7 Dispute settlement

> Undoubtedly, a nation that excludes you from all commercial intercourse with her, does you an injury; robs you, as far as in her lies, of the benefits of external commerce; if, therefore, by the dread of retaliation, you can induce her to abandon her exclusive measures, there is no question about the expediency of such retaliation, as a matter of mere policy. But it must not be forgotten that retaliation hurts yourself as well as your rival; that it operates, not defensively against her selfish measures, but offensively against yourself, in the first instance, for the purpose of indirectly attacking her. The only point in question is this, what degree of vengeance you are animated by, and how much will you consent to throw away upon its gratification.
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> Jean-Baptiste Say
> *A Treatise on Political Economy* (1803)

Introduction

Jean-Baptiste Say shared Adam Smith's view that countries were justified in retaliating against trading partners that excluded them from their markets, hoping that taking this step – or threatening to do so – would induce the partner to lift the restrictions. But while Smith was willing to leave it up "to the skill of that insidious and crafty animal, vulgarly called a statesman or politician" to determine whether retaliation is warranted in any given case,[1] Say was less enthusiastic about employing this option. He stressed both the costs that a country imposes upon itself when it retaliates and the disincentive that it might create to lifting those sanctions. In this respect, the dispute settlement system of the WTO might be said to reflect Say's thinking more than Smith's, for while it does ultimately rest on the prospect for retaliation, it is designed to make retaliation a last resort that members will employ only after exhausting all other options.

Dispute settlement is a more prominent feature of the WTO than it was in the GATT period. Whereas there were 101 dispute settlement cases that went through the entire process in just under a half-century of GATT's existence, or just over two per year, the docket of the WTO Dispute Settlement Body (DSB) swelled to an average of 25 complaints per year in its first 18 years. That huge increase may be attributed in part to the widening scope of subject matter that is covered by the WTO agreements (as discussed in Chapter 2), and in even greater part to the growing membership of the organization (as discussed below). Perhaps the largest cause of the increase,

however, has been the changed rules of the game. The GATT system had favoured defendants, and probably inhibited potential complainants from bringing cases in the first place. It had operated on the basis of consensus, thus giving all parties (including the respondent) the opportunity to block action at almost any stage. The WTO system provides no such opportunities. Based as it is on "reverse consensus", which in practice means that cases are suspended only if the complainant agrees (e.g. when parties reach some settlement out of court), the WTO system is far more attractive to petitioners than was its GATT predecessor. The change was not just quantitative but qualitative, with the system gradually shifting from an adjunct arm of diplomacy to a more judicialized process. This twin evolution was already under way, but still incomplete, when the GATT gave way to the WTO. The reformed WTO system generally provides for more adjudication, but nevertheless retains a preference for consultation and mediation over legal confrontation.

This chapter begins with a discussion of the differences between negotiations and dispute settlement as options for handling the frictions between members, with an emphasis on how WTO members approach this choice from different political cultures and legal traditions, followed by a brief recap of the changes made in the operation of the system by and after the Uruguay Round. The analysis then reviews the experience thus far under the Dispute Settlement Understanding (DSU). That is done primarily by presenting the descriptive statistics of cases, examining the rise and fall in the level of complaints, the subject matter covered by them, and which countries are most prominent among the petitioners and respondents. Readers will note that this review focuses on the quantifiable aspects of the DSU experience; space does not permit a review of the more nuanced issues of WTO jurisprudence and the implications of the interpretations that panels and the Appellate Body have given to the WTO agreements. The chapter then concludes with an examination of just who those panellists and Appellate Body members have been, observing patterns in their nationalities as well as their background.

Litigation, conciliation and negotiation

The dispute settlement procedures in the multilateral trading system have gradually evolved from an approach based upon mediation of disputes that were primarily between the members of a small circle of developed, like-minded countries towards a more rules-based process in which a larger circle of countries – but still much less than the full membership – takes an active part. There is no doubt that some members remain far more active than others in the system, such that a relatively small number are responsible for the great majority of the cases, and that about half of the membership is never involved in any more serious way than as third parties. Several different explanations may be offered for members' varying levels of participation, ranging from the size of their economies (larger members are more likely to have a wider range of sectors and issues at stake) to their differing capacities (members with large and well-staffed missions are better able to pursue disputes). In addition to those and other practical considerations, it is also important to take into account the differences between members' political cultures and legal traditions. Simply stated, policy-makers in some countries are more litigious than are their counterparts in other parts of the world.

Viewed at a high level of abstraction, there are two major distinctions that one might draw between the political cultures and legal traditions of WTO members. One is the distinction between what might be called litigious versus conciliatory cultures, with the first being marked by a widespread belief that disputes are normal and that the courtroom is the best place to resolve them, and the latter being driven by the concern that confrontation is destructive, leads to hard feelings between winners and losers, and ought to be avoided whenever possible. The other major distinction to be drawn is between those legal traditions that are based on the English common law, which emphasizes the importance of precedent, versus the code law or civil law traditions (sometimes coupled with other legal sources) that emphasize the terms of the specific law in question. The first of these major divisions helps to explain the differing degrees to which individual members utilize the dispute settlement system, such that the more traditionally litigious countries in Europe and the Americas (North and South) generally account for the larger number of complaints brought before the DSB, while members from Africa, the Middle East and Asia bring complaints infrequently. It is possible that the second of these divisions influences the outcome of those cases, although this point involves more inference than proof. Members with a common law legal tradition have contributed a disproportionately large number of the jurists in what we might broadly call the DSB bar. This can be seen in the nationalities of the panellists as well as the people who have held key directorships in the WTO, and in the legal educations of Appellate Body members.

In this section, we review the first of these distinctions, emphasizing the differences between the more litigious and the more conciliatory approaches to trade policy-making. Later in this chapter, we will return to the differences between the common law and code law subsets within that more litigious tradition.

Political culture and litigation versus conciliation

The multilateral trading system has become more litigious over time, with the volume of cases in the WTO greatly exceeding those in GATT and with many observers noting than the judicial function of the WTO now overwhelms the legislative function. The shift from negotiation to litigation can be seen as either an advance or a decline, depending on one's expectations for the system, and those expectations may be influenced by the differing political cultures of the members. The traditional GATT perspective, which reflects the political and legal cultures of Europe and the Americas, sees legal disputes as natural and even healthy. "Frequent recourse to these WTO dispute settlement proceedings is a sign of well-functioning legal and judicial systems," according to Petersmann (2005b: 141), "rather than of socially harmful conflicts." Alternatively, those who believe that the system should be based on cooperation rather than confrontation tend to see disputes as undesirable signs that the system is not working. That view may be especially prevalent among members that either were not yet in the system during the GATT period or were not very active in it.

That latter perspective, in which conciliation is favoured over confrontation, is often associated with Asian countries. Director-General Supachai Panitchpakdi took a very dim view of disputes, believing that both the members that engaged in them and the system as a whole

would be better off if problems were handled through negotiation and mediation. "I tried to promote the possibility of having mediation" as head of the WTO, he observed, "but it was not very popular and people seemed to be critical of me trying to avoid going to dispute-settlement and they would think that I'm not making use of the DSU."[2] Noting instead that he wanted "to create an atmosphere of peace and collegiality," Mr Supachai also stressed that avoiding litigation "saves time, it saves costs, it saves a lot of confrontation." Members filed fewer complaints during Mr Supachai's time in office (27.3 complaints per year) than they had before his time (34.6 per year), but they also filed fewer in the time after his tenure (14.7 per year). The declining use of the system during his administration might therefore represent part of a long-term trend rather than the result of his efforts to promote alternative approaches.

It is ultimately the members rather than the director-general that determine the frequency with which complaints are filed, and here one also finds mixed evidence regarding a decreased propensity for disputes on the part of Asian members. Liyu and Gao (2010: 165) stressed the importance that Confucian thought places on the avoidance of litigation, which "causes irreparable harm to relationships and should be pursued only as a last resort." This and other historical factors have led Chinese judges to "prefer mediation to resolve disputes so as to avoid the disharmony of conflict in confrontational litigation." An anthropologist who studied China's use of the DSU also placed the issue in a cultural context, noting that before Beijing could become an active participant in the system, it first had to overcome a tradition in which the need to "save face" dissuaded entry into direct legal confrontation. Even if one were to dismiss the argument that culture poses a barrier to litigation, it is still necessary to take into account a very practical matter: with little domestic expertise in this field, and even less experience at the international level, it took years for China to develop the legal talent necessary to become a proficient and frequent participant in disputes. Cai (2011: 220) chronicled three stages in China's approach, such that from 2002 to 2003 "the idea that prevailed in the Chinese delegation was that disputes had to be settled amicably," but China became more active from 2003 to 2007, and since 2007 China has been a leading participant in litigation. In this new environment, China not only engages in disputes of its own, but takes part in those involving other countries:

> With regard to disputes between Western countries, it is not necessary for China to intervene. In cases between emerging and development countries and developed countries, China can get on the side of the first, while in cases between emerging and developing, the only choice is to remain silent (*Ibid.*: 220).[3]

Nor are the cultural and practical barriers to litigation a uniquely Asian matter. "Although China and Africa similarly face all of these barriers," according to Kidane (2012: 66), "the African states are at a much more serious disadvantage." And whereas China eventually overcame its reluctance to bring disputes to the WTO, just as other WTO members overcame their reluctance to reciprocate (and then some), African and Middle Eastern countries have yet to file a single complaint.

These differences can be seen in Table 7.1, which shows the frequency with which various sets of members have brought complaints to the DSB. The data distinguish in the first instance between developed and developing countries, then between developing countries according to region, and further break each of these groups down according to the legal traditions of the countries in a group. These include some countries with a common law legal tradition (principally composed of former colonies of Great Britain), those that have a code law tradition (principally descended from Roman, Spanish or French legal systems) and those that are pluralist (a mixture of traditions). The first conclusion that one can draw from the data is that these distinctions between common, code law and pluralism are not significant for explaining different members' level of litigiousness. In any given economic or geographic group, the number of complaints brought by members adhering to one of these traditions was within the same order of magnitude as those of the other members in the same group. The more significant distinctions are between the groups themselves, rather than subset of legal traditions within a group. The developed countries are the most litigious, and among developing countries the spectrum is defined at one end by the relatively legalistic Latin American countries (all of which are from a code law tradition) and at the other by the African and Middle Eastern countries. The Asian and Pacific developing countries fall in the middle of this spectrum, as do the Caribbean countries and the former Soviet and Yugoslavian states.

Table 7.1. Frequency of dispute settlement cases by complainants, 1995-2012

	Number of members	Number of complaints	Complaints per member
Developed	**10**	**271**	**27.1**
Common law	4	150	37.5
Code law	6	121	20.2
Latin America (code law)	**20**	**119**	**6.0**
Asia/Pacific	**26**	**88**	**3.4**
Common law	10	28	2.8
Pluralist	3	19	6.3
Code law	13	41	3.2
Ex-Soviet Union/Yugoslavia (code law)	**7**	**4**	**0.6**
Caribbean	**11**	**1**	**0.1**
Common law	9	1	0.1
Pluralist	2	0	0.0
Africa/Middle East	**57**	**0**	**0.0**
Common law	2	0	0.0
Pluralist	10	0	0.0
Code law	45	0	0.0

Source: Summarized from data in Appendix 7.1.

Notes: The European Union is counted here as one member and classified as a code law legal system.

Economic interests and capacity

The greater litigiousness of the developed countries may also reflect the twin facts that these countries have more trade to defend and have the legal expertise available to pursue cases. Similarly, the Chinese case suggests that economic growth may contribute to a country's perceived stakes in litigation, and its increasing familiarity with the system may likewise enhance its capacity to act upon these perceptions. An Asian political culture does not appear to have restrained Japan's interest in making the most of the dispute settlement system, and over time China has become more like Japan in several ways: in its growing share of global exports, in the size and sophistication of its trade policy-making community and in its willingness to file complaints against other members. That is not a universal rule, however, insofar as even large economies such as South Africa or the Kingdom of Saudi Arabia have never brought complaints to the DSB.

Part of the difference may be explained by resources and capacity, as there are numerous practical barriers to developing countries' participation in the dispute settlement system. Among the difficulties commonly cited are the complexity and cost of the system, a concern that developing countries (especially those outside Latin America) are not adequately represented on panels and the aim of the system is not development but legal compliance.[4] Another contributing factor to their reluctance is another matter of capacity: countries with dedicated WTO missions are more likely to bring cases. Twenty-six of the 36 members that brought complaints to the DSU from 1995 to 2012 had dedicated missions in 2012, while only one non-resident member had ever done so. Only about one quarter of all members have dedicated missions, but these members were responsible for about three quarters of all complaints. The line of causation also moves in the other direction, with the rising level of litigation being a contributing factor in the expanding size of missions.[5]

These problems are partly overcome by the assistance that developing countries may receive from the Advisory Centre on WTO Law (see Box 7.1), and also by the practice of bringing in outside counsel that might be paid for by the private sector. No amount of technical assistance, however, can change the fact that countries that account for small amounts of trade have less leverage in the event that a case comes down to retaliation. In the US gambling case, for example, the retaliation that Antigua and Barbuda was authorized to impose on the United States had little impact on Washington, but the retaliatory power given to Brazil in the cotton case (discussed below) was much more persuasive. The Cotton-Four African countries did not have the same potential "clout" as Brazil, which is one reason why they chose to negotiate when Brazil opted to litigate.

