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# A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development

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## A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development

*Juscelino F. Colares\**

### ABSTRACT

*The positive theory of litigation predicts that, under certain conditions, plaintiffs and defendants achieve an unremarkable and roughly equivalent share of litigation success. This Article, grounded in an empirical analysis of WTO adjudication from 1995 through 2007, reveals a high disparity between Complainant and Respondent success rates: Complainants win roughly ninety percent of the disputes. This disparity transcends Case Type, Party Identity, Income Level, and other litigant-specific characteristics. After analyzing and discarding standard empirical and theoretical alternative explanations for the systematic disparity in success rates, this study demonstrates, through an examination of patterns in WTO*

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*adjudicators' notorious decisions, that biased rule development explains this disparity. This Article then discusses the effect of biased rule development on perceptions of the WTO dispute settlement system's democratic legitimacy and legality. (JEL: K 33, K 41)*

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[I]t is the Membership which through its appointments will *ex ante* ensure that the quality of Appellate Body reports will be preserved.

*Ex post*, the civic community discusses the activities of the WTO adjudicating bodies and through its writings gives or denies its vote of confidence.<sup>1</sup>

## I. INTRODUCTION

In ordinary litigation, one expects any pattern in judicial decisions to reflect the balance of the strength of plaintiffs' and defendants' cases. Absent information asymmetries or different stakes among plaintiffs and defendants, long-term trends in favor of one type of litigant do not occur. Each party's preference for (or aversion to) litigation adjusts to cues emanating from the litigation environment.<sup>2</sup> Indeed, the prevailing positive theory of judicial adjudication explains that it is unlikely for a particular type of litigant to systematically prevail over time because stronger cases will settle rather than result in full adjudication.<sup>3</sup> With the mortality of such strong cases thus accounted for, litigation assumes an unpredictable nature, where decisions favoring plaintiffs are just as likely as those favoring defendants.<sup>4</sup> As no particular trends emerge under these circumstances, litigation becomes the realm of randomness. However, where trends in judicial decisions favoring a particular type of litigant emerge, and the above assumptions hold, such trends might be viewed as the product of transformational shifts in the law. If an investigation into the nature of the law being made in the adjudicatory process indicates that this process increasingly benefits one particular type of litigant, one must consider whether the discrepancy in success rates is the result of biased rule development, or even the product of conscious judicial effort.<sup>5</sup>

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1. Petros Mavroidis & Thomas Cottier, *The Role of the Judge in International Trade Regulation: An Overview*, in *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO* 1, 2 (Thomas Cottier & Petros Mavroidis eds., 2003).

2. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 *J. ECON. LITERATURE* 1067, 1071–73 (1989).

3. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1, 19 (1984).

4. *Id.* at 17–20.

5. See Theodore Eisenberg & James A. Henderson, Jr., *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 *UCLA L. REV.* 479, 503 (1990) (discussing trends in decision making); Keith N. Hylton, *Information, Litigation, and Common Law Evolution*, 8 *AM. L. & ECON. REV.* 33, 35 (2006) (discussing unbiased rule evolution).

Do the insights applicable to ordinary litigation extend to the domain of the World Trade Organization (WTO) dispute system? The creation of the WTO Dispute Settlement Body (DSB) represented a major shift in the legal conception of trade disputes.<sup>6</sup> The political, consensus-based system of dispute settlement, prevalent during the “GATT years,” gave way to a rule-based, litigation-driven architecture designed to strengthen the multilateral trading system by providing both final and legally enforceable decisions.<sup>7</sup> While the DSB retained GATT’s sovereign-nation-centered arrangement, the shift in legal philosophy has brought it closer to the characteristics of ordinary systems of litigation. For instance, principles such as finality, basic due process, and adherence to established rules on legislative and “judicial” jurisdiction form the bedrock of both the DSB and other court-based systems.<sup>8</sup> This similarity in fundamental characteristics to ordinary litigation allows the application of the existing theory to the class of disputes thus far presented to the DSB. As this system has been in place for more than a decade, having decided disputes affecting more than thirty-three of its member countries in over one hundred cases, there is now sufficient data to determine if the standard model’s theoretical expectations can also be verified in the outcomes of these disputes.<sup>9</sup>

Of course, any attempt to extend the standard model of litigation to DSB disputes must account for specific constraints unique to WTO litigants. First, because sovereigns must respond to competing domestic political concerns, they may not be subject to the same incentives or pressures as litigants in domestic adjudication. However, WTO members, like corporations and other multidimensional litigants, can and do aggregate preferences and are able to express their balanced or consensus-driven choices in a unified manner. That the WTO’s basic rules and the operation of the international system impose constraints on members’ ability to settle disputes has been suggested as an important distinction between

6. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 264 (4th ed. 2002).

7. See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193 (1996) (describing the results of the Uruguay Round). Compare General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (demonstrating the consensus-based GATT system), with Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 2(4), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

8. See generally JACKSON ET AL., *supra* note 6, at 246–64 (examining the transition from the GATT dispute settlement system to the DSB).

9. See WTO Dispute Settlement—Chronological List of Dispute Cases, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Feb. 17, 2009) (listing the disputes brought before the DSB and the countries involved).

WTO dispute settlement and ordinary litigation.<sup>10</sup> Specifically, Guzman and Simmons theorize that the coexistence of parallel international commitments and the unavailability of certain typical settlement options deriving from the operation of the Most Favored Nation (MFN) principle depress settlement activity in WTO litigation.<sup>11</sup> While a definite feature of WTO litigation, settlement constraints do not seem to have a significant impact on members' litigation behavior, as will be demonstrated later in the study.

After conducting a thorough examination of all disputes submitted to the DSB, this Article shows that WTO litigation does not conform to the ordinary model's prediction that no trends will develop in favor of a particular party.<sup>12</sup> In fact, a sustained pattern of Complainant success across all categories of disputes (e.g., trade remedy and non-trade remedy), regardless of Complainant-specific characteristics (e.g., country identity, and level of income) or product-type (e.g., commodities and noncommodities), indicates that WTO litigation results are far from symmetric. This Article then attempts to explain why there is a consistently high rate of Complainant success in WTO dispute resolution. Arguably, this pro-Complainant WTO trend might be understood as the result of the violation of the model's general assumption of zero settlement-related transaction costs. However, while the low frequency of settlement activity might positively impact the rate of Complainant wins, its overall effect is not strong enough to explain the trend favoring one particular type of litigant over the other.

This Article proposes that the pro-Complainant tendency prevailing in all forms of WTO adjudication is likely the result of biased rule development. Specifically, it theorizes that the DSB has evolved WTO norms in a manner that consistently favors litigants whose interests are generally aligned with the unfettered expansion of trade. While it is quite uncontroversial that an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favor free trade,<sup>13</sup> the presence of particular, consistent patterns in these interpretations raises concerns about the system's adherence to the negotiated terms of the agreements, especially with respect to Respondents' reserved regulatory competencies. Although the limited number of fully adjudicated WTO disputes requires some degree of caution in interpreting empirical results, the combination of

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10. Andrew T. Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO*, 31 J. LEGAL STUD. 205 (2002).

11. *Id.* at 210–11.

12. Since only WTO members can be parties to WTO disputes, this Article uses the terms “party” and “member” interchangeably.

13. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999).

sustained, highly asymmetric adjudication outcomes with WTO adjudicators' adoption of a pro-Complainant stance in numerous decisions supports the conclusion that WTO adjudicatory outcomes are the result of biased rule development.

Part II of this Article briefly outlines the operation of the DSB. Part III examines prior literature on WTO litigation. Part IV presents discussions on the data, methods, and empirical results of all filed and fully adjudicated disputes. Part V discusses whether various alternative empirical and theoretical explanations could account for the general pattern of observed results. Among these, the study addresses the potential impact of case selection and provides an evaluation of the extent to which the high Complainant success rate can be explained by the transaction costs associated with settling. Part VI proposes biased rule development as the explanation for the discrepancy in Complainant and Respondent success rates through an examination of decision patterns reflected in a number of cases. While this Article does not claim to resolve every competing empirical, theoretical, or normative explanation for DSB results, analysis of these decisions tends to support prior anecdotal studies alleging that WTO panels and the WTO Appellate Body have interpreted the WTO agreements in a manner that consistently promotes the goal of expanding trade, often to the detriment of Respondents' negotiated and reserved regulatory competencies.

## II. OPERATION OF THE WTO DISPUTE SETTLEMENT SYSTEM

To ensure that bargained-for trade concessions (e.g., tariff reductions, elimination of nontariff barriers, and market access) are not frustrated by members' adoption of trade-restrictive measures, the WTO agreements provide a mechanism of binding dispute settlement.<sup>14</sup> Under the supervision of the DSB, on which each WTO member sits, panels and the Appellate Body deliberate and make rulings on disputes submitted by members.<sup>15</sup> Specifically, where either a panel or the Appellate Body finds that a challenged member's measure "nullifies or impairs" another member's "benefits accruing" under one of the "covered agreements," the adjudicator prepares a final report and then submits it to the DSB for formal adoption.<sup>16</sup>

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14. DSU, *supra* note 7, arts. 1(1), 7(2), 22(3). By the express language of GATT 1994 Article 1(a), the provisions of GATT remain effective "as rectified, amended or modified by the terms of the" more recent WTO agreements. General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 1(a), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

15. DSU, *supra* note 7, art. 2(1).

16. *Id.* art. 10(4); *see also* GATT, *supra* note 7, art. XXIII (discussing the implications of nullification and impairment).

Following DSB adoption, the offending country must eliminate the noncompliant measure and bring its practices into compliance with the ruling.<sup>17</sup> Failure to comply triggers the possibility of suspension of concessions on the part of the prevailing member.<sup>18</sup> However, suspension of WTO obligations vis-à-vis the offending member is generally the exception—the mere possibility of countermeasures provides a substantial incentive for compliance.<sup>19</sup>

Among the substantive norms used to gauge whether a measure amounts to a “nullification” of another member’s rights, the most important are the MFN principle, the national treatment principle, and the nondiscrimination principle. These norms generally prohibit discrimination among goods and services imported from or provided by any member and proscribe any discrepancy in the treatment of foreign and domestic goods and services.<sup>20</sup> For example, under the MFN principle, any advantage or beneficial treatment extended to one member in regard to border measures (e.g., tariff rules or customs practices) must be extended to all other WTO members.<sup>21</sup> These three basic pillars of WTO law, however, extend to areas beyond border measures, such as internal taxes and regulations pertaining to internal transportation, distribution, and sale.<sup>22</sup> In sum, members cannot adopt measures that either facially or in effect discriminate among foreign-origin products or favor domestic products.<sup>23</sup> Due to the importance of these broad principles to trade liberalization, numerous GATT/WTO agreements effectively mirror these provisions.<sup>24</sup>

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17. DSB adoption of panel and Appellate Body reports is largely a formality. To date, the DSB has adopted every final panel or Appellate Body report. World Trade Organization, Dispute Settlement: Appellate Body, Appellate Body Reports, [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_reports\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm) (last visited Feb. 17, 2009); cf. John Ragosta et al., *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 37 INT’L LAW. 697, 744–45 (2003) (discussing the lack of legitimacy and democratic participation in the DSB).

18. DSU, *supra* note 7, art. 22(3); GATT, *supra* note 7, art. XXIII.

19. See JACKSON ET AL., *supra* note 6, at 257–59.

20. See GATT, *supra* note 7, arts. I, III, XIII (discussing the MFN principle, the national treatment principle, and the nondiscrimination principle).

21. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. II, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATS]; GATT, *supra* note 7, art. I.

22. See GATT, *supra* note 7, art. III.

23. GATT, *supra* note 7, art. III; see GATS, *supra* note 21, art. IV.

24. See, e.g., Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 3, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 14, available at [http://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](http://www.wto.org/english/docs_e/legal_e/24-scm.pdf) [hereinafter SCM Agreement] (prohibiting subsidies contingent on the use of domestic over imported goods); GATT, *supra* note 7, arts. III, V, X, XI (discussing freedom of transit, transparency in the administration of trade regulations, general prohibition against quantitative restrictions, and transparency respectively).



Such broad requirements are also subject to qualified exceptions. Specifically, members have retained the GATT-based right to apply offsetting tariffs to “dumped”<sup>25</sup> or impermissibly subsidized products that cause material injury to domestic producers.<sup>26</sup> A set of strong public policy exceptions was also preserved from the GATT years. Among these exceptions are measures deemed necessary to protect public morals,<sup>27</sup> measures relating to conservation of natural resources,<sup>28</sup> and emergency trade restrictions that safeguard a member’s balance of payments.<sup>29</sup> Historically, these deviations from free trade were meant to facilitate further rounds of trade liberalization by giving the contracting governments the public policy space within which to maneuver through adjustments owing to decreasing levels of tariffication.<sup>30</sup> Members must justify these departures from the broad principles of free trade, however. These permissible deviations strike a complex balance between members’ needs to countervail trade-distorting policies and their potential protectionist relapses.

Building upon these broad GATT principles, the Uruguay Round, which culminated in the creation of the WTO in 1994, gave birth to new obligations and reciprocal rights. New multilateral agreements created additional trade disciplines and international standards in areas such as sanitary measures (SPS Agreement),<sup>31</sup> intellectual

25. Generally, “dumping” refers to the practice of selling products in the importing market at prices lower than their “normal value” (e.g., home market price, where available). See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 2, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 3, available at [http://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](http://www.wto.org/english/docs_e/legal_e/19-adp.pdf) [hereinafter Anti-Dumping Agreement].

26. See GATT, *supra* note 7, art. VI(2); see also Anti-Dumping Agreement, *supra* note 25, art. 9; SCM Agreement, *supra* note 24, art. 5.

27. GATT, *supra* note 7, art. XX(a).

28. *Id.* art. XX(g).

29. *Id.* arts. V, XII.

30. Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38 J. WORLD TRADE 1, 3–4 (2004).

The task of postwar institutional reconstruction . . . [was] to devise a framework which would safeguard and even aid the quest for domestic stability without, at the same time, triggering mutually destructive external consequences that had plagued the interwar period. This was the essence of the embedded liberalism compromise . . . .

John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 393 (1982).

31. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, pmbl., Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493, available at [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) [hereinafter SPS Agreement].

property rights (TRIPS),<sup>32</sup> technical barriers to trade (TBT Agreement),<sup>33</sup> and trade-related investment measures (TRIMS).<sup>34</sup> These additional disciplines were meant to go beyond the traditional tariff liberalization context and refocused the WTO in the direction of trade harmonization across new regulatory areas.<sup>35</sup> For example, a member's otherwise permissible discriminatory health measure may run afoul of the new regulatory harmonization provisions contained in the SPS Agreement if it is not based on scientific evidence.<sup>36</sup> Thus, where a member's regulation would previously have been upheld as a justified incidental restriction on trade by, for example, reliance on a GATT exception, it may no longer be acceptable due to additional restrictions imposed by these new trade harmonizing agreements. It is within this legal framework that WTO litigation takes place.

