

LEARNING TO DISPUTE: REPEAT PARTICIPATION, EXPERTISE AND REPUTATION AT THE WORLD TRADE ORGANIZATION

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ABSTRACT

This mixed method analysis examines the effects of repeat participation on disputing at the World Trade Organization (WTO). Differences between disputants in terms of their experience with WTO disputing processes affect the likelihood of a dispute transitioning to a panel review, depending upon the configuration of the parties. More experienced complaints tend to achieve settlements while more experienced respondents tend to refuse conciliation. The strategy of experienced respondents is derived from the expertise generated from repeated, direct participation, the normalcy of disputing for repeat players, as well as the perceived benefits accruing from a reputation as being unlikely to settle. Repeat players also seek to avoid disputes expected to produce unfavorable jurisprudence, but do not actively try to create new case law through the selection of disputes. This research demonstrates a dynamic learning process in how parties' use international legal forums and thus extends socio-legal scholarship beyond the nation-state.

INTRODUCTION

The normative claim underwriting recourse to law in international affairs is that law treats all legal actors, including vastly unequal countries, equally (cf. Ruggiero 1997; Alter 2003; Busch, Reinhardt, and Shaffer 2009). Several decades of socio-legal research on domestic litigation suggest, however, that equality before the law is at least in part shaped by how parties use a legal institution. The legalization of international affairs poses this question in new ways. The World Trade Organization (WTO) is a prominent example of the legalization of international affairs and provides an opportunity to investigate the effects of participation and experience on the use of rules for adjudicating and settling international trade disputes. In this article, I am concerned with understanding what experience means in the context of WTO disputes, how it affects the way disputes are managed, and how it mediates inequalities between states. How do member countries gain experience and how does this affect how they approach disputing?

Research on repeat players has emphasized the capabilities and orientations of two ideal types of litigants, repeat players and one-shotters (Galanter 1974; Albiston 1999; Epp 1999; Kritzer and Silbey 2003). These legal actors develop distinct orientations towards the use of the law. One-shotters have little interest in precedent and litigate when the chances of gain outweigh the odds of maximum loss. In contrast, repeat players are more likely to settle where they

expect unfavorable rule outcomes and litigate when precedent appears favorable. Moreover, they develop distinct capabilities as a result of their frequent encounters with legal forums, which confer advantages on them in disputes against one-shotters and permit influence over the long term development of the law. Such advantages are based on economies of scale in legal work, familiarity with the operation of the legal forum and the ability to formulate reasonable expectations about how a dispute is likely to play out, including possible implications for case law. Practical familiarity with legal processes and the ability to reasonably estimate the course and outcome of litigation provide significant advantages to repeat players in individual disputes as well as in serial legal transactions.

A similar dynamic appears to be at work in the disputing process of the World Trade Organization. WTO member nations are involved in ongoing trade and trade-related relationships. These include the negotiation of new trade agreements as well as disputing. There is, however, significant variation in levels of participation in the disputing process. Most countries have never taken part in a dispute, while a handful regularly appear before WTO panels. Navigating WTO legal contexts requires specialized forms of expertise useful for formulating disputing strategies and reasonable expectations about what disputing can achieve. The treaty agreements are voluminous and complex and there are significant uncertainties that complicate the processes of disputing (Conti 2008).

Acquiring and maintaining the necessary forms of expertise over time requires significant investment in legal capacity, which is a specialized bureaucratic apparatus combining material resources and organization with human skills and knowledge (Busch, Reinhardt, and Shaffer 2009). Davis and Bermeo (2009) demonstrate how past experience with litigation accounts for variation in which countries initiate disputes. They describe how experience with disputing familiarizes government and industry officials with processes of disputing and introduces them to legal specialists. Initial investments in legal capacity and expertise create economies of scale that lowers start-up costs for subsequent disputes, thus encouraging future participation in litigation.

Davis and Bermeo's analysis is an important exception to the scant attention that has been paid to the question of legal experience at the WTO. I build on their important insights by examining the role of experience within (rather than related to the initiation of) the process of disputing, by accounting for both cumulative and relative experience with the dispute process, by developing a dyadic theory of experience, and by eliciting the insights of practitioners about how they understand what legal experience means. To do so, I utilize a mixed method approach that combines a statistical model with analysis of semi-structured interviews. Overall, repeat players accrue advantages from direct participation in disputing. The acquisition of experience leads frequent participants to adopt specific approaches to disputing, which have implications for

how well infrequent participants are able to take advantage of their formal rights under the WTO agreements. This examination of the meaning and implications of experience thus extends socio-legal approaches into international legal contexts and shows how parties to trade disputes shape the ways in which disputes are processed, with significant implications for countries with different levels of resources and investment in WTO law.

The remainder of the article is organized as follows. I begin by discussing theories of repeat participation in the context of the WTO. I then describe issues of quantitative data collection and analysis. The bulk of prior empirical treatments of the WTO dispute system rely on quantitative cross-sectional analyses (Busch and Reinhardt 2002; Horn and Mavroidis 2006a). I build on that approach by operationalizing repeat participation in a novel manner and evaluating it with a discrete time event history model of dispute transitions from the mandatory initial consultative phase to adjudication. While demonstrating a systematic relationship between acquired experience and the use the disputing process, the quantitative model leaves several important questions unanswered. To address these and provide a robust interpretation of the statistical findings, I turn to reporting the insights of well-placed WTO actors on the meaning and value of experience in WTO proceedings. The concluding section considers the broader implications of the finding for legalization in international affairs.

Law and Diplomacy in International Trade Disputes

The inauguration of the WTO in 1995 profoundly altered the way that member nations engaged in disputes with each other over trade. A primary innovation of the WTO agreements, negotiated during the Uruguay Round of Ministerial meetings (1986-1994), was a new rule-bound system for the settlement of trade disputes that moved it closer towards “hard” law versus the “soft” law of the General Agreement on Tariffs and Trade (GATT) (Abbott and Snidal 2000). The reformed dispute settlement system eliminated the ability of any one country to unilaterally block an unfavorable vote, enacted more restricted and rigid time-frames for each phase of dispute settlement, instituted panel and appellate reviews by appointed jurists, and made panel review a nearly automatic result of initiating a dispute. While more judicialized, the use of WTO law for disputing is almost always accompanied by the possibility of recourse to diplomatic modes of engagement (Pauwelyn 2000, 337-42; see also Steinberg 2002; Palmeter and Mavroidis 2004, 303-5). It is meant to promote the settlement of disputes, rather than exact punishments, and to do it without threatening its members’ sovereignty (Palmeter and Mavroidis 2004; World Trade Organization 2006).

The disputing process, as defined by the Dispute Settlement Understanding (DSU), begins with a formal request by a complaining party for consultations with the responding country. This request is registered with the

Dispute Settlement Body, which is the general membership of the WTO meeting for the purposes of dispute settlement. Once this request is made, a formal dispute has begun, which then receives a dispute settlement (DS) number to identify the case. Initial consultations between the parties are mandatory, the goal of which is to achieve a negotiated resolution of the complainant's grievance. If, after 60 days from the date of request for consultations, there is a failure to reach a settlement, the complaining party may request that a panel of experts be assembled to review the dispute.¹ Panelists are chosen from the international community of trade administrators, practitioners, academics, lawyers and diplomats. The transition from consultations to the formation of a panel of experts is the primary focus in the quantitative analysis below. Transitioning to panel review reflects a failure to settle and invokes the greater time and expense of full legal contest over the disputed matters. It also increases the political profile of the case because it signals a heightened level of disagreement or trouble in the trade relationships between countries. Disputes become more serious, longer lasting and more expensive as a result of transitioning to panel reviews. As described in detail below, of 327 disputes initiated between January 1995 and October 2005, only 45 percent made this transition to adjudication by a panel of experts.

Once formed, the panel of experts reviews the grievance and issues a decision. The parties may appeal the decision to the WTO Appellate Body, which

then reviews the determinations of the initial panel, issues its own decision, and, if appropriate, requests that the responding party bring its trade practices into conformity with the WTO agreements. At this point, the dispute enters an implementation phase, where disputing turns to evaluating implementation and determining whether the complaining party should be authorized to retaliate against the responding party, should they fail to conform with WTO rules.

Theories of Repeat Participation and the WTO

Galanter (1974) asked how different groups of actors affected the way in which legal institutions operated and identified ideal types of legal actors: repeat players, who tend to serially engage in similar types of litigation, and one-shotters, who only occasionally take part in legal procedures. Repeat players accrue advantages over time. These advantages are many, including familiarity with the process and ready access to legal specialists, opportunities to develop facilitative informal relations with institutional incumbents, low stakes in any given case and lower start-up costs, the ability to play the odds and adopt a strategy to minimize maximum costs, and the option to play for the rules and work towards the long term development of law. Repeat players are future oriented. They plan in advance, strategize over a series of transactions, seek incremental gains, and influence the rules through the development of case law. Repeat litigants develop expertise that allows them to anticipate which cases are

not worth pursuing, which cases should be settled early, and which cases should be pursued with the intent of shaping jurisprudence, and further, which new rules are likely to be significant or merely symbolic alterations to the status quo. One-shotters, in contrast, lack these advantages, are less able to identify a “good” case, and are more likely to enter litigation without strategic ability to, or interest in, affecting the on-going development of law (Albiston 1999). Instead, the one-shooter seeks to maximize tangible returns from the immediate dispute and have less interest in the development of the law or the implications for future litigation.

Of the 151 members of the WTO, only 51 have ever participated in a dispute. Figures 1 and 2 show the fifteen most frequent complainants and respondents, respectively. The fifteen most frequent complainants brought 88.9 percent of all complaints while the fifteen most frequent respondents took part in 86.9 percent of all disputes. Figure 3 shows the fifteen most frequent participants overall when participation as a complainant and respondent is combined. These countries were involved in 86.9 percent of all disputes. Of the 51 member countries that have ever participated in a dispute, there are nine countries that have participated only once and another eight that have participated twice. All three figures indicate that the United States and the European Communities (EC)² are hands down the most frequent participants. However, if the dispersion of participation levels can be taken as a rough indicator of relative participation, Brazil, Canada and India are also frequent participants at the WTO.

