the study makes in Chapter Three. This section will now address them in order to explicate the extent to which they are supported by the cases. In all instances, costs are evaluated relative to the benefits.

Hypothesis 1 – the lower the litigation costs, the more credible is the threat to use the DSB when a dispute arises.

This hypothesis is supported by Mexico's threat to initiate against Guatemala, and also against the United States. In Guatemala's case, Mexico was defending the interests of CEMEX, which is one of the world's leading cement producers. Mexico's economic might would also convince Guatemala that Mexico is able to pay the litigation costs. Guatemala therefore took Mexico's threat as credible and responded accordingly.

In the case of the United States, it and Mexico had litigated so much with this case that the costs to prepare the case were now significantly reduced. What was at stake was the return of market access that Mexico needed. The United States therefore knew that Mexico was serious.

Hypothesis 2 – the higher the litigation costs, the less likely it is that states will use the DSB when a trade dispute arises.

This hypothesis is supported by China's refusal to file against Jamaica. As a neophyte to the DSB, the costs that China would pay to litigate would be huge in comparison to the benefit that it would get from winning.

Hypothesis 3 – the higher the litigation costs, the less likely it is that trading partners will engage in free trade.

All the countries were brought before the DSB with an accusation of protectionism. In all instances of litigation, the accused defended itself. In the context of the model, the relationship

between high costs and free trade is seen in either avoiding the DSB, or going to the DSB and litigating. While this is a very possible and plausible outcome, none of the cases examined supported this phenomenon specifically.

Hypothesis 4 – the more confident a country is that it has observed a trade violation, the more likely it is to use the DSB when a trade dispute emerges.

This hypothesis posits that the better able states are to observe their trading partners and identify specific breaches of the WTO's provisions, the greater are the chances that they will litigate. All of the countries that used the DSB had large amounts of information on what their trading partner was doing. Guatemala observed Mexico's exportation of cement, and the United States made the same observation of Mexico. Their invocation of the Anti-Dumping Agreement was therefore in relation to observable behavior. Of course, whether they used the Agreement correctly is another matter. Here, however, observation of trade violations caused them to litigate.

Hypothesis 5 – Countries that expect to win are more likely to use the DSB.

The cases that were brought before the DSB are examples of countries that expected to win. This is true in cases where the countries initiated the disputes, and also in cases where they responded. In the one case that was not filed, China anticipated an adverse filing and so it opted out of the DSB.

Hypothesis 6 – countries with membership in other dispute settlement organizations are more likely to use the DSB when a trade dispute arises.

The comparative case analysis reveals that only membership in regional dispute settlement organizations is likely to promote DSB participation. In this regard, only the case between the United States and Mexico validates this hypothesis.

Hypothesis 7 – countries with experience at the DSB are more likely to participate as a complainant or respondent when a trade dispute emerges.

This hypothesis is supported by Guatemala, Mexico and the United States, but refuted by China. All of the litigants had at least one case experience at the DSB. China, however, had complainant and third party experience, but did not file.

Hypothesis 8 – countries with experience with the specific WTO provision are more likely to participate as a complainant or respondent when that provision is evoked.

This hypothesis is validated by the United States and Mexico, but refuted by Guatemala and China. The United States and Mexico had experience with the Anti-Dumping Agreement and participated in the DSB when the dispute emerged. Guatemala had no experience with the Agreement, yet it responded to Mexico's threat. China had experience with the Agreement but did not initiate the dispute.

Research Questions

As this chapter closes, it is also important to address the research questions to see what specific and generalized conclusions we can draw from the results of the study.

Main Question

Why do aggrieved Member countries choose not to participate in the WTO's Dispute Settlement Body?

This research has shown that participation in the DSB is an intricate, multilayered consideration that is specific to the countries that are involved, the type of good that is being contested, and the timing of the dispute. Firstly, power disparities do not seem to be strong predictors of litigation. Some stronger countries do not file and some weaker countries defend themselves and win. What, then, can we conclude from the cases?

To understand the cases and what they tell about DSB participation, we can examine those that were litigated, and those that were not. For the litigated cases, the gains and potential gains from trade of the good, expectation to win and domestic audience costs all seem to matter. This is accompanied by DSB experience generally, and also with the Agreement that is being used for reprieve. In the case that was not filed, expectation to lose, new WTO Membership, reputational costs and budding trading relations all seemed to play a role. Where third party involvement is concerned, the countries joined if they had considerable market share of the good, traded large volumes of the product with one of the litigants, and if they were concerned about precedent. These indicate that costs are evaluated differently on a per country basis, and that countries will choose what is in their best interest at that time. This may mean litigating or foregoing that option based on the circumstance.

Secondary Questions

1. What effect does participation or nonparticipation have on states' trading relations?

Participation in the DSB for the most part, provides some legitimacy to states' actions. States therefore use the authority of the institution to resolve the conflict, or to bring their trading partner to the negotiating table. In the case of China, non-participation did not have any adverse effect on its relationship with Jamaica. For the litigants, participation also seemed to harmonize their relations. The United States and Mexico were able to come to a mutually agreed solution after 16 years. Guatemala and Mexico were able to form a regional trade agreement two years after the second dispute. All the states therefore made a strategic choice and benefited from it by securing better trading relations with their disputants in the aftermath.

2. Does the DSB create opportunities for trading partners to exploit members?

The cases that were explored attest to the fact that the DSB can create opportunities for trading partners to exploit each other. This is typified in the Anti-Dumping Agreement. With the provisions being so arcane, countries that are more legally adept use them to their advantage. In this sense, litigation can become more about who understands the Agreement better, and less about who is wrong or right.

3. Does the DSB influence state behaviour? Does the DSB control undesirable state behaviour?

The DSB influences state behaviour. All the countries involved understood its authority, and challenged each other in light of how well they were adhering to the rules. Domestic countermeasures, litigation and resolution of conflicts are examples of the DSB curtailing undesirable state behaviour. The challenge to this is that the DSB does not universally police states. Aggrieved members therefore have to call upon the institution to act, or suffer.

4. Does the DSB mitigate defection between trading partners with asymmetric interests?

In the cases that were examined, all the countries accepted the governance of the DSB, thereby suggesting that it mitigates defection. This is seen in Guatemala that brought its measures into compliance after the second cement case, and the United States and Mexico that worked out their conflict. China's acceptance of Jamaica's antidumping duty without retaliation is also an example of this mitigating effect.

5. To what extent is the DSB representative of dispute resolution mechanisms in institutions generally?

As mentioned in Chapter Six, the DSB is most similar to the International Court of Justice and the International Convention on the Law of the Sea. These are multilateral institutions whose rulings are legally binding. Their broad membership also has similitude to the DSB. The DSB,

like these organizations, only hears cases that are brought before it and does not seek out culpable states to prosecute. Getting recourse in these institutions therefore requires knowledge of the provisions, just as in the DSB. Additionally, they function in like manner by hearing cases submitted only by states. In these ways, the DSB can be said to be representative of dispute settlement mechanisms in other institutions.

Importantly, this study makes the claim that non-participatory membership is a phenomenon that is not unique to the DSB. Consequently, any institution that has a dispute settlement body will face this challenge. This is because, like the cost factors such as legal capacity, GDP potential of the good, experience and expectation to win, all affected countries will weigh how much they have to pay relative to how much they expect to gain. Whether countries act as claimants or defendants therefore come down to whether they are willing to pay the costs of participation. In these ways, the DSB can be argued to be representative of other dispute settlement mechanisms.

6. Why do institutions ossify?

Non-participatory membership can cause institutions to ossify. With pure non-participatory membership, if states avoid institutions because of collective action problems and ability to act independently, then over time, the institution can lose its relevance for those states. In cases where states do not participate in institutions because they cannot afford dispute settlement costs, this can cause them to abandon their membership, or seek cheaper alternatives for reprieve. If recourse is not available to all, institutions run the risk of being ceremonial organizations, with no real clout to police violators, and inaccessible assistance for those that need it.

Limitations of the Study

Even with the many contributions that this study makes to the existing body of literature, there are limitations in how far its findings can be applied. These will now be discussed.

1. The formal model has only complete and perfect information.

The world trading system is obscure, with many uncertainties about what trading partners are doing. Limiting the iterations of the model to only complete and perfect information therefore do not accurately represent this reality.

2. The formal model does not include third party contributions.

One of the considerations of this study is how the addition of third parties may increase the chances that countries will use the DSB. Here, the argument is that third parties reduce legal capacity costs by providing support for one of the litigants. This, however, is not included in the model. The model is therefore restricted to individual states and what they pay, without consideration of support from other states.

3. The formal model is not time bound.

Trade and dispute settlement often take years to occur. It is therefore easy to assume from the model that states make immediate, sequential steps. This is not the case. The model therefore does not include waiting periods and how quickly states move in relation to each other.

4. The formal model assumes that states evaluate their payoffs the same way.

In the model, the payoffs are standard and they are known. States are therefore aware of what each other's moves are and the payoffs for choosing those strategies. With so many variables in delta, however, different factors may matter differently to each state. Consequently, reputational costs may weigh more on a deliberation for one state, while domestic audience costs may matter more to another country. This variation in the payoffs' assessment is therefore not included in the model.

5. The information theory approach does not measure the magnitude of each factor on the outcome.

The information theory approach provides a systematic measurement of the chances that states will litigate given the costs. This study, however, does not measure how each unique factor affects the outcome. It should be noted, however, that the model allows for this calculation. This is therefore a limitation of the study and not of the model itself.

6. The information theory approach uses binary measurements for the variables.

The information theory approach mainly uses binary variables. This therefore computes whether variables are present and not their range. As a result, the calculations only measure if the states had those costs and not how those costs vary in relation to one another. Another version of the model can therefore be used to accomplish this.

7. Generalization challenges

This study examines four cases, analyzing how each country deliberated on the choice to litigate. This, however, is a small N study. There are also only six cases that feature cement. On a goods' basis, the cases are therefore representative of the universe of cases and can help us to make important conclusions about non-participatory membership. In terms of a larger N study, there would have to be the inclusion of other types of goods that are litigated and also disputed without filing to see if the results of this research hold across those cases.

Recommendations

The WTO remains the main regulatory body for international trade. In light of the recurrent challenges to using the DSB, I hereby make some recommendations on how the burden of litigating can be reduced.

