Are Asian WTO Members Using the WTO DSU ‘Effectively’?

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Abstract

Compared to the United States, the European Union, Brazil and Mexico, Asian World Trade Organization (WTO) members initiate fewer disputes relative to their respective stakes in global trade. They are also more likely to manifest a preference for negotiated settlements as respondents. Some have suggested that this is due to an “Asian culture of non-litigiousness”. This article seeks to explore this explanation as well as the fit of other explanations. We find that none of these explanations alone satisfactorily explain the current situation. We offer instead a combination of some alternative explanations by looking at the capacity to engage in WTO litigation, the domestic legal vetting processes for trade measures, industry sophistication and Asian production networks.

I. Introduction

The World Trade Organization (WTO) dispute settlement system, governed by the Dispute Settlement Understanding,¹ has been in existence for over 15 years. During this time the WTO

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dispute settlement system has been, by most accounts, the most prolific dispute settlement system in international law. As of 1 January 2013, 483 disputes have been brought to the WTO,\(^2\) dwarfing the 132 disputes brought to the old pre-WTO General Agreement on Tariff and Trade (GATT) days from 1948 – 1995.

Probably the most significant change in GATT dispute settlement and WTO DSU is the transformation in nature of the system. Whereas GATT dispute settlement could be described as ‘a nice sort of non-adversarial, nonthreatening, look-at-the-positive-side phrase for what most people would call a lawsuit’,\(^3\) the WTO DSU has been described as an ‘increasingly “legalized” and “judicialized” system for settling international trade disputes.’\(^4\)

The WTO dispute settlement system has been described as the ‘crown jewel’ of the WTO and the ‘central pillar’\(^5\) of the multilateral trading system. The DSU was created to introduce a new rules-based dispute resolution system to depoliticize the dispute settlement process.\(^6\) Under the DSU, Members submit their disputes to neutral third party panels, whose decisions are subject to appellate review and capable of being adopted by WTO members by negative

\(^1\) Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), 1869 UNTS 401, 33 ILM 1226 (hereinafter “DSU”).
\(^2\) Multi-complainant cases have been either classified as a single dispute or as separate disputes under the WTO classification scheme. For reasons of consistency, we treat multi-complainant cases as consisting of separate disputes between the defendant state and each of the complainant states e.g., WTO Appellate Body Report, United States - Continued Dumping and Subsidy Offset Act of 2000, WT/D217/AB/R, adopted 16 January 2003, is treated as nine separate disputes, as there were nine co-complainants in that case.
consensus. The system was intended to create a level-playing field for all Members; one of the principal objectives of the DSU was to create a fairer system in which every Member could bring forward a complaint and obtain a ruling on the same.\textsuperscript{7}

However, despite these laudatory aims the system has suffered from several criticisms including non-participation of developing countries and high cost of litigation. The non-participation of developing countries is problematic from three perspectives. First, developing countries (most countries in Asia with the exception of Japan are developing countries) miss out on the opportunity to enforce greater market access to other markets through the WTO dispute settlement system.\textsuperscript{8} Second, participation matters where ‘WTO jurisprudence shapes the interpretation, application and perceptions of the law over time, and thus affects future bargaining positions in light of these developments.’\textsuperscript{9} Third, with the rise of an ever-growing ‘noodle bowl’ of free trade agreements (FTAs) in Asia,\textsuperscript{10} some academics have argued that if Asian states begin to prefer the dispute settlement mechanisms (DSMs) of these FTAs, divergent interpretations on subject matters which are also covered by the WTO could ‘undermine the obligation and precision of WTO law’.\textsuperscript{11} While we think that the latter may in theory be a serious concern, with regard to the Asian region, we know of no Asian FTA which has been the basis of an empanelled dispute and we think that the relative quality of an institutional DSM, like that of the WTO over the often \textit{ad hoc} DSMs found in FTAs, would alleviate this concern for the most

\textsuperscript{7} Roderick Abbot, ‘Are Developing Countries Deterred from Using the WTO Dispute Settlement System?’ (ECIPE WORKING PAPER No. 01/2007).

\textsuperscript{8} Marc Busch and Eric Reinhardt, ‘Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement’, 37(4) Journal of World Trade 719 (2003), at 725.

\textsuperscript{9} Gregory Shaffer and Ricardo Melendez-Ortiz, ‘Preface: The ICTSD Dispute Settlement Project’, in Shaffer and Melendez-Ortiz, above n 4, xi-xiv at xii.


part, save for FTA WTO-plus disciplines which by definition will have to be resolved outside the WTO.\(^\text{12}\)

We have sought to review the use of the DSU by Asian\(^\text{13}\) countries from the establishment of the WTO to 1 January 2013. Asia provides a mix of economies most of which are highly export oriented, and therefore more likely to face obstructions in international trade. Throughout our analysis, we will be comparing Asia’s use of the DSU with corresponding use by the US, the EU, Brazil and Mexico. We include Brazil and Mexico in the analysis because apart from being major trading nations, they are also fairly proximate to Asia in their stage of economic development and count among the most active users of the DSU.

We did not engage in sophisticated regression analysis or other statistical methods of examining causation. While the number of WTO cases is large when compared to other international forms of dispute resolution, the data sets for Asian WTO members are still too small for such an inquiry. Instead, we used the data to see if any patterns emerged, whether there was clear evidence of non-causality (i.e. no correlation) and to show trends in behavior. We also accept that looking at Asian data as a whole generalizes trends from very diverse WTO members. However, we do this for three reasons. First, we observed the increasing use of the collective

\(^{12}\) For example, the system adopted under the ASEAN Enhanced Dispute Settlement Mechanism (EDSM) is modelled on that of the DSU, albeit with even shorter timelines. To date, the EDSM has not been resorted to by ASEAN members. Although this mechanism has never been invoked, it is interesting to note that Singapore (in 1995) and the Philippines (in 2008) both preferred to resort to the WTO DSM against other ASEAN countries (Malaysia and Thailand, respectively) rather than the existing ASEAN dispute settlement mechanism. See Request For Consultations, \textit{Malaysia — Prohibition of Imports of Polyethylene and Polypropylene}, WT/DS1/1, lodged 10 January 1995 and WTO Appellate Body Report, \textit{Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines}, WT/DS371/AB/R, adopted 17 June 2011.

\(^{13}\) The WTO Members considered Asian for the purposes of this paper are Bangladesh, Brunei (no participation in a dispute yet), Cambodia (no participation in a dispute yet), China, Chinese Taipei, Hong Kong, India, Indonesia, Japan, Macao (no participation in a dispute yet), Malaysia, Mongolia (no participation in a dispute yet), Myanmar (no participation in a dispute yet), Pakistan, Papua New Guinea (no participation in a dispute yet), Philippines, Singapore, South Korea, Sri Lanka, Thailand, and Vietnam.
term Asia when scholars talk about regional trade policy. At the same time, we also noted literature that suggested an Asian culture of non-litigiousness and attempted to see if this was supported by the data. Finally, we think that the integrated production networks in Asia which exist between different Asian WTO members are sufficiently unique and are only replicated in scale within the customs territory of the EU. We attempt to reduce the concerns about generalization by drilling down into data for selected Asian WTO members and analyzing the data qualitatively. Nonetheless, we are aware of the limitations of this study and we do not offer our analysis as hard evidence for our explanations. Indeed we do not propose a one-size-fits-all explanation for Asia or even of the behavior of any specific Asian WTO member. Instead, we attempt to examine the existing explanations, show the complexity of the interactions and tentatively offer new areas for inquiry.

With that said, as of 1 January 2013, a look at the data reveals that the EU and the US have between them initiated around 190 disputes, accounting for 39.3% of all initiations; Asian members collectively have initiated only 101 disputes or 20.9% of all initiations. On the flipside the EU and the US have been respondents in 216 disputes, accounting for 44.7% of all disputes; Asian members have been respondents in 96 disputes or 19.9% of initiations. While there is some positive news that Asia is not a major respondent, it must be noted that when compared to Asia, slightly fewer complaints initiated by the EU or US actually move to the panel stage and conversely, as respondents, the EU and US seem to escalate significantly more requests to the panel stage. What does this prima facie disproportionate use of the DSU mean for Asian members? Are Asian developing countries not using the DSU effectively? This paper will seek
to answer some of these questions on the basis of existing literature and by analyzing existing data.

II. Facts and Figures

Table 1 gives a breakdown of the total number of disputes initiated and the parties which are initiating them across three periods, namely 1995-1999, 2000-2004 and 2005-2012. The EU and the US are clearly the most frequent users of the system, with the total number of initiations from the US outstripping even the combined tally of Asian countries.\footnote{USA (103), Asia (101).}

Table 2 shows the average yearly number of initiations lodged by parties for similar time periods.

As shown by Table 2, the number of initiations filed per year is falling across the board. However, the rate at which Asian initiations have been falling is slower than that of the other regions. In fact, as seen from Table 2, in the most recent period of 2005-2012 Asian countries have been the most active complainants.
Much of the literature has focused on the number of complaints and full WTO disputes brought by countries and regions. However, we decided to also look at conversion rates of complaints into full disputes (i.e. disputes where a panel is established) to see if there were any significant Asian differences in the use of the DSU. Our hypothesis was that the data on conversion rates would also reveal some behavioral patterns and indeed it appears to do so.

Given the premium that the DSU places on consultation as a means of settlement, members must fulfill certain requirements before an initiated complaint can proceed to the panel establishment stage.

Under current DSU rules, a complainant may ask the DSB to establish a panel to decide the dispute in only five situations. First, where the party to which the request of consultations is made does not reply within 10 days after the date of receipt of the request of consultations (‘the date of receipt’); second, where the party to which the request of consultations is made replies

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15 This encompasses all instances where panels were established, including:

a. Where the complaint was withdrawn because the defendant had removed the impugned measure shortly after the panel establishment stage e.g. Request for Consultations, United States – Measures Affecting Imports of Women’s and Girls’ Wool Coats, WT/DS32/1, lodged 14 March 1996;

b. Where the complaint was withdrawn because both sides had reached a mutually agreed solution after the panel establishment stage e.g. Request for Consultations, China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, WT/DS358/1, lodged 2 February 2007 and Notification of Mutually Agreed Solution, WT/DS358/2, lodged 19 December 2007;

c. Where the complainant requested the panel to suspend its work after a panel was established, and did not request the panel to resume its work, resulting in the lapsing authority of the panel and no issuance of a panel report e.g. Request for Consultations, India – Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities, WT/DS352/1, lodged 20 November 2006;

d. Where a panel was established but not composed up to date e.g. Request for Consultations, Australia – Certain Measures Affecting the Importation of Fresh Fruits and Vegetables, WT/DS270/1, lodged 18 October 2002.

