

Does Legal Capacity Matter?
Explaining Patterns of Protectionism in the Shadow of WTO Litigation

Marc L. Busch
Karl F. Landegger Professor of International Business Diplomacy
School of Foreign Service
Georgetown University
mlb66@georgetown.edu

Eric Reinhardt
Associate Professor
Department of Political Science
Emory University
erein@emory.edu

Gregory Shaffer
Wing-Tat Lee Chair of International Law
Loyola University Chicago
James L. Krusemark Chair of Law
University of Minnesota Law School
gshaffe@luc.edu

Abstract

Does *legal capacity* matter in the World Trade Organization (WTO)? The conventional wisdom is that the “*right* perseveres over *might*” under the WTO’s more legalistic dispute settlement system. Yet, others stress that members can only take advantage of the rule of law if they have the resources to protect their rights through litigation. Despite all the interest in this topic, there is virtually no empirical evidence about how legal capacity affects patterns of litigation and import protection. Using an original survey of WTO delegations, we construct a novel index of legal capacity, and include this in a study of 1321 antidumping (AD) investigations between 1995 and 2005 by 17 WTO Members against firms located in 33 countries. We hypothesize that Members with more legal capacity are more likely to challenge AD suits brought against them at the WTO, and less likely to be named in AD petitions in the first place. The results strongly bear out our expectations; legal capacity matters.

1. Introduction

Dispute settlement under the World Trade Organization (WTO) has been described as the very “backbone of the multilateral trading system” (Moore 2000). Indeed, among international institutions, the WTO’s system of adjudication is widely thought to be the most efficacious (Hudec 1993; Petersmann 1997, 63-5; Moore 2000, 353; Palmetier 2000, 468). This assessment is typically traced to the fact that the system is highly legalistic, leading to the claim that, rather than being governed by power politics, “*right* perseveres over *might*” at the WTO (Lacarte-Muró and Gappah 2000, 401).

Yet observers have increasingly noted that there is a downside to greater legalism, especially as regards its relative complexity. A “rules-oriented” system like the WTO’s Dispute Settlement Understanding (DSU) can actually *raise* the transaction costs of settling disputes (Busch and Reinhardt 2003; Shaffer 2003b, Shaffer 2006), putting a greater premium on *legal capacity*—which we define as the institutional resources required to prepare and prosecute a case—in relation to market power. Indeed, Members can only take advantage of the rule of law if they can effectively pursue their rights, which depends on their having an adequate number of experienced legal, economic, and diplomatic staff. To varying degrees, developing countries, in particular, lack such legal capacity, impeding their ability to participate fully in WTO dispute settlement, and thus jeopardising their confidence in the multilateral trade regime.

This concern has not gone unnoticed at the WTO. Many developed countries have been quick to fund legal capacity in developing countries and have been receptive to various proposals by poor countries to make the DSU more user-friendly to resource-constrained Members.¹ Still, for all the attention the subject has received, there has been no systematic assessment of legal capacity, and virtually no empirical evidence about how it affects patterns of trade disputes and

import protection. This paper seeks to fill in this yawning gap in the literature.

To do so, we conduct a large-scale statistical test of the role of legal capacity in WTO dispute settlement. The paper is novel in several respects. First, we surveyed Members about different aspects of their legal capacity, addressing their bureaucratic organisation at home and in Geneva, their experiences handling WTO matters generally, and WTO litigation more specifically. We supplemented this survey with over three dozen semi-structured interviews with Members' WTO representatives in Geneva and elsewhere. Using these indicators, we have constructed an index of legal capacity that speaks more directly to the challenges of dispute settlement than commonly used proxies, such as per capita income.

Second, we offer an innovative test of whether legal capacity matters by using data on over 1,300 antidumping (AD) investigations initiated by 17 different countries against other WTO Members. These data allow us to test our hypotheses that countries with greater legal capacity are (1) more likely to challenge AD suits brought against them at the WTO; and (2) less likely to be targeted by AD measures in the first place. Put another way, we expect countries vested with more legal capacity to be better at countering and deterring the use of antidumping procedures against their exports. The results strongly support our argument.

The paper proceeds as follows. Section 2 provides some background on the workings of WTO dispute settlement and how AD duties, in particular, might be adjudicated. Section 3 describes our survey and provides an overview of findings from our interviews with developing country representatives. Section 4 articulates our hypotheses and explains our empirical tests as to whether countries endowed with greater legal capacity are *more likely to challenge AD duties against them at the WTO*, and, as a result, are *less likely, up-front, to have duties imposed on their products in domestic AD proceedings* by other WTO Members. Section 5 presents our

results. Section 6 concludes by teasing out implications that scholars and policymakers can draw from our study.

2. Background

Does legal capacity matter in WTO dispute settlement? To see why this question is interesting, consider the basics of how the system works.

Disputes arise at the WTO when a Member, the *complainant*, identifies an objectionable trade-related practice maintained by another Member, the *defendant*. The complainant must first request consultations with the defendant, the idea being to get the two sides to reach a negotiated settlement. If they fail to achieve a mutually agreed solution, the complainant's next option is to request that a panel hear the case. A panel ruling can, in turn, be appealed to the Appellate Body (AB), which happens to about 70 percent of panel judgments. If the panel's ruling is upheld by the AB, the complainant may still challenge the defendant's efforts to bring its measure(s) in line with its WTO obligations by asking for a "compliance" panel. If this panel determines that the respondent has not complied, the complainant can ask for authorisation to retaliate, the amount of which may be subject to further litigation.² The ability to retaliate, however, is a function of market power in relation to the defendant, which ultimately derives from the size of the complainant's market. Thus, the conventional wisdom is that market power should be the variable of interest in understanding patterns of dispute settlement, most notably in studies comparing the relative use of the system by rich and poor complainants (e.g., Mavroidis 2000; Bown 2004).

Recently, however, scholars have begun to shift their attention to the question of legal capacity. This interest should not be surprising; dispute settlement can be a long and complex

process, and thus it is hardly a stretch to imagine that it requires considerable legal capacity on the part of Members to mount an effective strategy at every stage. What is surprising, though, is that many scholars are increasingly of the view that, in explaining the fate of developing countries in WTO litigation, legal capacity may matter more than market power. Indeed, a long list of empirical studies points in this direction (Busch and Reinhardt 2003; Besson and Mehdi 2004; Guzman and Simmons 2005; Simmons 2005), suggesting that the time may be ripe to reconsider the conventional wisdom. Or is it?

One reason to harbour some doubt is that all of these empirical studies struggle to come up with a good measure of legal capacity. For the most part, they proxy legal capacity with per capita income or gross domestic product, the idea being that the resources needed to litigate are likely correlated with national wealth. Bown (2005) gets closer to what most observers have in mind when they think about legal capacity: the size of each Member's permanent staff in Geneva. There is some merit in all of these variables, but they come up short in tapping the experiential and institutional components of legal capacity. To get at these factors, we conducted a survey of the WTO membership and constructed an index variable of legal capacity, basing it on a variety of key responses concerning Members' experience in WTO legal matters and institutional support at home. Ours is thus the first large-scale empirical test of whether legal capacity, as interpreted through the eyes of the Member countries themselves, matters in WTO litigation.

Another distinguishing feature of our paper is that, given our focus on AD duties, we can test whether legal capacity matters not only in WTO dispute settlement, but *before* cases are brought to Geneva. Indeed, if greater legal capacity leads to more challenges at the WTO, it should also deter the use of protectionist devices in the first place.³ We can evaluate this feature because we

have data on “non-cases,” i.e., AD petitions that were investigated but then rejected domestically, offering us a unique window on the lead-up to a WTO dispute.

To see why, consider how AD petitions are vetted nationally. To start, a case is initiated by a domestic producer(s) who alleges that a foreign producer(s) is selling at “less-than-normal-value” in its home market.⁴ The domestic producer(s) petitions its government to investigate this charge, which involves determining whether dumping is taking place, and, if so, whether it is causing “material injury” to the domestic producer(s). In some countries, such as the US, these determinations are rendered by separate agencies, whereas in other countries, like Brazil, they are made by a single agency. A positive finding on material injury triggers a duty to offset the margin of dumping, i.e., the difference between a “normal” price and the one being charged.

Interestingly, while it is not terribly difficult for a domestic producer(s) to secure an AD duty, the positive decisions that governments render are often more selectively targeted at a few countries, rather than at many countries. Why? The conjecture advanced in the literature is that governments tend to avoid naming countries that can credibly threaten retaliation, given their market power (Bagwell and Staiger 2002; Blonigen and Bown 2003). Indeed, governments are likely to be more cautious in ruling against countries that receive a lot of their exports, since these trade partners can impose substantial costs on them by closing their market in retaliation. Blonigen and Bown (2003: 252-53) capture the spirit of this hypothesis, insisting that “the US government agencies are more likely to rule affirmatively when the named foreign country has a lower capacity to retaliate through the GATT/WTO dispute settlement process.”