1. Revise / Simplify the Anti-Dumping Agreement

Chapter Five outlined how ambiguous and technical the Anti-Dumping Agreement is. For countries that need this provision for protection, they first need to understand it. This may

require expending resources in legal capacity. In the second cement case with Guatemala, it lost because it failed to adhere to the Agreement. This was Guatemala's first time using it. The complexity and obscurity of the Agreement therefore complicated what could have been a legitimate case for Guatemala. The Panel / Appellate Body's rulings are sometimes just as vague. The WTO therefore needs to revise and simplify the Anti-Dumping Agreement to reduce the costs that are spent just to understand it, and also the revenue that goes into litigating based on misunderstanding it.

2. Consider *pro bono* cases for developing countries.

The WTO does not charge a fee for dispute settlement. There are, however, other costs associated with the process. This includes residence in Geneva, studying and preparing for the dispute, as well as the other costs outlined in Chapters Six and Seven. Some countries cannot afford it. If the WTO wants to be truly representative of all its Members, then it should implement some system whereby needy countries can receive *pro bono* services from competent lawyers.

3. Give firms legal standing before the institution.

All the cases that were studied showed two firms at war with each other. In Guatemala's case, it was its Cementos Progreso against Mexico's Cruz Azul. Technically, Guatemala and Mexico were not disputing with each other; their two firms were. Since only countries have legal standing before the institution, the cases are registered as countries against each other. This often leads to strong, domestic lobbying as firms try to get their governments to act on their behalf. If, however, firms had legal standing, they could advocate their own cases. This would also reduce the incidences of domestic policies that are implemented to benefit the elites, with no real benefit to the average consumer.

4. More countries should join the ACWL.

The ACWL was formed to help developing countries better prepare for their cases. Guatemala is one example of a state that got highly involved in the ACWL and has since been successful in some of its cases that it has initiated. At the time of the disputes, none of the countries had joined it. More countries that need legal support should take advantage of this mechanism.

5. Countries should get involved in more legal capacity building institutions.

One of the findings of the information theory model is that membership in regional dispute settlement organizations can increase the likelihood of DSB participation. The large number of cases that the United States and Mexico have filed and counter filed against each other in NAFTA can be said to have increased their legal capacity over time. States should therefore seek and participate in other legal capacity institutions to strengthen their readiness to use the DSB.

Next Steps

This study has provided some insightful results that I would like to study some more. Below is therefore an enumeration of my research agenda moving forward.

1. Game with imperfect information

An iteration of the model with imperfect information might be a more realistic depiction of the world trading system. I am also interested in seeing how the equilibrium solutions change under conditions of uncertainty.

2. Guatemala as a case study

Guatemala's DSB history is very interesting. I would therefore like to study it more fully. I especially would like to get a sense of how its legal capacity changed pre and post ACWL membership.

3. Information Theory model with continuous variables.

WTO litigants have cost differentials. Rerunning these factors as continuous variables may therefore further illuminate the chances of litigating when they are present.

4. Add third parties to the formal model

The formal model is already complex. I would like, however, to either remodel it, or add the support of third parties to see how doing so affects the equilibrium solutions.

5. Model different costs for each trade remedy

This study has modeled cost as a composite variable. The cases also only looked at the Anti-Dumping Agreement. There are, however, three trade remedies that are available to WTO Members. A next step might therefore be to model the different costs associated with each remedy to find out why anti-dumping proceedings largely outnumber the other two.

6. Probe vulnerability interdependence and the equilibrium solutions that lock some countries out of recourse

The formal model generated two equilibrium solutions that I would like to study some more. These show that countries that pay higher costs to litigate may have the "protect, protect" equilibrium taken away from them, and that they may be worse off than they would be in a world where the institution does not exist. These results have implications for the WTO as an organization. I would therefore like to examine dyads of asymmetric relationships along with their litigation patterns to see if these findings hold. China in Africa is a potential starting place.

In the final analysis, non-participatory membership remains a puzzle that is best unraveled by the individual state in question and the estimated costs that it faces. This state must contemplate the costs of using the institution, versus the costs of staying outside. Non-participatory membership is not a static phenomenon. Indeed, countries frequently engage and disengage with the DSB simultaneously. This study has shown that costs matter. They matter differently, however, for each country. The uniqueness of the decision to participate, predicated upon time and circumstance, suggests that no one explanation is universal. This study therefore joins the debate, fully cognizant of the fact that this phenomenon will again be probed; time and time again.

REFERENCES

- “2003: U.S. Trade in Goods with Mexico.” <https://www.census.gov/foreign-trade/balance/c2010.html#2003> Accessed June 4, 2017.
- “Accession: Explanation – How to Become a Member of the WTO.” https://www.wto.org/english/thewto_e/acc_e/access_e.htm Accessed November 10, 2016.
- “Advice, Support and Training to Developing and Least-Developed Countries.” ACWL. <http://www.acwl.ch/> Accessed May 25, 2017.
- Ahn, Dukgeun, Jihong Lee and Jee-Hyeong Park. 2013. “Understanding Non-Litigated Disputes in the WTO Dispute Settlement System.” 47 Journal of World Trade, Issue 5, pp. 985–1012.
- Alasuutari, Pertti, Leonard Bickman and Julia Brannen. eds. 2008. *The Sage Handbook of Social Research Methods*. London: Sage Publications Ltd.
- Allee, Todd L. and Paul K. Huth. 2006. “Legitimizing Dispute Settlement: International Legal Rules as Domestic Political Cover.” *The American Political Science Review*, Volume 100, Number 2 (May), pp. 219 – 234.
- Alschner, Wolfgang. 2013. “Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System.” *World Trade Review* (March), 1 -38.
- Alt, James E., Jeffrey Frieden, Michael J. Gilligan, Dani Rodrik and Ronald Rogowski. 1996. “The Political Economy of International Trade: Enduring Puzzles and an Agenda for Inquiry.” *Comparative Political Studies*, Volume 29, Number 6. (December), pp. 689 - 717.
- Anderson, Steven T. 2012. “U.S. Geological Survey Minerals Yearbook 2010: Guatemala.” <https://minerals.usgs.gov/minerals/pubs/country/2010/myb3-2010-gt.pdf> Accessed June 2, 2017.
- “Anti-Dumping: Technical Information.” https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm Accessed May 2, 2017.
- Anti-Dumping: WTO Members Exchange Views on Rise in Anti-Dumping Actions.” https://www.wto.org/english/news_e/news17_e/anti_10may17_e.htm Accessed May 15, 2017.
- “Avena and Other Mexican Nationals (Mexico v. United States of America)” Press Release 2004/16. 31 March 2004. <http://www.icj-cij.org/docket/index.php?pr=605&code=mus&p1=3&p2=3&p3=6&> Accessed May 24, 2017.
- Babbie, Earl R. 2010. *The Practice of Social Research*. 12th ed. Belmont, California: Wadsworth Cengage.
- Bajpai, Prableen. 2014. “China's GDP Examined: A Service-Sector Surge.” 31 October. <http://www.investopedia.com/articles/investing/103114/chinas-gdp-examined-servicesector-surge.asp> Accessed May 29, 2017.
- “Basic Documents.” International Court of Justice. <http://www.icj-cij.org/documents/index.php?p1=4> Accessed May 24, 2017.

- Bechtel, Michael M. and Thomas Sattler. 2015. "What is Litigation in the World Trade Organization Worth?" *International Organization*, Volume 69, pp. 375 – 403. Doi:10.1017/S002081831400037X
- Bown, Chad P. 2005. "Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders." *The World Bank Economic Review*. Vol. 19, No. 2, pp. 287-310.
- _____. 2005. "Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?" *World Bank Policy Research Working Paper* 3540.
- _____. 2002. "Antidumping Against the Backdrop of Disputes in the GATT/WTO System." *Journal of Economic Literature*. No. F13. http://people.brandeis.edu/~cbown/papers/ad_theory.pdf
- _____. and Bernard M. Hoekman. 2007. "Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough." *Policy Research Working Paper* 4450. The World Bank. Development Research Group. Trade Team.
- _____. and Bernard M. Hoekman. 2005. "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector." *Journal of International Economic Law*. Volume 8, Number 4: 861-890.
- _____. and Rachel McCulloch. 2010. "Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law." *Policy Research Working Paper* 5168. The World Bank. Development Research Group. Trade and Integration Team.
- Brander, James and Paul Krugman. 1983. *A 'Reciprocal Dumping' Model of International Trade*. *Journal of International Economics*. Volume 15: 313-321. North-Holland: Elsevier Science Publishers B.V.
- Brewster, Rachel. 2011. "The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement." *The George Washington Law Review*, Volume 80, Number 1 (November), pp. 102 – 158.
- Busch, Marc L. 2007. "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade." *International Organization*, Volume 61, Number 4. (Autumn), pp. 735 -761.
- _____. 2000. "Democracy, Consultation, and the Paneling of Disputes under GATT." *Journal of Conflict Resolution*, Volume 44, Number 4. August: pp. 425 – 446. Sage Publications, Inc.
- _____. and Eric Reinhardt. 2006. "Three's a Crowd: Third Parties and WTO Dispute Settlement." *World Politics*, Vol. 58, No. 3 (April), pp. 446-477.
- _____. , Eric Reinhardt and Gregory Shaffer. 2009. "Does Legal Capacity Matter? A Survey of WTO Members." *World Trade Review*, Volume 8, Number 4, pp. 559–577. United Kingdom.
- "CARICOM Single Market and Economy (CSME)." <http://caricom.org/work-areas/overview/caricom-single-marke-and-economy> Accessed May 25, 2017.
- "Caribbean Cement Company v The Attorney General and the Minister of Finance and Planning et al." <http://supremecourt.gov.jm/sites/default/files/judgments/Caribbean%20Cement%20Company%20Limited%20v%20The%20Attorney%20General%20and%20The%20Minister%20of%20Finance%20and%20Planning%20et%20al.pdf> Accessed June 5, 2017.
- "Case No. 17." *International Tribunal on the Law of the Sea*. <https://www.itlos.org/cases/list-of-cases/case-no-17/> Accessed May 25, 2017.