The choice between litigation and negotiation

Even those members that come from more litigious cultures, or that have grown to the point where they overcome cultural barriers to litigation, still face the same choice when deciding how to deal with specific irritants: do we sue or negotiate? Several different factors go into answering that question.

Box 7.1. The Advisory Centre on WTO Law

The Advisory Centre on WTO Law (ACWL) provides legal assistance to developing countries in dispute settlement cases. This institution was agreed to at the Seattle Ministerial Conference in 1999[6] and created in 2001 as an organization independent of the WTO. Its mission is to provide least-developed countries (LDCs) and other developing countries with the legal capacity they need to enforce their rights under the DSU. Beyond their membership dues, which are assessed on countries according to a sliding scale from the least developed (US$ 50,000) to the industrialized countries (US$ 1 million), advisory services are available to developing countries at rates that vary according to their levels of income. Among the services available are legal advice on WTO law (free to members and LDCs), support in WTO dispute settlement proceedings (ranging from US$ 25/hour for LDCs to US$ 350/hour for higher-income developing countries that are not members), seminars and internships. As of 2012, it had 12 counsel on staff, as well as arrangements for external counsel with 20 law firms and two individuals. Thirty developing-country members were entitled to ACWL services, as were 31 LDCs.

This institution is devoted much more to helping the beneficiaries play offense than to aiding in their defence. The ACWL's role in most of the first 41 cases in which it took part was to assist the complainant country; it helped the respondent just three times (calculated from ACWL 2012: 36-37). Having assisted the complainants 29 times it was more active on this front than all but three members (Canada, the European Union and the United States).

The ACWL has generally received favourable reviews. Some agree with Mshomba's (2009: 91) assessment that it "is a shining example of how technical assistance can and should be delivered". Bown (2009: 174) reaches a mixed verdict, concluding on the one hand that the ACWL "is improving enforcement in instances in which the market access at stake for exporters in poor countries is too small to make market-provided legal counsel a practical option," but observing on the other hand that "its effectiveness is also constrained by the services that it cannot offer." Those services include the gathering of information, organizing politically and inducing reform.

The sequence in the United States has been just the reverse of that in China, with policy-makers having become somewhat more restrained over time. The main difference between dispute settlement in the GATT and WTO periods, from the US perspective, comes in the switch from unilateral threats to multilateral litigation. As was discussed in Chapter 2, the US "reciprocity" laws were among the principal irritants in the late GATT period. These laws gave the Office of the US Trade Representative (USTR) the authority to investigate and retaliate against foreign acts, policies, and practices that it found to violate US rights, without first obtaining permission from GATT to impose retaliatory measures. The USTR often used this authority to promote US positions on what in the 1980s were called the "new issues" of services, investment and intellectual property rights. The United States thus chose litigation over negotiation, and litigation in which it played every part except the respondent; the USTR was the complainant, the judge and the enforcer. That at least was the tactical choice in specific cases, but in the larger picture this was part of an unstated but highly successful strategy of using this aggressive, unilateral form of litigation as a means of prodding negotiations. The grand strategy produced an equally grand bargain in the Uruguay Round:

the United States would forswear the reciprocity policy, and would henceforth bring its complaints to the DSB, but did so only because its partners agreed to approve substantive and enforceable agreements on the new issues. That deal was reiterated in the outcome of a challenge that the European Union brought in 1998 against the main US reciprocity law. The panel report in *United States – Sections 301-310 of the Trade Act 1974* agreed with the European Union that it is not for individual WTO members to determine whether another member's measures violate their WTO obligations. The panel nonetheless concluded that having the law on the books is "not inconsistent" with US obligations, even though the statutory language in itself constituted a serious threat of unilateral determinations, because the United States had pledged that it would render determinations in conformity with its WTO obligations. The panel further stipulated that, should the United States repudiate or remove in any way its undertakings, the finding of conformity would no longer be warranted.

While unilateral enforcement is now banned, when one member has a problem with another it still must choose whether to handle the problem through the legislative or the judicial functions of the WTO. Litigation and negotiation need not be seen as mutually exclusive choices, but can instead be employed sequentially in pursuit of the same goal. Viewed from a high enough altitude, these options may be mutually enforcing. John Weekes (2004: 1) observed that a "good agreement can persuade governments to accept a dispute settlement system capable of rendering impartial, definitive judgments in an expeditious manner" just as a "good dispute settlement system reinforces the obligations in the agreement and can contribute significantly to any renegotiation of that agreement." That positive outcome may be undermined, however, if the judicial function of the institution is seen to be out of kilter with its legislative powers. By one view, the judicialization of the WTO may make members less willing to produce agreements via the old practice of constructive ambiguity, by which negotiators were willing (although not eager) to settle on compromises that allowed each side to claim some victory but might leave the precise meaning in doubt. That has now changed. "No longer are people prepared to construct compromises with perhaps some ambiguity in them because they know that down the line a panel's going to make a decision which will be binding," Stuart Harbinson opined, "and they don't want their necks on the line."[7] Or to put it another way, there was a time when negotiators were willing to leave their own job half-done, with a view to taking up the issues again on their next go-around, but when they know that the litigators have the authority to pick up where they left off the negotiators may be more inclined to favour the safety of deadlock over the risks of an untidy resolution.

As one pair of experienced practitioners pose the choice, "multilateral trade negotiations seek to change the existing rules in order to build a global system based upon new principles (changes for the future)," whereas legal procedures "seek the application of the rules already in force but not respected by some members of the World Trade Organization" (Imboden and Nivet-Claeys, 2008: 127). Sometimes, the first step is to develop law through negotiation, and the next step is to perfect that law through selective litigation; at other times, the need for new negotiations may be highlighted by the imperfect results of litigation. In that same vein, Petersmann (2005b: 139) saw evidence of strategic linkage between litigation and negotiation when he observed that:

> The timing and legal targets of WTO dispute settlement proceedings suggest that WTO complaints, panel, and appellate proceedings are also used for clarifying existing WTO obligations, identifying the need for additional WTO rules, improving the bargaining position of countries, or putting pressure on other WTO Members to engage in negotiations on additional rules and commitments.

The choice between these options may not be decided by some universally applicable principle, but instead come down to a tactical calculation regarding which one is most likely to obtain the desired objective for the potential litigants or negotiators within a specific context. In the case of US subsidies that prejudiced the interests of cotton producers in Latin America and Africa, for example, Brazil chose to litigate by alleging that these subsidies violate US commitments under the existing Agreement on Agriculture and the Cotton-Four LDCs in Africa chose instead to negotiate in the Doha Round. The LDC choice not to participate as co-complainants was based on several factors. Brazil had already begun litigation and the LDCs had nothing new to add to those proceedings. In the event that the case resulted in retaliation, the Cotton-Four had less leverage over the United States than a major country such as Brazil and a multilateral round was already underway and thus offered an opportunity for leverage. These options were not mutually exclusive. In choosing to negotiate, the LDCs retained the option of pursuing litigation if the negotiations proved unproductive.

Operation of the Dispute Settlement Understanding

The DSU is a part of the grand bargain reached in the Uruguay Round. In that bargain, GATT would be replaced by the WTO, the jurisdiction of this new organization would extend beyond trade in goods to cover the new topics promoted by the United States, members would forswear the unilateral enforcement of their rights, and the dispute settlement system would be reformed to make it more efficient, less susceptible to blocking, and (by way of the Appellate Body) more consistent in its rulings. The new system did not represent a complete break from the past, however, as the fundamental legal principles were unchanged.

The fundamentals of dispute settlement

The dispute settlement process typically begins when one or more WTO members formally challenge another member's measures that are alleged to violate that member's commitments. These claims of violation are often based on the contention that the measure in question contravenes, for example, either or both of the central principles of non-discrimination (see Table 7.4). Put in their most simple terms, most-favoured-nation (MFN) treatment (GATT Article I) prevents a country from discriminating between one trading partner and another at the border, while national treatment (GATT Article III) prevents a country from discriminating between its own products and those from another country behind the border. The MFN principle means, for example, that Australia must apply the same tariffs to imports of Norwegian salmon that it applies to imports of similar Chilean

salmon.[8] The national treatment principle means that Brazil cannot apply sales taxes or other barriers to French products that are more restrictive than those applied to goods of Brazilian firms.[9] Complaints will typically further allege that a member's measures violate WTO rules on some other subject covered by GATT 1994 or the many WTO agreements. It is common for a complainant to pursue several claims and cite numerous provisions from several different agreements when specifying how a partner's laws or policies are alleged to violate their commitments. It is also possible to base a claim on a non-violation complaint, in which a member argues that it has been deprived of an expected benefit because of another government's action even if such action is not *per se* WTO-inconsistent.

In addition to contesting the facts of the case, or the complainant's interpretation of the agreement(s) in question, a respondent will often argue that the measures in question are permitted under one or more of the general exceptions. These are provided in GATT Article XX or, in the case of services, in its GATS counterpart (Article XIV). The issues that fall within the scope of these exceptions include, among others, the following topics:[10]

- protection of public morals
- protection of human, animal or plant life or health
- products of prison labour
- protection of national treasures of artistic, historic or archaeological value
- conservation of exhaustible natural resources
- intergovernmental commodity agreements
- restrictions on exports of domestic materials
- products in general or local short supply.

Measures that are otherwise illegal under WTO rules can be justified under these exceptions, but they do not give an automatic "free pass" for countries to employ whatever restrictions they deem to be politically necessary and that they claim are related to one or more of these principles. The exceptions are instead limited by the language in the *chapeau* to Article XX, which specifies that the exceptions are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Several of the incisions are further limited by a "necessity test" specifying that the measure must be necessary to achieve the stated objective and that no WTO-consistent or less trade-restrictive alternative is technically and financially available. The contention that a measure is justified by one or more of these exceptions is instead a rebuttable proposition that can be challenged by another WTO member and decided by a dispute settlement panel, based upon the arguments presented by both sides and the panel's reading of the WTO's laws and traditions.

Judgments that go against the respondent do not lead automatically to the invalidation of its laws. Rulings of a WTO panel are not comparable to (for example) decisions by a domestic court that has the power to strike down laws that it determines to be

unconstitutional. Dispute settlement provisions rely in the first instance on the willingness of the parties to abide by rulings. In the event that a panel finds a country's laws in violation of its GATT obligations, all panel and Appellate Body reports end with the same obligatory recommendation: it should bring the challenged measure into conformity with its WTO obligations. It is then up to the member in question to decide what course it will take. The preferred option is to bring its laws into conformity with the ruling, which might entail the law's repeal, amendment or replacement with some altogether new law. Only in extreme cases does the system contemplate that the injured party will request, receive and exercise the right to retaliate. In just one case prior to the Uruguay Round did the GATT contracting parties authorize one country to retaliate against another (i.e. a Dutch complaint against the United States in the 1950s), and the retaliatory measures were never employed. This hierarchy of preferred results is unchanged even under the reformed dispute settlement rules of the WTO. Despite the fact that there has been an explosion of cases in the WTO period, the total number of instances in which a petitioner was ultimately given leave to retaliate totalled just 17 through the end of 2012, or about one in 25 of all complaints filed through 2011. Not all members that receive this authorization choose to employ it. Some see a third option by which the country might compensate the injured parties (e.g. by reducing tariffs on some product that they export), but other jurists strongly reject the notion that this is a legitimate response when one has lost a case.

The Uruguay Round reforms

The judicialization of the dispute settlement system is partly a product of the Uruguay Round, and the changes did not stop with the conclusion of the round and the inauguration of the new organization. The evolving jurisprudence of the panels and especially the Appellate Body have reinforced those trends, making for a system in which dispute settlement is treated more like independent adjudication than like the conduct of diplomacy in another guise. The negotiations over the DSU were nevertheless a key part of this process, and led to major changes in the way that the system operates. There was a widespread consensus at the start of the Uruguay Round that change was needed. No one took the position then that the dispute settlement system functioned well; the only differences were in the best way to address the well-recognized shortcomings of the system.