[Insert Figures 1, 2, and 3 about here]

These figures demonstrate an ambiguous relationship between level of development and participation in the WTO. While the U.S. and EC are clearly repeat players and can be categorized as “haves,” there are many uncertain cases. Is Brazil a “have” or a “have not”? Are Japan or Australia repeat players? Nonetheless, the WTO is marked by the presence of repeat players and members that dispute only infrequently if at all, as well as many cases that fall somewhere in between.

Rule-Mindedness and the Development of Law

Frequent participants in a legal forum are likely to develop both practical knowledge about how the forum operates and different interests in how the forum may operate in the future. In the context of the WTO, both frequent and infrequent participants have an interest in keeping the costs of their litigation low while maximizing their tangible gains from a particular encounter with WTO law. The theory of repeat players suggests that their approach may be mediated by their “rule-mindedness,” such that they may be willing to “pay” for the development of law by accepting higher costs if new case law is anticipated to be substantially beneficial in future cases. Is this the case at the WTO? WTO expert

panels and the Appellate Body lack the formal ability to establish precedent, as this is deemed to undermine the right of member nations to negotiate their international obligations (Holmes 2001; Horn and Mavroidis 2004). Still, with the legalization of dispute procedures in the Uruguay Rounds, panels and the Appellate Body have acquired the “persuasive authority”³ to clarify members’ rights and obligations. Concerted efforts have been made to build a consistent body of case law, as evidenced in the publication by the Legal Affairs Division of the WTO of *The WTO Analytical Index* (Cambridge University Press 2007), which is the “authoritative” compilation of panel and Appellate Body decisions.

The establishment of juridical review began the de facto evolution of WTO jurisprudence. The decisions of panels and the Appellate Body are treated as sources of law “subsidiary” to the text of the agreements. While panelists retain the right to interpret and apply WTO rules as they see fit and are not bound to adhere to the decisions of prior panels or Appellate Body decisions (Cho 2008),⁴ deviations from prior decisions are not taken “lightly” (Palmer and Mavroidis 1998).⁵ Panel and Appellate Body decisions operate as non-binding precedent, are considered persuasive and possess a strong normative power. While retaining the formal right to negotiate their commitments, member nations are no longer the only authority on the interpretation of their obligations under WTO agreements. The non-binding precedent of panel and Appellate Body

rulings provides a potential opportunity for seeking specific rulings, or “playing for the rules,” as a way of influencing the future course of WTO law.

The Reputation of Repeat Players

Through their encounters with the same legal institution and personnel, repeat players may also develop concerns for reputation and fear of reprisals. This highlights the informal and practical dimensions of legal experience. How states manage their reputations, cope with stigmatizing events, and express national identities for international audiences is a growing area of scholarship (cf. Rivera 2008). Reputational concerns are also important at the WTO in several different ways. First, some countries are determined to build or maintain their status as legitimate members of the international community. Participating in international legal forums provides a mechanism to demonstrate to both domestic and foreign audiences that the state is competent, legitimate and deserving of respect accorded sovereign nations (Hurd 2007). This is a very general reputational concern, likely experienced by a variety of nations, and not the result of WTO disputing per se. Disputing at the WTO is just one more forum to claim legitimate statehood.

Second, some have suggested that powerful countries comply with WTO determinations due to concerns for maintaining the stability and utility of the system as a whole (Trachtman 2007). Maintaining a reputation as rule abiding

helps prevent defections from the regime by other countries. This is very much congruent the view that international legal organizations are constructed as a power bargain that exchanges constraint by powerful countries for stability and predictability in the trading system (Abbott and Snidal 1998). Failure to give deference to the rules would undermine a country's credibility in future negotiations and disputes. This kind of reputation is specific to the behavior of states in the context of international agreements. While this helps explain why powerful states generally follow the rules and comply with WTO rulings, it does not provide much information as to why a state might choose to settle or litigate a dispute.

Finally, repeat players in WTO disputing may become concerned about how they are perceived by other litigants. This is a concern very specific to the disputing process of the WTO. A reputation for settling too quickly may encourage litigants to initiate more disputes. As such, this concern will only arise for member countries that dispute frequently enough to establish a "track record." One-shotters would not be concerned about this type of reputation because they do not participate frequently enough for other parties to make judgments about whether they are "litigious" or "conciliatory."

The WTO as a Legal Institution

The character of a legal institution has implications for how repeat players accrue advantages. The WTO system can be conceived of as passive because disputants bear the full responsibility of utilizing the dispute system. The WTO Secretariat is not empowered to seek out violations of the treaty agreement or remedy them through the legal system. Forced to seek compliance with WTO laws themselves, member nations face risks stemming from direct confrontation with each other, possibly including extra-legal risks (Jawara and Kwa 2003; Zejan and Bartels 2006). As with much civil litigation, participation in WTO disputing is expensive, complex, and time-consuming. Inequalities in the abilities of countries to marshal the requisite resources and expertise create leverage for richer complainants while constituting a disincentive for poorer nations to initiate disputes. In sum, the WTO reproduces some existing inequalities between member nations through the passivity of the institution and the expense and difficulty of litigation.

Third Party Participation

One last dimension of the WTO dispute settlement system relevant for understanding how legal experience is accrued is the ability of member countries to participate in disputes as a third party. Third parties “reserve their rights” to participate in a dispute when they are neither the direct target of a claim nor a

complainant so long as they can demonstrate a “substantial” interest in the dispute (Busch and Reinhardt 2006).⁶ Third party status permits a member country to participate fully in the dispute. Busch and Reinhardt (2006) examined the impact of third party participation in detail, noting how third parties help to ensure the multilateral character of disputing. But, third party rights may also produce greater litigiousness and complexity as such disputes play out before a larger audience. Davis and Bermeo (2009) demonstrated that third party participation results in an increased likelihood of initiating a subsequent dispute, though the effect is less than experience as a complainant or respondent. Participating in a dispute as a third party is a valuable opportunity to gain legal experience in WTO disputing, but at reduced cost and risk.

Theories of repeat participation in general and the work specific to the WTO suggest that continued examination of repeat participation at the WTO can be a fruitful avenue for examining disputing in international domains. Theories of repeat participation suggest that once a dispute has begun, repeat players will use the dispute process of the WTO in distinctive ways. The next section quantitatively assesses how repeat participation impacts the likelihood of dispute transition.

SECTION 1: A MODEL OF WTO DISPUTE TRANSITIONS

In general, the empirical literature on the dispute system tends to be concerned with attributes of dispute participants as determinative of strategic disputing behavior. For instance, measures for Gross Domestic Product (GDP) frequently appear in statistical models for dispute initiation. Some have used it as a proxy for legal capacity (Horn, Mavroidis, and Nordström 1999; Busch and Reinhardt 2003; Bown 2005), others for power (Zejan and Bartels 2006), and others for both (Guzman and Simmons 2002). In contrast, this analysis relies on key variables constructed to reflect the difference between complainant and respondent in a given attribute theorized as relevant to the disputing process. Understanding how participants shape the use of law requires assessing the combination of forces deployed in disputing. It is not the attributes of participants held in isolation that matters for disputing, but the relationship between what the parties can bring to bear in a dispute.

This approach to modeling disputes is derived from Galanter's theorization of how different combinations of ideal-type parties lead to different approaches to disputing (1974, 107-14). For instance, serial disputes between repeat players are likely to produce informal bilateral controls with the goal of minimizing legal conflict. Such conflicts may be diverted to arbitration forums that allow the parties to avoid legal sanctions. Disputes between one-shotters will occur sporadically and litigation will be used in an ad hoc manner to repair or

terminate a long-term relationship. In both types of cases, the likeliness of litigation is reduced as the parties seek alternative or limited use of the law. Disputes between one-shotters and repeat players, in contrast, are more likely to be litigated. As such, it is not the attribute of the participant that matters so much as how those attributes become interactive in a specific dispute. Operationalizing experience and other variables as the difference in attributes between participants captures such contextual dimensions of disputes. This is not to argue that all attributes of disputes, such as their complexity are irrelevant (cf. Guzman and Simmons 2002). Rather, it is to argue for a more careful assessment of how attributes of countries manifest in specific disputes.

The dataset includes information on 327 disputes initiated in the first ten years of the WTO (January 1995 through October 2005).⁷ In counting disputes, this analysis follows the convention of collapsing redundant dispute initiations (Busch and Reinhardt 2002; Horn and Mavroidis 2006a; Davis and Bermeo 2009). Disputes initiated under the General Agreement on Tariffs and Trade (GATT) are excluded because of the specific procedural and substantive innovations introduced by the Uruguay Round negotiations in the Dispute Settlement Understanding.⁸ I constructed a discrete time event history model of dispute transitions. This modeling technique is ideal for the analysis of transitions with time varying covariates and with data defined by many instances of events occurring at the same time (Yamaguchi 1991; Allison 1995).⁹ Where other forms

of statistical analysis are forced to constrict datasets to only those cases that have concluded (to avoid right censoring), resulting in a significant loss of information, event history analysis permits evaluation of censored data (Allison 1995; Cleves, Gould and Gutierrez 2004).¹⁰

The unit of analysis is the dispute-month because the Dispute Settlement Body, the forum in which disputes are initiated and panels are established, generally meets only once per month, and thus disputes are only at risk for transition during those meetings. Thus, the data is truly defined by discrete time units and discrete time techniques using logistic regression are appropriate for analyzing such data.¹¹ The dataset of 327 disputes is organized into 10,877 observations of dispute months. Because of how the unit of time is built into the data set, robust standard errors were clustered by dispute.

The dependent variable is a binary indicator of disputes that transition from the initial mandatory consultative phase to the establishment of a panel of experts to review the dispute. This is an important juncture because it constitutes the full utilization of the legal review process, which has implications for the expense and complexity of continuing to dispute. The duration of a dispute thus affects how the dispute transitions through the phases of disputing. Disputes that are settled quickly are less expensive and often attract less attention. As Busch and Reinhardt (2003; see also Reinhardt 2001) have shown, disputes that last longer and proceed through advanced stages of disputing are less likely to be

settled and complainants successful in winning legal arguments are likely to win fewer substantive concessions. Analyzing duration also makes it possible to evaluate independent variables that change over time, including during ongoing disputes. This allows more precise estimation of what disputants bring to bear in a dispute across the period of time between dispute initiation and transition to panel review. For these reasons it is useful to account for duration in modeling dispute transitions.