- “CCJ: *From Concept to Reality*.” The Caribbean Court of Justice.
<http://www.caribbeancourtjustice.org/about-the-ccj/ccj-concept-to-reality> Accessed May 25, 2017.
- “Cement in the USA.” Global Cement. 14 March 2012.
<http://www.globalcement.com/magazine/articles/698-cement-in-the-usa> Accessed June 3, 2017.
- “Cement and Lime.” European Commission. https://ec.europa.eu/growth/sectors/raw-materials/industries/non-metals/cement-lime_en Accessed June 9, 2017.
- “Central American Common Market (CACM)”
<http://www.referenceforbusiness.com/encyclopedia/Ca-Clo/Central-American-Common-Market-CACM.html> Accessed May 25, 2017.
- “Central American Common Market (CACM).” The Editors of Encyclopædia Britannica.
<https://www.britannica.com/topic/Central-American-Common-Market> Accessed June 9, 2017.
- _____. Integrated Database of Trade Disputes for Latin America and the Caribbean.
<https://idatd.cepal.org/mcca.htm?perform=buscar> Accessed May 25, 2017.
- Chaudoin, Stephen. 2014. “Audience Features and the Strategic Timing of Trade Disputes.” International Organization, Volume 68, (Fall), pp. 877 – 911.
- _____, Jeffrey Kucik and Krzysztof Pelc. 2016. “Do WTO Disputes Actually Increase Trade?” International Studies Quarterly, Volume 0, pp 1–13.
- “China & Jamaica: Bilateral Economic and Trade Relations, Economic and Technical Cooperation.” <http://jm.china-embassy.org/eng/zygx/jmhzt211230.htm> Accessed June 4, 2017.
- “China & Jamaica: Bilateral Political Relations.” <http://jm.china-embassy.org/eng/zygx/zzgx/t211492.htm> Accessed June 5, 2017.
- “China agrees to eliminate ‘famous brand’ subsidies to end WTO Dispute.” 8 February 2010. Global Subsidies Initiative. <https://www.iisd.org/gsi/news/china-agrees-eliminate-famous-brand-subsidies-end-wto-dispute>
- “China.” List of RTAs in Force.
<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=156&redirect=1> Accessed June 5, 2017.
- “China.” Map of Disputes Between WTO Members.
https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm Accessed May 25, 2017.
- “China.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=156> Accessed June 5, 2017.
- “China’s Economy in 2003(2004/01/09).” <http://www.china-un.ch/eng/ljzg/shjjtj/t85857.htm> Accessed June 5, 2017.
- Christiansen, Bryan and Muslum Basilgan. 2014. *Economic Behavior, Game Theory, and Technology in Emerging Markets*. Pennsylvania: Business Science Reference.
- “CIA World Factbook: China.” <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> Accessed May 25, 2017.
- “CIA World Factbook: Guatemala.” <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html> Accessed June 4, 2017.
- Collins-Williams, Terry and Robert Wolfe. 2010. “Transparency as a Trade Policy Tool: the WTO’s Cloudy Windows.” World Trade Review, Volume 9, Number 4, pp. 551 – 581.

- Conti, Joseph A. 2010. "Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization." *Law & Social Inquiry*. Summer Volume 35, Issue 3, 625–662.
- Cox, Gary W. 2004. "Lies, Damned Lies, and Rational Choice Analyses" in *Problems and Methods in the Study of Politics*. New York: Cambridge University Press.
- Creswell, John W. 1998. *Qualitative Inquiry and Research Design: Choosing Among the Five Traditions*. (Sage Publications: London)
- _____. and Vicki L. Plano Clark. 2007. *Designing and Conducting Mixed Methods Research*. Thousand Oaks, California: Sage Publications, Inc.
- "Current Status of Disputes." https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm Accessed July 2, 2017.
- Czako, Judith, Johann Human, Jorge Miranda. 2003. *A Handbook on Anti-Dumping Investigations*. United Kingdom: Cambridge University Press.
- Dai, Xinyuan. 2006. "Dyadic Myth and Monadic Advantage: Conceptualizing the Effect of Democratic Constraints on Trade." *Journal of Theoretical Politics*, Volume 18, Number 8, pp. 267 – 297. London, Thousand Oaks, California and New Delhi: Sage Publications.
- Davey, William J. 2009. "Compliance Problems in WTO Dispute Settlement." *Cornell International Law Journal*, Volume 42, Issue 1, Article 5 (Winter), pp.119 – 128.
- Davis, Christina L. 2012. *Why Adjudicate? Enforcing Trade Rules in the WTO*. New Jersey: Princeton University Press.
- _____. and Sarah Blodgett Bermeo. 2009. "Who Files? Developing Country Participation in GATT/ WTO Adjudication." *The Journal of Politics*. Volume 71, Number 3: 1033 – 1049.
- Denscombe, Martyn. 2008. "Communities of Practice: A Research Paradigm for the Mixed Methods Approach." *Journal of Mixed Methods Research*. Volume 2, Number 3. July: pp. 270 – 283.
- Denzin, Norman K. and Yvonna S. Lincoln, eds. 2005. *The Sage Handbook of Qualitative Research*, 4th ed. Sage Publications: London.
- _____. 2003. *Collecting and Interpreting Qualitative Materials*. Sage Publications: London.
- "Disputes by Member: Belize." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed June 9, 2017.
- "Disputes by Member: China." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed May 25, 2017.
- "Disputes by Member: Costa Rica." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed June 9, 2017.
- "Disputes by Member: Ecuador." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed June 9, 2017.
- "Disputes by Member: European Union (formerly EC)." https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed June 9, 2017.

- “Disputes by Member: Guatemala.”
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed May 25, 2017.
- “Disputes by Member: Jamaica.”
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed May 25, 2017.
- “Disputes by Member: Mexico.”
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed May 25, 2017.
- “Disputes by Member: Nicaragua.”
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed June 9, 2017.
- “Disputes by Member: Panama.”
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed June 9, 2017.
- “Disputes by Member: United States.”
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed May 25, 2017.
- “Doha Round: What are They Negotiating?”
https://www.wto.org/english/tratop_e/dda_e/update_e.htm Accessed November 11, 2016.
- Downs, George W., David M. Rocke and Peter N. Barsoom. 1998. “*Managing the Evolution of Multilateralism.*” International Organization, Vol. 52, No. 2 (Spring), pp. 397 – 419.
- Drozдова, Katya and Kurt Taylor Gaubatz. 2017. *Quantifying the Qualitative: Information Theory for Comparative Case Analysis*. London: Sage Publications.
- “DS16: European Communities — Regime for the Importation, Sale and Distribution of Bananas.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds16_e.htm Accessed May 25, 2017.
- “DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III).” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm Accessed May 25, 2017.
- “DS53: Mexico — Customs Valuation of Imports.”
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds53_e.htm Accessed May 25, 2017.
- “DS58: United States — Import Prohibition of Certain Shrimp and Shrimp Products.”
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm Accessed May 25, 2017.
- “DS60: Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico.”
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds60_e.htm Accessed May 16, 2017.
- “DS122: Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland.”
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds122_e.htm Accessed May 16, 2017.

- “DS132: Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds132_e.htm Accessed May 17, 2017.
- “DS141: European Communities - Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds141_e.htm Accessed May 17, 2017.
- “DS156: Guatemala - Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds156_e.htm Accessed May 16, 2017.
- “DS184: United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds184_e.htm Accessed May 16, 2017.
- “DS211: Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds211_e.htm Accessed May 16, 2017.
- “DS219: European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds219_e.htm Accessed May 16, 2017.
- “DS241: Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds241_e.htm Accessed May 17, 2017.
- “DS252: United States — Definitive Safeguard Measures on Imports of Certain Steel Products.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm Accessed May 25, 2017.
- “DS264: United States - Final Dumping Determination on Softwood Lumber from Canada.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds264_e.htm Accessed May 15, 2017.
- “DS281: United States - Anti-Dumping Measures on Cement from Mexico.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds281_e.htm Accessed May 16, 2017.
- “DS309: China — Value-Added Tax on Integrated Circuits.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds309_e.htm Accessed May 25, 2017.
- DS316: European Communities – Measures Affecting Trade in Large Civil Aircraft. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm
- “DS331: Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds331_e.htm Accessed June 5, 2017.
- “DS387: China – Grants, Loans and Other Incentives.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds387_e.htm
- “Duty-Free Treatment for LDCs.” Preferential Trade Agreements. <http://ptadb.wto.org/ptaBeneficiaries.aspx>
- “Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey.” The Report of the Panel. WT/DS211/R. 8 August 2002.

- "Election of Judge Robinson to ICJ a Proud Moment for all Jamaicans." The Jamaica Observer. 18 November 2014. http://www.jamaicaobserver.com/editorial/Election-of-Judge-Robinson-to-ICJ-a-proud-moment-for-all-Jamaicans_17970036 Accessed May 24, 2017.
- "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India." The Report of the Panel. WT/DS141/R. 30 October 2000.
- "Fact Sheet: U.S.-Mexico Agreement on Cement." Office of Public Affairs. 6 March 2006. http://www.ita.doc.gov/media/FactSheet/0306/cement_030606.html Accessed June 5, 2017.
- Fang, Songying. 2010. "The Strategic Use of International Institutions in Dispute Settlement." Quarterly Journal of Political Science, Volume 5, pp. 107 -131.
- Fearon, James D. 1997. "Signaling Policy Interests: Tying Hands versus Sinking Costs." The Journal of Conflict Resolution, Volume 41, Number 1, New Games: Modeling Domestic-International Linkages (February), pp. 68 – 90.
- _____. 1994. "Domestic Political Audiences and the Escalation of International Disputes." The American Political Science Review, Volume 88, Issue 3 (September), pp. 577 - 592.
- "Fees" ACWL. <http://www.acwl.ch/fees/> Accessed May 25, 2017.
- Ferguson, James A., Clinton V. Black, Patrick Bryan and [David J. Buisseret](#). 2017. "Jamaica." <https://www.britannica.com/place/Jamaica> Accessed June 2, 2017.
- Finger, J. Michael and Nellie T. Artis. 1993. *Antidumping: How It Works and Who Gets Hurt*. Michigan: University of Michigan Press.
- _____. and Zlate, Andrei. 2003. "WTO Rules that Allow New Trade Restrictions: The Public Interest is a Bastard Child." UN Millennium Project Task Force on Trade. <http://fordschool.umich.edu/rsie/acit/TopicsDocuments/Finger030421.pdf>
- Fischer, Dana D. 1982. "Decisions to Use the International Court of Justice: Four Recent Cases." International Studies Quarterly, Vol. 26, No. 2 (June), pp. 251-277.
- Flick, Uwe. 2006. *An Introduction to Qualitative Research*, 3rd ed. Sage Publications: London.
- Frieden, Jeffry A., David A. Lake and Kenneth Schultz. 2013. 2nd ed. *World Politics: Interests, Interactions, Institutions*. New York: W.W. Norton & Company. (Introduction xxvii)
- Geddes, Barbara. 2003. *Paradigms and Sandcastles: Theory Building and Research Design in Comparative Politics*. Michigan: University of Michigan Press.
- Gilpin, Robert. 2001. *Global Political Economy: Understanding the International Economic Order*. (New Jersey: Princeton University Press)
- Goenner, Cullen F. 2007. "Economic War and Democratic Peace." Conflict Management and Peace Science, Peace Science Society (International), Volume 24, pp. 171-182.
- Goodlander, Maggie. 2007. "Is the United States Ready to Approve the Law of the Sea Treaty?" Council on Foreign Relations. 19 July. <https://www.cfr.org/backgrounder/united-states-ready-approve-law-sea-treaty> Accessed May 25, 2017.
- Gordon, Daniel V., Rögnvaldur Hannesson and William A. Kerr. 2001. "Of Fish and Whales: The Credibility of Threats in International Trade Disputes." Journal of Policy Modeling, Volume 23, pp. 83 -98.
- Greene, Jennifer C. 2007. *Mixed Methods in Social Inquiry*. California: John Wiley & Sons, Inc.
- Gresser, Edward. "Trade Facts: Agreements and Legislation." Progressive Economy. April 17, 2013. http://www.progressive-economy.org/trade_facts/the-wto-has-handled-457-trade-disputes-since-1995/ Accessed April 27, 2016.