All these instances were included because we believe that the very decision of a Member to escalate the dispute through requesting for establishment of a panel is a significant one indicating its intent to pursue all available legal means to resolve the dispute.

16 Article 4.3 of the DSU.
within the 10 day period but does not enter into consultations in good faith within 30 days after the date of receipt;\textsuperscript{17} third, where consultations fail to settle the dispute within 60 days after the date of receipt;\textsuperscript{18} fourth, where the consulting parties jointly consider during the 60 day period that the consultations have failed to settle the dispute\textsuperscript{19} and fifth, in cases of urgency where the Member to which the request of consultations is made does not enter into consultations within 10 days after the date of receipt or where consultations have failed to settle the dispute within 20 days after the date of receipt.\textsuperscript{20}

Figures in Table 3 reveal that in their role as complainants, Asian members request for the establishment of a panel 66% of the time, whereas the EU and the US request establishment of panel 54% and 53% of the time respectively. The figures do not change drastically even if Japan, a developed country in the context of the WTO, is removed from the category of Asia leaving the Asian developing countries with a slightly lower percentage of about 62%. Brazil and Mexico empanel at the rate of 58% and 52% respectively.

This suggests that there is a different behavioral phenomenon in the Asian region as compared with the behavior of the EU and the US and even Brazil and Mexico. We think that this under-examined phenomenon provides an insight into the way that Asian WTO members as a whole – whether developing or developed – behave with regard to WTO disputes. In this paper we will seek to explain this phenomenon.

\textsuperscript{17} Ibid.
\textsuperscript{18}Article 4.7 of the DSU.
\textsuperscript{19} Ibid.
\textsuperscript{20} Article 4.8 of the DSU.
Table 4 below gives a breakdown of the number of initiated complaints and the responding parties while Table 5 shows the rate at which these initiated disputes proceed to panel establishment. As indicated by Table 4, the US has been the target of most number of complaints, followed by Asia and then Europe.\textsuperscript{21}

Table 5 shows that a smaller percentage of complaints against Asian countries move on to the panel establishment stage, as compared to complaints against the US. In contradistinction to its role as complainant, the US seems to be less able to resolve the disputes at the consultation stage and accepts the establishment of more panels in its role as respondent.

Overall, the data reveals two interesting points. First, as complainants, Asian members have been \textit{less successful} in attaining negotiated settlements, as they request for panel establishment more often than the US and the EU.\textsuperscript{22} Second, complaints against Asian countries have led to establishment of fewer panels as compared to complaints against the US. Again the exclusion of Japan from the Asian data does not change the numbers significantly.

\textsuperscript{21} US (132), Asia (96), EU (84).
\textsuperscript{22} Asia w/o Japan (62%), US (53%), EU (54%).
In contrast, as complainants, the EU and the US seem to have the ability to reach more negotiated settlements or, a more unlikely scenario, have failed to follow up on their complaints. As respondent the US seems to be more intractable in its negotiations and therefore more panels are established.²³ Brazil and Mexico seem to settle even more complaints than Asia.

Does this mean that Asian members and developing countries in particular have less leverage in the consultation phase of the dispute settlement process when negotiating settlements as respondents?

When this is put together with the data as complainants, it would seem that Asian members seem to be less able to get a settlement as a complainant and seem to be less intractable in their negotiations for settlement as respondents.

II. Possible Explanations

We examine the following theories to see if they can explain why Asian countries initiate fewer disputes and have a substantially lower conversion (empanelment) rate as respondents and higher conversion rate as complainants.

A. Culture of non-litigiousness

²³ It must be noted, however, that we have not taken into consideration disputes that may be settled after the establishment of a panel.
A tempting explanation is the Asian tradition of non-litigation. In their coverage of China’s experience with the DSU, Han and Gao allude to the Confucian mindset of non-litigiousness as being one of the reasons for China’s relative reticence to initiate disputes at the WTO. The Confucian aversion to litigation stems from the view that ‘litigation causes irreparable harm to relationships and should be pursued only as a last resort’24 or avoided entirely. It has been said that Confucian attitudes influence much of East Asia.

This aversion to litigation may also be true in South East Asia. The ASEAN Way, a term derived from the Indonesian/Malay concepts of musjawarah and mufukat stresses decision-making by consensus. The approach involves conducting informal, behind-the-scene discussions to reach a general consensus, which then forms the starting point from which a unanimous decision is to be taken at formal meetings. This can be contrasted with formal across-the-table negotiations which result in deals enforceable in a court of law.

This explanation would suggest that societal aversion to litigation is projected onto the decision-making processes of Asian governments, who regard litigation as unfriendly behavior and damaging of bilateral relations. The ‘non-litigious’ mindset translates into a preference for seeking resolution through consultation and negotiation over adversarial modes of judicial settlement. This preference is witnessed in the eighth principle of inter-state relations of the Asian-inspired Bandung Declaration,25 which calls for the ‘[s]ettlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement’.

24 Han Liyu and Henry Gao, ‘China’s experience in utilizing the WTO Dispute Settlement Mechanism’, in Shaffer and Melendez-Ortiz, above n 4, 137-173 at 165.
Nonetheless, even if this culture did or does exist, our data on China and Korea provided below suggest that it is changing fast which is probably evidence against the culture theory or at least that the cultural resistance is a weak force. We believe that there are more economic and structural explanations for the apparently less litigious nature of Asian WTO members.

B. Legal Capacity

Legal capacity is the ability of a country to mobilize legal and human resources to participate in the dispute settlement system. According to Busch, Reinhardt and Shaffer, legal capacity is the main constraint limiting access to dispute settlement. It may be further suggested that adequate legal capacity allows Members more maneuvering space since the conversion of the consultation to a full dispute settlement is not seen as an outcome that should be avoided.

Apart from Japan, which has been involved with GATT and WTO litigation over many decades, most Asian countries may not have a legal capacity equal to that of the EU and the US. Therefore as respondents it would make sense for Asian countries to settle a dispute rather than pursue it to its logical end. On the other hand, the EU and the US, with their larger legal capacities have the ability to stretch the resources of an opponent by refusing to yield and escalating a dispute. Such an escalation may help them obtain a better bargain as capacity constraints mount.

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Increased legal capacity offers a strong explanation for the prominent change in China’s dispute settlement strategy at the WTO from 2009 onwards. Before 2009, China displayed a strong preference for negotiating settlements with the complainant party; she reached negotiated settlements in 6 out of 13 complaints\textsuperscript{27} filed against her during the 2002-2008 period, thus evincing ‘a clear reluctance’ to ‘make use of the WTO dispute settlement system’.\textsuperscript{28}

However, from 2009 onwards, no complaint initiated against China has resulted in a negotiated settlement. Instead, during this later time period,\textsuperscript{29} 12 out of 17 disputes involving China as respondent have proceeded on to the panel establishment stage\textsuperscript{30} with the remaining 5 disputes still in the consultation stage.\textsuperscript{31}


\textsuperscript{28} Henry Gao, ‘Aggressive Legalism: The East Asian Experience and Lessons for China’, in Henry Gao and Donald Lewis (eds), China’s participation in the WTO (London: Cameron May, 2005), 315-351 at 344.

\textsuperscript{29} 1 January 2009 to 10 August 2012.


\textsuperscript{31} Request for Consultations, China – Grant, Loans and Other Incentives, WT/DS390/1, lodged 19 January 2009; Request for Consultations, China – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union, WT/DS407/1, lodged 7 May 2010; Request for Consultations, China – Measures concerning wind power equipment, WT/DS419/1, lodged 22 December 2010; Request for Consultations, China – Certain Measures Affecting the Automobile and Automobile-Parts Industries, WT/450/1, lodged 17 September 2012; Request for Consultations - China — Measures Relating to the Production and Exportation of Apparel and Textile Products, WT/DS451/1, lodged 15 October 2012.
The shift in China’s attitude at the WTO coincided with the Chinese government’s decision to undertake a rapid expansion of China’s legal capacity at the WTO from 2009 onwards. In mid 2009, China set up its second legal team dedicated to WTO dispute settlement affairs, whereas previously, the workload fell entirely on the WTO Legal Affairs Division within the Department of Treaty and Law of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC).32 This was accompanied by the government’s decision to post one of China’s top international trade experts to Geneva in late 2009, which bolstered the legal capabilities of its WTO mission.33

Notably, these moves were preceded by a warming up period where China acted as third party in every panel established from August 2003 to early 2007.34 China’s active participation as third party ‘developed its understanding of the WTO dispute settlement mechanism’, and allowed it to ‘learn from other participants’ as well as to ‘obtain a better understanding of the reasoning and views of panels and the Appellate Body’.35

[Chart 1]

This wealth of experience, combined with an increased allocation of resources has expanded China’s legal capacity at the WTO, such that it is now apparently able ‘to handle five

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32 The second legal team took the form of a new division within China’s Ministry of Commerce (MOFCOM). See Wenhua Ji and Cui Huang, ‘China’s path to the Center Stage of WTO Dispute Settlement: Challenges and Responses’, 9 (5) Global Trade and Customs Journal 365 (2010), at 371.
33 Ibid, at 373.
34 Ibid, at 367.
35 See Han, above n 24, at 160.
to seven cases simultaneously’. In light of this newfound position of strength, it is not surprising that China has in the most recent period decided to escalate disputes rather than to reach a compromise with the other party to the dispute.

Charts 2 and 3 provide a graphical representation of this change in strategy by China as compared with other Asian WTO members such as India, Japan and South Korea.

[Chart 2]

[Chart 3]

Thailand has also complained about a lack of legal capacity to handle the dispute settlement process. The Permanent Mission of Thailand to the WTO, tasked with handling all DSU-related issues, remains ‘understaffed’ because the Thai Ministry of Foreign Affairs has not been able to afford the secondment of more than one international lawyer at a time to work at the Mission. To plug its capacity gap, Thailand appears to rely heavily on the expertise of the Advisory Center on WTO Law (ACWL) or those of co-complainants.

This is borne out in Thailand’s DSU usage statistics; except for one isolated instance, Thailand has not escalated any dispute unless it either received ACWL support for that dispute or was working in a team of co-complainants.