### III. THE EXISTING LITERATURE ON WTO ADJUDICATION OUTCOMES

Scholars have written extensively on WTO dispute settlement. Discussion has focused on the manner in which it functions, how its decisions are enforced, and its implications on international and domestic law. A large portion of the trade literature applauds the operation of the DSB as a force in promoting a stable, rules-based international trade regime. A number of trade scholars, however, have criticized the dispute settlement system for exhibiting an alleged bias in favor of a particular version of free trade.

Most articles advancing such critical views have focused on case-specific examples. For instance, Tarullo examines the Appellate Body's application of the standard of review in cases brought under

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32. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, pmb., Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 3, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement].

33. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, pmb., Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 3, available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) [hereinafter TBT Agreement].

34. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, pmb., Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 186, available at [http://www.wto.org/english/docs\\_e/legal\\_e/18-trims.pdf](http://www.wto.org/english/docs_e/legal_e/18-trims.pdf) [hereinafter TRIMS Agreement].

35. See Heiskanen, *supra* note 30, at 16–17 (discussing SPS, TBT and TRIPS agreements).

36. SPS Agreement, *supra* note 31, art. 2(2); see, e.g., Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 180, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC—Beef Hormones*].

the Anti-Dumping (AD) Agreement.<sup>37</sup> Tarullo focuses on disputes arising under Article 17.6 of the AD Agreement, which contains a provision requiring application of a *Chevron*-like standard of review when considering challenges to domestic agencies' AD decisions.<sup>38</sup> After reviewing all Appellate Body decisions adopted between 1995 and 2001 that interpret and apply this standard, Tarullo concludes that, with the exception of one case, the Appellate Body failed to apply the level of deference mandated by the AD Agreement.<sup>39</sup> Tarullo offers a series of explanations for why the Appellate Body failed to apply the correct AD standard of review. Chief among these is the notion that the Appellate Body is furthering the WTO preference for free trade<sup>40</sup> by attempting to establish a significant role for itself in shaping the law on international trade.<sup>41</sup> Noting other arguments for and against the Appellate Body's actions, Tarullo considers whether the refusal to apply the negotiated standard will have a negative impact on further rounds of international trade negotiations. He suggests that countries, particularly those with larger economies such as the United States, might be unwilling to enter into further trade-liberalizing agreements if they perceive the DSB system as pursuing an activist role by disregarding negotiated standards.<sup>42</sup>

Another anecdotal study, written by Ragosta, Joneja, and Zeldovich, is equally critical of WTO dispute settlement.<sup>43</sup> The study focuses on WTO cases involving trade remedy disputes and concludes that WTO panels and the Appellate Body have been engaged in a process of judicial activism creating a WTO "common law."<sup>44</sup> Specifically, the DSB has read obligations into trade disciplines where no such obligations exist.<sup>45</sup> The authors suggest that such judicial activism is a result of structural problems within the system, including the binding nature of the dispute settlement system, the unclear and ambiguous substantive provisions of the WTO agreements, the lack of democratic oversight of the Appellate Body

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37. Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109, 112 (2002).

38. *Id.* To the non-U.S. audience, *Chevron* is the short-name reference to a famous U.S. Supreme Court decision that announced a seemingly agency-deferential canon of statutory interpretation. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984). Although not exactly identical, the language of Article 17.6 of the Anti-Dumping Agreement (discussed in Part VI.A below) resembles that of the *Chevron* canon.

39. Tarullo, *supra* note 37, at 147.

40. *Id.* at 153.

41. *Id.* at 159.

42. *Id.* at 176.

43. Ragosta et al., *supra* note 17, at 698.

44. *Id.*

45. *Id.*

and the panels, and the absence of procedural protections in the system.<sup>46</sup> Endorsing Tarullo's theory, the authors assert that this combination of factors undermines faith in the WTO system and threatens support for additional liberalization in coming rounds of negotiations because the sovereigns involved cannot predict the consequences of their agreements.<sup>47</sup>

In contrast to these critical studies, most empirical scholarship praises the operation of the DSB. Such scholarship has produced either general descriptive statistical analyses of dispute outcomes or hypothetico-deductive studies on specific theories, such as the selection of defendants in WTO cases and the likelihood of settlement of disputes. Even where empirical analysis supports the critiques offered in the anecdotal studies previously discussed, most empirical authors look favorably at these results, viewing them as evidence that the WTO dispute settlement system functions according to its design and purpose. Thus, disagreement on whether these trends are beneficial or detrimental to the advancement of a rules-based international trade regime remains.

Among the descriptive statistical studies, Hudec presents the most comprehensive analysis of GATT dispute outcomes from 1948 to 1989.<sup>48</sup> Hudec seeks to determine how effectively the GATT system responded to "legally valid complaints."<sup>49</sup> After examining complaints by decade, party type, and identity and agreement type, Hudec concludes that the GATT dispute settlement procedure successfully resolved a high percentage of disputes (88% overall) in favor of complaints based on legally valid claims.<sup>50</sup> His data also indicates that the GATT dispute settlement system was more responsive to the interests of stronger countries, which, according to Hudec, is natural in a young legal system.<sup>51</sup> Hudec also finds that complaints involving agricultural trade are equally successful as complaints involving nonagricultural trade. Finally, Hudec's analysis shows that Antidumping and Countervailing Duty (AD/CVD) cases have a higher percentage of legal failure and a low rate of settlement.<sup>52</sup> He suggests that "the typical arbitrariness of AD/CVD criteria and the legal rigidity of the measures once taken might . . . have given them a greater than average chance of failure" and posits that "the ascension of AD/CVD measures to a place of importance in

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46. *Id.* at 706.

47. *Id.* at 699.

48. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 273 (1993).

49. *Id.* at 274.

50. *Id.* at 353.

51. *Id.* at 353–54.

52. *Id.* at 355.

national trade policy might . . . be a sign of other, deeper tendencies toward noncompliant behavior.”<sup>53</sup>

Hudec would later extend his empirical work to an examination of the outcomes of challenges brought against members’ measures during the early years of the DSB’s operation.<sup>54</sup> Hudec first observes a dramatic increase in the volume of cases and proposes two possible explanations for this increase.<sup>55</sup> Relying on the fact that developed and less developed countries had increased their complaint activity more or less equally, Hudec postulates that the increase in case volume was a result of the WTO members’ confidence in the new system’s ability to remove trade restrictions.<sup>56</sup> He also indicates that the increase in case volume is also related to the increase in the legal obligations arising from the creation of new WTO agreements.<sup>57</sup> Hudec’s second major finding is a threefold increase in the percentage of cases brought against developing countries.<sup>58</sup> He posits that this increase is the result of the successful effort in the Uruguay Round to impose legal discipline on developing countries.<sup>59</sup> To Hudec, the growth in the use of the dispute settlement mechanism by all parties is a welcome development toward strengthening trade as a rules-based system.<sup>60</sup>

Building on Hudec’s work, Davey conducts a survey of the WTO dispute settlement system in its first ten years of operation.<sup>61</sup> He focuses largely on the success of “major users” of the WTO dispute settlement system in achieving their goals of enforcement of specific agreements or trade policies.<sup>62</sup> “Major users” are the United States, the European Communities (EC), Canada, Japan, Brazil, and India.<sup>63</sup> Davey examines the outcomes achieved when the “major users” invoke the system, as well as the constraints the system places on them as a result of initiation of proceedings by other WTO

53. *Id.*

54. Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 3 (1999).

55. *Id.* at 15, 17.

56. *Id.* at 22. *But see* Marc L. Busch et al., *Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO 1* (Int’l Ctr. for Trade & Sustainable Dev. Programme on Dispute Settlement, Issue Paper No. 4, 2008), available at <http://ictsd.net/downloads/2008/12/legal-capacity.pdf> (theorizing that LDCs are actually less likely to bring claims at the WTO due to a weaker legal capacity).

57. Hudec, *supra* note 54, at 17.

58. *Id.* at 24.

59. *Id.* at 24–25.

60. *Id.* at 23.

61. Note that Davey looks at “disputes,” which begin at the request for consultations. *See* William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT’L ECON. L. 17, 18 (2005) (discussing disputes from 1995 through 1999).

62. *Id.* at 25.

63. *Id.*

members.<sup>64</sup> For example, Davey concludes that the United States has been “quite successful” in using the WTO system to effectively enforce two particular interests of U.S. trade policy: the TRIPS Agreement and the SPS Agreement.<sup>65</sup> However, as a Respondent, the U.S. experience has been mixed in that the special standard of review negotiated by the U.S. for AD cases has not been reflected in the outcomes of cases; however, Davey argues that such losses have not noticeably constrained the U.S. from imposing safeguards and antidumping and countervailing duties.<sup>66</sup>

Dunoff also conducts a brief overview of the U.S. experience under the WTO dispute settlement system.<sup>67</sup> He acknowledges that the United States has appeared either as Complainant, Respondent, or a third party in more disputes than any other WTO member<sup>68</sup> and argues that, as a Complainant, the U.S. “has been successful in virtually all of the cases it has pursued seriously.”<sup>69</sup> Dunoff asserts that the U.S. has complied with many of the adverse reports when it appears as Respondent and that many of the cases the U.S. lost were of relatively minor economic or political importance.<sup>70</sup> To Dunoff, U.S. compliance with WTO decisions reflects the U.S. perception that the DSB and the WTO system of trade rules maximize U.S. economic interests.<sup>71</sup> He does not discuss how U.S. losses as Respondent might affect such conclusions.

The other type of empirical analysis, the hypothetico-deductive study of WTO outcomes, attempts to empirically verify theories regarding the operation of the WTO dispute settlement. Some studies focus on explaining specific features of dispute settlement rather than formulating an overarching theory of WTO litigation. For example, Guzman and Simmons conduct an empirical analysis of settlements from the WTO’s inception in 1995 through 2000. They hypothesize that, when the subject matter of a dispute is of an “all or nothing” character, leaving little room for compromise, the parties are less likely to settle.<sup>72</sup> If the subject matter of the dispute is more flexible (e.g., tariff rates), however, the parties are more likely to negotiate a settlement.<sup>73</sup> From their data, the authors draw several conclusions. First, democracies are less likely to settle cases of an “all

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64. *Id.*

65. *Id.* at 26.

66. *Id.*

67. Jeffrey L. Dunoff, *The United States and International Courts and Tribunal* 24 (Temple Univ. Legal Studies, Research Paper No. 2007-08, 2007).

68. *Id.*

69. *Id.*

70. *Id.* at 26.

71. *See id.* at 28.

72. Guzman & Simmons, *supra* note 10, at 206.

73. *Id.*

or nothing” character.<sup>74</sup> Second, democracies are significantly more likely to resort to review by panels.<sup>75</sup> Finally, the authors conclude that transaction costs, such as domestic political ramifications and legal fees associated with pursuing a case, rather than legal culture or a high comfort level with the “rule of law,” better account for patterns of settlement in WTO adjudication.<sup>76</sup>

A more recent study seeks to explain the overall high success rate of Complainants at the WTO. Maton and Maton analyze the history of WTO disputes from its creation through 2004 in an attempt to determine whether members influence the outcomes of dispute settlement proceedings politically rather than through legal argument.<sup>77</sup> They first hypothesize that the greater the Complainant’s economic power and previous use of the Dispute Settlement Understanding (DSU), the more likely it is that the decision will favor the Complainant.<sup>78</sup> Second, they hypothesize that the EC and the United States are more likely to be successful than other members because of their “disproportionate political leverage” in international trade.<sup>79</sup> Finally, they examine the effect of third-party participants and hypothesize that the presence of third parties with greater economic power and prior litigation experience increases the likelihood of Complainant success.<sup>80</sup> In reporting their results, the authors first confirm that Complainants have a higher success rate (80% of all disputes) than Respondents.<sup>81</sup> They note that Complainants win 81.9% of panel rulings and 78.4% of Appellate Body decisions.<sup>82</sup> They further report that the United States and the EC have higher than average success rates at the panel level (92%).<sup>83</sup> However, their statistics show that the Respondent success rates of the United States and the EC (19% and 21%, respectively) do not match their Complainant success rates, and that these rates are comparable to the average success rate of all Respondents (18%).<sup>84</sup> The authors then report that the variables of economic power, previous participation in the system, or participation of third parties do not have a statistically significant effect on the high Complainant

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74. *Id.* at 227.

75. *Id.*

76. *Id.*

77. John Maton & Carolyn Maton, *Independence Under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement*, 10 J. INT’L ECON. L. 317 (2007).

78. *Id.* at 325–26.

79. *Id.* at 326.

80. *Id.* at 328.

81. *Id.*

82. *Id.*

83. *Id.* at 329.

84. *See id.* at 329 tbl.1.

Success Rate at the WTO.<sup>85</sup> They conclude by suggesting that further research incorporating a wider range of variables is necessary to explain the high Complainant Success Rate at the WTO.<sup>86</sup>

While it seems clear from these works that general trends can be detected in the operation of the dispute settlement system, there is no consensus on whether these trends will have a positive or negative impact on the future of the WTO and the international trade regime generally. For example, unlike Tarullo, Trachtman argues that WTO dispute resolution is the appropriate forum for clarifying key issues arising under the agreements, which the parties themselves have decided not to solve at the negotiating stage.<sup>87</sup> He supports this assertion using insights from “incomplete contract” theory.<sup>88</sup> This theory posits that contracts, including trade agreements, are incomplete in their capacity to specify in detail how norms will be applied to future conduct.<sup>89</sup> Focusing on the distinction between rules (specific norms) and standards (norms of broad meaning and application), Trachtman proposes that the WTO agreements are “optimally incomplete,” as they include not only rules, but also standards that give the DSB “appropriate instructions . . . to complete the ‘contract’ in particular cases.”<sup>90</sup> By interpreting these standards in concrete cases, the WTO dispute settlement mechanism acts in the manner envisaged by the WTO agreements. Despite the insightfulness of characterizing trade agreements as endogenously incomplete contracts, Trachtman’s positivist approach does not provide a comprehensive examination of *how* the DSB has actualized these standards.<sup>91</sup> Trachtman’s anecdotal study does not address whether DSB completion of the “WTO contract” might have consistently favored one particular set of litigants.

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85. The authors conduct both a logit and an OLS regression to test their hypotheses. *Id.* at 329–30. Logit regression results indicated that none of the variables have a statistically significant effect on the Complainant Success Rate. *Id.* at 330. However, when using the OLS model, the regressors “Difference in Previous Use” and “Difference in Third Party Numbers” become statistically significant. *Id.* at 331. However, the empirical literature does not condone the use of OLS regression analysis where dichotomous dependent variables are present because the general assumptions of OLS regression are violated. See DAMODAR N. GUJARATI, *BASIC ECONOMETRICS* 594 (4th ed. 2003).

86. See Maton & Maton, *supra* note 77, at 334.

87. Trachtman, *supra* note 13, at 333–34.

88. *Id.* at 334.

89. *Id.*

90. *Id.* at 346.

91. Trachtman’s study examines only two instances in which the Appellate Body “completed the contract”: Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US—Shrimp/Turtle*], and Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998). Trachtman, *supra* note 13, at 334–35.