We do not doubt this hypothesis. Rather, our point is that, if legal capacity makes it more likely that a Member can litigate at the WTO, it should, by extension, serve to deter positive AD decisions beforehand. In other words, we expect legal capacity to matter not only in Geneva, but

also in the shadow of potential litigation, thereby limiting the need to make recourse to the WTO.

What, then, is legal capacity? We define legal capacity as the institutional resources required to prepare, prosecute and monitor a case, including legal, economic and diplomatic staff. Most intuitively, lawyers are needed to argue cases, but even where a government hires outside legal counsel, in-house expertise is crucial in providing back-up legal and political support, and, in particular, the provision of factual data for the legal case, as well as the assurance of political masters in the capital of the benefits of pursuing the case. In addition, in-house expertise is required for tailoring and monitoring the litigation strategy to fulfil broader goals, including domestic and foreign policy objectives.⁵ Government officials also play a key role in deciding which cases to file, the terms on which a negotiated settlement might be reached, or whether to escalate to the point of asking for authorisation to retaliate, for example. Legal capacity is thus more than just the number of lawyers on staff; it includes the broader bureaucratic apparatus that supports a government's interpretation of its obligations, and enforcement of its rights, under trade law.⁶

Beyond the numbers, more generally, legal capacity is also about experience. A government may have sufficient numbers of staff, but be at a disadvantage in litigation because these staffers are inexperienced, given high rates of turnover, for example, or because they are unfamiliar with the issues in hand, given a dearth of related case work in the past. To get at this side of the legal capacity equation, we conducted a survey of the WTO membership that included questions about their experience in WTO legal matters of a variety of sorts (see below), supplemented by over three dozen semi-structured interviews with Member representatives to the WTO.

Why is there a premium on legal capacity? We contend that one of the side effects of the WTO's rules-oriented system is that the DSU has *high* transaction costs for settling disputes

(Busch and Reinhardt 2003a; Shaffer 2003b). At the beginning of a case, the tight enforcement of standardised terms of reference, legal disincentives for disclosure, and the rules on standing all serve to place the onus on disputants to mobilise legally as soon as possible to avoid losses on technicalities later (i.e., having the panel or AB deem a certain argument outside its terms of reference). Also, in a way that few observers have recognised, the mere fact that powerful defendants can no longer significantly delay, or block, the establishment of a panel means that legal preparation carries more weight in consultations *ex ante*. *Ex post*, the burden is no less clear; after a ruling, the prospect of a compliance panel (and possibly appeal) and, subsequently, arbitration regarding the suspension of concessions, greatly increases the incentives for foot-dragging, motivating errant defendants to delay making concessions (Shoyer 1998; Hudec 2002).

The complexity of WTO law only compounds the problem. As the institution reaches into non-traditional areas, from health and safety standards to technical barriers to trade, intellectual property rights, and rules governing services like banking, insurance, and transportation, the staffs of trade-related bureaucracies have had to broaden their expertise. Indeed, the agreements that took effect in 1995 added nearly 30,000 pages of new law. In addition, WTO jurisprudence has also become more demanding of contextualised factual analysis.⁷ Not surprisingly, the voluminous body of WTO case law has grown accordingly, with individual rulings averaging hundreds of pages, and the *acquis* of case law totalling over 25,000 pages. As a result, the need for legal capacity has never been greater.

This new premium on legal capacity under the DSU is much less of a burden for most of the advanced industrial states, which generally maintain large, dedicated, permanent staffs tasked with WTO and trade law matters (Shaffer 2003a). Poorer countries, however, have few of these resources. As a special adviser to Mike Moore, the former WTO Director-General, conceded,

“America has a battery of lawyers to fight [in] its corner, whereas small countries scrimp.”⁸

And yet, the problem is deeper than merely obtaining expensive legal representation. A country where the “prime minister answers the switchboard,”⁹ to use Moore’s evocative phrase, is “less able to manage and absorb legal advice by virtue of a well-developed institutional structure,” making it a “less sophisticated buyer of legal advice” (Trade and Development Centre 1999, 45). Poor countries often lack the expertise and resources to systematically monitor foreign trade policy developments and proactively identify and pursue the best cases. Yet this critical stage occurs long before the hiring of legal representation for any litigation which may ensue. Indeed, as of 2000, a sizable minority of developing country members (27 of 99) did not have even a single permanent representative in Geneva (Michalopoulos 2001, 156-7), let alone sufficient staff to dedicate to dispute settlement out of all of the dozens of specialised committees and working parties in the WTO, not to mention ongoing multilateral, regional and bilateral trade talks.¹⁰ “The problem,” to quote a Colombian delegate, “is not a lack of information but too much of it.”¹¹

3. Survey and Interviews

To better measure legal capacity, we conducted a 21-page survey of WTO Member delegations.¹² From May 2005 through May 2007, we surveyed the delegations of each of the 150 member states in the WTO, including by email where those Members did not have offices in Geneva.¹³ 52 delegations responded in full as of May 2007. The survey respondents include a broad range of member states, both in terms of income and geographical diversity. They comprise all major users of the WTO dispute settlement system and a broad representation of those who have never used it, including a large number of least developed countries. For

example, of the 52 countries responding, 10 fall within the World Bank's "low income" classification, 16 are "lower middle income," 14 are "upper middle income," and 12 are "high income" countries. There are 9 respondents from the East Asia & Pacific region, 9 from Europe and Central Asia, 9 from Sub-Saharan Africa, 17 from Latin America and the Caribbean, 4 from South Asia, and 2 from the Middle East & North Africa.

The survey included questions that provide us data regarding objective facts and subjective perceptions across WTO Members relating to legal capacity. The resulting objective data derive from questions regarding the number of a Member's professional staff in Geneva and in its home capital engaged in WTO-related work; the existence of a specialised WTO dispute settlement division in its organisation; the longest cumulative years of experience of a current member of government dedicated to WTO matters; the use of private legal counsel in WTO disputes; and the Member's attendance in WTO committee meetings. Questions addressing subjective perceptions of legal capacity included whether turnover of WTO-related personnel was a problem; the level of overall support from the home capital to the Geneva mission; and the challenge of coordination among governmental ministries, in each case ranked on a scale of 1 to 5. The survey also asked for reasons behind countries' decisions to participate in different ways in WTO disputes and for subjective assessments of the determinants of WTO dispute outcomes.

As a first cut, it is worth noting that a lack of legal capacity weighs heavily on the minds of developing country representatives. We asked each delegation whether there had been potential WTO complaints its government had considered but chosen *not* to file. We followed that with a checklist of "main considerations that led your government to choose *not* to file [such] cases," and then with a checklist regarding "the main considerations that motivate your government to reserve rights as a third party, instead of filing its own complaint." In response, fully 56 percent

of the respondents cited the “high cost of litigation” or a “lack of private sector support” as chief reasons for not pursuing a complaint. An additional 9 percent cited “training for future disputes” as the rationale for third party intervention instead of an independent filing, meaning that 66% chose these capacity-oriented factors to explain why they intervened as a third party instead of filing their own complaint.¹⁴ By way of comparison, a smaller proportion (49 percent) of the respondents cited inadequate market power as a reason for not filing (“lack of remedy other than suspension of concessions,” “lack of credible ability to suspend concessions,” or “external political pressures”).¹⁵

Similarly, when we asked each delegation about the sources of advantage in WTO dispute settlement for the most powerful Members, legal capacity explanations predominated over market power ones. A striking 88 percent of the respondents answered that the advantages held by the largest Members comes from their greater legal capacity (such as, the “number and legal sophistication of government officials,” “experience of government officials with WTO dispute settlement,” their greater ability to afford the “high cost of WTO litigation,” and “greater private sector support”). This stands in stark contrast to the mere 48 percent who thought that the advantages of powerful Members derive from considerations related to market power (such as “reliance on suspension of trade concessions,” the “ability to apply external political (non-legal) pressure,” and the “lack of retrospective remedies”). Overall, our survey reveals that the Members’ delegations view legal capacity as *the number one issue* that shapes how effectively Members use the WTO dispute settlement system.

We complemented the surveys with semi-structured interviews with over three dozen Member delegates to the WTO, from a similar diversity of Members. We started the interviews with an open-ended question regarding the chief challenges for their country to make effective

use of the WTO dispute settlement system. We then followed up with questions covered in the survey, while letting the interviewee take the lead in focusing on those issues of most concern to him or her. The responses were sobering.