- Grossman, G. M. and K. Rogoff (ed.), 1995. *Handbook of International Economics*. 1st ed. Volume 3, Number 3. Netherlands: Elsevier.
- “Groups in the Negotiations.”
https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002b
 Accessed May 24, 2017.
- Gruber, Lloyd. 2000. *Ruling the World: Power Politics and the Rise of Supranational Institutions*. New Jersey: Princeton University Press.
- Gaubatz, Kurt Taylor and Katya Drozdova. 2016. Quantifying the Qualitative Excel Implementation. June 7, 2017. URL: <https://study.sagepub.com/drozdova>
- “Guatemala.” Observatory of Economic Complexity.
<http://atlas.media.mit.edu/en/profile/country/gtm/> Accessed June 6, 2017.
- “Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico.” Report of the Panel. WT/DS60/R. 19 June 1998.
- “Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico.” Report of the Panel. WT/DS156/R. 24 October 2000.
- “Guatemala.” List of Notified RTAs in Force.
<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=320&edirect=1> Accessed June 5, 2017.
- “Guatemala.” Map of Disputes Between WTO Members.
https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm Accessed May 25, 2017.
- “Guatemala.” Nations Encyclopedia.
<http://www.nationsencyclopedia.com/economies/Americas/Guatemala.html> Accessed June 3, 2017.
- Guatemala.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=320>
 Accessed June 5, 2017.
- Guisinger, Alexandra and Alastair Smith. 2000. “Honest Threats: The Interaction of Reputation and Political Institutions in International Crises.” *Journal of Conflict Resolution*, Volume 46, Number 2 (April), pp. 175 – 200. Sage Publications.
- Guzman, Andrew T. 2002. “The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution.” *The Journal of Legal Studies*, Volume 31, Number 2 (June), pp. 303 – 326.
- _____, and Beth A. Simmons. 2005. “Power Plays and Capacity Constraints: the Selection of Defendants in World Trade Organization Disputes.” *Journal of Legal Studies*. Volume 34, Number 2: 557-598.
- Hoekman, Bernard. 1995. *Trade Laws and Institutions: Good Practices and the World Trade Organization*. World Bank Discussion Papers. The United States of America: The World Bank.
- _____, Aaditya Mattoo and Phillip English, eds. 2002. *Development, Trade, and the WTO: A Handbook*. Washington, D.C.: The World Bank. http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/08/19/000160016_20040819140633/Rendered/PDF/297990018213149971x.pdf Accessed February 16, 2016.
- _____, and Petros C. Mavroidis. 2000. “WTO Dispute Settlement, Transparency and Surveillance.” Oxford: Blackwell Publishers, Ltd.
- “How APEC Operates.” Asia-Pacific Economic Cooperation. <http://www.apec.org/About-Us/How-APEC-Operates> Accessed May 25, 2017.

- “How Cement is Made.” PCA: America’s Cement Manufacturers.
<http://www.cement.org/cement-concrete-basics/how-cement-is-made> Accessed May 30, 2017.
- “How the Court Works.” International Court of Justice. <http://www.icj-cij.org/court/index.php?p1=1&p2=6> Accessed May 24, 2017.
- Hufbauer, Gary Clyde and Jeffrey J. Schott. 2005. *NAFTA Revisited: Achievements and Challenges*. Washington D.C.: Institute for International Economics.
- Ikenberry, G. 2003. “Is American Multilateralism in Decline?” *Perspectives on Politics*. Volume 1, Number 3. (September), pp. 533 – 550.
- “Increase in GDP for Manufacturing and Processing Sector.” Jamaica Information Service. 6 January 2005. <http://jis.gov.jm/increase-in-gdp-for-manufacturing-and-processing-sector/> Accessed June 2, 2017.
- “Index of Disputes Issues.”
https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm Accessed July 2, 2017.
- Jackson, John. 1997. *The World Trade System: Law and Policy of International Economic Relations*. 2nd ed. Boston: The MIT Press.
- “Jamaica.” <http://caricom.org/about-caricom/who-we-are/our-governance/heads-of-government/jamaica> Accessed May 25, 2017.
- “Jamaica.” List of RTAs in Force.
<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=388&redirect=1> Accessed June 5, 2017.
- “Jamaica.” Map of Disputes Between WTO Members.
https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm Accessed May 25, 2017.
- “Jamaica.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=388> Accessed June 5, 2017.
- Johns, Leslie and Krzysztof J. Pelc. 2015. “Fear of Crowds in World Trade Organization Disputes: Why Don’t More Countries Participate?” *The Journal of Politics*, Volume 78, Number 1.
- Johnson, R. Burke and Anthony J. Onwuegbuzie. 2004. “Mixed Methods Research: A Research Paradigm Whose Time Has Come.” *Educational Researcher*. Volume 33, Number 7. October: pp. 14 – 26.
- Katzenstein, Peter J. and Nobuo Okawara. 2001 / 2002. “Japan, Asian – Pacific Security, and the Case for Analytical Eclecticism.” *International Security*. Volume 26. Winter: pp. 153 – 185.
- Keohane, Robert O. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. New Jersey: Princeton University Press.
- _____. and Joseph S. Nye, Jr. 1989. *Power and Interdependence: World Politics in Transition*, 3rd ed. Boston: Little-Brown.
- Kim, Moonhawk. 2008. “Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures.” *International Studies Quarterly* 52: 657-686.
- Kokko, Ari, Patrik Gusravsson Tingvall and Josefin Videnord. 2017. “Which Antidumping Cases Reach the WTO?” Ratio Working Paper No. 286.

- http://ratio.se/app/uploads/2017/03/ak_pt_jv_which_antidumping_cases_reach_the_wto_286.pdf
- Koremenos, Barbara, Charles Lipson and Duncan Snidal. 2001. "The Rational Design of International Institutions." International Organization, Vol. 55, No. 4, The Rational Design of International Institutions (Autumn), pp. 761-799.
<http://www.jstor.org/stable/3078615>
- Krasner, Stephen D. 1983. ed. *International Regimes*. Ithaca: Cornell University Press.
- Kucik, Jeffrey and Eric Reinhardt. 2008. "Does Flexibility Promote Cooperation? An Application to the Global Trade Regime." International Organization, Volume 62, Number 3, (Summer), pp. 477-505. <http://www.jstor.org/stable/40071901>.
- Lawrence, Richard. "GATT Rules for Mexico in Dumping Dispute." 15 July 1992.
http://www.joc.com/maritime-news/gatt-rules-mexico-dumping-dispute_19920715.html
Accessed June 5, 2017.
- Leal-Arcas, Rafael. 2007. "Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?" The Robert E. Hudec Article on Global Trade. Minnesota Journal of International Law, Volume 16, Number 1, pp. 1-59.
- Levy, Jack S. 2008. *Power Transition Theory and the Rise of China*, ed., Robert S. Ross and Zhu Feng. New York: Cornell University Press.
- Li, Tan and Larry D. Qiu. 2014. "Free Trade Agreements and Trade Disputes."
<http://www.freit.org/WorkingPapers/Papers/TradePolicyRegional/FREIT775.pdf>
- "List of Importing Markets for a Product Exported by Canada. Product: 2523 Cement, incl. cement clinkers, whether or not coloured." Trade Map – International Trade Statistics.
[http://www.trademap.org/\(X\(1\)S\(1vz4jqa00d550f55bukilgzt\)\)/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|124|||2523|||4|1|1|2|2|1|2|1|1](http://www.trademap.org/(X(1)S(1vz4jqa00d550f55bukilgzt))/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|124|||2523|||4|1|1|2|2|1|2|1|1) Accessed June 9, 2017.
- "List of Importing Markets for a Product Exported by China." Product: 2523 Cement, incl. cement clinkers, whether or not coloured. Trade Map – International Trade Statistics.
http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|156|||2523|||4|1|1|2|2|1|2|1|1 Accessed June 3, 2017.
- "List of Importing Markets for a Product Exported by Guatemala." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|320|||2523|||4|1|1|2|2|1|2|1|1 Accessed June 3, 2017.
- "List of Importing Markets for a Product Exported by Jamaica." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|388|||2523|||4|1|1|2|2|1|2|1|1 Accessed June 3, 2017.
- "List of Importing Markets for a Product Exported by Japan." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
[http://www.trademap.org/\(X\(1\)S\(1vz4jqa00d550f55bukilgzt\)\)/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|392|||2523|||4|1|1|2|2|1|2|1|1](http://www.trademap.org/(X(1)S(1vz4jqa00d550f55bukilgzt))/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|392|||2523|||4|1|1|2|2|1|2|1|1) Accessed June 9, 2017.
- "List of Importing Markets for a Product Exported by Mexico." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|484|||2523|||4|1|1|2|2|1|2|1|1 Accessed June 3, 2017.
- "List of Importing Markets for a Product Exported by Taipei, Chinese." Product: 2523 Cement, incl. cement clinkers, whether or not coloured.