None of these studies attempts to develop an overarching theory regarding the determinants of the higher rate of Complainant success in WTO litigation. This Article expands on the existing literature in two key ways. First, it takes advantage of a more detailed data set to analyze the outcomes of all WTO cases through September 2007 to determine if any discernable pattern in these outcomes can explain the high Complainant Success Rate. In doing so, it examines several litigation-based variables, including type of litigant, level of development, and subject matter of the litigation. It then subjects these variables to statistical testing. Only with such statistical verification is it possible to discern whether the WTO dispute settlement system in fact favors a specific type of party or interest. Second, this Article adds a new perspective to the debate on why the WTO dispute settlement system functions as it does by proposing biased rule development as the explanation for the asymmetric nature of WTO dispute outcomes.

#### IV. DATA DESCRIPTION AND METHODOLOGY

##### A. *Data and Methods*

###### 1. Defining a Case

For purposes of this Article, a “case” is a dispute in which a WTO member has requested that a panel be established by the DSB pursuant to the provisions of the DSU.<sup>92</sup> This, however, is not the first opportunity for potential litigants to avail themselves of their rights as WTO members. When a member believes that a benefit accruing to it under any of the GATT/WTO agreements has been nullified or impaired by a measure taken by another member,<sup>93</sup> it may request consultations with the “infringing” member.<sup>94</sup> These consultations are similar to the informal negotiating process that ordinarily occurs when two parties meet before one decides to file a complaint with a domestic court. Studies of patterns in domestic adjudication do not consider settlement activity that takes place before the filing of a complaint, as obtaining data on such activity is

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92. See DSU, *supra* note 7, art. 6.

93. GATT, *supra* note 7, art. XXIII(1)(a). A member may also claim that another member’s measure effectively deprives it of a benefit accruing under the agreements, even though the measure does not violate a specific provision of the WTO agreements. *Id.* art. XXIII(1)(b).

94. DSU, *supra* note 7, art. 4; GATT, *supra* note 7, art. XXIII(1). A complaining party must notify the DSB in writing when it requests consultations with another member to settle a matter before requesting a panel. DSU, *supra* note 7, art. 4(4).

not feasible.<sup>95</sup> To render WTO adjudication comparable to domestic litigation, one must use consistent concepts. Therefore, instead of looking at requests for consultations as the formal commencement of WTO adjudication, this study considers the panel request as the functional equivalent to filing a complaint in the domestic system.<sup>96</sup>

Indeed, as in a domestic system, it is only upon a member's request to establish a panel that the DSB can exercise its "judicial" jurisdiction, or, in WTO parlance, its "terms of reference."<sup>97</sup> Prior consultations, on the other hand, are merely a pre-litigation requirement designed to encourage cooperation among potential litigants. They operate much like notice-of-claim requirements in ordinary litigation, since they do not require any supervisory act by the adjudicating court.<sup>98</sup> Moreover, panel requests, unlike requests for consultations, share a number of characteristics with domestic complaints: they are "made in writing";<sup>99</sup> they identify the offending conduct or omission (i.e., the "measure");<sup>100</sup> and they provide "a

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95. See, e.g., Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 755–56 (1992). A general criticism applicable to empirical scholarship on litigation is that it focuses on too restrictive a set of disputes—those that are actually filed—to reach conclusions about the general nature of litigation. While the inability to study litigants whom one never sees can limit one's ability to fully model all litigation-related activity, it does not constitute an insurmountable barrier to understanding WTO adjudication. Studies of other litigation contexts reveal that "the linkage between developments among legal stages" of litigation "extend[s] back to the pre-filing settlement stage." *Id.* at 757 (citing other studies). As potential WTO complainants recognize that Complainants traditionally have fared very well in the bulk of observed disputes, it is more than plausible that they have become more and more confident and filed more requests for panels. Also, in litigation settings where plaintiffs are not likely to get any meaningful relief unless they sue, the existence of "might have been" plaintiffs is inconsequential. For the many reasons discussed in Part V, WTO Respondents might be reluctant to offer settlement concessions. This minimizes WTO Complainants' chances to obtain meaningful relief via pre-adjudication settlement, thereby forcing them to request the formation of a panel. Thus, the number of "might have been" WTO Complainants who refrain from suing after obtaining full redress of their grievances at the pre-panel request stage is likely quite limited.

96. For a discussion on the comparability of the WTO dispute settlement system to domestic court systems, see Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 225 (2008) ("Among international tribunals, the WTO's [Appellate Body] is arguably the most like domestic courts.").

97. DSU, *supra* note 7, art. 7.

98. See, e.g., *Felder v. Casey*, 487 U.S. 131, 151 (1988) (rejecting application of a state statute-mandated notice-of-claim requirement in federal civil rights litigation); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987) ("[Under 33 U.S.C. § 1365(b)(1)(A), part of the Clean Water Act], the purpose of [pre-litigation] notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.").

99. Compare DSU, *supra* note 7, art. 6(2), with FED. R. CIV. P. 3 (civil action commences with the filing of a complaint).

100. Compare DSU, *supra* note 7, art. 6(2), with FED. R. CIV. P. 8(a)(2) (short and plain statement of the claim).

summary of the legal basis of the complaint sufficient to present the problem clearly.”<sup>101</sup> Finally, analysis of the GATT and DSU texts supports the distinction drawn here between requests for consultations and panel requests.<sup>102</sup> In sum, members’ requests for the establishment of panels are the WTO counterpart to domestic complaint filings, which constitute the unit of analysis of studies conducted under the traditional positive theory of litigation.

## 2. Determining Case Outcomes

A case is considered to have a final outcome when the DSB adopts a panel or Appellate Body report. A “settled” case is any case in which: (1) the complaining party withdraws the panel request; (2) the DSB defers the establishment of a panel<sup>103</sup> (usually due to a responding party’s request) and the complaining party has not renewed its original request in the past three years;<sup>104</sup> (3) the DSB establishes a panel<sup>105</sup> but there has been no reported activity in the past three years; (4) the parties request that a panel stop its work<sup>106</sup> and the panel has remained inactive for twelve months; or (5) the parties officially notify the DSB that they have reached an agreed solution.<sup>107</sup> Finally, a case is considered “active” when a panel request has been made and the panel or Appellate Body is currently working toward a formal disposition of the case. The following table contains a breakdown of all WTO cases from January 1995 through September 2007:

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101. Compare DSU, *supra* note 7, art. 6(2), with FED. R. CIV. P. 8(a)(2) (short and plain statement of the claim).

102. See GATT, *supra* note 7, arts. XXII, XXIII (distinguishing between consultations and requests for panels after no satisfactory adjustment is reached); see also DSU, *supra* note 7, arts. 1, 3(5) (listing separately consultations and invocation of the dispute resolution process), 4(7) (discussing the procedure to be followed during consultations), 6 (discussing the process for requesting panel and requiring Complainants to state that consultations have been held).

103. DSU, *supra* note 7, art. 6(1).

104. In this study, this means any case that has remained inactive since September 2004.

105. DSU, *supra* note 7, art. 6.

106. *Id.* art. 12(12).

107. *Id.* art. 3(6).

TABLE A: STATUS OF CASES

Case Status	Number of Cases
DSB Adopted Report	105
Settled	44
Active	29
Total	178

Litigants' success rates are calculated from the universe of adopted decisions. A Complainant wins a case any time the Respondent's measure is deemed not in compliance with the Respondent's WTO obligations. Conversely, a finding that at least one of Respondent's measures "impairs or nullifies" Complainant's cognizable rights under the "covered agreements" was coded as a Respondent loss, because at that point the Respondent is ordinarily under an obligation to bring the defeated measure into compliance.<sup>108</sup>

After determining the overall success rate of Complainants and Respondents (the dependent variable), the study attempted to ascertain whether litigants' success rates correlate with a host of potential explanatory factors. Factors tested included type of agreement invoked (e.g., trade remedy vs. non-trade remedy agreement), litigant identity (e.g., U.S., EC, Brazil, India, etc.), level of litigant's development (e.g., First World vs. Third World), existence and type of litigant coalitions (e.g., Complainants from multiple countries), and type of product involved (e.g., commodities vs. noncommodities). Should Complainant Success Rates remain unchanged regardless of the independent factor tested, then one can safely conclude that no particular case or litigant variables can account for litigant success. Thus, absent asymmetric information or stake asymmetries (or both) among Complainants and Respondents, the detection of a sustained pattern of success by Complainants would indicate that the results might instead be caused by some inherent property of the WTO dispute settlement system.

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108. Another study, focusing on the 1995 to 2000 period, reported that Complainants succeeded in obtaining full or partial victories ("concessions") in 79% of all disputes. See Marc Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 725 (2003).

### B. Results

As discussed in Part III, prior studies have detected some general trends in WTO adjudication, with the high Complainant Success Rate being the most significant. However, none of these studies examined whether such rates vary in response to the subject matter of a case, the identity of litigants, or change due to some other litigation-related factor. A party's overall high success rate cannot alone explain what other factors might be influencing litigation results. This Part presents Complainant win rates along several different categories of cases and litigants and empirically tests whether variations within these categories have any statistical impact on such rates. To avoid double-counting, only the outcomes from panel and Appellate Body reports adopted by the DSB are used.<sup>109</sup>

Table B.1 indicates that Complainant Success Rates vary between 83% and 91% across all Case Types.<sup>110</sup> To test whether Case Type is statistically correlated with Complainant Success, I performed Fisher's Exact Tests on cross-tabulations of these two variables and found no significant correlation.<sup>111</sup> Furthermore, nothing in the Appellate Body's decisions reveals that it distinguishes between trade remedy and non-trade remedy cases.

That the Complainant Success Rate appears unaffected by differences in Case Types is remarkable for at least two reasons. First, one would expect that in trade remedy cases—of which approximately half (twenty-two) are challenges to (Respondent) agencies' antidumping rulings—Complainants would have a lower rate of success than in non-trade remedy cases. Under the AD Agreement, agencies' factual and legal determinations are owed a heightened, *Chevron*-like level of deference.<sup>112</sup> Presumably, this should result in fewer Complainant wins in AD cases and, thus,

109. The DSB does not consider panel reports for adoption when "a party to the dispute formally notifies the DSB of its decision to appeal." DSU, *supra* note 7, art. 16(4). However, panel analyses comprise a significant portion of DSB adoptions, as the Appellate Body has affirmed 91% of all panel decisions.

110. Cases involving challenges to both trade remedies and non-trade remedies were excluded to avoid double-counting. Similarly, simultaneous challenges under the AD Agreement and the SCM Agreement were excluded. However, the excluded AD/SCM mixed cases were counted in the general trade remedy category. This counting methodology was applied to overlapping categories reported in the tables below.

111. The statistical results discussed in Part B (Fisher's Exact Tests, two-tailed) were obtained from cross-tabulations of the independent variables displayed in the left columns of the tables below and Complainant Success Rate, the sole dependent variable studied.

112. See Anti-Dumping Agreement, *supra* note 25, art. 17.6 (stating that a measure will be in conformity with the Agreement if it rests upon a permissible interpretation of law).

produce a lower Complainant Success Rate in trade remedy cases than in non-trade remedy cases. Quite simply, outcome expectations based on the AD Agreement's more Respondent-friendly standard did not result in a lower rate of Complainant wins in this category of cases. Second, among trade remedy cases, one would expect challenges to AD decisions to result in a lower percentage of Complainant wins than in subsidy cases (i.e., cases under the Subsidies and Countervailing Measures (SCM) Agreement) since the AD Agreement expressly prescribes a stringent standard of review while the SCM Agreement does not.<sup>113</sup> Yet, the Complainant Success Rate in SCM cases (86%) was actually lower than in AD cases (91%), although the difference is not statistically significant. That the AD Agreement's prescribed level of deference has not resulted in lower Complainant Success Rates in statistical—or even in relative percentage—terms is both surprising and revealing. This evidence seems to support Tarullo's comment that the Appellate Body has disregarded the heightened AD standard of review.<sup>114</sup>

TABLE B.1: COMPLAINANT SUCCESS RATE BY CASE TYPE

Case Type	Complainant Success Rate
Trade Remedy	88.89%
AD	90.91%
SCM	86.36%
Non-Trade Remedy	83.33%

Note: Difference-of-proportion tests performed on success rates between categories (rows) and within subcategories (indented rows) yielded no statistically significant results (p-values > .05 (one-tailed)).

Because case-specific distinctions cannot explain litigant success, one turns to Party Identity as a potential explanatory variable. Of the 105 adopted DSB reports, the U.S. and the EC have been the two

113. The question of which standard of review applies in SCM cases was hotly contested and (apparently) ultimately settled by the Appellate Body in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (May 10, 2000) [hereinafter *US—Leaded Bar*]. In that case, when presented with a Ministerial Declaration recognizing the need to apply a common standard of review to both AD and SCM cases, the Appellate Body refused to apply the AD Agreement's standard of review in the SCM context. According to the Appellate Body, the Declaration was merely hortatory. Cf. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 122, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *US—Shrimp/Turtle Compliance*] (emphasis added) (recognizing that declarations can be binding on WTO members). These two cases are discussed in detail in Part VI.B below.

114. Tarullo, *supra* note 37, at 118.

most frequent Complainants, with 29 and 25 appearances respectively (51% of all cases). If litigant success is related to Party Identity, cases involving the two most litigious WTO members might serve as a test for such a relationship. As First World countries with presumably more resources dedicated to prosecuting WTO cases, the U.S. and the EC should have higher Complainant Success Rates.<sup>115</sup> Indeed, as Table B.2 illustrates, U.S. and EC success rates as Complainants are quite high—83% for the U.S. and 96% for the EC in all cases, regardless of subject matter. However, cross-tabulations of Party Identity against Complainant Success Rate show that Party Identity is not a statistically significant factor, either in the aggregate or within any particular case category. Similarly, an examination of cases where the U.S. and the EC appear as sole Complainants reveals that their lone appearance is not statistically correlated with their respective success rates. Finally, as in Table B.1 (all countries), the percentage of U.S. and EC wins is systematically higher in trade remedy cases than otherwise, although this difference is not statistically significant.

TABLE B.2: COMPLAINANT SUCCESS RATE BY PARTY IDENTITY  
(U.S. & EC)

Party Identity	Complainant Success Rate
U.S.	82.76%
Trade Remedy (5) <sup>116</sup>	100.00%
AD (1)	100.00%
SCM (3)	100.00%
Non-Trade Remedy	79.17%

115. For purposes of this study, a First World country is a “high income economy” according to the World Bank Country Classification by income. Conversely, for purposes of this study, a Third World country is any country classified otherwise. See World Bank Country Classification, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Feb. 17, 2009) (describing the World Bank’s classification of countries and providing a table showing each country’s current classification).

116. Of the five trade remedy cases the U.S. brought, *Mexico—Rice* was discarded from the pure AD and SCM count because it is both an AD and an SCM case. Appellate Body Report, *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R (Nov. 29, 2005). Such mixed cases were similarly discarded throughout Part B. They were, however, included in the overall trade remedy count.