Most developing countries noted that they confronted serious challenges due to lack of resources. For example, a representative who handled dispute settlement from one of the larger Asian countries stated that “lack of resources is our main problem,” and noted problems tracing to the dearth of personnel, experience, and legal knowledge, exacerbated by linguistic challenges (since only English, French and Spanish are official WTO languages).¹⁶ Regarding the creation of a specialised dispute settlement unit, this representative stated that “we have considered it, but unfortunately do not have it.” Thus he handles complaints “alone.” It is “too much,” he said. “I can’t do it. I can take you back in my office and show you the files.” He raised his hands to indicate that the stack is a few feet high. As a representative from another Asian country responded, “the largest Members have experience and numbers that are difficult to match for smaller Members, which give them an edge in playing procedural games, and in bringing cases that attempt to influence the outcome of negotiations and interpretations.”¹⁷ As a smaller Central American delegation official stressed, “our mission faces many problems,” including “a lack of participation in WTO meetings, a lack of follow-up on issues, a lack of legal support, and a lack of human resources.”¹⁸

Yet our interviews revealed that the problem is not just in Geneva. To be sure, a number of representatives noted the lack of support from the *home capital*, where only a few personnel handle all WTO matters, is also a hindrance. An engaged representative from a Caribbean country stated that developing country delegates often feel “on their own” in Geneva.¹⁹ “We need better instructions, quicker instructions, more detailed instructions,” she said. In the words

of a representative from one of the smaller Asian Members, the support it received from the capital was clearly “inadequate,” and its personnel were “overstretched.”²⁰ Even one of the largest developing countries explained that support from the capital on dispute settlement “is bad.”²¹ The official commented that his country, which is relatively active compared to other members, takes decisions on disputes on an “ad hoc basis” with no system for review or decision-making and little legal assistance from the home capital or the private sector. He concluded, “we offer a good case for how things should not be done at the WTO.”²² On ranking home capital support, “I give a miserable F,” he said.

Similarly, a number of interviewees cited the difficulty of participating even just as a third party in WTO complaints because of lack of support from the home capital. A Latin American country cited one occasion on which it could not file a third party submission in time because the approval from capital took too long.²³ This same Latin American representative noted that even when they “get third party submissions from capital,” “they are not in the proper form” and do not make a “proper argument” for panels.²⁴ He complained that “they are written in a totally ineffective form, they are not clear, and it can be difficult to understand the substance of the argument.” Yet another Latin American representative stated that, even when it received approval to be a third party, the lack of clear guidance constrained its ability to participate effectively.²⁵ In the representative’s words, “we receive ‘guidelines’ but not concrete decisions,” which limits the ability to participate in a meaningful way in an organisation where legal details matter. Sometimes the Geneva mission can only obtain a general approval to participate as a third party, but cannot get approval of a written position within the time delay set by the panel. As a result, when faced with an important case involving systemic issues, this country only put forward a vague general position, and did so orally, rather than submit a written position

regarding the appropriate legal interpretation of the relevant WTO articles. Yet in a legalised dispute settlement system, this representative noted, vague third party general policy declamations are meaningless.²⁶

Many of our developing country interviewees cited problems with inter-agency collaboration as a complementary challenge. As a representative from a smaller Asian Member stated, “technically we are supposed to have intra-ministerial collaboration, but it is not functioning and has not been active.”²⁷ He maintained that there was a “lack of knowledge” and “lack of interest” in WTO matters in the home capital that made coordination among ministries a problem. A mid-sized Asian country offered the example of when it asked for assistance from the capital to identify non-tariff barriers that its exporters faced, barriers that the representative could raise and have addressed before the relevant WTO committees. He reported, however, that he “could not get the information because of lack of coordination in the capital.”²⁸

For many of these countries, the problem is not just lack of support from the home capital or lack of coordination between ministries, but a lack of experience and expertise in any ministry. Many interviewed developing country representatives saw the main problem to be that of diplomatic rotation, when personnel circulate within or among government departments as part of traditional civil service career paths. A mid-sized Latin American country noted that five years appears to be about the maximum time that people stay on WTO matters and then they leave for a better job, whether within government, to the private sector or for an international organisation.²⁹ A representative from a smaller Latin American country noted how the ministry assigns people to Geneva postings for two to three years, after which they will leave for an unrelated post.³⁰ An official from an Asian country similarly indicated that “turnover is a major problem because the [ministry] also handles trade promotion issues, and these professionals

often get assigned to foreign posts with minimal contact with WTO issues.”³¹ Yet another Asian country representative noted how its officials shift ministries, including between federal and state ministries, possibly being sent off to something “like the rural development department” where their WTO technical training clearly offers little use.³²

Although some commentators may suggest that legal capacity should not be an issue because private lawyers and the ACWL are available, our interviewees indicated that a WTO Member needs some capacity to make effective use of private law firms and the ACWL. Outside lawyers who work with developing countries on WTO matters are also quick to stress this point about the lack of continuity of personnel and lack of support for cases from the home capital.³³ Indeed, they noted how they see good people in the mission who suddenly have to leave because their term is up and they are replaced by someone who will take at least a year “to learn the ropes.” They further explained that this lack of continuity undermines the expertise that has been built up. In fact, in conducting the survey, we found that representatives need some legal capacity just to understand (and thus respond to) our survey. For some representatives, even the basic WTO dispute settlement terms used in the survey required some explanation.

4. Hypotheses, Data and Variables

Hypotheses

We propose two hypotheses:

H1. A country with greater legal capacity is *more likely* to bring a suit to the WTO against an AD duty imposed on its firms by a trade partner.

H2. A country with greater legal capacity is *less likely* to have a trade partner impose an AD duty against it, given its more credible threat to file for WTO dispute settlement.

The first hypothesis addresses the role of legal capacity in enabling a country to take

advantage of the options afforded by the WTO to roll back a partner's trade-restrictive measure in violation of WTO rules. The second (corollary) hypothesis addresses the deterrent effect of such legal capacity. This corollary hypothesis follows if we are right that target countries with greater legal capacity will be more prone to file suit against an AD measure at the WTO. If so, then AD-using countries should anticipate this potential reaction and will less likely impose AD duties against imports from the target country.

The explanation for the corollary hypothesis has less to do with individual firm behaviour than with a country's administration of its AD laws. Firms petitioning for AD duties may not be concerned about the prospect of a WTO filing because they receive the benefits of AD protection, or of a market-sharing agreement, during the drawn-out period in which litigation and negotiation occurs. The government imposing the AD duty, however, faces a variety of additional costs if its measure is challenged at the WTO (Busch, Raciborski, and Reinhardt 2007). First, it will have to bear the expenses involved in litigating a defence, and these are nontrivial. Second, a WTO legal challenge may put at risk not just the AD decision being challenged, but the country's AD statute or procedures more generally, which would reduce the government's flexibility to support import-competing businesses in the future. The US has certainly confronted such costs in repeated WTO disputes, e.g., *1916 Act*, *Zeroing*, *Byrd Amendment*, and *Oil Country Tubular Goods Sunset Review*. Ignoring such legal ruling is problematic for a government since the government also wishes to protect its export interests against third country infringement of WTO rules. A government contemplating non-compliance with a panel ruling on this front thus raises the problem of "dirty hands," complicating its ability to get others to settle on favourable terms in subsequent complaints of its own. Third, while the firms petitioning for import relief would not be directly affected, the government that imposes an

AD measure also faces increased odds of foreign retaliation if a WTO complaint is filed. Such retaliation, whether through authorised suspension of concessions via a dispute settlement ruling, or through “vigilante justice” achieved by AD actions by the target country (Bown 2005), is surely more likely when the foreign government has secured a legal victory at the WTO. As a result, the target’s legal capacity, which makes it more likely to file a WTO complaint, should also deter fellow WTO member states from imposing AD measures against its firms in the first place. Hence our corollary hypothesis.

Before turning to the empirical tests, it is important to keep in mind the alternative explanation for the phenomena we seek to explain. Even if legal capacity played no role in WTO dispute settlement, developing countries might still be less likely to file and win a WTO dispute³⁴ because of power-oriented disadvantages. In particular, the traditional problem for developing countries is their lack of market power, which means they cannot impose punitive tariffs that would hurt a defendant more than they would hurt themselves (Mavroidis 2000; Bown 2003). Such retaliation is said to be the key to the WTO’s self-help enforcement system (Vermulst and Driessen 1995, 147). If a poor country knows it cannot credibly retaliate after achieving a legal victory, it may choose not to bring suit in the first place; even if it did file the case, it would fail to induce concessions from more powerful defendants. Developing countries are also at a disadvantage because they derive benefits, often greater than the potential gains in any one dispute, from aid or trade preferences donated by rich (potential) defendant states. Aid and preferences, such as the Generalized System of Preferences (GSP), are not legally bound within the WTO regime, and thus can be removed with impunity by the donor (Özden and Reinhardt 2005). The prospect of losing these cash cows hangs over the head of every recipient, deterring WTO lawsuits and weakening the complainant’s resolve even if it *does* file a complaint.