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36 See Ji, above n 32, at 367.
39 WTO Panel Report, United States – Anti Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, WT/DS383/P/R, adopted 22 January 2010; WTO Appellate Body Report, Thailand — Customs and Fiscal
Legal capacity issues may also arise even for a developed country like Japan. As pointed out by Nakagawa, the policy focus on negotiating regional trade and investment agreements has constrained Japan’s legal capacity at the WTO as staff members have been reassigned from the WTO to the negotiations of these agreements.\(^{41}\) One can imagine that Asian developing countries face an even steeper uphill task than Japan in strengthening their legal capacity at the WTO.

Nevertheless, we posit that legal capacity issues do not offer the only explanation for the behavior of Asian states at the WTO. We hypothesized that a threshold of five years would be a reasonable time period for most new WTO entrants to learn and overcome a lack of experience and capacity to engage the WTO panel process if they chose to do so. Thus, we undertook a comparison of the data of the behavior of members in the first five years of WTO membership and their behavior thereafter. Our data in the following Tables 6 – 8 shows that Asian members do not always become more litigious even after an initial five-year “learning period”.

\[\text{[Table 6]}\]
\[\text{[Table 7]}\]
\[\text{[Table 8]}\]

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\(^{41}\) See Nakagawa, above n 11, at 848.
Indeed, as seen from Table 6, we have some contrary examples. Japan, India and Thailand became less prone to initiate complaints at the WTO in the period following five years of WTO membership. It may well be argued that these three were GATT members and may have been familiar with GATT rules even if they were not familiar with the new WTO DSU. However, India’s propensity to lodge complaints at the WTO halved in the period following five years of WTO membership as compared to the first five years of its WTO membership, dropping from 1.8 complaints a year to 0.92 complaints a year. The same is true to a greater extent for Japan. These examples do not support a capacity-based explanation of state behavior at the WTO as they do not show greater state propensity to initiate complaints even after an initial five-year period to overcome legal capacity issues.

On the other hand, Table 6 shows that China and Korea became more aggressive in lodging complaints at the WTO after the initial five-year period. China’s increased willingness to lodge complaints is consistent with a capacity-based explanation; as we earlier observed, the Chinese government decided to undertake rapid expansion in China’s legal capacity at the WTO from 2009 onwards and this probably explains her increased litigiousness. While greater legal capacity may offer a convenient explanation for the rise in Korean-initiated complaints after the initial five-year “learning period”, Ahn suggests that the primary trigger for Korea’s heightened legalism was a confidence-boosting win in United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) (“US-DRAMS”)42 within the initial five-year “learning period”.43

According to Ahn, “the sheer fact of winning a WTO dispute concerning chronic trade barriers of the major trading partners furnished the Korean government with confidence in the new WTO dispute settlement system” and “clearly led the Korean government to adopt a more legal approach by utilizing the WTO dispute settlement system to address foreign trade barriers in subsequent cases”. Ahn’s rationalization suggests that Korea’s heightened litigiousness is not simply due to more lawyers on the job or increased legal expertise; instead, heightened litigiousness was also due to a psychological change in how the Korean government perceived its chances of winning at the WTO, and consequently, how it thought trade disputes should be sorted out. This analysis lends credence to our “Self Understanding” theory, which we will elaborate on later.

As to the willingness of Asian states to defend themselves at the WTO before WTO panels, our data from Table 8 demonstrates that India continues to defy a capacity-based explanation. Even after the initial five-year period, India has not displayed greater willingness to defend itself before WTO panels. This stands in contrast to the behavior of its other developing country counterparts China, Brazil and Mexico, and suggests that in India’s case, other explanations must be found for its continued unwillingness to empanel complaints against herself.

C. Monetary cost

44 Ibid, at 619-620.
The cost of maintaining standing legal capacity at the WTO features as a possible explanation for relatively less developed Asian members’ (with the exception of China) participation under the DSU system.

Unlike China, many Asian developing countries may not boast the financial strength needed to maintain standing legal teams dedicated to the WTO dispute settlement. It may also not make financial sense for them to do so. For many of the smaller developing economies, their potential WTO caseload may not reach a level which would allow them to derive substantial economies of scale from maintaining standing legal capacity.

Engaging private legal services to plug the in-house legal capacity gap may also be prohibitively expensive for some Asian developing countries. At present, a legal dispute at the WTO can run into hundreds of thousands even when operating on basis of the ACWL’s subsidized hourly rates.\footnote{Category A members are charged 324 Swiss francs per hour, while Category B, C and LDC members are charged 242,162, and 40 Swiss francs per hour respectively.} A prominent Thai government official estimates that the fees charged by private law firms are approximately double, even triple of those charged by the ACWL.\footnote{See Danvivathana, above n 37, at 217.} Trade lawyers give even higher monetary cost estimates; for example, it is estimated that Canada’s WTO challenge on the EU’s ban on marketing seal products\footnote{Request for Consultations, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/1, adopted 2 November 2009.} would cost about US$9 million.\footnote{Campbell Clark, ‘A $10-million fight to save $1-million hunt’, The Globe and Mail, http://www.theglobeandmail.com/news/politics/a-10-million-fight-to-save-1-million-hunt/article1200631/ (visited 28 January 2013). The US$9 million figure is based on the exchange rate on 28 July 2009 (this being the date the news article was published), which was 1.08140 Canadian dollars for 1 US dollar.}
Against the backdrop of high litigation costs, the ACWL’s role in mitigating cost-related issues for Asian developing countries through the provision of subsidized legal assistance has become critical. Since its establishment in 2001, the ACWL’s support has allowed some Asian developing countries to pursue active dispute settlement strategies.

A clear beneficiary of the AWCL’s subsidized legal assistance has been Thailand, a state which has been mindful of ‘setting limits to the costs’. 49 Thailand applied and successfully obtained the ACWL’s assistance for all five of the disputes it has escalated since 2001. 50 Another major recipient of the ACWL’s assistance has been the Philippines, which obtained the ACWL’s help in three 51 of the four disputes it has escalated since 2001. 52 The ACWL’s tightly-governed time, budget and billing policies 53 (all pegged at subsidized hourly rates) are reassuring to these Asian countries, which might otherwise fear that litigation costs would spiral out of control should they decide to pursue dispute settlement proceedings. Bolstered by such assurances, Asian developing countries are more confident and prepared to escalate their disputes.

49 See Danvivathana, above n 37, at 224.
52 The Philippines could not obtain assistance in the sole remaining instance i.e. WTO Appellate Body Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/AB/R, adopted 17 June 2011 because the ACWL had already agreed to help Thailand, which was the other party in the dispute.
53 See above n 45.
However, the ACWL’s establishment has not transformed the dispute settlement strategies of Asian developing countries at a broader level. It continues to be used only by a very select group of Asian members, most of which are repeat-users of the dispute settlement system. Most notably, none of the Asian LDCs with the exception of Bangladesh has to date initiated a dispute at the WTO. Thus, if the ACWL functions to alleviate developing members’ concerns about absolute cost and capacity, the continued limited use of the dispute settlement system by most of the developing members even after the establishment of the ACWL suggests that other factors are also behind the limited use of the DSU by many countries in Asia.

Aside from the AWCL’s assistance, financial support from the private sector also helps defray the costs of pursuing dispute settlement proceedings at the WTO. In some instances, private sector support has enabled Asian developing countries to pursue more active dispute settlement strategies.

An example is *India – Anti-Dumping Measures on Batteries from Bangladesh*, which is the only instance of an Asian LDC initiating a dispute at the WTO with a view to escalating it. Mohammad Ali Taslim notes that the complainant, Bangladesh, was prepared to ‘[go] through all the process of dispute settlement in the WTO’ because ‘[m]ost importantly’, the company affected, Rahimafrooz, had given an undertaking to bear the entirety of the ACWL’s subsidized legal fees and to cooperate fully with the national anti-dumping authority (BTC) to prepare for

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54 To date, the ACWL has represented only the Philippines, Thailand, Indonesia, Pakistan, Bangladesh and India before WTO adjudicatory bodies.
and pursue the case.\textsuperscript{56} This suggests that many Asian LDCs are less than willing to pay for even the ACWL’s subsidized legal assistance, and require additional assurances of support from the private sector.

Thailand also deals with the cost issue in an interesting way which taps into assistance from both the ACWL and the private sector. For example, in the \textit{European Communities – Export Subsidies on Sugar} case,\textsuperscript{57} Thailand sought the ACWL’s help and simultaneously used financial contributions from the Thai private sector to hire a private law firm. Under this arrangement the ACWL worked closely with the private law firm on the case.\textsuperscript{58}

Cost considerations present a plausible explanation for why Asian developing countries are about 8\% more likely to escalate disputes when they are in the capacity of complainants than when they are respondents.\textsuperscript{59} This is because when Asian developing countries act as complainants, it is more likely that the dispute has been brought about at the request of an exporting industry which would fund the litigation, at least in part.

Conversely, it may be difficult to get the domestic industry to pay for the cost of litigation when existing policies that do not benefit them directly come under attack at the WTO. This might explain why most Asian developing countries are more likely to seek to reach negotiated settlements when they are respondents.

\footnotesize{\textsuperscript{56} Mohammad Ali Taslim, ‘How the DSU worked for Bangladesh: The first least developed country to bring a WTO claim’, in Shaffer and Melendez-Ortiz, above n 4, 230-247 at 242.  
\textsuperscript{58} See Danvivathana, above n 37, at 217.  
\textsuperscript{59} As shown by Tables 3 and 5, when Asian developing countries act as complainants, they escalate disputes 62\% of the time, as opposed to 54\% when they act as respondents.}
D. Political Power

In contrast to theories of Legal Capacity or Monetary Cost, a Power theory postulates that it is the external considerations of political power that affect a country’s decision on whether or not to escalate a dispute. Proponents suggest that a less powerful state would be slow in escalating a dispute against a more powerful counterpart at the WTO, for fear that the defendant may consider such a move to be hostile, attracting retaliation through trade, foreign aid or other areas of international relations. Conversely, where the complainant has a favourable power differential vis-à-vis the respondent, it is more able to sue the less powerful state at the WTO without concern for the costs arising from counter-retaliation. The ‘Power’ theory speaks to realpolitik calculations underlying the DSU text; even though the text exhorts that ‘the use of the dispute settlement procedures should not be intended or considered as contentious acts’, there is no guarantee that a more powerful defendant would take kindly to being sued at the WTO.