- [http://www.trademap.org/\(X\(1\)S\(1vz4jqa00d550f55bukilgzt\)\)/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|490|||2523|||4|1|1|2|2|1|2|1|1](http://www.trademap.org/(X(1)S(1vz4jqa00d550f55bukilgzt))/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|490|||2523|||4|1|1|2|2|1|2|1|1) Accessed June 9, 2017.
- “List of Importing Markets for a Product Exported by United States of America.” Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
- http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|842|||2523|||4|1|1|2|2|1|2|1|1 Accessed June 3, 2017.
- “List of Supplying Markets for a Product Imported by Guatemala.” Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
- http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|320|||2523|||4|1|1|1|2|1|2|1|1 Accessed June 3, 2017.
- “List of Supplying Markets for a Product Imported by Jamaica.” Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
- http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|388|||2523|||4|1|1|1|2|1|2|1|1 Accessed June 3, 2017.
- “List of Supplying Markets for a Product Imported by Mexico.” Product: 2523 Cement, incl. cement clinkers, whether or not coloured.
- http://www.trademap.org/tradedstat/Country_SelProductCountry_TS.aspx?nvpm=1|484|||2523|||4|1|1|1|2|1|2|1|1 Accessed June 3, 2017.
- Lohmann, Susanne. 2003. “Why Do Institutions Matter? An Audience Cost Theory of Institutional Commitment.” *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 16, No. 1, (January) pp. 95–110.
- Maggi, Giovanni. 1999. “The Role of Multilateral Institutions in International Trade Cooperation.” *The American Economic Review*, Vol. 89, No. 1 (March), pp. 190-214. <http://www.jstor.org/stable/116985>
- Mahoney, James and Gary Goertz. 2006. “A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research.” *Political Analysis*. Volume 14: pp. 227 – 249.
- Mansfield, Edward D., Helen V. Milner and B. Peter Rosendorff. 2000. “Free to Trade: Democracies, Autocracies and International Trade.” *The American Political Science Review*, Volume 94, Number 2. (June), pp. 305 – 321.
- Martin, Lisa L. 1993. “Credibility, Costs, and Institutions: Cooperation on Economic Sanctions.” *World Politics*, Volume 45, Number 3 (April), pp. 406 – 432
- _____. 1992. “Interests, Power and Multilateralism.” *International Organization*, Vol. 46, No. 4 (Autumn), pp. 765 – 792. <http://www.jstor.org/stable/2706874>
- Matsushita, Mitsuo and Thomas Schoenbaum. 2003. *The World Trade Organization: Law, Practice and Policy*. New York: Oxford University Press.
- McCarthy, Nolan and Adam Meirowitz 2007. *Political Game Theory: An Introduction*. New York: Cambridge University Press.
- “Member Economies.” Asia-Pacific Economic Cooperation. <http://www.apec.org/About-Us/About-APEC/Member-Economies> Accessed May 24, 2017.
- “Member Information: China and the WTO.”
- https://www.wto.org/english/thewto_e/countries_e/china_e.htm Accessed May 24, 2017.
- “Member Information: Guatemala and the WTO.”
- https://www.wto.org/english/thewto_e/countries_e/guatemala_e.htm Accessed May 24, 2017.

- “Member Information: Jamaica and the WTO.”
https://www.wto.org/english/thewto_e/countries_e/jamaica_e.htm Accessed May 24, 2017.
- “Member Information: Mexico and the WTO.”
https://www.wto.org/english/thewto_e/countries_e/mexico_e.htm Accessed May 24, 2017.
- “Member Information: United States of America and the WTO.”
https://www.wto.org/english/thewto_e/countries_e/usa_e.htm Accessed May 24, 2017.
- “Member States.” Organization of American States.
http://www.oas.org/en/member_states/default.asp Accessed June 5, 2017.
- “Member States.” United Nations. <http://www.un.org/en/member-states/index.html> Accessed May 24, 2017.
- “Members.” ACWL. <http://www.acwl.ch/members-introduction/> Accessed May 25, 2017.
- Merrill Tim L. and Ramón Miró, eds. 1996. “*Mexico: A Country Study*.” Washington: GPO for the Library of Congress. <http://countrystudies.us/mexico/> Accessed June 3, 2017.
- “Mexico.” Observatory of Economic Complexity.
<http://atlas.media.mit.edu/en/profile/country/mex/> Accessed June 6, 2017.
- “Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States.” Report of the Panel. WT/DS132/R. 28 January 2000.
- “Mexico – Northern Triangle.” Foreign Trade Information System.
http://www.sice.oas.org/TPD/Mex_Norte/MEX_Norte_e.ASP Accessed June 5, 2017.
- “Mexico: U.S.-Mexico Trade Facts.” Office of the United States Trade Representative.
<https://ustr.gov/countries-regions/americas/mexico> Accessed June 6, 2017.
- “Mexico.” List of Notified RTAs in Force.
<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?lang=1&membercode=484&redirect=1> Accessed June 5, 2017.
- “Mexico.” Map of Disputes Between WTO Members.
https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm Accessed May 25, 2017.
- “Mexico.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=484> Accessed June 5, 2017.
- Milner, Helen V. and David B. Yoffie. 1989. “*Between Free Trade and Protectionism: Strategic Trade Policy and a Theory of Corporate Demands*.” International Organization, Volume 43, Number 2. (Spring), pp. 240.
- “Monitoring and Surveillance: The Rising Agenda of the WTO.” WTO NEWS: SPEECHES – DG Pascal Lamy. 22 October 2007.
https://www.wto.org/english/news_e/sppl_e/sppl78_e.htm Accessed November 21, 2016.
- Morrow, James D. 1994. “*Alliances, Credibility, and Peacetime Costs*.” Journal of Conflict Resolution, Volume 38 (June), pp. 270 – 297.
- _____. 1994. *Game Theory for Political Scientists*. New Jersey: Princeton University Press.
- _____. 1994. “*Modeling the Forms of International Cooperation: Distribution versus Information*.” International Organization, Volume 48, Number 3 (Summer), pp. 387 – 423.
- Movsesian, Mark L. 2003. “*Enforcement of WTO Rulings: An Interest Group Analysis*.” Hofstra Law Review, Faculty Publications, Volume 32, Number 1 (Fall), pp.1 -23.

- Murphy, Sean D. 2014. "International Judicial Bodies for Resolving Disputes Between States" in Oxford Handbook on International Adjudication. Romano, Cesare et al. eds. Oxford: Oxford University Press.
- "Ninth Regional Law of the Sea Workshop Held in Mexico City." International Tribunal for the Law of the Sea. Press Release. ITLOS/Press 195. 7 June 2013.
https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_195_E.pdf
 Accessed May 25, 2017.
- Nordstrom, Hakan and Gregory Shaffer. 2008. "Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?" World Trade Review 7: 4, 587 - 640.
- "North America Free Trade Agreement. NAFTA." Integrated Database of Trade Disputes for Latin America and the Caribbean. <https://idatd.cepal.org/tlcan.htm?perform=buscar>
 Accessed May 25, 2017.
- "Notice of Affirmative Final Determination." REF. No. AD-01-2003. 14 June 2004. Antidumping and Subsidies Commission, Jamaica: Kingston.
- "Notice of Affirmative Preliminary Determination." REF. No. AD-01-2003. 15 March 2004. Antidumping and Subsidies Commission, Jamaica: Kingston.
- "Nottebohm (Liechtenstein v. Guatemala)." International Court of Justice. Judgment of 6 April 1955. <http://www.icj-cij.org/docket/index.php?sum=215&p1=3&p2=3&case=18&p3=5>
 Accessed May 24, 2017.
- Olson, Mancur. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, Massachusetts: Harvard University Press.
- "Overview of ASEAN-China Dialogue Relations." ASEAN Secretariat Information Paper. April 2017. <http://asean.org/storage/2016/01/Overview-of-ASEAN-China-Relations-April-2017.pdf> Accessed May 25, 2017.
- Pauwelyn, Joost. 2000. "Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach." The American Journal of International Law, Volume 94, Number 2 (April), pp. 335- 347.
- Pelc, Krzysztof J. 2011. "Why Do Some Countries Get Better WTO Accession Terms Than Others?" International Organization, Vol. 65, No. 4 (Fall), pp. 639-672.
<http://www.jstor.org/stable/23016229>
- _____. 2010. "Constraining Coercion? Legitimacy and Its Role in U.S. Trade Policy, 1975–2000." International Organization, Volume 64, Number 1, (Winter), pp. 65-96.
<http://www.jstor.org/stable/40607981>.
- Pervez, Fouad. 2015. "Countersuits and the Politics of Abandoned WTO Trade Disputes." Prepared for the 2016 Political Economy of International Organizations Annual Conference. Salt Lake City, Utah.
- "Press Brief – Fiftieth Anniversary of the Multilateral Trading System." https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm Accessed November 10, 2016.
- Putnam, Robert. 1988. "Diplomacy and Domestic Politics: the Logic of Two – Level Games." International Organization. (Summer) Volume 42, Number 3.
- Reinhardt, Eric. 2001. "Adjudication Without Enforcement in GATT Disputes." Journal of Conflict Resolution, Volume 45, Number 2. April: pp. 174 – 195. Sage Publications, Inc.
- _____. 1999. "Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948 – 1998.