Data and Variables

We test our hypotheses using data combined from two main sources. The first is our survey of WTO delegations, which provides detailed information about variations in dispute-related legal capacity across member states. The second is a dataset of antidumping investigations and measures imposed by 17 different countries during the period 1995-2005. This dataset provides a framework for examining the “dogs that don’t bark,” that is, cases that might have been, but were not, brought before the WTO as disputes, as well as instances of trade protection that were contemplated but were not imposed in the first place.

From our survey, we have created a combined index of legal capacity that we call the *Capacity Score*. It sums the standardised values of five separate questions in the survey.³⁵ The questions are:

1. Does your government have a specialised WTO dispute settlement division? If so, how many professional staff does this division have?
2. What is the longest cumulative amount of time that any single current member of your government’s professional staff dedicated to WTO matters (including, prior to 1995, GATT matters) has served, in years?
3. Is turnover of your WTO-related professional staff a problem for your government?
4. What proportion of the cost of external legal assistance for your government’s WTO disputes have *private firms or trade associations* financed?
5. Which meetings of standing WTO councils and committees do the members of your mission’s professional staff attend regularly, or close to regularly? Please check all that apply [out of a list of 23 bodies, which we sum into a total count].

We chose these survey questions for the index because they most closely tapped into the themes, as highlighted above, that WTO delegations emphasised most in the complementary interviews. Note, for example, that these questions do not focus on the size of each country’s Geneva

delegation. Rather, they speak in particular to the capabilities for dealing with WTO dispute settlement back in the *home capital*. They also emphasise the experience and quality of a country's representation on WTO matters, as reflected in staff sources of institutional memory, staff turnover, and staff knowledge of up-to-date legal issues and policy developments arising in the many WTO agreements (proxied by attendance at meetings). Finally, the measure addresses the government's coordination with the private sector on dispute settlement matters, embodied here by the extent of private sector financing for disputes.

The resulting variable, *Capacity Score*, ranges on a continuous scale from -5.4 to 8.1, with higher values denoting better legal capacity. In the survey sample, its mean is 0 and its standard deviation is 2.8. It varies only modestly, not highly, with a country's World Bank income category (regression $R^2 = 0.19$) or with the size of its Geneva delegation as listed in the June 2005 WTO Directory ($R^2 = 0.20$). While we cannot identify specific countries due to the terms of consent for our survey, the list of governments with the highest levels of *Capacity Score* accords quite well with the conventional wisdom on this subject.

As a validity check, we obtained the International Country Risk Guide's (ICRG) subjectively-coded variable, *Bureaucratic Quality*. This widely-used variable (e.g., Knack and Rahman 2007) assesses whether a government's bureaucracy is "autonomous from political pressure" and has an "established mechanism for recruitment and training," such that it has "the strength and expertise to govern without drastic changes in policy or interruptions in government services." *Bureaucratic Quality* ranges from 0 to 4, with high values denoting better bureaucracies. It does not speak directly to trade-related capacity, let alone WTO dispute settlement. As a result, it correlates positively, but not too strongly (regression $R^2 = 0.21$) with our *Capacity Score*. We use this variable as a cross-check for our survey-derived measure in

some analyses below.

To see how these variations in legal capacity affect dispute initiation and underlying patterns of import protection, we use an indispensable data platform compiled by Chad Bown (2006), the Global Antidumping Database (version 2.1). From it, we obtain a list of 1934 antidumping investigations conducted by 17 different countries³⁶ against firms in 61 fellow WTO member states during the years 1995 through 2005. (We do not include any observations whose country targets were not Members of the WTO in the year the AD investigation was initiated). Lack of survey response from some of these target countries leaves us with a usable sample of 1321 investigations against firms in 33 target countries.³⁷ This accounts for 46 percent of all reported AD investigations worldwide in our period.

We analyse two dichotomous dependent variables. The first, *AD Measure*, is 1 if the country conducting the investigation concluded it with an antidumping measure; 0 otherwise. We define “measure” broadly, including not only ad valorem or specific duties, but also trade-restrictive commitments made by target firms under threat of such duties (in the form of price undertakings and suspension agreements).³⁸ 849 (64 percent) of the 1321 observations ended with one of these types of affirmative AD actions.

The second dependent variable, *Complaint*, is 1 if the country targeted by an AD action filed at least one WTO complaint against that measure; it is 0 otherwise.³⁹ 76 (9 percent) of the 849 AD measures were challenged in this fashion. Of the 33 countries named in those measures, 12 initiated at least one of these WTO disputes.

To isolate the impact of legal capacity on the pattern of WTO complaints and import protection, it is vital to control for the impact of market power, or the ability of one state to shift the terms of trade in its favour by imposing trade restrictions. A number of other studies

conclude that countries with greater market power are more likely to file WTO complaints (e.g., Bown 2005) and more able to deter their partners from imposing trade restrictions against them (e.g., Blonigen and Bown 2003; Busch, Raciborski, and Reinhardt 2007). Our analyses incorporate the standard measure of such market power in the variable *Export Dependence of Investigating Country*, which tallies the antidumping user's exports to the target country as a proportion (from 0 to 1) of its exports to the world, in the year the investigation was initiated. A higher value means the target country has greater market power. This in turn should increase the odds that the target will file a WTO complaint, because it expects to have greater leverage should it win the authority to suspend concessions. The average of *Export Dependence* is 0.11 across the 1321 AD investigations in the sample.⁴⁰

We also control for (the natural logarithm of) each state's gross domestic product (GDP) and level of economic development, in the form of logged per capita GDP, in constant 2000 USD prices.⁴¹ (As noted earlier, our survey-derived measure of dispute-specific legal capacity is not very strongly correlated with per capita income.) Finally, we observe that the United States and other antidumping users designate certain countries as "Non-Market Economies" (NMEs) for the purposes of "less-than-normal-value" pricing assessments. In such cases, the authorities typically base their "normal value" figure on the cost of the relevant factor inputs in market economies of comparable levels of development, which also produce the goods in question. This use of substitute data tends to make the case easier to prove. We accordingly add a dichotomous control variable, *Non-Market Economy*, to flag such country targets.⁴² Four countries⁴³ are NMEs at some point in the dataset, constituting 13 percent of the investigations. Summary statistics are presented in Table 1.

[Insert Table 1 about here]

We estimate two sets of two probit models (four in total). The first set takes the 849 positive AD measures and asks *whether the target chooses to file a WTO complaint*. The equation for Model 1 is thus

$$\Pr(\text{Complaint} = 1) = F(\alpha_0 + \alpha_1[\text{Capacity Score}] + \alpha_2[\text{Export Dependence}] + \dots + \varepsilon) \quad (1)$$

where F is the standard normal cumulative density function. As a sensitivity test, we also estimate a version of the same equation, Model 2, with *Bureaucratic Quality* substituted in place of *Capacity Score*.

The second set of models start with all 1321 antidumping investigations, asking *whether the outcome is an affirmative AD measure* (i.e. whether the AD-imposing country is deterred from levying AD duties on the target). The equation for Model 3 is:

$$\Pr(\text{AD Measure} = 1) = F(\beta_0 + \beta_1[\text{Capacity Score}] + \beta_2[\text{Export Dependence}] + \dots + \mu_i + u) \quad (2)$$

Model 3 here includes fixed effects, μ_i , specific to each investigating country i , because the antidumping users differ widely in their average propensity to conclude cases affirmatively (from the US, on the low end, with 46 percent of its investigations ending with duties, to India, on the high end, with 85 percent ending with AD measures). We estimate again a version of this equation, Model 4, with *Bureaucratic Quality* in place of *Capacity Score*.

Our hypotheses are that $\alpha_1 > 0$ under the first two models, and that $\beta_1 < 0$ under the third and fourth models. To be conservative, we report heteroskedastic-robust standard errors clustered by the targeted country for all four models.

Before continuing to the results, we should note that it is possible that the errors in the *AD Measure* and *Complaint* equations are correlated, which could hypothetically bias the findings. We confront this possibility directly, in a sensitivity test, using a Heckman probit estimation.

Those results, as we will spell out, are no different from the main single-equation probit estimates reported below. However, some scholars have recently raised questions about the appropriateness of the assumptions of the Heckman model for studies of international law.⁴⁴ Thus, we present the single-equation estimates as our main findings in order to demonstrate that our claims hold up even in straightforward tests that do not rely on the potentially fragile assumptions required for more sophisticated econometric techniques.

5. Results

To begin, we generated a simple graph plotting the proportion of the 849 AD measures that each target country challenged in WTO disputes. This is Figure 1, whose x -axis is the country's value of *Capacity Score*. The size of the "bubble" for each country in Figure 1 is proportional to the number of AD measures against it in our sample. If our argument is correct, there should be a positive trend in the graph, which is indeed what we see. Country 25, whose firms were the target of 197 of these AD measures, is obviously driving some of this trend. But even without it, four other high-capacity countries (2, 19, 6, and 21) file WTO complaints against a larger share of AD measures than any other country in the dataset, save Country 11.