Of the 327 disputes initiated, less than half (n=145) make the transition to panel review. An additional 52 are settled or resolved in other ways. The rest (n=130) have no *official* resolution but nonetheless constitute an outcome of the legal system that affects the odds of transition. While the main focus of this paper is on the impact of experience on dispute processing, it is necessary to discuss the model as a whole. The independent variables fall into three categories: institutional features of disputes and disputants, trade relationships, and the structural position of countries in the modern world system.

Institutional Effects

Repeat players as complainants would be expected to have the ability to better pick “best” cases that are more likely to settle early, as well as facilitate a process of disputing that engenders favorable outcomes without litigation due to their familiarity with institutional processes (Conti 2008). Furthermore,

complainants are in control of the formal decision to transition. More experienced respondents, for the same reasons, would be expected to be less likely to concede and more likely to use their acquired expertise to resist conciliation. Consequently, (H1.a) *relatively experienced participants can be expected to avoid the expense of dispute transition when they are complainants and engender a process of disputing that achieves their goals without incurring the time and expense of full litigation.* By extension, (H1.b) *when the respondent is the more experienced participant in a dispute, they will seek to force the complainant to take on those costs, thus delaying negative consequences that may accompany an unfavorable ruling and heightening the potential for incurring dispute fatigue in the complainant.*

The measure for *difference in experience* represents the difference between complainant and respondent in the number of prior WTO disputes each participant had been, or currently is, officially involved with in any given month.¹² It includes participation as a third party. The construction of the variable can be made clear through an example. The United States began disputing in the first month of the World Trade Organization, January 1995, as a respondent in a dispute over oil initiated by Venezuela (DS2).¹³ For January 1995, both the U.S. and Venezuela were scored as having one month of dispute experience and the difference between them was zero. In April of 1995, the U.S. initiated a dispute against Korea over agricultural products (DS3)¹⁴ and Brazil

initiated a dispute against the United States over the same issues as Venezuela (DS4).¹⁵ Because DS2 and DS4 were about the same issue and were ultimately reviewed by the same panel of experts, the U.S. was not credited with a new dispute but Brazil was. At this point (April 1995, month 4 of the WTO), the United States held an experience score of two, while each of the other countries mentioned so far had a score of one. In May of 1995, the score for the United States jumped to five when it initiated a new dispute against Korea about the shelf life of products (DS5),¹⁶ became the respondent in a dispute initiated by Japan over Section 301 duties on car imports (DS6),¹⁷ and joined another dispute (DS7) as a third party.¹⁸ Japan also joined DS7 as a third party, bringing its experience score to two disputes. Thus the experience difference score for the first month of DS6, in May 1995, was minus three, reflecting the experiential advantage of the U.S., which was or had participated in five disputes compared to Japan, which had participated in two (once as a complainant in DS6 and once as a third party in DS7). The score is negative because Japan is the complainant in DS6 and the variable is constructed by subtracting the value for the respondent from that of the complainant.

As the example demonstrates, experiential difference is a dyadic measure of the relative experience the parties can rely on in a given dispute at a given point in time. This is consistent with Galanter's conception of how combinations of different types of parties affect how a legal institution is used. It is a measure of

the particular “match-up” of countries in a dispute, based on the argument that it is the *relative* expertise that affects how a dispute progresses through the disputing process. However, to evaluate that argument, the models below also examine the effects of experience operationalized as monadic attributes of each participant.

The variable is time varying, making it distinct from the measures employed by Davis and Bermeo (2009), but reflecting how countries acquire experience through direct participation in disputing over time. While there are 129 months in the time period, the minimum and maximum scores for difference in experience across the whole time period are -199 and 209, respectively. These scores reflect the fact that countries accrue experience from engaging in multiple disputes simultaneously. Such extreme differences reflect disputes in which a repeat player is disputing against an infrequent player. At the end of the time period, on average, the complainant held a 7.4 dispute advantage over the respondent, which is close to the median of 8. Recalling that this variable expresses the monthly difference between a complainant and respondent, this provides some support for the findings of Davis and Bermeo related to how more experienced countries are more likely to initiate disputes. The positive mean and median indicates that complainants, across the entire time period, tend to have greater levels of experience than the responding parties to the dispute. The standard deviation is quite large, 83.2 dispute months. The long tails on the

distribution are accounted for by the participation of the U.S. as both a claimant and respondent. However, these descriptive statistics fail to capture how experience levels change over time, reflecting instead the cumulative experience of member countries only in the last month of the time period. As such, they should be interpreted with caution.

Legal Capacity and Complexity

Participating in the dispute settlement system is a time-consuming and sophisticated legal and political task, requiring teams of lawyers, economists, diplomats, and politicians. Countries with high levels of legal capacity are better able to mobilize the individuals possessing the expertise to identify trade grievances, to identify and acquire relevant evidence about WTO violations, to formulate strong legal reasoning, to meet filing deadlines, and to endure the duration and overall expense of disputing, among other things. Countries with robust legal capacity are more likely to initiate disputes (Guzman and Simmons 2005; Busch, Reinhardt, and Shaffer 2009; Davis and Bermeo 2009)

This analysis relies on two measures of legal capacity. The first measure is derived from the number of staff present in Geneva offices of national trade delegations to the WTO.¹⁹ It is composed of two binary variables, one for when the complainant has the larger Geneva staff, and the second when the respondent has the larger staff. The second legal capacity variable is a binary indicator of

whether a country has a permanent mission to the WTO notified, as per the Geneva conventions, to the Swiss government.²⁰

Characteristics of disputes may also affect the odds of transition independently of the attributes of the participants (Guzman and Simmons 2002). One of the primary goals of the panel review process is to arrive at independent and objective determinations about how trade practices may or may not fulfill the stated requirements of the WTO agreements. This can be difficult even in simple disputes due to ambiguities in the WTO treaty, limited jurisprudence, the complexity of the substantive issues at stake beyond questions of trade, and difficulties acquiring and assessing relevant trade data, among other uncertainties. Legal complexity can contribute to the difficulty of obtaining clarification of member nations' rights and obligations under the WTO treaties. The first complexity measure is a count of the number of WTO treaty invocations made by the complaining party at the time of request for consultations. The second indicator represents the complexity of disputes through the number of complainants and third parties involved in the dispute. Both are time-invariant.

Trade Effects

The volume of and dependence on trade has been shown to impact the propensity of member countries to initiate disputes (Horn, Mavroidis and Nordström 1999; Bown 2005; Nordström 2005; Zejan and Bartels 2006), which

suggests that trade flows may play a role in why a dispute would transition to panel review. This line of research places emphasis on the economic importance of overall trade volume as predictive of the likelihood of encountering WTO-incompliant trade practices by a trading partner. Countries who trade in large volumes and for whom trade is a significant share of their economy are both more likely to encounter illegal trade practices (as well as engage in them) and take those grievances more seriously than countries who trade less or who are less reliant on trade. To control for this dynamic, the indicator for *difference in trade reliance* expresses the relative economic role of each participant in world trade. Trade reliance difference captures the time-varying ratio of exports to the world (total exports) to share of GDP of the respondent subtracted from the ratio of exports to the world to share of GDP of the complainant.²¹ It is a measure for the relative reliance of each economy on its overall foreign exports.

Bilateral trade is a central feature of the WTO's retaliation mechanism, which operates through selective increases of tariffs by the complainant on imports from the responding party after the complainant has been authorized to do so through arbitration. The ability to sanction, however, is constrained by the relative importance of bilateral trade flows between each of the countries. The ability to sanction is considered at the outset of a dispute as it constitutes the possibility of eventually retaliating. *Market dependence difference* captures the value of one direction of trade – from respondent to complainant – relative to each

country, calculated as the ratio of that trade flow to the GDP of each country.²² This one way flow of trade is what would be targeted for retaliation and thus captures the relative importance of that trade flow to each country. A high magnitude score (either positive or negative) indicates a condition of dependence and suggests that one party has an advantage over the other. If the score is positive it indicates that the complainant is more dependent on that trade flow than the respondent. In this situation, effective use of the retaliatory measures would be unlikely and, as a result, the complainant would be expected to settle or abandon the dispute rather than transitioning to panel review. In contrast, when the value of the market dependence variable is negative, the respondent is more dependent on the trade flow than the complainant. In this situation, transition to panel review would be more likely as the complainant would be better positioned to invoke the retaliatory measures should the responding party fail to comply with panel and Appellate Body rulings.

This measure differs from trade reliance because it accounts for one direction of trade between disputants rather than the volume of overall trade. It controls for the specific trade relationship, as it matters for the possibility of effectively withdrawing concessions, rather than the relative position of each disputant in terms of overall trade.

The analysis also examined a set of seven binary variables, defined by one-level harmonized system commodity codes provided by Horn and Mavroidis

(2006b). These variables control for the commodity group implicated in a dispute, including agriculture, chemicals, minerals, machines, textiles and legal regimes or patents.²³ Including these variables, however, did not change the results and are omitted from the models reported below.

World Economy Effects

The world systems perspective posits that the modern world-system is a socially structured stratification system historically constituted and spatially defined through the expansion of European capitalism (Wallerstein 1976; 2000; Chase-Dunn 1989). The sources of power and dependency relationships are the "unequal distribution and access to productive assets, and the institutionalized power that flows from and reproduces" that distribution (Boswell and Chase-Dunn 2000, 23). The unequal distribution of productive assets is reflected in the concentration of economic activities that command a large share of surplus in "core" regions, while relatively low-profit activities are marginalized in "peripheral" zones (Arrighi and Drangel 1986). The semiperiphery is defined by a mix of core and peripheral economic activities.

The specific legal capacities of member nations of the WTO are manifestations of these historical processes. Structural position in the world economy is translated, via the relative ability of the state to capture a portion of the surplus acquired or extracted in its territory (cf. Skocpol 1977; Evans,

Rueschemeyer and Huber 1985; Chase-Dunn 1989 for discussion of the relationship between state strength and zones of the world system). In turn, states allocate resources and political will to specific disputes.

Conceptualizing the modern world system as hierarchically organized through “zones” of dependency does provide a more nuanced vision of stratification in the world economy than other approaches, especially in the context of trade relationships between states. For instance, Busch and Reinhardt (2003) utilize a measure for level of development based on logged per capita income. They find that complainants with higher income are more likely to get respondents to fully concede prior to a ruling by a panel, but that there is little effect of level of development once litigation gets underway. The ability to induce early settlement is an advantage accruing to rich countries, enabling them to better extract benefit out of the WTO legal system. This approach, however, treats development as a characteristic of a country rather than as a relationship between countries, as in world systems theory. Controlling for the effects of world system position provides a theoretically rich test of the impact of structural inequality in the world economy and thus a more powerful lens to re-visit the how the “wealth of nations” shapes disputing.