The Power theory finds credence in the Asian context to a limited extent. In the aforementioned India – Anti-Dumping Measures on Batteries from Bangladesh dispute, Ali Taslim recounts how the BTC’s recommendation to take the dispute to the WTO faced initial resistance from officials of the Commerce and Foreign Affairs Ministries, who were afraid that ‘delicate trade negotiations’ with India would be derailed by Bangladesh’s move to push the

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61 Ibid.
62 Article 3.10 of the DSU.
dispute to the WTO.\textsuperscript{63} Even though such anxieties were not sufficient to prevent Bangladesh from eventually initiating the dispute,\textsuperscript{64} the episode suggests that there may be at least a few unaccounted instances where smaller countries refrain from bringing disputes because of power considerations.

Apart from these speculative instances, power considerations have not been strong enough to prevent Asian countries from using the WTO DSU mechanism. In fact, the very first country to use the mechanism was the small island-state of Singapore.\textsuperscript{65} Despite its then-dependence on Malaysia for basic essentials like food and water, Singapore initiated a complaint against Malaysia for instituting a system requiring importers of polyethylene and polypropylene to obtain advance permits from the trade ministry, where approval required a letter of no-objection from the Malaysian producer Titan Chemicals.\textsuperscript{66} Even though Singapore withdrew the complaint, the withdrawal was not due to power considerations but because Titan, pressured by the Singapore Government, had requested for the advance permit system to be dropped.\textsuperscript{67}

In addition, even though South Korea relies in part on an onshore American presence\textsuperscript{68} as part of its security arrangement against the threat of North Korea, it has not been afraid to

\begin{itemize}
\item \textsuperscript{63} See Taslim, above n 56, at 243.
\item \textsuperscript{64} Bangladesh decided not to convert the dispute because India had already withdrawn the anti-dumping duties that were the subject of the dispute before the panel establishment stage. See Taslim, above n 56, at 245.
\item \textsuperscript{65} Request for Consultations, \textit{Malaysia – Prohibition of Imports of Polyethylene and Polypropylene}, WT/DS1/1, lodged 10 January 1995.
\item \textsuperscript{66} Edmund Sim, ‘The Reliance on Non-ASEAN Legal Structures and Norms in ASEAN regionalism’ (Presentation given at the 9\textsuperscript{th} Asian Law Institute Conference; Law: An Asian Identity? on 31 May 2012, on file with author), at 5.
\item \textsuperscript{67} Ibid, at 6.
\item \textsuperscript{68} At present, the US stations around 28,500 troops in Korea under the United States Forces Korea. See US Department of Defense, ‘DoD Press Briefing with Secretary Gates and Minister of National Defense Lee Sang-hee from the Pentagon Briefing Room, Arlington, VA’, \url{http://www.america.gov/st/texttrans-english/2008/October/20081020121847eafas0.7119104.html} (visited 20 February 2013).
\end{itemize}
escalate its trade disputes with the US to the panel stage. To date,\(^69\) South Korea in its capacity as complainant has taken the US before panels in 8 out of 9 times. Panel establishment was not requested in the sole remaining instance only because the US had withdrawn the challenged measure beforehand.\(^70\)

Likewise, even though the US military is a major contributor to Japan’s security as well,\(^71\) Japan has not been afraid to escalate disputes with the US. Out of the 8 complaints it has initiated against the US at the WTO, Japan has chosen to escalate 7 of these.\(^72\)

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\(^69\) This figure covers disputes up to January 2013.


\(^71\) This is guaranteed by the Treaty of Mutual Cooperation and Security between the United States of America and Japan, entered into force on 23 June 1960, 11 UST 1632; TIAS 4509: 373 UNTS 186, Article VI of which provides that the USA is granted the use by its military of facilities and areas in Japan for ‘the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East’.

E. Democracy

It has been suggested by Christina Davis that there is a positive correlation between democracy and trade complaints:73

in democracies with sharp partisan divisions and institutional checks and balances in the structure of government, the executive faces demands from the legislature to demonstrate its effort to enforce ratified agreements… Choosing adjudication as a strategy allows the government to visibly demonstrate enforcement actions to its domestic audience and signal a strong resolve to a trade partner. Adjudication functions as a response to domestic pressure that promotes settlement of trade disputes by providing information about preferences.

On the conversion of disputes, Busch offers a reason to explain why democracies have a greater tendency to invoke the assistance of panels. This is because ‘[to] the extent that panels are formal, transparent and guided by case law, they would appear to give democracies much of what they value in domestic institutions’.74 Guzman calls this an ‘affinity argument’;


democracies prefer and trust international adjudicatory processes because they ‘resonate with domestic institutions and processes’.  

In some instances, as respondents, governments in democracies with sharp partisan divisions would rather escalate a dispute so as to depoliticize the dispute. A binding decision by a neutral adjudicating body may be easier to explain to the affected constituency than a negotiated compromise.

This dynamic was at work in United States – Definitive Safeguard Measures on Imports of Certain Steel Products, where most trade lawyers were of the opinion (and one assumes that some lawyers even in the United States Trade Representative or USTR) that the US had a weak case and were therefore not surprised by the Panel and Appellate Body Reports finding all ten safeguard measures to be inconsistent with WTO obligations. The Steel Safeguards were imposed on 5 March 2002 by the Bush Administration (in response to the US steel industry lobby) in the belief that this would increase their support for the 2004 Presidential Elections in the swing states of Pennsylvania, Ohio, and West Virginia. This therefore made it difficult for the Bush Administration to unilaterally remove the safeguard measures without an exogenous reason.

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76 See Davis, above n 73, at 93.
On 13 June 2002, the EU published a provisional retaliation list that threatened sanctions against $2.2 billion worth of US goods unless the US lifted the steel tariffs. However, even so, it would have been seen to be politically unacceptable to cave in to the EU in response to this threat. When the AB Report was adopted on 10 November 2003, the EU again threatened that it would impose retaliations which targeted products from what were also potentially political battleground states for the 2004 Presidential Elections, such as Florida citrus fruits, textiles from the Carolinas and Harley-Davidson motorcycles from Wisconsin. The AB Report then provided enough of a cover for the Bush Administration to announce that it would withdraw the safeguard measures on 4 December 2003, one day before the deadline given by the EU on 5 December 2003.

An example of a case of democratic pressures compelling an Asian member to empanel a complaint so as to depoliticize the dispute was Korea–Taxes on Alcoholic Beverages. In that case, the Korean liquor taxes system, which pegged the whisky tax at 100 per cent and the tax on diluted soju at 35 per cent, was challenged by the US and the EU for being in violation of the National Treatment obligation under the GATT, Article III. The Korean government’s decision to empanel the dispute was seen by Gao as being borne out of the need ‘to show that Korea [would] not bulge under foreign pressures’. This analysis must be right; after all, given the intense media attention given to the case from the consultation request to the panel proceeding

82 Gao and Lewis, above n 28, at 321.
and the Appellate Body ruling, a negotiated settlement with the US and EU could be seen by the Korean public as a concession at the expense of domestic soju constituencies. This was even so despite established WTO law being clearly against the Korean measure. By escalating the dispute to the panel stage, the Korean government depoliticized the dispute and shifted the brunt of public opinion against the WTO system.

Nevertheless, the Democracy-related explanations do not account for the data presented in Table 9. In Table 9, we make a comparison between a country’s degree of democratic governance (as indicated by its average Polity rating over selected time periods) and its propensity to empanel disputes. As shown by the data, countries which are perceived to be more democratic do not necessarily initiate and convert more disputes.

[Table 9]

Two observations can be made from the data presented in Table 9. First, there is no immediate correlation between a country’s degree of democratic governance and its propensity to initiate disputes. Although the most frequent complainant, the US, enjoys a perfect score of 10 according to the POLITY benchmark, this is counteracted by the example of the other perfect scorer Japan, which has lodged only 17 complaints as of 1 January 2013. Furthermore, Mexico is one of the most active complainants even though it ranks the second lowest on the POLITY scale among the seven jurisdictions chosen for comparison.

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83 See Ahn, above n 43, at 612.
84 We use the POLITY benchmark because it is recognized to be a “standard source” regarding the degree of a country’s democratic governance. See Guzman and Simmons, above n 75, at S220, where Guzman uses the same benchmark.
Second, the link between a country’s degree of democratic governance and its propensity to empanel disputes is also weak. South Korea shares top spot with Japan in empanelling 68% of its disputes, even though it has a lower POLITY rating on average than the US, Japan, India and Brazil. Most significantly, China’s conversion rate is a significant 23 percentage points higher than India’s, even though its score on the POLITY scale is -7 across the 1990-2011 period as compared to India’s 8.7 score.

Clearly, a country that is more ‘democratic’ does not automatically make more active use of the DSU. We believe one of two additional factors must be present before a democratic country is motivated to make more active use of the DSU.

The first additional factor is the presence of private industry players which have WTO sophistication and are willing to pull the levers of power within the democratic space to influence the government’s engagement at the multilateral trading system. Where private industry players are familiar with WTO rules and their domestic implementation in importing countries, they are able to function effectively as the ‘enforcement constituencies’ of the WTO. This is because they are the direct beneficiaries of complaints through the WTO DSM, and are also in a good position to detect WTO-inconsistent measures in importing countries because they

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are direct victims of such measures. Such measures include ‘border measures’ types of infractions that may not be observable to government officials.

Shaffer highlights that in the US, private firms are proactive in formally petitioning the government to make complaints challenging WTO-inconsistent measures of trading partners under the Section 301 procedure of the US Trade Act and typically lobby Congress and other relevant agencies even after making the formal petition. In contrast, a quieter picture is seen in Asia. In Japan, the Ministry of Economy, Trade and Industry (METI) opened an inquiry point for compliance with WTO rules by Japan’s trading partners on its website in May 2004, but this has hardly ever been used by Japanese companies. The same trend is witnessed in China, where the Trade Barrier Investigation mechanism introduced in 2002 has been rarely invoked. As suggested by Nakagawa, these private industry players ‘may simply not know how useful the WTO DSM is’, and may ‘prefer adapting their businesses to the laws and practices of their trading partners, regardless of whether they are WTO consistent or not’. This lack of WTO sophistication among the Asian private sector actors may account for why Asian states have been relatively reticent in filing complaints.

