



DIGITAL ACCESS TO
SCHOLARSHIP AT HARVARD
DASH.HARVARD.EDU



HARVARD LIBRARY
Office for Scholarly Communication

Dilemmas of Delegation: The Politics of Authority in International Courts

The Harvard community has made this article openly available. [Please share](#) how this access benefits you. Your story matters

Citation	Cremer, Cosette D. 2016. Dilemmas of Delegation: The Politics of Authority in International Courts. Doctoral dissertation, Harvard University, Graduate School of Arts & Sciences.
Citable link	http://nrs.harvard.edu/urn-3:HUL.InstRepos:33493262
Terms of Use	This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA

Dilemmas of Delegation: The Politics of Authority in International Courts

A dissertation presented

by

Cosette D. Creamer

to

The Department of Government

in partial fulfillment of the requirements
for the degree of
Doctor of Philosophy
in the subject of
Political Science

Harvard University
Cambridge, Massachusetts

May 2016

©2016 — *Cosette D. Creamer*

All rights reserved.

Dilemmas of Delegation: The Politics of Authority in International Courts

Abstract

One of the most enduring questions for the study of politics relates to what, if any, independent power international institutions have to affect the behavior of sovereign states. This dissertation addresses this question by examining the politics underlying one supranational judicial body's exercise of authority—the World Trade Organization's (WTO) Dispute Settlement Mechanism (DSM). International courts are strategic legal actors that operate in a highly political context. Politics matter for judicial outcomes—the rulings of courts—but legal constraints moderate the impact of politics in fairly systematic ways. The dissertation specifies the conditions under which one dynamic prevails and demonstrates that power politics do not dominate international judicial interactions. Rather, courts are sensitive to the degree of institutional support they enjoy among the collective membership and a broader set of relevant stakeholders. Collective support for or challenges to a court's institutional legitimacy—what I call a court's political capital—affect judicial outcomes more than the preferences of dominant stakeholders.

The second chapter develops the dissertation's theoretical argument, while the third chapter describes the political context within which the WTO's judicial bodies operate. It applies methods of automated text analysis to an original dataset of all member statements made within the WTO Dispute Settlement Body from 1995-2013 in order to construct measures of the DSM's political capital. I supplement this evidence with a series of interviews with member representatives and WTO Secretariat officials.

The fourth chapter employs original measures of dispute outcomes to identify how WTO panels respond to shifts in the DSM's political capital. It finds that dispute panels are politically savvy, as they tend to signal less deference to national regulatory choices only when the DSM enjoys relatively greater support among the membership as a whole. However, the legal constraints of appellate case law moderate the influence of these political pressures on dispute outcomes. Through their rulings, panels seek to maximize support among their legal and political audiences simultaneously.

The fifth chapter turns to the relationship between the Appellate Body (AB) and dispute panels. How panels review domestic laws and policy choices can be—and has been increasingly—challenged on appeal by parties. This chapter describes how the AB initially directed panels to engage in searching review of domestic policy choices, but that it has encouraged greater deference to national authorities in recent years. It identifies when the AB reverses panel findings on these grounds, with a focus on when it takes into account views expressed by governments.

The final chapter turns to the impact of the WTO's judicial authority on state behavior, specifically compliance with its judgments. Employing original measures of dispute judgments and compliance outcomes, this chapter demonstrates that the WTO's judicial bodies use the content of their rulings to ease the domestic political costs of trade policy changes, thereby acting as 'partners in compliance' with a government's executive branch. Yet the extent to which these strategies successfully facilitate swifter implementation is conditional on the domestic politics of compliance. The political cover provided within adverse rulings has no observable impact on the fact or timing of compliance for disputes that can be implemented through executive action alone. However, relatively greater validation of a trade measure does increase the probability of compliance and swifter implementation when legislative action is required. This suggests that the WTO's judicial bodies successfully facilitate compliance through the content of their rulings, thereby improving the effectiveness of the dispute settlement system.

Contents

Abstract	iii
Acknowledgments	vii
1 Introduction	1
1.1 The Dilemma of Delegating Authority to Courts	3
1.2 International Trade Authority	5
1.3 Conclusion	12
2 The Exercise of International Judicial Authority	16
2.1 Why Delegate?	18
2.2 Formal Mechanisms of Control	20
2.3 Maximizing Political Capital under Legal Constraints	23
2.4 Conclusion	36
3 The Political Capital of the WTO Dispute Settlement System	38
3.1 The Political Capital of the DSM	42
3.2 Discussion of Dispute Rulings	56
3.3 Conclusion	82
4 The Balancing of Trade Authority by WTO Dispute Panels	85
4.1 Judicial Review within the WTO	87
4.2 Empirical Strategy	96
4.3 Conclusion	109
5 The Dynamics of Appellate Reversal in the WTO	113
5.1 The Appellate Body and its members	114
5.2 Appellate Review	117
5.3 The success and failure of Article 11 challenges	120
5.4 Conclusion	135

6	Partners in Compliance:	
	The Political Cover of WTO Rulings	137
6.1	Why Comply?	139
6.2	Empirical Strategy	146
6.3	Results	155
6.4	Political Cover and Patents	162
6.5	Conclusion	167
7	Conclusion	170
7.1	Contributions	171
A	Appendix to Chapter 3: Political Capital	175
A.1	Coding & Classification of DSB Statements	175
A.2	Probability of Issuing a Critical Statement	180
B	Appendix to Chapter 4: Panel Authority	182
B.1	Panel Validation Score	182
B.2	Regression Results and Robustness Checks	183
C	Appendix to Chapter 5: Appellate Body	189
C.1	Ruling Validation Scores	189
C.2	Article 11 Appeals	192
D	Appendix to Chapter 6: Political Cover	193
D.1	Regression Results and Robustness Checks	193
	Bibliography	197

Acknowledgments

The genesis and development of this manuscript owes much to the guidance and feedback of the members of my dissertation committee—Beth A. Simmons, Gerald Neuman, Dustin Tingley, and Mark Wu—who each contributed in their own unique ways. The mentorship of my committee chair—Beth A. Simmons—has been invaluable over the years and the highlight of my time in graduate school. The support she has provided is unquantifiable—from praising an insightful comment in workshop, to applauding a successful presentation, to meticulously reading and commenting on draft chapters, to brainstorming new research ideas. Mark Wu’s enthusiasm about the project was a constant motivator, and his intimate knowledge of trade law and the inner workings of the World Trade Organization (WTO) pushed the project in new and interesting directions. Although not an official member of my committee, Rachel Brewster provided such detailed comments on draft chapters that she may as well have been.

The manuscript benefited considerably from the tangible and intangible support provided by iCourts, the Danish National Research Foundation’s Centre of Excellence for International Courts, and especially its director—Mikael Rask Madsen—who provided me with constant encouragement and laughter. My time spent there as a visiting researcher allowed me to push the project to near-completion, and proved essential to my ability to conduct so many successful interviews with WTO officials and member representatives. Laura Nielsen deserves special thanks for sharing her trade policy connections with me and serving as my entrée into the WTO world. The numerous government representatives and WTO officials with whom I spoke gave this project its voice.

The faculty and staff at iCourts created an incredibly productive and stimulating environment, within which the project’s research design benefited from lively feedback during workshops and discussions. Katrine Meldgaard Kjaer deserves special mention for giving me a place to live in Copenhagen and for putting up with my insane work hours and obsession with kartoffel bød. By far, the highlight of my stay at iCourts was meeting a life-long collaborator and co-author—Zuzanna Godzimirska—whose work ethic and excitement for all of our collaborations continue to be sources of inspiration for me. Zuzanna kept me organized, color-coded, and calm while conducting interviews in Geneva, and many of the ideas within this project sparked during our incessant discussions, texts, or emails.

Numerous drafts were read by and ideas brainstormed with Joan Cho and Emily Clough, and I couldn’t have tackled the text analysis without Anton Strezhnev’s help and support. Elise Baranouski provided exceptional research assistance, thanks to the generous funding of Dustin Tingley. Finally, the love and encouragement of my family, Courtney DiCarlo, Daniel Tavana and Patrick Underwood helped get me through the toughest periods of research and writing.

1 | Introduction

One of the most enduring questions for the study of politics relates to what, if any, independent power international institutions have to affect the behavior of sovereign states. The answer to this question is constantly evolving, in line with changes in the underlying global context and the growing institutionalization of international rules, making it one of the most consistently salient and exciting subjects of inquiry within world politics. The turn towards international law—and the increased reliance on courts—by states over the past few decades is indisputable. While states are unique—but by no means the exclusive—public authorities within the international sphere, they are also creating a growing number of supranational entities—including international courts—to whom they collectively grant the competence to perform certain functions or provide a collective good. This grant of competence forms the basis for an international court’s exercise of authority, an authority that substantially affects the daily lives of citizens around the world. Today, there are more than twenty permanent international courts and hundreds of quasi-judicial and non-permanent judicial bodies (Alter 2014).¹

This dissertation provides new evidence and insight into the nature of the authority exercised by these international courts. Drawing on research situated firmly at the intersection of international law and politics, I challenge prevailing perceptions that powerful states effectively control courts *or* that international courts are completely beyond state influence.

¹See also *The Project on International Courts and Tribunals*, available at: <http://www.pict-pcti.org/>.

This stark dichotomy—that global institutions are either completely determined by or entirely removed from (power) politics—is often recognized as a false one, yet both political scientists and lawyers continue to rely on it as a useful analytical device. In contrast to such simplistic framing, I argue that legal and political factors represent countervailing forces that influence outcomes—the rulings of international courts. Not only do I demonstrate that both political and legal factors shape outcomes, but I also specify the conditions under which one dynamic dominates the other. Politics matter for outcomes, but the impact of politics is moderated by legal constraints in fairly systematic ways. Additionally, I show that politics matter but not through our traditional understanding of power politics, or the preferences and interests of the most powerful states. Rather, the exercise of authority by international courts is largely influenced by the degree of institutional support a court enjoys among both the collective membership and a broader set of relevant stakeholders, rather than being shaped solely by the most powerful members of a regime. Collective political support for or challenges to a court’s institutional legitimacy—what I call an international court’s level of political capital—affect judicial outcomes more than the preferences of dominant states.

The study of these outcomes—the rulings of an international court—is significant because they allocate authority between sovereign states and international bodies. International courts sometimes seek to expand and at other times restrain the use of their delegated authority, in ways that fundamentally shape the distribution of authority between member states and the international institution. Why does a court sometimes engage in intense scrutiny of domestic legislation or the basis for a policy choice, effectively asserting the authority of an international institution to regulate those decisions? Why, at other times, does it defer considerably to a government’s competence to enact a law or justify a regulatory measure, effectively recognizing that national governments retain sovereignty over that policy space?

I argue that international judges are strategic actors who pay attention to their court’s political capital, defined as the aggregate views of a court’s constituents on its exercise of judicial authority. Because a court’s authority is created through an initial grant, it

is relational in that its exercise relies on continuing legitimation by a court's constituents, while its boundaries are subject to ongoing negotiation and contestation between and among international judicial institutions, sovereign states, and other relevant constituents (Lake 2010, 592, 596). For this reason, judges will only seek to expand their authority when the institutional legitimacy of their court is not in jeopardy or when doing so would explicitly increase its political support among the broader membership or important stakeholders. The underlying and continuous struggle over the balance of authority between international courts and their constituents, and the diffuse ways in which various stakeholders seek to influence—through their ongoing (de)legitimation of—a court's exercise of its authority, is what defines both the nature and the substance of global governance in a wide range of issue areas.²

1.1 The Dilemma of Delegating Authority to Courts

The decision by states to grant courts the authority to interpret legal agreements, resolve disputes, or enforce international rules remains puzzling, with many assuming that states can exercise sufficient control over these courts or exit the regime if membership costs begin to outweigh benefits. Despite the fact that delegating authority to an international body is controversial and raises a number of concerns about sovereignty, legitimacy and accountability (Bradley 2003; Franck 2000; Ku 2006; Lake 2007a; Swaine 2004), international courts also clarify obligations, help states overcome cooperation problems, and contribute more generally to the development of an international legal system (Alter 2014). Perhaps for this reason, states continue to create formally independent tribunals. Even more surprising, many states comply with their rulings, sparking lively debates about the reasons for and

²The literature on global governance is extensive, though the boundaries of the term are somewhat fuzzy, and it has been used to describe a wide range of empirical phenomena. See generally, Avant, Finnemore, and Sell (2010); Barnett and Duvall (2004); Barnett and Finnemore (2004); Lake (2010); Rosenau and Czempiel (1992); Weiss and Wilkinson (2014).

effects of such delegation.³

As with all types of delegation, states balance considerations of control and independence when they create international courts. States face a dilemma, however, in that they need independent tribunals to reap the benefits of the delegation decision, but the very granting of such autonomy gives courts delimited discretion over the scope and exercise of their judicial authority. Individual states want to select judges and create tribunals that will make decisions that align with their preferences, but collectively states need judges that are qualified experts in law and autonomous tribunals able to exercise judicial authority—the source of their expertise and their unique contribution to the political order. The very inclusion of this autonomy within the delegation relationship provides opportunities for judges, through their decisions, to incrementally shift the treaty-specified balance of authority between member states and a tribunal.

To address this concern, governments create independent tribunals subject to structural constraints and political pressures. Just as independent domestic courts face a number of formal and informal constraints, international courts also operate within an environment characterized by numerous—and sometimes competing—pressures. States create *ex ante* and *ex post* structural mechanisms, which may include control over judicial appointments and tribunal funding, the ability to re-contract, and the nuclear option of regime exit. Despite these formal mechanisms, the *potential* for tribunals to incrementally and often subtly alter the balance of authority between international institutions and governments remains. Moreover, states often are unwilling or unable to employ them at every instance of expansion, largely due to diverse preferences across members.

At times, however, the costs imposed by the judicial reallocation of authority outweigh the benefits derived from allowing a tribunal to operate independently. In such cases, states rely primarily on informal or diffuse rhetorical pressures to influence the decisional behavior

³Scholars continue to debate the utility of the concept of compliance in evaluating the effects and effectiveness of international law more generally, and international judicial bodies specifically. See, for example: Chayes and Chayes (1993); Downs, Rocke, and Barsoom (1996); Howse and Teitel (2010); Kapiszewski and Taylor (2013); Martin (2012); Raustiala and Slaughter (2002); Shany (2012).

of a court. These communicative acts—in the aggregate—represent a court’s political capital, or level of support for its exercise of authority, at a given moment in time. Critically, the political capital of a court is not determined simply by responses to extreme or controversial instances of judicial overreaching. Rather, the shaping of and contestation over the balance of authority between a court’s constituents and international institutions occurs on a near-daily basis, around regular court decisions and their (de)legitimation by relevant constituents.

Within the following chapters, I develop this argument for international courts more broadly, and specify the way in which the identity of relevant constituents, and the role and influence of political capital, depends on a court’s design characteristics. I then test this theory in the context of the multilateral trade regime, specifically the World Trade Organization (WTO).

1.2 International Trade Authority

The exercise of international trade authority by the WTO’s judicial bodies is particularly salient today. The World Trade Organization regulates over \$25 trillion in trade on the basis of formal treaty agreements, and spans most of the globe, with 160 members at present. The broad scope and considerable specificity of WTO rules create a highly legalized set of international obligations that have the potential to interfere significantly with domestic regulatory decisions and policy choices. The increasing number of regional trade agreements is intensifying pressure on governments to finalize a new round of multilateral trade negotiations, which if successful would create even more detailed international obligations covering a broader range of issue areas. In conjunction with expanding international trade and continued protectionism, conflict between states over trade-related measures is inevitable. Reliance on the WTO’s dispute settlement system to resolve these conflicts has only increased over time, a trend likely to continue. Since the creation of the WTO, the

system has helped to resolve inter-state disputes involving at least \$1 trillion in trade flows.⁴

1.2.1 Dispute Settlement within the World Trade Organization

Unlike the WTO, the General Agreement on Tariffs and Trade (GATT) 1947 system did not establish a formal organizational structure, as parties were preparing to create an International Trade Organization (ITO). Largely motivated by the failed attempt to establish the ITO, the GATT parties subsequently developed an informal organizational structure in order to facilitate operation of the General Agreement.⁵ In 1960 the GATT Parties established one of the first formal bodies—a Council of Representatives—composed of representatives of Contracting Parties “willing and able to accept responsibilities of membership on the Council.”⁶ This body eventually became known as the GATT Council and continued to operate until the entry into force of the WTO Agreement.⁷

The reluctance of states parties to the GATT to develop formal treaty bodies did not prevent agreement during the Uruguay Round negotiations to create an overarching institutional framework incorporating the GATT multilateral treaty into a formal international organization. To be sure, they voiced sovereignty concerns during the Uruguay Round about the implications of moving from the GATT to a formal organizational model, particularly that it might “become politicized over time and therefore less able to deal with trade on a business-like basis” and might change members’ “relationship with the secretariat that,

⁴Statement by WTO Director-General Roberto Azevêdo, Minutes of the Meeting of the Dispute Settlement Body held on 26 September 2014, WT/DSB/M/350.

⁵For example, beginning in 1951/2 an *ad hoc* committee was established in order to facilitate operations between formal sessions of the parties and subsequently this “Intersessional Committee” was made permanent in 1955. GATT, CP.6/41 BISD Vol. IIS/205-209, at 206 (1952); Report adopted by the CONTRACTING PARTIES on 28 February, 5 and 7 March 1955, (L/237), BISD 3S/9, 231-252, at 245-247 (1955).

⁶Decision of 4 June 1960, *Establishing the Council of Representatives*, GATT Docs. SR.16/11, at 160; W.16/15 corrigendum 1,2 (1960), reproduced under ‘Procedures’, sub-heading ‘Other Procedures’, in BISD 9S/7-9, at 8 (1961).

⁷In addition to dealing with urgent inter-sessional matters, supervising the work of subsidiary bodies, and preparing for sessions of the Contracting Parties, the Council could also exercise functions regarding matters delegated by or on behalf of the Contracting Parties. This permitted the Council to eventually consider requests from Contracting Parties for consultations under Article XXII GATT and to deal with matters involving nullification or impairment of a benefit accruing to a contracting party under Article XXIII GATT (dispute complaints and their resolution) (Footer 2006, 118-9).

under GATT, had no real power of initiative”(Stoler 2003, 2). Ultimately these concerns did not prevail and the World Trade Organization, the successor organization of the GATT, was created at the close of the Uruguay Round negotiations, with the Marrakesh Agreement Establishing the WTO coming into force on 1 January 1995.

The transition from the decentralized GATT system to the formal organizational structure of the WTO created a significantly more institutionalized framework for negotiations and decision-making. By exercising various functions through different councils and committees, member states make up the organization’s political—and in some sense legislative—bodies (von Bogdandy 2001; Footer 2006; Shaffer and Trachtman 2011). In fact, the WTO describes itself as “member-driven” and both government representatives and WTO officials repeat this phrase almost as a self-affirming mantra (WTO 2011, 101). Governments see themselves as the primary constituents of the Organization as a whole, and its dispute settlement system in particular. Yet the transition from the GATT dispute settlement proceedings to the WTO’s Dispute Settlement Mechanism (DSM) also represented a notable instance of judicialization within international economic governance, in that it considerably strengthened the power and independence of its judicial bodies to rule on trade conflicts between states (Jackson 2001). In fact, dispute settlement is the only function that the WTO exercises somewhat autonomously. Governments merely ‘administer’ the Dispute Settlement Understanding (DSU), with the judicial function exercised by two bodies—the dispute panels (the ‘court of first-instance’) and the Appellate Body (AB)—thereby ensuring a degree of independence and compulsory adjudication.⁸

The WTO relies on a decentralized form of enforcement, with governments challenging within the dispute settlement system other members’ laws and policies as being in violation of WTO rules. Although member states formally adopt dispute rulings and issue implemen-

⁸Existing accounts of this significant judicialization leap, which was not necessarily anticipated at the outset of the Uruguay Round negotiations, often point to the following in explaining the creation of the WTO dispute settlement system: US negotiators attempt to tie Congress’ hands (Brewster 2006) the desire to improve the legitimacy and consistency of the system (Goldstein and Gowa 2002; Pelc 2010); and ‘experiential learning’ under the GATT system (Elsig and Eckhardt 2015).

tation recommendations under a “reverse consensus” rule,⁹ the primary responsibility for clarifying WTO rules and interpreting the scope of international trade authority rests with panels and the Appellate Body. Governments are bound by these decisions, face retaliatory concessions if they do not comply with their rulings, and as a result most governments do eventually make costly changes to domestic laws and regulations to bring their measures into compliance.

The structural relationship between the DSB and the WTO’s judicial bodies (the DSM) reflects the pervasive tension between the latter’s independence and state control, in that the DSM possesses compulsory jurisdiction, acts as the authoritative interpreter of WTO law, and its decisions are “virtually impossible” for states to reverse (Alter 2008; Stone Sweet and Brunell 2013). Strengthening the WTO’s judicial bodies in this way created the potential for the DSM to exercise its authority—removed from direct state control—in ways that could critically interfere with national governance in a wide range of policy areas, ranging from trade remedies in the form of safeguards and subsidies, to regulations intended to protect the safety of consumers or the environment, to broad public health policies. Yet the WTO’s judicial bodies have not always used this independence to expand the reach of their authority. At times, they defer considerably to a government’s authority to make a policy choice, while at other times they refuse to afford any leeway to domestic authorities and assert that the WTO has the ultimate authority over policy decisions. Perhaps more surprisingly, the considerable variation in the extent to which the WTO’s judicial bodies defer to governments cannot be explained by the interests of the most powerful trading members—the United States and the European Union—alone.

⁹The general rule within the political body charged with administering the DSU—the Dispute Settlement Body (DSB)—is to take decisions by consensus. However, for the establishment of a panel, adoption of panel and Appellate Body reports, and authorization of retaliation, the DSU provides that the DSB must adopt the decision unless there is a consensus against it (Articles 6.1, 16.4, 17.14, and 22.6, Dispute Settlement Understanding). This decision-making procedure is referred to as negative or reverse consensus.

1.2.2 Re-Contracting within the WTO

The primary political body of the WTO—the General Council—handles the day-to-day work of the organization in between the biennial Ministerial Conferences, including administration of the dispute settlement mechanism and trade policy review, sitting as the Dispute Settlement Body (DSB) and Trade Policy Review Body (TPRB) respectively.¹⁰ Although the DSM possesses considerable interpretive authority and autonomy, states did create two formal mechanisms of legislative feedback or response to shape the DSM’s exercise of judicial authority: amendment of WTO rules and adoption of authoritative interpretations.¹¹ The power to adopt amendments represents a clear ability to re-contract,¹² though the procedures for amending the various WTO covered agreements are fairly complex and differ according to the agreement and provision at issue. The right to adopt authoritative interpretations provides a tool to implicitly re-contract by filling in interpretive gaps or ambiguities in the WTO’s rules, and thus allows governments to shape WTO jurisprudence if it begins to move away from states’ interpretive preferences (Allee and Huth 2006; Grant and Keohane 2005; Hawkins et al. 2006).

These two re-contracting tools constitute a type of “deliberative engagement” between members and the judicial bodies of the WTO (Leib, Ponet, and Serota 2013; Stone Sweet and Brunell 2013).¹³ While the latter have the primary responsibility for interpreting and

¹⁰WTO Agreement, Article IV. The DSB and TPRB are referred to as ‘emanations’ or the ‘alter ego’ of the General Council (Van den Bossche 2005: 126).