World system position is measured with three binary variables derived following Babones (2005; see also Arrighi and Drangel 1986), which represent the dyadic world system position relationship between claimant and respondent,

where at least one of those is a core country.²⁴ Babones derived world system position from smoothed distributions of GDP per capita weighted by population. These smoothed data tend to display a tri-modal distribution and are theorized to reflect the location of core, peripheral and semi-peripheral economic activities. The divisions between zones are empirically identified as the nadir of the troughs in the tri-modal distributions (Babones 2005). Babones identified the break points between zones of the world system for a period of time including 1995-2002. Applying his break points to GDP per capita data for WTO member countries, these countries were coded as core, semiperipheral, or peripheral for each year in the dataset. Then disputes were coded by the pairing of disputants, creating a set of binary variables for disputes involving 1) two core countries, 2) core and semiperipheral countries, and 3) core and peripheral countries. The reference category is all other combinations of countries by world system position that do not involve core countries. This is a time varying variable for the period 1995 – 2002 and then is constant, as that was the last year for which Babones provides the data used in determining the boundaries between zones.

A binary indicator for the participation of the United States or Europe is used to assess whether the participation of these two countries influences the effects of repeat participation. This is used in a product term with the differences in experience variable to test the hypothesis that (H2) *the participation of the United States and Europe account for the effects of experience*. This hypothesis posits

that the variable for experience represents the strategies of the largest trading countries rather than representing a general trend across the membership.

Finally, a variable is included that controls for the number of months since dispute initiation. The DSU provides that if, after 60 days from the date of request for consultations, there is a failure to reach a settlement, the complaining party may request that a panel of experts be assembled to review the dispute. These time periods are not enforced. Nonetheless, requests for a panel review are more likely to be clustered at month three and after rather than at month one or two, indicating a nonlinear relationship between risk of the event and time. This variable accounts for that relationship.²⁵ The mean score for this variable, *months from dispute initiation*, is 35.9 months. The mean for only those disputes that transition to a panel review is 6.7 months between dispute initiation and the formation of a panel.

The Influence of Dispute Experience on Dispute Transition

Table 1 reports the log odds that a dispute will transition in any month, given that the dispute is still active at that time. Four models were examined. These models demonstrate that that while controlling for trade and structural position in the world economy, legal institutional variables, particularly experience, have significant effect on the propensity of disputes to transition to a panel review. Notably, disputes between core countries are more likely to

transition than those not involving those nations. This contrasts with the findings of Busch and Reinhardt (2003) about the propensity of such countries to settle early.

[Insert Table 1 about here]

Model I includes all variables while model III has been fit. Model II includes the test for the impact of U.S. and EC participation and is described below. Model IV examines experience as an attribute of the complainant and respondent and not as a “difference” variable. Model III was derived through stepwise backwards elimination of the variables included in model I. Fitting stopped when all variables had a p-value of less than .1. Importantly, this results in a model that excludes the legal capacity variables, which were significant at less than .1 in model I, and thus provides only weak support for findings in the literature related to the importance of legal capacity.²⁶ Other institutional factors are significant in the fit model, including both measures of complexity and experience.

In each of the main models (I and III) the indicator for experiential difference is significant and negative. For each additional dispute-month of experience held by the complainant relative to the respondent, the odds of transition decrease by about .5 percent.²⁷ The inverse of this is that a decrease in the difference variable – that is, when the respondent is relatively more experienced – corresponds to an

increase in the odds of transition. This is confirmed in model IV, where the experience of the complainant and respondent are treated in isolation and not as the difference between them. This model demonstrates that as the experience of the complainant increases the dispute is less likely to transition. But, as the experience of the respondent increases, the odds of transition increase. Each of these models demonstrate that experience affects the disputing process but that how it does so depends on whether the more experienced party is the complainant or the respondent.

The magnitude of the effect of difference in experience is small, but considering the large spread of levels of dispute participation, the impact of such odds accumulate rapidly, increasing the implications of acquired experience over time. For instance, a difference of twelve dispute-months of experience would affect the rate of transition by about six percent (based on model I and III).

Where disputants like the EC and U.S. may be relatively evenly matched, the impact of experience on a new dispute between the EC and India, or Brazil and Mexico would be of important magnitude.

Figure 4 depicts the effects of difference in experience on the percent change in the odds of transition. Recalling that this variable is constructed by subtracting the experience of the respondent from the complainant, the positive scores on the x-axis reflect situations in which the complainant has more experience than the respondent, whereas the negative scores on the x-axis reflect

dispute months in which the respondent had relatively more experience. As this figure makes clear, when the respondent has the greater experience the odds of transition increase and when the complainant has greater experience, the odds decrease. However, these effects are asymmetrical. As the experiential advantage of the respondent increases relative to the complainant, the percent change in the odds of dispute transition increase at a greater rate than they would decrease if the parties were reversed. For instance, in a hypothetical dispute where in a given month the respondent had a 108 month experiential advantage over the claimant, the odds of transition would increase by over seventy two percent compared to a dispute where the parties were equal. Were the situation reversed, however, and the claimant had participated in 108 dispute months more than the respondent, the odds of transition would decrease by only about forty two percent. While WTO rules grants some advantages to complainants due to the passive structure of the WTO, acquired experience enables experienced respondents to disproportionately shape the odds of disputes proceeding through the phases of the disputing process.

[Insert Figure 4 about here]

Model II introduces the product term for the interaction of difference in experience and the participation of the United States and Europe, which tested the

hypothesis that the participation of these counties moderates the overall effect of experience. The product term is insignificant. Likelihood ratio tests confirm that the addition of the product term explains a trivial amount of variance. As a result, the hypothesis (H2) that the participation of the United States and Europe moderate the effect of experience can be rejected.

Across each of the models, the variable for difference in experience shows how the implications of repeat participation vary with the configuration of the parties, which is congruent with Galanter's original conception. As complainants, more experienced members tend to divert disputes away from litigation. Because the option to transition falls to the complainant, when more experienced complainants are less likely to transition their disputes, it suggests that they are able engender a processing of the dispute that gives them what they want without the time and expense of full litigation. In contrast, when the more experienced participant is a respondent, these models show that they are more likely to resist conciliation and, as a result, those disputes are more likely to transition.

SECTION 2: PRACTITIONER CHARACTERIZATIONS OF DISPUTE EXPERIENCE

The event history analysis identified a systematic relationship between relative advantages in acquired experience and the odds of a dispute transitioning to adjudication. While frequent participation is thus demonstrated to have an

important effect on how the parties use the WTO disputing process, it is less clear why experience produces this effect. Specifically, the statistical analysis raises the following questions. First, what does it mean to gain experience at the WTO, who accrues it, and why does it constitute an advantage? Second, why do more experienced parties adopt the approaches to disputing identified in the statistical analysis? In particular, why do more experienced respondents systematically opt for litigation? Finally, theories of repeat participation emphasized the importance of rule-mindedness and the ability of repeat players to affect the development of law. The statistical model does not address this question, but it is salient to understanding how experienced parties make use of disputing. Are frequent participants in WTO disputing rule minded? Do they select disputes for litigation because of possible implications for the development of WTO jurisprudence?

To answer these questions and make sense of the statistical findings, I conducted thirty semi-structured interviews between May 2004 and May 2006, primarily in Washington, D.C.; Brussels, Belgium; and Geneva, Switzerland. These included interviews with senior legal counsel in trade delegations and Ambassadors to the WTO. Interviewees also included a former Appellate Body chair, WTO Secretariat staff in several divisions, and private attorneys. All but three were men and each had direct experience with the WTO disputing process. Almost all insisted that their comments should be considered “off the record” and not attributed to them by name.

Experience is Important; Expertise is More than Knowledge of the Law

The bulk of this analysis stemmed from the following prompt: do countries that participate more frequently in the WTO system gain advantages over those that do not? Interviewees argued that experience matters for effective disputing. For example, this attorney remarked:

There is a certain kind of knowledge that you can't have if you have not been in Geneva. . . . People who have not been in Geneva normally do not have any idea of how it works because there are a lot of details that are not written in the [Dispute Settlement Understanding] (Interview with Argentinean official, Geneva, April 19, 2006).

As made clear through the statistical analysis, acquired experience matters significantly for how the dispute process is used. Familiarity with the practices of disputing is the basis for effective and strategic behavior. Obtaining this kind of knowledge necessitates being in Geneva and taking part in the action. This is because expertise in the WTO legal field is more than knowledge of formal law. It also involves knowledge of the diplomatic dimensions of international trade disputes. For instance, this Geneva-based private attorney remarked that,

this is a very unusual field of law. Because in many ways it's not purely law. It has a very strong diplomatic overtone. . . . It is not a system that can be regarded just as a legal system. It is much more

collegial, collaborative (Interview with private attorney, Geneva, April 9, 2006).

The “collegial” and “collaborative” aspects of disputing emphasize interpersonal factors. Particularly in Geneva, the social world of WTO actors is “small.”²⁸ Interviewees report that personal reputation, the ability to get along, and gather information is very useful for effective participation of member countries.²⁹ Developing relationships between trade delegation members facilitates learning about the positions taken by other disputants and assessing the politics of a dispute. At times, a trade delegate from a country not involved in a dispute will act as an interlocutor for disputing parties, serving as a medium to informally exchange information for assessing what is “really” going on.³⁰ In these contexts, expertise is constituted by familiarity with informal and unwritten details of the process, knowledge of political contexts and diplomatic sensitivities, and the cultivation of professional relationships. This is more than facility with complicated legal requirements. It takes time working in Geneva, and taking part directly in actual disputes to acquire this form of practical knowledge. Repeated, direct participation in disputing is therefore vital for acquiring the relevant expertise necessary for effective engagement in the legal and diplomatic processes of disputing and at the core of why repeat players obtain advantages over infrequent participants.