The presence of WTO sophistication among private industry players might also affect the conversion of disputes by respondents. Sophisticated industry players within a respondent country are incentivized to strike deals with executive actors to extend litigation at the WTO

86 See Nakagawa, above n 11, at 845.
89 See Nakagawa, above n 11, at 846.
90 See Han, above n 24, at 162.
91 See Nakagawa, above n 11, at 846.
DSU, in exchange for rewards like electoral funding. This is because during the period of litigation, these players continue to enjoy the benefit of the challenged measures. From the governmental viewpoint, this politically expedient ‘delay strategy’ is feasible because governments are not directly punished for such tactics; under the WTO scheme, no damages can be awarded for harm caused in the past and during dispute settlement proceedings.⁹²

On the flipside, an absence of WTO sophistication among industry players may lead to a country converting fewer disputes. In the Indian context, Dhar and Majumdar⁹³ observed that in the run-up to *European Communities – Conditions for the Granting of Tariff Preferences for Developing Countries*,⁹⁴ stakeholders from the affected textile industry were conspicuously absent until ‘well after the panel was constituted under the dispute settlement mechanism’.⁹⁵ This inaction was merely ‘an example’⁹⁶ of a broader situation where private stakeholders make only ‘marginal’ and ‘*ex post facto*’ contributions towards WTO-related processes,⁹⁷ and where cases are often brought and pursued at the WTO only because of the government’s insistence.⁹⁸ The relative disinterest of Indian private industry stakeholders and their unwillingness to organize themselves into politically powerful lobbies that monitor the government’s DSU engagement is a strong explanation for India’s low conversion rate; after all, the dearth of private sector interest means that there may be no interested party holding the Indian government to account when it chooses not to escalate a dispute. Extraneous domestic political considerations rather than legal

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⁹² The only remedy that can be given by the WTO is a recommendation by the Panel or the Appellate Body that the respondent bring the impugned measure into conformity with the relevant agreement. See Article 19 of the DSU. ⁹³ Biswajit Dhar and Abhik Majumdar, ‘Learning from the India-EC GSP dispute: the issues and the process’, in Shaffer and Melendez-Ortiz, above n 4, 174-209 at 183. ⁹⁴ WTO Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences for Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004 (hereinafter *EC-GSP*). ⁹⁵ See Dhar, above n 93, at 183. ⁹⁶ Ibid. ⁹⁷ Ibid, at 182. ⁹⁸ Ibid, at 183.
justification are more likely to become decisive in the government’s deliberations on how to handle the dispute.\(^9^9\)

The second additional factor is the presence of political considerations of such substantial magnitude so as to compel the government to convert the dispute even in the absence of pressure from the private sector. This is seen in India’s rather selective approach towards converting disputes; five out of eight complaints that India has converted were related to the critically important textile and clothing sector.\(^1^0^0\) In the context of the EC-GSP case, the government’s insistence that the case be initiated and converted probably stemmed from the importance of the textile and clothing sector as a job-creator for the semi-skilled, unskilled and women; in 2001, total employment in the sector was a politically significant figure of thirty-four million.\(^1^0^1\) Failure to take decisive action against the EU’s preferential tariff system would accelerate the Indian textile industry’s loss of market share in the EU market and posed a major threat to the livelihoods of those dependent directly or indirectly on the textile industry. Given the impact on huge job losses on the ballot box, it was unsurprisingly that the Indian government was so keen to pursue the case at the WTO. Where political considerations of such magnitude are not present, the government may feel it is more at liberty to abandon the dispute before the panel establishment stage.

\(^9^9\) See Han, above n 24, at 165.
\(^1^0^1\) See Dhar, above n 93, at 178-179.
Conversely, one can also imagine that in a less democratic polity, which allows interest capture and engages in non-transparent decision making, the increase in conversions or even initiations will not be caused by political pressure from the electorate but by certain interest groups encouraging the government to take a decision on measures or indeed even capturing the process.

F. Self-Understanding

Discussions with officials from some developing Asian WTO members suggest that they view their regulatory processes in a different way than that of US and EU officials. Several suggested that the reason for this difference in conversion rates is that they do not always have adequate internal administrative processes to vet all their regulations for compliance with existing trade obligations. In China’s case, the task of vetting is made more difficult because of the maze of regulations that protect and sustain the giant state-owned sector (a legacy of the Communist era). This could also explain India’s low conversion rate for complaints initiated against it. Thus, when consultations are sought about certain domestic regulations, the officials may be more likely to be willing to amend the regulations and settle the dispute before the establishment of a panel. This was particularly true in the early days of China’s WTO membership though as evidenced by the data above, China has been more ready to escalate disputes recently due to greater confidence in its current legal and administrative capacity.

102 In total, China revised over 3000 laws and regulations in an effort to fully implement WTO obligations and to reduce the potential for trade disputes. See Han, above n 24, at 144.
103 The official government position has changed. The focus is now on developing a “socialist market economy”, in which prices are set by the marketplace and public ownership dominates but coexists with private and other non-state sectors. See Julia Ya Qin, ‘WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) - A Critical Appraisal of the China Accession Protocol’, 7 (4) Journal of International Economic Law 863 (2004), at 872.
By contrast, the EU and the US have established regulatory processes that often clear new regulations with their trade lawyers, and which have opinions provided by those lawyers taking a view as to the compliance of those new regulations. As administrative capacity and sophistication increases, the official self-understanding of the legitimacy of their domestic regulations likely increases. This will make it harder for officials to acknowledge non-compliance though it must be emphasized that the vetting process probably prevents many disputes from arising in the first place.

The ‘Self-Understanding’ theory offers a plausible explanation for the data presented in Table 10.

[Table 10]

Noteworthy in the data broken down into individual members, is that China and India’s conversion rates as complainants are significantly higher than their conversion rate as respondents. On the other hand, the EU’s conversion rate as complainant is the same as its

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105 India: complainant conversion rate (52%), respondent conversion rate (38%) China: complainant conversion rate (82%), respondent conversion rate (63%).
conversion rate as respondent,\textsuperscript{106} while the US boasts a significantly higher conversion rate as respondent.\textsuperscript{107} It may be that some Asian countries convert fewer disputes as respondents because they are less confident of having examined their regulations in light of WTO consistency as rigorously as other WTO members.

G. Trading Stakes

A ‘Trading Stakes’ theory postulates that the aggregate of a WTO Member’s imports and exports is a good predictor of the use of the system. The theory provides an intuitive explanation for the pattern of initiated disputes; a country with a higher export volume is more likely to encounter a trade obstacle which is inconsistent with WTO rules and thus be more likely to initiate a complaint. Likewise, bigger export markets are more likely targets of complaints, simply because the economic cost of not pursuing a claim against a bigger export market is higher.

When applied to the conversion of disputes, the theory would postulate that countries which are bigger import markets are likely to defend litigation with more vigor, simply because the benefits accruing from protectionism would be larger. Likewise, bigger exporters are likely to convert more of their complaints because the benefits of enforcing market access would be larger. \textbf{Table 11} compares the average yearly value of selected countries’ exports during the period 2002-2010 with the number of complaints they lodge during the same period. We also include the data on the rate at which these countries convert their complaints.

\textsuperscript{106} EU: complainant conversion rate (53%), respondent conversion rate (56%).
\textsuperscript{107} US: complainant conversion rate (50%), respondent conversion rate (74%).
The ‘trading stakes’ theory explains the data presented in Table 11 to some extent. The US and the EU, being the biggest exporters on average over the nine-year period from 2002 to 2010, correspondingly initiated the most amounts of complaints over the same period. On the other hand, the theory does not explain the reticence of Asian export powerhouses at the WTO. Japan, China and Korea each lodged fewer complaints at the WTO than Brazil and Mexico during this period despite having substantially higher export figures.

The ‘trading stakes’ theory also does not explain conversion rates; the biggest exporters, the US and the EU have a lower conversion rate than Japan, India, Brazil, South Korea and China.

Table 12 compares the average yearly value of selected countries’ imports during the period 2002-2010 with the number of complaints lodged against them during the same period. Data on the rate at which these complaints are converted is also included.

Certain trends as observed in Table 8 continue to replicate themselves in Table 9. The US and the EU, being the biggest import markets, were subject to the most complaints during the same period. On the other hand, a disproportionately small amount of complaints (relative to the value of their imports) was lodged against major Asian import markets like Japan and South
Korea. More notably, the number of complaints against China dwarfed the number of complaints against Japan even though both countries were not far apart in terms of the annual value of their imports. Similarly, the data does not show an immediate correlation between the quantum of a country’s imports and its propensity to defend litigation. As evidenced from Tables 11 and 12, the ‘trading stakes’ theory offers little explanatory force for the use of the DSU in Asia.

H. Production networks

Instead of looking at aggregate trading stakes, we believe that a better explanation for Asian use of the DSU can be found in analyzing the extent to which Asian economies are plugged into Asian production networks. Asian members which are more integrated into such networks are less likely to lodge complaints simply because less trade conflicts arise. In addition, the production network dynamics cause them to be more willing to settle complaints rather than defend litigation.

Because of the region’s diverse mix of economies, Asian members have found it feasible to forge a production network that some have called ‘Factory Asia’. For some industries, this roughly takes the shape of a triangular trade pattern, where Japan and Newly Industrialized Economies (NIEs) with their superior technical know-how export capital goods and sophisticated intermediate goods to their less developed counterparts in the region for relatively

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109 Singapore, Hong Kong SAR, South Korea, and Chinese Taipei.
simple assembly functions.\textsuperscript{110} Within this production network, components or intermediate goods and services ‘pass from economy to economy’\textsuperscript{111} before becoming part of a final traded product for export to developed countries. A good illustration of such trade is the manufacturing process of the iPhone. Even though China exports a high-value product like the iPhone to the rest of the world, the underlying reality is that ‘Chinese workers simply put [imported] parts and components together’ and contribute only about 3.6% of the total manufacturing cost.\textsuperscript{112} As pointed out by Rassweiler, sophisticated components like the flash memory, touch screen, FEM and display module are imported from Japan, while the application processor and the SDRAM mobile DDR are brought in from Korea.\textsuperscript{113}

Such an integrated production base in Asia would mean that it is in the self-interest of many Asian states to facilitate such trade rather than to limit it. Trade-friendly frameworks allow less developed Asian countries to become attractive destinations for Japanese companies seeking to relocate their assembly operations from expensive Japan. This is because Japanese overseas enterprises prefer to procure much of their sophisticated intermediate inputs from Japanese supporting industries or related industries and have more faith in the high quality and timely delivery of Japanese components. Thus, countries which facilitate the smooth operation of such procurement become attractive destinations for Japanese manufacturing operations.\textsuperscript{114} As such,

\textsuperscript{110} China and ASEAN, excluding Singapore.
\textsuperscript{111} World Trade Organization and IDE-JETRO, \textit{Trade patterns and global value chains in East Asia: From trade in goods to trade in tasks} (Geneva: World Trade Organization, 2011) 128, at 3.
apart from high tariffs on certain sensitive products in Asia, many Asian members indeed do take a strategic decision to reduce trade barriers for production chains. **Table 13** provides a snapshot of the export profiles of the same eight countries examined in **Tables 11 and 12**.