- http://www.isr.umich.edu/cps/pewpa/archive/archive_99/19990004.pdf Accessed June 1, 2016.
- "Report (2016) of the Committee on Anti-Dumping Practices." G/L/1158. G/ADP/23. 1 November 2016. World Trade Organization.
- Reynolds, Kara M. 2007. "Why Are So Many WTO Disputes Abandoned?" <http://fs2.american.edu/reynolds/www/Consultations.pdf>
- Richardson, Julian. "Jamaica Now Top Caribbean Trading Partner for China." The Jamaica Observer. 23 August 2013. http://www.jamaicaobserver.com/business/Jamaica-now-top-Caribbean-trading-partner-for-China_14928589 Accessed June 5, 2017.
- Rosendorff, Peter B. and Alastair Smith. 2015. "Domestic Political Determinants of the Onset of WTO Disputes." https://wp.nyu.edu/faculty-rosendorff/wp-content/uploads/sites/1510/2015/06/May28_2015WTOOnset.pdf
- _____. and Helen V. Milner. 2001. "The Optimal Design of International Trade Institutions: Uncertainty and Escape." International Organization, Vol. 55, No. 4, The Rational Design of International Institutions (Autumn), pp. 829 – 857.
- Ruggie, John Gerard. 1992. "Multilateralism: the Anatomy of an Institution." International Organization, Volume 46, Number 3 (Summer), pp. 561 – 598.
- Russett, Bruce and John R. Oneal. 2001. *Triangulating Peace: Democracy, Interdependence, and International Organizations*. New York: W.W. Norton & Company.
- Sattler, Thomas and Thomas Bernauer. 2011. "Gravitation or Discrimination? Determinants of Litigation in the World Trade Organisation." European Journal of Political Research 50: 143-167.
- "Semi-Annual Report Under Article 16.4. of the Agreement - People's Republic of China." G/ADP/N/105/CHN. 22 August 2003. World Trade Organization.
- "Semi-Annual Report Under Article 16.4. of the Agreement – Guatemala." G/ADP/N/22/GTM. 15 May 1998. World Trade Organization.
- "Semi-Annual Report Under Article 16.4. of the Agreement – Guatemala." G/ADP/N/65/GTM. 25 July 2000. World Trade Organization.
- "Semi-Annual Report Under Article 16.4. of the Agreement - Jamaica." G/ADP/N/119/JAM. 21 October 2004. World Trade Organization.
- "Semi-Annual Report under Article 16.4 of the Agreement - South Africa." G/ADP/N/202/ZAF. 12 July 2010. World Trade Organization
- "Semi-Annual Report under Article 16.4 of the Agreement - Trinidad and Tobago." G/ADP/N/202/TTO. 9 July 2010. World Trade Organization,
- "Semi-Annual Report under Article 16.4 of the Agreement - Malaysia." G/ADP/N/286/MYS. 31 August 2016. World Trade Organization.
- "Semi-Annual Report Under Article 16.4. of the Agreement – Mexico." G/ADP/N/22/MEX. 21 March 1997. World Trade Organization.
- "Semi-Annual Report Under Article 16.4. of the Agreement – Mexico." G/ADP/N/53/MEX. 13 August 1999. World Trade Organization.
- "Semi-Annual Report Under Article 16.4. of the Agreement – Mexico." G/ADP/N/105/MEX. 25 August 2003. World Trade Organization.
- "Semi-Annual Report Under Article 16.4. of the Agreement – United States." G/ADP/N/105/USA. 12 September 2003. World Trade Organization.
- Statement of Reasons, REF. No. AD-01-2003. June 14, 2004. Anti-Dumping and Subsidies Commission, Jamaica: Kingston.

- Snidal, Duncan. 1985. "Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes." *The American Political Science Review*, Volume 79, Number 4 (December), pp. 923 – 942.
- "Surveillance in the WTO: Dispute Settlement & Trade Policy Review Mechanism." Module 10. https://ecampus.wto.org/admin/files/Course_382/Module_1234/ModuleDocuments/eWTO-M10-R1-E.pdf Accessed November 21, 2016.
- Tashakkori, Abbas and Charles Teddlie. eds. 2003. *Handbook of Mixed Methods in Social and Behavioral Research*. London: Sage Publications Ltd.
- "The Court." International Court of Justice. <http://www.icj-cij.org/court/index.php?pl=1> Accessed May 24, 2017.
- The Customs Duties (Dumping and Subsidies) Act. July 1, 1999.
- "The GATT Years: From Havana to Marrakech." https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm Accessed November 10, 2016.
- The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. 2002. Geneva: The World Trade Organization Secretariat. <https://www.hse.ru/data/2011/11/14/1272847001/LEGAL%20TEXTS%20ENG.pdf>
- "The Tribunal." International Tribunal for the Law of the Sea. <https://www.itlos.org/the-tribunal/> Accessed May 24, 2017.
- Thomas, Jeff and Hamlin Jennings. "Types of Portland Cement." *The Science of Cement*. <http://iti.northwestern.edu/cement/aboutTheAuthor.html> Accessed May 30, 2017.
- "Trade in Goods with Mexico." Foreign Trade. <https://www.census.gov/foreign-trade/balance/c2010.html> Accessed June 6, 2017.
- "Trade restrictions among G20 remain high, despite slight slowdown in new measures." TRADE MONITORING. WTO: 2016 NEWS ITEMS. 10 November 2016. https://www.wto.org/english/news_e/news16_e/trdev_09nov16_e.htm Accessed November 23, 2016.
- "Training." ACWL. <http://www.acwl.ch/training-introduction/> Accessed May 25, 2017.
- "Understanding the WTO: Principles of the Trading System." https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#bind Accessed May 15, 2017.
- "Understanding the WTO: The Agreements. Anti-dumping, Subsidies, Safeguards: Contingencies, etc." https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm Accessed May 15, 2017.
- "Understanding the WTO: The Organization, Members and Observers." https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm Accessed February 16, 2016.
- "Understanding on Rules and Procedures Governing the Settlement of Disputes." Annex 2 of the WTO Agreement. https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm Accessed November 24, 2016.
- "United Nations General Assembly and Security Council Elect Four Members of the Court." International Court of Justice. Press Release. Unofficial. No. 2011/34. 11 November 2011. <http://www.icj-cij.org/presscom/files/9/16769.pdf> Accessed May 24, 2017.
- "United States." Map of Disputes Between WTO Members. https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm Accessed May 26, 2017.

- “United States and Mexico Agree to Resolve Antidumping Order on Mexican Cement.” 19 January 2006. <http://www.CEMEXusa.com/MediaCenter/PressRelease/resolve-antidumping-order-20060119.aspx> Accessed June 5, 2017.
- “United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan.” WT/DS184/R. 28 February 2001.
- “United States – Final Dumping Determination on Softwood from Canada.” (WT/DS264/R). 13 April 2004.
- “U.S. Geological Survey, 2015, Mineral Commodity Summaries 2015: U.S. Geological Survey.” 196 p., <http://dx.doi.org/10.3133/70140094> . Accessed May 29, 2017.
- “United States.” Preferential Trade Agreements. <http://ptadb.wto.org/Country.aspx?code=840> Accessed June 5, 2017.
- “U.S. and Mexico Reach Agreement in Principle on Cement Trade.” 19 January 2006. [International Trade Administration, U.S. Department of Commerce. http://trade.gov/press/press_releases/2006/cement_011906.asp](http://trade.gov/press/press_releases/2006/cement_011906.asp) Accessed June 5, 2017.
- van Oss, Hendrik G. 2017. “Mineral Commodity Summaries 2016.” U.S. Department of the Interior: U.S. Geological Survey. <https://minerals.usgs.gov/minerals/pubs/mcs/2016/mcs2016.pdf> Accessed June 3, 2017.
- Vandenbussche, Hylke and Maurizio Zanardi. 2007. “What Explains the Proliferation of Antidumping Laws?” Core Discussion Paper 2007/66. Universite Catholique de Lovain and Tilburg University and CentER.
- Weisman, Dennis L. (2006). *Notes on Predatory Pricing*. United States of America: Kansas State University. <http://www.k-state.edu/economics/staff/websites/weisman/courses/815/homework/Notes%20On%20Predation.pdf> Accessed May 30, 2017.
- Wells Bowman, Gregory, Nick Covelli, David A. Gantz and Ihn Ho Uhm. 2010. *Trade Remedies in North America*. The Netherlands: Kluwer Law International.
- “What is the WTO?” https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm Accessed January 8, 2016.
- “Who are the Developing Countries in the WTO?” https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm Accessed May 24, 2017.
- Workman, Daniel. “Top Cement Exporting Countries.” 2 April 2017. <http://www.worldstopexports.com/top-cement-exporting-countries/> Accessed May 30, 2017.
- “World Trade Organization Annual Report 2016.” https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf Accessed November 21, 2016.
- “WTO Analytical Index: Anti-Dumping Agreement. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).” https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_01_e.htm#general Accessed May 15, 2017.
- Yocis, David A. 2001. “Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations.” *New York University Law Review*. Volume 76, Number 4: 1259 – 1296.

APPENDIX I

FACTS ABOUT THE CASES

a. *China – Ordinary Portland Grey Cement*

1. “*Notice of Affirmative Final Determination.*” REF. No. AD-01-2003. June 14, 2004.
Antidumping and Subsidies Commission, Jamaica: Kingston.
2. “*Notice of Affirmative Preliminary Determination.*” REF. No. AD-01-2003. March 15, 2004. Antidumping and Subsidies Commission, Jamaica: Kingston.



THE ANTI-DUMPING AND SUBSIDIES COMMISSION
24 Trafalgar Road, Kingston 10, JAMAICA

NOTICE OF AFFIRMATIVE PRELIMINARY DETERMINATION

KINGSTON, JAMAICA

Date: March 15, 2004

REF. NO. AD-01-2003

IN THE MATTER OF an investigation opened on its own initiative by the Anti-dumping and Subsidies Commission ("the Commission"), pursuant to Section 4 of the **Customs Duties (Dumping and Subsidies) Act, 1999**, ("the Act") **on behalf of the Jamaican cement industry;**

AND IN THE MATTER OF the Preliminary Determination by the Anti-Dumping and Subsidies Commission pursuant to Section 27 of the Act;

IN RESPECT OF the dumping in Jamaica of Ordinary Portland Grey Cement, originating in or exported from The People's Republic of China ("China"), classified under Harmonized Tariff Schedule (HS) Codes: 2523.29 and 2523.291.

On December 16, 2003, pursuant to Sections 4, 22 and 23 of the Customs Duties (Dumping and Subsidies) Act, 1999, the Anti-Dumping and Subsidies Commission, ("the Commission") initiated an investigation in respect of alleged injurious dumping into Jamaica of the aforementioned goods, originating in or exported from China.

The Commission has made an affirmative Preliminary Determination pursuant to section 27 of the Customs Duties (Dumping and Subsidies) Act, in respect of the dumping in Jamaica of Ordinary Portland Grey Cement originating in, or exported from China, and finds that the goods under consideration have been dumped and the dumping has caused and is likely to cause material injury to the domestic industry.