¹¹WTO Agreement, Articles X and IX:2. ‘Legislative response’ refers to the response of the WTO’s political bodies—the Membership as a whole—to interpretations or practices of the Organization’s judicial branch that governments perceive to be at odds with their intention, will or preferences. For an overview of scholarship in the American context that focuses on the ongoing interaction among “separated institutions sharing power,” see Neustadt (1990, 34). See also Barnes (2007).

¹²Members may seek an amendment for reasons other than legislative response, such as to address time-inconsistent preferences on international trade or in response to changes in the uncertain environment of international economic relations (Koremenos 2005).

¹³Within the domestic context, mechanisms of legislative response or override play a similarly important role in ensuring accountability between branches of government and minimizing the “countermajoritarian difficulty” of unaccountable judges overruling the “will of the legislature” (Bickel 1962, 16; Ely 1980, 5; Eskridge 1987). Additionally, mechanisms of legislative response likely enhance the quality and representativeness of decision-making undertaken by various branches in that they encourages a continuing and

enforcing WTO rules, states retain the final interpretive word. This is particularly important given the difficulty (if not impossibility) of blocking report adoption, due to the reverse consensus rule. Because rulings of the WTO’s judicial bodies have significant political and economic implications for the membership as a whole, the ability of governments to respond to their decisions encourages a dialogical relationship with the DSM about states’ rights and obligations under the covered agreements—and thus the allocation of international authority. However, due to the practice of consensus decision-making within the WTO, member states have not been able to make effective use of these mechanisms. The amendment procedure is inefficient and understandably lengthy.¹⁴ Similarly, states have made relatively few efforts to adopt interpretations, with none adopted to date.¹⁵ This does not imply, however, that governments are left without informal mechanisms to shape the direction of WTO jurisprudence.

1.2.3 The Political Capital of the WTO’s Judicial Bodies

Although the WTO’s judicial bodies operate free from significant or formal multilateral controls, governments frequently employ diffuse or “horizontal pressures” (Alford 2006: 220) through comments or writings on the activities of the DSM (Cottier and Mavroidis 2003: 2). Governments often—either individually or collectively—criticize or call into question the DSM’s exercise of authority, through public statements within meetings of the political body tasked with overseeing the dispute settlement system (the DSB). Perhaps one of the

dynamic “dialogue” over the meaning of the law (Bickel 1962; Fisher 1988; Friedman 1993). Even though the domestic model is not directly transposable to the decentralized WTO system, legislative response still provides a useful framework to analyze the relationship between states and the WTO’s judicial bodies.

¹⁴The first treaty amendment agreed upon by WTO Members—the Protocol Amending the TRIPS Agreement adopted in 2005—is not currently in effect, with two thirds of the WTO’s Members yet to formally deposit an instrument of acceptance with the Director General. General Council, Amendment of the TRIPS Agreement: Decision of 6 December 2005, WT/L/641, 8 December 2005. For a list of Members that have deposited instruments of acceptance with the WTO’s Director General, see: http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.

¹⁵For example, when the DSM began accepting unsolicited *amicus curiae* briefs, Members merely criticized the practice during the course of a General Council meeting. General Council, Minutes of Meeting held on 22 November 2000, WT/GC/M/60.

most extreme and visible manifestations of such horizontal pressures followed the Appellate Body’s report in *US—Zeroing (EC)*, with the United States sending two communications to the Dispute Settlement Body, in which it detailed its legal objections to the Appellate Body’s report, criticizing the reasoning as “fatally flawed” and highly corrosive to the credibility of the dispute settlement system.¹⁶

Not only do governments use these communicative acts on a regular basis, they do so with the explicit intention of signaling to the WTO’s judicial bodies their (dis)satisfaction with its exercise of authority. In fact, these rhetorical signals constitute the primary—and for many members the exclusive—way in which governments seek to influence the exercise of authority by the WTO’s judicial bodies. More critically, the majority of these statements do not represent cheap talk by states. The content of these statements typically necessitates considerable research, analysis and drafting by government officials. These statements place on the formal, public record of a political body a government’s ‘official’ view on a given issue. Because these views may impact a state’s bargaining position or diplomatic relationships within other political forums, governments carefully and intentionally decide when and what views to express. While a few statements may simply represent a losing state complaining about or a winning state approving of a ruling, many governments without a direct stake in a case (in that the ruling does not have direct impact on domestic interests) often express views on the broader, systemic implications of a court’s exercise of authority.

The institutional structure of the WTO, with regular meetings of the political body of the DSB and formal minutes of statements made within these meetings, facilitates the assimilation of these expressed collective views. Officials within the WTO Secretariat—both the Legal Affairs Division and the Appellate Body Secretariat—attend every meeting

¹⁶DSB, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)—Communication from the United States*, WT/DS294/16 (17 May 2006); DSB, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)—Communication from the United States*, WT/DS294/18 (19 June 2006). The U.S. also responded to the Appellate Body Report in *US—Stainless Steel (Mexico)* by claiming that “[w]hen the Appellate Body alters the negotiated balance, it acts beyond its authority and jeopardizes Members’ confidence that the bargains that are negotiated are bargains that will be respected.” DSB, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico—Communication from the United States*, WT/DS344/11 (12 June 2008), at para. 11.

of the DSB and help transcribe the statements made on the record. These officials, who are tasked with assisting in the adjudicative functions of the dispute panels and the Appellate Body respectively, provide a low-cost way of transmitting these rhetorical signals to WTO adjudicators. In addition, Secretariat officials pay particular attention to aggregate revealed views on the DSM's exercise of authority—the political capital of the DSM among the WTO membership as a whole. In this way, the WTO's judicial bodies are able to pay attention to fluctuations in their political capital among the wider membership, and under certain conditions they respond to these rhetorical pressures through the content of their rulings.

1.3 Conclusion

This dissertation contributes to a growing body of research on the nature of international authority and global governance by examining the politics underlying one supranational judicial body's exercise of authority—the World Trade Organization's Dispute Settlement Mechanism. Chapter 2 develops my theoretical argument, and specifies the conditions under which international courts seek to expand or restrict their authority, and thereby alter the balance of authority between member states and an international institution. I argue that international courts are strategic legal actors that are sensitive, and under certain conditions responsive, to the collective preferences of their constituents and not simply to the interests of the most powerful member states. For this reason, international judges pay attention to and seek to cultivate the political capital of the body on which they sit, defined as the aggregate expressed views by relevant stakeholders on their exercise of judicial authority.

Chapter 3, "The Political Capital of the WTO Dispute Settlement System," describes the political context within which the WTO's judicial bodies operate and further develops the project's central argument that member states primarily employ diffuse pressures to influence the decisional behavior of WTO panels and Appellate Body members. Governments engage in rhetorical politics through the public expression of views on the (in)appropriateness of the DSM's exercise of its delegated authority. In the aggregate, these signals represent the

political capital of, or level of support enjoyed by, the WTO’s judicial bodies at a given moment in time. This chapter empirically operationalizes the concept of political capital, by drawing on an original dataset of all member statements made within the Dispute Settlement Body (DSB) from 1995-2013 and a series of interviews with member representatives and WTO Secretariat officials. Employing methods of automated content analysis, this chapter provides a descriptive analysis of all expressed views over time and across relevant categories. The final section of this chapter focuses exclusively on statements made prior to report adoption—those most likely to signal a view on the DSM’s exercise of authority. Drawing on individual sentiment classification of each report statement, this chapter explains cross-national and temporal variation in government criticism of and support for the DSM within these statements. To further understand why governments are signaling critical or supportive views at certain moments in time, I identify recurring topics emphasized within statements made on ‘focal reports,’ or those that elicit discussion amongst a broad subset of the membership.

Chapter 4, “Between Law and Politics: The Balancing of Authority by WTO Dispute Panels,” identifies the conditions under which the WTO dispute panels seek to expand or restrict the DSM’s authority in reviewing government laws or regulations. WTO panels, through their discrete findings on each claim, convey to governments the extent to which they are taking into account sovereignty concerns and the relative authority of domestic and international bodies. Employing original measures of panel accommodation and the DSM’s political capital, this chapter examines how panels respond—through their substantive review of domestic laws and policies—to views expressed by member states on the DSM’s exercise of authority. It finds that dispute panels are politically savvy when it comes to reviewing government decisions, as they tend to signal less deference to governments’ regulatory choices—asserting international authority over a vast range of policy areas—only when they enjoy relatively greater support among the membership as a whole. Panels are not purely political actors, however, in that they are accountable to a higher judicial authority. This chapter finds further that the legal constraints of appellate case law moderate the

influence of political pressures on dispute outcomes. In this way, panels seek to maximize support among their legal and their political audiences simultaneously, thereby balancing greater legalism and predictability within the trade regime against continued flexibility for governments.

Chapter 5, “The Dynamics of Appellate Reversal in the WTO,” turns to the relationship between the Appellate Body (AB) and dispute settlement panels. The accommodation provided within panel rulings may not successfully signal to the membership greater flexibility if these findings are consistently reversed on appeal. Although more than half of panel reports are appealed, this chapter argues that the AB rarely changes the basic outcome of a ruling. In other words, the accommodation provided within AB reports does not differ significantly from that provided within panel reports. How panels review or scrutinize domestic laws and policy choices can be—and has been increasingly—challenged on appeal by parties. The second part of this chapter turns to AB case law on challenges to the panel review function. It describes how during the AB’s first decade, it directed panels to engage in more searching review of the policy choices made by domestic bodies, but that it has encouraged somewhat greater deference to national authorities in recent years. This chapter identifies when the AB has generally reversed panel findings on these grounds, with a focus on when it takes into account the views expressed by governments.

Chapter 6, “Partners in Compliance: The Political Cover of WTO Rulings,” turns to the impact of the WTO’s judicial authority on state behavior, specifically compliance with its judgments. The concept of compliance has long preoccupied scholars of legal institutions, law, and courts. In contrast to studies that focus on a government’s (dis)incentives to comply with a judicial ruling, this chapter approaches the question of compliance in terms of the strategies courts have to foster timely implementation. As demonstrated within previous chapters, the WTO’s judicial bodies often respond to shifts in their institutional support through the content of their decisions. Employing original measures of dispute judgments and compliance outcomes, this chapter argues that the WTO’s judicial bodies use the content of their rulings to ease the domestic political costs of trade policy changes, thereby

acting as ‘partners in compliance’ with a government’s executive branch. Yet the extent to which these strategies successfully facilitate swifter implementation is conditional on the domestic politics of compliance. The political cover provided within adverse rulings has no observable impact on the fact or timing of compliance for disputes that can be implemented through executive action alone. However, relatively greater validation of a trade measure does increase the probability of compliance and swifter implementation when legislative action is required. This suggests that the WTO’s quasi-judicial bodies at times successfully facilitate compliance through the content of their rulings, with the goal of improving the effectiveness—and thereby political capital—of the dispute settlement system.

Chapter 7 concludes by briefly highlighting the distinct contributions of this research.

2 | The Exercise of International Judicial Authority

At a very general level, authority is the ability or right of one actor to alter in some respect the obligations of another actor.¹ By granting an international court the competence to rule, states create the basis for its exercise of authority.² States collectively grant international courts the power to determine whether a government's acts are in line with its international legal obligations—a form of judicial review over the acts of states subject to their jurisdiction. Tribunals exercise this review function by assessing the conformity of domestic laws, administrative or regulatory policies, and national court decisions with international legal standards. In doing so, courts confront questions regarding the appropriate roles of and relationship between international rules and institutions on the one hand, and national authorities on the other.

The scope of a court's review authority is initially delimited by its founding treaty, but as is the case with most multilateral agreements, these treaties are incomplete contracts that contain ambiguities or gaps (Abbott and Snidal 2000, 433-4). These gaps are filled in by a

¹The political science literature on authority is extensive. For discussions of the nature of international or transnational authority, see: Barnett and Finnemore (2004); Cronin and Hurd (2008); Hooghe and Marks (2014); Barnett and Duvall (2004); Koppell (2008); Lake (2007b, 2010); Peters and Schaffer (2013a); von Bogdandy et al. (2010); Zürn, Binder, and Ecker-Eckhardt (2012).

²States can agree to grant international institutions many types of authority, such as legislative, adjudicative, regulatory, monitoring and enforcement, agenda setting, research and advice, policy implementation, or re-delegation authority, with most acts of delegation involving some combination of two or more types. International tribunals are primarily delegated adjudicative functions, but they may also be granted or over time exercise other types of authority, either formally or informally (Bradley and Kelley 2008).

court through its decisions, necessitating ongoing negotiation over the scope of international judicial authority and its legitimation by member states (Lake 2010, 592, 596). Courts can review the basis for a government's law or policy decision with varying degrees of scrutiny. How closely an international court scrutinizes a government's decisions defines the scope of the authority it believes it legitimately has a right to exercise. When an international court defers to a government decision, it indicates that states retain authority over that policy area and that the court does not have the right to alter their obligations. In contrast, when a court refuses to defer to a government decision, it allocates authority over that policy space to the international institution and asserts that the tribunal has the right or ability to change state obligations therein. In this way, the amount of deference afforded states directly determines who has the authority to make policy decisions—the national or the international body.

A court's exercise of its review function holds political significance for the regime as a whole, as indicated by the degree of controversy typically surrounding standard of review questions. How and when tribunals defer to states proves central to allocating authority between national actors on the one hand and international institutions on the other (Oesch 2003). This balance of authorities—or 'allocation of competences'—has direct implications for the substance of a court's output (its judgments). Examining the conditions under which a court affords governments relatively greater deference provides an indication of when and how it signals, through its decisions, the extent to which it is willing to second-guess the decisions of national bodies and thus where authority over that policy area resides—at the international or the national level.

This chapter provides the dissertation's theoretical context by first discussing government delegation to and the design of international institutions more generally. Section 2.2 elaborates on the formal mechanisms available to states to control a court's exercise of authority, while Section 2.3 develops my central theoretical argument regarding the role of a court's political capital in its exercise of judicial authority and briefly addresses alternative explanations for international judicial deference.

2.1 Why Delegate?

The question of why states would delegate any authority to a third-party to interpret international agreements or adjudicate disputes remains puzzling (Guzman and Landside 2008; Hawkins et al. 2006). For some, international organizations reflect underlying power distributions and typically serve the interests of the most powerful members. States may find international tribunals useful under certain circumstances, but powerful states retain the right to sanction or ignore any decision counter to their vital interests and thus will only resort to international tribunals over which they can exercise significant control (Posner and Yoo 2005; Steinberg 2004). In practice, however, states are creating a greater number of highly independent courts, suggesting perhaps that even powerful states need such courts to achieve certain goals internationally. Still, a focus on power politics “permeates approaches to international law” and helpfully focuses our attention on the role played by the interests of powerful states in both the decision to establish a tribunal and its institutional design (Steinberg 2013, 155). It also highlights how powerful states’ interests may shape the underlying politics of international adjudication.

Others retain the focus on state authority but emphasize that international courts help states overcome cooperation problems through their informational functions (Johns 2012), their effects on subsequent bargaining (Gilligan, Johns, and Rosendorff 2010) or on domestic politics (Goldstein and Steinberg 2008). Despite the absence of centralized enforcement mechanisms, tribunals provide one tool to lower transaction costs, increase information provision, and enhance the credibility of international legal commitments. Additionally, decisions of international tribunals publicly identify (non)compliant behavior, which increases the likelihood that other actors will impose sanctions as a penalty for breach (Johns 2012) and increases the reputational costs of noncompliance (Guzman 2008).

The dominant rationalist approach adopts a variant of principal-agent analysis,³ and

³Principal Agent analysis has been applied extensively to US Congressional politics and European integration studies, and more recently in studies on international organizations (Epstein and O’Halloran 1999; Hawkins et al. 2006; Kiewiet and McCubbins 1991; Nielson and Tierney 2003; Pollack 1997).

argues that states (principals) grant powers to international organizations (agents) in order to achieve certain goals (Hawkins et al. 2006). Because states recognize that the preferences of principals and agents do not always align, they tailor the discretion afforded agents according to the expected gap between principal and agent preferences, as well as the states' delegation objectives (Hawkins et al. 2006; Nielson and Tierney 2003; Pollack 1997). States thus create formally independent tribunals subject to various structural constraints, in order to reduce agency "slack" (Hawkins et al. 2006). The principal-agent approach helpfully emphasizes the strategic environment within which international courts operate, and draws attention to the numerous ways in which states can ensure that decisions of these bodies do not stray too far from states' preferences over time.

More sociological approaches, on the other hand, emphasize the constitutive power of international norms and highlight the non-instrumental or sociological mechanisms through which international rules influence state behavior (Bruneo and Toope 2010; Franck 1990; Goodman and Jinks 2013; Hurd 2008; Koh 1997; Kratochwil 1989; Onuf 1989; Reus-Smit 2004). While there does not exist much explicitly constructivist work on the operation of international courts, a few studies emphasize the influence of pressures to maintain legitimacy with various constituencies—state, sub-state, and transnational—and reputational pressures on judges emanating from professional networks or role orientations (Pollack 2014). The trusteeship view of international courts, for example, argues that the logic underlying delegation to adjudicative bodies is fundamentally different from that underlying other types of delegation (Majone 2001; Alter 2008). States do have the ability to influence courts, but this influence does not typically arise from the design of the delegation relationship, the threat of re-contracting or exit. Instead, states seek to influence judicial bodies through rhetorical or legitimacy politics, in the form of persuading judges through legal reasoning or shaping actors' views of a tribunal's legitimacy (Alter 2008; Ginsburg 2005; Grant and Keohane 2005; Kratochwil 1989). While the trusteeship view argues that states design tribunals to be relatively insulated from day-to-day political pressures, it still recognizes that they necessarily operate within a broader political environment inhabited by states and other

actors with the ability to exert various diffuse forms of influence.

Whether one views international courts as agents or trustees, part of why states have been increasingly willing to grant independence and authority to these bodies is that governments believe they have the ability to shape important legal outcomes. As many have noted, viewing international tribunals as completely beyond member state influence is counterproductive (Elsig and Pollack 2012; Voeten 2013). Rather we should empirically study the specific mechanisms whereby states are—or are not—able to shape the behavior of the courts they create. We have considerable empirical evidence supporting the proposition that international judges are strategic actors, and that under certain conditions member states effectively use formal mechanisms of control to influence judicial behavior (Burley and Mattli 1993; Carrubba, Gabel, and Hankla 2008; Ginsburg 2005; Voeten 2008). We know much less about the conditions under which states employ informal mechanisms (rhetorical or legitimacy politics) and the consequences of these attempts to influence courts. This research is particularly important given that formal control mechanisms become increasingly difficult for states to employ over time, as institutional path dependence and interdependency increases.

2.2 Formal Mechanisms of Control

In designing international courts, states create structural means to de-limit *ex ante* or influence *ex post* a tribunal's behavior. This section outlines the formal means available to states to control a tribunal. I argue, however, that in many institutional contexts these tools prove difficult to employ in practice and relatively ineffective when states do attempt to use them.

First, states seek to shape a court's authority by delimiting its jurisdiction and mandate. Constraints on authority are specified within the body's founding statute, which typically takes the form of a negotiated multilateral treaty. Many founding statutes include provisions for re-contracting, which permit states to (collectively) change a tribunal's jurisdiction or

mandate *ex post*. Amendment of a court's jurisdiction and other tools to implicitly re-contract gives members the ability to shape the a court's jurisprudence—and thus its exercise of authority—if it begins to move away from states' interpretive preferences (Alter 2006; Grant and Keohane 2005; Hawkins et al. 2006). In practice, however, formal amendment of a tribunal's mandate is made difficult if not impossible by the coordination problems generated by multiple or collective principals (Cogan 2008, 427-8).

Second, states can seek to influence tribunals through budgetary contraction, the salaries of individual judges, or other resources provided to the court (such as judicial clerks, libraries, access to legal research resources, and funding for in-country investigations or expert witnesses) (Romano 2005). However, financing for many international courts is integrated within an organization's overall budget, making it a particularly difficult mechanism for individual or groups of states to exercise sufficient control. In the context of the WTO, member governments could agree to provide less funding for the WTO Secretariat as a whole (the Legal Affairs Division provides assistance to the panels and supports the operation of the dispute settlement system more generally), but given that the Secretariat also performs a number of critical non-dispute-related functions, this does not constitute an efficient mechanism of control. While the Appellate Body and its Secretariat is allocated a separate portion of the budget, it does not appear that states have been using fiscal control to influence its operations. For years when separate figures for the Appellate Body and its Secretariat are available (2001—2008), their budget steadily increased, with the exception of 2008 (when their annual budget decreased slightly).⁴

Third, the threat of regime exit represents the most extreme mechanism to control international courts. While exiting a regime is always possible, in many instances it will be prohibitively costly for an individual state, both materially and politically (Ginsburg 2005; Helfer 2006). Exit has occurred in a few instances. For example, the United States and France both decided to withdraw their acceptance of the compulsory jurisdiction International Court of Justice following adverse decisions. Similarly, a number of Caribbean re-

⁴See http://www.wto.org/english/thewto_e/secre_e/budget_e.htm.

moved themselves from the jurisdiction of the Privy Council and created their own Caribbean Court of Justice following decisions implementing prohibition of the death penalty. For similar reasons, Jamaica (in 1997) and Trinidad and Tobago (for the second time in 2000) denounced the Optional Protocol of the International Covenant on Civil and Political Rights, withdrawing their acceptance of the Human Rights Committee's jurisdiction to receive individual communications. In the Inter-American context, Peru withdrew its acceptance of the contentious jurisdiction of the Inter-American Court of Human Rights (IACtHRs) in 1999, though subsequently re-accepted its jurisdiction in 2001, while Trinidad and Tobago denounced the entire American Convention of Human Rights (including the jurisdiction of the IACtHRs) effective in 1999. More recently, the IACtHRs has faced increasingly credible threats of exit, with Venezuela denouncing the entire American Convention in 2012, effective 2013. For the WTO, however, acceptance of its jurisdiction is part and parcel of membership within the broader international trade regime, which creates considerable diplomatic and economic disincentives for following through on threats of regime exit.⁵

Finally, states design the rules and procedures for international judicial appointments and may use them to control a tribunal's composition (Elsig and Pollack 2012; Danner and Voeten 2010; Mackenzie et al. 2010; Steinberg 2004; Terris, Romano, and Swigart 2007; Voeten 2007, 2009; Wood 2007). While the nomination and election process for international courts is certainly politicized and often entails considerable inter-state bargaining (Cogan 2008, 428; Mackenzie et al. 2010), it is unlikely that the overall composition of a court can be controlled by any one state or group of states. In the context of the WTO, disputing parties do not have absolute control over the selection of dispute panels, and the WTO Director General has composed the majority of the 143 panels established between 1995-2013 (60.8%). The appointment of WTO Appellate Body members, however, is subject to relatively greater

⁵Instead of formally exiting a regime, states can engage in forum shopping. In the context of the WTO, governments may resort to overlapping alternatives to WTO dispute settlement (such as the North American Free Trade Agreement) (Busch 2007), or create new regional or preferential trade agreements, such as the 'mega-regional' free trade agreements currently being negotiated (the Trans-Pacific Partnership Agreement and the Transatlantic Trade and Investment Partnership). Despite the availability of these alternative forums, most of the dispute settlement mechanisms within regional trade agreements are rarely used.

member state influence, with the U.S. and the EU effectively afforded ‘permanent seats’ (Elsig and Pollack 2012). States typically do not have identical preferences with respect to candidates, which affects their ability to use appointment to influence the overall composition of tribunals.⁶ In addition, they possess less than perfect information about how nominees will behave once on the bench, though they can often make reasonable inferences from past behavior, interviews, or the political and professional background of prospective candidates. More importantly, it remains an open question whether politicization of the nomination process actually affects judicial outcomes.