[Insert Figure 1 about here]

The results of Models 1-2 and 3-4 are shown in Tables 2 and 3, respectively. The evidence consistently supports our argument. The indicators of legal capacity are substantively and statistically significant predictors of whether a country targeted by an AD action chooses to file a WTO complaint. Moving back in the process, they also strongly predict whether the country

conducting an AD investigation elects to impose AD measures on that target in the first place. These findings shine through even though we control for the role of market power and other important case characteristics, and they are robust to a number of other challenges as well.

[Insert Tables 2 and 3 about here]

Models 1 and 2 tell us whether this finding holds up in the multivariate context. Both models provide a more than adequate fit to the population, as evidenced by the model χ^2 test statistics. Consistent with the market power perspective and as revealed by *Export Dependence*'s positive coefficient, AD targets with greater leverage over their partners' exports are more likely to challenge their partners' AD actions before the WTO. What is most important for our purposes, however, is the coefficient estimate for *Capacity Score*, which is positive and statistically significant (with two-tailed $p < 0.01$). Controlling for its level of development, market size, and bilateral trade share, a country with greater WTO-specific legal capacity is significantly more likely to file a WTO complaint against another Member's AD action.

Legal capacity thus has a strong substantive impact on the odds of filing WTO disputes, after controlling for market power. Holding all other variables at their sample means, using the estimates from Model 1, the predicted probability of a WTO complaint is 0.013 [0.002, 0.058] for a country with the sample's 10th percentile value of *Capacity Score*.⁴⁵ Moving to the sample's average level of legal capacity increases the predicted probability of a complaint to 0.056 [0.027, 0.106]. At the 90th percentile value, the odds rise again, to 0.21 [0.084, 0.407]. Note again that these figures hold the target's market power *constant*. In comparison, using the same counterfactual technique, we find that changing the target's market power (*Export Dependence*)

from its 10th to 90th percentile values in the sample increases the predicted probability of a WTO dispute from 0.04 [0.02, 0.08] to 0.09 [0.05, 0.15]. Legal capacity thus appears to make *at least* as much substantive difference as market power.

Consider one other counterfactual before moving on. How many more WTO complaints would there have been (in this 1995-2005 period) if all of these 32 country targets had possessed the US level of legal capacity, assuming that these 849 AD measures would have remained in place? Model 1's estimates suggest that there would have been **134 more** [50, 263] WTO disputes against these AD measures if that were the case. In reality, there were 76 complaints filed. That is, such an increase in legal capacity could have caused a *176 percent increase* in WTO complaints over AD measures. This is truly a remarkable contrast.

Model 1's findings are robust to a variety of changes. For starters, as Model 2 reveals, an alternative measure of capacity, *Bureaucratic Quality*, also successfully predicts the pattern of WTO complaints. That variable taps into a rather different, and more generic, source of capacity, however, which is probably why its substantive impact in Model 2 is a bit smaller than that of *Capacity Score* in Model 1.⁴⁶ Indeed, both remain statistically significant and positive if *Bureaucratic Quality* is added to Model 1. The coefficient of *Capacity Score* also stays positive and statistically significant if we alternately drop all the measures against, say, China or the US; if we add a variable denoting that the target is itself an antidumping user (and thus a candidate user of "vigilante justice"); if we drop any one of the five component questions from the *Capacity Score* index; or if we control for the number of professional staff in the target country's Geneva WTO delegation, as listed in the annual editions of the WTO Directory.⁴⁷ Interestingly, in keeping with our argument that large Geneva staffs by themselves are not sufficient, this staff variable is not even close to statistically significant when added to Model 1, with or without

Capacity Score.

Next we move one step backwards. Does legal capacity deter countries from imposing AD duties in the first place? Consider the simple descriptive data shown in Figure 2. Among the most frequent targets of AD investigations (i.e., the large bubbles in the figure), those with the least legal capacity (e.g., Countries 5, 10, 11, and 12) are subject to a higher rate of AD measures than those with higher levels of capacity (e.g., Countries 3, 6, 18, 21, and 25).

[Insert Figure 2 about here]

This association holds up in multivariate testing, in Models 3 and 4. Both models fit the population well, with $p < 0.001$. The overall results generally fit with intuition, insofar as AD investigations are significantly more likely to end in affirmative measures when (a) the targets are non-market economies, (b) the investigating country is a “new user” (at a lower level of economic development), and (c) the investigating country has a larger market and thus greater leverage on the target’s export prices.

Turning to our hypothesis, the coefficient of *Capacity Score* is indeed negative and statistically significant. Controlling for the other factors, countries with greater legal capacity are *less* likely to be subjected to duties if AD investigations are conducted against their firms. Using the same technique as before, but for Model 3, the estimated probability that an investigation will end in an AD measure is 0.73 [0.68, 0.77] for a country whose *Capacity Score* is at the 10th percentile level in the sample. It drops to 0.67 [0.65, 0.69] for a country with the average level of legal capacity, and then to 0.60 [0.54, 0.66] for a country at the 90th percentile level. Remember once again that these statistics hold market power constant. For comparison, it is revealing to

find that the impact of the target's non-market economy status is about the same as that of its legal capacity, increasing the odds of an AD measure from 0.65 [0.62, 0.67] to 0.80 [0.73, 0.85].

How many fewer AD measures would there have been, against these 33 WTO member states during the 1995-2005 period, had they all possessed a level of legal capacity equal to that of the United States? The answer, going by Model 3's estimates, is **123** [79, 169]. Since, for reference, there were 849 in actuality, this amounts to a hypothetical *14.5 percent reduction* in the number of AD measures. We do not attempt to estimate the economic impact of these would-be AD measures, but by any account it would be substantial, especially since it bears most on exports from the poorer developing countries in our survey sample. Still, it appears that the *deterrent* impact of legal capacity is somewhat smaller than its impact on WTO dispute initiation. Given the large numbers of AD actions, WTO complaints against them are, after all, quite rare, even from targets with very high legal capacity. Thus, moving backwards, this attenuation of the impact of our variable is not surprising, as the deterrent value of legal capacity exists only because of how it affects the anticipation of a WTO dispute.

Model 3's findings are as robust as those of Model 1. The sign and statistical significance of *Capacity Score* does not change if we drop all investigations against the top two investigation targets, the EU and China. Model 4's results show, once again, that the alternative, but more generic measure of capacity, *Bureaucratic Quality*, also significantly affects the odds of an affirmative AD action. Indeed, both variables work if we add *Bureaucratic Quality* to Model 3. Another recurring theme is that the size of the target's WTO professional staff in Geneva makes no difference if added to the model (and does not alter the findings for *Capacity Score*); nor does a variable denoting that the target itself is an antidumping user. The results also stay the same if we recode *AD Measure* as 1 for the cases in which the preliminary investigation was positive

even if the final determination was negative.

For a final sensitivity test, we re-estimated Models 1 and 3 jointly, using the Heckman probit technique. Note that the resulting model is identified not only by the standard assumption about the normality of the joint distribution of errors, but also by the inclusion of some unique and powerful predictors of *AD Measure* (*Non-Market Economy* and the country-specific fixed effects) in the first stage equation. As it turns out, the estimated coefficients (and standard errors) of *Capacity Score of Target Country* in the *AD Measure* and *Complaint* equations are, respectively, -0.034 (0.014) and 0.117 (0.044), yielding two-tailed $p < 0.05$ in both cases. These estimates are entirely consistent with those presented for Models 1 and 3. We conclude that our findings regarding the importance of legal capacity are not merely an artifact of selection bias.

6. Conclusion

Legal capacity matters. Members of the WTO who possess greater legal capacity enjoy a distinct advantage over the majority of countries for whom the requisite institutional resources are scarce. We find, in particular, that those countries that are abundant in legal capacity are *more likely to challenge* AD duties brought against them, and *less likely to be targeted* by AD duties in the first place. These results are especially striking in light of the fact that we control for these countries' market power, which makes credible their threat to retaliate. Doing so allows us to speak directly to the conventional wisdom, which says that power considerations are paramount in explaining these outcomes. In fact, as our evidence shows, legal capacity affects patterns of dispute initiation and underlying antidumping protection among WTO members *at least* as much as market power, if not more.

Several implications follow. First, investments in legal capacity can promise sizable returns,

especially for developing countries. As our results make clear, even modest gains in legal capacity can result in greater use of WTO dispute settlement by poorer complainants and greater deterrence of protectionist procedures against their exports. In our view, legal capacity is thus a crucial clue in explaining why developing countries file WTO complaints less frequently than developed countries do when confronted with potentially challengeable protectionist measures by their partners. It also helps explain why more AD investigations against their firms, as opposed to those against firms located in wealthier countries, end with the imposition of duties.