The main shortcoming of the GATT dispute settlement system was the opportunity it gave to countries to block cases. The problem with applying the rule of consensus to GATT disputes was rather obvious. Imagine how a similar rule would operate in a criminal proceeding if everyone present in the courtroom – including the accused and his lawyer – had the authority to halt the case at any stage. That respondents in GATT disputes came to abuse this privilege is less surprising than the decades that passed before they did so almost routinely. That systemic failing was already discussed in Chapter 2, as were the rising demands on the part of other contracting parties for disciplines on the US penchant to define and enforce its trade rights unilaterally. Those developments, coupled with the expanding scope of issues under negotiation in the Uruguay Round, made reform of the dispute settlement system one of the

principal objectives of that round. The negotiations produced a much stronger system that corrected many of the deficiencies of the GATT rules. In the DSU, a single country cannot delay or block action, no longer having the power to prevent the appointment of a panel, the adoption of a panel report or the granting of permission to retaliate. The process is also supposed to be swifter. Under the WTO procedures it should ordinarily take 12 and a half months from the time that a country brings a complaint until the adoption of a panel report, or 15 and a half months if there is an appeal to the new Appellate Body, followed by a reasonable period of implementation. In actual practice, cases tend to run somewhat longer than the DSU contemplated.

Like other aspects of the transition from GATT to the WTO, the Uruguay Round reforms came in stages. One stage was completed with the 1988 Montreal Ministerial Conference, when the GATT contracting parties adopted on a provisional basis a series of reforms that had been developed within the De la Paix group (see Chapter 3). The most important reform adopted then was reverse consensus for the establishment of panels. The contracting parties were not yet ready to agree to the application of the same principle to the adoption of panel reports. Among the other reforms were specific time-lines for stages of the dispute process, with a total time limit of 15 months; shorter time limits for cases involving perishable products; longer time limits for some aspects of cases involving developing countries; arbitration as an alternative to panels; an expanded list of non-governmental experts for use on panels; legal advice for developing countries and the implementation of panel findings was to be reviewed within six months (Weston and Delich, 2000). This was an "early harvest" of the low-hanging fruit, and left the more difficult issues to be taken up in the second half of the Uruguay Round. The most important of these concerned the ability of respondents to block the adoption of panel reports; the reformers wanted an end to the abuse of consensus, moving instead to automatic adoption. "That's when the discussions began post-Montreal about the Appellate Body," one Canadian negotiator recalled.[11] The key remaining issue was automatic adoption of panel reports, and "to get the big guys, particularly the Americans and the Europeans, to sign onto this. That's how people came up with the Appellate Body. It was to ensure adoption of panel reports."

The Appellate Body

The Appellate Body represents one of the main differences between dispute settlement in the WTO versus GATT. It is composed of seven people serving four-year terms (each of which may be renewed once), all of whom have reputations for probity and integrity and are among the most experienced and trusted members of the trade community. When panel decisions are appealed, there are three Appellate Body members assigned by a random process, who then have a clear timeline of 90 days in which to render a decision. "That also forces us to be on the ball even before an appeal is filed," according to Appellate Body Member Ujal Bhatia (see Biographical Appendix, p. 574), such that "when a report is available all of us, all the seven members, are expected to read all panel reports."[12] They consult with the Appellate Body membership as a whole before they issue the ruling so as to avoid contradictions and to ensure consistency and collegiality. While the Appellate Body technically does not operate

under a rule of *stare decisis*, in actual practice its decisions have formed a consistent body of case law. "We are under a system of trade agreements," to paraphrase something that US Supreme Court Justice Charles Evans Hughes said of the Constitution in 1907,[13] "but trade law is what the AB members say it is."

Cases are assigned through randomization and rotation. Article 6 of the Working Procedures for Appellate Review provides for selection "on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin." Said El Naggar (see Biographical Appendix, p. 587), who was one of the original Appellate Body members, worked out a method by which this random selection would be accomplished. Appellate Body members draw numbered chips out of a bag and record the number that is then used to identify them, and by which they are assigned to cases according to a mathematical scheme. This method ensures that no one knows in advance which cases they will be assigned or which of their six colleagues will be named to the same appellate panel. Once an assignment is made the only permissible reason for an Appellate Body member not to accept is for reason of a conflict of interest; being a citizen of one of the parties to the dispute is no bar to participation in the appellate panel for that case. An Appellate Body member cannot plead the press of other business. The retainer that the members receive is intended to ensure that whatever other duties they may take on elsewhere – teaching or serving on arbitration panels, among others – will not interfere with their availability to discharge their Appellate Body duties.

In contrast to the detailed direction that negotiators gave to panels, they did not include in the DSU much guidance for the Appellate Body with respect to its procedures, operation and functioning. The DSU states simply that the Appellate Body "shall be provided with appropriate administrative and legal support as it requires" (Article 17:7), the expenses of its members "shall be met from the WTO budget" (Article 17:8), and that its "[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information" (Article 17:9). Debra Steger, who served as the first director of the Appellate Body Secretariat, recalls that there were many challenges in setting up the new body in 1995. Although a small budget had been allocated for it initially the WTO Secretariat expected that not many cases would be appealed and that the Appellate Body members would only occasionally be in Geneva. From the beginning, however, Ms Steger believed that it was necessary to create a separate secretariat for the Appellate Body in order to maintain and ensure its independence from the WTO Secretariat officials who worked with the panels. The procedures for swearing in the new Appellate Body members and the working procedures for Appellate Body review had to be developed very quickly because the first appeal was expected early in 1996.

When the Appellate Body was first proposed in the Uruguay Round the proponents thought that it would be called upon only in rare instances, such as allegations of improper influence being brought upon a panel or egregious failings in their interpretation of law. John Jackson

was an early advocate of such a mechanism (which he called an "appellate tribunal"), for example, but also urged that rules should be created to ensure "that not every case gets appealed" as the process would then risk "simply becoming prolonged, without substantial advantages."[14] In retrospect, it is clear that the expectation was unrealistic: any trade minister who has to explain a loss in the DSB to the president or prime minister, not to mention cabinet colleagues, the legislature, and the affected industry groups, will want to demonstrate that the ministry took every available step to defend the country's laws, especially if it is put in a position of asking parliament to repeal or revise one. Anything short of a vigorous and exhaustive defence would be politically untenable. That simple calculation seems to have evaded the DSU negotiators during the round.

The expectation that few cases would be appealed soon proved wildly inaccurate. In the early years every panel report was appealed and the legal issues were often novel, and as a result, the work of the Appellate Body multiplied. Its members were also called upon to act as arbitrators in the Article 21.3(c) "reasonable period of time" cases, supported by Appellate Body Secretariat staff. Because of the short time frames for appeals, and in order to deliberate and exchange views effectively with their colleagues, it was important that Appellate Body members spend time in Geneva working together on cases. While it is a "standing tribunal", its members are compensated on a part-time basis. They are paid a retainer that compensates them for their availability throughout the year, and are also paid a daily rate for working on cases, together with *per diem* for their expenses while in Geneva. Some have opted to rent accommodation in Geneva for the duration of their appointments.

The Appellate Body has affected the jurisprudence in the WTO both directly and indirectly. The direct effects are the most obvious, coming via the decisions that it renders. These decisions reach judgments on the meaning of WTO agreements as well as on the conduct of disputes themselves, as is the case for its rulings regarding outside counsel and *amicus* briefs (see below). The presence of the Appellate Body has also indirectly affected cases by giving panellists an incentive to "appeal-proof" their decisions. In the WTO system, panellists are more likely to become invested in their decisions, and want to avoid the implied criticism of a reversal. This motivation may account for the expanding length and complexity of the decisions that panels render. Similar concerns also encourage countries to insist that at least one of the panellists appointed to cases in which they are involved be lawyers, and to prefer that the chairman also be a lawyer. In the GATT system, most panellists were from the local missions and were usually diplomats rather than lawyers (no matter what it might have said on their diplomas).

Adjustments to the operation of the DSU

The rules and procedures governing dispute settlement cases have been adjusted since the Uruguay Round through actual practice, especially in some landmark Appellate Body decisions, and through what is known as the Jara Process. The Appellate Body set an important precedent when it ruled that panels may consider *amicus curiae* (friends of the court) briefs. This is a principle that it stated in 1998 in the case of *United States – Import*

Prohibition of Certain Shrimp and Shrimp Products[15] and affirmed in several subsequent cases. The Appellate Body found that the panels' comprehensive authority to seek information from any relevant source (as provided in DSU Article 13) and to add to or depart from the Working Procedures in DSU Appendix 3 (as provided in DSU Article 12.1) permits panels to accept or reject information and advice even if it was unsolicited. This remains a contentious matter among WTO members, many of whom consider WTO disputes to be procedures purely between members and see no role for any other parties, stakeholders or experts, and are wary of any involvement on the part of non-governmental organizations. Developing countries in particular tend to take a cautious view on this point.

Even more significant was the Appellate Body's 1997 determination in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (better known as *Bananas III*) that members can be represented by outside counsel. When Saint Lucia first tried to bring in private lawyers during the panel deliberations this was widely opposed and disallowed, but the Appellate Body permitted it and thus changed the nature of dispute settlement cases. It said that there were no provisions in the WTO Agreement, in the DSU, or in the Working Procedures "that specify who can represent a government in making its representations in an oral hearing of the Appellate Body," nor could it find any "previous [GATT] panel report which speaks specifically to this issue in the context of panel meetings with the parties." It further stated that –

> representation by counsel of a government's own choice may well be a matter of particular significance – especially for developing-country Members – to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.[16]

This decision has led to trade lawyers in private practice becoming accredited to a member's WTO delegation for purposes of a case. This also provides an indirect means by which the WTO partially and indirectly relaxes the general rule that disputes are solely pursued state-to-state, without a private right of action. Private firms and trade associations still have no independent standing in the WTO, but they may nonetheless ask member governments to bring complaints on their behalf. When making such a request, they can now promise to underwrite the often considerable legal fees involved in a case. This may offer one reason why developing countries are less reluctant to bring formal complaints in the WTO. In the GATT period, such a country might not even have had a permanent mission in Geneva, much less one staffed with an experienced litigator, but matters are quite different when both the expertise and the bankroll can be outsourced.

The so-called Jara Process is yet another way that the system has been reformed. Named after Deputy Director-General Alejandro Jara, the process aims to make the dispute settlement process more efficient and less costly. At issue here are the burdens imposed by a more judicialized system, as measured both by the time that panellists must devote and the

budgetary costs of translating and even transporting the documents. Some panellists report that the paperwork they receive from the parties is excessive. "At times they play the lawyer's game," one panellist observed, "so they flood you with all kinds of irrelevant documents."[17] The Jara process aims to reduce that flood to manageable proportions, and to make other, complementary reforms to the process.

This is an example of how reforms and innovations may create demand for new changes. The reform of the DSU spawned an increase in cases; the creation of the Appellate Body encouraged petitioners, respondents, and panellists to take a more legalistic approach to cases; and the involvement of private lawyers did not lessen the interest in creating even longer paper trails. The net result has been a rise in the costs of individual cases and of the docket as a whole. Acting at the request of Director-General Pascal Lamy, Mr Jara began a process of fact-finding and consultations in 2010, seeking efficiency gains in the panel process so as to reduce the financial and human burdens. He solicited ideas widely, but stressed that any reforms had to be consistent with existing rules; changes could be contemplated only if they did not involve amending the DSU. He also insisted that changes should not undermine the reputation and output of the system. In this process, Mr Jara relied primarily on the flexibility afforded under DSU Articles 12.1 and 12.2, which require panels to follow the procedures in DSU Appendix 3 "unless the panel decides otherwise after consulting the parties to the dispute" and indicate that panel procedures "should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process."

One of the reforms to emerge is double-briefing, a process in which parties' first written submissions, as well as rebuttals and the submissions of third parties, are sent to a panel before the first hearing. This reform, Jara (2012) observed, "would probably delay the first hearing with the parties" but could also "speed up the panel process by moving forward the maturity of the parties' discussions on the relevant issues, thus probably eliminating some exchanges at the written question and answer phase." It might also obviate the need for a second hearing. Another reform is early (indicative) questions for the panel meeting. Panels generally use the first substantive meeting to determine basic factual and legal questions, and sometimes the parties are not prepared to answer panellists' questions at these meetings. It was therefore suggested that panels provide in advance a list of questions that might be posed. Another especially important reform allows for electronic filing. Among the others are time limits on oral statements, advance distribution of a proposed agenda or structure for the meeting, page limits for executive summaries, and reduction of annexes. In addition to speeding the process, these reforms have also reduced the number of pages that get filed and that must therefore (at great expense) be translated and sent to panellists. In a related initiative, in 2010 the WTO developed a digital database of information on all prior panel and appellate cases. The database is intended to facilitate research and access to dispute settlement reports and related documents.

Use of the Dispute Settlement Understanding

In the pages that follow, we review the descriptive statistics of DSU cases. Before examining the numbers, it should first be stressed that the arithmetic of dispute settlement can be peculiar. The unit of measurement in all that follows is the complaint, the first formal step that a member – and sometimes a group of members acting in concert – will take in a case against another member. Not all complaints will be pursued through every stage of the process, from the filing of that motion to the formation of a panel, the release and adoption of that panel's report and (if either or both parties appeal the results) review by the Appellate Body. The mortality rate for cases is actually quite high, especially at the early stages of life. From 1995 to 2011, there were 427 requests for consultation, but only 232 of these cases led to a decision to establish a panel. This means either that the petitioner and the respondent were able to resolve the matter at this stage or that the petitioner (for whatever reasons) opted not to take the matter any further. In 29 of those 232 cases, the panel was never actually composed. Of the 204 cases in which a panel was formed, 96 matters led to mutually agreed solutions or to the withdrawal of complaints somewhere during the process, equal to 22.5 per cent of all complaints. In the end, only 146 panel reports were ultimately circulated, such that just over one third (34.2 per cent) of all cases went through the entire process from complaint through to the report.