<b>Party Identity</b>	<b>Complainant Success Rate</b>
U.S. Alone	75.00%
Trade Remedy (3)	100.00%
AD (1)	100.00%
SCM (1)	100.00%
Non-Trade Remedy	70.59%
EC	96.00%
Trade Remedy	100.00%
AD (3)	100.00%
SCM (5)	100.00%
Non-Trade Remedy	90.91%
EC Alone	94.74%
Trade Remedy	100.00%
AD (3)	100.00%
SCM (4)	100.00%
Non-Trade Remedy	88.89%

Notes: Where a category has five or fewer cases, the number of cases is indicated in parentheses. Difference-of-proportion tests performed on success rates between categories (rows) and within subcategories (indented rows) yielded no statistically significant results (p-values > .05 (one-tailed)).

While Party Identity cannot account for the high Complainant Success Rate of the most litigious First World WTO members, one may still wonder if it might explain the Complainant Success Rates of the two most litigious Third World WTO members: Brazil (11 cases) and India (8 cases). Table B.3 indicates that Brazil and India have very high rates of success as Complainants. Overall, Brazil has won all of its cases and India has succeeded in all but one case it has brought so far (an 88% win rate). As with the U.S. and the EC, cross-tabulations of Party Identity against Complainant Success Rate showed that identity has no statistically significant correlation with a party's win rate, either in the aggregate or within any particular Case Type. Similarly, appearances by Brazil (100% win rate) and India (83% win rate) as sole Complainants were not statistically correlated with their success as complainants. In keeping with the trend observed in Tables B.1 (all countries) and B.2 (U.S. and EC), the percentage of Brazilian and Indian wins is systematically higher in



trade remedy cases than otherwise, but, again, this difference is not statistically significant.

TABLE B.3: COMPLAINANT SUCCESS RATE BY PARTY IDENTITY  
(BRAZIL & INDIA)

Party Identity	Complainant Success Rate
Brazil	100.00%
Trade Remedy	100.00%
AD (2)	100.00%
SCM (4)	100.00%
Non-Trade Remedy (3)	100.00%
Brazil Alone	100.00%
Trade Remedy (5)	100.00%
AD (2)	100.00%
SCM (3)	100.00%
Non-Trade Remedy (1)	100.00%
India	87.50%
Trade Remedy (3)	100.00%
AD (1)	100.00%
SCM (0)	---
Non-Trade Remedy	80.00%
India Alone	83.33%
Trade Remedy (2)	100.00%
AD (1)	100.00%
SCM (0)	---
Non-Trade Remedy (4)	75.00%

Notes: Where a category has five or fewer cases, the number of cases is indicated in parentheses. Difference-of-proportion tests performed on success rates between categories (rows) and within subcategories (indented rows) yielded no statistically significant results (p-values > .05 (one-tailed)).

Arguably, a finding of no causation between Party Identity and Complainant success based on data that includes all litigants, or on a sample of the two most litigious First and Third World WTO

members, cannot by itself eliminate the possibility that Complainant win rates might be related to some other country-based explanation. One might posit, for instance, that a country's success as a Complainant might be related to its level of income, even if this relationship could not be detected among the two most litigious members of each group tested above. Indeed, working with larger samples by switching from dual-country to multiple-country analysis increases the chances of finding statistically significant relationships. Among the 105 adopted reports, First World countries initiated anywhere between 56% (59 cases brought solely by First World countries) and 70% of the empanelled WTO disputes (73 cases, including those brought with Third World countries as co-plaintiffs), while Third World countries were Complainants between 28% (29 cases brought exclusively by Third World countries) and 35% (37 cases, including those brought with First World countries as co-plaintiffs) of the time.

As in prior tests, I looked at whether the dependent variable Complainant Success Rate changed as Income Level varied. Table B.4 shows that Complainant Success Rates did vary between 84% (for all cases involving First World Complainants) and 92% (all cases involving Third World Complainants). First World-Complainant-only cases showed an 80% win rate, while cases prosecuted solely by Third World Complainants showed a win rate of 90%. These results conform to the overall pattern of high Complainant success in WTO litigation and appear to contradict the assumption that First World Complainants would fare better in WTO litigation. However, these results provide no evidence of a statistically significant relationship between a member's Income Level and its likelihood of success as a Complainant. Fisher's Exact Tests on cross-tabulations between these two variables produced no statistical correlation, either by combining all cases together or by segregating them by subject matter.

I also detected another familiar trend: despite the lack of statistical significance, the percentage of First and Third World Complainant wins is systematically higher in trade remedy cases than in non-trade remedy cases.<sup>117</sup> This pattern is puzzling given the differences in the text, declarations, and Appellate Body-approved

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117. The only exception is the Third World "all cases" sample. However, even this exception deserves some qualification. As in all other instances, the rate of Complainant success in AD cases is still relatively higher than or the same as the success rate in SCM cases, though the difference is not statistically significant. As discussed above, one would expect that the AD Agreement's more agency-deferential standard of review would translate into more agency or Respondent wins (i.e., more Complainant losses) than in SCM cases, since the Appellate Body determined that the AD standard does not apply to cases under the SCM Agreement. *See supra* note 116 and accompanying text.

interpretations of the WTO agreements. With AD challenges constituting about half of all trade remedy disputes, one would expect the more Respondent-deferential AD standard of review to depress the Complainant Success Rate in the trade remedy category. Even if one believed that WTO dispute resolution was created to favor Complainants, such belief would not be antithetical to the expectation that, at least in AD cases, a stricter standard of review should have some discernible impact on the results of WTO adjudication.

TABLE B.4: COMPLAINANT SUCCESS RATE BY INCOME LEVEL

<b>Income Level</b>	<b>Complainant Success Rate</b>
First World	83.56%
Trade Remedy	88.24%
AD	90.00%
SCM	86.67%
Non-Trade Remedy	80.56%
First World Alone	79.66%
Trade Remedy	85.71%
AD	90.00%
SCM	83.33%
Non-Trade Remedy	75.86%
Third World	91.89%
Trade Remedy	91.30%
AD	91.67%
SCM	87.50%
Non-Trade Remedy	92.86%
Third World Alone	89.66%
Trade Remedy	90.00%
AD	91.67%
SCM	85.71%
Non-Trade Remedy	88.89%

Note: Difference-of-proportion tests performed on success rates between categories (rows) and within subcategories (indented rows) yielded no statistically significant results (p-values > .05 (one-tailed)).

Because Case Type, Party Identity, and Income Level cannot account for the high rate of Complainant success in WTO litigation, one must look beyond the impact of substantive variables to the potential role that interactions among members may have on adjudication. Specifically, one would expect that joint appearances as Complainants would lead to more wins than solo appearances. Presumably, countries acting together increase their chances of success, not only by drawing more attention to the legal issues implicated in a case, but also by exerting greater pressure on the adjudicators to base their decisions along more majoritarian lines. Furthermore, co-Complainants can pool their resources and consult with one another throughout the process. Indeed, in no other configuration were Complainants more successful than in the sixteen cases in which at least two of them appeared together.

Table B.5 shows that multiple Complainants have a perfect record as WTO litigants, both in the aggregate and by Case Type. Similarly, different combinations of First and Third World countries produced the same level of success. At first, it appeared that in a system in which complainants have been very successful, this pooling effect might compound their chances of prevailing in litigation. To detect whether multiple-Complainant appearances were statistically correlated with Complainant success, I performed Fisher's Exact Tests on several cross-tabulations, but again found no statistically significant correlation, either in the aggregate or within any particular Case Type.

TABLE B.5: EFFECT OF MULTIPLE COMPLAINANTS ON  
COMPLAINANT SUCCESS RATE

<b>Multiple Complainant Appearances</b>	<b>Complainant Success Rate</b>
All Cases	100.00%
Trade Remedy	100.00%
AD (0)	---
SCM (3)	100.00%
Non-Trade Remedy	100.00%
U.S. & EC (3)	100.00%
Trade Remedy (1)	100.00%
AD (0)	---
SCM (1)	100.00%
Non-Trade Remedy (2)	100.00%

Multiple Complainant Appearances	Complainant Success Rate
Brazil & India (1)	100.00%
Trade Remedy (1)	100.00%
AD (0)	---
SCM (0)	---
Non-Trade Remedy (0)	---
First World & Third World (5)	100.00%
Trade Remedy (3)	100.00%
AD (0)	---
SCM (1)	100.00%
Non-Trade Remedy (2)	100.00%

Notes: Where a category has five or fewer cases, the number of cases is indicated in parentheses. Difference-of-proportion tests performed on success rates between categories (rows) and within subcategories (indented rows) yielded no statistically significant results (p-values > .05 (one-tailed)).

Having discarded Complainant interaction and other variables as explanations for Complainant success, I tested whether the Product Type implicated in a particular challenged measure could affect Complainants' win rate. Because commodities are a traditional export from mature industries in both First and Third World countries, they are typical candidates for trade-restricting measures on the part of importing countries (i.e., Respondents).<sup>118</sup> Indeed, as scarcely differentiated goods, commodities are often in direct competition with nationally-sourced goods and are likely targets of protectionist measures; therefore, they are regularly involved in WTO disputes.<sup>119</sup> Once challenged at the WTO, the logic goes, these commodity-restricting measures are more likely to be defeated than measures in noncommodity cases. This is so because commodity-restricting measures could be the product of collective action by rent-

118. For coding purposes, I relied on the MIT Dictionary of Modern Economics' definition of "commodity" to distinguish between commodities and noncommodities. Specifically, a merchandise qualifies as a commodity if it is a "raw foodstuff or material" and is "widely traded internationally in organised markets." THE MIT DICTIONARY OF MODERN ECONOMICS 68 (David W. Pearce ed., 4th ed. 1992).

119. Note that despite the low degree of differentiation among commodities, developed countries often export and import the "same" commodities to each other because commodities, though often similar, are not necessarily identical. Research on intra-industry trade in the international economics subdiscipline has long recognized this feature of developed-country trade. See, e.g., HERBERT G. GRUBEL & P.J. LLOYD, INTRA-INDUSTRY TRADE: THE THEORY AND MEASUREMENT OF INTERNATIONAL TRADE IN DIFFERENTIATED PRODUCTS 14 (1975).

seeking, less-dynamic domestic producers, which might not have the requisite political clout to preserve their domestic successes against the background of the higher, multisector considerations involved in WTO sovereign adjudication.<sup>120</sup> If these assumptions are correct, one would expect WTO challenges to measures restricting commodity trade to have a high percentage of Complainant wins, with WTO dispute settlement functioning as the ultimate check on such protectionism. Should this occur, and should Product Type turn out to be statistically correlated with Complainant Success Rate, the reason for such high win rates would be explained.

As Table B.6 illustrates, commodity cases do indeed have a high rate of Complainant success (90% of 48 cases), but so do noncommodity cases (82% of 57 cases). It is no surprise then that cross-tabulations of Product Type against Complainant Success Rate show no statistically significant correlation between the two variables. As in every test conducted in this study, the high Complainant Success Rate simply cannot be explained by any case or litigant-intrinsic characteristic.

TABLE B.6: EFFECT OF PRODUCT TYPE ON COMPLAINANT SUCCESS RATE

Product Type	Complainant Success Rate
Commodity	89.58%
Noncommodity	82.46%

Note: Difference-of-proportion tests performed on success rates between categories (rows) and within subcategories (indented rows) yielded no statistically significant results (p-values > .05 (one-tailed)).

Since none of the tested variables can account for WTO Complainants' high success rates, one must wonder whether some all-encompassing, systemic factor might be at work. Indeed, these rates occur regardless of case or litigant characteristics. The remainder of

120. Prior empirical research in the context of U.S. judicial and NAFTA Chapter 19 trade remedy litigation reveals that domestic commodity producer rent-seeking behavior cannot explain their high rate of success at the agency level. See Juscelino F. Colares, *An Empirical Examination of Product and Litigant-Specific Theories for the Divergence Between NAFTA Chapter 19 and U.S. Judicial Review*, 42 J. WORLD TRADE 691, 709 (2008) ("[M]any investigations of commodities, like Softwood Lumber, Pork and Wheat, involve at least as concentrated downstream U.S. consuming industries as they involve U.S. producers seeking trade barriers."). Because members of large or more concentrated commodity *importing* industries and their foreign industry allies can be just as well organized for collective action as the domestic producing industry, they often are well positioned to offset domestic producers' rent-seeking attempts at winning domestic-agency protection.

this article discusses some potential explanations of the systemic prevalence of high Complainant Success Rates.

## V. ALTERNATIVE EXPLANATIONS

### A. Case Selection Effect and the Results of WTO Dispute Settlement

One could argue that a case selection effect undermines any conclusion regarding the general nature of WTO dispute settlement.<sup>121</sup> Since the sustained pattern of Complainant success is based on observing only fully adjudicated disputes, the high percentage of Complainant wins describes at most the characteristics of fully adjudicated disputes, rather than the characteristics of the entire universe of disputes brought before the DSB system.<sup>122</sup> However, the case selection effect fails as an alternative explanation in the WTO context for two basic reasons.

First, case selection as a result of settlement agreements has little effect on the DSB system, where approximately 70% of all cases in which a panel is requested are fully adjudicated *without* settlement (105 of 149 cases).<sup>123</sup> These statistics are in stark contrast to patterns observed in U.S. civil litigation, where only 1.8%<sup>124</sup> of federal civil cases<sup>125</sup> are fully adjudicated and up to 72% of the disputes are terminated due to settlements.<sup>126</sup> The low frequency of WTO settlement activity undercuts the selection argument, as the

121. See Priest & Klein, *supra* note 3, at 1 (discussing that doctrinal information has disclosed little about how legal rules affect behavior or affect the generation of legal disputes).

122. For reasons discussed in Part IV.A.1 *supra*, the reader should recall that the formal commencement of WTO litigation for purposes of this study is triggered by the request for a panel. Therefore, cases dropped before a request for a panel is made are not part of the population of disputes investigated in this study.

123. See *supra* tbl. A.

124. Percentage from 2002. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

125. Note that even in the realm of litigation that often involves high monetary stakes and litigants with substantial resources, such as intellectual property cases, the rate of trials as a percentage of dispositions is very low (2.4% in the U.S.). See *id.* at 463; PRICEWATERHOUSECOOPERS LLP, 2007 PATENT AND TRADEMARK DAMAGES STUDY (2007), available at [http://www.pwc.com/extweb/service.nsf/docid/3ca24a75615f03948025711e004b69a0/\\$file/2007\\_Patent\\_Study.pdf](http://www.pwc.com/extweb/service.nsf/docid/3ca24a75615f03948025711e004b69a0/$file/2007_Patent_Study.pdf) (reporting that the median award amount for 2005 was \$6,000,000). The much lower settlement-to-total-number-of-disputes ratio in WTO litigation makes WTO outcomes much more representative of overall litigation.

126. See Gillian Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 729–33 (2004) (using data from 2000, including consent judgments, but not cases disposed of through abandonment or default).

subset of fully adjudicated disputes represents such a large portion of the entire universe of disputes. More importantly, Complainants are winning *more* cases, not fewer, even after one excludes their presumably stronger, settled cases.

Second, even assuming the presence of a selection effect in the 70% of disputes reaching full adjudication, this effect cannot account for the magnitude of the win rate disparity between Complainants and Respondents. Complainant Success Rates ranging from 83% to 91% across all Case Types are a substantial deviation from the 50% success rate expected under random litigation assumptions.<sup>127</sup> Thus, even if a residual selection effect exists here—because cases decided do not comprise 100% of all empanelled cases—such a large deviation in litigant success rates is too substantial and systematic to be attributed to case selection alone.