Second, our findings suggest that experience, and not simply number of personnel, matters most. Sometimes a country's development of such legal capacity is sparked by being a respondent, as in the case of Brazil.⁴⁸ In other cases, such as Bangladesh (which was the first and only least developed country to file a WTO complaint), its ability to overcome internal perceptions of political risks, and its resulting successful settlement of its complaint against an Indian AD measure, so motivated the government that it created a new specialised WTO cell in its department of commerce, thereby increasing its legal capacity for the future.⁴⁹ Our study shows that countries that invest in developing professional staff who retain expertise in WTO matters over time, that develop specialised WTO dispute settlement units, and that work with their private sectors are better-positioned to roll back and deter barriers to their exports.

Third, as our counterfactual exercises reveal, all WTO members would be economically better off if more countries enjoyed greater legal capacity. Indeed, our estimates show that not only would there be more litigation over AD duties, but that, as a consequence, there would be far fewer AD duties to begin with, if only Members had the resources that the US (and a few others) dedicate to trade policy and law.⁵⁰ In this light, the contributions being made to building legal capacity in developing countries promise to yield returns not only for these countries, but

for global economic welfare as well. The challenges, of course, remain—those of building legal capacity in light of political pressures in the largest developed countries to protect domestic producing interests, as well as the constrained resources, other immediate needs and general governance challenges that many developing countries face. Our study, nonetheless, demonstrates the benefits that can be obtained.

Table 1: Descriptive Statistics

Variable	Mean	SD	Min	Max
AD Measure	0.643	0.479	0	1
Complaint†	0.089	0.286	0	1
Capacity Score of Target Country	2.901	3.797	-3.597	8.127
Bureaucratic Quality of Target Country‡	3.167	0.864	1	4
Non-Market Economy Status	0.133	0.340	0	1
Export Dependence of Investigating Country	0.106	0.145	0	0.886
Log GDP of Investigating Country	27.357	1.579	24.550	30.011
Log GDP of Target Country	27.749	1.704	21.941	30.011
Log Per Capita GDP of Investigating Country	8.714	1.470	5.923	10.509
Log Per Capita GDP of Target Country	8.677	1.487	5.769	10.561

$N = 1321$, except † ($N = 849$) and ‡ ($N = 1319$)

Number of investigating countries = 17

Number of target countries = 33

Average number of investigations per target country = 40.0

Years = 1995-2005

SD = standard deviation

Table 2: Probit Model of WTO Complaints Against AD Measures

Estimation: Dependent Var:	Model 1 Probit Complaint		Model 2 Probit Complaint	
	Coeff.	SE	Coeff.	SE
Constant	-8.473	(5.199)	-8.651	(5.670)
Capacity Score of Target Country	0.145**	(0.054)	—	—
Bureaucratic Quality of Target Country	—	—	0.664*	(0.321)
Export Dependence of Investigating Country	1.460**	(0.252)	1.985**	(0.530)
Log GDP of Investigating Country	0.352*	(0.178)	0.333	(0.177)
Log GDP of Target Country	0.034	(0.135)	-0.008	(0.113)
Log Per Capita GDP of Investigating Country	-0.220	(0.126)	-0.225	(0.125)
Log Per Capita GDP of Target Country	-0.274	(0.170)	-0.255*	(0.121)
<i>N</i>	849		847	
Freq (Complaint = 1)	76		76	
Years	1995-2005		1995-2005	
Countries Imposing AD Measures	17		17	
Countries Subject to AD Measures	32		31	
Model Test	$\chi^2(6) = 40.1^{**}$		$\chi^2(6) = 16.1^*$	
Fit to Sample, Pseudo- R^2	0.167		0.172	

* $p < 0.05$; **, $p < 0.01$. All tests of statistical significance are two-tailed. Robust standard errors clustered by the country targeted by the AD measure are in parentheses.

Table 3: Probit Model of Results of AD Investigations

Estimation: Dependent Var:	Model 3 Probit AD Measure		Model 4 Probit AD Measure	
	Coeff.	SE	Coeff.	SE
Constant	-30.977*	(14.309)	-27.659*	(13.115)
Capacity Score of Target Country	-0.036**	(0.013)	—	—
Bureaucratic Quality of Target Country	—	—	-0.136*	(0.056)
Non-Market Economy Status	0.454**	(0.138)	0.392**	(0.142)
Export Dependence of Investigating Country	0.392*	(0.173)	0.192	(0.244)
Log GDP of Investigating Country	2.897**	(0.833)	2.772**	(0.806)
Log GDP of Target Country	0.031	(0.025)	0.040	(0.031)
Log Per Capita GDP of Investigating Country	-5.406**	(1.330)	-5.350**	(1.337)
Log Per Capita GDP of Target Country	-0.017	(0.033)	-0.028	(0.041)
<i>N</i>	1321		1319	
Freq (AD Measure = 1)	849		847	
Years	1995-2005		1995-2005	
Countries Conducting AD Investigations	17		17	
Countries Subject to AD Investigations	33		32	
Model Test	$\chi^2(23) = 4951.7^{**}$		$\chi^2(23) = 7655.6^{**}$	
Fit to Sample, Pseudo- R^2	0.127		0.126	

* $p < 0.05$; **, $p < 0.01$. All tests of statistical significance are two-tailed. Robust standard errors clustered by the country targeted in the AD investigation are in parentheses. The model includes fixed effects specific to the investigating country, which are omitted from the table to save space.

Figure 1. Proportion of AD Measures Subjected to WTO Complaints, by Capacity Score, 28 Target Countries, 1995-2005⁵¹