Under a simple strategic actor hypothesis, tribunals will signal relatively greater deference when they are likely to face sanctioning by state parties; when control over sanctioning is fragmented or otherwise divided, judges have greater freedom in determining the scope of their authority. Similar to the situation faced by courts in new democracies, where power is fragmented or divided, sanctioning power is limited, which creates a less threatening environment for judges. On the other hand, to the extent that power is concentrated in the hands of one political actor (or several with similar preferences), a threatening environment is created for judges, leading to increased expectations of deferential judicial behavior (Ginsburg 2003; Helmke 2003). International courts will expand their authority only when states lack the ability to quickly cut back on a tribunal’s mandate or budget, and when regime exit by states is difficult or highly unlikely. In contrast, courts are likely to afford more deference when member states credibly signal their intention to restrict its jurisdiction or when an important member or a critical mass of states credibly threaten to exit the regime.

2.3 Maximizing Political Capital under Legal Constraints

For many international courts, the formal mechanisms outlined above are inapplicable or ineffective, as states have difficulty employing them due to collective action problems

⁶Exceptional cases do exist. For example, the majority of the UN General Assembly replaced the judges who voted on the “wrong” side of the unpopular judgment of the International Court of Justice in the *South West Africa (Second Phase)* case. Five years later the ICJ essentially reversed the decision in the *Namibia* case.

and the power of precedent and institutional inertia (Alter 2008; Cogan 2008; Stone Sweet and Brunell 2012). Moreover, if a court is effectively settling disputes, clarifying ambiguity and promoting international cooperation, states hesitate to formally sanction every instance of perceived judicial activism (Weiler 1994). For this reason, states use other means to signal dissatisfaction with the decisional behavior of a tribunal. The primary way in which they do so is through *communicative acts intended to influence the perceived legitimacy of a court*, understood as constituents' beliefs that a tribunal's authority is justified (Alter 2008; Bodansky 2013; Buchanan and Keohane 2006; Carrubba, Gabel, and Hankla 2008; Ginsburg 2005; Grossman 2009; Helfer 2006).

International courts—like many other institutions—employ a wide variety of legitimation strategies in order to establish and maintain a sound basis of support with their constituents (Bodansky 2013; Easton 1975; Zaum 2014, 16-19). International courts attempt to acquire or maintain broader political support through their selection of justiciable cases (deGuzman 2009), interpretation techniques (Lagomarsino 2011; Letsas 2013), and citation practices (Lupu and Voeten 2012). Yet the underlying rationale of international judges is not directly observable (Smith 2003, 74), and thus we often infer legitimating motivations from revealed behavior, which is classified as 'legitimizing' in reference to some prior (normative) conception of legitimacy. In contrast, assessment of the *effects* of various judicial practices on a court's degree of support has both a normative and an empirical dimension. In the normative sense, a tribunal is legitimate when it is *worthy* of support (Bodansky 1999, 602). Evaluations of the normative legitimacy of the WTO's DSM requires consideration of the conditions under which it *should* be considered legitimate, drawing from moral, political, and legal theory (Bodansky 2008). In the descriptive sense, on the other hand, legitimacy relates to whether a court is "widely believed to have the right to rule" (Buchanan and Keohane 2006, 405), a factual question susceptible to empirical evaluation of constituents' views on the institution's exercise of authority (Bodansky 2008; Peters and Schaffer 2013b; Zürn, Binder, and Ecker-Eckhardt 2012).

While discussion of the legitimacy of political—and judicial—institutions is wide-ranging,

considerable disagreement remains over its definition and strategies to evaluate its presence empirically. At a very basic level, legitimacy relates to constituents' beliefs about the right of an actor or institution to exercise authority, a concept that can be further disaggregated by drawing on David Easton's (1975) distinction between specific and diffuse support of political authority. In the context of international courts, specific support refers to constituents' satisfaction with particular rulings. Satisfaction or support derives from the extent to which constituents perceive these rulings to fulfill individual or collective objectives, needs or preferences (Easton 1975, 437-439). Diffuse support, in contrast, tends to be more durable and generalized and will typically continue even when a constituent disagrees with a particular ruling. Indeed, diffuse support often helps constituents tolerate specific decisions to which they are opposed (Easton 1975, 444-445). Because such support is not tied to any particular decisional output of a court—at least in terms of fulfilling specific objectives, needs or preferences at a given moment in time—it *tends* to fluctuate less than specific support, although it can still change within relatively short periods of time.

Zürn, Binder and Ecker-Ehrhardt (2012) further develop this distinction between specific and diffuse support in identifying two layers of recognition: one relating to authority and the other to legitimacy. The first layer refers to constituents' "recognition that an authority is considered *per se* functionally necessary in order to achieve certain common goods" (Zürn, Binder, and Ecker-Eckhardt 2012, 83-5). Such general acceptance of the necessity of an institution's authority is a precondition for the expression of specific and diffuse support, but does not otherwise impact the institution's legitimacy. The second layer represents the "acknowledgement of the rightful exercise of authority" by an institution, and may be manifested through expressions of diffuse support (Zürn, Binder, and Ecker-Eckhardt 2012, 83). Empirical evaluation of constituents' recognition of or support for an international court thus requires assessing: (1) acceptance of the general authority of the institution (recognition of the first layer); (2) views on its *exercise* of authority more generally (recognition of the second layer and diffuse support); and (3) views on whether specific decisions fulfill certain objectives, needs or preferences (specific support). An institution may be considered

functionally necessary to achieve certain objectives (1), even in instances where governments disagree with particular outcomes (3), but still be perceived as illegitimate with respect to the way it exercises its authority more generally (2).

Does diffuse support influence judicial practices? Under what conditions do international courts respond to these informal and diffuse methods to influence their exercise of international authority? Why and when are they sensitive to rhetorical pressures intended to affect the overall political capital of a tribunal? To answer these questions, this section first specifies the motivations and preferences of international judicial actors. I focus on international judges (broadly understood) as the actors explicitly delegated judicial authority, though I fully recognize that judges' strategies may be developed with or influenced by other actors.⁷ I then develop my central theoretical argument: international courts operate within a dual political and legal environment. While judges pay attention and often respond to such collective political pressures, in order to ensure continued legitimation of their court's authority, the extent to which they do so is moderated by the legal constraints which they face.

2.3.1 Judicial Preferences and Goals

Theories of judicial behavior can be placed into three general categories: attitudinal, legal revisionist, and strategic.⁸ Strategic approaches have come to dominate both U.S. and comparative studies of courts. According to the strategic model, judges seek to achieve

⁷This is particularly the case for WTO panelists and the Legal Affairs Division of the WTO Secretariat, with a number of WTO officials and member states recognizing that the latter sometimes play a determinative role in the legal research, writing, and oral questioning during the panel stage of a dispute. A number of governments also note that the Appellate Body Secretariat plays a strong—if not overly aggressive—role in ensuring the insulation of Appellate Body members from interactions with government representatives, in order to control the information received by these adjudicators. Similarly, the Secretariat of the Inter-American Court of Human Rights (IACtHR) as well as the Inter-American Commission on Human Rights both differentially shape and influence the strategies of judges sitting on the IACtHR.

⁸Early American scholarship adopted a pure attitudinal model (Schubert 1965; Spaeth 1979), according to which a judge's ideology accounted for variation in voting patterns (Segal and Spaeth 2002). An integrated legal revisionist approach then emerged, which argued that some judges were also motivated to issue decisions that conformed to the existing legal framework (Epstein and Kopylka 1992; Richards and Kritzer 2002, 2003, 2005; Songer and Lindquist 1996). In response to the reductionist assumptions of these approaches, political scientists began to adopt a strategic account of judicial behavior (Epstein and Knight 1998, 2000).

their individual policy goals, defined as developing the law in line with their personal policy preferences, but do so strategically, taking into account how the preferences and responses of other actors—such as their colleagues, appellate courts, other branches of government, and the general public—will affect achievement of these goals (Epstein and Knight 1998; Epstein, Knight, and Martin 2001; Hammond and Sheehan 2005; Maltzman, Spriggs II, and Wahlbeck 2000; Songer, Segal, and Cameron 1994; Spiller and Gely 1992). Policy preferences of American judges are typically specified in terms of political ideology, but within the comparative literature there exists little consensus on primary judicial goals within and across geographical regions. Some view judges as political activists employing the law in order to ‘transform’ society (Gargarella 2004), while others see judges as obedient followers of the president (Larkins 1998) or as strategic actors seeking to build institutional legitimacy (Helmke 2002; Staton 2004).

Theories of international judicial behavior have drawn largely from these studies on domestic courts, with recent scholarship adopting a strategic approach in recognizing that international judges are not always interested in expanding their authority or interpreting treaties expansively (Voeten 2013). In fact, courts often employ a number of decisional and procedural devices that can be considered issue-avoidance techniques, such as the use of judicial economy within the WTO (Busch and Pelc 2010) or the margin of appreciation within the European Court of Human Rights (Legg 2012; Letsas 2006). However, as legal actors, courts are also not deciding cases solely in terms of state interests, with judges actually preferring in some instances to risk sanctioning or backlash rather than adopt blatantly political or biased decisions (Helfer and Alter 2013; Pollack 2014). Because their authority is relational and depends on continued support from relevant constituents, international courts necessarily operate within a context that exerts (sometimes competing) political *and* legal pressures on judicial behavior.

The primary goal of international judges is to ensure the survival and increase the institutional legitimacy of the tribunal on which they sit.⁹ In other words, support for the court’s

⁹Like courts within new democracies, international courts operate within a context where norms of

continued exercise of authority is one of the policy goals judges seek to maximize through their rulings (Burley and Mattli 1993; Ferejohn and Weingast 1992). Both professional role orientations and self-interest motivate judges to promote their tribunal's political capital or ensure its survival, as these factors critically influence their own personal salary potential, professional prestige, and occupational ambition (Schauer 2000). International judges are not purely political actors, however, as professional role orientations motivate them to consider how their rulings comport with the existing legal framework, a factor that may also contribute to the continued legitimation of their exercise of authority.

2.3.2 The Political Capital of International Courts

As the previous section demonstrated, states often find it difficult to employ structural mechanisms to control courts. For this reason, they primarily on informal and diffuse pressures to signal their support for or dissatisfaction with a court's exercise of its delegated authority. The collective revealed views of a court's membership constitute the institution's political capital among one central category of constituents—member states. States' views carry more weight than those of other actors, as a court's authority is relational and requires ongoing legitimation by the community of actors that granted it the right to rule (Lake 2010). For this reason, I define a court's political capital primarily in terms of member governments' support for and expressed views on the its rightful exercise of delegated authority, although the extent to which this is the case varies considerably across types of international courts. Governments engage in ongoing legitimation of a court's exercise of authority and can shape its underlying political capital by individually or collectively questioning the direction of its jurisprudence and reasoning, identifying errors it has committed, or highlighting its abuses of authority. The modes through which such challenges are conveyed are many, ranging from statements within domestic government bodies or the media to communications expressed

judicial independence are underdeveloped and expectations that political actors will comply with decisions are unclear (Helmke 2002, 291). Comparative scholarship on judicial behavior thus provides particularly useful insights into international judicial preferences, particularly studies on transitional societies and judges sitting on newly established or weakly institutionalized courts (Annus and Tavits 2004; Helmke and Sanders 2006; Iaryczower, Spiller, and Tommasi 2002; VonDoepp 2006, 2008).

directly to individual judges.¹⁰ Public statements within meetings of international organizations are the main way in which government directly signal their views to both the court and other member states, with the intent of influencing a court's overall political capital. In contrast to the relatively severe and infrequent use of formal mechanisms, governments can express views on a court's exercise of authority on a regular and repeated basis. This allows states to not only respond critically and vocally to controversial instances of judicial overreaching, but to also deploy these diffuse pressures to shape the margins of a court's exercise of judicial authority within its daily work.

International judges are sensitive to how member states respond to their exercise of authority—both rhetorically and behaviorally—and as strategic actors anticipate how those responses will impact their ultimate goal: ensuring the survival and increasing the institutional legitimacy of their court. As judges seek to maximize political support for their court through adjudication, they will afford less deference to national laws and policy choices—thereby shifting the balance of authority slightly away from states and towards the tribunal—only when they enjoy relatively high levels of political capital. Conversely, when states are relatively more critical of a court's exercise of judicial authority, judges will afford national authorities slightly more deference, in order to signal to states that they are taking into account collective dissatisfaction with judicial overreaching and assuage concerns about encroachments on state sovereignty.

To be sure, government non-compliance with a particular decision represents the most explicit way to express dissatisfaction.¹¹ While the difficulty of implementing a ruling varies across issue areas, cases and political systems, partial or non-compliance does tend to undermine the credibility of the system as a whole, as arguably the authority and power of a tribunal emanates largely from its ability to settle disputes or ensure compliance. For this

¹⁰Empirically, it is difficult if not impossible to identify all instances of this last mode; moreover *ultra vires* communications with sitting judges are typically prohibited.

¹¹Partial and delayed compliance sometimes occurs in the context of the World Trade Organization, where systematic delays by some Members in implementing rulings raises considerable controversy within meetings of member states.

reason, judges that seek to increase the institutional legitimacy of their tribunal also seek to facilitate compliance (Carrubba, Gabel, and Hankla 2008; Shapiro 1981), and so might be sensitive to systematic or abnormally lengthy delays in implementation. However, the exogenous factors that contribute to delayed or non-compliance with court judgments, such as domestic political obstacles or legislative roadblocks, weakens the strength of the signal sent by such decisional pressures alone. If used as a diffuse form of political pressure, states will typically do so in combination with the rhetorical pressures on which I focus (Helfer 2006).

Political scientists and socio-legal scholars have long recognized that the perceived legitimacy of judicial institutions proves central to the exercise of their authority, the outcomes produced, and compliance with their decisions (Gibson and Caldeira 1995; Gibson, Caldeira, and Baird 1998; Ginsburg and Moustafa 2008; Tyler 2006). Despite the large number of comparative studies on the legitimacy of domestic courts, little systematic analysis has been conducted on the perceived legitimacy of international judicial bodies (Bodansky 2013). Given the fact that international courts cannot rely upon the same presumption of constituent support—or political capital—typically enjoyed by national institutions in order to secure voluntary compliance, this research is just as important as studies on their domestic counterparts (Gibson and Caldeira 1995, 464).

2.3.3 The Moderating Effect of Law

International judges also operate within a legal context that exhibits remarkably strong professional norms. Many judges view themselves as contributing to a project of international legal development and are sincerely concerned with the success of this endeavor (Helfer 2006). For this reason, the strategic environment of an international court not only includes the structural mechanisms of control and the diffuse political pressures outlined above. It is also comprised of “discursive constraints (e.g., procedural rules, interpretive methodologies, and substantive norms) generated by interactions among participants in the global community of law and internalized by tribunal members” (Helfer 2006, 266). Despite

the absence of a formal rule of *stare decisis* in international law (Pelc 2014), professional norms often push judges to seek consistency across cases and a type of *de facto* precedent is said to operate within many international legal regimes. The existing legal framework and the development of jurisprudence regarding the norm at issue thus acts as a constraint on judicial choice and the level of discretion judges have to signal more or less deference to particular types of domestic laws or policies.

Judges' motivations—compliance with their rulings, influencing policy and law, and increasing the legitimacy and authority of their respective court—can sometimes be in tension (Voeten 2014). The perceived legitimacy of a court derives not simply from high rates of compliance but also from the degree to which its rulings are consistent and contain high-quality reasoning motivated by the applicable legal framework. In this way, judges strategically use the content of their rulings to balance the goal of legal consistency and coherence with the maximization of political support among a broad subset of a court's stakeholders (Kelemen 2001).

In sum, one of the primary goals of international judges is to increase support for their court's continued exercise of authority. To do so, they afford less deference to national authorities—thereby shifting the balance of authority slightly away from states and towards the tribunal—only when the institutional legitimacy and future of the tribunal is not in jeopardy. Judges use the discretion inherent in applying often vague international legal rules to the concrete *facts* of a case to subtly alter their treaty-specified scope of authority. When deciding whether to signal greater or lesser deference, judges simultaneously assess the degree of legal discretion available and the extent of political support for their exercise of authority. For this reason, decisions under international rules for which there is considerably more case law or guidance should begin cluster around one particular level of deference over time, whereas decisions applying rules for which few cases have been decided will display more variance in deference levels.

2.3.4 Alternative Explanations for Deference

Individual-Level Factors

Considerable research highlights the importance of individual-level attributes, such as nationality, legal culture, and professional background. States frequently express concern over a judge’s identity and the inability of individuals to detach themselves from a nationality bias (Lauterpacht 1933). Mixed empirical evidence suggests that nationality bias plays a role in some contexts (Posner and de Figueiredo 2005; but see Smith 2005), while others argue that nationality has become a decreasingly influential factor in international adjudication over time (Brower 2009; Dannenbaum 2012). Nationality bias suggests that a judge will defer more to her home government because she identifies with those national interests, or because greater familiarity with the legal system, culture or policymaking process of one’s home country facilitates greater understanding of—and thus deference to—the basis for policy decisions. Additionally, future career advancement or success may be dependent on a judge’s home government, suggesting that under those conditions judges that care about their career prospects will afford relatively more deference when reviewing laws enacted by their national government (Posner 1993).

International courts vary in whether and how the nationality of members should be taken into account during judicial selection procedures. Within the WTO, the selection procedure for panelists protects against the operation of a direct nationality bias, given that nationals of a disputing state (or third party) may not serve without the parties’ agreement (Article 8.3, DSU).¹² For the Appellate Body, however, members may be a national of a disputing country, although the strong consensus decision-making norm within the WTO likely mitigates the influence of any one member’s nationality bias.¹³

¹²To date this has only occurred three times, all in the context of EU member state panelists for disputes involving the EU. In *Korea—Taxes on Alcoholic Beverages*, a complaint brought by both the U.S. and the EU against Korea, two nationals of EU member states (France and Sweden) sat on the panel. The same Swedish national (i.e. Lindi) sat on the panel in *EC—Asbestos*, for which the EU was the respondent, and a German national sat on the panel for the EU complaint against the U.S. in *US—Asbestos(EC)*.

¹³Appellate Body rulings are supposed to reflect agreement among the three members and dissent is

A number of studies focus on a wider range of factors unique to an international judge's home country, such as judicial independence, legal culture, and human rights practices (Danner and Voeten 2010; Meernik 2007; Meernik and Farris 2006; Voeten 2008). The comparative literature similarly highlights the influence of national legal origin or culture (Flango, McSpadden Wenner, and Wenner 1975; Gloppen 2003), particularly differences between common law and civil law countries (La Porta et al. 1998). Although perhaps an oversimplification, common law countries typically charge courts with developing a body of case law to supplement statutory law, and judges generally have greater interpretive latitude than civil law judges trained to enforce existing codes of law (Roe 2006). Common law adjudication is more inductive and empirically grounded than civil law adjudication, with judicial review by common law courts typically viewed as concrete and fact-based in contrast to the more politicized review undertaken by courts in civil law countries (Rosenfeld 2004). While there has been little evidence that the civil-common law background influences decisional behavior in international courts (Hensley 1978; Meernik, King, and Dancy 2005; Voeten 2007, 2008), its role cannot be dismissed entirely. Given the more fact-based approach to adjudication and review undertaken within common law countries, courts with predominantly common law judges should tend to afford government laws and policy choices relatively greater deference, as such an inductive approach is more accepting of variation in government's implementation of their international obligations.

Finally, existing literature provides some empirical support for the proposition that judges' professional backgrounds likely influence their decisional behavior. For example, Erik Voeten (2008) found that among judges on the European Court of Human Rights, former diplomats and government bureaucrats were less activist and more deferential to state concerns than former academics or those in private practice. If professional background explains the level of substantive deference afforded to national determinations, we would expect international judges who previously (and predominantly) held government political

informally discouraged, although individual members may—though only rarely do—anonously include a separate or dissenting view.

positions to be more sensitive to sovereignty concerns than individuals who were previously national judges (from countries with higher levels of judicial independence in particular) or international judges (though not necessarily international arbitrators). In addition, professional background likely moderates the extent to which a judge is sensitive to fluctuations in a court's political capital.

Former government bureaucrats are likely to exhibit greater deference than academics because, on average, they are more familiar with the policy-making processes underlying national-level determinations and thus possess a greater understanding of both the determination's complexity as well as the need for a degree of discretion for different government systems in implementing international obligations. Prior experience within national governments—and particularly prior or simultaneous experience within the court's regime—increases the probability that a judge will be relatively more sensitive to the political context of a particular dispute or case. Because of this background, former government officials will on average be more attuned to the need to signal a certain level of deference to or provide greater political cover to state parties. In addition, former diplomats and government bureaucrats are likely more sensitive or attuned to their own tribunal's political context (and thus more aware of or receptive to changes in its political capital) than either former judges or academics. Former national judges, from democratic states with a strong rule of law in particular, typically hold strong norms of judicial independence from the political process and thus will not necessarily feel the need to signal deference. For this reason, they will be more likely to decide cases in an independent manner on the basis of legal considerations alone, or at the very least to accord less weight to rhetorical challenges to the court's authority signaled by member states. Individuals with predominantly international arbitral experience or experience working as a bureaucrat within an international organization, on the other hand, may be more aware of the need for sensitivity in managing the tribunal-state delegation relationship. However, their prior experience may have also have trained them to promote expansive, sovereignty-restricting decisions in order to further strengthen the position of the tribunal vis-a-vis member states (Barnett and Finnemore 2004, 5-6). The

influence of arbitral background on deference afforded may for this reason be indeterminate. Finally, judges with professional backgrounds largely in academia may be less attuned to political context, either because academic independence from politics is a strong professional norm within many regions or because academia generates lower levels of political savvy. For this reason, I expect academics to, on average, afford lower levels of deference to national determinations and to be less attuned to the political capital of their own tribunal.

Party-Specific Factors

If power politics determines outcomes in international institutions, courts will always rule in line with the interests and preferences of powerful member states.¹⁴ While judges might avoid ruling against powerful states whose support (both politically and financially) is critical to the tribunal's survival, they may also take advantage of cases against less influential states to reassert their authority. This suggests that on average courts will review with less scrutiny laws or policies enacted by authorities within politically or economically powerful countries.

Domestic constitutional law theories on the legitimacy of judicial review more generally suggest that tribunals will defer to national authorities within democratic states, due to their relatively stronger institutional competence and higher levels of public participation in and support for policy choices and legislation (von Staden 2012).¹⁵ If international courts are sensitive to concerns about their own democratic legitimacy, they will tend to afford more deference to decisions made by more democratic states, wherein they can expect greater public participation in or support for the measure at issue. They will also tend to afford more deference to national bodies with a strong democratic mandate (i.e. legislatures as opposed

¹⁴Similarly, the comparative literature on courts in new democracies highlights how judges seeking to protect their institutions, careers, and personal security will exhibit more deferential behavior in cases where government power holders have a significant interest (Ginsburg 2003, 76; Vanberg 2001, 354).

¹⁵In the human rights context, the European Court of Human Rights' application of the margin of appreciation is partially based on the importance of democracy within the European Convention system and an understanding that the Court should show more deference to national-level measures enjoying a high degree of democratic legitimacy (Legg 2012).

to administrative agencies or national courts) or measures enacted following widespread participation in the policy-making process.