Individual Repositories of Expertise and the Implications for Inequality Between Countries

Individuals, rather than trade delegations or national governments, accrue experience. This is important because it affects how member governments are able to harness practical experience by hiring, training, and retaining individuals that have developed expertise through direct participation in disputing. Legal capacity refers to this “bureaucratic apparatus” for mobilizing individuals for disputing by providing compensation, administrative support and other resources that enable them to do the work of disputing at the WTO (Busch, Reinhardt, and Shaffer 2009). Expertise acquired by individuals and the legal capacity of member countries for retaining that know-how for future disputes thus mediates the role of experience identified in the statistical model. This helps to explain how frequent participants are able to translate participation into advantages in litigation.

It is common for trade delegation personnel to rotate in and out of Geneva periodically. The duration of appointments, while not wholly consistent across all member countries, are intended to provide sufficient time to master the intricacies of the WTO but limited enough to prevent personnel from losing track of their countries’ interests.³¹ Even representatives of governments with elaborate and sophisticated trade bureaucracies can find it difficult to acclimate to the tasks of managing disputes in Geneva, as noted by this official.

The learning curve is steep depending on background experience. . . . I'd been doing a lot of WTO litigation before. I used to come here, about once every five weeks. Yet, when I arrived, minor details about procedure that were just mind boggling, and you know, the time, whom to call, and how to get things done. It takes time. . . . I think longer than four and a half years risks seriously the "go local" territory, and anything less than three years is not really effective because it takes that long to actually get to know a place (Interview with Canadian attorney, Geneva, April 3, 2006).

As described above, effectively navigating the dispute system requires mastering nuanced details of process and procedure and cultivating social relationships useful for getting things done and gathering information. This can be a challenge even for delegates from frequent participants, such as Canada, a relatively rich country with a specialized governmental agency for handling trade affairs. The rotation of personnel has more severe implications for small trade delegations or those lacking a sophisticated trade bureaucracy with institutionalized redundancies in expertise.³² For instance, this European counsel described the presence of "small delegations" in the WTO and how their abilities in disputing are linked to particular individuals.

You have [countries] that are very active . . . simply because the guy in Geneva happens to be very good and quite interested by WTO law and

then the guy goes back to his capital and his country disappears (Interview with E.C. Official, Brussels, April 20, 2006).

For countries with small delegations in Geneva, the rotation of personnel may result in the total collapse of expertise in key areas. Repeat participation is more difficult for smaller countries and acquiring the advantages that stem from it are premised on the institutionalization of legal capacity such that the practical experiences of individuals are not lost through routine personnel changes.

The individual locus of acquired practical experience is an important source of differences between frequent and infrequent participants in disputing. Interviewees asserted that infrequent players often can not justify dedicating staff and resources to hiring and maintaining trade practitioners if they are not frequently engaged in disputing.³³ And frequent participation requires a commitment to building legal capacity. As a result, infrequent participants often lack individuals with highly developed expertise in WTO disputing and must seek that expertise elsewhere, either through the market for private legal services or legal assistance.

In sum, expertise is derived from direct participation in disputing and it accrues to individuals who must be mobilized over time to ensure effective participation. In turn, these features of experience are the source of differences between repeat players and member countries that participate infrequently, if at

all. These differences also underwrite the strategies of how these countries approach WTO disputing.

Approaches to Dispute Transitions

The results of the statistical analysis suggested that experienced complainants structure disputing in such a way as to achieve settlements. For instance, this official described their approach as complainants.

We will approach the country concerned and say, ‘look, we believe there is a violation, let’s discuss’ . . . Starting a WTO case is heavy, requires lots of energy, resources, and it takes a lot of years. So, that’s why I prefer to settle at an early stage (Interview with EC official, Brussels, April 20, 2006).

In fact, most practitioners preferred settlement to litigation for the reasons cited by the European official. But, more experienced complainants are better able to accomplish this task, as evident in the statistical model. This is because experienced complainants, as described above, are more familiar with the process and better able to select disputes that are likely to secure a settlement. These are “best” cases because the reasoning as well as evidence are so clear or obvious as to provoke a settlement (Conti 2008).

As respondents, the statistical model showed that more experienced players are unlikely to settle and disputes are more likely to transition to panel

review. While there are many reasons why a country may choose to litigate rather than settle, interviewees specifically linked experience and expertise to failure to settle in two ways. First, frequent participants treat disputing as routine. Second, frequent participants develop reputational concerns that construct settling by a respondent as a sign of weakness, and thus something to be avoided.

Disputing as Routine

Trade grievances may be broached informally by representatives of governments prior to the initiation of a formal dispute. One official called such informal dialogue, “the front door” of the relationship between countries.³⁴ Such informal dialogue can be quite successful. When it is not, however, disputing provides a “back door” for insisting that there is a problem that should be addressed. The initiation of a dispute is often intended to signal dissatisfaction with a trade relationship and constitutes an escalation of the grievance because it becomes formalized, the rules and procedures of disputing are invoked, and the grievance is made public. However, such “theatrical” (Hudec 1996) tactics may not have the desired effects, particularly when the respondent is a frequent participant in the disputing process (Conti 2008). This is because repeat participation leads to a sense of disputing as routine.³⁵ As in domestic contexts, repeat players have lower stakes and start-up costs in any given case. When

asked about how he approaches litigating against frequent participants in the WTO, this attorney compared it to domestic litigation.

It's just like any litigation strategy. . . . if you're going against IBM, you're not going to paper them, you know, they have enough lawyers; they just hire more. It's the same situation (Interview with private attorney, Washington D.C., February 28, 2005).

As with attempting to sue IBM, bringing a dispute against a frequent player requires careful strategy about which arguments to make. A company like IBM will not be overwhelmed by lots of complex legal argumentation. They have the legal specialists and staff to handle any kind of dispute. This interviewee makes an analogy between that company and frequent participants in the WTO process. This comment also invokes the uncertainties of disputing. At the outset of a dispute, it can be difficult to know what arguments will be effective. This is complicated by the lack of a remand procedure and results in an incentive to make as many arguments as possible in the hopes that enough will be effective to substantively win the dispute. This same attorney describes this effect of uncertainty, particularly as it relates to disputing against the most frequent of participants.

In bringing your claims, you have many different things you're thinking about, but one is, it's not clear which one's going to win, so you have to bring claims. You're not going to overwhelm the United States for

example, but will the panel be overwhelmed? (Interview with private attorney, Washington, D.C., February 28, 2005).

It is impossible to “paper” the U.S. – or try to overwhelm them with legal argumentation.³⁶ They have the personnel, organization, and the resources to manage litigation, even multiple simultaneous disputes. But is not just the United States or Europe that have these capacities for highly effective, routine participation, but also Canada and Brazil.³⁷ Interviewees singled Brazil out as a developing country but one with capacity greater than some small, developed countries that do not participate frequently, such as New Zealand or Norway.³⁸

By contrast, infrequent participation makes it difficult to dispute effectively because of a lack of trade practitioners familiar with the nuances of the disputing process. A Brazilian official described the difficulties of infrequent players in managing a dispute.

It should be harder to bring a case to the WTO if they had never before brought a case to the WTO, because they would be alone. They would be unaware of the features of the system, of the jurisprudence and things like that. I think it will be very, very hard for them to bring a case to the WTO and to appear before a panel, the Appellate Body (Interview with Brazilian official, Geneva, May 20, 2005).

This demonstrates again the basis of expertise in direct participation and shows how that creates a gap between the expertise of frequent players and the hurdles faced by infrequent participants. Some practitioners described mistakes and missteps made in early attempts at disputing as well as continuing problems related to under-staffing of experienced personnel.³⁹ They experienced both higher stakes and higher start up costs. In contrast, frequent participants are more skillful in managing disputes and finding the right political and legal strategy. In the words of a European Counsel, the growing sophistication of repeat participants “causes a problem for developing countries because then it basically forces you to have a private lawyer” (Interview with E.C. official, Brussels, April 20, 2006).

A responding country represented by a highly experienced legal team creates a significant challenge for countries lacking institutionalized access to such expertise. This forces a less experienced complainant to spend heavily on private legal services, to seek legal assistance (if they qualify), or lump it. Over time, the growing sophistication of frequent players has created strong pressures on developing countries to develop expertise. This counsel from Argentina described the growing complexity of WTO disputes, arguing that they are,

becoming more complex because the usual participants in the WTO dispute settlement become more sophisticated. . . . It’s much more difficult

for developing countries, I can tell you (Interview with Argentinean official, Geneva, April 19, 2006)

This informant describes how the “usual,” or frequent, participants have created pressure for greater sophistication. Some developing countries, most notably Brazil and India as evident in their frequent participation, have responded to this pressure and have become increasingly sophisticated as well. Other countries may have recourse to private attorneys or the services of the Advisory Center for WTO Law (ACWL), an international legal assistance organization.⁴⁰

In sum, adjudication invokes many uncertainties as to what constitutes a good case and how to best manage a dispute through the process. Frequent participants approach disputing as routine and are better positioned to deal with those uncertainties, which can be a significant problem for less frequent participants. Repeat participation leads to a gap in expertise and the ability to mobilize it through legal capacity. This gap underwrites the approach of experienced respondents, who treat disputing as routine. They have lower start-up costs and operate with economies of scale with well-trained trade practitioners. Failure to settle does not invoke inordinate costs for them. But, when they avoid conciliation it increases the stakes, duration, and expense of continuing to dispute. These constitute burdens for infrequent participants and serve as a disincentive for continuing to dispute.

For the most part, this is a product of the system and how different parties engage and make use of it, rather than an explicit strategy. But there is an implicit strategic element: refusing to settle forces the complaining party to “prove” their argument. In a rather extreme articulation of this dynamic, an American official described this as a “‘lets see how good your case is and I’ll show you how bad it is,’ kind of exercise” (Interview with American official, Washington, D.C., March 3, 2005). This clearly invokes competition based on differences in expertise. Most interviewees, however, demurred when asked whether frequent players ever intentionally tried to use the complexity and expense of disputing against less frequent participants. It could be that the topic is too sensitive for disclosure in an interview. Nonetheless, most emphasized how the differences in expertise acquired from direct participation generate divergent incentives for parties depending on whether they are a complainant or a respondent and their abilities to manage the uncertainties associated with litigation.