**Table 13**

Noteworthy of the data presented in **Table 13** is that capital goods and intermediate industrial parts form close to 70%, an overwhelmingly large component, of Japanese and South Korean exports. A markedly different export profile is witnessed for countries like India and Brazil, where these goods form only 30% and 41% of total exports respectively. Furthermore, final traded consumption goods comprise only around 5-6% of Japanese and South Korean exports. On the other hand, exports of final traded consumption goods form a far bigger percentage of Indian, Brazilian and Mexican exports.\(^{115}\)

The data demonstrates that Japan and South Korea are more plugged into regional and global production networks than countries like India, Brazil and Mexico. A higher proportion of Japanese and South Korean exports consist of capital goods and often sophisticated intermediate goods, which are welcomed by less developed countries that do not have the technological know-how to produce such goods themselves. A smaller percentage of their exports are in final-traded consumption goods, which are more likely to attract protectionist measures because of direct competition with domestic suppliers. This could help explain (at least partially) why Japan and South Korea have lodged so few complaints at the WTO – there is simply less need to do so. If there is a dispute, it would be simpler to persuade the other WTO members that are part of this

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\(^{115}\) India (15%), Brazil (14%), Mexico (18%).
production networks to adjust their policies to facilitate the continued growth of the network as a win-win situation for all concerned.

The ‘production network’ theory also explains some instances where Asian countries decided to settle rather than defend litigation. Critically, the basis of these disputes was not a fight between the exporting country and the importing country, but a ‘conflict of interests’ between companies of the exporting country which had manufacturing operations in the importing country, and companies of the exporting country which did not.\textsuperscript{116}

A good example is\textit{ China – Value Added Tax on Integrated Circuits}.\textsuperscript{117} In that case, the US complained about a set of Chinese regulations which granted rebates on the value-added tax (VAT) on certain integrated circuits (ICs). These appeared to violate China’s national treatment and the most-favoured-nation obligations under the GATT because they made the VAT lower for ICs which were either domestically designed or manufactured than those which were not. Significantly, even though the regulations were ‘drafted with the intention of promoting the development of home-grown IC industry’, the real beneficiaries were foreign-invested firms such as the US firm Motorola.\textsuperscript{118} This was because the structure of the regulations, which provided that a firm had to sell at least 70-80 percent of its ICs domestically in order to enjoy the rebate. Whereas foreign-invested IC firms had no problem fulfilling this condition because they sold most of their products within China, most Chinese firms were left out in the cold because they exported about 70-80 percent of their products. China’s decision to settle the dispute by

\textsuperscript{116} See Nakagawa, above n 11, at 859.
\textsuperscript{118} See Gao, above n 28, at 334.
abolishing the rebate scheme was made easier by the fact that few domestic companies were affected.

Another instance where production network dynamics affected the importing country’s decision to settle is the run-up to Japan – Import Quotas on Dried Laver and Seasoned Laver. The case, which arose as a result of a complaint by Korea, was preceded by a similar type investigation by China against previous Japanese import quotas on dried and seasoned laver. However, the earlier investigation resulted in a negotiated settlement between China and Japan instead of escalation to the WTO level. Nakagawa argues that Japan was more willing to negotiate a deal with China because the laver imports were conducted within a ‘develop-and-import’ scheme, where Japanese companies consigned the cultivation of laver to their affiliated firms in China, which would then export the products to Japan. Thus, the substance of the dispute was between two domestic Japanese constituencies i.e. Japanese companies which had outsourced their cultivation operations to China, versus Japanese companies which continued to cultivate laver in Japan. Viewed in this light, Japan’s choice to settle was not so much a capitulation to Chinese demands but the reflection of a compromise between two domestic Japanese constituencies.

In contrast, where production network dynamics are not dominant, the settlement option is more likely to be shunned because it is seen to result in losses to a domestic constituency with no countervailing gains to another domestic constituency with overseas interests.

120 See Nakagawa, above n 11, at 859.
This is witnessed in China’s markedly different approach in the cluster of cases that is *China – Measures Affecting Imports of Automatic Parts*,\(^\text{121}\) which took place barely two years after the *China – Integrated Circuits* case. In three separate complaints, the US, the EU and Canada alleged that a set of Chinese measures discriminated against imported automobile parts via the imposition of an additional internal charge of 15 percent on vehicle manufacturers whose imported auto parts exceeded a specified quantity or value thresholds. China’s decision to defend the measure all the way to the Appellate Body stage might have been borne out of the fact that the biggest beneficiaries of the measures were State-Owned Enterprises (SOEs) like First Automotive (Group) Corporation\(^\text{122}\) and Shanghai Automobile Industry.\(^\text{123}\) These firms were engaged in fierce competition with foreign players to supply the auto parts to the locally-based vehicle manufacturing industry. Settlement would have compromised the interests of these SOEs, an unpalatable outcome given that many SOEs were still charged with ‘important social responsibilities’\(^\text{124}\) during that period, such as providing ‘cradle to grave’ social services to workers and their families.\(^\text{125}\)

### IV. Conclusion


\(^{122}\)The company prides itself on being ‘China’s state-owned automotive corporation’ (See FAW, ‘Company Overview’, [http://www.faw.com/aboutFaw/aboutFaw.jsp?pros=Profile.jsp&phight=580&about=Profile](http://www.faw.com/aboutFaw/aboutFaw.jsp?pros=Profile.jsp&phight=580&about=Profile). Up to this date, this company is still placed under the State-owned Assets Supervision and Administration Commission (SASAC) and is also under management by the Chinese Communist Party Central Committee (see Hon. S Chan, ‘Politics over Markets: Integrating State-Owned Enterprises into Chinese Socialist market’, 29 (1) Public Admin. Dev. 43 (2009), at 44.


\(^{124}\)See Chan, above n 122, at 43.

\(^{125}\)See Ya Qin, above n 103, at 872.
We believe that there is no single factor that can alone explain why Asian members initiate fewer disputes than may be suggested by the region’s importance in trade. Furthermore, there is also no single explanation as to why Asian members are more likely to settle disputes in the capacity of respondents than complainants. Nevertheless, we posit a few important factors that contribute to these twin trends.

First, developing countries in Asia convert more disputes in their capacity as complainants because as complainants, they are often supported by sufficiently well-organized industry groups, which are more willing to fund the entirety of litigation costs. Such financial support is used to fund the hiring of private legal counsel or ACWL lawyers, alleviating the lack of a country’s in-house capacity at the WTO. On the other hand, capacity and cost constraints become bigger obstacles when Asian members are at the receiving end of complaints because private industry support is less able to organize itself within the time frames provided by the DSU.

Second, the Self-Understanding theory gives the best explanation for China’s and India’s substantially lower conversion rate as respondents than as complainants. The limited central vetting process in both countries means that trade officials are less confident about winning when their own regulations are being challenged. In turn, this lack of confidence may make them more willing to amend those regulations. However, China’s significant expansion in terms of legal capacity at the WTO has already shown signs of altering this dynamic; increased legal capacity has allowed China to adopt a more pragmatic attitude towards WTO litigation by using extended litigation as a means to advance their trade interests.
Third, the significant extent to which most Asian economies are plugged into Asian production networks explains why they initiate fewer disputes. These networks create employment opportunities in less developed Asian countries, and encourages them to promote trade-friendly legal frameworks in order to facilitate the continued existence of the networks. These production network dynamics have in some instances encouraged Asian countries to settle instead of defending litigation. It is however difficult to find evidence of this quantitatively due to the limited empirical data on production networks and global value chains. The amounts of component parts traded between Asian WTO members as opposed to consumer goods might provide some hard evidence. However, qualitatively, there are quite a few narratives showing the interconnectedness and interdependence of WTO members plugged into “Factory Asia” and how this affects Asian trade policies.

While the rest of the explanations mentioned could be factors, they do not stand up to scrutiny when looking at Asian data and do not offer much explanatory force for the situation in Asia. As demonstrated by the examples of Singapore, Japan, Korea, and Bangladesh, Power considerations do not exert a decisive weight in a country’s decision on whether to initiate and convert a dispute. In the same vein, Democracy theories are weak explanations for the current situation. India defies Democracy theories as the country has a substantially lower conversion rate than China despite being perceived to be far more democratic. In order for Democracy to affect a country’s use of the DSU, one of two additional factors needs to be present. These are (1) the presence of industry players which have WTO sophistication and which are willing to monitor the government’s engagement at the WTO and/or, (2) the presence of political
considerations of such magnitude, or indeed interest capture, as to compel the government to take action under the DSU mechanism.

Finally, there is no evidence of an immutable Asian culture of non-litigiousness within the international law sphere. As illustrated by the various examples cited in this article, Asian developing countries are willing to adopt over time more active dispute settlement strategies as China and Korea did. Thus any apparent reticence in initiating and converting disputes is symptomatic of other factors rather than reflecting any Asian culture of non-litigiousness.

As Shaffer suggests reciprocity offers a better framework for understanding the use of the DSU by countries.126 This is true domestically as well. Private actors such as corporations are dependent on public actors (the WTO members) which have an exclusive right to bring a WTO complaint. Conversely, public actors are often dependent on private actors to notify them of breaches of WTO obligations and often also to fund the litigation process. In the Asian context, this necessitates substantial focus on the attitudes and motivations of private industry actors. An analysis that looks only to state-centric factors through the perspectives of Power and Democracy will not provide adequate explanations for Asian behavior.