### B. *Effect of Settlement Constraints on WTO Adjudication*

The relative low frequency of settlement activity in WTO adjudication in comparison to ordinary adjudication merits consideration beyond the case selection context. The presence and potential importance of settlement constraints in WTO adjudication could be a systemic explanation for WTO dispute outcomes. Specifically, a low level of settlement activity in WTO litigation (only about 30% of all litigation) might be the reason for such high Complainant Success Rates. If, due to some feature of the WTO system's design, members face significant settlement constraints, the occurrence of high Complainant success might be attributed to Respondents' inability to settle.

A previous study suggests that informal constraints, such as members' inability to make deals involving transfers in unrelated areas or members' general reluctance to procure settlement via cash payments, reduce the scope and the possibility of settlement in WTO litigation.<sup>128</sup> It also proposes that the operation of the MFN principle further limits members' willingness to enter into settlements because they hesitate to offer concessions that "may have to be granted to

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127. The Author is aware of only one other adjudicatory system that has produced higher plaintiff success rates: the Japanese criminal justice system, where conviction rates exceed 99%. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 53–54 (2001). However, the authors of this study demonstrate these high conviction rates result from case selection and low prosecutorial budgets, as "understaffed prosecutors present judges with only the most obviously guilty defendants." *Id.* at 53. This phenomenon does not appear to occur in WTO adjudication, where the "prosecutor" is necessarily a sovereign government who typically has more budgetary discretion than a prosecutor in criminal proceedings.

128. Guzman & Simmons, *supra* note 10, at 210–11.



every WTO member state.”<sup>129</sup> One could thus hypothesize that the combined effect of these institutional characteristics has a depressing effect on the rate of settlements in WTO litigation. At first glance, the low settlement rate verified in WTO adjudication seems to support this hypothesis.<sup>130</sup>

However, before one can conclude that settlement constraints are the driving forces behind the highly asymmetric pattern of Complainant and Respondent Success Rates, it must first be shown that these constraints indeed influence members’ litigation behavior. Taking the operation of the MFN principle and other settlement constraints into account, one would expect that a Respondent’s trade dependence affects its attitude toward settlement. Specifically, Respondents with higher trade-to-GDP ratios should have lower settlement rates due to their heavier reliance on trade. Such reliance on trade should cause Respondents to hesitate extending settlement offers, because whatever special concession they offer to Complainants must necessarily be granted to other WTO members, creating potential broad repercussions in their economies.<sup>131</sup> Conversely, if settlement constraints significantly influence Respondents’ litigation behavior, Respondents with lower trade dependence should be more inclined to settle, because any concession granted would have a comparatively smaller impact on their overall economy.

To determine whether Respondents’ litigation behavior is susceptible to settlement constraints, I obtained each Respondent’s trade-to-GDP ratio<sup>132</sup> and then regressed this ratio against its settlement rate.<sup>133</sup> The goal was to ascertain whether a Respondent’s trade dependence, as measured by its trade-to-GDP ratio, affected its attitude toward settlement as demonstrated by its settlement rate. I also looked at Respondents’ import-to-GDP ratios as an alternative regressor. Arguably, a country’s import level most directly reflects the effects of settlement concessions, as other trade partners are likely to take advantage of removed restrictions on trade.

129. *Id.* at 210.

130. To be clear, Guzman & Simmons did not propose that settlement constraints provide a systemic explanation for WTO outcomes. *See id.* Rather, this author uses their observation regarding settlement constraints to test whether these constraints have a significant impact on the overall pattern of WTO outcomes.

131. Viewed in this way, the MFN principle operates in the settlement context much like *res judicata* does in the ordinary adjudication context.

132. Data on Respondents’ overall *merchandise* trade (export + imports) and GDP was obtained from each member’s “Trade Profile” in the WTO Website. World Trade Organization, Trade Profiles, <http://stat.wto.org/CountryProfile/WSDBCountryPFReporter.aspx?Language=E> (last visited Feb. 17, 2009). All figures were calculated in 2005 U.S. dollars. *Id.*

133. Respondents’ settlement rates were calculated as the ratio between number of cases settled and the total number of cases.

Table C reports the results of these two linear regressions. These models show that the economic dimension of settlement constraints, as reflected in Respondents' overall trade or import levels, is likely *not* affecting Respondents' attitudes toward settlement. None of these models or their regressors was statistically significant at the .05 probability level. Furthermore, since one can be 95% confident that the intervals around each regression coefficient contain the true regression slope, and because each interval includes a value of zero, Respondents' concerns over the potential economic impact of concessions likely have had no impact on their settlement behavior.

TABLE C: REGRESSION MODELS OF SETTLEMENT RATE

	N	[95% Conf. Interval]	t (p-value)	Model's F (p-value)	R <sup>2</sup> /Adj-R <sup>2</sup>
<i>Regressors based on Respondents' Trade Profile:</i>					
trade-to-GDP (tGDP) .109 (.214)	27	[-.332 .549]	.510 (.616)	.260 (.616)	.010/-.029
import-to-GDP (iGDP) .106 (.441)	27	[-.802 1.015]	.240 (.812)	.060 (.812)	.002/-.0376

*Notes:* Regressor coefficients and standard errors are presented below regressors. Models' intercepts are not reported. Regressor and model test statistics and their p-values (in parentheses) are reported in separate columns. Both models were estimated by using the "regress" command in Stata (v.9.2).

Because the potential economic effect of settlement concessions is not correlated with settlement rates, one must deduce that settlement constraints have not influenced Respondent settlement calculus. Thus, although potentially having a settlement-depressing influence, settlement constraints cannot *alone* account for the extreme imbalance between Complainant and Respondent success in litigation. The magnitude of the outcome asymmetry is too great to be explained by an otherwise empirically minor feature of the system. Perhaps the existence of certain built-in incentives for full adjudication offers a better explanation for the low settlement rate than does a theory of settlement constraints. The WTO litigation system and its associated expenses are largely a sunk cost. "Court" costs are covered by members' contributions, and most WTO legal representation is institutionally built into governmental budgets. Therefore, WTO members are not exposed to all of the financial constraints that confront ordinary litigants. Yet, adjudication does

present an opportunity cost. Trade diplomats are also busy conducting further rounds of negotiations and complying with their countries' trade policy reporting requirements, when they are not already involved in other litigation. In any case, WTO members' reluctance to settle is likely the result of a much more complex calculus than the mere existence of settlement constraints suggests.<sup>134</sup>

### C. *Asymmetry of Information and Asymmetry of Stakes*

It is possible that the relatively high frequency of pro-Complainant outcomes in WTO litigation is simply the result of better-informed Complainants whose cases are also meritorious. Indeed, some non-trade studies have pointed to instances in ordinary litigation where better-informed plaintiffs systematically bring cases and litigate them more effectively than defendants.<sup>135</sup> To date, however, there is no empirical support for this type of claim in the WTO context. In fact, the finding that country identity, income level, and case subject matter play no part in WTO litigation undermines the case for any information advantage by Complainants alone. Thus, a thesis that Complainants, as the "haves" in WTO litigation, are the likely successful litigants, and Respondents, as the "have nots," are the likely losers, has no empirical support. Where Complainant Success Rates cannot be attributed to any particular plaintiff characteristic or Case Type, and where no evidence exists to support any information advantage by Complainants, it is highly unlikely that some undetected and systemic information asymmetry is causing these results. Furthermore, there does not seem to be any theoretical support for this view. As in ordinary litigation, WTO litigants face similar, albeit not necessarily identical, economic incentives. Governments on each side are pressured by domestic interests who are more than willing to close any perceived information gaps in their government's cases. Thus, these incentives typically keep governments "honest" and discourage weak representation.

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134. See *infra* Part V.D–E (discussing whether this calculus and Respondents' inability to settle might be the result of a faulty assessment of the system in which they operate).

135. See, e.g., Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92, S109 (1997) (acknowledging that differing information available to plaintiffs and defendants may be a factor in trial outcomes); Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL. STUD. 29, 29–30 (1995) (asserting that asymmetric information about the likely outcome at trial plays a large role in the decision to go to trial or settle); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL. STUD. 187, 189 (1993) (suggesting that strategic behavior stemming from an informational advantage is necessary to explain litigation patterns).

Under a different theory, one could argue that Complainants, as the initiators of litigation, are more invested in judicial disputes due to their condition as “aggrieved” parties. This self-perception might provide Complainants with the impetus to invest more resources and effort in prosecuting their cases, thus producing stake asymmetry. However, the rationale applicable to information asymmetry applies equally here. For instance, as the discussion of the role of the MFN principle in the settlement context illustrates, Respondents are fully aware of the *res judicata* implications of a settlement offer and are just as interested as Complainants in presenting a strong case. Moreover, even when facing a weak case on the merits, a strategically minded senior trade bureaucrat might find a well-fought WTO loss much more politically palatable than the offer of a meaningful settlement to a Complainant that might disappoint electoral interests.<sup>136</sup> Thus, stake asymmetry cannot theoretically or empirically explain the discrepancy in Complainant and Respondent win rates. Simply put, the highly asymmetric pattern of Complainant Success Rates requires an alternative, more robust, systemic explanation.

#### D. Complainant Desire to Make Law

One could also suggest that Complainants’ preference for “rule results” instead of “tangible results” explains the dearth in settlement activity in WTO adjudication and therefore the persistent high Complainant Success Rate. Marc Galanter was among the first to analyze the outcomes of a case in terms of a rule component and a tangible component. He proposed that a repeat litigant “interested in maximizing his tangible gain in a series of cases . . . may be willing to trade off tangible gain in any one case for rule gain (or to minimize

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136. Note that not all trade disputes are politically salient in terms of their electoral implications. While the electoral dimensions of a case may discourage settlement in some instances—e.g., US–Steel Safeguards—not all trade disputes have significant electoral import. See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10, 2003) (affirming the Panel’s finding that safeguard measures imposed by the United States “were deprived of a legal basis,” and suggesting that the U.S. bring its safeguard measures into conformity with its obligations under certain WTO agreement). That many WTO disputes are not inherently political, but rather the product of interest-group rent-seeking activity, is illustrated by cases such as *EC—Bananas III* and *Brazil—Retreaded Tires*, where litigants could have settled without necessarily incurring any tangible electoral loss. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tires*, WT/DS332/AB/R (Dec. 3, 2007); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997). In sum, electoral politics does not influence settlement behavior in all cases.

rule loss).<sup>137</sup> By virtue of “experience and expertise,” Galanter argues, a repeat litigant is willing to decline an immediate, albeit fully satisfying settlement offer in favor of the opportunity to pursue the long-term advantage that continuing with litigation might bring.<sup>138</sup> Because they expect to litigate again, such litigants are motivated to “play for precedent” and thus seek to obtain a favorable ruling that will have implications for future disputes.<sup>139</sup> Since some “WTO plaintiffs” have been repeat litigants, one must wonder if their desire to make law has kept them away from settlements, which in turn would explain Respondents’ inability to reduce their overall losses by settling.

The notion that repeat Complainants have systematically refrained from settling, thus rejecting tangible outcomes in favor of proceeding with litigation aimed at creating precedent, lacks any empirical support. Unlike the prototypical repeat litigants in Galanter’s study who tend to appear in one particular posture (i.e., as defendants), WTO repeat Respondents also often appear as Complainants. Remarkably, the “experience and expertise” gained from being repeat litigants on one side fails to explain their very disparate success rates. For example, the U.S. appeared as Complainant 29 times, with an 83% win rate, while it appeared as Respondent 38 times, with an 82% loss rate. In the 25 instances in which the EC appeared as Complainant, it won 96% of the time, but lost in 88% of its 17 appearances as Respondent. Aside from being nearly identical, these win–loss rates reveal that repeat litigants have not been able to successfully implement a “play-for-precedent” strategy, if they ever had one.<sup>140</sup> Moreover, from a theoretical perspective, Galanter’s argument is based on a dichotomy between one-time and repeat litigants facing each other in litigation, with a definite advantage accruing to the latter group due to experience and expertise. As discussed earlier, this argument is premised on the type of information and stake asymmetry that has not been detected in this or other studies of WTO litigation.

Yet, the notion that Complainants have gained expertise from engaging in litigation should not be discarded merely because they

137. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 101 (1974).

138. *Id.* at 103.

139. For a discussion on the de facto precedential power of rulings in subsequent WTO adjudication, see Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT’L L. & POL’Y 1, 151 (1999).

140. In the 38 cases where the U.S. appeared as a Respondent, the EC was a Complainant in 11 cases (29%). Conversely, in the 17 cases in which the EC was a Respondent, the U.S. was a Complainant 6 times (35%). Thus, even if these members’ respective Respondent losses were fully attributable to litigating with the other repeat litigant, these experts in WTO litigation should have still lost fewer cases as Respondents.

have been unable to replicate their success when appearing as Respondents. In fact, they may have relied on such expertise to decide *not* to bring more cases, as they realize that every win reduces their discretion as sovereign states. They understand that a trade liberalizing decision creates precedent that restrains the universe of policy and regulatory choices they may adopt in the future. Complainants realize that appearing before a court that is more than willing to restrain members' ability to regulate trade may give rise to a "winner's curse." In this sense, the asymmetric pattern of Complainant wins, although an auspicious omen, may actually abate their litigiousness.

#### E. *Weakness of Respondents' Cases*

A final potential systemic explanation for high Complainant Success Rates could be that Respondents have consistently failed to present meritorious defenses. However, the notion that Respondents have been consistently incorrect in their interpretation of WTO law fails for several reasons. First, Respondents in one case often appear as Complainants in other cases with unmatched success. That they can successfully adjudicate as Complainants demonstrates that they *do* understand and *can* apply the provisions covered by the same agreements on which they tend to make losing arguments as Respondents. Second, according to the positive theory of litigation,<sup>141</sup> upon recognizing their early failures in WTO dispute settlement, Respondents should have adjusted their litigation strategies by, for example, settling more cases which would have improved their win rate.<sup>142</sup> However, as Figure A illustrates, Respondent win rates show no signs of convergence with Complainant win rates. In fact, the passage of time shows a growing divergence in litigants' relative success. After a brief early period (1996–1998)<sup>143</sup> in which success rates converged, Respondent and Complainant win rates increasingly diverged with the passage of time.<sup>144</sup>

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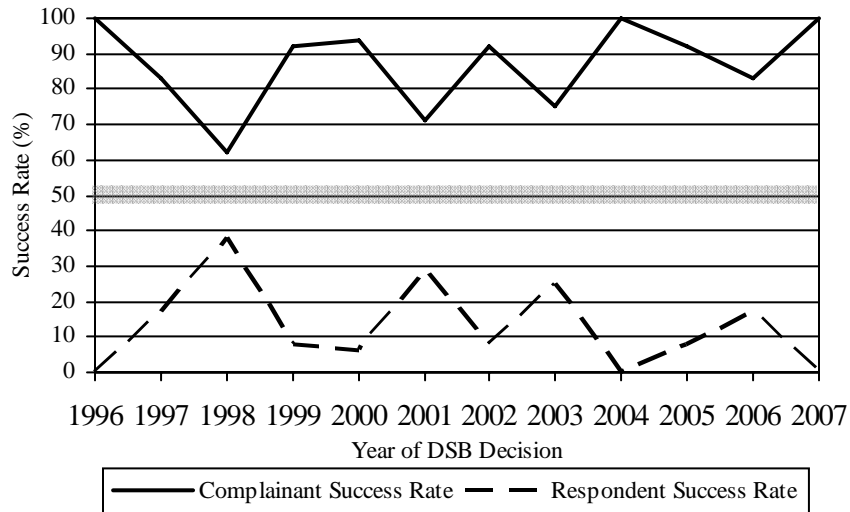
141. See, e.g., Priest & Klein, *supra* note 3, at 5 (suggesting that when gains or losses from litigation are equal to both parties, there is a strong bias toward a rate of success for plaintiffs at trial of 50% regardless of the substantive standard of law).