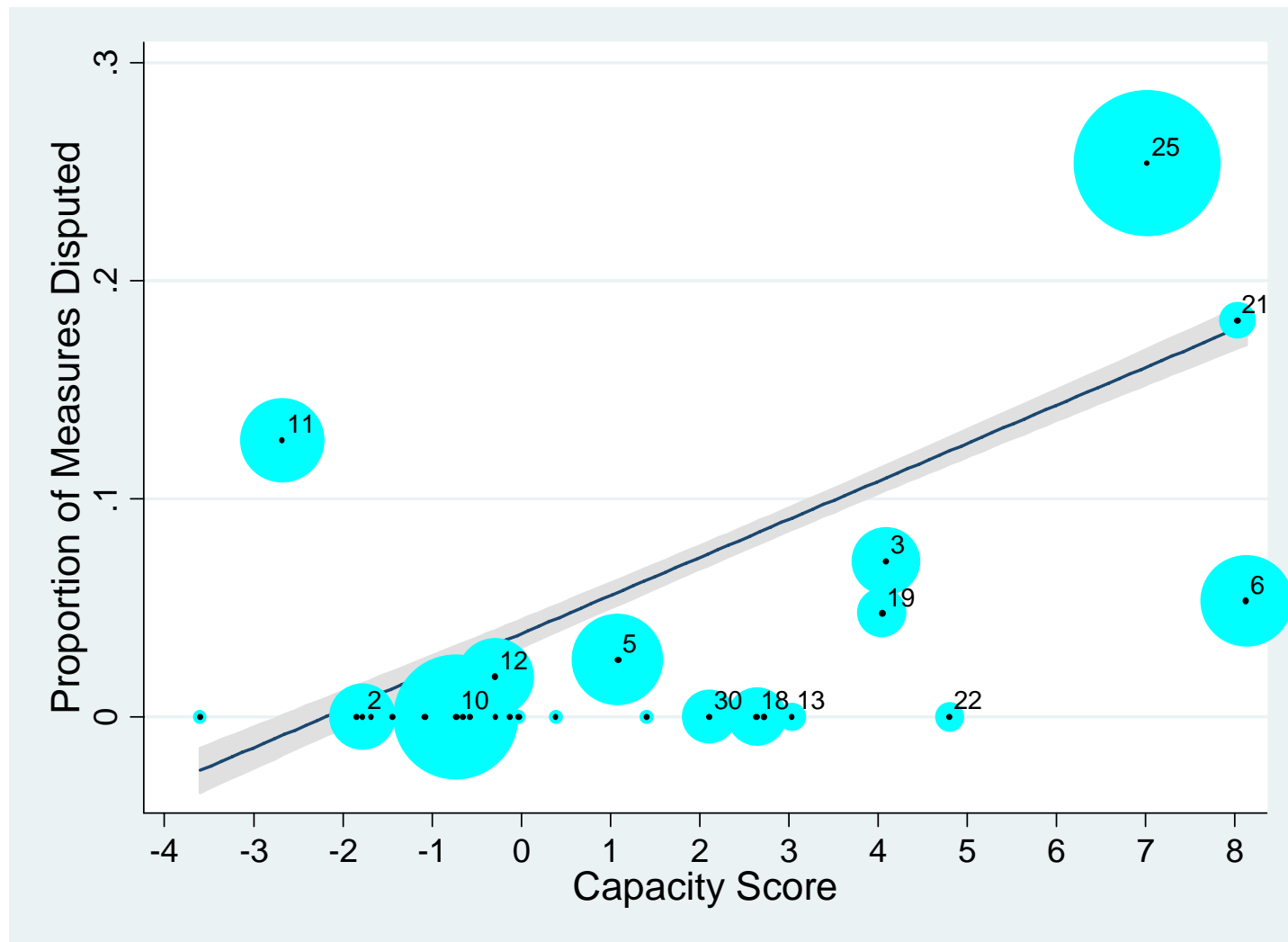
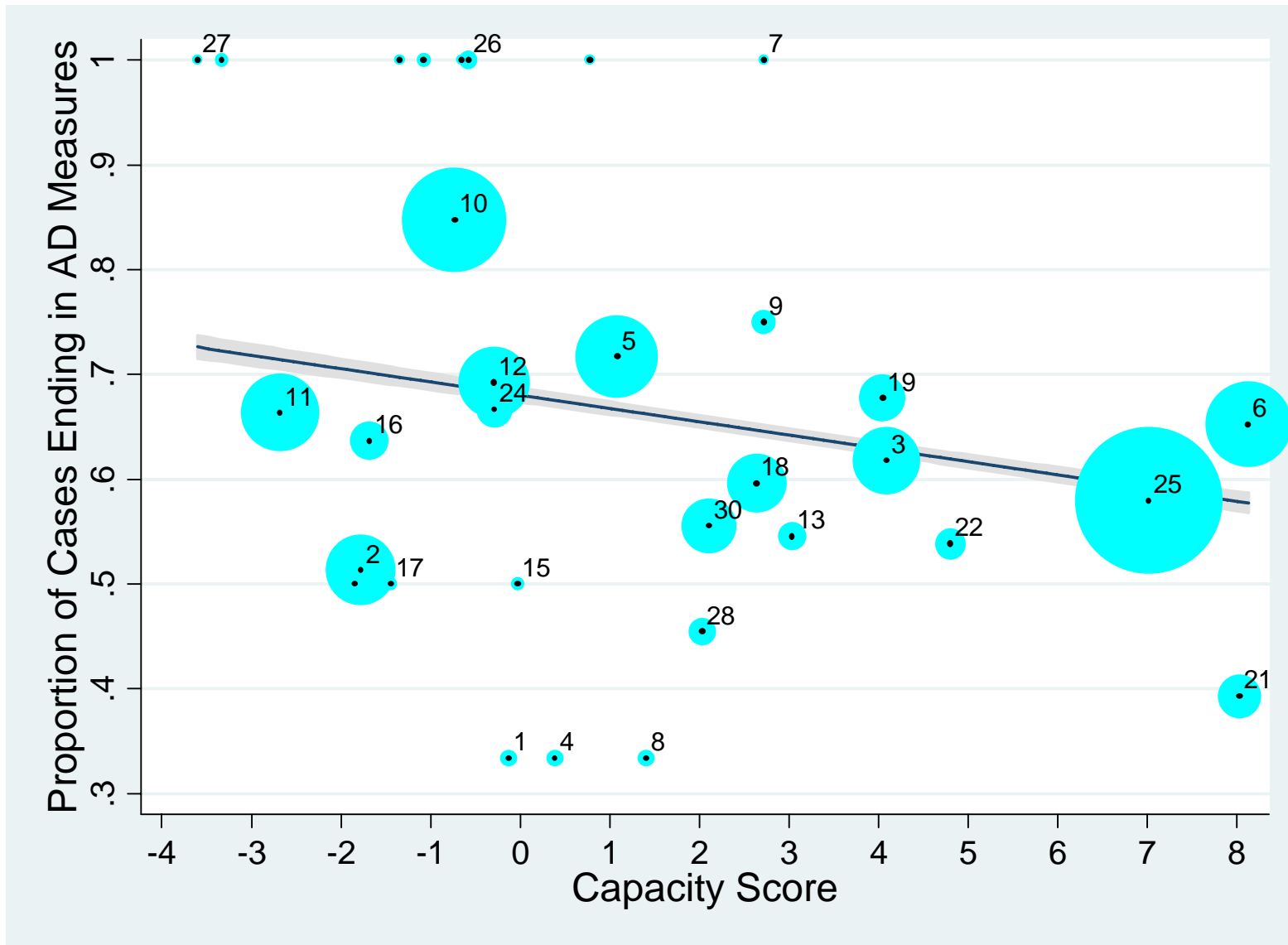


Figure 2. Proportion of Investigations Ending in AD Measures, by Capacity Score, 32 Target Countries, 1995-2005



Endnotes

¹ For example, ten developed countries each have contributed at least one million dollars (and some more than three million) to the Advisory Centre on WTO Law (ACWL), the most important source for legal assistance to developing countries in WTO dispute settlement. The list of such donors includes Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom. Notably, the US, the European Union (EU), and Japan have not provided any financial support to the ACWL (although some individual EU member states have done so).

² There is some ambiguity in DSU rules, in particular regarding whether an article 21.5 proceeding on compliance must precede an article 22.2 request for authorization of retaliation. What we describe, however, has been WTO practice.

³ Whether or not one normatively supports antidumping procedures, they clearly provide protection to domestic producers against foreign trade, reducing competition in the domestic market and increasing prices for consumers (a category which includes domestic industries purchasing the protected products as inputs).

⁴ These calculations are quite complicated, and subject to many alternatives, exceptions and other nuances. In general, however, according to Article 2.1 of the Agreement on Implementation of Article VI of the GATT 1994 (Antidumping), “a product is to be considered as being dumped... if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.” Dumping is thus deemed to occur even if the cost of production is lower than the export price (i.e. even where the exporter still makes a profit).

⁵ This point was made by Frieder Roessler, Director of the ACWL, as well as interviewed counsel in private law firms.

⁶ This definition is in keeping with Bown (2005).

⁷ E.g., the Appellate Body’s *Shrimp Products* report (WTO 1998c) rejected a generic analysis based on categories of trade measures in favour of a fact-intensive analysis based on the “specific case.” The AB’s *Hormones* report (WTO 1998b, para. 133) likewise applied a fact-centered approach based on an “objective assessment” of “the evidence presented to the panel.” Accordingly, for its complaint against Argentina’s customs treatment of US textiles, the US had to provide data on measures applying to 118 separate tariff categories (WTO 1998a, para. 61).

⁸ *BusinessWorld*, December 6, 2000, 1.

⁹ *Financial Times*, November 29, 1999, 2.

¹⁰ To give examples, a smaller Asian developing country Member noted that regional negotiations and agreements have taken away personnel who could otherwise be available on WTO matters. A member of ASEAN went so far as to say regarding “free trade and regional trade agreements,” that it seems “it’s all we do now.” Andean and Central American countries engaged in FTA negotiations with the US noted the same challenge. Author interviews, Geneva, July 2005.

¹¹ *Independent*, July 18, 1999, 13.

¹² A copy of the survey is available at userwww.service.emory.edu/~erein/research/survey.pdf.

¹³ We attempted to be present as frequently as possible when the survey respondent filled the responses to ensure that the wording of the questions was unambiguous and understood in the same way by all respondents. We kept track of this in order to control for the manner in which the survey was completed. We found that the manner of completing the survey had no impact on our findings.

¹⁴ Third parties only have limited rights in the proceeding to make one (usually brief) written and oral presentation.

¹⁵ 49 percent cited weak legal merits as a reason for not filing some complaints.

¹⁶ Author interview, July 12, 2005.

¹⁷ Author interview, July 19, 2005.

¹⁸ Author interview, July 22, 2005.

¹⁹ Author interview, July 18, 2005.

²⁰ Author interview, July 14, 2005.

²¹ Author interview, July 20, 2005.

²² Author interview, July 19, 2005.

²³ Author interviews, July 21, 2005.

²⁴ Author interview, July 21, 2005.

²⁵ Author interview, July 15, 2005.