We would group the explanations into the following categories – the capacity and self-understanding factors as an inquiry into the domestic governance of the WTO member, the power and democracy factors as focusing on the international relations and political concerns of the WTO members, and the final two factors of industry sophistication and production networks as economic explanations that unpack the Trading Stakes analysis. As we have shown, domestic

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governance issues like the capacity to engage in WTO litigation and confidence in domestic processes to vet regulations and measures for WTO consistency offer a more significant explanation than the traditional international relations and political considerations of most other areas of international dispute settlement. This underscores the depoliticization of the WTO DSU and the potential value it could provide to all WTO members. The world is not a fair place and it is unlikely that most WTO members will be able to change their relative power differentials at the international relations level. However, some Asian WTO members have fixed their domestic governance issues through the implementation of policies to address limitations in capacity. Others may learn from their experiences. The DSU allows WTO members to make their bargains stick regardless of their relative size. Education and the rule of law are great equalizers.
## Appendix A

Table 1 - Number of initiations made by countries/regions across selected time periods

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Asia</td>
<td>33</td>
<td>35</td>
<td>33</td>
<td>101</td>
</tr>
<tr>
<td>Asia w/o Japan</td>
<td>25</td>
<td>31</td>
<td>28</td>
<td>84</td>
</tr>
<tr>
<td>Brazil</td>
<td>6</td>
<td>16</td>
<td>4</td>
<td>26</td>
</tr>
<tr>
<td>EU</td>
<td>47</td>
<td>21</td>
<td>19</td>
<td>87</td>
</tr>
<tr>
<td>Mexico</td>
<td>8</td>
<td>5</td>
<td>10</td>
<td>23</td>
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<tr>
<td>USA</td>
<td>60</td>
<td>20</td>
<td>23</td>
<td>103</td>
</tr>
<tr>
<td>Rest of the WTO</td>
<td></td>
<td></td>
<td></td>
<td>143</td>
</tr>
<tr>
<td>Global Total</td>
<td></td>
<td></td>
<td></td>
<td>483</td>
</tr>
</tbody>
</table>
Table 2 – Yearly Rate of Initiations made by countries/ regions

<table>
<thead>
<tr>
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<th></th>
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</thead>
<tbody>
<tr>
<td>Asia</td>
<td>6.6</td>
<td>7</td>
<td>4.1</td>
</tr>
<tr>
<td>Asia w/o Japan</td>
<td>5</td>
<td>6.2</td>
<td>3.5</td>
</tr>
<tr>
<td>Brazil</td>
<td>1.2</td>
<td>3.2</td>
<td>0.5</td>
</tr>
<tr>
<td>EU</td>
<td>9.4</td>
<td>4.2</td>
<td>2.4</td>
</tr>
<tr>
<td>Mexico</td>
<td>1.6</td>
<td>1.0</td>
<td>1.3</td>
</tr>
<tr>
<td>USA</td>
<td>12.0</td>
<td>4.0</td>
<td>2.9</td>
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</tbody>
</table>
Table 3 – Requests for empanelling by complainant countries/region

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Asia</td>
<td>18</td>
<td>23</td>
<td>26</td>
<td>67</td>
<td>66% (67/101)</td>
</tr>
<tr>
<td>Asia w/o Japan</td>
<td>12</td>
<td>19</td>
<td>21</td>
<td>52</td>
<td>62% (52/84)</td>
</tr>
<tr>
<td>Brazil</td>
<td>3</td>
<td>10</td>
<td>2</td>
<td>15</td>
<td>58% (15/26)</td>
</tr>
<tr>
<td>EU</td>
<td>23</td>
<td>12</td>
<td>12</td>
<td>47</td>
<td>54% (47/87)</td>
</tr>
<tr>
<td>Mexico</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>12</td>
<td>52% (12/23)</td>
</tr>
<tr>
<td>USA</td>
<td>26</td>
<td>12</td>
<td>17</td>
<td>51</td>
<td>53% (55/103)</td>
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</table>
Table 4 – Number of initiations made against parties across selected time periods

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Asia</td>
<td>46</td>
<td>11</td>
<td>39</td>
<td>96</td>
</tr>
<tr>
<td>Asia w/o Japan</td>
<td>34</td>
<td>9</td>
<td>38</td>
<td>81</td>
</tr>
<tr>
<td>Brazil</td>
<td>9</td>
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<td>2</td>
<td>14</td>
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<td>EU</td>
<td>39</td>
<td>23</td>
<td>22</td>
<td>84</td>
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<tr>
<td>Mexico</td>
<td>3</td>
<td>9</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>USA</td>
<td>43</td>
<td>58</td>
<td>31</td>
<td>132</td>
</tr>
<tr>
<td>Rest of the WTO</td>
<td></td>
<td></td>
<td></td>
<td>143</td>
</tr>
<tr>
<td>Global total</td>
<td></td>
<td></td>
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<td>483</td>
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</table>

Table 5 – Number of empanelled disputes and responding parties

<table>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Asia</td>
<td>21</td>
<td>5</td>
<td>21</td>
<td>53</td>
<td>55% (53/96)</td>
</tr>
<tr>
<td>Asia w/o Japan</td>
<td>15</td>
<td>3</td>
<td>20</td>
<td>44</td>
<td>54% (44/81)</td>
</tr>
<tr>
<td>Brazil</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>5</td>
<td>36% (5/14)</td>
</tr>
<tr>
<td>EU</td>
<td>17</td>
<td>17</td>
<td>11</td>
<td>45</td>
<td>54% (45/84)</td>
</tr>
<tr>
<td>Mexico</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>6</td>
<td>43% (6/14)</td>
</tr>
<tr>
<td>USA</td>
<td>25</td>
<td>45</td>
<td>21</td>
<td>96</td>
<td>73% (96/132)</td>
</tr>
</tbody>
</table>

Table 6 – Number and rate of initiations made by members within and after 5 years of entry
<table>
<thead>
<tr>
<th>Complainant</th>
<th>No. of complaints initiated within 5 years of entry</th>
<th>Yearly rate of initiated complaints</th>
<th>No. of complaints initiated after 5 years of entry (up till 1 January 2013)</th>
<th>Yearly rate of initiation</th>
<th>Trend</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>1</td>
<td>0.2</td>
<td>10</td>
<td>1.67</td>
<td>↑</td>
</tr>
<tr>
<td>Japan</td>
<td>8</td>
<td>1.6</td>
<td>9</td>
<td>0.69</td>
<td>↓</td>
</tr>
<tr>
<td>India</td>
<td>9</td>
<td>1.8</td>
<td>12</td>
<td>0.92</td>
<td>↓</td>
</tr>
<tr>
<td>South Korea</td>
<td>3</td>
<td>0.6</td>
<td>12</td>
<td>0.92</td>
<td>↑</td>
</tr>
<tr>
<td>Thailand</td>
<td>5</td>
<td>1</td>
<td>8</td>
<td>0.62</td>
<td>↓</td>
</tr>
<tr>
<td>Brazil</td>
<td>6</td>
<td>1.2</td>
<td>20</td>
<td>1.54</td>
<td>↑</td>
</tr>
<tr>
<td>Mexico</td>
<td>8</td>
<td>1.6</td>
<td>15</td>
<td>1.15</td>
<td>↓</td>
</tr>
<tr>
<td>USA</td>
<td>60</td>
<td>12</td>
<td>43</td>
<td>3.31</td>
<td>↓</td>
</tr>
<tr>
<td>EU</td>
<td>47</td>
<td>9.4</td>
<td>40</td>
<td>3.08</td>
<td>↓</td>
</tr>
<tr>
<td>Australia</td>
<td>4</td>
<td>0.8</td>
<td>3</td>
<td>0.23</td>
<td>↓</td>
</tr>
<tr>
<td>Canada</td>
<td>15</td>
<td>3</td>
<td>18</td>
<td>1.38</td>
<td>↓</td>
</tr>
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</table>

Table 7 – Percentage of complaints converted by complainant members within and after 5 years of entry
<table>
<thead>
<tr>
<th>Complainant member</th>
<th>% of complaints initiated within 5 years of entry</th>
<th>% of complaints initiated after 5 years of entry (up till 1 January 2013)</th>
<th>Trend</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>100% (1/1)</td>
<td>80% (8/10)</td>
<td>↓</td>
</tr>
<tr>
<td>Japan</td>
<td>75% (6/8)</td>
<td>100% (9/9)</td>
<td>↑</td>
</tr>
<tr>
<td>India</td>
<td>56% (5/9)</td>
<td>50% (6/12)</td>
<td>↓</td>
</tr>
<tr>
<td>South Korea</td>
<td>66% (2/3)</td>
<td>83% (10/12)</td>
<td>↑</td>
</tr>
<tr>
<td>Thailand</td>
<td>20% (1/5)</td>
<td>63% (5/8)</td>
<td>↑</td>
</tr>
<tr>
<td>Brazil</td>
<td>50% (3/6)</td>
<td>60% (12/20)</td>
<td>↑</td>
</tr>
<tr>
<td>Mexico</td>
<td>38% (3/8)</td>
<td>60% (9/15)</td>
<td>↑</td>
</tr>
<tr>
<td>USA</td>
<td>38% (23/60)</td>
<td>67% (29/43)</td>
<td>↑</td>
</tr>
<tr>
<td>EU</td>
<td>49% (23/47)</td>
<td>60% (24/40)</td>
<td>↑</td>
</tr>
<tr>
<td>Australia</td>
<td>75% (3/4)</td>
<td>100% (3/3)</td>
<td>↑</td>
</tr>
<tr>
<td>Canada</td>
<td>53% (8/15)</td>
<td>78% (14/18)</td>
<td>↑</td>
</tr>
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</table>

Table 8 – Percentage of complaints converted by responding party within and after 5 years of entry
<table>
<thead>
<tr>
<th>Respondent member</th>
<th>% of complaints against respondent member converted within 5 years of entry</th>
<th>% of complaints against respondent member converted after 5 years of entry (up till 1 January 2013)</th>
<th>Trend</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>75% (3/4)</td>
<td>62% (16/26)</td>
<td>↓</td>
</tr>
<tr>
<td>Japan</td>
<td>42% (5/12)</td>
<td>100% (3/3)</td>
<td>↑</td>
</tr>
<tr>
<td>India</td>
<td>38% (5/13)</td>
<td>38% (3/8)</td>
<td>–</td>
</tr>
<tr>
<td>South Korea</td>
<td>55% (6/11)</td>
<td>100% (3/3)</td>
<td>↑</td>
</tr>
<tr>
<td>Brazil</td>
<td>50% (3/6)</td>
<td>60% (12/20)</td>
<td>↑</td>
</tr>
<tr>
<td>Brazil</td>
<td>22% (2/9)</td>
<td>60% (3/5)</td>
<td>↑</td>
</tr>
<tr>
<td>Mexico</td>
<td>33% (1/3)</td>
<td>45% (5/11)</td>
<td>↑</td>
</tr>
<tr>
<td>USA</td>
<td>63% (27/43)</td>
<td>80% (71/89)</td>
<td>↑</td>
</tr>
<tr>
<td>EU</td>
<td>44% (17/39)</td>
<td>62% (28/45)</td>
<td>↑</td>
</tr>
<tr>
<td>Australia</td>
<td>66% (4/6)</td>
<td>57% (4/7)</td>
<td>↓</td>
</tr>
<tr>
<td>Canada</td>
<td>80% (8/10)</td>
<td>71% (5/7)</td>
<td>↓</td>
</tr>
</tbody>
</table>