Reputational Concerns

The second way in which experience affects the strategic incentives of the responding party is related to how frequent participants develop reputational concerns. They do not wish to be perceived as weak because they have settled. A Washington D.C. based private attorney described the logic of this strategy in this way:

Sometimes there are settlements. The U.S. doesn't and the EU doesn't – they don't typically want to settle because they don't want to give the appearance, the Michael Jackson appearance, that if you settle the case, well you were guilty. Or, if I settle the case, are other people are going to bring cases just because they think I'm going to settle? And so they resist settlement even when they lose. . . So that tends to be the big countries that will not settle. Most of the settlements you will see are honest to goodness settlements between smaller countries who really go there and, one country makes a point, the other country sees that they are probably going to lose in the WTO and they don't want to lose so they come to some settlement agreement . . . It was Singapore that went after Malaysia on licensing, but then Malaysia just kind of realized, "it's a problem, ok", so they came to an agreement and settled the case, that's it. (Interview with private attorney, Washington D.C., February 28, 2005).

This practitioner reported that major players develop reputational concerns about how other member nations perceive them. Cultivating a reputation for litigiousness is strategically aimed at shaping the perceptions of other member countries. The purpose is to avoid the perception of guilt while dissuading potential claimants from initiating a dispute. This is a future-oriented concern because it seeks to influence how potential opponents assess the prospects of a

future, perhaps unrelated dispute. Indeed, this strategy, according to the same informant, means that future disputes will often “just go away. People will say, ‘well, we don’t have the stomach, or intention to go forward’” (Interview with private attorney, Washington D.C., February 28, 2005). He contrasts this with a dispute between Singapore and Malaysia that resulted in a settlement. For both countries, this was their only foray into WTO disputing. He cites them as examples of how less frequent players lack the incentive to cultivate a reputation as litigious.

The crafting of this kind of reputation is only possible for repeat players as it is only they that participate enough to have a reputation related to disputing. Furthermore, it is oriented primarily towards infrequent participants. This is because, as discussed above, frequent participants approach disputing as routine and are thus less likely to be concerned about the relative litigiousness of opposing parties. Reputation provides an additional explanation, besides the expertise gap, of the pattern of likely transitions to panel review identified through the statistical analysis: repeat players as respondents opt for litigation so as to dissuade future complaints against them.

Staying on Safe Ground

One of the important interests of repeat players, as described in the scholarly literature, is a concern for the ongoing development of law. Repeat players are

better able to anticipate the implications of a ruling and act to secure changes to case law that they favor. Do repeat players play for the rules, even in international trade disputes? This question moves beyond the statistical analysis but is nonetheless central to understanding the implications of frequent participation at the WTO.

Formally prohibited from generating new obligations, the Appellate Body is empowered to establish procedures for disputing and to clarify the obligations of WTO member countries. Nonetheless, WTO jurisprudence is developing and the rulings of panels and the Appellate Body are conferred with a strong normative authority such that they are considered persuasive in other disputes, though not binding. For instance, this former U.S. official noted,

Generally the decisions and panel interpretations provide additional guidance on obligations that might be somewhat unclear and subject to argumentation, thus the dispute. I don't think clarifying obligations amounts to creation of new obligations (Email exchange with former U.S. negotiator, February 5, 2005).

The rulings of the panel and the Appellate Body are oriented towards clarifying the meaning of the treaty agreements. He distinguishes this from the creation of new obligations and thus affirms the non-binding character of prior panel and Appellate Body decisions. WTO treaties contain many ambiguities (cf. Horn and Mavroidis 2004).⁴¹ This is in part a product of the negotiation process, where

intentional, “constructive” ambiguities in the treaty language facilitated reaching a consensus on their adoption.⁴² Further, the newness of the system means that certain areas of WTO law have never been tested in a dispute (Conti 2008).⁴³ As evidenced in the comments of this European official, untested areas of WTO law, rather than leading to disputes intended to shape jurisprudence, tend to be avoided. He said,

we don't do a case to create the case law for the next one. . . . It's more the negative. Sometimes we don't make claims because we know that if those claims are successful they would be used against us in another case. . . . So that it is kind of a vicious circle of staying on safe ground (Interview with EC official, Brussels, April 20, 2006).

Disputes are not litigated for the purposes of developing case law. There is little evidence that repeat litigants strategize the development of WTO law over a series of disputes. Instead, anticipation of the likely impacts of the development of jurisprudence leads to careful avoidance of some areas of the law. The normative authority of panel and Appellate Body decisions is taken seriously. Rather than seeking to develop jurisprudence in an area, trade delegations prefer to stay within the realm of established decisions. This is a reverse playing for the rules based on the avoidance of uncertainty and negative implications of the clarification of obligations. This orientation towards rule development shares some similarities

to the rule-mindedness of repeat players in domestic litigation in that in both situations frequent players develop the ability to anticipate the implications of a possible ruling.

Effectively operating within the WTO dispute system takes significant resources and personnel with practical experience. Expertise is not gained through abstract learning, nor is the relevant experience narrowly focused on law. Countries that regularly participate acquire advantages over those that participate less frequently because they have more opportunities to acquire informal and practical knowledge about how the dispute process works. Because experience accrues primarily to individuals, trade delegations, particularly small trade delegations, have difficulty acquiring and maintaining experienced trade practitioners over time. This is a problem compounded by infrequent participation due to the increasing sophistication of frequent participants. Differences in experience-based expertise and the ability to mobilize it over time leads to a distinctive strategy by experienced respondents. As identified by the statistical model and reaffirmed and explained by interviewees, these countries avoid conciliation. In so doing, experienced respondents cultivate a reputation intended to dissuade future complainants while forcing the current complainant to make a choice between possibly protracted litigation and exiting the system. Finally, to the degree that frequent participants are concerned with changes in the

understanding of WTO obligations due to panel decisions, it is in its negative form of avoiding possible developments in jurisprudence that may in the future pose adverse implications. These findings thus extend the work of Davis and Bermeo (2009) that showed how an initial experience with disputing increased the likelihood of subsequent dispute initiation by pointing to impact of dispute experience for *how* the process is used once under way.

CONCLUSION: INTERNATIONAL TRADE DISPUTES IN THEIR SOCIAL CONTEXTS

The importance of experience acquired through repeat participation was established through statistical testing and illuminated by practitioners. These are important findings because they focus critical attention on how disputants influence the use of international trade law. The effects of repeat participation are not reducible to economic position in the world trading system or trade relationships. It is a *general* feature of how the system is used that is not restricted to the most powerful. This is evident in the insignificant product term (model II), which indicates that the advantages of repeat players can also accrue to a larger group of frequent players, including Canada, Brazil, India, and others.

The general character of acquiring expertise through direct participation indicates how frequent participation generates important differences in capability even between member countries that may be viewed broadly as repeat players.

Viewed this way, repeat participation in disputing effectively stratifies all participants and not just by the binary categories of repeat player/one-shotter.⁴⁴ The advantages of repeat participation in disputing vary importantly, even amongst relative “haves” and can be expected to produce significant differences between countries that are quite present and active in the WTO system. This is evident in the effects of the experience variable, which accumulate rapidly even in the context of players of broadly similar frequency of participation.

The generality of experience as a mechanism for accruing advantages, however, is based on the basic ability and willingness to marshal requisite resources for participation and to create an institutional structure for mobilizing expertise over time. Initiatives intended to “level the playing field,” such as private legal services and cut-rate representation from the Advisory Center for WTO Law are important and helpful for developing country litigants as they provide access to dispute experience not otherwise easily attainable without repeat participation and persistent investment in building legal capacity. However, empirical accounts of private legal services for WTO disputing are not well developed. Future research should seek to more adequately account for the impact of private services. For instance, it remains difficult to systematically assess when and how private attorneys have been involved in a dispute and what their impact may be. Still, experience remains a discerning factor in dispute transition, and that suggests that – whatever the role of private legal services – the

playing field remains tilted in favor of those with greater direct participation.

This suggests that the provision of such services is unlikely to permanently alter how the WTO legal system distributes advantages among unequal participants. It is difficult to catch up and over-come the expertise gap.

Experience with disputing is constitutive not only of strategies, such as when to litigate or settle, but also the identities of WTO members. Some interviewees offered broad characterizations of member countries, assigning behavioral and psychological traits to entire countries and how they approach participation in a dispute. The comments are in the vein of “the Americans are like *this* while the Japanese are like *that*.” The content of such attributions is less important than that they are made and that they have impact on how different member countries plan and manage their efforts in disputing. WTO forums are expressive as well as instrumental, and serve as one site for the articulation of identity in international contexts. These identities are more than merely symbolic, as made evident in the role of litigiousness as a reputation. Such features of disputing have important impacts on the processing of disputes, and by extension the power dynamics of the global trading system.

Critical elements of this analysis, such as expertise and reputation point to the *social* contexts in which high-stakes international relations take place. Rather than anarchic, world society is increasingly saturated with cultural content, such as specific know-how, meanings related to what law can achieve, and concerns

about status. Indeed, the WTO is a complex social forum defined by symbolic and cultural features linked to ideas about how things should be done, and which mediate, through personal, professional and institutional dynamics, the historical structures of the global economy and international relations. A legal institution requires actors to make use of the law, to interpret it, apply it, and argue over what it means. Struggles over meaning provide positions for legal actors to confront one another. These meanings and practices matter precisely because they create or re-create power relationships. The acquired “know-how” that trade practitioners develop through directly taking part in disputes is at the heart of the advantages that frequent participants exert over infrequent participants. This knowledge of law is the medium through which competitions for dominance occur, with unequal participants seeking to use the law for their own advantage. Those that acquire greater facility with the processes of disputing gain the upper hand in these competitions. And by extension, repeat participation can be seen as a new site of inequality that is rooted in the abilities of member countries to invest in legal capacity, in cultivating expertise through direct participation, and how that plays out through the work of legal argumentation and interpretation.

International legal forums are sites for the study of how law is made and used in specific social contexts. Law happens outside of the nation-state, is shaped by parties using it, and thus creates the opportunity to extend socio-legal scholarship to international and global social contexts. Future research should

continue to extend this approach, seeking larger samples and conducting comparative evaluations of other international legal forums as a basis for revisiting the production of law in action at the global level.