Case-Specific Factors

The type of case before a tribunal—the issue or policy area and the legal norm at stake—may influence the probability of signaling more or less deference based on two factors: the nature of the measure under review and the amount of pre-existing case law regarding the norm(s) adjudicated. Review of a policy or law under a primarily ‘internally-oriented’ norm that seeks to regulate exclusively domestic matters likely differs from application of an ‘externally-oriented’ norm that seeks to regulate cross-border activities and conduct (Shany 2006). While most international treaties include some combination of the two orientations, they still vary in the degree to which they seek to regulate internal conditions typically viewed as fundamental to notions of state sovereignty. Following this logic, a court will likely afford greater deference to national policies viewed as lying at the ‘heart’ of domestic sovereignty (for example, measures protecting the health and safety of citizens or laws based on public morals) (Guzman 2004; Letsas 2006).

2.4 Conclusion

As this chapter has argued, international courts are legal actors that operate in a highly political context. They are sensitive, and under certain conditions responsive, to the collective preferences of their constituents and not simply to the interests of the most powerful member states. For this reason, international judges pay attention to and seek to cultivate the political capital of the body on which they sit, defined as the aggregate expressed views by relevant stakeholders on their exercise of judicial authority. They do so, however, within the constraints of existing caselaw. The way in which they assimilate both legal and political considerations within their rulings continuously shapes the scope of their international authority in patterned ways. The following chapters develop this argument in the context

of the World Trade Organization's judicial bodies.

3 | The Political Capital of the WTO Dispute Settlement System

In creating the WTO's Dispute Settlement Mechanism (DSM), governments recognized that they need a judicial body to resolve their trade disputes and to clarify ambiguous trade obligations. This does not imply, however, that they always support dispute panels' or the Appellate Body's *exercise* of delegated authority. The political body responsible for administering the WTO dispute settlement system—the Dispute Settlement Body—provides the primary public forum for government representatives to engage actively with the operation of the DSM.¹ Members of the World Trade Organization thus constitute the *primary* political actors within the DSM's environment, as they represent both its audience and constituency.² Although the views of other stakeholders—such as civil society, industry and business associations, and other private actors—are certainly relevant, the system provides no private rights of access and it was designed specifically to resolve trade disputes between states.³ In addition, although members find it difficult if not impossible to employ formal

¹The primary political body of the WTO—the General Council—handles the day-to-day work of the organization in between the biennial Ministerial Conferences, including administration of the dispute settlement mechanism, sitting as the Dispute Settlement Body (DSB). The official function of the DSB is to 'administer' the rules and procedures governing disputes between Members (as outlined within Article 2.1, DSU), in that the DSB establishes panels, adopts panel and Appellate Body reports, monitors implementation of its recommendations, and authorizes compensation and the suspension of concessions. See Articles 6, 16, 21, and 22, DSU.

²WTO Members include both states and customs territories possessing full autonomy, which is why member governments are never referred to as 'states.' For the sake of convenience, I employ the term 'states' interchangeably with Members and governments to refer to both state and non-state members.

³Only members can initiate disputes under the DSM and only members can ensure implementation of and compliance with dispute rulings. Although other actors will undeniably be affected by decisions of the DSM, states remain the primary constituents of the dispute settlement system.

control mechanisms, states do retain the ability to withdraw their acceptance of jurisdiction, to alter the delegation contract, and to withhold funds. While actors other than member states will play an important role in shaping the overall political capital of the DSM—in particular by affecting governments’ perceptions of the dispute settlement system’s legitimacy and authority—in most cases this is reflected within and through the expressed views of states.⁴

Statements within Dispute Settlement Body (DSB) meetings represent the primary way in which governments express views on the DSM and its exercise of authority. Interviews conducted with WTO government representatives provided considerable evidence that many members use these statements to signal to the DSM as a whole (whether the Secretariat, panelists or Appellate Body members) their (dis)satisfaction with its overall operation, jurisprudential developments or particular decisional outcomes. To be sure, the extent to which this occurs will be very much member- and issue-specific, with some governments much more inclined than others to place frank views on the record or to send strong signals.⁵ The quantity, type and nature of these expressed views constitute the DSM’s political capital—or the aggregate level of state support for its exercise of authority—at a given moment in time.

Within these statements, governments often express approval of particular dispute findings, as satisfactorily settling the dispute, vindicating their position and/or claims, or furthering the trade interests of the collective membership (expression of specific support) (Easton 1975, 437-439). At other times, they may indicate that a ruling helped to “set an important precedent to guide the future operation of the dispute settlement system”⁶ or

⁴This expectation was largely confirmed through interviews with WTO Member delegations in January 2014, Geneva, Switzerland.

⁵In addition, these statements are often be ‘dressed up’ in the diplomatic language of Geneva (one delegate noted that he often had to re-write or tone down the statement language drafted by a private legal firm his Mission employed for disputes), in order to respect the internal culture and practices of the WTO. The majority of representatives interviewed also emphasized that they believe the Secretariat (both the Legal Affairs Division and the Appellate Body Division) is paying attention to their statements. Almost all interviewees stressed that whether statements actually influence subsequent decisions is a separate question. Interview 2.3, Geneva, Switzerland (14 January 2014); Interview 4.3, Geneva, Switzerland, (16 January 2014).

⁶See, for example, Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meet-

reaffirm their commitment to the authority of the DSM in adjudicating disputes, despite voicing concerns with the manner in which it interpreted a particular provision or evaluated the evidence before it (expression of diffuse support).⁷ DSB statements often contain elements of both specific and diffuse support or criticism. There is a tendency, however, for governments with a direct trade interest in a dispute to voice specific support or concerns, while third and non-parties tend to focus the content of their public views on issues relating more to diffuse support/criticism. In addition, *cumulative* expressions of specific support—over time by one government or across a broad subset of the Membership—also indicate the DSM’s level of political capital.

In order to capture states’ attitudes about the WTO’s dispute settlement process, this chapter employs a mixed-methods approach to provide direct evidence of governments’ expressed views on the Dispute Settlement Mechanism’s exercise of its adjudicative authority. It relies on automated and manual content analysis of statements made within meetings of the DSB to explain aggregate revealed views over time, across issue areas, between different groups of countries, and within the context of focal disputes. Section 3.1 provides a descriptive analysis of the DSM’s political capital, in terms of aggregate revealed views within the DSB, from 1995 to the present day, and identifies the agenda items—or topics of discussion—under which governments are most likely to signal a view on the DSM’s exercise of authority. I find that a critical shift in governments’ engagement with the WTO’s judicial bodies occurred after the first decade of operation, which is partly attributable to governments’ frustration with a few instances of continued non-compliance with dispute rulings and partly explained by a growing number of countries becoming increasingly comfortable with the practices and procedures of the dispute settlement system.⁸ Greater experience

ing held on 22 April 1998, WT/DSB/M/45, pp. 8-9.

⁷See, for example, Statement by the representative of Thailand, Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, WT/DSB/M/299, para. 5.

⁸Interviews with member representatives confirmed that such experience contributes to more informed views on the DSM and its proceedings, and thus to an improved ability to express views on its exercise of authority.

with the system increases the confidence, capacity, and incentives of states to participate more actively within meetings of the DSB, particularly when important issues are under discussion.

To further unpack the relationship between dispute experience and the DSM's political capital, this section also examines expressed views as a function of a member's usage rate. Given that the US and the EU are much more active users of the system, it is not surprising that their perceptions on the DSM's exercise of authority differ significantly from other governments. However, and somewhat surprisingly, despite the fact that these two largest traders are often 'dragged before' the WTO's judicial bodies and subject to repeated rulings against their trade measures, the US and the EU are not more—and actually relatively less—critical of the DSM than other members. In fact, their aggregate expressed views on dispute reports are just as, if not slightly more, supportive of the DSM's exercise of authority than other members.⁹ While the total number of statements issued by low- and non-users of the system is significantly lower than that issued by more active users, when these governments do express a view they tend to be relatively more critical of the DSM, despite their lack of direct experience with the mechanism. These critical views arise largely in the context of implementation of DSB recommendations, suggesting that continued non-compliance adversely affects the strength, effectiveness and *legitimacy* of the DSM.

Section 3.2 focuses exclusively on statements made prior to report adoption—those most likely to signal a view on the DSM's exercise of authority. Drawing on individual sentiment classification of each report statement, this section explains cross-national and temporal variation in government criticism of and support for the DSM within these statements. Section 3.2 then focuses on 'focal reports' that elicit widespread comment (particularly by third and non-parties to a dispute). Because third and non-parties are typically affected less directly than parties by the outcome of a dispute, they often devote their statements

⁹Of course, there are notable exceptions, such as the continued and vocal criticism by the United States on the DSM's approach to reviewing zeroing practices in the context of imposing anti-dumping duties.

to procedural issues or cases implicating systemic interests.¹⁰ By examining the content of statements issued in the context of such ‘focal’ reports, I identify four recurring topics that tend to generate more statements by a wider subset of the membership. This analysis of focal report statements reveals that in many instances governments hold *divergent* views on how these topics affect the DSM’s political capital. Dissensus on the desirability or legitimacy of various issues and practices, such as increased due process in WTO proceedings or greater openness in panel or Appellate Body hearings, suggests that governments hold different beliefs about what lies at the core—or the sources—of the DSM’s legitimacy. Finally, Section 3.3 concludes.

3.1 The Political Capital of the DSM

3.1.1 Classification of Revealed Views of WTO Members

To assess the political capital of the WTO’s judicial bodies within the Dispute Settlement Body, I compiled an original dataset of all DSB statements since the WTO’s inception and developed a coding scheme to differentiate between statements explicitly expressing a view on the DSM and those not directly related to the WTO’s judicial bodies. The final coding scheme consists of four categories: statements expressing a supportive or critical view on the DSM (‘Supportive’ and ‘Critical’), those that relate to the DSM, but do not express an evaluation of its exercise of authority (‘Neutral’), and those that do not relate directly to the DSM (‘Other’).¹¹ Following manual coding of a training set of statements and validation tests, methods of automated content analysis were employed to estimate the percentage of

¹⁰Interview 1.3, Geneva, Switzerland (13 January 2014); Interview 2.4, Geneva, Switzerland (14 January 2014); Interview 3.2, Geneva, Switzerland (15 January 2014).

¹¹The original coding instrument consisted of six categories: (1) Strongly Critical; (2) Predominantly Critical; (3) Neutral; (4) Predominantly Supportive; (5) Strongly Supportive; and (6) Other. For methods of automated content analysis, these categories were collapsed to the four listed above. The six more nuanced categories were used to manually classify the report statements described in Section 3.2. See Appendix A for a more detailed description of the six-category coding instrument.

all statements falling within each of these four categories.¹²

Statements classified as **Supportive** include those that express strong support for the DSM, despite one or two critical comments, as well as those that express both criticism and support but overall—both qualitatively and quantitatively—convey more support. Qualitatively, governments may emphasize that a report is of a “high quality...setting a high standard for future panels,”¹³ or that the “sound legal reasoning underlying the Appellate Body’s conclusions made a significant contribution to the dispute settlement system.”¹⁴ Quantitatively, this category includes statements in which representatives indicate that they are “in general very satisfied,” but that they “wished to register [...] concern regarding one element of the Report.”¹⁵ This category also includes statements that exclusively express support for the DSM, even if the statement does not employ strongly supportive language.¹⁶

Similarly, statements that fall within the **Critical** category include those that: express strong criticism of the DSM despite the presence of one or two supportive comments; exclusively express criticism, despite the absence of strong language; or express both criticism and support for the DSM, but overall convey more criticism.¹⁷ This category also includes

¹²Methods of automated content analysis employing the ReadMe (Hopkins and King 2010) R-package were used to obtain final estimates for the out-of-sample statements. See Appendix A for a more detailed description of methods, the coding scheme and validation tests.

¹³Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 17 February 1999, WT/DSB/M/55, p. 11.

¹⁴Statement by the representative of Guatemala, Dispute Settlement Body, Minutes of Meeting held on 25 November 1998, WT/DSB/M/51, p. 19.

¹⁵Statement by the representative of Norway, Dispute Settlement Body, Minutes of Meeting held on 23 January 2007, WT/DSB/M/225, para. 81; Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 10 December 2003, WT/DSB/M/160, para. 8.

Statements made in the context of adoption of an Appellate Body report that also include comments on the panel report often fall within this category. A Member may be supportive of the Appellate Body report, and in particular Appellate Body rulings that overturned panel findings with which the Member disagreed, yet still express criticism of the panel’s reasoning or findings.

¹⁶For example, Members often stress that the report under adoption was “generally well-reasoned” or that the Member “support[s] the Appellate Body’s interpretation” on a specific question, and uses the rest of the statement to recap the findings, without expressing any further view on the issue. See, for example, statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 18 August 2003, WT/DSB/M/154, para. 40; Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 25 November 1998, WT/DSB/M/51, p. 19.

¹⁷See for instance, statement by the representative of Turkey, Dispute Settlement Body, Minutes of Meet-

statements not primarily about the DSM, dispute proceedings, or reports, but that still signal criticism of the effectiveness or operation of the system as whole. This includes statements that express frustration over the lack of implementation of DSB recommendations by another government (in essence compliance with the ‘rulings’ contained within dispute reports), but that additionally highlight the negative effects of continued non-compliance on the DSM’s operation. Statements emphasizing the detrimental effects of continued non-compliance on the interests of certain groups of states, such as developing countries, also fall within this category.¹⁸

Statements classified as **Neutral** in some way reference the DSM, but without expressing criticism or support. This category largely encompasses statements requesting the establishment of a panel or the reservation of third party rights, those referencing bilateral negotiations over implementation of DSB recommendations, and statements about (non)implementation of DSB recommendations that additionally reference systemic implications for the dispute settlement system as a whole, but that do not express a view on the direction (negative or positive) of these effects.¹⁹ Finally, the **Other** category ensures that statements not about the operation of the DSM are excluded from the analysis. This category includes statements that discuss other issues, such as the trading system in general, or refer to the actions or lack thereof of a Member, such as (non)implementation of DSB

ing held on 23 October 2002, WT/DSB/M/134, para. 70.

Strongly critical language includes phrases in which Members express that they are “seriously concerned about the Report” or “deeply disappointed and concerned with the decision of the Appellate Body.” Statement by the representative of Brazil, Dispute Settlement Body, Minutes of Meeting held on 20 April 2004, WT/DSB/M/167, para. 71; Statement by the representative of Mauritius on behalf of the fourteen African, Caribbean and Pacific (ACP) countries, Dispute Settlement Body, Minutes of Meeting held on 19 May 2005, WT/DSB/M/189, para. 72.

¹⁸See, for instance, Bolivia’s statement that “The continued postponement of compliance with the DSB’s decision was regrettable on account of systemic implications and the failure to comply with the obligations resulting from intellectual property rights under the TRIPS Agreement, thereby harming a developing country for over four years.” Statement by the representative of Bolivia, Dispute Settlement Body, Minutes of Meeting held on 21 November 2006, WT/DSB/M/222, para. 11.

¹⁹See, for instance, Brazil’s statement that “...this issue had systemic implications and concerned all WTO Members. In recalling that the implementation of the banana disputes had not yet been completed, Brazil noted that the EC had not established a definitive tariff regime for MFN bananas.” Statement by the representative of Brazil, Dispute Settlement Body, Minutes of Meeting held on 21 November 2006, WT/DSB/M/222, para. 29.

recommendations.²⁰

These four categories give an approximate evaluation of the DSM’s political capital as expressed by its core constituents—member states—in a public forum within which we would expect governments to signal their views on the exercise of authority by the WTO’s judicial bodies. The following section provides a descriptive analysis of expressed views falling within each of these four categories, by year and by agenda item, in order to explore patterns in the DSM’s political capital over time and across topics of discussion.

3.1.2 General Trends in the DSM’s Political Capital

Over the course of the 340 DSB meetings held between 1995 and 2013, governments have made 9,833 statements in total, an average of 28.92 statements per meeting. In terms of overall activity (see Figure 3.1), representatives were very vocal in the early days of the Organization, reaching a peak of 730 statements in 1999, after which they gradually began to speak less—dropping to almost half of the 1999 level by 2002. Government participation within DSB meetings then remained somewhat stable, before increasing again after 2005.

Grouping statements under seven Agenda Item categories reveals that the majority of DSB statements are made in the context of surveillance of implementation of DSB recommendations and other issues related to compliance with dispute rulings (see Table 3.1 and Figure 3.2). The proportion of total DSB statements made per year under the Implementation of Recommendations category steadily increases over time, which is not surprising given the increasing number of disputes under surveillance each year.²¹

²⁰For example: “Multilateral trade rules could not, and should not force Members to allow a product that caused an alarming and unacceptable number of deaths to continue to be sold packaged like a sweet to attract new victims. This would undermine the credibility of the multilateral trading system.” Statement by the representative of Uruguay, Dispute Settlement Body, Minutes of Meeting held on 28 September 2012, WT/DSB/M/322, para. 69.

As an example of a statement primarily intended towards other Members: “Norway would also prefer immediate implementation, but in view of the complexity of the matter some time was needed. He requested the United States to inform Members in which issue of the Federal Register the notice of the EPA would be published.” Statement by the representative of Norway, Dispute Settlement Body, Minutes of Meeting held on 18 June 1996, WT/DSB/M/19, p. 3.

²¹Statements falling under this agenda item discuss both the few cases of long-standing non-compliance under surveillance, as well as DSB recommendations implemented outside of the specified Reasonable Period

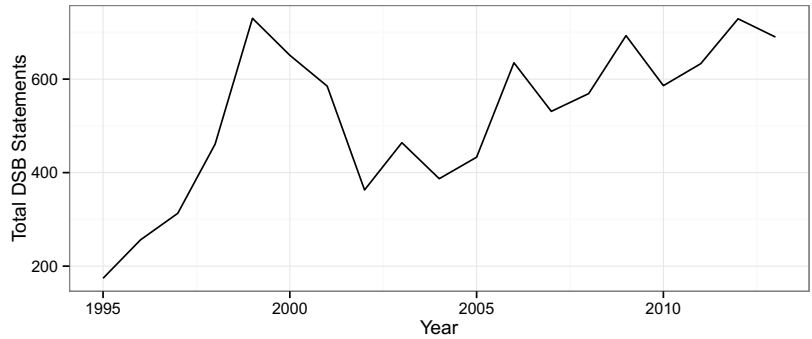


Figure 3.1: Total statements within the DSB (N=9833), by year. Source: WTO *Documents Online* (<https://docs.wto.org/>).

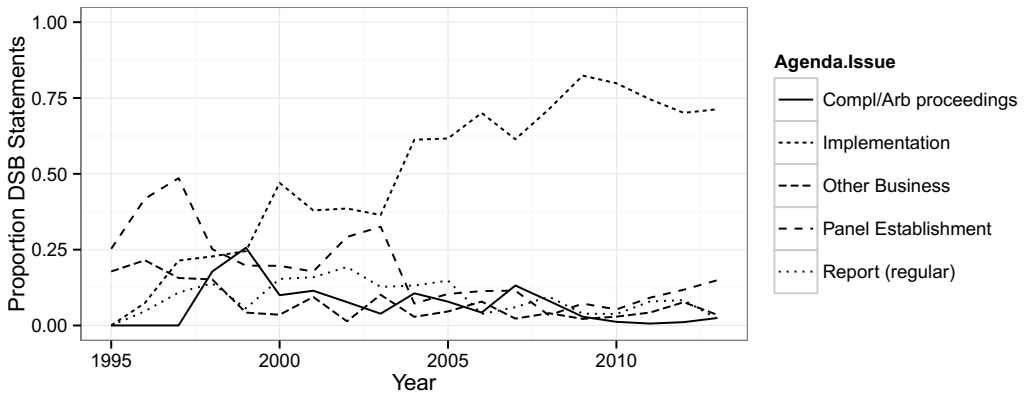


Figure 3.2: Proportion of total statements within the DSB (N=9833), by consolidated Agenda Item.

In terms of the other Agenda Item categories, the proportion of statements related to the establishment of panels has decreased over the years, in line with a decline in overall use of the system.²² Statements made prior to the adoption of dispute reports (for regular, non-compliance proceeding reports) have regularly comprised less than 20% of all DSB statements, though have decreased proportionally over time as well.

Table 3.1: Frequency of DSB Statements under Consolidated DSB Agenda Items

Agenda Issue	Total DSB Statements
Items relating to Implementation of Recommendations	5,402
Requests for establishment of a panel	1,605
Adoption of Reports (regular)	873
Miscellaneous other business and statements	621
Items relating to compliance/arbitration proceedings	721
Regular Course of Business (likely to reference DSM)	392
Regular Course of Business (unlikely to reference DSM)	269

The factors motivating the decision to make a DSB statement vary by the agenda item under which the intervention is made. In general, if the agenda item involves a dispute to which a government is a party (as a complainant or respondent), there exists an unwritten custom to make a statement. This is not always the case for third parties to disputes, who think carefully about the pros and cons of intervening regarding a dispute in which they are not a direct party.²³ The reasons for intervening under an agenda item related to implementation or compliance tend to be either diplomatic or systemic in nature, based on whether the issue is of domestic political or economic importance, whether it has systemic implications or whether, for political reasons, a state seeks to support or oppose the view of another member. The intended audiences of such statements are almost always other states, parties to the dispute, and for some delegations their home Ministry, other branches of govern-

of Time.

²²Overall use of the system is assessed by the number of requests for consultations filed in a given year, which has decreased from an average of 32.4 per year during the first ten years of the operation of the dispute settlement system, to an average of 15.6 per year since 2005.

²³Interview 1.3, Geneva, Switzerland (13 January 2014).

ment, domestic constituencies and industry stakeholders. For disputes that have remained under surveillance for a considerable period of time (due to delayed or non-implementation of the DSB’s recommendations), governments tend to make the same point (and in many instances employ the same language) across meetings, though an increasing number of non-parties to the dispute have begun to highlight concerns over the systemic implications of delayed implementation or developing country concerns.²⁴

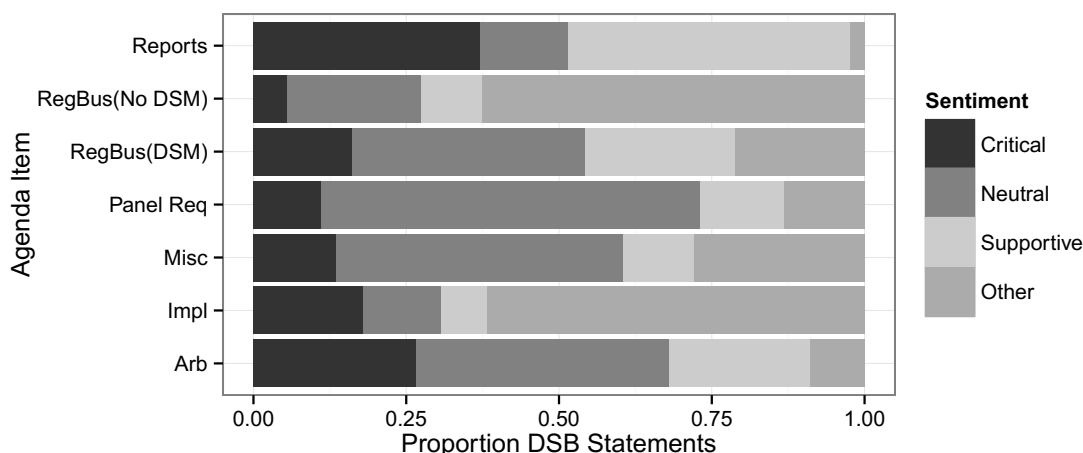


Figure 3.3: Estimates for proportion of total DSB statements, by consolidated DSB Agenda Item, categorized by statement sentiment (Critical, Neutral, Supportive and Other). Total DSB statements = 9833.