Table 9[^127^] - Degree of democratic governance in selected countries and conversion rates

[^127^]: POLITY does not provide any rating for the EU. Therefore, we have omitted the EU from Table 9. Furthermore, we were not able to include data beyond 2010 because POLITY only provides data up till 2010.
<table>
<thead>
<tr>
<th>Country</th>
<th>Average Polity rating 1990-1999</th>
<th>Average Polity rating 2000-2010</th>
<th>Average Polity rating 1990-2010</th>
<th>Percentage of Conversion</th>
<th>Number of complaints up till 1 January 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>-7</td>
<td>-7</td>
<td>-7</td>
<td>68% (28/41)</td>
<td>11</td>
</tr>
<tr>
<td>Japan</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>72% (23/32)</td>
<td>17</td>
</tr>
<tr>
<td>India</td>
<td>8.4</td>
<td>9</td>
<td>8.7</td>
<td>45% (19/42)</td>
<td>21</td>
</tr>
<tr>
<td>South Korea</td>
<td>6.2</td>
<td>8</td>
<td>7.1</td>
<td>72% (21/29)</td>
<td>15</td>
</tr>
<tr>
<td>Brazil</td>
<td>8</td>
<td>8</td>
<td>8</td>
<td>50% (20/40)</td>
<td>26</td>
</tr>
<tr>
<td>Mexico</td>
<td>3</td>
<td>7.7</td>
<td>5.5</td>
<td>49% (18/37)</td>
<td>23</td>
</tr>
<tr>
<td>USA</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>64% (150/235)</td>
<td>103</td>
</tr>
</tbody>
</table>

128 Even though the WTO DSU came into operation only in 1995, we use the time period 1990-1999 to take into account the often considerable time lag between democratic reform and a consequent change in government behavior.
### Table 10 – Conversion rates in capacity as complainant and respondent

<table>
<thead>
<tr>
<th>Country</th>
<th>Combined conversion rate up till 1 January 2013</th>
<th>Combined conversion rate up till 1 January 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>82% (9/11)</td>
<td>63% (19/23)</td>
</tr>
<tr>
<td>Japan</td>
<td>88% (15/17)</td>
<td>53% (8/15)</td>
</tr>
<tr>
<td>India</td>
<td>52% (11/21)</td>
<td>38% (8/21)</td>
</tr>
<tr>
<td>South Korea</td>
<td>80% (12/15)</td>
<td>64% (9/14)</td>
</tr>
<tr>
<td>Brazil</td>
<td>58% (15/26)</td>
<td>36% (5/14)</td>
</tr>
<tr>
<td>Mexico</td>
<td>52% (12/23)</td>
<td>43% (6/14)</td>
</tr>
<tr>
<td>USA</td>
<td>50% (52/103)</td>
<td>74% (98/132)</td>
</tr>
<tr>
<td>EU</td>
<td>54% (47/87)</td>
<td>54% (45/84)</td>
</tr>
</tbody>
</table>
Table 11\(^{129}\) - Exports, initiations and conversion rates from 2002-2010

<table>
<thead>
<tr>
<th>Country</th>
<th>Average annual value of exports 2002-2010 (US$)</th>
<th>Value of exports 2010 (US$)</th>
<th>No. of complaints initiated by country 2002-2010</th>
<th>Conversion rate as complainants</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>$1046bn</td>
<td>$1752bn</td>
<td>7</td>
<td>86% (6/7)</td>
</tr>
<tr>
<td>Japan</td>
<td>$671bn</td>
<td>$834bn</td>
<td>5</td>
<td>100% (5/5)</td>
</tr>
<tr>
<td>India</td>
<td>$206bn</td>
<td>$384bn</td>
<td>6</td>
<td>50% (3/6)</td>
</tr>
<tr>
<td>South Korea</td>
<td>$367bn</td>
<td>$532bn</td>
<td>8</td>
<td>88% (7/8)</td>
</tr>
<tr>
<td>Brazil</td>
<td>$152bn</td>
<td>$233bn</td>
<td>8</td>
<td>88% (7/8)</td>
</tr>
<tr>
<td>Mexico</td>
<td>$245bn</td>
<td>$314bn</td>
<td>11</td>
<td>73% (8/11)</td>
</tr>
<tr>
<td>USA</td>
<td>$1437bn</td>
<td>$1840bn</td>
<td>28</td>
<td>75% (21/28)</td>
</tr>
<tr>
<td>EU(^{131})</td>
<td>$1414n(^{132})</td>
<td>$1799bn(^{133})</td>
<td>26</td>
<td>58% (15/26)</td>
</tr>
</tbody>
</table>


\(^{130}\) Export and import figures for 2011 have not been made available by the World Bank as of this date (06/06/2012) and therefore, we do not include data on 2011. The period between 2002 to 2010 was selected because all eight jurisdictions selected for comparison in Tables 8 and 9 were members during this period; we do not include data earlier than 2002 because China only acceded to the WTO on December 11, 2001.

\(^{131}\) The World Bank’s Databank does not provide statistics on the external trade of the EU. Therefore, we had to use data from Eurostat, which is the EC’s official portal on European statistics. See Eurostat, ‘Extra-EU27 trade, by main partners, total product’, http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tet00040&language=en (visited 1 August 2012).

\(^{132}\) Ibid. Eurostat statistics were presented in Euro dollar terms; we converted these figures into US dollars, based on the annual official exchange rates for the Euro against the US dollar for the years between 2002-2010. For annual official exchange rates, see European Union, External and intra-EU trade: A statistical yearbook Data 1958 – 2010. (Luxembourg: Publications Office of the European Union, 2011) 395.

\(^{133}\) This was based on the official exchange rate for the Euro against the US dollar for 2010, which are 1.3257. See EU, above n 132, at 395.
Table 12 – Imports, complaints against country and conversion rates of selected countries from 2002-2010

<table>
<thead>
<tr>
<th>Country</th>
<th>Average annual value of imports 2002-2010 (US$)</th>
<th>Value of imports 2010 (US$)</th>
<th>No. of disputes initiated against country 2002-2010</th>
<th>Conversion rate as respondent</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>$872bn</td>
<td>$1520bn</td>
<td>21</td>
<td>57% (12/21)</td>
</tr>
<tr>
<td>Japan</td>
<td>$615bn</td>
<td>$768bn</td>
<td>3</td>
<td>100% (3/3)</td>
</tr>
<tr>
<td>India</td>
<td>$242bn</td>
<td>$453bn</td>
<td>7</td>
<td>29% (2/7)</td>
</tr>
<tr>
<td>South Korea</td>
<td>$350bn</td>
<td>$503bn</td>
<td>3</td>
<td>100% (3/3)</td>
</tr>
<tr>
<td>Brazil</td>
<td>$140bn</td>
<td>$256bn</td>
<td>2</td>
<td>100% (2/2)</td>
</tr>
<tr>
<td>Mexico</td>
<td>$259bn</td>
<td>$329bn</td>
<td>7</td>
<td>57% (4/7)</td>
</tr>
<tr>
<td>USA</td>
<td>$2034bn</td>
<td>$2357bn</td>
<td>54</td>
<td>81% (44/54)</td>
</tr>
<tr>
<td>EU</td>
<td>$1594bn&lt;sup&gt;134&lt;/sup&gt;</td>
<td>$2029bn&lt;sup&gt;135&lt;/sup&gt;</td>
<td>37</td>
<td>70% (26/37)</td>
</tr>
</tbody>
</table>

<sup>134</sup> See Eurostat, above n 131, and EU, above n 132, at 395

<sup>135</sup> Ibid.
Table 13 – Export profiles of selected countries from 2002-2010

<table>
<thead>
<tr>
<th>Country</th>
<th>Average yearly value of total exports (2002-2010)</th>
<th>Average yearly value of exports for capital goods and intermediate parts$^{136}$ (2002-2010)</th>
<th>% of average yearly value of total exports</th>
<th>Average yearly value of exports for final traded consumption goods$^{137}$ (2002-2010)</th>
<th>% of average yearly value of total exports</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>$1046bn</td>
<td>$627 bn</td>
<td>60%</td>
<td>$291 bn</td>
<td>28%</td>
</tr>
<tr>
<td>Japan</td>
<td>$671bn</td>
<td>$452 bn</td>
<td>67%</td>
<td>$37 bn</td>
<td>6%</td>
</tr>
<tr>
<td>India</td>
<td>$206bn</td>
<td>$61 bn</td>
<td>30%</td>
<td>$31 bn</td>
<td>15%</td>
</tr>
<tr>
<td>South Korea</td>
<td>$367bn</td>
<td>$251 bn</td>
<td>68%</td>
<td>$19 bn</td>
<td>5%</td>
</tr>
<tr>
<td>Brazil</td>
<td>$152bn</td>
<td>$63 bn</td>
<td>41%</td>
<td>$22 bn</td>
<td>14%</td>
</tr>
<tr>
<td>Mexico</td>
<td>$245bn</td>
<td>$130 bn</td>
<td>53%</td>
<td>$45 bn</td>
<td>18%</td>
</tr>
<tr>
<td>USA</td>
<td>$1437bn</td>
<td>$679 bn</td>
<td>47%</td>
<td>$128 bn</td>
<td>9%</td>
</tr>
<tr>
<td>EU</td>
<td>$1414n</td>
<td>$894 bn</td>
<td>63%</td>
<td>$260 bn</td>
<td>18%</td>
</tr>
</tbody>
</table>

$^{136}$ Data is derived using the data query function on the UN ComTrade website [see UN Comtrade, ‘Data Query’, http://comtrade.un.org/db/dqBasicQuery.aspx (visited 1 August 2012)]. Under the classification of Broad Economic Categories (BEC), capital goods and intermediate goods (excluding the food and fuel sectors) fall under categories 41*, 521*, 22*, 42* and 53*.

$^{137}$ Ibid. Final-traded consumption goods fall under categories 112*, 122*, 522*, 61*, 62* and 63* of the BEC classification.
Appendix B

Chart 1

Year to Year Comparison (China)
Chart 2

Year to Year Comparison (Claimant)