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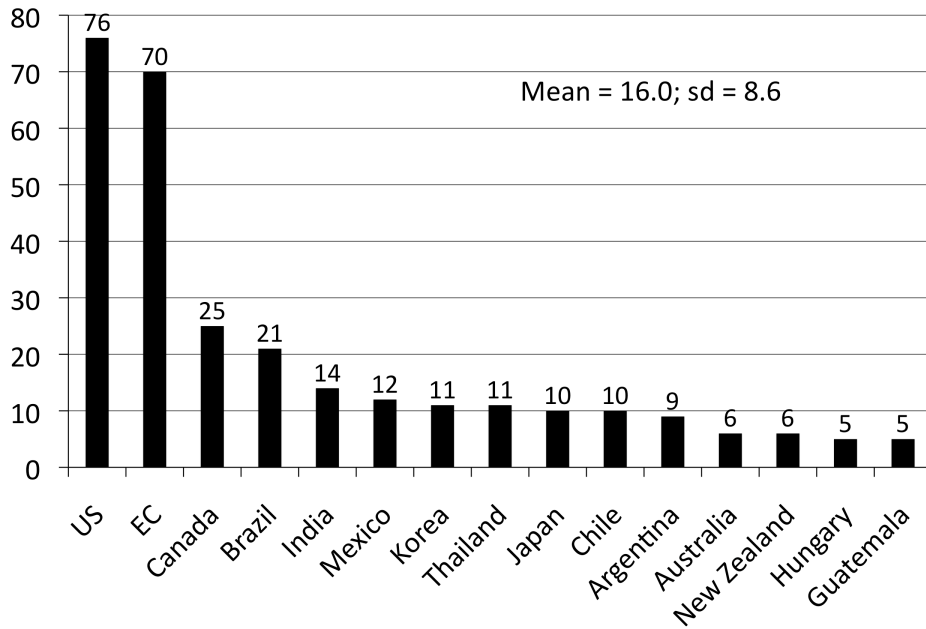
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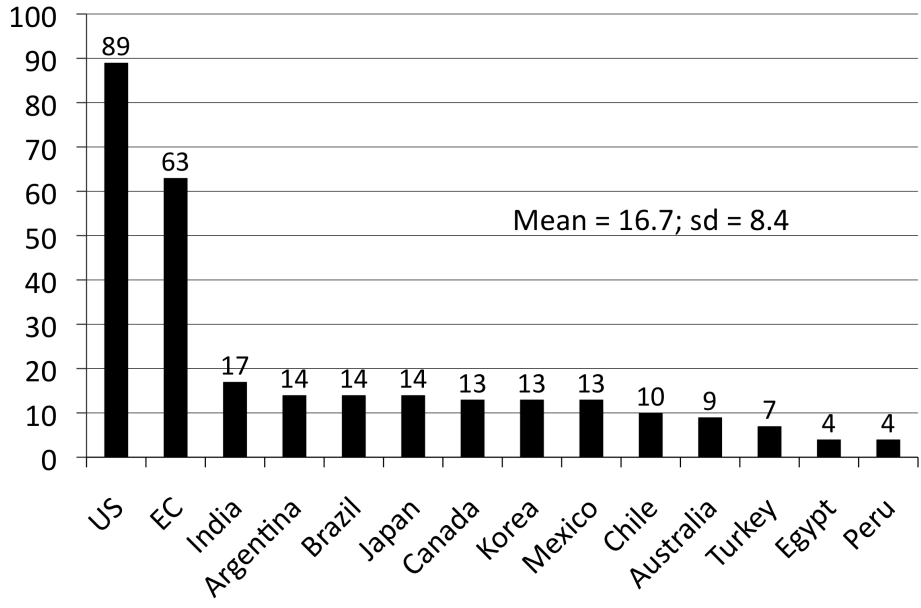
TABLES AND FIGURES

Figure 1: Fifteen Most Frequent Complainants as of October 2005



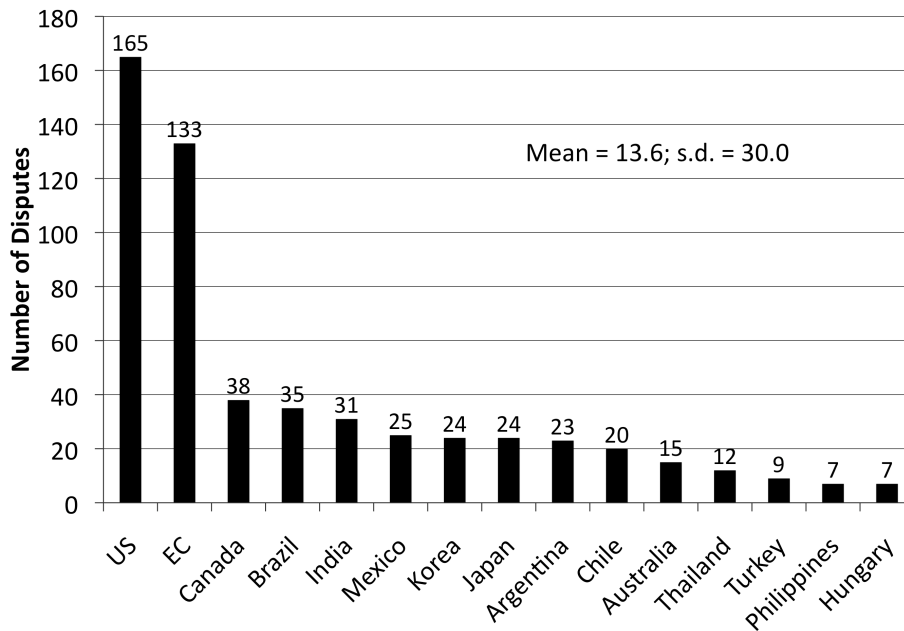
NOTE: These figures represent a single snapshot in time (October 2005) and do not account for fluctuation in relative levels of participation over time. Mean and standard deviation account for all complainants (n= 40).

Figure 2: Fifteen Most Frequent Respondents as of October 2005



Note: Vertical axis is number of disputes. Mean and standard deviation account for all respondents (n= 39).

Figure 3: Fifteen Most Frequent Participants as Complainant and Respondent as of October 2005



Note: Mean and standard deviation account for all 51 countries that had ever participated in a dispute. Because the figure sums a countries' participation as complainant and respondent, each dispute is counted twice.

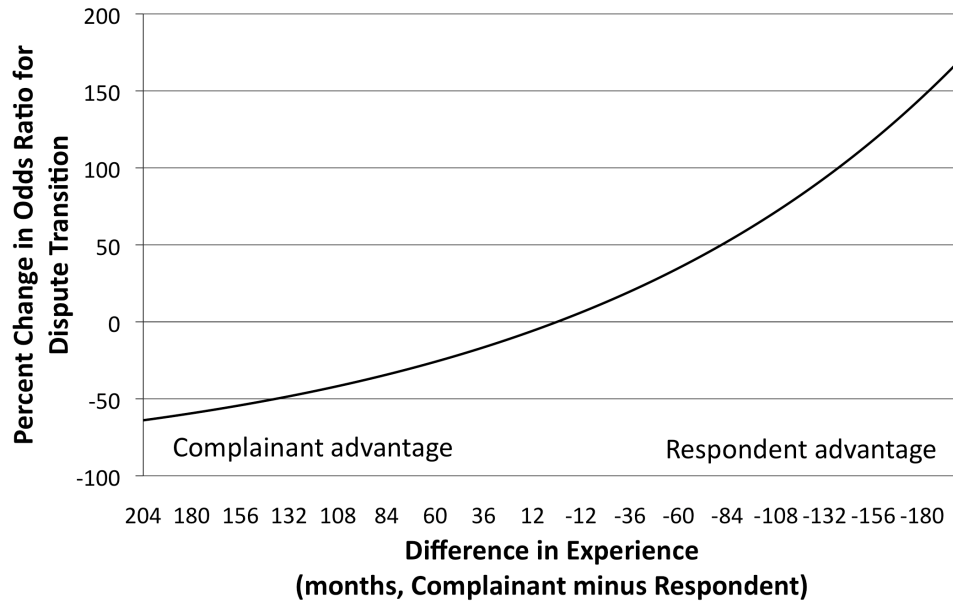
Table 1: Log Odds of Empanelment

Independent variables	I	II	III	IV
Market dependence diff.	-0.040*	-0.044*	-0.048**	-0.048**
	(0.019)	(0.019)	(0.016)	(0.016)
Trade reliance diff.	-0.607	-0.548		
	(0.741)	(0.742)		
U.S. & E.C.	-0.028	-0.131		
	(0.341)	(0.334)		
Core & Core	1.455**	1.613**	1.262**	1.269**
	(0.472)	(0.460)	(0.323)	(0.357)
Core & Semiperiphery	0.824+	0.969*	0.793*	0.798*
	(0.467)	(0.450)	(0.350)	(0.372)
Core & Periphery	0.766+	0.950*	0.738+	0.741+
	(0.439)	(0.430)	(0.376)	(0.386)
Experiential diff.	-0.005**	0.012	-0.005**	
	(0.002)	(0.012)	(0.001)	
Complainant experience				-0.006**
				(0.002)
Respondent experience				0.005**
				(0.002)
No. treaty invocations	0.029*	0.030*	0.025*	0.025+
	(0.012)	(0.012)	(0.012)	(0.013)
No. co-complainants	0.038*	0.039*	0.036*	0.036*
	(0.017)	(0.017)	(0.017)	(0.017)
Comp. advantage - personnel	-0.704	-0.846		
	(0.515)	(0.517)		
Resp. advantage - personnel	-0.820	-0.872+		
	(0.507)	(0.496)		
Comp. advantage - Mission to WTO	-0.459+	-0.507*		
	(0.243)	(0.246)		
Resp. advantage - Mission to WTO	-0.182	-0.164		
	(0.243)	(0.244)		
Experiential diff. by U.S./EC		-0.017		
		(0.011)		
Months from dispute initiation	-0.092**	-0.092**	-0.093**	-0.093**
	(0.009)	(0.009)	(0.008)	(0.009)
Constant	-3.273**	-3.239**	-4.065**	-4.066**
	(0.558)	(0.536)	(0.345)	(0.346)

Log Likelihood	-618.89	-617.95	-621.65	-621.65
df	14	15	8	9
N	10877	10877	10877	10877

Robust standard errors in parentheses. ** p<0.01, * p<0.05, + p<0.1

Figure 4: Effect of Difference in Experience on Odds of Transition



Note: percent change in odds ratio were calculated using the formula $e^{\beta \times \Delta}$.