Pursuant to Section 15 of the Customs Duties (Dumping and Subsidies) Act, the Commission has decided to impose a provisional duty in the amount of 96.27% on all goods that are of the same description as those to which this Affirmative Preliminary Determination applies. The duties will take effect from March 29, 2004 and will terminate on the date that the Commission: accepts an undertaking; suspends or terminates the investigation or makes a Final Determination.

The Commission has determined that the importer in Jamaica of the goods that are the subject of this investigation is Mainland International Limited, of 8 March Pen Road, Spanish Town, St. Catherine, the Exporter is Shandong Metals and Minerals I/E Corp, of 9 Tangyi Road, Qingdao, China 266011 and the Producer is Longkou Fanlin Cement Company Limited, Zhu You Guan Town, Longkou, Shandong, China.

RESULTS OF THE GANGER CASUALITY TESTS USED TO MAKE DETERMINATIONS IN THE ANTIDUMPING INVESTIGATIONS ON EXPORTS OF ORDINARY PORTLAND GREY CEMENT FROM THE PEOPLE'S REPUBLIC OF CHINA

(Source: Statement of Reasons, REF. No. AD-01-2003, Antidumping and Subsidies Commission, Kingston, Jamaica)

Definition of Variables

DR	-	Change in CCCL Sales Revenue to own Production
DMSC	-	Change in Mainland Sales of Chinese Cements
DEX	-	Change in Exchange Rate
DOIS	-	Change in other Import Sales (all except export CCCL and China)
Downtime	-	Dummy variable taking account of all CCCL downtime episodes

Pair wise Granger Causality Tests

Sample 2002:08 to 2003:09

Null Hypothesis: DOIS does not Granger Cause DR

Lags	Obs	F-Static	Probability
1	14	3.13699	0.10420
2	14	0.83570	0.46462
3	14	0.94428	0.46910

Pair wise Granger Causality Tests

Sample 2002:08 to 2003:09

Null Hypothesis: DEX does not Granger Cause DR

Lags	Obs	F-Static	Probability
1	14	0.09674	0.76159
2	14	0.89830	0.44086
3	14	0.71675	0.57269

Pair wise Granger Causality Tests

Sample 2002:08 to 2003:09

Null Hypothesis: DMSC does not Granger Cause DR

Lags	Obs	F-Static	Probability
1	14	5.32520	0.04147
2	14	2.70835	0.12000
3	14	2.97977	0.10586

Pair wise Granger Causality Tests

Sample 2002:08 to 2003:09

Null Hypothesis: DOWNTIME does not Granger Cause DR

Lags	Obs	F-Static	Probability
1	14	0.17258	0.68581
2	14	6.28432	0.01958
3	14	3.09088	0.09900

Note: The level of Confidence with which the null can be rejected is 1 minus probability. So that if the probability is 0.04, the confidence level is $1 - 0.04 = 0.96$ or 96 per cent. A rejection of the null indicates that the particular variable does granger cause the other with that level of confidence.



THE ANTI-DUMPING AND SUBSIDIES COMMISSION
24 Trafalgar Road, Kingston 10, JAMAICA

NOTICE OF AFFIRMATIVE FINAL DETERMINATION

KINGSTON, JAMAICA

Date: June 14, 2004

REF. NO. AD-01-2003

IN THE MATTER OF an investigation opened on its own initiative by the Anti-dumping and Subsidies Commission ("the Commission"), pursuant to Section 4 of the **Customs Duties (Dumping and Subsidies) Act, 1999**, ("the Act") on behalf of the **Jamaican cement industry**;

AND IN THE MATTER OF the Final Determination

IN RESPECT OF the dumping in Jamaica of Ordinary Portland Grey Cement, used for building or construction purposes, except in the case of white cement used for decorative purposes and oil well cement, originating in or exported from The People's Republic of China ("China") where the characteristics of the goods under consideration fall under separate sub-headings of the Harmonized Tariff Schedule (HS) Codes the characteristics and purpose of the goods shall be the controlling guide.

On December 16, 2003, pursuant to Sections 4, 22 and 23 of the Customs Duties (Dumping and Subsidies) Act, 1999, the Anti-Dumping and Subsidies Commission, ("the Commission") initiated an investigation in respect of alleged injurious dumping into Jamaica of the aforementioned goods, originating in or exported from China.

The Commission has made an affirmative Final Determination pursuant to section 30 of the Customs Duties (Dumping and Subsidies) Act, in respect of the dumping in Jamaica of Ordinary Portland Grey Cement originating in, or exported from China, and finds that the goods under consideration have been dumped and the dumping has caused and is likely to cause material injury to the domestic industry.

Pursuant to Section 30 of the Customs Duties (Dumping and Subsidies) Act, the Commission has decided to impose a definitive antidumping duty in the amount of 89.79% on all goods that are of the same description as those to which this Affirmative Final Determination applies. The duties will take effect from July 20, 2004 and will be terminated five (5) years from the date the duties take effect.

The Commission has determined that the importer in Jamaica of the goods that are the subject of this investigation is Mainland International Limited, of 8 March Pen Road, Spanish Town, St. Catherine, and the Exporter is Shandong from China.

As a consequence of the Commission's determination Jamaica Customs will collect an anti-dumping duty on all goods imported into Jamaica that are of the same description, characteristics and purpose as those to which this Affirmative Final Determination applies, which are released after July 20, 2004 regardless of the importer of said goods.

A Statement of Reasons explaining this decision has been provided to persons directly interested in these proceedings. A copy may be obtained by contacting the Commission, or from the Commission's website at www.mct.gov.jm/Antidumping.htm.

b. Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico

Source: “DS60: Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico.” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds60_e.htm

DISPUTE SETTLEMENT

DS60: Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico

Current status

- Report(s) adopted, no further action required on 25 November 1998

Key facts

Short title:	Guatemala — Cement I
Complainant:	Mexico
Respondent:	Guatemala
Third Parties:	Canada; El Salvador; Honduras; United States
Agreements cited: (as cited in request for consultations)	Anti-dumping (Article VI of GATT 1994): Art. 2 , 3 , 5 , 6 , 7 , 7.1 , Annex I GATT 1994: Art. VI
Request for Consultations received:	17 October 1996
Panel Report circulated:	19 June 1998
Appellate Body Report circulated:	2 November 1998

Summary of the dispute to date

Consultations

Complaint by Mexico.

On 15 October 1996, Mexico requested consultations with Guatemala in respect of an anti-dumping investigation commenced by Guatemala with regard to imports of Portland cement from Mexico. Mexico alleged that this investigation was in violation of Guatemala’s obligations under Articles 2, 3, 5 and 7.1 of the Anti-Dumping Agreement.

On 4 February 1997, Mexico requested the establishment of a panel. At its meeting on 25 February 1997, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

Further to a second request to establish a panel by Mexico, the DSB established a panel at its meeting on 20 March 1997. The US, Canada, Honduras and El Salvador reserved their third-party rights. On 21 April 1997, Mexico requested the Director-General to determine the composition of the Panel. On 1 May 1997, the Panel was composed. The report of the Panel was circulated to Members on 19 June 1998. The Panel found that Guatemala had failed to comply with the requirements of Article 5.3 of the Anti-Dumping Agreement by initiating the investigation on the basis of evidence of dumping, injury and casual link that was not “sufficient” as a justification for initiation.

On 4 August 1998, Guatemala notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 2 November 1998. The Appellate Body reversed the Panel’s finding that the dispute was properly before the Panel, on the grounds that Mexico did not comply with Article 6.2 of the DSU in its request for a panel since it did not identify the measure it was complaining against. Having found that the dispute was not properly before the Panel, the Appellate Body could not make any conclusions on the findings by the Panel on the substantive issues that were also the subject of the appeal. The Appellate Body stressed that its decision was without prejudice to Mexico’s right to pursue new dispute settlement proceedings on this matter.

At the DSB meeting on 25 November 1998, the DSB adopted the Appellate Body Report and the Panel Report, as reversed by the Appellate Body Report.

c. *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*

Source: “DS156: Guatemala - Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds156_e.htm

DISPUTE SETTLEMENT

DS156: Guatemala — Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico

Current status

- Implementation notified by respondent on 12 December 2000

Key facts

Short title:	Guatemala — Cement II
Complainant:	Mexico
Respondent:	Guatemala
Third Parties:	European Communities; Ecuador; El Salvador; Honduras; United States
Agreements cited: (as cited in request for consultations)	Anti-dumping (Article VI of GATT 1994): Art. 1 , 2 , 3 , 5 , 6 , 7 , 9 , 12 , 18 , Annex I , Annex II
Request for Consultations received:	5 January 1999
Panel Report circulated:	24 October 2000

Summary of the dispute to date

The summary below was up-to-date at 24 February 2010

Consultations

Complaint by Mexico. (See DS60)

On 5 January 1999, Mexico requested consultations with Guatemala concerning definitive anti-dumping duties imposed by the authorities of Guatemala on imports of grey Portland cement from Mexico and the proceedings leading thereto. Mexico alleged that the definitive anti-dumping measure is inconsistent with Articles 1, 2, 3, 5, 6, 7, 12 and 18 of the Anti-Dumping Agreement and its Annexes I and II, as well as with Article VI of the GATT 1994.