Classifying aggregate revealed views by Agenda Item demonstrates that statements regarding implementation often do not express a view on the DSM, but those that do are more likely to be critical than supportive or neutral (Figure 3.3). Conversely, because statements on reports, or on compliance and arbitration proceedings, explicitly relate to the DSM’s exercise of authority, they typically convey a view—supportive or critical—and are rarely classified as ‘Other.’ Statements requesting the establishment of a panel, however, rarely convey a view on the DSM’s exercise of authority, as they are largely logistical in nature.

Turning to trends in the DSM’s political capital over time, Figure 3.4 displays how aggregate revealed views have varied by year. During the early years of the WTO, governments

²⁴Interview 1.1, Geneva, Switzerland (13 January 2014); Interview 3.5, Geneva, Switzerland (15 January 2014).

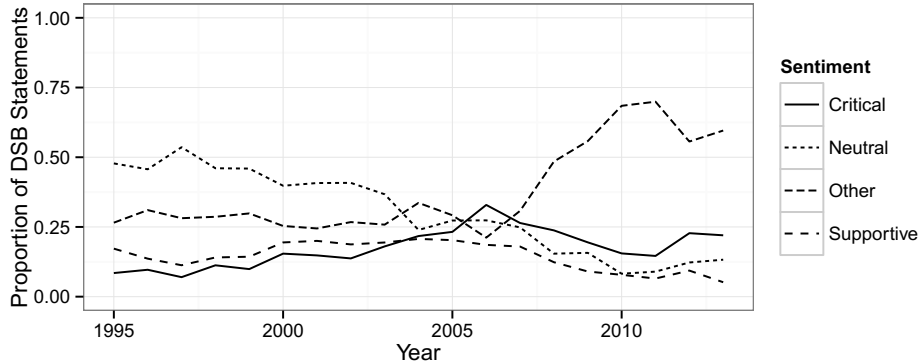


Figure 3.4: Estimates for proportion of total DSB statements by year, categorized by statement sentiment (Critical, Neutral, Supportive and Other). Total DSB statements = 9833.

made relatively more statements unrelated to the DSM or that expressed a neutral view on its operations (approximately half of all DSB statements). Of those statements expressing a view on the DSM, states were relatively more supportive than critical. This is not very surprising, given that the dispute settlement mechanism was just beginning to operate, with only eight dispute reports adopted by the end of 1997. In this initial phase, governments were focusing their attention on the practical and procedural issues that were required to make the system more operational. For example, during the first two years, statements generally related to the appointment of Appellate Body members, working procedures for appellate review, creating the indicative list of individuals for appointment as panelists, the scope of third-party rights in panel proceedings and a number of other issues falling under Other Business. In addition, a number of requests for panel establishment were made, which are typically categorized as Neutral (see also Figure 3.3). The relative preponderance of supportive statements (over critical) is reflective of the general atmosphere in those early years: the DSM is ubiquitously referred to as the “jewel in the crown” of the WTO, and during this early period there is general optimism about the new system (Zimmerman 2006, 22).

Between 1997 and 2005, there is a general decrease in the proportion of neutral statements and a simultaneous increase in the proportion of statements expressing a view—critical

or supportive—on the DSM. After the Organization’s first two years, practical issues related to getting the new system up and running are resolved for the most part, and the DSM begins to issue its first reports. As the Mechanism begins to operate, governments start to explicitly discuss and express their views on its activities and exercise of authority.

Around 2005, a noticeable increase in critical and a simultaneous decrease in neutral statements occurs. Members also begin to issue more statements classified as Other. These patterns are partly attributable to increased discussion of issues related to the implementation of DSB recommendations, which are not necessarily about the DSM as such. In other words, governments begin addressing each other within the DSB, rather than the dispute settlement mechanism. However, governments are also increasingly making statements that express frustration over the lack of implementation of dispute rulings, highlighting the systemic negative effects that continued non-compliance has for the operation of the DSM, which accounts for approximately 20% of statements relating to implementation.²⁵

Over the years, a significant amount of this discussion on implementation occurs in the context of three long-standing disputes that have triggered extensive engagement by governments: *US—Section 211 Appropriations Act*,²⁶ *US—Offset Act (Byrd Amendment)*,²⁷ and *EC—Bananas III*.²⁸ Together, statements related to these three disputes comprise 33.9% of all statements made within the DSB between 1995 and 2013, and almost half (45.3%) of statements made after 2005 alone.²⁹ Much of this engagement relates to continued non-implementation of recommendations, and the significant economic consequences of ongoing

²⁵Recall that statements not primarily about the DSM, but that still signal criticism of the effectiveness or operation of the system as whole, are categorized as Critical (and not Other).

²⁶Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, 2 January 2002.

²⁷Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R; WT/DS234/AB/R, 16 January 2003

²⁸Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997.

²⁹Members made 1363 statements in relation to *United States—Section 211 Omnibus Appropriations Act of 1998*, 1013 statements in relation to *US—Offset Act (Byrd Amendment)*, and 971 statements in relation to *EC—Bananas III*.

trade discrimination.

There may, however, be an additional explanation for the relative increase in the number of critical statements after 2005. Engagement with the dispute settlement system increases steadily in the first ten years of the Organization, as more members begin to participate in disputes, as either parties or third parties. During those ten years, a growing number of governments acquire direct experience with dispute settlement practices and procedures. Increasing familiarity with the system may contribute to more informed views on the DSM's judicial activities, encouraging more vocal participation within the DSB (Conti 2010). In addition, governments could be starting to accept the authority of the DSM and by consequence feel less inclined to make a statement on the operation of the system, unless there is a truly important issue at stake and they are particularly dissatisfied.

Aggregate revealed views—or the political capital of the DSM—thus change in patterned ways over time, with a noticeable shift in how governments engage with the system around 2005. Specifically, many states begin to use discussion of implementation issues to signal a growing frustration with the inability of the system to address broader and somewhat systemic disparities between groups of countries. This section also highlighted that governments use statements under certain Agenda Items within the DSB—namely statements on dispute reports or compliance proceedings—more often than others to signal a view on the DSM's exercise of authority. Yet not all WTO members participate extensively within the dispute settlement system. Many simply are not parties to trade conflicts, or lack the resources to engage as third parties for disputes in which they may have an economic or political interest. To explore this expected cross-national variation in views on the DSM, the following section provides a descriptive analysis of revealed views on the DSM's exercise of authority across relevant groups of countries.

3.1.3 The DSM’s Political Capital across Members

Although DSB meetings are open to accredited representatives of all governments, not every member sends a representative to every meeting.³⁰ The extent to which representatives attend depends primarily on the size and composition of their delegation in Geneva, Switzerland (the home of the WTO) and the agenda items for a given meeting. Larger countries and the most frequent users of the dispute settlement system attend every meeting, while smaller or less active governments will attend when the meeting does not conflict with another body’s with higher priority (in terms of economic or political interest for the country).³¹

Table 3.2: Member Participation within the Dispute Settlement Body

Rank	Member (Total Statements)	Member (Statements by DSS Usage)	Member (Statements by DSM Exposure)
1	US (2069)	Bolivia (58)	Venezuela (143)
2	EU (1536)	Cameroon (17)	Panama (111)
3	Japan (615)	Saint Lucia (16.3)	Ecuador (97)
4	Canada (517)	Cuba (12.8)	Colombia (96)
5	Brazil (511)	Antigua & Barbuda (10)	Vietnam (79)
6	India (448)	Zimbabwe (8.3)	Malaysia (55)
7	Mexico (347)	Malaysia (7.9)	Japan (41)
8	China (338)	Hong Kong (7.7)	Philippines (40.7)
9	Argentina (262)	Venezuela (7.5)	Honduras (35.7)
10	Thailand (238)	Panama (7.4)	Chile (35.5)

Unsurprisingly, the U.S. and the EU are the most vocal DSB participants, having made 2,069 and 1,536 individual DSB statements respectively (compared to the next most vocal member, Japan, with a total of 615 individual statements). Table 3.2 provides a ranking of the top ten most vocal DSB participants in terms of total statements, statements by usage

³⁰Article IV: 2, WTO Agreement; Rules of Procedure for Meetings of the General Council, WT/L/161, Rule 8.

³¹Interview 1.1, Geneva, Switzerland (13 January 2014); Interview 2.2 and 2.4, Geneva, Switzerland (14 January 2014).

of the dispute settlement system (DSS usage), and statements by DSM exposure.³²

The countries ranked in the first column (total DSB statements) predictably correspond to the most active users of the system, as those involved in a dispute must necessarily speak within DSB meetings, either out of custom or to take care of logistical matters. Rankings are somewhat different for the other two columns, which control for participation within the system or exposure to the DSM, with a number of countries considerably more vocal than we might expect based on dispute involvement. For example, Cuba and Hong Kong have never been a party to an empaneled dispute (though have been fairly active third party participants), yet have made 217 and 108 statements respectively. Controlling for all participation within the system, Cuba still ranks as the 4th and Hong Kong as the 8th most vocal members within DSB meetings. Even more interesting are those countries that have never been a party (third party or otherwise) to a dispute (empaneled or not), yet have made the effort to participate within DSB meetings, however minimally (Morocco (4), Haiti (2), Tunisia (1), and Slovenia (1)).

Views expressed on the DSM also vary as a function of participation within the dispute settlement system.³³ Since 1999, the US and EU make proportionally fewer critical statements about the DSM than all other members (Figure 3.5), but not proportionally more supportive statements (Figure 3.6). In fact, low and non-users of the system tend to express more support (as a percentage of their total statement activity) than the US or EU do, particularly after 2003 (see Figure 3.6).

The high point of relatively *critical* statements for all members (aside from the US and EU) appears to fall between 2006 and 2009, although the ten countries with medium usage

³²DSS usage is calculated by normalizing DSB statements with a Member's participation in all disputes, empaneled or not, and includes third party participation. DSM exposure is calculated by normalizing DSB statements with a Member's participation in empaneled disputes only and excludes third party participation.

³³DSM usage was calculated according to a Member's participation as a party within empaneled disputes and thus reflects engagement with the DSM specifically, as opposed to the dispute settlement system as a whole. The high usage category only includes the US and the EU, while the medium category includes the next ten most active users: Canada, the Republic of Korea, China, Japan, Mexico, Brazil, India, Argentina, Thailand and Australia. The low category includes all other Members that have participated as a party within at least one empaneled dispute (twenty-six Members in total), while non-use includes Members that have never directly participated in an empaneled dispute (though may have participated as a third party).

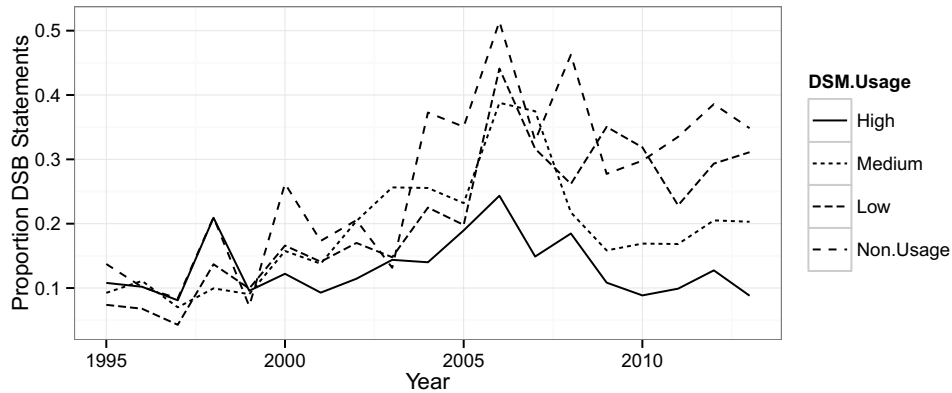


Figure 3.5: Yearly estimates of statements categorized as Critical, as proportion of total DSB statements, by member state’s use of the WTO dispute settlement system. High use category includes the US and EU (DSB statements=3605). Medium use category includes the next ten most active users (as parties to an empaneled dispute) of the dispute settlement system (DSB statements=3671). Low use category includes remaining states that have been party to at least on empaneled dispute (DSB statements = 1713). Non-Usage category includes all member states that have never been party to an empaneled dispute (DSB statements=894).

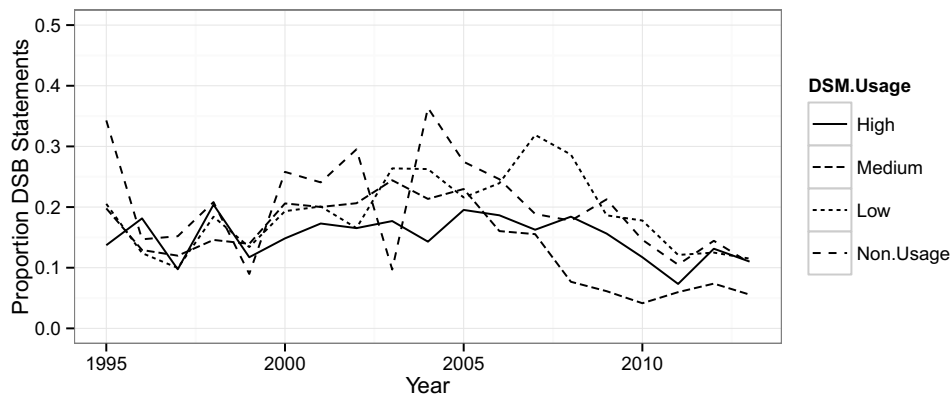


Figure 3.6: Yearly estimates of statements categorized as Supportive, as proportion of total DSB statements, by member state’s use of the WTO dispute settlement system. High use category includes the US and EU (DSB statements=3605). Medium use category includes the next ten most active users (as parties to an empaneled dispute) of the dispute settlement system (DSB statements=3671). Low use category includes remaining states that have been party to at least on empaneled dispute (DSB statements = 1713). Non-Usage category includes all member states that have never been party to an empaneled dispute (DSB statements=894).

rates³⁴ return to similar proportions as the US and EU by 2007 (see Figure 3.5). Almost half of the statements made by non-users of the dispute system after 2003 are critical of the DSM, indicating relatively greater dissatisfaction among this group of countries. This could be due to the fact that representatives that do not engage regularly with the system only make a statement when they are particularly unhappy with a certain development, or when they wish to flag political support for states adversely affected by ongoing non-compliance.³⁵ In contrast, there are fewer differences across states in terms of their *supportive* statements after 2007 or 2008, although countries with Medium usage rates use a surprisingly small percentage of their statements to express supportive views.

Figure 3.7 displays aggregate expressed views related to implementation of recommendations, by DSM usage rate. Less frequent users of the DSM express relatively more views—predominantly critical—on the operation of the DSM in the context of implementation. This relates to the three long-standing disputes discussed above that elicited widespread engagement across WTO Members (*US—Section 211 Appropriations Act*; *US—Offset Act (Byrd Amendment)*; and *EC—Bananas III*). Moreover, governments that participate within the DSB in relation to these disputes comprise a wider subset of the membership than those that typically engage in the context of many other disputes. A little over one-third of the statements on these cases were issued by governments not party to at least one of the disputes.³⁶

The DSM's political capital not only changes over time, but varies in systematic ways across actors. Striking differences in views on implementation issues exist between high users of the dispute system—the US and the EU—and all other governments. In fact, criticism of the DSM in the context of implementation decreases in tandem with usage

³⁴Canada, the Republic of Korea, China, Japan, Mexico, Brazil, India, Argentina, Thailand and Australia.

³⁵The absolute number of statements made by non-users of the system represents a small percentage of total DSB statements (9.1%), so any interpretations of patterns in their statement sentiment remain suggestive.

³⁶Twenty-seven countries have made statements in relation to *US—Section 211 Appropriations Act* (WT/DS176), seventeen in relation to *US—Offset Act (Byrd Amendment)* (WT/DS217/234), and forty-seven in relation to *EC—Bananas III* (WT/DS27).

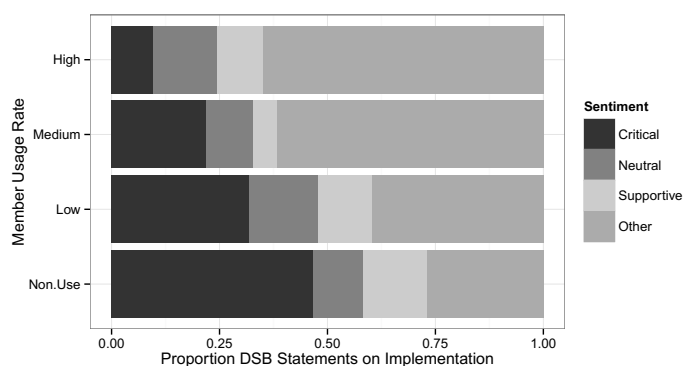


Figure 3.7: Estimates for proportion of DSB statements on Items related to Implementation of Recommendations, by DSM Usage Rate, categorized by statement sentiment (Critical, Neutral, Supportive and Other). DSM Usage Rate grouped according to High Use (2171 statements on Implementation), Medium Use (1926 statements on implementation), Low Use (805 statements on Implementation), and Non-Use (500 statements on Implementation).

of the dispute settlement system. While low- and non-users of the system have pretty consistently expressed more support for the DSM than the US and the EU over time, since 2006 governments that somewhat regularly use the system (medium users) have voiced even less support for its exercise of authority compared to all other members, including the US and EU. In addition, since 1999 all other members have voiced significantly more criticism as compared to the US and the EU. To further unpack the substantive reasons for these cross-national differences, the following section explores aggregate revealed views within statements most likely to signal a view on the DSM’s exercise of authority, namely statements issued in the context of report adoption.

3.2 Discussion of Dispute Rulings

Statements made prior to the adoption of a dispute report (the ‘ruling’ of the DSM) typically comment on legal interpretations or procedural decisions, and are thus more likely to reflect governments’ views on the DSM’s exercise of its authority than other types of statements (see Figure 3.3 above). This section first describes general trends in report statements, before identifying the factors associated with a greater likelihood of issuing a

critical report statement.

3.2.1 General Patterns in Report Statements

Between 1995 and 2013, the DSB considered, discussed and adopted 172 dispute reports, with an average of 9.56 reports adopted per year. Table 3.3 disaggregates report statements, which represent a little over 10% of all statements made within the DSB, by type of report and the relationship of the government making a statement to the dispute (i.e. whether it was a party, third party, or non-party). The majority of report statements express a view on regular (non-compliance proceeding) reports (873 statements in total), with statements on compliance reports (panel or Appellate Body) constituting a mere 1.8% of all DSB statements.³⁷ Governments typically make fewer total statements on panel reports than either Appellate Body or Article 21.5 compliance reports, but views expressed on Appellate Body reports do often reference panel findings.

Table 3.3: Statements Prior to Report Adoption

	Panel	Appellate Body	Compliance Panel	Compliance (AB)	All Reports
Reports Adopted	51	93	9	19	172
Total Statements	224	649	60	120	1053
Average/Report	4.39	6.98	6.67	6.32	6.12
Party Statements					
Average/report	2.65	2.87	3.22	3.21	2.86
Third Party Statements					
Average/report	1.26	2.40	2.00	2.84	1.99
Non-Party Statements					
Average/report	0.49	1.71	1.44	0.26	1.17

The WTO Agreement permits all governments to express views prior to report adoption, yet only a select group of countries make use of this opportunity in practice, with only thirty-nine percent of the WTO membership in 2013 (fifty-one Members in total) having expressed

³⁷On very rare occasions, parties to the dispute circulate written views on a report, in addition to their statement within the DSB. See, for example, Dispute Settlement Body, Communication by Mexico, *United States—Anti-Dumping Act of 1916*, WT/DS162/8, 26 July 2000. Due to the unique nature of these types of communications, and the fact that they largely reiterate—albeit in more detail—the views expressed within DSB statements, written expression of views prior to report adoption are not included within the present analysis.

at least one view on an Appellate Body or panel report.³⁸ Among newer members, those that participate in more disputes (either as a party or a third party) are slowly increasing their expression of views prior to report adoption (i.e. China, Vietnam, and Saudi Arabia). Tellingly, only two Members that have never participated in an empaneled dispute (either as a party or a third party) have expressed a view prior to report adoption.³⁹ Controlling for empaneled dispute participation reveals a different picture, with the less frequent users of the system relatively more vocal. For example, Malaysia is by far the most vocal Member relative to its participation as a party or third party. While frequent users of the system deliver more report statements in absolute terms, they are not necessarily more willing to express views when not directly involved in a dispute.

The reasons for placing a report statement on the record and the substance of a statement varies according to whether the country was a party to or had a direct economic interest in the dispute, and whether the report addressed issues with potential implications for future disputes. Within interviews, most delegations indicated that the intended audience of report statements was the system as a whole (the Secretariat, panelists, and the Appellate Body) with the purpose being to place on the record a government's views on legal interpretations or procedural decisions.⁴⁰

Parties have extensive opportunities to develop their legal arguments during dispute

³⁸Percentage of Membership calculated excluding all European Union member states, as only the EU representative may express views or make statements within the DSB. Interviews 1.2 and 1.3, Geneva, Switzerland (13 January 2014).

³⁹Prior to adoption of the Appellate Body and panel Reports in *United States—Section 211 Omnibus Appropriations Act of 1998* (WT/ DS176/AB/R; WT/DS176/R), Haiti issued a brief statement praising the Appellate Body's findings and supporting Cuba's position (Dispute Settlement Body, Minutes of Meeting held on 1 February 2002, WT/DSB/M/119, para. 34). Prior to adoption of the Appellate Body and panel Reports in *European Communities—Trade Description of Sardines* (WT/DS231/AB/R; WT/DS231/R), Morocco expressed its frustration with its inability to defend its interests as a third-party and its resort to submission of an *amicus curiae* brief as an alternative procedure (Dispute Settlement Body, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134, paras. 67-68).

⁴⁰Interviews 1.3, Geneva, Switzerland (13 January 2014); Interview 3.4, Geneva, Switzerland (15 January 2014); Interview 5.5, Geneva, Switzerland (15 January 2014). Some smaller or less active delegations denied that the Secretariat or Appellate Body members were the intended audience of such statements, while a few emphasized that these statements were also meant to send a message to domestic constituencies. Others emphatically stated that such statements held "zero value" for domestic audiences. Interview 2.4, Geneva, Switzerland (14 January 2014).

proceedings, but it is still customary for them to make a statement prior to report adoption. To date all have done so, with one exception.⁴¹ Parties to a dispute have made almost half of all report statements, although third parties also regularly express views. While third party report statements decreased slightly from the early years of the WTO, a trend that some representatives noted,⁴² the difference is not substantial. Moreover, even though the average number of third parties per dispute has grown steadily over the years, the percentage of third parties that make a report statement has not declined significantly. Members not parties or third parties (the ‘non-parties’) to a dispute tend to express views primarily on Appellate Body reports, and not panel or Article 21.5 compliance rulings.