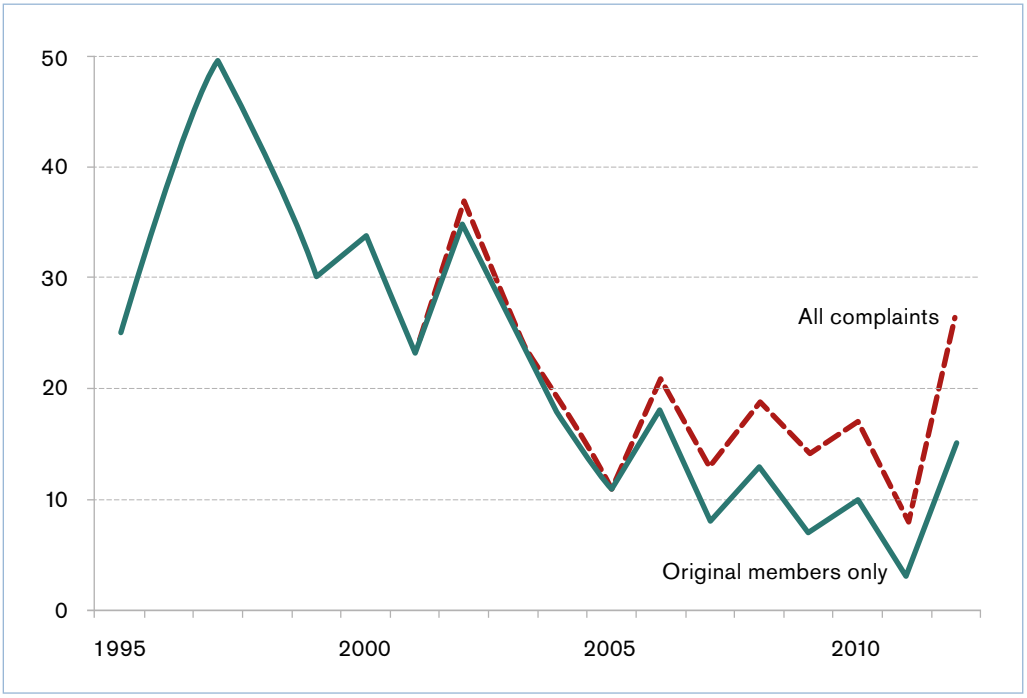
The numbers are further complicated by the multiplicity of cases that can be related to a single matter. Sometimes multiple members file a joint complaint against a single member, while in other instances more than one member files separate complaints against a member. In the latter instance, it is common for the complaints to be consolidated into a single case with a single panel. Sometimes one dispute will spawn others, especially if the complainant in the original case is dissatisfied with the steps that the respondent has taken to come into compliance with an unfavourable ruling. In the case of the European Union, it is also possible for one member to file several, similar complaints against more than one of its members, rather than a single complaint against the European Union as a whole. For all of these reasons, some matters loom larger in the statistics than do others. No effort has been made here to consolidate multiple proceedings into single cases, as there are simply too many reasons why apparently related matters will variously produce single or serial cases and no one decision rule can adequately compress them all. Readers should therefore be aware that, as is so often the case in reviews of descriptive statistics, the numbers reported below are best seen as a general representation of broad trends rather than a mathematically precise representation of reality.

It must also be stressed that no effort is made here to weight cases according to either their economic value or their legal significance. It is quite evident that some cases do involve larger flows of trade than do others. If one were to total all the billions of dollars and euros that have been at stake in the dispute between Boeing and Airbus, for example, the result might outweigh the combined value of most of the other cases that have been brought to the DSB. By the same token, some cases are more significant than others for the issues that are at stake and the precedents that might be set. Space does not permit a detailed analysis of such distinctions here.

The declining pace of complaints

With those caveats in mind, we start from the observation that complaints have trended downwards since the early years in the WTO period. This can be appreciated from the data illustrated in Figure 7.1, which show that the complaints peaked in 1997 and declined sharply thereafter. In rough numbers, the level of disputes in the WTO started at an average of just over three complaints per month from 1995 to 2000, then fell to just under two per month from 2001 to 2006, and dropped still further to about one every five weeks from 2007 to 2012. Put another way, there were nearly as many complaints lodged in the six years from 1995 to 2000 as in the 12 years from 2001 to 2012. The decline is still greater if one focuses solely on cases brought by or against the countries that were original WTO members, and thus exclude the cases involving countries that acceded to the WTO. If we examine only the cases in which the original WTO members were the respondents or were among the complainants, and thus compare apples to apples, the rate at which complaints are filed fell from an average of 36.5 per year from 1995 to 2000 to 9.2 per year from 2007 to 2012. Acceding members Ukraine, Viet Nam and, above all, China have accounted for growing shares of the disputes, both as complainant and as respondents. They have taken up much of the slack that has set in among the original members.

Figure 7.1. Complaints brought under the DSU, 1995-2012



Source: Tabulated from data at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Notes: "Original members only" excludes any cases in which the respondent or a sole complainant was a member that acceded to the WTO in 1996-2012.

The data also show a sharp jump in the number of complaints filed in 2012, almost half of them being brought by or against members that acceded since 1995 (especially China). That leap was so large as to require a reallocation of resources in the WTO Secretariat to handle the higher caseload. At the time of writing, it is far too early to know whether that one year represents an anomaly or the start of a new trend. For the time being, we may provisionally treat it as part of a longer period in which, on average, the amount of litigation is notably lower than it had been in earlier periods. In the statistical survey that follows, the numbers for 2012 are treated as part of the 2007 to 2012 period, and the data show that filings during those six years were, on the whole, below those for either of the previous six-year periods.

At least two reasons may be cited for this decline in litigation. As reviewed below, one is the much slower pace at which the European Union and the United States bring complaints against one another. That observation may only beg the question, however, as it is not immediately clear why these two largest members have been less active litigants. Another reason helps to explain why other members bring fewer cases against these two members: there has been a slowdown in the level of anti-dumping activity, both by them and by others, which has affected one of the principal causes for the complaints brought against Brussels and Washington.

Who brings complaints against whom

Not all WTO members bring complaints to the DSB, or are complained against in that body. Fully 44 members of the WTO, or close to one third of the total membership, did not participate in a dispute settlement case in any capacity from 1995 to 2012 (see the data on countries' participation in Appendix 7.2). Another 35 members participated exclusively as third parties in at least one dispute settlement case in which they were neither a complainant nor a respondent. In some instances, they did so because of an identifiable national interest in the matter, and in some instances because they followed the advice of the WTO Secretariat that it is good to participate as a third party so as to get some practical experience in how disputes are conducted. China, for example, was a third party in 92 cases through 2012, a step it took in part to provide training for its officials. One side-effect of that decision is that it contributed to the paucity of Chinese citizens serving on panels. In sum, precisely half of the 158 total members had either little or no experience in the DSU.

The Quad (Canada, the European Union, Japan and the United States) accounts for the largest number of cases, so that is where we should look first for the explanation behind the decline. Here the logic of a tit-for-tat approach is compelling. If member A brings a complaint against member B, there is a fair chance that member B will respond in kind. Conversely, if the pace of member A's complaints against member B declines, the result may be multiplied by a reciprocal reduction in complaints from member B. That would appear to have been the case, for example, in the declining pace of litigation between the European Union and the United States. As shown in Table 7.2, the number of complaints that these two members brought against one another moved approximately in tandem across three periods, having been reciprocally high from 1995 to 2000 and then declining to a reciprocally low pace by 2007 to 2012.

Table 7.2. Participation of the European Union and the United States in WTO dispute settlement cases, 1995-2012

	1995-2000	2001-2006	2007-2012	Total
EU-US cases	**46 (21.0%)**	**15 (11.0%)**	**3 (3.1%)**	**64 (14.1%)**
EU complaints against United States	22 (10.0%)	9 (6.6%)	1 (1.0%)	32 (7.0%)
US complaints against the European Union	24 (11.0%)	6 (4.4%)	2 (2.0%)	32 (7.0%)
Cases against other members	**77 (35.2%)**	**22 (16.1%)**	**27 (27.6%)**	**126 (27.8%)**
EU complaints against other members	33 (15.1%)	12 (8.8%)	10 (10.2%)	55 (12.1%)
US complaints against other members	44 (20.1%)	10 (7.3%)	17 (17.3%)	71 (15.6%)
Cases brought by other members	**47 (21.5%)**	**57 (40.6%)**	**37 (37.8%)**	**141 (31.1%)**
Complaints against the European Union	19 (8.7%)	20 (14.6%)	15 (15.3%)	54 (11.9%)
Complaints against the United States	28 (12.8%)	37 (26.0%)	22 (22.4%)	87 (19.2%)
EU/US involvement as third parties	**18 (8.2%)**	**16 (11.7%)**	**15 (15.3%)**	**49 (10.8%)**
European Union alone in non-US cases	2 (0.9%)	1 (0.7%)	3 (3.1%)	6 (1.3%)
United States alone in non-EU cases	6 (2.7%)	3 (2.2%)	1 (1.0%)	10 (2.2%)
Both European Union and United States	10 (4.6%)	12 (8.8%)	11 (11.2%)	33 (7.3%)
Total EU and/or US involvement	**188 (85.8%)**	**110 (80.3%)**	**82 (83.6%)**	**380 (83.7%)**
As complainants and/or respondents	170 (77.6%)	94 (68.6%)	67 (68.4%)	331 (72.9%)
As Third Parties	18 (8.2%)	16 (11.7%)	15 (15.3%)	49 (10.8%)
Cases with no EU or US involvement	**31 (14.2%)**	**27 (19.7%)**	**16 (16.3%)**	**74 (16.3%)**
Total cases	**219 (100.0%)**	**137 (100.0%)**	**98 (100.0%)**	**454 (100.0%)**

Source: Tabulated from data at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Notes: Based on the year in which a formal complaint is lodged. Data for the European Union include those cases in which the European Union as a whole acts as well as cases involving individual EU member states as respondents. EU member states have never been sole complainants. Some cases in which the European Union and/or the United States are complainants, whether against one another or third parties, also involve one or more other WTO members as complainants.

Perhaps most remarkable, and least coincidental, is the fact that the total number of complaints that the European Union brought against the United States was, at 32, precisely equal to the total number of cases that the United States brought against the European Union. The cases that these two members brought against one another accounted for over one fifth of the total in the first six years of the WTO's existence. This share was roughly halved in the next six-year period, and cut much more in the one after that. In absolute terms, the fall-off in filings was even greater. From 1995 to 2000, one of these two largest members brought a complaint against the other almost once every six weeks, but by 2007 to 2012 they were doing so only once every two years. All other things being equal, if these two members had brought as many cases against one another from 2007 to 2012 as they had from 1995 to 2000, the total number of complaints lodged in the WTO in the latter period would have been 140 rather than 98. These 42 "missing" EU–US cases explain about one third of the reduction in WTO litigation.

While the United States and the European Union bring fewer cases against one another, that does not mean that they are less active in litigation overall. Taken together, these two major members have been involved with 80 per cent to 85 per cent of all dispute settlement cases throughout the WTO period, but over time their involvement has shifted from transatlantic cases (comprising 21.0 per cent of the total from 1995 to 2000 versus 3.1 per cent from 2007 to 2012) and against third parties (35.2 per cent from 1995 to 2000 versus 27.8 per cent from

2007 to 2012) to a rising share as third-party interveners in other members' disputes (8.2 per cent from 1995 to 2000 versus 15.5 per cent from 2007 to 2012). Another major shift in the direction of disputes has been a reorientation from transatlantic to transpacific cases. A turning point came in March 2004, when the United States filed its first dispute settlement complaint against China. Prior to that, 17.2 per cent of all dispute settlement cases in the WTO were direct confrontations between the United States and the European Union (in either direction). Between then and the end of 2012, complaints that the United States brought against China or (less often) vice versa have accounted for 11.4 per cent of all cases.

The subject matter of complaints by topic and agreement

What are the predominant issues in WTO dispute settlement cases? As was already pointed out in Chapter 2, the introduction of new issues into the system has not had as large an impact on disputes as one might expect. As shown in Table 7.3, traditional issues involving trade in goods still account for the great majority of cases. With the trade-remedy laws producing over one third of all complaints, and issues affecting trade in agricultural and non-agricultural goods each accounting for just over one quarter of the complaints, these three topics collectively produced 88 per cent of all cases in the first 18 years of the WTO.