On 15 July 1999, Mexico requested the establishment of a panel. At its meeting on 26 July 1999, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

Further to a second request to establish a panel by Mexico, the DSB established a panel at its meeting on 22 September 1999. Ecuador, El Salvador, the European Communities, Honduras and the United States reserved their third-party rights. On 12 October 1999, Mexico requested

the Director-General to determine the composition of the panel. On 2 November 1999, the Panel was composed. The panel report was circulated on 24 October 2000. The panel concluded that Guatemala's initiation of an investigation, the conduct of the investigation and imposition of a definitive measure on imports of grey Portland cement from Mexico's Cruz Azul is inconsistent with the requirements in the Anti-Dumping Agreement in that:

- Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation, is inconsistent with Article 5.3 of the Anti-Dumping Agreement;
- Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation and consequent failure to reject the application for anti-dumping duties by Cementos Progreso is inconsistent with Article 5.8 of the Anti-Dumping Agreement;
- Guatemala's failure to timely notify Mexico under Article 5.5 of the Anti-Dumping Agreement is inconsistent with that provision;
- Guatemala's failure to meet the requirements for a public notice of the initiation of an investigation is inconsistent with Article 12.1.1 of the Anti-Dumping Agreement;
- Guatemala's failure to timely provide the full text of the application to Mexico and Cruz Azul is inconsistent with Article 6.1.3 of the Anti-Dumping Agreement;
- Guatemala's failure to grant Mexico access to the file of the investigation is inconsistent with Articles 6.1.2 and 6.4 of the Anti-Dumping Agreement;
- Guatemala's failure to timely make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997 is inconsistent with Article 6.1.2 of the Anti-Dumping Agreement;
- Guatemala's failure to provide two copies of the file of the investigation as requested by Cruz Azul is inconsistent with Article 6.1.2 of the Anti-Dumping Agreement;
- Guatemala's extension of the period of investigation requested by Cementos Progreso without providing Cruz Azul with a full opportunity for the defence of its interest is inconsistent with Article 6.2 of the Anti-Dumping Agreement;
- Guatemala's failure to inform Mexico of the inclusion of non-governmental experts in the verification team is inconsistent with paragraph 2 of Annex I of the Anti-Dumping Agreement;

- Guatemala's failure to require Cementos Progreso's to provide a statement of the reasons why summarization of the information submitted during verification was not possible is inconsistent with Article 6.5.1 of the Anti-Dumping Agreement;
- Guatemala's decision to grant Cementos Progreso's 19 December submission confidential treatment on its own initiative is inconsistent with Article 6.5 of the Anti-Dumping Agreement;
- Guatemala's failure to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" is inconsistent with Article 6.9 of the Anti-Dumping Agreement;
- Guatemala's recourse to "best information available" for the purpose of making its final dumping determination is inconsistent with Article 6.8 of the Anti-Dumping Agreement;
- Guatemala's failure to take into account imports by MATINSA in its determination of injury and causality is inconsistent with Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement; and
- Guatemala's failure to evaluate all relevant factors for the examination of the impact of the allegedly dumped imports on the domestic industry is inconsistent with Article 3.4.

The DSB adopted the panel report on 17 November 2000.

Implementation of adopted reports

At the DSB meeting of 12 December 2000, in accordance with Article 21.3 of the DSU, Guatemala informed the DSB that in October 2000 it had removed its anti-dumping measure and had thus complied with the DSB's recommendations. Mexico welcomed Guatemala's implementation in this case.

d. *United States – Anti-Dumping Measures on Cement from Mexico*

Source: “DS281: United States - Anti-Dumping Measures on Cement from Mexico.”

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds281_e.htm Accessed May 16, 2017.

DISPUTE SETTLEMENT

DS281: United States — Anti-Dumping Measures on Cement from Mexico

This summary has been prepared by the Secretariat under its own responsibility. The summary is for general information only and is not intended to affect the rights and obligations of Members.

Current status

- Settled or terminated (withdrawn, mutually agreed solution) on 16 May 2007

Key facts

Short title:	US — Anti-Dumping Measures on Cement
Complainant:	Mexico
Respondent:	United States
Third Parties:	Canada; China; Chinese Taipei; European Communities; Japan
Agreements cited: (as cited in request for consultations)	Anti-dumping (Article VI of GATT 1994): Art. 1 , 2 , 3 , 4 , 5 , 6 , 8 , 9 , 10 , 11 , 12 , 18 , Annex II GATT 1994: Art. III , VI , X Agreement Establishing the World Trade Organization: Art. XVI:4
Request for Consultations received:	31 January 2003
Mutually Agreed Solution notified:	16 May 2007

Latest document

- United States - Anti-Dumping Measures on Cement from Mexico - Notification of Mutually Agreed Solution
[G/ADP/D46/2#G/L/604/Add.1#WT/DS281/8](https://www.wto.org/english/press/p/2007/p07052.htm) | 21 May 2007

Summary of the dispute to date

The summary below was up-to-date at 24 February 2010

Consultations

Complaint by Mexico.

On 3 February 2003, Mexico requested consultations with the US concerning several antidumping measures imposed by the US on imports of Gray Portland cement and cement clinker from Mexico, including:

- the final determinations in several administrative and sunset reviews;
- the US authorities' determination regarding the continuation of the antidumping orders; and
- the US authorities' rejection of a request by Mexican producers to initiate an administrative review based on changed circumstances as well as.

In addition to the above measures, Mexico's request included a number of laws, regulations and administrative practices (such as "zeroing") used by the US authorities in the above determinations. Mexico considered that the above antidumping measures are incompatible with Articles 1, 2, 3, 4, 6, 8, 9, 10, 11, 12 and 18 of the Antidumping Agreement, Articles III, VI and X of the GATT 1994 and Article XVI:4 of the WTO Agreement.

On 29 July 2003, Mexico requested the establishment of a panel. At its meeting on 18 August 2003, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

Further to a second request to establish a panel by Mexico, the DSB established a panel at its meeting on 29 August 2003. China, the EC, Japan and Chinese Taipei reserved their third-party rights. On 5 September 2003, Canada reserved its third-party rights.

On 24 August 2004, Mexico requested the Director-General to compose the panel. On 3 September 2004, the Director-General composed the panel.

On 1 March 2005, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months, inter alia due to the large number of claims involved, the complexity of the issues and certain postponements in the Panel's timetable and that the Panel hoped to complete its work by the end of October 2005. On 3 October 2005, the Panel informed the DSB that due to its continued consideration of the issues in this dispute, it would not be possible for the Panel to complete its work by the end of October, and that the Panel expected to complete its work in January 2006.

On 16 January 2006, the Chairman of the Panel informed the DSB that in the context of negotiations to find a mutually acceptable solution to this dispute, Mexico had requested the Panel to suspend its proceedings, in accordance with Article 12.12 of the DSU, until further notice. The Panel agreed to this request. Since the Panel was not requested to resume its work, pursuant to Article 12.12 of the DSU, the authority for establishment of the panel lapsed as of 14 January 2007.

Mutually agreed solution

On 16 May 2007, the United States and Mexico notified the DSB of a mutually agreed solution under Article 3.6 of the DSU. The mutually agreed solution was in the form of an agreement between the United States and Mexico, dated 6 March 2006 (the "Trade in Cement Agreement"). The Trade in Cement Agreement makes possible increased imports of Mexican cement, encourages US cement exports to Mexico, and settles outstanding litigation relating to the US anti-dumping order on Mexican cement. The Agreement also provides for the anti-dumping order to be revoked as of 1 February 2009.

APPENDIX II

COMPARATIVE CASE ANALYSES RESULTS

- a. Legal Capacity Costs and their Effects on Participation in the Dispute Settlement Body
- b. Other Dispute Settlement Costs and their Effects of Participation in the Dispute Settlement Body

Source: Gaubatz, Kurt Taylor and Katya Drozdova. 2016. Quantifying the Qualitative Excel Implementation. *June 7, 2017*. URL: <https://study.sagepub.com/drozdova>

	Sig. GDP	Alt. Marks.	Can Enforce	Rep. Costs	Rep. Benefits	Dom. Aud. Costs	Interd. Payoffs	Ex. Win	Alt. Forums	PTAs/RTAs	Sens. Interd.	Vul. Interd.	Outcome
Jamaica	0	1	1	0	1	1	1	1	1	0	0	1	0
China	1	1	1	1	1	1	1	0	1	0	1	0	0
Guat. 1	1	1	1	0	1	1	1	1	0	0	1	0	1
Mex. 1	1	1	1	1	1	1	1	1	0	0	1	0	1
Guat. 2	1	1	1	1	1	1	1	1	0	0	1	0	1
Mex. 2	1	1	1	1	1	1	1	1	0	0	1	0	1
U.S.	1	1	1	1	1	1	1	1	1	1	0	1	1
Mex. 3	1	1	1	1	1	1	1	1	1	1	0	0	1
<i>a</i>	0.75	0.75	0.75	0.625	0.75	0.75	0.75	0.75	0.25	0.25	0.5	0.125	
<i>b</i>	0.00001	0.00001	0.00001	0.125	0.00001	0.00001	0.00001	0.00001	0.5	0.5	0.25	0.625	
<i>c</i>	0.125	0.25	0.25	0.125	0.25	0.25	0.25	0.125	0.25	0.00001	0.125	0.125	
<i>d</i>	0.125	0.00001	0.00001	0.125	0.00001	0.00001	0.00001	0.125	0.00001	0.25	0.125	0.125	
$H(Y)$	0.8110	0.8110	0.8110	0.8110	0.8110	0.8110	0.8110	0.8110	0.8110	0.8110	0.8110	0.8110	
$H(Y X)$	0.5180	0.8110	0.8110	0.7380	0.8110	0.8110	0.8110	0.5180	0.5000	0.6890	0.7960	0.7380	
$I(Y;X)$	0.2930	0.0000	0.0000	0.0730	0.0000	0.0000	0.0000	0.2930	0.3110	0.1220	0.0150	0.0730	
Direction	Positive	Positive	Positive	Positive	Positive	Positive	Positive	Positive	Negative	Negative	Positive	Negative	

VITA

Felicia Anneita Grey
Graduate Program in International Studies
Old Dominion University
Norfolk, VA 23529

Felicia Grey is a Fulbright scholar who completed her doctoral studies in the Graduate Program in International Studies at Old Dominion University (ODU). Her primary and secondary concentrations are International Political Economy and Development, and American Foreign Policy respectively. Felicia has a Master's in International Relations from the University of the West Indies, Jamaica. She also holds a Bachelor's in International Relations / Spanish / Psychology, and a postgraduate diploma in Education and Training.

She has served as a course assistant for Introduction to International Politics at Old Dominion University, and a tutor for Introduction to International Relations and Theories and Approaches to International Relations at the University of the West Indies. She also spent nine (9) years teaching Spanish at Bridgeport High School in Jamaica. Her last position at ODU was as a web content manager, providing support and maintaining the web presence of the departments, centers and institutes in the College of Arts and Letters.

She has presented her work at numerous local, regional and national conferences. Her research areas include:

- The strategic use of the World Trade Organization's Dispute Settlement Body.
- The rise of China and the consequences for the world generally and the United States specifically.
- China's deepening relationship with the developing world (the Caribbean and Africa), incidences of unfair trading practices and the paucity of formal litigation.
- The complex interdependent relationship between the United States and Saudi Arabia in spite of their inherent differences.
- Energy (in) security and the quest for sustainable renewal energy sources.
- The United Arab Emirates' Masdar City as a possible prototype for eco-cities.