Third parties and non-parties are much more cautious about expressing views on the record. Some worry that the statement may be “used against [them] at a later stage.”⁴³ For this reason, many typically reserve report statements for procedural and systemic issues.⁴⁴ This may also be due to the fact that the ability to express a substantive view on a report requires the legal capacity and resources necessary to analyze its systemic legal implications, which many developing country third and non-parties do not possess (Davis and Bermeo 2009).⁴⁵

The substance of a report statement—and whether it relates to specific and/or diffuse support—understandably varies according to whether a government was a party to the case, had a direct economic interest in the dispute, or whether the report addressed issues with potential implications for future disputes. Report views can roughly be placed into three categories, though any one statement may include all three types of views: (1) those that focus on the merits of the findings of the panel or Appellate Body in that particular

⁴¹Prior to adoption of the Appellate Body and panel Reports in *Mexico—Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/AB/R; WT/DS308/R), Mexico did not express a view (Dispute Settlement Body, Minutes of Meeting held on 24 March 2006, WT/DSB/M/208, paras. 1-11).

⁴²Interview 5.5, Geneva, Switzerland (17 January 2014).

⁴³Interviews 1.1, 1.3, Geneva, Switzerland (13 January 2014).

⁴⁴Interview 1.3, Geneva, Switzerland (13 January 2014); Interview 2.4, Geneva, Switzerland (14 January 2014); Interview 3.2, Geneva, Switzerland (15 January 2014).

⁴⁵Interview 1.4, Geneva, Switzerland (13 January 2014).

dispute;⁴⁶ (2) those that note findings, interpretations or procedural decisions adopted within a report and highlight their implications for future disputes, the system as a whole or broader interpretive consistency;⁴⁷ and (3) those that merely ‘take note’ of an interpretation or finding, in order to flag it as an issue deserving further consideration, but without adopting a substantive view.⁴⁸ Parties to a dispute typically reiterate legal arguments made within their submissions and highlight particular report findings or procedural aspects with which they strongly agree or that they find problematic. On average, party statements tend to represent a government’s degree of specific support for the DSM at a given moment in time. Third and non-parties generally limit their comments to specific findings or procedural issues that raise systemic concerns or that might affect their interests in the future. For the most part, these statements are shorter than those of parties (though there are exceptions), and generally speak to diffuse support for the DSM. While there is a tendency for party statements to highlight specific report findings, and third and non-party statements to focus on more general DSM practices, this should not be overstated as statements often manifest both specific and diffuse support.

Drawing on manual classification of all report statements, Figure 3.8 displays changes in aggregate revealed views in the context of report adoption over time. Since the first reports were adopted in 1996, governments have consistently—with the exceptions of 1999,

⁴⁶For instance, prior to adoption of the Appellate Body and panel Reports in *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines* (WT/DS371/AB/R; WT/DS371/R), the representative of the Philippines, a party to the dispute, expressed its deep satisfaction with the Reports, emphasizing that they had given clear guidance as to the contents of the disputed rules (Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, WT/DSB/M299, paras. 2-4).

⁴⁷For instance, prior to adoption of the Appellate Body and panel Reports in *United States—Measures Affecting Trade in Large Civil Aircraft—Second Complaint* (WT/DS353/AB/R; WT/DS353/R), the representative of Canada, a third party to the dispute, expressed views on two interpretive issues with systemic implications found within the Reports: the causal analysis required to support a panel finding that subsidies caused serious prejudice and the scope of the specificity analysis under Article 2.1(a) of the SCM Agreement (Dispute Settlement Body, Minutes of Meeting held on 23 March 2012, WT/DSB/M/313, para. 76).

⁴⁸For instance, prior to adoption of the Appellate Body and panel Reports in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R; WT/DS58/R), the representative of Australia, a third-party to the dispute, noted that “[t]he Appellate Body’s finding had pointed to some important aspects of these tests which deserved further consideration.” Dispute Settlement Body, Minutes of Meeting held on 6 November 1998, WT/DSB/M/50, p. 13.

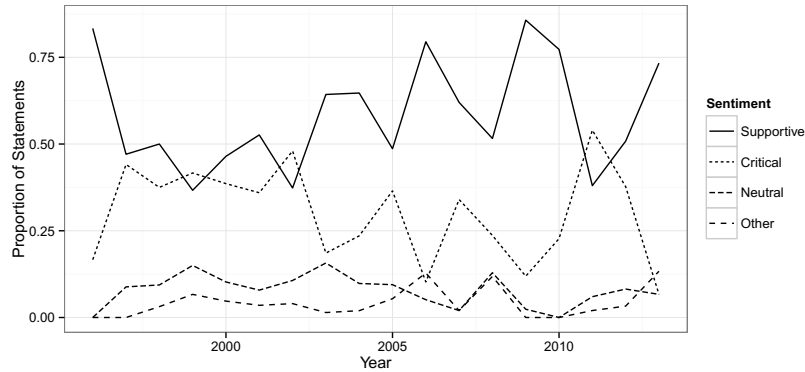


Figure 3.8: Yearly estimates for proportion of DSB report statements, categorized by statement sentiment (Critical, Neutral, Supportive and Other). Total report statements classified (includes compliance proceeding reports) = 1040. The six original categories employed for classification are collapsed to four for simplicity of presentation

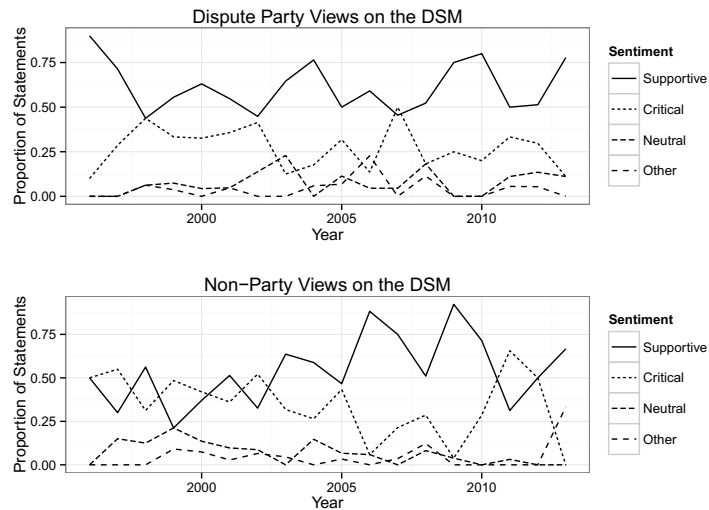


Figure 3.9: Yearly estimates for proportion of DSB report statements, categorized by statement sentiment (Critical, Neutral, Supportive and Other), made by dispute parties, and third and non-parties respectively. Total report statements by dispute parties classified (includes compliance proceeding reports) = 561; total report statements by third and non-parties classified (includes compliance proceeding reports) = 492. The six original categories employed for classification are collapsed to four for simplicity of presentation

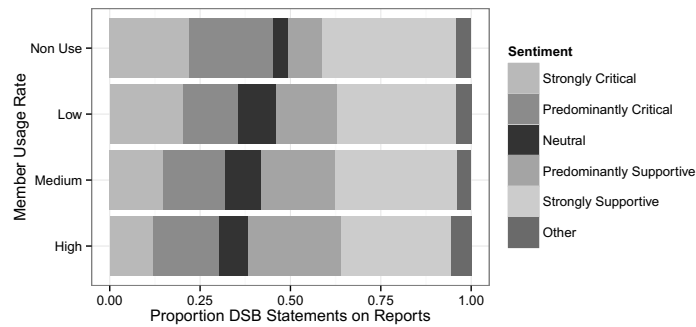


Figure 3.10: Estimates for proportion of DSB statements made prior to Report Adoption (including reports on compliance or arbitration proceedings), by DSM Usage Rate, categorized by statement sentiment (Strongly Critical, Predominantly Critical, Neutral, Predominantly Supportive, Strongly Supportive, and Other). DSM Usage Rate grouped according to High Use (324 report statements), Medium Use (443 report statements), Low Use (213 report statements), and Non-Use (73 report statements)

2002 and 2011—made proportionally more supportive statements than those expressing other sentiments. The exceptions to this pattern are largely driven by third and non-parties to a dispute, as parties have consistently been more supportive than critical within their report statements (see Figure 3.9), save for in 1998, 2002, and 2007, when they were roughly as critical as supportive. This in and of itself is telling, as we might have expected the ‘losing’ party to always criticize adverse decisions and the ‘winning’ party to similarly express support for findings on which it prevailed. If that was the case, party statements would reflect roughly equal sentiment proportions (as the majority of disputes involve two parties), largely related to the degree of specific support enjoyed by the DSM among the parties. But that is not what we observe. Instead, parties—including many ‘losing’ parties—on average will express diffuse support for the exercise of authority by the DSM in spite of or in addition to voicing specific concerns about adverse findings related to their interests or objectives. In this way, generalized support for the DSM’s exercise of authority has facilitated acceptance of adverse decisions—to the point of still voicing positive views—in some periods, and less so in 1998, 2002, and 2007.

Widespread support in the system’s initial years could be attributed to general optimism about the newly established DSM, similarly reflected in all DSB statements (and not merely

report statements; see Figure 3.4), or to a “collective cease-fire against all public criticism of Appellate Body decisions during its start-up years,” as Robert Hudec has suggested (Hudec 1999, 28).⁴⁹ However, members did not shy away from expressing explicitly critical views on reports adopted the following year, with aggregate revealed views on the DSM roughly balanced in terms of criticism and support.⁵⁰ By 2002, governments were the most critical in relative terms, with nearly half of report statements revealing express dissatisfaction with the DSM, largely driven by the overwhelming concern with the Appellate Body report in *EC—Sardines* (see discussion below).⁵¹

It is also interesting that for the membership as a whole (Figure 3.8), the proportions of supportive and critical statements vary together after 2002, representing clear highs and lows in the political capital of the DSM, although these fluctuations only represent approximately six to seven statements per year. The directions and relative size of these changes are similar for both party and third/non-party statements, with the conspicuous exceptions of 2007 and 2011 (Figure 3.9). In 2007, there is a much sharper increase in critical party statements than in those made by third/non-parties. This might be due to the fact that there are relatively low levels of engagement by a broader subset of the membership this year compared to other years. Additionally, the US made nearly half of the critical party statements in that year. In contrast, during 2011 the proportion of critical views expressed by third/non-parties increased dramatically compared to the much smaller uptick observed within party

⁴⁹The two exceptions to this moratorium on public criticism include the US, which issued one strongly critical statement on the panel report in *United States—Gasoline*, and Japan, which made an ambiguously critical statement prior to the adoption of the panel and Appellate Body reports in the same dispute, not expressing any objections but not necessarily agreeing with “every point in the two reports.” Statement by the representative of Japan, Minutes of the Meeting of the Dispute Settlement Body held on 20 May 1996, WT/DSB/M/17, p.3; Statement by the representative of the United States, Minutes of the Meeting of the Dispute Settlement Body held on 20 May 1996, WT/DSB/M/17, p.3.

⁵⁰Notably not all critiques were levied by countries party to a dispute or with a direct interest in its outcome. See, for example, the statements by the representatives of third parties (Indonesia, Malaysia and Sri Lanka) and a non-party (Mexico) expressing criticism prior to the adoption of the Appellate Body and panel reports in *Brazil—Measures Affecting Desiccated Coconut* (WT/DS22/AB/R; WT/DS22/R). Dispute Settlement Body, Minutes of Meeting held on 20 March 1997, WT/DSB/M/30, pp. 10-11.

⁵¹Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R; WT/DS231/R, 26 September 2002.

statements. As discussed in the following section, this is attributable primarily to a number of states voicing concern over the non-transparent way in which the Appellate Body was dealing with its increased workload.

Figure 3.10 shows the proportion of report statements falling into the six more nuanced categories employed for manual classification of report statements, by usage rate of the DSM.⁵² Notably, a government's experience with the dispute settlement system does not appear to be strongly related to how much support a country is willing to voice in the context of report adoption, with the US and the EU (High Usage Rate) expressing approximately the same degree of support as low, medium and non-users of the system. In contrast, statements devoted to criticism of the DSM's exercise of authority steadily increase in tandem with declining usage of the system, suggesting that higher levels of engagement with the system may contribute to higher levels of diffuse support for its authority that mitigate the impulse to criticize reports. Alternatively, it could be that the DSM tends to cater its exercise of authority to those governments that use the system more regularly, perhaps alienating non-users in the process.

3.2.2 What prompts criticism?

Does experience with or usage of the dispute settlement system influence the likelihood of expressing criticism of the DSM's exercise of authority? What other factors prompt states to engage in criticism? Drawing on the manual classification of all report statements discussed above, this section employs multivariate analysis to identify the factors associated with the probability of expressing a critical view on panel or Appellate Body reports. While Figure 3.10 suggested that the likelihood of criticizing the DSM decreased with greater direct experience in the dispute settlement system, when controlling for other pertinent factors, a

⁵²DSM usage was calculated according to a Member's participation as a party within empaneled disputes and thus reflects engagement with the DSM specifically, as opposed to the dispute settlement system as a whole. The high usage category only includes the U.S. and the EU, while the medium category includes the next ten most active users: Canada, the Republic of Korea, China, Japan, Mexico, Brazil, India, Argentina, Thailand and Australia. The low category includes all other members that have participated as a party within at least one empaneled dispute (twenty-six members in total), while non-use includes Members that have never directly participated in an empaneled dispute (though may have participated as a third party).

country’s DSM usage category is not strongly associated with the probability of making a critical report statement (see Figure 3.11).

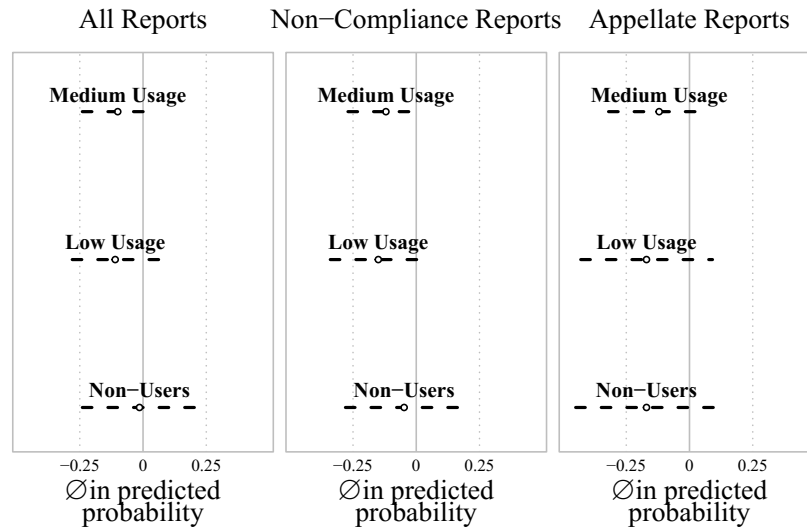


Figure 3.11: Likelihood of making a critical report statement, by DSM Usage Category. Simulated estimates of probability of issuing a critical statement across DSM usage categories, controlling for a number of pertinent factors. The circles represent estimates of the expected effect on the probability of criticism voiced by members falling within Medium, Low and Non-User usage categories, relative to High Users (the US and EU), with all other variables held constant at their means. The lines are 90% confidence intervals. The circles and lines are solid when there is at least 90% confidence of a positive or negative effect. Otherwise, circles are open and lines are dotted. See Appendix Table A.1 for standard regression tables.

Perhaps not all types of experience with the DSM are equal. Governments that consistently find themselves on the defensive within disputes may feel unfairly singled out by the WTO’s judicial bodies, as nearly 95% of disputes have found at least one violation of regime obligations. Replacing DSM usage category with a country’s cumulative experience prior to issuing a given report statement, Figure 3.12 displays expected changes in the probability of making a critical statement as either complainant or respondent experience increases. Even when taking into account whether the statement was issued by the United States or the European Union, more respondent experience is consistently associated with higher prob-

abilities of criticism.⁵³ Governments with five disputes brought against them in the past (Respondent Experience) are approximately 5% more likely to issue a critical statement than countries who have never appeared on the defensive before the DSM, a moderate expected change that is nonetheless highly significant. Conversely, greater experience bringing disputes (Complainant Experience) is associated with around a 10% decrease in the likelihood of criticizing the DSM. This relationship holds across all types of dispute reports—panel and Appellate Body reports, as well as compliance (DSU Article 21.5) rulings. In sum, experience in *bringing* disputes tends to matter more—almost twice as much—for expressing positive or neutral views than defensive experiences do.

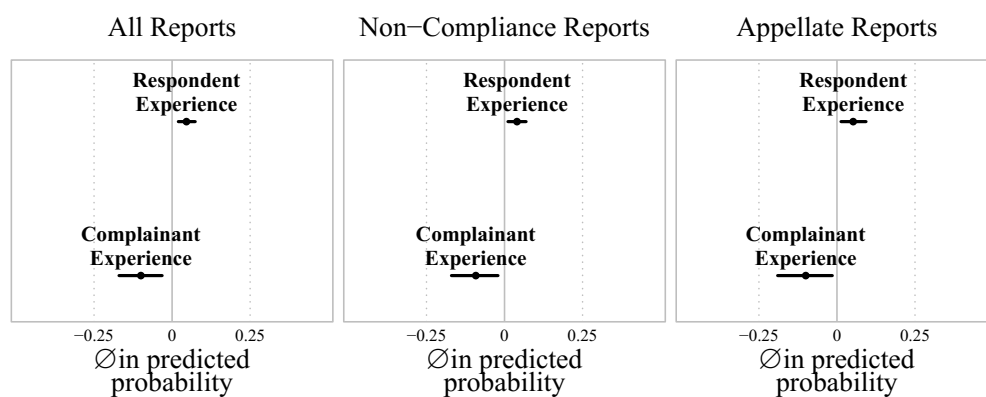


Figure 3.12: Likelihood of making a critical report statement, by dispute experience. Simulated estimates of probability of issuing a critical statement. The circles represent estimates of the expected effect on the probability of criticism as the cumulative experience of the country as a Respondent or Complainant moves from 0 to 5 disputes, and all other variables are held constant at their means. The lines are 90% confidence intervals. The circles and lines are solid when there is at least 90% confidence of a positive or negative effect. Otherwise, circles are open and lines are dotted. See Appendix Table A.2 for standard regression tables.

⁵³By 2013, the U.S. had been subject to fifty-five empaneled dispute complaints, while the EU had defended itself within twenty-three empaneled disputes. Canada is the next highest repeat defender with only eleven respondent appearances in empaneled disputes. Mean respondent experience is 9.188. The U.S. and the EU are also the highest repeat complainants, with forty-one and thirty-eight empaneled complaints brought respectively by 2013. Again, Canada is the third highest repeat complainant with fifteen empaneled complaints; mean complainant experience is 11.04.

Another strong predictor of making a critical statement is whether the state was a party (including third party participation) to the dispute. Disputing parties are almost 20% *less* likely than non-parties to make a critical statement. This relationship should be interpreted with caution. It does *not* necessarily suggest that non-party governments are *always* dissatisfied with the WTO's exercise of judicial authority. Rather, it speaks to the fact that governments speak up more often to signal criticism, and remain silent even when supportive of the DSM's authority. Moreover, as discussed below, non-party report statements tend to address broader systemic issues and diffuse support for the DSM, more so than party statements.

Neither the wealth of a country nor its size are significantly related to the probability of expressing a critical view (see Appendix Table A.2). Similarly, the relationship between greater third-party participation and critical report views is weak. In other words, disputes that elicit engagement and interest among a broader subset of the membership—as proxied by the number of third parties—are not always likely to prompt more critical views, though a bit more likely to do so in the context of disputes that reach the appellate stage. Anti-dumping disputes also tend to prompt slightly less criticism than those that do not entail claims under the Anti-Dumping Agreement, even when controlling for those rulings on the U.S. use of a zeroing methodology in anti-dumping investigations.⁵⁴ While early on, anti-dumping disputes were relatively controversial, jurisprudence has accumulated around some of the most-litigated provisions, such that these disputes have become almost routine.

Finally, for those disputes that do reach the appellate stage, governments are considerably more likely to express critical views on those that involve a challenge to *how* the panel

⁵⁴One reason why anti-dumping disputes were so controversial is that the U.S. actively criticized a line of cases ruling against the Department of Commerce's practice of 'zeroing' in anti-dumping investigations. Anti-dumping authorities calculate the margin of dumping for a product by computing the difference between normal value and export price for each model or type of a particular product, and aggregate the results. 'Zeroing' refers to the practice of omitting the calculations where export price was higher than normal value, thus inflating dumping margins. Following the Appellate Body's ruling in *United States—Softwood Lumber V*,⁵⁵ a number of countries filed complaints against the U.S. Department of Commerce's zeroing practice in investigations and reviews. To address the unique nature of this line of cases, I controlled for all disputes from the sample against the U.S., following *United States—Softwood Lumber V*, that only challenged its zeroing practices.

exercised its authority compared to appeals that only address whether the panel arrived at an incorrect legal or factual interpretation (Article 11 Appeal).⁵⁶

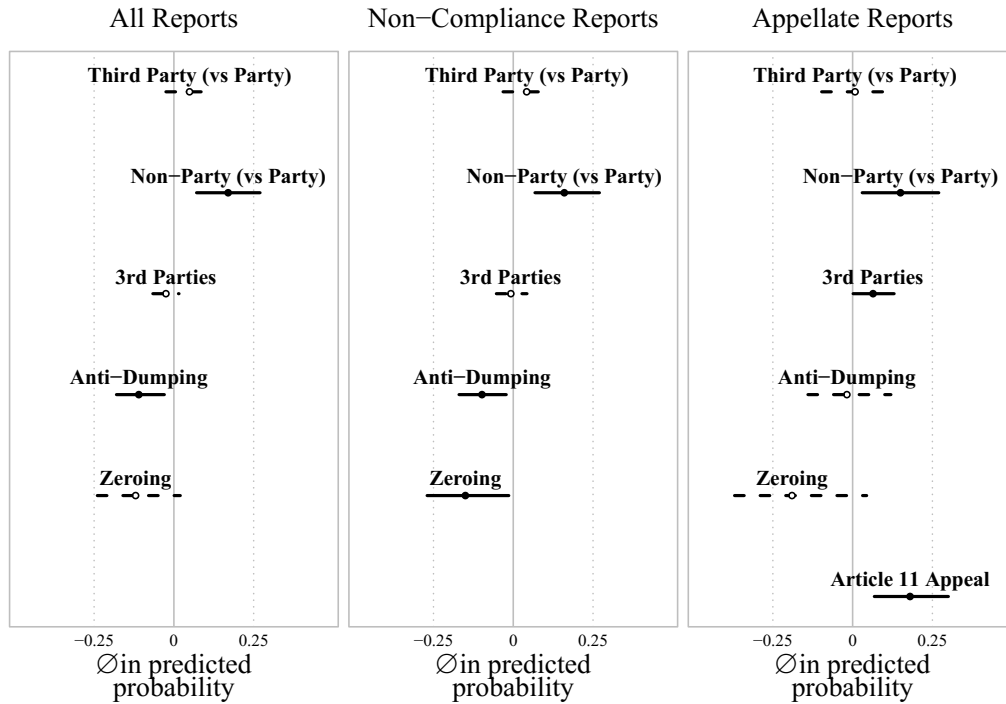


Figure 3.13: Likelihood of making a critical report statement. Simulated estimates of probability of issuing a critical statement. The circles represent estimates of the expected effect on the probability of criticism as the Number of Third Parties to a dispute changes from the 25th to the 75th quartile, and all other variables are held constant at their means. For all other binary variables, the circle represents the expected probability of reporting as it changes from 0 to 1, and all other variables are held constant at their means. The lines are 90% confidence intervals. The circles and lines are solid when there is at least 90% confidence of a positive or negative effect. Otherwise, circles are open and lines are dotted. See Appendix Table A.2 for standard regression tables.

⁵⁶In terms of the panel's standard for reviewing domestic decisions, or undertaking an 'objective assessment' of the evidence before it. See further, Chapter 4.