The subject matter varies according to the respondent. The single largest source of complaints from 1995 to 2012 was the trade-remedy laws of the United States, especially the anti-dumping law; over one in six of all cases concerned this one member and issue. The second-highest cause of complaint was the agricultural policy in the European Union. These two subjects thus represent real continuity with the pattern of disputes in the GATT period. China was not a member from 1995 to 2000 and was engaged in few disputes from 2001 to 2006, but was a frequent target of complaints by 2007 to 2012. The largest number of complaints against China in that later period concerned trade in non-agricultural goods, accounting for one in nine of all WTO disputes in the most recent six-year period. The large group of "other developing countries" (i.e. all but China) were the respondents in just over one third of all cases, divided almost equally between those involving trade-remedy cases, agricultural goods and non-agricultural goods. Just four countries – Argentina, India, the Republic of Korea and Mexico – were the respondents in over two fifths of these cases.

The subject matter of cases can also be broken down according to specific agreements and, more precisely, the articles in those agreements that are cited in complaints. The data in Table 7.4 provide only a glimpse of the total picture here, presenting the statistics on a selected number of the provisions that have been at issue. One interesting observation is that more cases are based on grounds of national treatment than on MFN treatment, a pattern that holds true for both the goods sector (there are more cases citing GATT Article III than GATT Article I) and the services sector (there are more cases citing GATS Article XVII than GATS Article II). The data also show how cases involving market access for goods have greatly outnumbered those for access in services sectors. It is no surprise that the trade-remedy laws are frequent causes of complaint, but there are actually more complaints concerning members' alleged shortcomings with respect to the publication and administration of trade regulations (generally as a supplementary complaint on some other matter) than any single provision of the trade-remedy laws.

Table 7.3. WTO dispute settlement cases by subject matter and respondent, 1995-2012

	1995-2000	2001-2006	2007-2012	Total
Trade-remedy and related	**57 (26.0%)**	**69 (50.3%)**	**31 (31.6%)**	**157 (34.6%)**
China	–	0 (0.0%)	6 (6.1%)	6 (1.3%)
European Union	3 (1.4%)	6 (4.4%)	4 (4.1%)	13 (2.9%)
United States	29 (13.2%)	37 (27.0%)	13 (13.3%)	79 (17.4%)
Other developed	2 (0.9%)	2 (1.5%)	0 (0.0%)	4 (0.9%)
Other developing	23 (10.5%)	24 (17.5%)	8 (8.2%)	55 (12.1%)
Non-agricultural goods	**64 (29.2%)**	**29 (21.2%)**	**29 (39.6%)**	**122 (26.9%)**
China	–	4 (2.9%)	11 (11.2%)	15 (3.3%)
European Union	10 (4.6%)	8 (5.8%)	5 (5.1%)	23 (5.1%)
United States	12 (5.5%)	4 (2.9%)	2 (2.0%)	18 (4.0%)
Other developed	11 (5.0%)	2 (1.5%)	2 (2.0%)	15 (3.3%)
Other developing	31 (14.2%)	11 (8.0%)	9 (9.2%)	51 (11.2%)
Agricultural goods	**58 (26.5%)**	**37 (27.0%)**	**26 (26.5%)**	**121 (26.7%)**
China	–	0 (0.0%)	3 (3.1%)	3 (0.7%)
European Union	18 (8.2%)	12 (8.8%)	6 (6.1%)	36 (7.9%)
United States	4 (1.8%)	3 (2.2%)	8 (8.2%)	15 (3.3%)
Other developed	11 (5.0%)	8 (5.8%)	1 (1.0%)	20 (4.4%)
Other developing	25 (11.4%)	14 (10.2%)	8 (8.2%)	47 (10.4%)
Intellectual property rights	**20 (9.1%)**	**1 (0.7%)**	**7 (7.1%)**	**28 (6.2%)**
China	–	0 (0.0%)	2 (2.0%)	2 (0.4%)
European Union	9 (4.1%)	0 (0.0%)	2 (2.0%)	11 (2.4%)
United States	1 (0.5%)	1 (0.7%)	0 (0.0%)	2 (0.4%)
Other developed	4 (1.8%)	0 (0.0%)	3 (3.1%)	7 (1.5%)
Other developing	6 (2.7%)	0 (0.0%)	0 (0.0%)	6 (1.3%)
Services	**7 (3.2%)**	**1 (0.7%)**	**4 (4.1%)**	**12 (2.6%)**
China	–	0 (0.0%)	4 (4.1%)	4 (0.9%)
European Union	3 (1.4%)	0 (0.0%)	0 (0.0%)	3 (0.7%)
United States	0 (0.0%)	1 (0.7%)	0 (0.0%)	1 (0.2%)
Other developed	2 (0.9%)	0 (0.0%)	0 (0.0%)	2 (0.4%)
Other developing	2 (0.9%)	0 (0.0%)	0 (0.0%)	2 (0.4%)
Other	**13 (5.9%)**	**0 (0.0%)**	**1 (1.0%)**	**14 (3.1%)**
China	–	0 (0.0%)	0 (0.0%)	0 (0.0%)
European Union	5 (2.3%)	0 (0.0%)	0 (0.0%)	5 (1.1%)
United States	4 (1.8%)	0 (0.0%)	0 (0.0%)	4 (0.9%)
Other developed	2 (0.9%)	0 (0.0%)	0 (0.0%)	2 (0.4%)
Other developing	2 (0.9%)	0 (0.0%)	1 (1.0%)	3 (0.7%)
Total	**219 (100.0%)**	**137 (100.0%)**	**98 (100.0%)**	**454 (100.0%)**
China	–	4 (2.9%)	26 (26.5%)	30 (6.6%)
European Union	48 (21.9%)	26 (19.0%)	17 (17.3%)	91 (20.0%)
United States	50 (22.8%)	46 (33.6%)	23 (23.5%)	119 (26.2%)
Other developed	32 (14.6%)	12 (8.8%)	6 (6.1%)	50 (11.0%)
Other developing	89 (40.6%)	49 (35.7%)	26 (26.5%)	164 (36.1%)

Source: Tabulated from data at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Notes: Data for the European Union include the group as a whole as well as its individual EU member states. Cases are listed according to the first category shown here into which they fall. Anti-dumping cases involving agricultural products, for example, are counted here in the trade-remedy category rather than agriculture, just as the cases involving bananas are classified as agricultural rather than services disputes.

Table 7.4. Frequency with which selected provisions of WTO agreements are at issue in dispute settlement cases, 1995-2012

	1995-2000	2001-2006	2007-2012	Total
Non-discrimination				
National treatment (GATT Art. III)	68 (31.1%)	41 (29.9%)	10 (10.2%)	149 (32.8%)
MFN treatment (GATT Art. I)	59 (26.9%)	36 (26.3%)	24 (24.5%)	119 (26.2%)
Services: National treatment (GATS Art. XVII)	9 (4.1%)	3 (2.2%)	6 (6.1%)	18 (4.0%)
Services: MFN treatment (GATS Art. II)	9 (4.1%)	1 (0.7%)	1 (1.0%)	11 (2.4%)
Market access and related				
Quantitative restrictions (GATT Art. XI)	57 (26.0%)	26 (19.0%)	24 (24.5%)	107 (23.6%)
Schedule of concessions (GATT Art. II)	42 (19.2%)	26 (19.0%)	17 (17.3%)	85 (18.7%)
Agriculture: Market access (Art. 4)	31 (14.2%)	13 (9.5%)	6 (6.1%)	50 (11.0%)
Import Licensing: Non-automatic licensing (Art. 3)	22 (10.0%)	5 (3.6%)	4 (4.1%)	31 (6.8%)
Customs Valuation (GATT Article VII)	9 (4.1%)	3 (2.2%)	5 (5.2%)	17 (3.7%)
Services: Market access (Art. XVI)	7 (3.2%)	1 (0.7%)	6 (6.1%)	14 (3.1%)
Trade-remedy laws and subsidies				
Anti-dumping and countervailing (GATT Art. VI)	21 (9.6%)	44 (32.1%)	25 (25.5%)	90 (19.8%)
Anti-dumping: Determination of dumping (Art. 2)	25 (11.4%)	27 (19.7%)	16 (16.3%)	68 (15.0%)
Anti-dumping: Evidence (Art. 6)	24 (11.0%)	25 (18.2%)	16 (16.3%)	65 (14.3%)
Anti-dumping: Initiation and investigation (Art. 5)	23 (10.5%)	26 (19.0%)	12 (12.2%)	61 (13.4%)
Anti-dumping: Determination of injury (Art. 3)	24 (11.0%)	24 (17.5%)	12 (12.2%)	60 (13.2%)
SCM: Prohibited subsidies (Art. 3)	24 (11.0%)	18 (13.1%)	13 (13.3%)	55 (12.1%)
Anti-dumping: Imposition and collection (Art. 9)	11 (5.0%)	20 (14.6%)	15 (15.3%)	46 (10.1%)
Other				
Publication and administration of trade regulations (GATT Art. X)	35 (16.0%)	37 (27.0%)	28 (28.6%)	100 (22.0%)
TBT: Technical regulations (Art. 2)	23 (10.5%)	9 (6.6%)	11 (11.2%)	43 (9.5%)
SPS Measures: Basic rights and obligations (Art. 2)	17 (7.8%)	12 (8.8%)	10 (10.2%)	39 (8.6%)
SPS Measures: Assessment of risk (Art. 5)	17 (7.8%)	11 (8.0%)	10 (10.2%)	38 (8.4%)

Source: Tabulated from data at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Notes: Data for the European Union include those cases in which the European Union as a whole acts as well as cases involving its member states. The table does not include references to those articles of agreements that concern the incorporation of commitments in schedules and agreements, such as WTO Article XVI:4 or Article 3 of the Agreement on Agriculture, or those that cover an agreement broadly (e.g. Article 1 of the Anti-Dumping Agreement).

Filings also vary according to the complainant, and here there are some important differences in the approaches that the developed and developing countries take. Bown (2009) examined cases according to the level of "observability" in the measure that a complainant alleged to be WTO-inconsistent, ranging in a four-part spectrum from the most obviously observable measures (i.e. anti-dumping and countervailing duty orders) to the least observable (e.g. subsidies, other domestic measures, and export restrictions). He found two interesting patterns in the data. The first was that the European Union and the United States concentrate on the less observable measures, with the bulk of the complaints that they filed from 1995 to 2008 being directed against those of low or medium observability. This would suggest their use of the DSU as a means of defining the scope of countries' commitments, including the

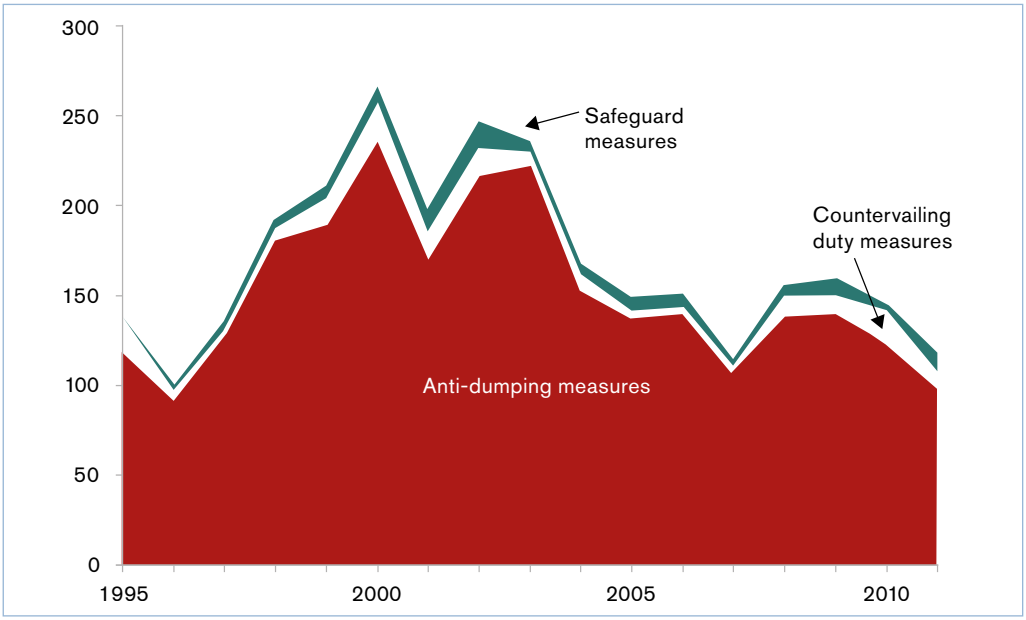
resolution of ambiguities in the "grey zones". That is one way of using litigation as a follow-up to negotiation. By contrast, developing countries were more likely to file complaints in cases involving measures in either the "obvious" or medium levels of observability. Their use of the DSU tends to focus less on systemic objectives than on the need to address specific irritants that arise in their trade relations with specific partners.