NOTES

¹ Dispute Settlement Understanding Art. 4.7.

² For legal reasons, prior to November 2009 the European Union was referred to as the European Communities for official WTO business.

³ Interview with U.S. official, Washington, D.C., March 4, 2005. Qualitative data is described below.

⁴ A principle recently made explicit in *United States – Final Anti-Dumping Measures on Stainless Steel From Mexico* (DS344).

⁵ In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body determined that “Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute” (DS8/AB/R).

⁶ Third parties may join consultations under Dispute Settlement Understanding (DSU) Article 4.11 so long as they can demonstrate a substantial trade interest. The standard is broadened under DSU Article 10.2, which allows third party participation in panel processes for either trade or systemic interests.

⁷ This is an expanded version of a dataset compiled by Horn and Mavroidis (2006b), which included 311 disputes initiated prior to April 24, 2004. Additional disputes were coded by the author based on official WTO documents available at

the WTO website to make the data set current as of October 2005. Several other types of data for the period of 1994 to 2005 were utilized. Annual GDP data were obtained from the World Bank's *World Development Indicators* (WDI); import/export data were obtained from the International Monetary Fund's *Direction of Trade Statistics* (DOTS). Trade data for Taiwan (Chinese Taipei) was obtained from the Taiwan Bureau of Foreign Trade, <<http://cus93.trade.gov.tw/english/FSCE/FSC0011E.ASP>> and the U.S. Census Bureau, Foreign Trade Division. Per capita GDP data for Taiwan was obtained from <www.globalfinancialdata.com>.

⁸ While there is much continuity between the two regimes (such as the central place of GATT 1947 in the WTO agreements), one of the most important differences is in the procedures for disputing. Procedurally, the DSU specifies that panels are formed automatically (negative consensus) at the request of the complainant and provides guidelines that such requests ought to occur within 60 days of initiating a dispute. Both the rule of negative consensus and guidelines for the duration of the phases of disputing are new to the WTO. Substantially, the WTO incorporated new agreements on new subjects, such as intellectual property rights and investment. These new areas introduced new demands for expertise and legal capacity in disputing. The WTO agreements also contain provisions for applying sanctions and prohibit unilateral retaliation. The possibility of asserting

leverage over a responding country is both new to the WTO and an important feature of the decision to initiate a dispute and then to transition a dispute through the process. For these reasons, experience with GATT disputing is ignored and this analysis is restricted to WTO disputes. This is not to argue that experience with GATT disputing is completely irrelevant. Indeed, Davis and Bermeo (2009) have demonstrated that prior experience with disputing, including with GATT disputing, is predictive of subsequent dispute initiations, including in the WTO. But, if the mechanisms of repeat participation are relevant and significantly important enough to affect the processes of disputing they ought to appear in the more limited domain of WTO disputes. Restricting the dataset to the WTO provides a more exacting test of the effects of experience while maintaining tighter control and consistency over the relevant experiences and expertise influencing decisions to transition to a panel review, as all such escalations would occur under exactly the same legal regime.

⁹ Techniques of event history analysis have been applied to trade grievances in only two known instances. Economists Grinols and Perrelli (2002) analyzed the initiation and duration of Section 301 investigations under changing international political conditions and found that the inauguration of the WTO did not affect the volume or duration of international trade disputes. The same authors (Grinols and Perrelli 2006) applied a set of event history techniques, including a series of

parametric and semi-parametric models to find that WTO cases occur with greater frequency than GATT or Section 301 disputes and that the WTO raised the probability of new cases per month nearly fivefold. Their analysis demonstrates the utility of event history techniques for analyzing international trade disputes. However, it focused exclusively on disputes involving the United States, and on the impact of different regimes for initiating and terminating international trade disputes, and does not go very far in evaluating other covariates of these processes.

¹⁰ For instance, prior analyses of dispute escalation have been forced to truncate their dispute case data sets because many cases had not yet concluded (Busch and Reinhardt 2003; Guzman and Simmons 2002). This is a modeling problem that use of event history techniques avoids and is especially important given the relatively short existence of the WTO legal system and relatively few disputes to examine.

¹¹ A Cox proportional hazards model with the “discrete” option was also tested, with similar results. However, the discrete time model with logistic regression is preferred for its efficiency with tied data and the greater familiarity of the technique.

¹² Disputes with multiple complainants were coded the same as the most experienced participant in the group at the given month. There is no reason to

think that participating as one of multiple disputants would diminish the value or impact of the experiential knowledge of any of the participants. More likely, inexperienced participants would benefit from more experienced participants.

¹³ *United States — Standards for Reformulated and Conventional Gasoline* brought by Venezuela (DS2).

¹⁴ *Korea — Measures Concerning the Testing and Inspection of Agricultural Products* brought by the United States (DS3).

¹⁵ *United States — Standards for Reformulated and Conventional Gasoline* brought by Brazil (DS4)

¹⁶ *Korea — Measures Concerning the Shelf-Life of Products* brought by the United States (DS5)

¹⁷ *United States — Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974* brought by Japan (DS6)

¹⁸ *European Communities — Trade Description of Scallops* brought by Canada (DS7)

¹⁹ This is derived from data provided by Michalopoulos (1998) for the years 1987 and 1997. Time-varying data for the three years between January 1995 and December 1997 were interpolated for each month based on this data. For the remainder of the period, the variable is constant based on the 1997 values. For

multicomplainant disputes, the highest value among the group of complainants was used to represent the whole set of complainants.

²⁰ The indicator is non-time varying and is based on the 2005 and 2007 registry of permanent missions to the WTO (Federal Department of Foreign Affairs 2007).

It is a three level ordinal variable treated as categorical when entered into the logistic regression and where equal capacity is the reference category. For multicomplainant disputes, if one complainant had a permanent WTO mission, the group of complainants was coded as having the same.

²¹ The variable is logged and time varying. After construction of the variables based on yearly data, the indicator was interpolated for months for use in the discrete time data set. For multicomplainant disputes, the value assigned to the complainant was the sum of each of their exports divided by the sum of their GDP.

²² Market power difference = $[\log(\text{imports}_{\text{from_respondent}}/\text{GDP}_{\text{complainant}})] - [\log(\text{exports}_{\text{to complainant}}/\text{GDP}_{\text{respondent}})]$

²³ Where absent in the Horn and Mavroidis data, codings for “legal regimes and patents” or “other” were applied based on their data column “ConRegMat,” which provided a statement as to the matter in dispute. There are many disputes that are both about a good and a legal regime. For this coding, the good was privileged in the classification. If there were no specific goods mentioned in a dispute, then it

would be coded in reference to its other substantive content. The “other” category was used as the reference category in the models.

²⁴ For disputes with multiple complainants, the group of complainants was assigned the world system position of the most powerful country.

²⁵ As a robustness check, this variable was also examined in quadratic form, since the probability of escalation in the first months after initiation is likely low, but then would likely increase thereafter until eventually declining again. Using the quadratic form did not lead to differences in interpretation.

²⁶ The legal capacity variables perform better in a model (not shown) where the experience variable is omitted. However, likelihood ratio tests between that model and model III indicate that model III (which includes the experience variable) is better fit. Together, this suggests that the experience variable is a better predictor of legal capacity than these legal capacity variables. Busch, Reinhardt, and Shaffer (2009) developed a survey-based indicator of legal capacity that shows significant promise. Nonetheless, the relative weakness of the legal capacity variables used here in models with the measure for experience is consistent with the understanding that legal capacity is the bureaucratic apparatus for mobilizing individuals with expertise.

²⁷ Factor changes are computed using the formula $e^{\beta \times \Delta}$. In this case it equals $(1 - e^{-0.005 \times 1}) \times 100$, or .5%.

²⁸ Interview with EC official, Brussels, April 20, 2006.

²⁹ Interviews with EC official, Brussels, April 20, 2006, with former Ambassador to the WTO, Geneva, May 11, 2005, and with private attorney, Geneva, April 9, 2006.

³⁰ Interview with E.C. Official, Brussels, April 20, 2006.

³¹ Interview with Canadian attorney, Geneva, April 3, 2006.

³² Interview with E.C. Official, Brussels, April 20, 2006.

³³ Interviews with former Ambassador to the WTO, Geneva, May 11, 2005 and Brazilian official, Geneva, May 20, 2005.

³⁴ Interview with Indian official, Geneva, May 19, 2005.

³⁵ Interviews with WTO official, Geneva may 24, 2004, Indian official, Geneva, May 19, 2005, and EC official, Brussels, April 20, 2006.

³⁶ Interviews with U.S. trade delegation official, Washington D.C., March 4, 2005 and with U.S. Official, Washington, D.C. March 3, 2005.

³⁷ Interviews with former Ambassador to the WTO, Geneva, Geneva, May 11, 2005 and with EC official, Brussels, April 20, 2006.

³⁸ Interview with Argentinean official, Geneva, April 19, 2006.

³⁹ Interviews with Indian official, Geneva, May 19, 2005 and Mexican official, Geneva, May 12, 2005.

⁴⁰ Access to private lawyers can serve to enhance the abilities of infrequent participants. But they are expensive and are generally understood by informants to be a second-best solution compared to developing in-house experts (Conti 2010). As such, when experienced participants opt to litigate they place large burdens on inexperienced complainants, who are less familiar with the disputing process and must find ways of acquiring expertise. The Advisory Centre on WTO Law (ACWL) was created to assist countries lacking effective legal capacity and domestic commercial support for private representation. The ACWL provides sliding scale legal advice and representation and works to enhance the legal capacity of developing countries (Davis and Bermeo 2009). While well regarded, both in terms of the quality of their legal acumen and how they enhance the credibility of the WTO system by increasing access to WTO law and fostering developing country legal capacity, the ACWL devotes the bulk of its legal work to issues un-related to disputing (ACWL 2008). And even at reduced rates, many countries cannot afford the services of the ACWL (Interview with private attorney, Washington, D.C., February 28, 2005).

⁴¹ Interviews with Argentinean official, Geneva, April 19, 2006 and Brazilian official, Geneva, May 20, 2005.

⁴² Interview with U.S. official, Washington D.C., March 4, 2005 and with former U.S. negotiator, March 10, 2005).

⁴³ Interview with Brazilian official, Geneva, May 20, 2005.

⁴⁴ Much thanks to Laura Beth Nielson for her insight on this point.