-
- ²⁶ Id.
- ²⁷ Author interview, July 14, 2005.
- ²⁸ Author interview, July 14, 2005.
- ²⁹ Author interview, July 13, 2005.
- ³⁰ Author interview, July 19, 2005.
- ³¹ Author interview, July 19, 2005.
- ³² Author interview, July 20, 2005.
- ³³ Author interview with a member of the Advisory Centre on WTO Law and attorneys with US law firms, July 2005.
- ³⁴ Again, “winning” in our terms means inducing liberalisation by the defendant, an entirely separate matter from the direction of any WTO rulings.
- ³⁵ The standardisation is performed on the survey sample. Four of the questions contribute positively to *Capacity Score*, but higher values of the turnover question *subtract* from it.
- ³⁶ The investigating countries are Argentina, Australia, Brazil, Canada, China, Colombia, the European Union, India, Indonesia, Mexico, New Zealand, Peru, South Africa, South Korea, Turkey, the United States, and Venezuela. Bown’s version 2.1 dataset also includes AD investigations by Japan and Taiwan, which together account for a very small number of AD investigations (25) during our sample period (for Taiwan, 2002-2005). These are dropped from our analyses due to a variety of missing data limitations.
- ³⁷ As per usual when dealing with WTO matters, we treat the European Union as one “country” for statistical purposes, since antidumping matters and WTO disputes are handled by the Commission under the EU’s common external trade policy.
- ³⁸ *AD Measure* does not, however, count positive preliminary duties if the final decision was negative. This occurred in 142 of our 1321 cases. Altering the definition of *AD Measure* to count those as well makes no difference for the findings reported below on the impact of *Capacity Score*.
- ³⁹ Version 2.1 of Bown’s (2006) dataset matches WTO disputes to the corresponding antidumping actions.
- ⁴⁰ These trade data are from the United Nations’ COMTRADE dataset.
- ⁴¹ Source: the World Bank’s World Development Indicators.
- ⁴² We apply the US list of NMEs to all antidumping users in our analysis, presumably with little loss of generality. We thank Tim Truman of the US International Trade Administration at the Department of Commerce for providing this information.
- ⁴³ China, Estonia, Georgia, and Hungary.
- ⁴⁴ E.g., Simmons and Hopkins (2005).
- ⁴⁵ Here and elsewhere, figures in brackets represent the bounds of a 95 percent confidence interval.
- ⁴⁶ In Model 2, going from its 10th to 90th percentile values in the sample, *Bureaucratic Quality* increases the predicted probability of a WTO complaint from 0.01 [0.00, 0.08] to 0.16 [0.08, 0.28].
- ⁴⁷ We obtained the data from these Directories in Geneva in May 2006, with the assistance of Jeffrey Kucik. No directory was published during 2003 or 2004, so for those years we use 2002 figures.
- ⁴⁸ See Shaffer, Ratton Sanchez, and Rosenberg (2007). For quantitative evidence that a developing country challenged before the WTO is more likely to challenge other Members subsequently, see Davis and Bermeo 2006.
- ⁴⁹ See Taslim 2007. This successful use of the DSU also allegedly spurred the government to take a more proactive role in the Doha negotiations than in any multilateral trade negotiations before. Success in dispute settlement appears to have demonstrated to the Bangladeshi government that WTO law can be used to the country’s advantage so that greater expertise in WTO matters can matter. Author interview, July 21, 2005.
- ⁵⁰ Pushing this point one step farther, it is also likely that countries with the legal capacity necessary to deter others’ use of AD actions may, ironically, be more able to form domestic AD mechanisms and defensively invoke AD actions of their *own*. It may seem at first blush that this possibility would detract from the global welfare benefits of additional WTO-specific legal capacity. However, Kucik and Reinhardt (2007) provide large-scale evidence substantiating the fact that countries establishing their own AD mechanisms use them as a device to co-opt domestic protectionist interests that would otherwise be opposed to liberalisation. The result is dramatically greater cuts in bound and applied tariffs. (See also Finger and Nogues 2005). Consequently, if legal capacity enables countries to form sophisticated AD systems of their own, then it should indirectly facilitate significantly broader and deeper tariff liberalisation as well.
- ⁵¹ The numbers on the graph are randomly-assigned codes for each country in the survey. The size of each country’s circle is proportional to the number of AD measures imposed against its firms in the analysis sample.

References

Bagwell, K. and Staiger, R.W. (2002). *The Economics of the World Trading System*. MIT Press. Cambridge, Massachusetts, USA.

Besson F. and Mehdi, R. (2004). "Is WTO Dispute Settlement Biased Against Developing Countries? An Empirical Analysis". Available at http://www.ecomod.net/conferences/ecomod2004/ecomod2004_papers/199.pdf.

Blonigen, B. A. and Bown, C. P. (2003). "Antidumping and Retaliation Threats." *Journal of International Economics* 60 (2): 249-273.

Bown, C. P. (2004). "Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes." *World Economy* 27 (1): 59-80.

Bown, C. P. (2005). "Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders." *World Bank Economic Review* 19 (2): 287-310.

Bown, C. P. (2006). "Global Antidumping Database, Version 2.1." Brandeis University and Development Research Group, World Bank.

Busch, M. L. and Reinhardt, E. (2003a). "Developing Countries and GATT/WTO Dispute Settlement." *Journal of World Trade* 37 (4): 719-735.

Busch, M. L. and Reinhardt, E. (2003b). "Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement" in *Transatlantic Trade Disputes: The EU, the US, and the WTO*. Petersmann, E.-U., Pollack, M. A.

Busch, M. L., Raciborski, R., and Reinhardt, E. (2007). "Does the Rule of Law Matter? The WTO and US Antidumping Investigations." Typescript. Emory University. Atlanta, Georgia, USA.

Davis, C. and Blodgett Bermeo, S. (2006). "Who Files? Developing Country Participation in WTO Adjudication." University Manuscript. Princeton. New Jersey, USA.

Finger, J. M. and Nogues, J.J., eds. (2005). *Safeguards and Antidumping in Latin American Trade Liberalization: Fighting Fire with Fire*. World Bank. Washington, DC. USA.

Guzman, A. T. and Simmons, B. A. (2005). "Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes." *Journal of Legal Studies* 34 (557): 557-598.

Hudec, R. E. (1993). *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. Butterworth Legal Publishers. Salem. New Hampshire, USA.

Hudec, R. E. (2002). "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" in *Development, Trade, and the WTO: A Handbook*. Hoekman, B., Mattoo, A., English, P.

Knack, S. and Rahman, A. (2007). "Donor Fragmentation and Bureaucratic Quality in Aid Recipients." *Journal of Development Economics* 83 (1): 176-197.

Kucik, J. and Reinhardt, E. (2007). "Does Flexibility Promote Cooperation? An Application to the Global Trade Regime." Typescript. Emory University. Atlanta. Georgia, USA.

Lacarte-Muró, J. and Gappah, P. (2000). "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench." *Journal of International Economic Law* 3 (3): 395-401.

Mavroidis, P. C. (2000). "Remedies in the WTO Legal System: Between a Rock and a Hard Place." *European Journal of International Law* 11 (4): 763-813.

Michalopoulos, C. (2001). *Developing Countries in the WTO*. Palgrave. New York. USA.

Moore, M. (2000). "WTO's Unique System of Settling Disputes Nears 200 Cases in 2000". Press Release (June 5), at http://www.wto.org/english/news_e/pres00_e/pr180_e.htm.

Özden, Ç. and Reinhardt, R. (2005b). "The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976-2000." *Journal of Development Economics* 78 (1): 1-21.

Palmeter, D. (2000). "The WTO as a Legal System." *Fordham International Law Journal* 24 (1&2): 444-480.

Petersman, E.-U. (1997). *International Trade Law and the GATT/WTO Dispute Settlement System*. Kluwer. London. UK.

Shaffer, G. (2003a). *Defending Interests: Public Private Partnerships in WTO Litigation*. Brookings Institution Press. Washington DC, USA.

Shaffer, G. (2003b). "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies." *ICTSD monograph*, Geneva, at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

Shaffer, G. (2006). "The Challenges of WTO Law: Strategies for Developing Country Adaptation." *World Trade Review* 5 (2):177-198.

Shaffer, G., Ratton-Sanchez, M. and Rosenberg, B. (2007). *Brazil's Response to the Judicialized WTO Regime: Strengthening the State through Diffusing Expertise*. ICTSD working paper, available at http://www.ictsd.org/issarea/dsu/resources/Brazil_paper.pdf.

Shoyer, A. W. (1998). “The First Three Years of WTO Dispute Settlement: Observations and Suggestions.” *Journal of International Economic Law* (1): 277–302.

Simmons, B. A. (2005). “Market Power or Legal Capacity: Explaining Developing Countries’ Use of the Dispute Settlement Mechanism.” Paper presented at the annual meeting of the International Studies Association.

Simmons, B. A., and Hopkins, D. J. (2005). “The Constraining Power of International Treaties: Theory and Methods.” *American Political Science Review* 99 (4): 623-631.

Taslim, M.A., “Dispute Settlement in the WTO and the Least Developed Countries: the Case of India’s Antidumping Duties on Lead Acid Battery Imports from Bangladesh.” ICTSD working paper, available at http://www.ictsd.org/issarea/dsu/resources/M.A._Taslim.pdf.

Trade and Development Centre. (1999). “Agreement Establishing the Advisory Centre on WTO Law.” Typescript. Trade and Development Centre. Geneva. Switzerland. At www.itd.org/links/char1611.doc.

Vermulst, E. and Driessen, B. (1995). “An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements—Nice on Paper but Too Much Stress for the System?” *Journal of World Trade* 29 (2): 131-61.