Disputes about disputes: cases based on trade remedies

As noted above, fully one third of all dispute settlement cases concern the anti-dumping (AD), countervailing duty (CVD) and safeguard laws. These are collectively termed the trade-remedy laws, although they might alternatively be called the unfair trade laws[18] (a designation with double meaning) or mechanisms of contingent protection. Each of them allows the temporary imposition of restrictions on imports: AD orders may be imposed to compensate for the degree to which goods are sold at less than fair value, CVDs may be imposed to correct for subsidies, and safeguards allow for the imposition of tariffs on imports that cause serious injury to domestic industries. No matter what one chooses to call these laws, they were a major means by which developed countries and a few developing ones restricted imports in the GATT period, and have come to be employed more frequently by developing countries in the WTO period. That rise in use by the developing countries can be attributed in part to the restrictions that were placed in the Uruguay Round on their recourse to the balance-of-payments provisions in GATT Articles XII and XVIII:B.[19] With their access to those protections now constrained by the terms of the Understanding on the Balance-of-Payments Provisions of GATT 1994, and also with an increase in their own level of imports (especially from other developing countries), they have fallen back on other means of dealing with injurious and allegedly unfair imports. It may also be attributed in part to the "blowback" that followed some countries' liberalization at the wholesale level (by freeing up exchange rates) and at the retail level (in sectors that had previously been restricted).

The number of disputes arising as a result of trade-remedy cases generally tracks the actual use of these laws. As can be seen from the data in Table 7.3, the number of WTO disputes in this category rose from 57 from 1995 to 2000 to 69 from 2001 to 2006 before declining to 31 from 2007 to 2012. That is roughly the same pattern that one can see in Figure 7.2. Combining these three types of measures together, WTO members went from taking action an average of 155.4 times per year from 1995 to 1999 to 223.4 per year from 2000 to 2004 (a 43.8 per cent increase), but by 2005 to 2009 the average had fallen to 146.2 (5.9 per cent below the 1995 to 1999 level). That pattern of rising and then falling usage held true for all three types of measures. The data thus confirm the general expectation that activity in the DSB will reflect activity in the world outside.

Figure 7.2. Measures taken by WTO members under the trade-remedy laws, 1995-2011



Sources: Calculated from WTO data posted at www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.xls (antidumping), www.wto.org/english/tratop_e/scm_e/scm_e.htm (countervailing duties), and www.wto.org/english/tratop_e/safeg_e/SG-Measures_By_Reporting_Member.xls (safeguards).

The more intriguing and complex question is whether this dual decline suggests causation in one direction or the other. That is, do we have fewer complaints in the DSB because the number of trade-remedy cases is down, or have trade-remedy cases declined because of rulings made in the DSB? Space does not permit an exhaustive review of this question, but the descriptive statistics presented below offer a reasonably strong *prima facie* case that action under the safeguard laws has been dampened by the operation of the DSU, and especially for the invocation of safeguards by developed countries. In the case of the anti-dumping and countervailing duty laws, however, the data seem to imply that it is the use of those laws that drives the number of disputes more than the other way around.

Anti-dumping and countervailing duty laws

The AD law is by far the most utilized of the trade-remedy statutes, both by developed and developing countries. The data in Appendix 7.3 summarize the use of this mechanism by 11 selected WTO members during the late GATT and WTO periods. The actual level of orders imposed by these countries was almost identical in the two periods. If we leave China out of the equation, considering the fact that it did not even have an AD law prior to 1997, the countries shown in the table took action 98.5 times per year from 1989 to 1994 and 98.6 times per year from 1995 to 2010. When China is added the rate in the WTO period rises to 107.7 per year. The

distribution of that action changed significantly, however, with the four developed countries imposing 89.8 per cent of the orders in the late GATT period but just 38.7 per cent in the WTO period. All of the developed countries in the table experienced a decline in the annual rate of AD filings and orders. In the case of the European Union, for example, the rate of filing declined from 36.7 per year from 1989 to 1994 to 26.0 from 1995 to 2010, and the rate of orders imposed fell from 20.7 to 15.4 in the same periods. Both rates also declined for Australia, Canada and the United States. Rates also fell for Mexico, but that country offers the exception that proves the rule: all of the other developing countries saw their rates rise for filing and (in most cases) the imposition of orders.

That rise was especially high for China and India. After inaugurating its law in 1997, China became the fifth-largest user of this mechanism in the WTO period. India went from being one of the least-frequent users of the AD law in the late GATT period to the most frequent in the WTO period. The rising use of AD laws by the developing countries "was absolutely predictable", in the view of Stuart Harbinson. He had handled AD negotiations for Hong Kong in the Uruguay Round, when the developed countries retained this option for themselves – and hence for everyone – while dampening the use of other protective mechanisms that had previously been favoured by the developing countries. "There had been a concerted series of actions by the developed users of AD against emerging economies and the latter had learned the lesson. But the developed users still refused to countenance the need for serious reform."[20] The net result was not so much the removal as the redirection of protectionist initiatives.

The raw data offer mixed messages on the effect that the Uruguay Round agreements had on countries' recourse to the AD laws. It is possible that the disciplines imposed by the Anti-Dumping Agreement (more formally the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) explain part of the decline in developed countries' use of the law. The ban on "voluntary" export restraints (VERs) in the Agreement on Safeguards might also indirectly suppress AD activity in the United States, to the extent that it forestalls the once-favoured tactic of flooding the system with AD and CVD petitions in hopes of forcing the overextended investigators to seek VERs instead. In the case of the developing countries, however, the reform of the balance-of-payments provisions may (for reasons already discussed) have had the unintended consequence of shifting activity to AD laws. It is also worth highlighting that whatever else may have been achieved by the Anti-Dumping Agreement, petitioners have actually been more successful after the Uruguay Round than they were before it. The data show that in the average country less than half (47.1 per cent) of the AD petitions filed in the late GATT period resulted in the imposition of orders, but that over three fifths (62.7 per cent) of them were successful from 1995 to 2010. That rate of success rose in both developed and developing countries.

For our present purposes, the most notable statistics in the table concern the share of the AD orders that ended up being challenged under the DSU. Despite the fact that trade-remedy cases are the single largest source of complaints, in the WTO period just 3.9 per cent of all AD orders imposed by these ten members have been challenged in this way. That is actually a considerable increase from the late GATT period, when only 0.8 per cent were challenged, but still means that a successful petitioner under one of these laws had less than one chance in

25 of facing the additional cost and uncertainty of having to defend (or rely upon the government to defend) their victory in the DSB. This one statistic casts serious doubt on the expectation that the new dispute settlement rules may have dampened activity under the AD law.

That observation needs further qualification in the case of the United States, and on two grounds. One is that a much higher share of AD orders imposed by the United States get challenged. Only 1.4 per cent of the US orders were brought to dispute settlement in the late GATT period, but precisely ten times that share have been challenged in the WTO. Second, some of the findings in WTO dispute settlement cases have led to major changes in US trade-remedy law. One example is the Byrd Amendment, a 2000 statute under which the revenue raised in AD or CVD cases would be directed to the aggrieved industry. This law, which greatly incentivized filings, was ruled WTO-illegal by a dispute settlement panel in September 2002. While the US Congress did not actually repeal the amendment until February 2006 (and even then the Byrd Amendment remained in effect until 1 October 2007) that ruling demonstrated that congressional tinkering with the trade-remedy laws was subject to WTO review. The same may be said for another finding in April 2004 against the US practice of "zeroing", in which negative dumping margins are eliminated from the dumping calculation. It once again took years for the United States to come into compliance with the ruling, with the Department of Commerce announcing in February 2012 that it would generally end the practice of zeroing not just for AD investigations but also in administrative reviews of existing orders.

The net effect is thus mixed. In the case of the United States, one might argue that the correlation moves in both directions: there are fewer cases brought to the DSU because there have been fewer AD petitions and orders, and there may be fewer petitions filed because some of the more important cases decided in the DSB have forced changes in US law. For the WTO membership as a whole, however, the data show an increased success rate for petitioners, no net reduction in the number of AD orders imposed, and a low rate at which AD orders are challenged in the DSU. Action under these laws declined after 2003, and so therefore did the number of DSB cases concerning these laws, but it is difficult to argue that the net effect of the Uruguay Round agreements was to suppress the use of the AD law.

The CVD laws are not nearly as consequential as the AD laws. The average number of CVD orders imposed by the nine WTO members shown in Table 7.5 was, at 8.1 per year, well below the level of AD action. Unfortunately the data are not nearly as complete for these laws as they are for their AD counterpart, and hence it is difficult to make the same sort of comparisons over time. It is, however, notable that while countries use the CVD law less frequently, when they do use it they are more likely to be challenged in the DSU. Fully one fifth of the orders imposed by these countries have been brought to dispute settlement. One might speculate that this higher challenge rate may be attributed to the fact that CVD orders are aimed at the unfair trade practices of governments versus the unfair trade practices of firms that are at issue in AD cases. The United States is the largest user of this law, accounting for nearly half (47.7 per cent) of all cases, and over one quarter of the CVD orders imposed by the United States have been challenged. The observations made above on the impact of the Uruguay Round agreements and the DSU on AD activity in the United States generally apply, *mutatis mutandis*, to the CVD law as well.

Table 7.5. Use of countervailing duties by selected members and related dispute-settlement cases in WTO, 1995-2011

	Cases initiated	Orders imposed	Leading to orders (%)	Challenged in WTO	Orders challenged (%)
Argentina	3	3	100.0	2	66.7
Australia	13	4	30.8	0	0.0
Brazil	3	2	66.7	2	100.0
Canada	25	17	68.0	0	0.0
Chile	6	2	33.3	0	0.0
China	4	4	100.0	2	50.0
European Union	57	30	52.6	2	6.7
South Africa	13	5	38.5	0	0.0
United States	113	63	55.8	18	28.6
Total	**237**	**130**	**54.9**	**26**	**20.0**
Rate per year	**14.8**	**8.1**		**1.6**	

Sources: Chad P. Bown "Global Antidumping Database", available at http://econ.worldbank.org/ttbd/gad/; WTO cases tabulated from Chad P. Bown available at http://econ.worldbank.org/ttbd/dsud/.

Notes: Based on the year in which a formal complaint is lodged. The 1995 starting date is dictated by the availability and consistency of data of the major users listed.

Safeguards

Safeguards are the one form of trade-remedy law that seems to be most affected by the Uruguay Round agreements and the DSU. That is true at least for the invocation of this law by developed countries, a practice that has nearly disappeared since early in the WTO period. The reason here is simple: challenges to members' invocation of the safeguard law have invariably succeeded, to the point where prospective petitioners in the developed countries see little benefit to utilizing this option.

The key distinction to be drawn here is between the developed and the developing countries, as these two groups face very different levels of challenge. As can be seen from the data in Table 7.6, safeguard cases have been initiated during the WTO period in all four Quad members, but only in the European Union and the United States did these lead to the actual imposition of restrictions on imports. All but one of the nine EU and US safeguard actions were then challenged in the DSB, and all eight challenges were successful. This has effectively meant the end of an instrument that has been a part of US trade law since 1942, when it first appeared in a bilateral agreement with Mexico, and was later incorporated directly into US law and GATT. The last time that the United States invoked the safeguards law was in 2001, when the Bush administration used it to restrict imports of steel. Fifteen other WTO members challenged those restrictions in eight separate complaints, and ever since the panel and the Appellate Body found against the United States in the consolidated case of *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, there have been no more safeguard petitions filed in that country.

Table 7.6. Use of global safeguard laws by selected members and related dispute settlement cases in the WTO, 1995-2012

	Cases initiated	Safeguards imposed	Leading to safeguards (%)	Challenged in WTO	Safeguards challenged (%)
Quad	**21**	**9**	**42.9**	**8**	**88.9**
United States	10	6	60.0	5	83.3
European Union	5	3	60.0	3	100.0
Canada	3	0	0.0	0	—
Japan	3	0	0.0	0	—
All other	**219**	**105**	**47.9**	**12**	**11.4**
India	28	12	42.9	0	0.0
Indonesia	18	10	55.6	0	0.0
Jordan	16	7	43.8	0	0.0
Turkey	16	13	81.3	1	7.7
Chile	13	7	53.8	5	71.4
Czech Republic	9	5	55.6	0	0.0
Philippines	9	7	77.8	0	0.0
Ukraine	9	2	22.2	0	0.0
Venezuela, Bolivarian Republic of	9	0	0.0	0	—
Rest of world	92	42	45.7	6	14.3
Total	**240**	**114**	**47.5**	**20**	**17.5**

Sources: Safeguard cases tabulated from http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574935~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html; WTO cases tabulated from data at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Notes: Based on the year in which a formal complaint is lodged.

While safeguard actions in the Quad countries are almost invariably challenged, developing countries and smaller developed countries have generally been able to use this mechanism with impunity. Table 7.6 shows that only about one in ten (11.4 per cent) of the safeguards imposed by countries other than the Quad have led to complaints in the DSB. Trade lawyers seem unanimous in their opinion that panels interpret the Agreement on Safeguards in a way that makes it virtually impossible for a member to use this mechanism, but that point is rendered moot in those cases where the affected countries opt not to bring a complaint.