142. As demonstrated earlier, WTO litigants have only opted for settlements 30% of the time. See *supra* Part IV.B. Moreover, as also demonstrated above, settlement constraints are not to blame for the low utilization of settlements. Rather, the low settlement rate must be attributed to WTO litigants' choices.

143. Although there were five panel requests in 1995, the DSB would only have the opportunity to adopt reports in the following year since all panel decisions were appealed. See DSU, *supra* note 7, art. 16(4) (implying that a panel report is appealed before the DSB adoption).

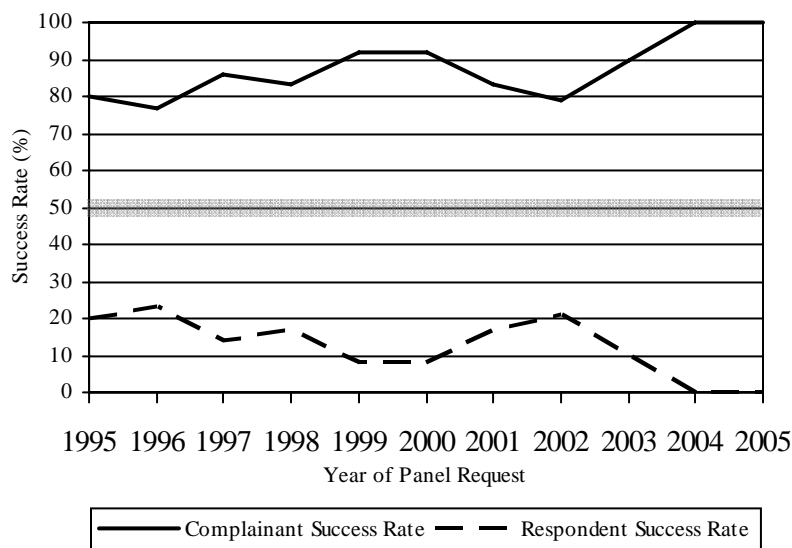
144. Of the thirteen cases decided in 1998, Complainants won eight cases (62%) and Respondents won five (38%).

FIGURE A: ADJUDICATION OUTCOMES BY YEAR OF DSB ADOPTION



However, even the early approximation in Respondent and Complainant win rates appears to be more a result of how litigation outcomes are tabulated than evidence of an actual convergence in litigation outcomes. Figure B reports litigants' success rates for all cases based on the year in which the panel was requested. For instance, among the five requests for a panel made in 1995, Complainants eventually won four cases (80%) and Respondents won only one (20%). Viewed in this way, the early 1995–1998 convergence in litigant win rates was nothing more than one of three contrarian fluctuations in an overall increasingly divergent trend.

FIGURE B: ADJUDICATION OUTCOMES BY YEAR OF PANEL REQUEST



Yet, this lack of convergence in success rates conveys very little about the *quality* of Respondents' cases. It merely suggests the possibility that Respondents have been myopic in their estimates of success. That some defect in WTO Respondents' litigation calculus causes them to poorly forecast specific case outcomes does not imply that their defenses have no merit.

Alternatively, it is possible that Respondents have gone forward with litigation despite a strong likelihood of defeat, not because they fail to see inherent weaknesses in their cases, but rather because they strongly believe in the value of presenting their cases before a seemingly unbiased adjudicator. The fact that the countries that are most frequently Respondents are also among the most frequent Complainants and are, therefore, very successful litigants, might distort their perception of how the system actually operates.<sup>145</sup> In the

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145. As discussed in Part IV, the U.S. has appeared as Complainant in 28% and as Respondent in 36%, respectively, of all disputes. The EC has been the Respondent in 24% and the Complainant in 16%, respectively, of all disputes. As Third World countries have done just as well as or even slightly better (in absolute terms) than their First World counterparts, their perceptions as Complainants have likely influenced their overall perception of the WTO dispute settlement system as well. Indeed, Respondents, as most individuals, "tend to overestimate the frequency of memorable . . . events" and they may persist in "incorrect judgments in the face of inconsistent new information." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 694 n.217 (1987) (citation omitted).



absence of presenting systematically weak cases, Respondents' faith in the adjudicatory system, although contributing to their overall rate of losses, is not the ultimate cause of their high loss rate, but the unperceived bias of the adjudicatory system might be. In any case, the fact that success rates show no significant correlation with Complainant or Respondent identity or case attributes suggests that a phenomenon other than case weakness or poorer lawyering is at work. Thus, the possibility that Respondents' faulty assessment of the system in which they participate has contributed to a greater loss rate does not negate the potential of biased rule development as a systemic explanation.

## VI. BIASED RULE DEVELOPMENT AT THE WTO

The existence of a systematic, asymmetrical pattern of outcomes in WTO dispute settlement has so far defied any robust empirical explanation. Typical litigation-based variables and other systemic explanations, such as case selection, settlement constraints, information and stake asymmetries, Complainants' desire to make law, and the weakness of Respondents' cases fail to account for the sustained high Complainant Success Rates in WTO adjudication. It is only logical to ponder whether these systematic asymmetrical findings are the result of a process of authoritative normative evolution (i.e., rule development) that has expressed itself with a tilt favoring Complainants—hence the term “biased rule development.”

In general, adjudication is a mode of interaction that, at least in form, is largely egalitarian. As in other adjudicatory contexts, WTO litigants are equal before the law and play by rules of engagement that “do not permit them to deploy all their resources in the conflict, but require that they proceed within the limiting forms” of WTO dispute settlement.<sup>146</sup> In such disputes, the applicable law can be any one or several of the negotiated agreements dealing with diverse aspects of international trade. Of course, one would not expect WTO rule development to be isolated from the influence of external intellectual currents or from “the preferences and prudences of the decision-makers.”<sup>147</sup> Clearly, the agreements will be articulated by a set of individuals who are not operating in an intellectual vacuum. Still, specific and purposeful distinctions among the agreements, such as differing standards of review, should be reflected in the decisions

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146. Galanter, *supra* note 137, at 135; *see also* DSU, *supra* note 7, art.1; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 109 (2d ed. 1997) (contrasting settlement by negotiation and agreement with reference (explicitly or implicitly) to relative power status of the parties with settlement by negotiation or decision with reference to norms or rules both parties have previously agreed).

147. Galanter, *supra* note 137, at 103.

issued by the adjudicating authorities and in the overall pattern of outcomes. To date, the uniform pattern of complainant success, regardless of the agreement underlying the dispute, indicates that WTO adjudication fails to map out these distinctions. This distinction and WTO adjudicators' adoption of other pro-Complainant decisional patterns are the most robust explanation for the asymmetric nature of WTO adjudication.

A. *Biased Ruled Development in the Application of the AD Standard of Review*

The high rate of Complainant success in one type of dispute under an agreement with a more Respondent-deferential standard of review—the AD Agreement—could result from Respondents' systematically poor defenses on the merits. In this manner, a more deferential standard of review cannot by itself produce the expected higher rate of Respondent success in the presence of the most egregious violations of an agreement. However, there is no evidence that confirms the occurrence in AD disputes of systematically weaker defenses or more egregious violations than in disputes arising under other agreements. On the contrary, a look at the early years of WTO dispute settlement (January 1995–September 2002), with a specific focus on WTO decisions in AD cases, actually reveals that the lower-than-expected rate of Respondent success was less related to the relative strengths of the litigants' cases than to the adjudicators' dilution of the AD Agreement's standard of review. In light of the general consensus that WTO adjudicators view prior decisions as having at least some precedential value, I focused on early WTO decisions concerning AD cases.<sup>148</sup> If this consensus is correct, these cases have significant future import and thus provide an ideal window into the nature of WTO dispute settlement.

There were a total of ten adjudications involving disputes under the AD Agreement during this period.<sup>149</sup> The standard of review of

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148. See, e.g., Bhala, *supra* note 139, at 151 (observing de facto precedent on procedural and substantive issues).

149. Panel Report, *Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (Aug. 8, 2002) [hereinafter *Egypt—Steel Rebar*]; Panel Report, *United States—Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R (June 28, 2002); Appellate Body Report, *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) [hereinafter *US—Steel Products*]; Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron of Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (Mar. 12, 2001); Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001); Panel Report, *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (Dec. 22, 2000); Panel Report, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (Oct. 24,

national authorities' legal interpretations is expressly set forth within the Agreement:

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>150</sup>

A similarly deferential standard applies to Respondents' factual determinations. Indeed, so long as Respondent authorities' factual evaluations are "unbiased and objective," the panel should not overturn them "even though the panel might have reached a different conclusion."<sup>151</sup> Despite its sui generis status as the only standard of review explicitly developed for a particular type of WTO dispute, and notwithstanding its heightened deference to Respondents' authorities, the Article 17.6(ii) standard did not lead to any pro-Respondent jurisprudence in the earlier years of WTO dispute settlement. Respondents lost every single case. In fact, as Tarullo observed, "It is difficult to identify any issue in any of the cases in which this special standard has produced an outcome different from that which would have prevailed had there been no Article 17.6."<sup>152</sup>

#### 1. Nullification of the AD Standard by Capriciously Interpreting Its Terms

The Appellate Body most thoroughly articulated its views on the application of the Article 17.6(ii) standard in *US—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US—Steel Products)*.<sup>153</sup> In the course of an AD investigation, the U.S. Department of Commerce (Commerce), pursuant to its regulations,<sup>154</sup> rejected information from two Japanese companies because they had failed to submit such information within the required deadline (87

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2000); Panel Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (Jan. 28, 2000); Panel Report, *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R (Jan. 29, 1999); Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R (Nov. 2, 1998) [hereinafter *Guatemala—Cement*].

150. Anti-Dumping Agreement, *supra* note 25, art. 17(6)(ii).

151. *Id.* art. 17(6)(i).

152. Tarullo, *supra* note 37, at 118; accord MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 393 (2d ed. 2006) ("[W]e have yet to see a case in which the choice of a standard of review had an impact on the outcome of a dispute.").

153. Tarullo, *supra* note 37, at 118.

154. See Customs Duties, 19 C.F.R. § 351.301 (2008).

days).<sup>155</sup> In its WTO challenge, Japan argued that the U.S. agency could not reject this information solely because it was submitted after the agency's established deadline.<sup>156</sup> The panel found that Commerce had not acted in conformity with AD Article 6.8, which requires interested parties to "provide[] necessary information within a reasonable period" and allows the investigating authority to proceed with the investigation on a "facts available" basis. The panel first explained that "a 'reasonable period' will not in all instances be commensurate with pre-established deadlines set out in general regulations."<sup>157</sup> Using this flexible definition, the panel concluded that Commerce's refusal of a submission that "could have been verified and used, but was instead rejected as untimely," was not consistent with Article 6.8, since "an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that [the Japanese companies] had failed to provide necessary information within a reasonable period."<sup>158</sup>

On appeal, the U.S. argued that Commerce's pre-established deadlines for data submission were "reasonable" and constituted "a permissible interpretation" of Article 6.8.<sup>159</sup> Using the language of Article 17.6(i), the U.S. maintained that "even if the panel might have reached a different conclusion," that conclusion should not displace an objective and unbiased decision by the domestic agency to reject the evidence as submitted.<sup>160</sup> Remarkably, the Appellate Body focused its analysis solely on the "objective and unbiased" portion of the Article 17.6(i) standard and never addressed the "permissible interpretation" argument put forth by the U.S.<sup>161</sup> The Appellate Body held that the panel had been correct in ruling that Commerce had failed the "objective and unbiased" portion of the test by not concluding that the Japanese companies had provided the necessary information within a "reasonable period."<sup>162</sup> To determine what constitutes a reasonable period, the Appellate Body developed a list of six factors that antidumping authorities should consider as they analyze "the particular circumstances of each case."<sup>163</sup> Because Commerce failed to conduct a "reasonableness analysis" similar to that proposed by the Appellate Body, the Appellate Body found its

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155. See *US—Steel Products*, *supra* note 149, ¶ 10 (discussing the assertion of the United States that deadlines were reasonable).

156. *Id.* ¶ 18.

157. Panel Report, *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 7.54, WT/DS184/R (Feb. 28, 2001).

158. *Id.* ¶¶ 7.55, 7.57.

159. *US—Steel Products*, *supra* note 149, ¶¶ 9–10.

160. *Id.* ¶ 11.

161. *Id.* ¶¶ 55–56.

162. *Id.* ¶¶ 87–90.

163. *Id.* ¶ 85.

action did “not rest upon a permissible interpretation of Article 6.8 of the *Anti-Dumping Agreement*.”<sup>164</sup>

While a reference to the “permissible interpretation” language of Article 17.6(ii) might create the illusion that the Appellate Body was in fact applying the standard as it construed the term “reasonable,” the Appellate Body actually nullified it by creating a new, non-contemporaneous test. In basing its decision solely on its newly constructed reasonableness test, the Appellate Body failed to consider that Commerce’s interpretation might fall squarely within the *ordinary* meaning of the term.<sup>165</sup> In any litigation system in the world, tardy submissions are per se impermissible. Indeed, the conclusion that “an administrative agency may never ‘reasonably’ adhere strictly to the letter of limits it may establish for the submission of information by interested parties, even if those limits are themselves generous” is “inconsistent with much administrative and judicial practice.”<sup>166</sup> In fact, paragraph 3 of Annex II of the Agreement—referenced by Article 6.8—incorporates the ordinary meaning of reasonableness by explicitly referring to “verifiable information” as information submitted “in a timely fashion.”<sup>167</sup> More importantly, the AD Agreement itself adheres to the general presumption of reasonableness of national authorities’ regulations by directing WTO adjudicators to “examine the matter based upon . . . facts made available *in conformity with appropriate domestic procedures to the authorities of the importing Member*.”<sup>168</sup> That the Appellate Body could find a generally accepted practice unreasonable while extolling the flexibility of the very term “reasonableness” demonstrates its willingness to disregard the mandated standard and engage in sophistry.

## 2. Application of a Non-Deferential Standard Where the AD Standard Controls

A more troubling aspect of the Appellate Body’s pro-Complainant interpretation of the AD Agreement, however, has been the systematic erosion of the Article 17.6(ii) deferential standard. In non-AD disputes, the Appellate Body has recognized that Article 17.6

164. *Id.* ¶ 89 (italics in original).