3.2.3 Substantive Topics of Report Statements

As Lawrence Helfer and Karen Alter recognize, a court's exercise of authority is not challenged merely because a decision is controversial among those actors whose interests are or were directly at stake in the dispute (Helfer and Alter 2013, 502).⁵⁷ While such criticism may reflect changes in the DSM's level of specific support, its perceived legitimacy is very much tied to expressions of diffuse support which do not always relate to how a discrete ruling affects a Member's specific objectives or interests within a dispute. This section thus explores the sources of the DSM's diffuse support, not solely in terms of views expressed by parties to a dispute, but through a substantive analysis of views on focal reports. Focal reports represent those that prompt extensive engagement across a broader subset of the membership, and relatively greater engagement by countries not directly affected by the dispute ruling.

The tone and content of report statements understandably vary according to the identity of the speaker, a government's interest in the outcome, and the substance of the report under adoption. However, reports prompting widespread engagement across the membership tend to address a select number of recurring issues or themes. Rulings that governments view as developing expansive interpretations often give rise to concerns over upsetting the treaty-specified balance between the WTO's political and judicial bodies. Other recurring issues include procedural practices that affect the fair balance between parties within dispute proceedings, or findings that governments believe disproportionately and detrimentally affect certain groups of Members. Governments also tend to speak up when they are particularly satisfied with how the DSM exercised its authority. When panels or the Appellate Body adopt interpretations in line with what many believe to be the appropriate interpretations, third and non-parties often will make a statement supporting the DSM's exercise of author-

⁵⁷In 2008, the representative of the EU expressed a similar perspective, in noting that "one could not help but have the impression that the overall objective of the US statement and its communication seemed to prove that the Appellate Body was right, wherever it had agreed with the United States, and utterly and scandalously wrong wherever the Appellate Body had chosen not to follow the US view." Statement by the representative of the European Communities, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 35.

ity. The following discussion reveals four broad topics referenced on a recurring basis: the balance of authority between the political and judicial bodies of the WTO; the fairness and transparency of dispute proceedings; ‘minority activism’ by the DSM; and ‘majoritarian activism’ by the DSM. Table 3.4 provides an overview of the focal reports (and specific topics at issue within each dispute) that fall within each of these categories.

Table 3.4: Recurring Topics within Statements on Focal Reports

Topic	Dispute (Year)	Specific Issue
Balance of authority	<i>US—Shrimp</i> (1998)	<i>Amicus</i> briefs; Evolutionary interpretations
	<i>EC—Bananas (Article 21.5)</i> (1999)	Ongoing negotiations (sequencing)
	<i>India—Quantitative Restrictions</i> (1999)	Balance of Payment Committee
	<i>US—Lead and Bismuth II</i> (2000)	<i>Amicus</i> briefs
	<i>US—Section 110(5)</i> (2000)	<i>Amicus</i> briefs
	<i>US—Certain EC Products</i> (2000)	Ongoing negotiations (sequencing)
	<i>US—Wheat Gluten</i> (2001)	Causality in safeguard investigations
	<i>EC—Sardines</i> (2002)	Ongoing negotiations (<i>amicus</i> briefs)
	<i>US—Corrosion-Resistant Steel Sunset Review</i> (2003)	Precedent
	<i>US—Zeroing (Japan)</i> (2007)	Ongoing negotiations (zeroing); Precedent
	<i>US and Canada—Continued Suspension</i> (2008)	Ongoing negotiations (sequencing)
	<i>US—Stainless Steel (Mexico)</i> (2008)	Ongoing negotiations (zeroing); Precedent
<i>US—Anti-Dumping and Countervailing Duties (China)</i> (2011)	Interpretation of ‘public body’	
Fairness and Transparency	<i>US—Shrimp</i> (1998)	<i>Amicus</i> briefs
	<i>Argentina—Textiles and Apparel</i> (1998)	Evidence from other IOs
	<i>US—Section 110(5)</i> (2000)	<i>Amicus</i> briefs
	<i>US—Lead and Bismuth II</i> (2000)	Appropriate standard of review
	<i>Guatemala—Cement II</i> (2000)	Precedent; Appropriate standard of review
	<i>US—Wheat Gluten</i> (2001)	Judicial economy
	<i>EC—Sardines</i> (2002)	<i>Amicus</i> brief by non-party member
	<i>US—Corrosion-Resistant Steel Sunset Review</i> (2003)	Judicial economy
	<i>US and Canada—Continued Suspension</i> (2008)	Bias of appointed experts; Public hearings
	<i>Thailand—Cigarettes (Philippines)</i> (2011)	Appropriate standard of review
	<i>US—Tyres (China)</i> (2011)	Delayed circulation of reports
	<i>China—Raw Materials</i> (2012)	Delayed circulation of reports
<i>US—COOL</i> (2012)	Delayed circulation of reports	
Minority activism	<i>India—Quantitative Restrictions</i> (1999)	Developing country concerns
	<i>EC—Tariff Preferences</i> (2004)	Developing country concerns
Majority activism	<i>US—Section 301 Trade Act</i> (1999)	Unilateral retaliatory measures
	<i>US—Offset Act (Byrd Amendment)</i> (2003)	Permissible responses to dumping/subsidization
	<i>US—Zeroing (Japan)</i> (2007)	Zeroing
	<i>US—Stainless Steel (Mexico)</i> (2008)	Zeroing
	<i>US—Zeroing (Japan) (Article 21.5)</i> (2009)	Zeroing
	<i>US—Continued Zeroing</i> (2009)	Zeroing

Topic 1: Balance of Authority

When governments perceive that the DSM has engaged in expansive interpretations of WTO rules, thus *adding to* instead of *clarifying* members’ existing rights and obligations, many voice concern about ‘unsettling’ the treaty-specified balance between the Organiza-

tion’s judicial and political bodies.⁵⁸ The conventional wisdom, repeatedly affirmed by governments, is that only member states may create new rights and obligations, while the purpose of the DSM is merely to clarify existing provisions in the course of facilitating the settlement of disputes. This understanding of the institutional relationship between the WTO’s political and judicial bodies also explains why governments typically express a view on findings that implicate issues subject to ongoing negotiations.

The issue of *amicus curiae* brief submissions arises frequently during dispute settlement, prompting the wider membership to express views on the balance of authority between the WTO’s political and judicial bodies. The issue first arose in 1998, in the context of the Appellate Body report in *US—Shrimp* and the right of panels to consider *amicus curiae* briefs submitted by non-governmental organizations.⁵⁹ Similarly, the Appellate Body’s report in *US—Lead and Bismuth II* generated overwhelmingly critical statements, by parties, third parties and non-parties alike, the majority of which focused on the *amicus* submissions received by the Appellate Body from the American Iron and Steel Institute and the Specialty Steel Industry of North America. While the Appellate Body found that non-Member individuals and organizations do not have a legal *right* to make submissions to the Appellate Body, and the Appellate Body does not have a legal *duty* to accept or consider unsolicited briefs, it did find that it has the legal *authority* to accept and consider *amicus* submissions when it is “pertinent and useful” to do so, without further elaborating on how that determination would be made.⁶⁰ All report statements, save that by the representative of the US, voiced serious concerns over the Appellate Body’s *approach* to resolving the question

⁵⁸For many governments, the separation of powers within the WTO is reflected in DSU Article 3(2), and more importantly in Article IX:2 of the WTO Agreement which establishes Members’ *exclusive* right to issue authoritative interpretations on WTO law.

⁵⁹Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R; WT/DS58/R, 12 October 1998.

⁶⁰The substantive focus of the dispute was relatively uncontroversial, though it did address the unsettled question of the appropriate standard of review for panels to apply to a government’s imposition of countervailing duties (Article 11 DSU or Article 17.6 of the Anti-Dumping Agreement). Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS/138/AB/R; WT/DS/138/R, 7 June 2000, paras. 40-42.

of such submissions, regardless of the government’s underlying view on the desirability of permitting *amicus* briefs.

Interpretations perceived to upset the balance of authority between the political and judicial bodies also prompt comment by the broader membership. The topic of allocation of authority has arisen in the context of the DSM engaging in allegedly ‘evolutionary interpretations,’⁶¹ the respective responsibilities of and relationship between the DSM and various WTO committees,⁶² and the scope of the DSM’s authority to define appropriate remedies⁶³ or recommend resort to a particular dispute settlement procedure.⁶⁴

The issue of *amicus curiae* brief submissions has also prompted governments to comment on the role of the DSM in relation to issues subject to ongoing negotiations. For example, the Appellate Body’s decision to accept *amicus* briefs in *EC—Sardines* was viewed by many as “prejudicial to the position held by some Members regarding the on-going DSU negotiations

⁶¹For example, the DSM’s interpretation within *US—Shrimp* that “‘exhaustible natural resources’ within the meaning of GATT Article XX(g) included living species threatened with extinction” prompted a number of comments on the pros and cons of such ‘evolutionary interpretations.’ See statement by the representative of Mexico, Dispute Settlement Body, Minutes of Meeting held on 6 November 1998, WT/DSB/M/50, p. 13. See also Dispute Settlement Body, Minutes of Meeting held on 6 November 1998, WT/DSB/M/50, pp. 1-17.

⁶²For example, the DSM’s interpretation of its institutional relationship with the Balance of Payments Committee in *India—Quantitative Restrictions* generated overwhelmingly critical statements. See statements by the representatives of India, Cuba, Dominican Republic, Egypt, Indonesia, Jamaica, Malaysia, Philippines and Sri Lanka, Dispute Settlement Body, Minutes of Meeting held on 24 September 1999, WT/DSB/M/68, pp. 14-23. See also Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R; WT/DS90/R, 23 August 1999.

⁶³The compliance report in *Australia—Automotive Leathers II (Article 21.5)* prompted criticism of the remedy imposed by the DSM, which a number of governments viewed as punitive in nature and at odds with the Dispute Settlement Understanding and previous GATT practice. See, for example, statement by the representative of Brazil, Dispute Settlement Body, Minutes of Meeting held on 11 February 2000, WT/DSB/M/75, p. 8. See also Article 21.5 Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW, 11 February 2000.

⁶⁴Nearly all governments (with the exception of the European Communities) voiced concern over the Appellate Body’s findings on the sequence of use of DSU procedures in the *US—Continued Suspension* and *Canada—Continued Suspension* reports, in which the Appellate Body recommended that the DSB request the parties to initiate Article 21.5 proceedings. See, for example, statement by the representative of Argentina, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 26. See also Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R; WT/DS320/R, 14 November 2008. Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS321/AB/R; WT/DS321/R, 14 November 2008.

over the acceptance of *amicus* briefs.”⁶⁵ Conversely, when the DSM explicitly engages in judicial restraint, the broader membership tends to express overwhelming support, as seen in the context of adoption of the reports in *US—Certain EC Products*, which addressed an issue central to ongoing DSU review negotiations: the appropriate sequencing between Articles 21.5 and 22.6 of the DSU, and particularly whether states could resort to authorization of countermeasures before completing compliance panel proceedings.⁶⁶ The Appellate Body had concluded that it was up to Members to resolve the sequencing issue as “[d]etermining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.”⁶⁷ Every single statement made prior to report adoption approved of the Appellate Body’s exercise of judicial restraint on this issue.⁶⁸

Finally, the issue of precedent also generates topical discussion of the allocation of authority between member states and the WTO’s judicial bodies. For example, in the context of *US—Stainless Steel (Mexico)* a number of governments voiced reservations about whether and when panels should follow prior Appellate Body jurisprudence, as doing so unconditionally could undermine the requirement that dispute rulings cannot add to or diminish the rights and obligations established within the WTO agreements.⁶⁹

⁶⁵Statement by the representative of Ecuador, Dispute Settlement Body, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134, para. 65; Statement by the representative of India, Dispute Settlement Body, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134, para. 62; Statement by the representative of Mexico, Dispute Settlement Body, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134, para. 49.

⁶⁶On DSU review negotiations regarding the sequencing issue, see (Zimmerman 2006, 101-8).

⁶⁷Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R; WT/DS165/R, 11 December 2000, para. 92.

⁶⁸See Dispute Settlement Body, Minutes of Meeting held on 10 January 2001, WT/DSB/M/96.

⁶⁹For example, Chile agreed that the Appellate Body’s reports create “legitimate expectations among Members and should, therefore, be taken into consideration, although they were not—he reiterated not—binding,” but then expressed concern about some of the language used by the Appellate Body that “could lead to unfortunate conclusions regarding the nature of the dispute settlement system.” Statement by the representative of Chile, Dispute Settlement Body, Minutes of Meeting held on 20 May 2008, WT/DSB/M/250, paras. 67-68. Australia similarly emphasized that it was “necessary for panels and the Appellate Body to strike a balance between security and predictability, on the one hand, and maintaining the parties’ rights and obligations under the covered agreements, on the other.” Statement by the representative of Australia, Dispute Settlement Body, Minutes of Meeting held on 20 May 2008, WT/DSB/M/250, paras. 63-65. See

Topic 2: Fairness and Transparency of Proceedings

Another recurring topic involves procedural practices that affect the fair balance between parties within dispute proceedings. Notably, disputes in which the DSM has accepted *amicus* briefs from external parties, such as private individuals or law firms, spur engagement for two additional reasons. First, governments worry that their acceptance will create a “floodgate to non-requested submissions,”⁷⁰ with potentially detrimental effects for the system’s effectiveness.⁷¹ Second, and more importantly, accepting such briefs might effectively grant greater *de facto* rights and input to non-WTO Members.⁷² As observed in *EC—Sardines*, this set of issues becomes more complicated when the DSM accepts such briefs from WTO members not party to the dispute. The overwhelming majority of statements made prior to this report’s adoption voiced concern over the Appellate Body’s decision to accept—albeit not take into account—unsolicited *amicus curiae* briefs by one private individual and Morocco—at the time a WTO member but not a third party to the dispute. Many viewed this decision as giving Morocco—a non-party in the dispute—greater participation rights than some passive third-parties.⁷³ Because parties and third parties to the proceedings must follow the stringent Working Procedures for Appellate Review, allowing briefs from non-parties gives these governments more extensive opportunities to advance their legal arguments. Such practices elicit engagement because they are perceived to upset the fair balance between members within dispute proceedings, a balance that is central to

also Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R; WT/DS344/R, 20 May 2008.

⁷⁰Statement by the representative of Hong Kong, China, Dispute Settlement Body, Minutes of the Meeting held on 27 July 2000, WT/DSB/M/86, para. 71

⁷¹This concern was made explicit during adoption of Panel Report, *United States—Section 110(5) of US Copyright Act*, WT/DS160/R, 27 July 2000.

⁷²Prior to adoption of the panel report in *US—Section 110(5)*, see statements by representatives of Hong Kong, India, Mexico, Malaysia and Australia, Dispute Settlement Body Meeting, Minutes of Meeting held on 27 July 2000, WT/DSB/M/86, paras. 69-78.

⁷³For Chile, the decision “created a new category of Members, giving them rights and obligations that had not been negotiated and, furthermore, had not been recognized in the WTO Agreements.” Statement by the representative of Chile, Dispute Settlement Body, Minutes of Meeting held on 23 October 2002, WT/DSB/M/134, para. 42.

the maintenance of procedural due process.

Concern over the fairness of dispute proceedings and the ‘inherent’ rights of parties to procedural due process arises not only in relation to *amicus* submissions, but also frequently in the context of panels’ consultations with or appointment of experts⁷⁴ or other international organizations,⁷⁵ panels’ objective assessment and consideration of evidence and arguments before it in line with Article 11 of the Dispute Settlement Understanding,⁷⁶ the reluctance of the Appellate Body to complete the legal analysis when the panel has exercised judicial economy,⁷⁷ and delayed circulation of Appellate Body reports in the absence of consultation with or agreement of the parties.⁷⁸

⁷⁴In the context of the Appellate Body’s reports in *US—Continued Suspension* and *Canada—Continued Suspension*, see: Statement by the representative of Australia, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 27; Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 21.

In this dispute, the Appellate Body reaffirmed its previous findings that a due process requirement was “inherent in the WTO dispute settlement system” and “fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings,” in the context of finding that the Panel had infringed the EC’s due process rights by appointing experts with questionable institutional affiliations. See: Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R; WT/DS207/R, 23 September 2002, para. 176; Appellate Body Report, *Mexico—Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (Article 21.5—US)*, WT/DS132/AB/RW; WT/DS132/RW, 22 October 2001, para. 107; Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/AB/R; WT/DS122/R, 12 March 2001, para. 88.

⁷⁵In the context of the Appellate Body report in *Argentina—Textiles and Apparel*, see: Statement by the representative of Argentina, Dispute Settlement Body, Minutes of Meeting held on 22 April 1998, WT/DSB/M/45, p. 6.

⁷⁶In the context of the Appellate Body report in *Thailand—Cigarettes (Philippines)*, see: Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, WT/DSB/M/299, para. 10.

⁷⁷In the context of *United States—Tuna II*, see: Statement of the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 13 June 2012, WT/DSB/M/317, para. 28.

⁷⁸See, for example, Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 5 October 2011, WT/DSB/M/304, para. 14.

By 2011, the DSM—and the Appellate Body in particular—was facing a heavy workload affecting its ability to circulate reports within the time-frames specified within the DSU. The lack of transparency with which the DSM dealt with delayed circulation of reports—particularly whether it had consulted with or obtained the consent of the disputing parties—in addition to a number of new, controversial interpretations, prompted relatively greater criticism by Members during this year and the following year. See, for example, statements made in the context of: Appellate Body Report, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R; WT/DS399/R, 5 September 2011; Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R; WT/DS394/R; WT/DS395/R; WT/DS398/R, 22 February 2012; Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL)*

Although the language of ‘procedural fairness and due process’ is not found within the DSU, the Appellate Body increasingly incorporates these phrases within its reports. While a number of governments recognize that “it would be difficult to imagine any delegation, relying on a wholly literal interpretation of the DSU to suggest that these principles did not apply to panel proceedings,”⁷⁹ others express concern with the incorporation of this language within reports, while still supporting the underlying principles.⁸⁰ What is clear is that the fair and balanced treatment of parties by the DSM within dispute proceedings constitutes a central source of its legitimacy for some governments.

Topic 3: Minority Activism

When the DSM issues rulings that governments believe disproportionately and detrimentally affect certain groups of members—a form of ‘minority activism’—representatives do not shy away from voicing active criticism. For example, in the context of *India—Quantitative Restrictions*, a number of governments issued critical statements on the DSM’s findings related to developed-developing country dynamics within the WTO.⁸¹ Similarly, the Appellate Body report in *EC—Tariff Preferences*, the first to consider the Generalized

Requirements, WT/DS384/AB/R; WT/DS386/AB/R; WT/DS384/R; WT/DS386/R, 23 July 2012.

⁷⁹Statement by the representative of Canada, Dispute Settlement Body, Minutes of Meeting held on 19 May 2004, WT/DSB/M/169, para. 53.

⁸⁰Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 21; Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, WT/DSB/M/299, para. 10.

⁸¹Nine of eleven statements made prior to report adoption criticized the reports for not having “fully appreciated development concerns and imperatives of developing countries.” See statements by the representatives of India, Cuba, Dominican Republic, Egypt, Indonesia, Jamaica, Malaysia, Philippines and Sri Lanka, Dispute Settlement Body, Minutes of Meeting held on 24 September 1999, WT/DSB/M/68, pp. 14-23. In contrast, the only two strongly supportive statements were made by two developed country Members: the EC and the US.

System of Preferences (GSP) Program,⁸² similarly triggered extensive expression of views.⁸³ In this dispute, India challenged one aspect of the EC's GSP plan of January 2002 as discriminatory in the granting of preferences.⁸⁴ The Appellate Body found that developed countries could under certain conditions differentiate among GSP beneficiaries, so long as the procedure for doing so was non-discriminatory, which the EC had failed to do within its program. The majority of statements touched on the finding that preference-giving countries *could* differentiate among GSP beneficiaries, though statements were equally supportive and critical. While Ecuador, speaking on behalf of the Andean Community, expressed support for this ruling, other Members criticized it as effectively "legitimizing the GSP as a tool of foreign policy of developed countries, something developing countries had tried to avert when negotiating the Enabling Clause in order to overcome the fragmented scheme of special preferences in the past."⁸⁵

Topic 4: Majority Activism

Finally, governments also tend to speak up when they are particularly satisfied with how the DSM exercised its authority. When panels or the Appellate Body adopt interpretations in line with what many believe to be the appropriate interpretations, third and non-parties often will make a statement supporting the DSM's exercise of authority.

⁸²GATT Contracting Parties, *Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, 28 November 1979, GATT B.I.S.D. 203 (1980). Under the GSP program, developed countries are permitted and encouraged to give preferential market access by lowering tariffs for developing countries below the level of tariffs for developed countries. However, many developed countries began to make the preferences conditional on various factors.

⁸³Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R; WT/DS246/R, 20 April 2004.

⁸⁴EC Council Regulation 2501/2001 of 10 December 2001, Applying a Scheme of Generalized Tariff Preferences for the Period from 1 January 2002 until 31 December 2004. Under the EC's Drug Arrangement preferences program, the EC gave additional preferences to countries certified as having programs to combat drug production and drug trafficking. Countries did not apply for special preferences and the EC did not state what standards country would have to meet to qualify for the drug incentives. The EC itself identified the countries it would grant these preferences, which included the Andean Community, Central American States and Pakistan (12 countries total).

⁸⁵Statement by the representative of Brazil, Dispute Settlement Body, Minutes of Meeting held on 20 April 2004, WT/DSB/M/167, paras. 71-75.

For example, in 2000 the panel's report in *US—Section 301 Trade Act*⁸⁶ generated considerable interest across the broader membership because it ruled on US legislation that authorized the Office of the United States Trade Representative (USTR) to unilaterally suspend concessions or impose import restrictions in response to trade barriers imposed by other countries.⁸⁷ The panel ruled that the US measure permitted the USTR to exercise discretion in a way that constituted a *prima facie* violation of Article 23 of the DSU, but that the US had already lawfully removed this *prima facie* violation through its Statement by Administrative Action (SAA).⁸⁸ Overall, more than half of the report statements expressed either strong or predominant support for the panel decision. Only five statements voiced minimal criticism, largely directed towards the panel's reliance on US statements to cure the measure's *prima facie* violation of WTO law. One reason for this ruling eliciting such widespread support, including by the United States,⁸⁹ may be that the decision, while including new interpretations of WTO obligations and DSU provisions, engaged in a form of 'majoritarian activism' in that it simply reaffirmed both current practice and what

⁸⁶Panel Report, *United States—Sections 301-310 of the Trade Act 1974*, WT/DS152/R, 22 December 1999.

⁸⁷Prior to the establishment of the WTO, the USTR frequently relied on Section 301 of the Trade Act in lieu of (and due to general dissatisfaction with the effectiveness of) the dispute resolution procedures of the GATT system. The strengthened dispute settlement mechanism of the WTO resulted, in part, from the efforts of governments to restrain the 'aggressive unilateralism' of the US, as it required all Members to resolve trade disputes through the procedures outlined within the Dispute Settlement Understanding (Hudec 1999, 13-4). See Article 23, DSU. On the use of Section 301 prior to the Uruguay Rounds, see Bhagwati and Patrick 1990. Under the WTO, the USTR continued to rely on Section 301 investigations, including to threaten unilateral retaliation in response to non-implementation of DSB recommendations. On the background of this dispute, see Chang 2000.

⁸⁸The SAA was a document submitted by the President and approved by Congress that accompanied the US implementation of the Uruguay Round results. See statement by Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994), reprinted in 1994 U.S.C.C.A.N.