In addition to these global safeguard cases, 11 WTO members initiated at least one case each from 2001 to 2012 under a special safeguard mechanism that applies to imports from China. Only four of these countries appear[21] to have taken these cases all the way to final, affirmative injury determinations: the Dominican Republic (on lavatories and washbasins), India (on soda ash and aluminium flat rolled products and aluminium foil), Turkey (on float glass), and the United States (on tires). The last of these cases is the only one that led to a challenge by China in the DSB; both the panel and the Appellate Body found against China in its claims against the United States. The Chinese special safeguard is thus an exception to the general rule concerning the demise of safeguards, but it is limited in time. The terms of China's accession specified that this mechanism is to last for only 12 years, meaning that it will terminate at the end of 2013.

The composition of dispute settlement panels and the Appellate Body

If it is judges who decide what the law is, we had best know more about who those panellists and Appellate Body members are. Panellists are usually selected from a roster that the Secretariat maintains but, if the parties cannot agree on the panellists within 20 days, either party may request that the director-general appoint them. From 1995 to 2012, there were 245 people serving on dispute settlement panels, often doing so for two or more panels. These individuals came from 61 different countries, many of them supplying just one or two panellists but others contributing as many as 12 (Chile), 15 (Switzerland), 16 (Australia) or 20 (both Canada and New Zealand).

Those contributions do not appear to be random, however, as they are heavily influenced by two determinants. One is a simple matter of practicality: because of the need to avoid undue influence, panellists never come from countries that are parties to a dispute. The frequency with which a WTO member is a party to disputes is inversely related to the extent of its nationals' service as panellists.[22] The European Union is often a complainant or a respondent, and even when it is not directly involved it may well be a third party (see Table 7.2). One consequence of this litigiousness is that EU citizens rarely serve on panels. From 1995 to 2012, there was only one panellist each from Austria, France, Germany, the Netherlands and Portugal. Only a few other EU member states have contributed more than that (1.6 per cent came from Sweden, 1.0 per cent from Belgium and 0.4 per cent from Italy); and several other EU member states have never contributed a single panellist. The United Kingdom and Ireland present partial exceptions to the general rule against panel service by EU nationals, being home to 1.4 per cent and 0.6 per cent, respectively, of all panellists. These are the only two common-law countries in the European Union. The other determinant, as suggested by the fact that three former British colonies rank at the top of that list of panellists' home countries, is an apparent bias towards one legal tradition. These two factors together make for a system that, at some risk of exaggeration, might best be described as one in which jurists from mid-sized countries that variously inherited their legal systems from Rome, Paris and especially London now sit in judgment of the European Union and other large members from North America and Asia.

The decision-rules by which panellists are chosen would appear to have a preference for those who come from countries in which English common law is the prevailing legal system. This point is evident from the data shown in Table 7.7. Thirteen of the WTO members that have supplied panellists are common-law countries. Despite the fact that these 13 comprise less than one twelfth of the total membership of the WTO they have contributed close to two fifths of all of the panellists. That disparity is even greater if one concentrates on six of them, including three developed countries (Australia, Canada and New Zealand) and two developing economies (Hong Kong, China; and India). These five members, collectively accounting for just 3.2 per cent of the WTO membership, were home to 28.3 per cent of all panellists from 1995 to 2012. Or to zero in on the single country from which the largest number of panellists have hailed, nearly one in ten of all panels have included a member – and not infrequently a chairman – from New Zealand. Twenty different New Zealanders served on panels during this period, one of them (Crawford Falconer; see Biographical Appendix, p. 577) 13 times. When they served they often chaired: eight of these twenty New Zealanders chaired at least one panel, and altogether they chaired no fewer than 18 of the 44 WTO dispute settlement panels on which they served from 1995 to 2012.

Table 7.7. Nationality of WTO dispute settlement panellists, 1995-2012, in %

	1995-2000	2001-2006	2007-2012	Total
Common law legal systems	**37.4**	**41.1**	**34.8**	**38.3**
New Zealand	10.6	8.3	6.7	9.1
Australia	6.9	8.9	4.5	7.2
Canada	6.0	2.8	12.4	6.0
India	2.8	5.0	0.0	3.1
Hong Kong, China	5.1	1.7	0.0	2.9
Other developing	2.3	7.2	11.2	5.7
Other developed	3.7	7.2	0.0	4.3
Pluralist legal systems	**9.6**	**9.5**	**15.7**	**10.7**
South Africa	4.1	5.6	5.6	4.9
Other developing	5.5	3.9	10.1	5.8
Civil law or other legal systems	**56.9**	**49.4**	**49.5**	**51.0**
Latin America	16.5	30.6	30.4	24.3
Chile	*3.2*	*5.6*	*4.5*	*4.3*
Brazil	*5.5*	*2.8*	*3.4*	*4.1*
Other Latin American	*7.8*	*22.2*	*22.5*	*15.9*
Switzerland	9.7	3.9	7.9	7.2
Other developed	21.6	10.0	5.6	13.9
Other developing	6.2	4.9	5.6	5.6
Total	**100.0**	**100.0**	**100.0**	**100.0**
Memo:				
All developing	*42.7*	*58.9*	*62.9*	*52.4*
All developed	*57.3*	*41.1*	*37.1*	*47.6*

Source: WTO Secretariat.

Notes: Percentage of panellists serving through September 2012 by country of citizenship; panellists counted for each panel on which they served. Other developing countries with common law legal systems from which panellists have come are Bangladesh, Jamaica, Malaysia, Pakistan and Singapore. Other developed countries with common law legal systems from which panellists have come are Ireland, the United Kingdom and the United States. Other developing countries with pluralist legal systems from which panellists have come are Israel, the Philippines and Thailand. Other Latin American countries from which panellists have come are Argentina, Colombia, Costa Rica, Ecuador, Mexico, Panama, Peru, Uruguay and the Bolivarian Republic of Venezuela. Other developed countries with civil law or other legal systems from which panellists have come are Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Slovenia and Sweden. Other developing countries with civil law or other legal systems from which panellists have come are China, Egypt, Indonesia, the Republic of Korea, Mauritius, Morocco, Chinese Taipei and Zambia.

What accounts for this disparity? We may start by considering the pool from which panellists are chosen. The Biographical Appendix to this book offers some guidance here, for while it is not explicitly intended as a guide to dispute settlement panellists, it does offer a sense of the types of people who are prominent in the multilateral trading system and therefore might be asked to serve on a panel. It is notable that many of the 93 people in the appendix for whom educational details are available went to school in North America or the United Kingdom, many of them to study law. Five are graduates of Harvard Law School, five from Michigan Law School, three from Georgetown Law School[23] and 11 from other US law schools. Two studied law in a British university and one in Canada. Taken together, 29.0 per cent of the leading figures in this field studied law in either North America or the United Kingdom. The pattern changes a bit if citizens

from Canada, the United Kingdom or the United States are excluded from this count. Of the 66 people from other countries for whom information is available, 13 (19.7 per cent) studied law in one of these three countries, and 23 others (34.8 per cent) studied a subject other than law in a North American or British university. Taken together, 37 out of 93 people (39.8 per cent) studied in the United States, 19 (20.4 per cent) did so in the United Kingdom and three (3.2 per cent) did so in Canada, such that nearly three out of four of the leading figures in the WTO have an alma mater in one of these three countries. In short, the Anglo-American origins of the GATT and WTO system are still reflected in the schooling of its leaders.

The same point emerges when we look to the key personnel in the WTO Secretariat's legal sections. Four people served as director of the Legal Affairs Division from 1995 to 2012, three of whom were either a Canadian or US citizen. Similarly, two of the three people who have served as director of the Appellate Body division came from Canada. North Americans held these two directorships for 25 of the 36 years between 1995 and 2012.

Countries with a civil (or code) law tradition accounted for over half of all panellists. Within this group, the Latin American countries are particularly active, providing nearly one quarter of all panellists (24.3 per cent) from 1995 to 2012, and close to half (44.5 per cent) of all panellists from countries without a common law system. The great majority of the remaining panellists came from European countries that either have not joined the European Union or were not EU members at the time that the panellists in question were serving. Switzerland is the most prominent non-EU member in this respect, having supplied 7.2 per cent of all panellists. It is reasonable to suppose that proximity is one of the factors accounting for the high frequency of Swiss jurists' participation. Other non-EU countries that contributed appreciable (although not very large) numbers of panellists include Norway (1.8 per cent) and Iceland (0.6 per cent). Several panellists came from countries that were in the process of accession to the European Union at the time of their service, but whose countries supplied few or no panellists after completing that process. From 1995 to 2000, for example, there were several panellists serving from the Czech Republic (3.7 per cent of all panellists in that period) and Poland (2.8 per cent), but both of these countries then acceded to the European Union in 2004. From 2007 to 2012, there were no Czech or Polish panellists. Similar patterns of pre- and post-accession activism can be found in the contributions of Bulgaria, Hungary and Slovenia to the pool of panellists.

The corresponding data for the individuals appointed to the Appellate Body show that common-law countries are not as heavily over-represented at this level. As shown in Table 7.8, less than one third of the Appellate Body members from 1995 to 2012 were from countries with common law legal systems. That connection is attenuated somewhat by the rule that members of this body are quite explicitly "unaffiliated with any government," although the membership is intended to "be broadly representative of membership in the WTO" (Article 17.1 of the Dispute Settlement Understanding). Perhaps more significantly, the educational background of the members of this body may have introduced common-law concepts by the back door. Of the 20 Appellate Body members for whom this information is available, no fewer than 15 either obtained degrees from or (in one case) served as a research fellow at a US law school, and two others received law degrees from UK universities. Altogether, 85.0 per cent of the Appellate Body members for

Table 7.8. Nationality of Appellate Body members, 1995-2012

	Number	Share (%)
Citizens of countries with common law legal systems	**12**	**30.8**
United States	5	12.8
India	3	7.7
Australia	2	5.1
New Zealand	2	5.1
Citizens of countries with pluralist legal systems	**5**	**12.8**
Philippines	3	7.7
South Africa	2	5.1
Citizens of countries with civil law legal systems	**22**	**56.4**
Japan	5	12.8
Egypt	4	10.3
Brazil	2	5.1
China	2	5.1
Germany	2	5.1
Italy	2	5.1
Uruguay	2	5.1
Belgium	1	2.6
Korea, Republic of	1	2.6
Mexico	1	2.6
Total	**39**	**100.0**
Memo:		
All developing	*20*	*51.3*
All developed	*19*	*48.7*

Source: Tabulated from data at www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

Notes: Appellate Body membership calculated by the number of terms.

whom the information is available studied law in one of these two major countries in the common law tradition. In several cases, this came in later stages of their legal education, however, and thus may not have had the same formative impact as their original schooling.

This all begs the question, do these different legal traditions matter? Will a panellist or Appellate Body member who comes from a common law legal tradition approach the issues, the laws (national and international) and the implications of their rulings in a different manner than one from a code law tradition? At least one close observer of the process believed that this was the case in the late GATT period. Plank (1987: 81) observed how the differences between panellists' backgrounds could affect their approaches to individual cases and the system as a whole:

> [T]here are those who are more "expansionist" in their legal interpretation. Looking at the general purposes of the specific provisions of the GATT, and the trend in GATT case law, they seek to adapt the provisions if necessary to new circumstances in the interest of trade creation and elimination of trade-distorting

> measures. On the other hand, there are those who are more "strict constructionist", carefully weighing the specific wording of the General Agreement. If this is ambiguous, they consider that it is not for jurisprudence to take over the job from the drafters.

It might be speculated that panellists who come from civil law countries may be more likely to concentrate on the specific terms of the laws and agreements that are in dispute, while those who either come from or were educated in common law countries might be more prone to supplement or even supplant this aspect of their deliberations by an eye on the precedents set in other cases considered by panels and the Appellate Body. Simply stated, a panellist or Appellate Body member with a common-law outlook may be more predisposed to consider how a given decision might contribute to or detract from the broader goals of the multilateral trading system. There is however no hard evidence one might cite to support or refute that hypothesis. The deliberations in panels and the Appellate Body are highly confidential, so it is not possible to interview jurists in the detail necessary to determine whether those from one set of countries appeared to approach cases from a different angle.

There are also several points that argue against the contention that the legal traditions of panellists may influence their manner of deliberation and the outcomes of their panels. One is that not all panellists are lawyers, meaning that the influence of these distinct traditions may not be transmitted to all of the individuals who actually serve. Another point is that the panels in the WTO period operate under a different set of rules than did their GATT predecessors, such that the observations that Plank made in 1987 may be more in the nature of an historical than a contemporary description. "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system," according to DSU Article 3.2, and it "serves to … clarify the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law." Some lawyers read this language as explicitly sanctioning a move away from the common law traditions that were prevalent in GATT jurisprudence, towards the alignment of WTO law with international law and its traditional stress on code law interpretation. Others see elements of common law in the rulings of the Appellate Body. "The reality of World Trade Organization (WTO) Appellate Body adjudication is that *stare decisis* operates in a *de facto*, but still not *de jure*, sense," according to Bhala (1999: 151), referring to the key common law principle (i.e. "to stand by things decided").