165. See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

166. Tarullo, *supra* note 37, at 124.

167. Anti-Dumping Agreement, *supra* note 25, Annex II, ¶ 3 (“All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, *which is supplied in a timely fashion* . . . should be taken into account when determinations are made.” (emphasis added)).

168. *Id.* art. 17.5(ii).

“sets out a special standard of review for disputes arising under that Agreement,”<sup>169</sup> and acknowledged that no agreement but the Anti-Dumping Agreement “prescrib[es] a particular standard of review.”<sup>170</sup> In fact, the Appellate Body has stated that applying the AD standard in the context of a dispute arising under the SPS Agreement would alter a “finely drawn balance” between “the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”<sup>171</sup> Despite the avowed respect for the Members’ retained competencies and the recognition of the AD Agreement’s special standard, the Appellate Body has not applied the more deferential review required in actual AD disputes.<sup>172</sup>

In its initial decisions involving the AD Agreement, the panels and the Appellate Body either made token references to or articulated views that diluted the impact of the Article 17.6 standard. In fact, in its first AD decision, the Appellate Body held that the AD and the DSU standards “complement[] each other.”<sup>173</sup> The Appellate Body explained that the DSU standard also governs the analysis in AD cases unless adherence to the DSU standard leads to a “conflict” between the provisions of the DSU and the AD Agreement.<sup>174</sup> Thus, rather than controlling in every AD dispute, the Article 17.6 standard is construed as serving an auxiliary role to the less deferential DSU standard, and, therefore, only governs review of AD decisions in situations where the adjudicator would reach conflicting decisions under the two standards.<sup>175</sup> Yet, the ordinary meaning of the DSU provision quoted by the Appellate Body does not support this interpretation. Specifically, DSU Article 1.2 provides that “[t]o the extent that there is a *difference* between the rules and procedures of this Understanding . . . the special or additional rules and procedures in Appendix 2 shall prevail.”<sup>176</sup> Appendix 2 lists AD Agreement Article 17.6 as one such special rule.<sup>177</sup> Since the DSU expressly recognizes a *difference* between the AD Agreement standard and its own general standard and requires application of the “special or additional rule” as the rule that “shall prevail,”<sup>178</sup> one wonders why

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169. *US—Leaded Bar*, *supra* note 113, ¶ 47.

170. *EC—Beef Hormones*, *supra* note 36, ¶ 114.

171. *Id.* ¶ 115.

172. DSU Article 11 provides the standard of review otherwise applicable to disputes arising under the other agreements. DSU, *supra* note 7, art. 11. Under this standard, a panel is required to “make an objective assessment of the matter before it,” and is not bound to extend the greater deference afforded under the AD Standard. *Id.*

173. *Guatemala—Cement*, *supra* note 149, ¶ 65.

174. *Id.*

175. *Id.* ¶ 66.

176. DSU, *supra* note 7, art. 1(2) (emphasis added).

177. *Id.* app. 2.

178. *Id.* art. 1.2.

the Appellate Body interposed the occurrence of a *conflict* as the requirement for exclusive application of the AD standard. The plain language of DSU Article 1.2 requires the adjudicator to apply the AD standard as the controlling authority; the DSU standard does not apply. By interjecting the requirement of a conflict between the two standards, the Appellate Body not only contradicted the letter of the DSU, but also diluted the impact of the AD standard.

### 3. Conflation of the AD Standard with the DSU Standard

The WTO adjudicators' tendency to interpret WTO law in a way that dilutes the AD standard has also manifested itself in their conflation of Article 17.6(i)'s call to "determine whether the authorities' . . . evaluation [of the facts] was unbiased and objective"<sup>179</sup> with the DSU Article 11 requirement to "make an objective assessment."<sup>180</sup> In applying DSU Article 11's "objective assessment" simultaneously with the Article 17.6(i) standard, the panel in *Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey (Egypt—Steel Rebar)* suggested that agencies' factual determinations are subject to a more intrusive review than the Article 17.6(i) standard seems to authorize.<sup>181</sup> Early in its report, the panel stated that fact-finding is "*always* constrained by the mandate of Article 11 of the DSU."<sup>182</sup> Also, despite recognizing that "we should not involve ourselves in a *de novo* review of the facts," the panel "deem[ed] it necessary to undertake a *detailed review* of the evidence submitted [to the agency]."<sup>183</sup> The panel's detailed review of the evidence involved a thorough examination of the administrative record, including an extensive analysis of the responses submitted by each investigated company and the agency's reactions to these responses.<sup>184</sup> Thus, the panel reviewed the evidence as if DSU Article 11 controlled.

By applying the DSU standard where it cannot apply,<sup>185</sup> the *Egypt—Steel Rebar* panel conflated the two standards and minimized all distinctions between them. Moreover, the panel's analysis under the DSU standard approaches, and is perhaps identical to, the *de novo* standard of review it recognized as improper under Article 17.6(i). More importantly, this approach effectively eliminates the possibility of considering antidumping authorities' factual

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179. Anti-Dumping Agreement, *supra* note 25, art. 17.6(i).

180. DSU, *supra* note 7, art. 11.

181. *Egypt—Steel Rebar*, *supra* note 149, ¶¶ 7.9, 7.14.

182. *Id.* ¶ 7.11.

183. *Id.* ¶ 7.14 (emphasis added).

184. *Id.* ¶¶ 7.165–266.

185. See DSU, *supra* note 7, art. 1.2, app. 2.

determinations under the more deferential purview of the AD Agreement.<sup>186</sup>

As exemplified in each of these cases, whether through specious definitions of terms contained in the AD Agreement's factual and legal standards, through the creation of artificial and unwarranted tests, or through the conflation of the DSU and AD standards, WTO adjudicators have severely diminished the level of deference owed to Respondents' agencies under the AD Agreement as negotiated by WTO members. This systematic erosion of the AD standards illustrates a pattern of rule development that not only constitutes what several scholars have characterized as "judicial activism,"<sup>187</sup> but also exhibits a pro-Complainant bias. The existence of a Respondent-deferential standard and the absence of any evidence indicating that Respondents engage in more egregious violations of the AD Agreement than other WTO agreements suggest that the high rate of Complainant success (and Respondent loss) in AD litigation follows from the evisceration of the standard. This bias explains the high rate of Complainant success.

This normative evolution of rules with a systematic pro-Complainant bias would have a limited explanatory scope if it were restricted to the particular context of AD adjudication. However, because activist adjudicators are not likely to restrict their activism to a particular area of the law, one would expect biased rule development to transcend case categories and thus serve as an explanation for the generally asymmetric nature of WTO outcomes. The following subpart presents a set of cases that illustrate a pattern of biased rule development occurring outside the context of AD disputes.

#### B. *Biased Rule Development in the Inconsistent Use of Declarations*

The Appellate Body's use of declarations contained in WTO documents and in other international treaties illustrates yet another method of developing WTO law in Complainants' favor. The Appellate Body has been inconsistent in interpreting and giving effect to declarations, or general proclamations made by parties in connection with an agreement but not contained within the statutory terms of the agreement itself. This lack of general coherence also

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186. That the panel upheld most of the agency's findings in this dispute does not diminish the point that the panel, relying on Appellate Body precedent, had engaged in the kind of intrusive review that defies the level of deference mandated by the Article 17.6(i) standard.

187. Ragosta et al., *supra* note 17, at 748–50; *see also* CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY AND THE FUTURE OF THE WTO* 42 (2001) (stating that the Appellate Body is legislating instead of interpreting the law); MATSUSHITA ET AL., *supra* note 152, at 130 (referring to more recent cases).



coincides with the Complainant–Respondent divide in that the legal significance given to declarations in a particular case seems to correlate with the interests of the Complainants. The following cases illustrate that the Appellate Body’s inconsistent treatment of declarations has restricted Respondents’ discretion beyond the domain of AD law.

1. Interpretation of “Pro-Respondent” Declarations as Merely Hortatory

In *United States–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US–Leaded Bar)*, the Respondent argued that the AD Agreement’s standard of review applied to WTO analysis of countervailing duty measures covered by the SCM Agreement. Despite recognizing that the SCM Agreement contains no specific standard of review, the U.S. availed itself of a Ministerial Declaration that seemingly communicated the ministers’ intent to extend the AD Agreement’s standard of review to disputes arising under the SCM Agreement.<sup>188</sup> Specifically, the Declaration provides that the

*Ministers recognize, with respect to dispute settlement pursuant to the [AD] Agreement . . . or . . . the [SCM] Agreement . . . the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.*<sup>189</sup>

The U.S. argued that the declaration not only expressed the “clear intent of the Ministers to apply the [AD] standard of review” to subsidy disputes, but also “create[d] binding obligations.”<sup>190</sup> Thus, according to the U.S., the panel “erred in applying the [DSU] standard . . . rather than the standard . . . set forth in [the AD] Agreement.”<sup>191</sup> Finding that the SCM Agreement “does not contain any ‘special or additional rules’ on the standard of review to be applied,”<sup>192</sup> the Appellate Body ruled that the declaration could not “impose an obligation to apply” the AD standard of review.<sup>193</sup> Rather, the declaration contained “hortatory language,” exemplified by the use of the term “recognize,” which, in the Appellate Body’s view, was not a command, but “merely acknowledge[d] ‘the need for the

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188. *US–Leaded Bar*, *supra* note 113, ¶¶ 45, 48.

189. World Trade Organization, Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, LT/UR/DEC-2/1 (1994) [hereinafter AD Ministerial Declaration].

190. *US–Leaded Bar*, *supra* note 113, ¶ 10.

191. *Id.* ¶ 44.

192. *Id.* ¶ 45.

193. *Id.* ¶ 49.

consistent resolution of [AD and CVD] disputes.”<sup>194</sup> This language seems to indicate that, as far as declarations are concerned, the Appellate Body adhered to a strict constructionist approach. They also signal that the Appellate Body construed declarations couched in similar words as no more than aspirational. Perhaps this explains why the Appellate Body did not articulate how not applying the same standards of review to the two types of disputes would lead to their “consistent resolution,” a goal that the declaration “merely acknowledge[d].” Thus, the Appellate Body upheld the panel’s application of the less Respondent-deferential DSU standard.

However, when it had previously considered “hortatory” language contained in another WTO document and in a set of non-WTO international agreements, the Appellate Body reached beyond their aspirational content, choosing to give similarly worded declarations binding effect. In doing so, the Appellate Body effectively limited the scope of Respondent’s regulatory conduct, which it viewed as impermissibly restricting trade.

## 2. Interpretation of “Pro-Complainant” Declarations as More than Hortatory

In *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp/Turtle)*, the Appellate Body struck down U.S. legislation designed to limit the incidental taking of sea turtles in the process of shrimp harvesting, finding that it violated GATT Article XX’s criteria against arbitrary and unjustified discrimination.<sup>195</sup> U.S. regulations had banned the import of shrimp from countries that failed to show “a credible enforcement record” of the use of turtle-excluder devices (TEDs) similar to that imposed on the U.S. domestic shrimp industry.<sup>196</sup> While never disputing that its import ban was a violation of GATT Article XI’s prohibition of quantitative restrictions, the U.S. argued that these measures intended to promote the conservation of an exhaustible natural resource and, as such, were excepted under GATT Article XX(g).<sup>197</sup>

The Appellate Body agreed that the challenged measures were indeed within the exception<sup>198</sup> but found them impermissible because they had been implemented “in a manner which constituted arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.”<sup>199</sup> Specifically, the Appellate Body faulted the U.S. for securing

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194. *Id.* (quoting AD Ministerial Declaration, *supra* note 189).

195. *US–Shrimp/Turtle*, *supra* note 91, ¶ 186.

196. *See id.* ¶ 162.

197. *See id.* ¶ 25.

198. *Id.* ¶ 145.

199. *Id.* ¶ 186.

agreements with some but not all shrimp-exporting members, which resulted in their differential and thus “discriminatory” treatment.<sup>200</sup> Despite U.S. protests that “it had offered to negotiate but Complainants [India, Malaysia, Pakistan and Thailand] did not reply,”<sup>201</sup> the Appellate Body, following the panel below, “did not find it necessary to examine whether [the U.S. and the Complaining] parties entered into negotiations in good faith.”<sup>202</sup> Rather, the Appellate Body relied heavily on the notion that the U.S. was *obligated* to engage in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements . . . before enforcing the import prohibition.”<sup>203</sup> The Appellate Body based this obligation on the “need” for “concerted and cooperative efforts,” which had been recognized in prior WTO declarations and other international instruments regarding the environment.<sup>204</sup>

Yet, not unlike the declaration referenced in *US—Leaded Bar*, these declarations were couched in otherwise “hortatory” language.<sup>205</sup> For instance, the preamble of the Agreement Establishing the WTO (WTO Agreement), which the Appellate Body quoted, states:

The *Parties* to this Agreement,

*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living . . . while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment . . . .

*Resolved*, therefore, to develop an integrated . . . multilateral trading system . . . .<sup>206</sup>

200. *Id.* ¶ 167.

201. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, § VII(E)(2), ¶ 7.54, WT/DS58/R (May 15, 1998) [hereinafter *US—Shrimp Turtle Panel Report*].

202. *US—Shrimp/Turtle*, *supra* note 91, ¶ 166 (quoting the *US—Shrimp Turtle Panel Report*, *supra* note 201, ¶ 7.56).

203. *US—Shrimp/Turtle*, *supra* note 91, ¶ 166 (emphasis added). Thus, the Appellate Body attached great significance to the fact that the creation of the regulatory scheme preceded the unsuccessful attempts by the U.S. to enter into an agreement with the Complainants. While the perception of U.S. unilateralism may have contributed to the lack of success in convincing the Complainants to enter an agreement, the preexistence of the TED requirement by itself hardly constitutes evidence that the U.S. had not tried to negotiate in good faith with the Complainants. In fact, the Appellate Body itself recognized that the U.S. had entered into the 1996 Inter-American Convention for the Protection and Conservation of Sea Turtles. *See id.* ¶ 171. Remarkably, however, the Appellate Body construed such success *against* the Respondent, indicating that the existence of the Convention “provide[d] convincing demonstration that an alternative course of action was reasonably open to the USA.” *Id.*

204. *Id.* ¶ 168.

205. *US—Leaded Bar*, *supra* note 113, ¶ 49.

206. Marrakesh Agreement Establishing the World Trade Organization, pmb., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter *WTO Agreement*].

To the Appellate Body, this preambular language “reflect[ed] the intentions of negotiators of the *WTO Agreement*,” and thus “must add color, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*.”<sup>207</sup> The interpretation the Appellate Body eventually gave to the chapeau of Article XX imposed on members an obligation to exhaust multilateral avenues before enacting a conservation scheme that might present obstacles to trade. That obligation, however, is found nowhere in the WTO agreements. A member is entitled to avail itself of any of the enumerated exceptions under Article XX and does not necessarily engage in arbitrary or discriminatory conduct when it pursues a regulatory course that precedes negotiation of a multilateral agreement.<sup>208</sup> In fact, Article XX owes its existence to members’ desire to retain such jurisdictional competencies by reserving themselves the right to deviate from WTO general principles under particular circumstances. Although vowing to “protect and preserve the environment” in prefatory language,<sup>209</sup> members did not enter into any express or implicit obligation to proceed multilaterally as a matter of WTO law.