Endnotes

1 Smith did go on to note that when "there is no probability" that a retaliation can force a trading partner to open its market "it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them." See *The Wealth of Nations* Book IV, Chapter 2.

2 Author's interview with Mr Supachai on 27 September 2012.

3 Author's translation of the French original.

4 See, for example, Mshomba (2009: 46-59).

5 Consider the case of the United States. The US mission had just one attorney in the GATT period, and much of that person's time was spent on matters other than disputes. As of 2013, the mission had three attorneys and two full-time support staff devoted entirely to dispute settlement. That is a level of commitment to disputes that most developing countries cannot afford.

6 The text of the Agreement Establishing the Advisory Centre on WTO Law is available at www.acwl.ch/e/documents/agreement_estab_e.pdf.

7 Author's interview with Mr Harbinson on 24 January 2013.

8 Note that there are many exceptions to these general rules. If Australia has a free trade agreement with Chile, for example, it is not obliged to grant to Norway the concessions that it made to Chile.

9 The national-treatment obligation of GATT Article III applies only to the issues that are specifically identified in the article, especially sales taxes and regulations affecting internal sales. Later agreements negotiated in the Uruguay Round provided for national treatment in other areas, such as trade in services (GATS Article XVII) and trade-related investment measures (Article 2 of the TRIMs Agreement).

10 The language here is shortened and simplified. See Article XX for the full text.

11 Author's interview with Elaine Feldman on 19 December 2012.

12 Author's interview with Mr Bhatia on 27 September 2012.

13 Original quote at www.bartleby.com/73/328.html.

14 See "GATT Dispute Settlement – Appeals Procedure", memorandum from John Jackson and Eric Canal – Forgues to "Interested Persons", 29 August 1990, p. 1.

15 See *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body*, WTO document WT/DS58/AB/R, 12 October 1998.

16 See *European Communities – Regime for the Importation, Sale and Distribution of Bananas: Report of the Appellate Body*, WTO document WT/DS27/AB/R, 9 September 1997, p. 7.

17 Author's interview with Elbio Rosselli on 20 December 2012.

18 Properly speaking, this term applies to the AD and CVD laws but not to safeguards, as the latter law is meant to deal with injurious imports whether or not they are alleged to be unfairly traded.

19 For an African perspective on the changing opportunities to employ the balance-of-payments provisions to restrict imports, see Oyejide et al. (2005).

20 Author's correspondence with Mr Harbinson on 30 January 2013.

21 The term "appear" is key here, as data are missing on the final disposition of several cases in Chad P. Bown's "China-Specific Safeguards Database" available on the World Bank's website at http://econ.worldbank.org/ttbd/csgd/. Other members that initiated investigations under this special safeguard, leading either to negative determinations or to results that are missing from the database, include Canada, Chinese Taipei, Colombia, Ecuador, the European Union, Peru and Poland. There were altogether 30 such investigations initiated from 2001 to 2012.

22 This statement applies only to those WTO members that are involved in at least *some* disputes. Another general rule is that those members that are *never* involved as either complainants or respondents tend to supply zero panellists.

23 It is worth noting that John Jackson is one of the Michigan Law School graduates, and that he taught trade law there before moving to Georgetown. Several of the graduates of these two law schools who went on to distinguished service in the field of trade were students of his.

Appendix 7.1. WTO members' complaints in dispute settlement cases, 1995-2012

	Number of members	Number of complaints	Complaints per member
Common law	**25**	**179**	**7.2**
Developed	4	150	37.5
North America	2	136	68.0
United States	*1*	*103*	*103.0*
Canada	*1*	*33*	*33.0*
Pacific	2	14	7.0
Australia	*1*	*7*	*7.0*
New Zealand	*1*	*7*	*7.0*
Developing	21	29	1.4
Asia/Pacific	10	28	2.8
India	*1*	*21*	*21.0*
Pakistan	*1*	*3*	*3.0*
Others	*8*	*4*	*0.5*
Caribbean	9	1	0.1
Africa/Middle East	2	0	0.0
Pluralist	**15**	**19**	**1.3**
Caribbean	2	0	0.0
Africa/Middle East	10	0	0.0
Asia/Pacific	3	19	6.3
Thailand	*1*	*13*	*13.0*
Philippines	*1*	*5*	*5.0*
Sri Lanka	*1*	*1*	*1.0*
Code law	**91**	**285**	**2.4**
Developed	6	121	20.2
Europe	5	104	20.8
European Union	*1*	*87*	*87.0*
Others	*	*17*	*
Japan	1	17	17.0
Developing	85	164	1.9
Latin America	20	119	6.0
Brazil	*1*	*25*	*25.0*
Mexico	*1*	*23*	*23.0*
Argentina	*1*	*18*	*18.0*
Chile	*1*	*10*	*10.0*
Others	*16*	*43*	*2.7*
Former Soviet Union/Yugoslavia	7	4	0.6
Asia/Pacific	13	41	3.2
Korea, Republic of	*1*	*15*	*15.0*
China	*1*	*11*	*11.0*
Others	*11*	*15*	*1.4*
Africa/Middle East	45	0	0.0

Sources: Classification of members' legal systems based on data at http://en.wikipedia.org/wiki/List_of_national_legal_systems. Data on complaints from Appendix 7.2.

Notes: *Includes four European Free Trade Association members plus those EU member states that acceded from 1996 to 2012. Those acceding member states are not counted separately in the totals for "Europe", "Developed" or "Code Law".

Appendix 7.2. WTO members' participation in dispute settlement cases, 1995-2012

	Complainant	Respondent	Third party	Total
Have been both complainants and respondents				
United States	103	119	97	319
European Union and member states	87	98	126	311
European Union	87	73	126	286
Individual member states	0	25	0	25
France	*0*	*4*	*0*	*4*
Belgium	*0*	*3*	*0*	*3*
Ireland	*0*	*3*	*0*	*3*
Netherlands	*0*	*3*	*0*	*3*
United Kingdom	*0*	*3*	*0*	*3*
Germany	*0*	*2*	*0*	*2*
Greece	*0*	*2*	*0*	*2*
Spain	*0*	*2*	*0*	*2*
Denmark	*0*	*1*	*0*	*1*
Portugal	*0*	*1*	*0*	*1*
Sweden	*0*	*1*	*0*	*1*
Japan	17	15	130	162
Canada	33	17	84	134
China	11	30	92	133
India	21	21	80	122
Brazil	25	14	73	112
Mexico	23	14	67	104
Korea, Republic of	15	14	69	98
Australia	7	13	74	94
Argentina	18	22	44	66
Thailand	13	3	57	73
Chile	10	13	34	57
Turkey	2	9	46	55
Colombia	5	3	40	48
Guatemala	8	2	23	33
Ecuador	3	3	19	25
Peru	3	4	14	21
Philippines	5	6	9	20
Venezuela, Bolivarian Republic of	1	2	16	19
Indonesia	6	4	8	18
Nicaragua	1	2	13	16
Pakistan	3	2	9	14
Panama	6	1	6	13
Dominican Republic	1	7	4	12
Uruguay	1	1	8	10
Hungary (pre-EU accession)	5	2	2	9
Malaysia	1	1	3	5
Poland (pre-EU accession)	3	1	1	5

	Complainant	Respondent	Third party	Total
Ukraine	3	1	0	4
Czech Republic (pre-EU accession)	1	2	0	3
Moldova, Republic of	1	1	1	3
Have been complainants but not respondents				
Chinese Taipei	3	0	71	74
Norway	4	0	46	50
New Zealand	7	0	34	41
Honduras	8	0	19	27
Costa Rica	5	0	15	20
Viet Nam	2	0	16	18
El Salvador	1	0	14	15
Hong Kong, China	1	0	13	14
Switzerland	4	0	8	12
Singapore	1	0	8	9
Sri Lanka	1	0	3	4
Bangladesh	1	0	1	2
Antigua and Barbuda	1	0	0	1
Have been respondents but not complainants				
Egypt	0	4	7	11
South Africa	0	3	2	5
Trinidad and Tobago	0	2	3	5
Slovak Republic (pre-EU accession)	0	3	0	3
Romania (pre-EU accession)	0	2	0	2
Armenia	0	1	0	1
Croatia	0	1	0	1
Have been third parties only				
Cuba	0	0	15	15
Paraguay	0	0	15	15
Saudi Arabia, Kingdom of	0	0	15	15
Iceland	0	0	8	8
Jamaica	0	0	8	8
Mauritius	0	0	6	6
Barbados	0	0	4	4
Belize	0	0	4	4
Côte d'Ivoire	0	0	4	4
Israel	0	0	4	4
Madagascar	0	0	4	4
Malawi	0	0	4	4
Dominica	0	0	3	3
Fiji	0	0	3	3
Guyana	0	0	3	3
Kenya	0	0	3	3
Saint Kitts and Nevis	0	0	3	3
Saint Lucia	0	0	3	3
Swaziland	0	0	3	3
Tanzania	0	0	3	3
Senegal	0	0	2	2

	Complainant	Respondent	Third party	Total
Bahrain, Kingdom of	0	0	1	1
Benin	0	0	1	1
Bolivia, Plurinational State of	0	0	1	1
Cameroon	0	0	1	1
Chad	0	0	1	1
Ghana	0	0	1	1
Grenada	0	0	1	1
Kuwait, State of	0	0	1	1
Namibia	0	0	1	1
Nigeria	0	0	1	1
Oman	0	0	1	1
Saint Vincent and the Grenadines	0	0	1	1
Suriname	0	0	1	1
Zimbabwe	0	0	1	1

Source: Tabulated from data posted at www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

Notes: The following WTO members are not listed above insofar as they have never been involved as a complainant, a respondent, or a third party: Albania, Angola, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cape Verde, the Central African Republic, Congo, the Democratic Republic of the Congo, Djibouti, Gabon, The Gambia, Georgia, Guinea, Guinea-Bissau, Haiti, Jordan, the Kyrgyz Republic, Lesotho, Macao, China, the former Yugoslav Republic of Macedonia, Mali, Mauritania, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Nepal, Niger, Papua New Guinea, Qatar, Rwanda, Samoa, Sierra Leone, the Solomon Islands, Togo, Tonga, Tunisia, Uganda, the United Arab Emirates and Zambia. Note that this count does not include the individual EU member states, most of which have participated in the DSU solely through the regional body.

Appendix 7.3. Use of the anti-dumping laws by selected members and related dispute settlement cases in the GATT and WTO, 1989-2010

	GATT period (1989-1994)					WTO period (1995-2010)				
	Cases initiated	**Orders imposed**	**Leading to orders (%)**	**Challenged in GATT**	**Orders challenged (%)**	**Cases initiated**	**Orders imposed**	**Leading to orders (%)**	**Challenged in WTO**	**Orders challenged (%)**
Developed	**933**	**434**	**46.5**	**4**	**0.9**	**1,236**	**667**	**54.0**	**45**	**6.7**
Australia	287	90	31.0	0	0.0	209	74	35.4	1	1.4
Canada	111	75	67.6	0	0.0	155	97	62.6	1	1.0
European Union	220	124	56.4	2	1.6	416	246	59.1	8	3.3
United States	315	145	46.2	2	1.4	456	250	54.8	35	14.0
Developing	**323**	**157**	**48.6**	**1**	**0.6**	**1,514**	**1,056**	**69.7**	**22**	**2.1**
Argentina	74	44	59.5	0	0.0	259	166	64.1	4	2.4
Brazil	62	22	35.5	0	0.0	212	126	59.4	2	1.6
China[a]	–	–	–	–	–	189	145	76.7	5	3.4
India	12	12	100.0	0	0.0	615	477	77.5	3	0.6
Korea, Republic of	25	10	40.0	1	10.0	119	70	58.8	1	1.4
Mexico	145	65	44.8	0	0.0	103	63	61.2	6	9.5
Philippines	5	4	80.0	0	0.0	17	9	53.0	1	11.1
Total	**1,256**	**591**	**47.1**	**5**	**0.8**	**2,750**	**1,723**	**62.7**	**67**	**3.9**
Rate per year	209.3	98.5				171.9	107.7			

Sources: Chad P. Bown, "Global Antidumping Database", available at http://econ.worldbank.org/ttbd/gad/; GATT cases tabulated from data at www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm; WTO cases tabulated from data at www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6#selected_agreement.

Notes: Based on the year in which a formal complaint was lodged. The 1989 starting date is dictated by the availability of data, which are available from that year forward for all countries shown here (and earlier for some). [a]China did not have an AD law prior to 1997, nor was it a contracting party to the GATT during the period shown.