In fairness, the Appellate Body did not rely solely on this prefatory language but on a growing number of international legal instruments that together express the growing consensus for multilateral action. Indeed, the Appellate Body quoted four other non-WTO declarations: the Rio Declaration on Environment and Development, the Inter-American Convention for the Protection and Conservation of Sea Turtles (Inter-American Convention), the Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals.<sup>210</sup> Despite references in some of these treaties to members’ obligations under different WTO Agreements,<sup>211</sup> none of these treaties create binding obligations *as a matter of WTO law*. As Article 1.1 of the DSU provides, the rules and procedures of the DSU, the WTO Agreement, and the other covered agreements are the law that WTO adjudicators “shall apply to [WTO] disputes.”<sup>212</sup> No express or implicit provision in these WTO agreements authorizes resort to *substantive* public international law. In fact, the call of DSU Article 3.2 for WTO adjudicators “to clarify the existing provisions of [the] agreements”

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207. *US—Shrimp/Turtle*, *supra* note 91, ¶ 153. The Appellate Body also referred to language in the Report of the Committee on Trade and Environment, which “endorsed and supported . . . ‘multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.’” *Id.* ¶ 168.

208. GATT, *supra* note 7, art. XX(d).

209. WTO Agreement, *supra* note 206, pmb1.

210. *US—Shrimp/Turtle*, *supra* note 91, ¶ 130, 168–70.

211. *Id.* ¶ 169 (quoting Inter-American Convention on the Protection and Conservation of Sea Turtles art. XV, Dec. 1, 1996, 37 I.L.M. 1246).

212. DSU, *supra* note 7, art. 1(1).

expressly circumscribes hermeneutic activity to “customary rules of *interpretation* of public international law,” not in any way endorsing the application of *substantive* provisions of non-WTO international law.<sup>213</sup> That the Vienna Convention calls for the consideration of non-WTO international norms in the interpretation of ambiguous WTO terms does not amount to an authorization to construe those extrinsic norms as giving rise to WTO obligations in and of themselves.<sup>214</sup>

Although there is much to be said for the need for multilateralism in environmental conservation as well as other transnational issues, none of the declarations or binding commitments contained in these non-WTO agreements should have been used by the Appellate Body to “mark[] out the equilibrium line” between members rights and obligations.<sup>215</sup> In doing so, the Appellate Body used the words of these non-WTO authorities to impute to the chapeau of Article XX concepts that were not intended. In fact, the Appellate Body gave these non-WTO substantive instruments binding effect, as confirmed by the Appellate Body’s language in the subsequent compliance case brought by Malaysia.<sup>216</sup> In concluding that the Respondent had complied with its ruling in the underlying dispute, the Appellate Body explained:

[G]iven the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, *the United States, in our view, would be expected to make good faith efforts to reach international agreements* that are comparable from one form of negotiation to the other.<sup>217</sup>

Thus, the Appellate Body, in its own words, used non-WTO substantive law to craft and enforce an entirely new obligation on a Respondent.<sup>218</sup>

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213. DSU, *supra* note 7, art. 3(2) (emphasis added).

214. See Vienna Convention, *supra* note 165, art. 31(3)(c) (“There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.”).

215. See *US—Shrimp/Turtle*, *supra* note 91, ¶ 170.

216. *US—Shrimp/Turtle Compliance*, *supra* note 113 (explaining the Appellate Body’s review of Malaysia’s complaint that United States failed to make good-faith efforts to negotiate with it before banning the importation of certain shrimp from Malaysia).

217. *Id.* ¶ 122 (emphasis added).

218. For a similar endorsement of giving binding effect to substantive public international law in WTO disputes, see Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (June 19, 2000), in which the Panel states that:

Customary international law applies generally to the economic relations between the WTO Members. Such international law applies . . . to the extent there is no conflict or inconsistency, or an expression in a covered WTO

As far as this analysis of WTO rule development is concerned, the unauthorized resort to substantive public international law, while troubling, is not the most revealing aspect of *US–Shrimp/Turtle*. Rather, the use of declarations expressed in WTO documents is the better illustration of the Appellate Body’s tendency to evolve WTO law to the detriment of Respondents. That the Appellate Body could construe one declaration—the preambular declaration—as creating an obligation upon members and interpret similar language in another—the standard-of-review declaration—as no more than an aspiration, demonstrates an inconsistent attitude not found in unbiased adjudicators. To detect this inconsistency, one need neither disagree with the Appellate Body’s ruling that the U.S. afforded differential and, thus, discriminatory treatment to the Complainants in this case, nor with the Appellate Body’s ruling in *US–Leaded Bar*.<sup>219</sup> One need only observe the different reading the Appellate Body gave to declarations in *US–Shrimp/Turtle* and, later, in *US–Leaded Bar*. Both declarations express the intent of the same negotiators, during the same round of negotiations, with similar language. In *US–Shrimp/Turtle*, however, the pertinent declarations, which favored Complainants, were given binding effect.

*C. Biased Rule Development: From Localized Patterns to an All-Encompassing Activist Jurisprudence*

The cases discussed in Parts VI.A and VI.B show how WTO adjudicators have consistently deployed interpretive methods that produce a consistent outcome: restricting Respondent discretion to adopt otherwise trade-restrictive measures, and thus furthering the promotion of an unfettered version of trade. While free trade itself is the noble goal on which the entire WTO edifice is erected—a goal that is not controverted by this Article—its pursuit is disciplined by a set of agreements that demarcate what constitutes permissible conduct under a self-contained system of laws. As described above and as the overall asymmetric pattern of Complainant and Respondent Success Rates suggests, WTO litigators have adopted a pro-trade adjudicatory

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agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

*Id.*

219. Indeed, the holding of the case—that measures prohibiting the importation of shrimp harvested by methods that kill sea turtles qualify as WTO-compliant, even when discriminatory, so long as they are not applied in an arbitrary and unjustified manner—could hardly be interpreted as anti-Respondent. Rather, what seems problematic is the Appellate Body’s finding that Respondent’s application of the TED measures constituted arbitrary and unjustified discrimination due to Respondent’s “failure” to negotiate a multilateral agreement that included the Complainants on the assumption that Respondent was so obligated on the basis of declaratory language.

philosophy that sacrifices Respondents' jurisdictional competencies. This adjudicatory philosophy has manifested itself in two major types of case dispositions: *reducing Respondents' rights under the agreements* (e.g., nullifying the Respondent-deferential AD standard by capriciously interpreting its terms, applying the DSU standard where the more deferential AD standard controls, conflating the two standards into an amorphous de novo standard, and giving no effect to declarations that would presumably favor Respondents) and *creating Respondent obligations where none previously existed* (e.g., creating extraneous, non-contemporaneous tests to gauge Respondents' conduct during investigations, finding an obligation to engage in multilateral negotiations before instituting regulations, and using non-WTO obligations to test a Respondent's good faith). As the Appellate Body has acted in a manner that consistently reduces Respondents' regulatory discretion, it has produced a jurisprudence that privileges trade liberalization at the expense of the reservations members made through the negotiating process. By producing a jurisprudence that "clarif[ies] the existing provisions of [the] agreements" consistently in one direction, WTO adjudicators have failed to "preserve the rights and obligations of Members under the covered agreements."<sup>220</sup>

However, in describing the task of clarifying the provisions of the WTO agreements, trade scholars have often used neutral terms to characterize this process, such as filling in gaps,<sup>221</sup> "completing the analysis,"<sup>222</sup> or "clarifying ambiguity,"<sup>223</sup> which describe the otherwise normal and uncontroversial operation of impartial adjudicators in applying abstract norms to concrete cases. Use of these neutral terms might be justified because most analyses focus on a limited number of disputes, a method that does not permit the detection of broader, case-transcending trends that reveal the

220. See DSU, *supra* note 7, art. 3(2).

221. Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 638 (2006) (explaining that WTO adjudicators are required to fill in gaps in cases involving matters either unconsidered or unresolved by negotiators and stating that the Appellate Body "has been prudent and has avoided extensive 'judicial legislation'"); see also Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 617 (2002) (stating that Appellate Body was at times "confronted with a 'gap,' i.e., an issue apparently not addressed by the covered agreement, but which [has] to be decided nevertheless").

222. Robert Howse, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power*, in THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION, 11, 17 (Thomas Cottier & Petros C. Mavroidis eds., 2003) (quoting the Appellate Body in Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996)).

223. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 252 (2004).

systematic pro-Complainant nature of this jurisprudence. Still, these scholars raise cautionary notes about the Appellate Body's authority to craft principles of WTO law. For instance, while Deborah Cass argues that WTO adjudicators are generating a body of law perhaps best understood through a constitutional lens, she cautions that "the international trade 'constitutionalization project' should take more seriously the powerful and insistent claims of legitimacy, democracy (of both substance and form) and community."<sup>224</sup>

Indeed, many international trade law scholars have addressed the inherent dangers of using a judicial process to generate new rules and procedures,<sup>225</sup> especially because this adjudicative activity generates ex post facto rules and standards.<sup>226</sup> Giving broad interpretive—and even legislative—authority to the WTO's dispute settlement system transfers decisional power to a select few WTO panelists and Appellate Body members, when it is clear that the intention of the WTO members was to reserve the power to adopt new binding interpretations to the Ministerial Conference and to make new law only via the treaty amendment process.<sup>227</sup> The creation of an ambitious body of law teleologically bound to an activist, liberal view of trade that reaches beyond the set of negotiated bargains significantly strains the considered original will of the WTO members. In the absence of institutions that can both serve as a check on judicial lawmaking and "be accountable for the policy and value tradeoffs" involved in making teleological choices, WTO

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224. DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM 246 (2005); see also Deborah Z. Cass, *The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39, 72 (2001) ("[C]onstitutionalization practice described here . . . contains within some difficult debates about trade liberalization and globalization, and legitimacy, democracy and international order, about how legal systems are made, and by whom.").

225. See Armin von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. U.N. L. 609, 611 (2001) (arguing that there is a deficient relationship between the political and adjudicative functions of the WTO); Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 664 (2006) ("The paradox is that constitutionalism . . . cannot possibly deliver the escape from politics that it promises."); Rahul Singh, *The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit*, 42 J. WORLD TRADE 347, 352–54 (2008) (testing the legitimacy of the WTO's law making apparatus); Trachtman, *supra* note 221, at 637 ("These types of quasi-legislation, delegated by the WTO to these other bodies, present important questions about democratic accountability.").

226. Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 412 (2000).

227. See WTO Agreement, *supra* note 206, art. IX(2), X ("Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."); see also von Bogdandy, *supra* note 225, at 628 ("Article X:8 WTO provides the competence for autonomous rulemaking with regard to the dispute settlement procedures.").



adjudicators should exercise judicial restraint.<sup>228</sup> Simply put, there is no WTO demos or democratic community whose will WTO adjudicators can validly express.<sup>229</sup> However laudable the development of a jurisprudence that embraces predictability through judicial lawmaking may be, the creation of nonnegotiated obligations under the guise of interpreting negotiated agreements is antithetical to the basic principle that what sovereign states have not specifically promised to do cannot be legally required of them.<sup>230</sup>

Granted, the adoption of a philosophically more modest jurisprudence that is cognizant of the value of domestic regulations in a multilateral trade regime but that still permits a great deal of regulatory diversity involves striking a difficult balance. In their quest to create a unifying trade regime, members recognized the value in experimenting with alternative rules suited to their individual needs, even at the cost of sacrificing trade. This recognition is evident, for instance, in the subject-matter exceptions of GATT Article XX. Though tempered by restrictions against arbitrary enforcement, these exceptions exist to protect the regulatory diversity that itself mirrors “the values and norms that shape” members’ different societies.<sup>231</sup> Thus, more sensitivity to Respondents’ sovereign rights, as the Appellate Body demonstrated in the early *EC–Beef Hormones* case, need not be equated with total deference, as the result of the case suggests.<sup>232</sup> However, if such sensitivity were extended throughout the domain of WTO litigation, it is unlikely that the balance of outcomes would be so one-sided.

## VII. CONCLUSION

The problem that activism poses is not merely one of lack of democratic checks, which is itself a very serious problem, but the fact that such activism is occurring within the domain of a rules-based system. A rules-based system is antithetical to activism, especially one that creates consistently one-sided jurisprudence by eroding

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228. Robert Howse & Kalypso Nicolaidis, *Legitimacy through “Higher Law”?* *Why Constitutionalizing the WTO Is a Step Too Far*, in *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION* 307, 309 (Thomas Cottier & Petros C. Mavroidis eds., 2003).

229. *See id.* at 329 (making a similar point regarding the European Parliament).

230. *See* The Case of the S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (allowing Turkish jurisdiction over a French defendant as long as does not conflict with international law when the act occurred abroad but had effects in Turkey).

231. Dani Rodrik, *Feasible Globalizations*, in *GLOBALIZATION: WHAT’S NEW?* 196, 199 (Michael M. Weinstein ed. 2005).

232. *EC–Beef Hormones*, *supra* note 36, ¶ 246 (invalidating a trade ban on hormone-fed beef, but stating that a ban based on scientific evidence, after scientific risk assessment, would be upheld even if the standard applied were more stringent than international standards).

Respondents' rights and increasing Respondents' obligations. The argument that WTO adjudicators have embarked on a project to curb national authorities' power to engage in actions inconsistent with a liberal view of international trade involves more than a debate on the merits of comparative advantage. Determining whether this adjudicatory mechanism does what it is *legally* required to do is critical to the preservation of a system founded on negotiated rules.

While the perception that the WTO system is operating under a single coherent philosophical force is widely discussed in current WTO literature, until this study there had been no demonstration of just how far-reaching an asymmetric pattern of decision making has materialized in the collective repertoire of WTO decisions. The existence of a sustained pattern of Complainant success, with win rates ranging from 83% to 91% across Case Types, constitutes a substantial deviation from the 50% success rate predicted under random litigation assumptions. This systematic outcome asymmetry defied several alternative explanations, such as case selection, settlement constraints, information and stake asymmetries, Complainants' desire to make law, and supposed weakness in Respondents' cases. Rather, the outcome asymmetry is more parsimoniously explained by a normative evolution that consistently construes WTO law against Respondents by either curtailing their reserved rights or creating new obligations under the covered agreements or even beyond WTO law.

To reach these conclusions, this study went beyond an analysis of the relative success rates of Complainants and Respondents and attempted to identify patterns in the type of law created. Rather than focusing solely on who won each dispute, it considered whether precedent-creating decisions favored a particular type of litigant. Such decisions more often than not seemed to rest on particular teleological interpretations assumed by adjudicators and not on the quality of the litigants' arguments. Because these interpretations neatly fell on one side of the Complainant–Respondent divide, the study was able to establish a link between adjudicatory lawmaking and the empirically and anecdotally established asymmetrical pattern of outcomes. By calling attention to this extreme pattern of decisions, this Article seeks to further the discussion of democratic legitimacy and legality, so that academics, WTO adjudicators, politicians, and trade constituencies might more fully understand the implications and consequences of the system they have created and continue to perpetuate.