The SAA, in conjunction with statements made by the US before the panel, effectively limited the discretion afforded the USTR to impose retaliatory measures in a way that brought the Trade Act into conformity with WTO obligations. See Panel Report, *US—Section 301 Trade Act*, paras. 7.109-125.

⁸⁹Prior to the report's adoption, the US representative expressed support for the panel's findings, though it did note that it "did not agree with all of the reasonings of the Panel." Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 27 January 2000, WT/DSB/M/74, p. 10. Surprisingly, the EC expressed even greater support for the panel report, in that it saw the decision as representing "an important outcome for the preservation and the proper functioning of the WTO multilateral system." Statement by the representative of the European Communities, Dispute Settlement Body, Minutes of Meeting held on 27 January 2000, WT/DSB/M/74, pp. 10-12.

a majority of governments had effectively tried to achieve through Article 23 of the DSU (Stone Sweet and Brunell 2013).

Reports in the *US—Offset Act (Byrd Amendment)* dispute in early 2003 also represented a form of ‘majority activism’ on the part of the DSM, as there existed a relatively broad consensus among members that the Byrd Amendment violated WTO rules.⁹⁰ The overwhelming majority of statements made within the DSB thus affirmed the DSM’s conclusion in this regard, rather than evaluating its exercise of authority or the quality of its reasoning.

3.2.4 Summary of Focal Report Statements

This analysis of statements on focal reports highlights a number of issues that WTO member states believe to lie at the heart of the Dispute Settlement Mechanism’s authority. One recurring issue, with adverse effects on its political capital, arises from governments’ views that the DSM engaged in expansive interpretations of WTO rules, something that contributes to an ‘unsettling’ of the balance established within the WTO agreements between the Organization’s judicial and political bodies. For many, the separation of powers within the WTO is reflected in DSU Article 3(2), and more importantly in Article IX:2 of the WTO Agreement which establishes members’ *exclusive* right to issue authoritative interpretations on WTO law. Only governments may create new rights and obligations, while the purpose of the DSM is merely to clarify existing provisions in the course of facilitating the settlement of disputes. This view on the institutional relationship between the WTO’s political and judicial bodies also explains why a number of the focal reports concern DSM findings on issues subject to ongoing negotiations, both within and outside the framework of DSU review. The DSM’s interpretations regarding ‘sequencing’ and its practices with regard to *amicus* briefs are but two examples.

Notably, the DSM’s practices on the acceptance of unsolicited *amicus curiae* briefs prompt more than concern with the balance between the political and judicial branches

⁹⁰Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R; WT/DS217/R, WT/DS234/R, 16 January 2003.

of the WTO. Disputes for which the DSM has accepted *amicus* briefs from external parties, such as private individuals or law firms—for example in *US—Section 110(5) Copyright Act*—spur engagement for two additional reasons. First, governments worry that their acceptance will create a “floodgate to non-requested submissions,”⁹¹ with potentially detrimental effects for the system’s effectiveness. Second, and more importantly, accepting such briefs might effectively grant greater *de facto* rights and input to non-WTO Members. As observed in *EC—Sardines*, this set of issues becomes more complicated when the DSM accepts such briefs from states not party to the dispute. Because parties and third parties to the proceedings must follow the stringent Working Procedures for Appellate Review, allowing briefs from non-parties gives these governments more extensive opportunities to advance their legal arguments. Such practices elicit engagement because they are perceived to upset the fair balance between Members within dispute proceedings, a balance that is central to the maintenance of procedural due process.

Concern over the fairness of dispute proceedings and the ‘inherent’ rights of parties to procedural due process arises not merely in relation to *amicus* submissions. It also emerges frequently in the context of panels’ consultations with or appointment of experts⁹² or other international organizations,⁹³ panels’ objective assessment and consideration of evidence and arguments before it in line with Article 11 of the Dispute Settlement Understanding,⁹⁴ the reluctance of the Appellate Body to complete the legal analysis when the panel has exercised

⁹¹Statement by the representative of Hong Kong, China, Dispute Settlement Body, Minutes of the Meeting held on 27 July 2000, WT/DSB/M/86, para. 71

⁹²In the context of the Appellate Body’s reports in *US—Continued Suspension* and *Canada—Continued Suspension*, see: Statement by the representative of Australia, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 27; Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 21.

⁹³In the context of the Appellate Body report in *Argentina—Textiles and Apparel*, see: Statement by the representative of Argentina, Dispute Settlement Body, Minutes of Meeting held on 22 April 1998, WT/DSB/M/45, p. 6.

⁹⁴In the context of the Appellate Body report in *Thailand—Cigarettes (Philippines)*, see: Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, WT/DSB/M/299, para. 10.

judicial economy,⁹⁵ and delayed circulation of Appellate Body reports in the absence of consultation with or agreement of the parties.⁹⁶ Although the language of ‘procedural fairness and due process’ is not found within the DSU, the Appellate Body increasingly incorporates these phrases within its reports. While a number of governments recognize that “it would be difficult to imagine any delegation, relying on a wholly literal interpretation of the DSU to suggest that these principles did not apply to panel proceedings,”⁹⁷ others express concern with the incorporation of this language within reports, while still supporting the underlying principles.⁹⁸ What is clear is that the fair and balanced treatment of parties by the DSM within dispute proceedings constitutes a central source of its legitimacy for some governments.

Members are also prompted to speak up when they are satisfied with the DSM’s exercise of authority. As statements in the context of e.g. *US—Section 301 Trade Act* demonstrated, interpretations that reflect a high degree of consensus among the membership and represent the DSM’s engagement in so-called ‘majoritarian activism’ strengthen its aggregate level of diffuse support. This finding indirectly supports the argument made by Alec Stone Sweet and Thomas Brunell that ‘majoritarian activism’ helps the DSM to “mitigate... legitimacy problems” (2013, 64). Conversely, when the DSM engages in what could be called ‘minority activism,’ by adopting interpretations governments believe adversely affect the majority of the membership (particularly developing countries, as was the case in *India—Quantitative Restrictions*), representatives do not shy away from voicing active criticism resulting in a weakening of the DSM’s level of political capital.

⁹⁵In the context of *United States—Tuna II*, see: Statement of the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 13 June 2012, WT/DSB/M/317, para. 28.

⁹⁶See, for example, Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 5 October 2011, WT/DSB/M/304, para. 14.

⁹⁷Statement by the representative of Canada, Dispute Settlement Body, Minutes of Meeting held on 19 May 2004, WT/DSB/M/169, para. 53.

⁹⁸Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 21; Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, WT/DSB/M/299, para. 10.

3.3 Conclusion

This chapter provided a systematic mapping of support for the World Trade Organization's judicial bodies, through an examination of member states' expressed views on the Dispute Settlement Mechanism's exercise of its adjudicative authority. By analyzing aggregate revealed views over time and between different users of the system, and by substantively examining focal reports, the preceding sections identified a number of practices that contribute to strengthening or weakening the DSM's political capital in the eyes of its main constituents—WTO members. Moreover, the analysis revealed that the sources of a court's political capital vary across actors, and that WTO members often apply different standards in evaluating the appropriateness of the DSM's exercise of authority (Bodansky 2013).

Sections 3.1 and 3.2 demonstrated that the WTO membership has overall expressed proportionally more support than criticism for the DSM's exercise of authority. In the context of statements issued prior to report adoption, the exceptions to this general pattern in 1999, 2002 and 2011 were largely attributable to third and non-parties voicing dissatisfaction with the DSM. Of note, criticism of the DSM appeared to steadily increase in tandem with declining usage of the DSM. Given that the US and the EU are much more active users of the system, it would not be surprising that their perceptions on the DSM's exercise of authority differ significantly from other members. What is slightly surprising though, is that despite the fact that these two largest traders are often 'dragged before' the WTO's judicial bodies and subject to repeated rulings against their trade measures, the US and the EU are actually on average relatively less critical of the DSM than other governments.⁹⁹ This may suggest either that higher engagement with the system contributes to higher levels of diffuse support that mitigate the impulse to exclusively voice criticism within a report statement, or that the DSM tends to cater its practices to governments that use the system more regularly, while at the same time alienating non-users in the process. However, when controlling for a

⁹⁹Of course, there are notable exceptions, such as the continued and vocal criticism by the United States on the DSM's approach to reviewing zeroing practices in the context of imposing anti-dumping duties.

number of other critical factors within a multivariate analysis, this chapter found no strong relationship between DSM usage category and the probability of making a critical statement. Rather, a country's *type* of DSM experience strongly predicts the probability of expressing a critical view, with experience in *bringing* disputes tending to matter more—almost twice as much—for expressing positive or neutral views than defensive experiences do.

To further unpack the relationship between expressed support or criticism of the DSM with the sources of its political capital, Section 3.2 then examined why certain reports elicit engagement across the wider membership, and third and non-parties in particular. The in-depth analysis of statements in the context of 'focal' reports revealed that certain practices *do* affect aggregate diffuse support for the DSM. Additionally, this analysis highlighted not only that the political capital of international courts varies across actors, but that the *sources* of a court's exercise of authority do as well. The issues that have given rise to widespread engagement do not always elicit consensus, but in many instances result in *divergent* views on how these practices affect the DSM's political capital. Dissensus on the desirability or legitimacy of various issues and practices, such as increased due process in WTO proceedings or greater openness in panel or Appellate Body hearings, suggests that governments hold different beliefs about what lies at the core—or the sources—of the DSM's legitimate exercise of authority.

These findings suggest a number of important questions, the most pressing line of inquiry relating to what, if any, effects these expressed views have on the actual operation of the DSM. How do panels and the Appellate Body respond to crises of or fluctuations in their political capital? What practices do they adopt to maintain sufficient levels of diffuse support? The following two chapters turn to these questions in the context of dispute panels (Chapter 4) and the Appellate Body (Chapter 5). Each chapter examines how these two levels of adjudication respond to changes in the DSM's political capital within their hierarchical interactions with each other.

A second line of inquiry, briefly touched on within this chapter but not further explored within this book, relates to the regional, cultural or other differences in the standards gov-

ernments apply when evaluating an international court's exercise of authority. What characteristics of a government or its legal system explain differences in expressed views on the DSM's legitimacy? Do states apply the same sets of evaluative factors across different international courts? Finally, future research should explore how the DSM's political capital relates to normative theories on the legitimacy of international courts. This research would also have important institutional implications, given that a number of proposals on how the WTO *can* and *should* increase the legitimacy of its judicial bodies draw from such normative theories. If the sources of the DSM's political support differ in critical ways from the presumed normative sources of legitimacy underpinning these proposals, their implementation may not effectively serve to enhance support for the DSM's exercise of authority among the broader membership.

4 | The Balancing of Trade Authority by WTO Dispute Panels

This chapter examines the conditions under which the WTO dispute panels seek to expand or restrict their delegated authority in the course of settling trade disputes. While panels sometimes intensely scrutinize the basis for a policy choice or regulatory measure, at other times they defer considerably to the government's authority to make such a decision. What explains variation in these outcomes? Because members have been unable or unwilling to use formal mechanisms to direct the WTO's judicial bodies, I have argued that states rely primarily on diffuse rhetorical pressures to signal support for or criticism of panels' exercise of their authority. They do so through regular contestation over rulings and their impact on policy areas over which governments continue to assert exclusive authority. Panels are sensitive, and under certain conditions responsive, to these collective pressures in order to ensure the continued political support of the membership as a whole.

Similar to recent empirical efforts to unpack and explain international judicial behavior, this chapter focuses on panels' substantive review of domestic policy choices (Busch and Pelc 2010; Cole 2011; Danner and Voeten 2010; Lupu and Voeten 2012; Pelc 2014; Voeten 2008, 2013). The extent to which panels validate such choices effectively allocates decision-making authority between national actors on the one hand and international institutions on the other, and defines the parameters of the delegation relationship between states and the WTO (Oesch 2003; von Staden 2012, 1033). The previous chapter demonstrated that WTO members have relied primarily on diffuse rhetorical pressures to signal support for or criticism of the Organization's exercise of judicial authority, through regular contestation

over dispute rulings and their impact on policy areas over which they continue to assert exclusive authority. Panels are sensitive, and under certain conditions responsive, to these collective pressures—the DSM’s political capital—in order to ensure the continued political support of the membership as a whole.

To evaluate this argument, I examine how panels respond—through their substantive review of domestic laws and policies—to shifts in their political capital. Employing the measures of political capital described in the previous chapter, this chapter finds that dispute panels are politically savvy when it comes to reviewing government decisions. When WTO members are relatively more critical of the DSM, panels will signal more deference to a government’s regulatory choices, effectively allocating authority over those policy spaces to states. Conversely, panels tend to validate fewer elements of a trade regulation only when they enjoy relatively greater support among members.

Yet WTO panels are not purely political actors and are very much aware of the dual political and legal environments within which they issue their judgments (Steinberg 2004). Dispute panels are accountable to a higher legal authority—the Appellate Body—and while not strictly bound by previous case law, some argue that a form of *de facto* precedent operates within the WTO (Bhala 1999a,b). In addition, for reasons of personal and professional self-interest, panelists often do not want to see their decisions overturned. Indeed, this article finds further that the density of relevant Appellate Body case law moderates the influence of diffuse political pressures on dispute outcomes, suggesting that panels simultaneously seek to maximize their support with both their legal and their political audiences.

The remainder of this chapter proceeds in three parts. The next section develops the chapter’s argument for why and when we would expect panels to signal deference to national authorities within their rulings. Section 4.2 outlines the empirical strategy used to test these theoretical expectations and discusses the primary findings of the analysis. Section 4.3 concludes.

4.1 Judicial Review within the WTO

WTO dispute settlement begins with a complainant (the government bringing the case) alleging that the trade measure(s) of a respondent (the ‘defendant’ government) violate WTO law. If the dispute is not settled during the consultations period, the complainant may request that a panel of three individuals adjudicate the dispute. Following oral and written arguments, the panel issues a final report that contains multiple findings on whether the challenged measures violate WTO law (Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Articles 4-16). In reaching these findings, panels necessarily exercise a form of judicial review over the acts of states subject to their jurisdiction.

Panels’ exercise of this review function holds political and legal significance for the regime as a whole, and is viewed by governments, commentators, and WTO officials as an important—albeit sometimes controversial—issue.¹ Yet the legal standard of review is flexible, not fully specified within WTO law, and not clearly developed by the Appellate Body, which gives panels considerable *discretion* in how to apply it to the the case before them. This provides a unique opportunity to examine the way in which legal and political factors simultaneously shape the contours of international trade authority.

Despite frequent warnings about the threat posed by judicial activism, international courts are not always interested in extending their authority or interpreting treaties expansively (Helfer and Alter 2013). The fact that panels can increase the scope of the DSM’s authority through their exercise of judicial review is not to suggest they always wish to do so or that they are always successful when they do.² This is particularly the case given

¹The standard of review issue almost de-railed negotiations and represented “one of three or four issues that could have broken [them] apart” (Jackson 1994, 139). Ultimately, a compromise was reached by including an explicit standard within the Anti-Dumping Agreement (ADA) alone, in order to appease the United States (Oesch 2003, 72-80). The remaining WTO agreements, however, do not specify the standard of review to be applied.

²Similar to courts within new democracies where judges seek to protect themselves and their institutions from political reaction, the DSM operates within a political context where norms of judicial independence are underdeveloped and expectations that governments will comply with decisions are unclear (Helmke 2002,

that the WTO describes itself as “member-driven,” and governments view themselves as the primary constituents of the Organization and its dispute settlement system (Footer 2006, 101; WTO 2011).

Given the environment in which they operate, I argue that panelists are strategic actors who are sensitive to various forms of political pressure, especially when the institutional legitimacy of the DSM appears fragile.³ A straightforward expectation derived from a view of panelists as strategic political actors is that they will exercise judicial restraint when they are likely to face sanctioning by states parties, particularly economically dominant ones; if this is the case, we would observe panels largely tilting their rulings in favor of the more powerful party of the disputing dyad. However, as discussed below, direct and unilateral sanctioning by the economically dominant members is difficult to achieve in practice, due to collective action problems and the institutional structure of the DSM. Instead, this article suggests that member states use diffuse rhetorical pressures to voice criticism of or support for panels’ exercise of authority, a claim supported by government representatives within interviews.

Following from this, I argue that panels pay attention to their support among the membership *as a whole*, and not solely the largest trading partners. This is because panels anticipate how government responses to their decisions—both rhetorical and behavioral responses—will impact their ultimate goal: ensuring the survival and increasing the institutional legitimacy of the DSM. In other words, collective support for the WTO’s judicial bodies represents one of the policy preferences I hypothesize panels seek to maximize through adjudication. If this is the case, we should see panelists not only paying attention to dips in their *collective* political support but also responding to these diffuse pressures through the content of their rulings. On the other hand, if panelists are pandering more to the

291).

³Strategic approaches to judicial behavior have come to dominate both the American and the comparative literatures on courts. These approaches emphasize how judges seek to maximize personal policy preferences but take into account anticipated responses of other legal and political actors (Epstein and Knight 1998, 2000; Helmke 2002).

largest traders, we would not observe any consistent relationship between collective political support and panel rulings.

These diffuse political pressures are not entirely determinative of a panel’s exercise of authority. The WTO subordinates panels’ judicial authority to that of the Appellate Body, which creates an additional set of legal constraints. If panels are strategic legal actors, we would expect them to anticipate the response of the higher judicial body to their ruling and strive to ensure that they will not be overturned. I argue further, however, that panels are playing to their two audiences—legal and political—simultaneously. If this is the case, we should see panelists considering *both* the views of legal actors (the Appellate Body) and political actors (member states) when deciding how to rule. This section develops this theoretical argument and teases out a number of observable implications, drawing from interviews conducted with government representatives and WTO officials.

4.1.1 The Political Capital of the DSM

The claim that international judges are sensitive to diffuse forms of political influence is relatively under-theorized within the literature, even though many recognize that states frequently employ such “horizontal pressure” (Alford 2006, 220; Ehlermann and Ehring 2005, 819; Ginsburg 2005; Goldstein and Steinberg 2008, 273-4; Mavroidis and Cottier 2003, 2; Steinberg 2004). Anecdotal evidence of the political pressures exerted by member states abounds, but we lack a comprehensive understanding of their use and consequences over time. In the context of the WTO, commentators largely agree that states find it difficult if not impossible to engage in formal legislative response to rulings of the organization’s quasi-judicial bodies.⁴ Instead, as I argue below, governments rely primarily on diffuse

⁴The WTO Agreement provides for two formal mechanisms of legislative response: amendment of the covered agreements (Article X, WTO Agreement) and adoption of authoritative interpretations (Article IX:2, WTO Agreement). Within the domestic context, mechanisms of legislative response or override play an important role in ensuring accountability between branches of government and minimizing the “countermajoritarian difficulty” of unaccountable judges overruling the “will of the legislature” (Bickel 1962, 16; Ely 1980, 5; Eskridge 1987). However, due to the practice of consensus decision-making within the WTO, member states have not been able to make effective use of these mechanisms. The amendment procedure is inefficient and understandably lengthy, and states have made relatively few efforts to adopt interpretations, with none adopted to date.

political pressures and legal persuasion to influence panels' exercise of their review authority. Members engage in a continuing 'dialogue' with the DSM by conveying (dis)satisfaction with its decisional behavior and by rhetorically challenging or supporting its institutional legitimacy (Alter 2008; Ginsburg 2005; Helfer 2006).

Meetings of governments representatives—particularly meetings of the body tasked with overseeing the dispute settlement system (the Dispute Settlement Body (DSB))—constitute the primary public forum within which WTO members express views on the DSM and seek to exert such political influence.⁵ The formal purpose of the DSB is to ensure the effective and efficient operation of the system, and both government representatives and the WTO Secretariat proudly note that the DSB is viewed as the least politicized and most efficient body within the WTO. But they also see DSB meetings as serving an important communicative role, by providing a public forum within which governments may send political signals to disputing parties, the membership as a whole, domestic audiences, and the DSM itself (Mueller-Holyst 2005, p. 25).⁶ The DSB typically meets once per month for regular sessions, with statements made on the record considered the official position of the government. In the view of a number of representatives, the formality of DSB meetings—the fact that statements are made publicly, officially and on the record—plays a critical role in fulfilling the DSB's underlying purpose and also influences a government's decision to make a statement. Not only do governments use these communicative acts on a regular basis, they do so with the explicit intention of signaling to the WTO's judicial bodies their (dis)satisfaction with its exercise of authority.

Governments use DSB statements to convey to the DSM as a whole (whether future

⁵This section draws from a series of interviews conducted with Member representatives and WTO Secretariat officials. A total of twenty-nine interviews were conducted between 13-17 January 2014 in Geneva, Switzerland. Three interviewees were officials within the WTO Secretariat; twenty-five interviews were conducted with current or former delegates representing their respective Members within DSB meetings; one interview was conducted with a representative from the Advisory Centre on WTO Law, an independent organization that provides legal advice and assistance to developing and least-developed countries. Interviewed Members varied across relevant characteristics, including size, wealth, use of the dispute settlement system, and vocal participation within meetings of the DSB. The identities of all interviewees have been redacted and replaced with random numbers, to ensure interviewee confidentiality.

⁶Interview 4.3, Geneva, Switzerland (16 January 2014).

panelists, Appellate Body members, or the Secretariat) their (dis)satisfaction with its overall operation, jurisprudential developments or decisional outcomes.⁷ The quantity, type and nature of these expressed views represent the DSM's political capital—or the aggregate level of state support for its exercise of authority—at a given moment in time. More critically, the majority of these statements do not represent 'cheap talk' by states. First, these statements typically necessitate considerable research, analysis and drafting by government officials prior to a DSB meeting. In other words, the content of a statement is pre-meditated and purposive. Second, these statements place on the formal, public record of an international political body a government's 'official' view on a given issue. Because these views may impact a state's bargaining position or diplomatic relationships within other forums, governments carefully and intentionally decide when and what views to express. Third, while a few statements may simply represent a losing state complaining about or a winning state approving of a ruling, governments without a direct stake in a case often express views on the broader, systemic implications of a court's exercise of authority.

How might we expect panels to respond to such diffuse forms of pressure? I argue that both professional role orientations and self-interest motivate WTO adjudicators to promote the DSM's political support and ensure its survival, as these factors critically influence their own personal salary potential, professional prestige, and occupational ambition (Schauer 2000). As strategic actors interested in ensuring continued support for their exercise of authority, the WTO's judicial bodies pay attention to their collective political capital, as expressed within views of member states. Given the difficulty of employing unilateral sanctioning within the WTO, we would expect them to have an interest in cultivating it among the wider membership, and not solely in relation to the largest economies or most 'powerful' states within the regime.

The extent to which cultivating the collective political capital of the DSM drives judicial

⁷The majority of representatives interviewed emphasized that they believe the Secretariat (both the Legal Affairs Division and the Appellate Body Division) is paying attention to their statements. Almost all interviewees emphasized that whether statements actually influence subsequent decisions is a separate question. Interview 2.3, Geneva, Switzerland (14 January 2014); Interview 4.3, Geneva, Switzerland (16 January 2014).

decision-making behavior varies across the two levels of WTO adjudication—the dispute panels and the Appellate Body. Appointed individuals serve as panelists on a part-time basis, in addition to their usual job.⁸ On average, panelists have shorter time horizons than elected international judges, as they are appointed *ad hoc* for a given dispute and only have this ‘one shot’ to achieve their individual goals or motivations for agreeing to serve on a panel. Due to their shorter time horizons, we would expect panelists to be more sensitive than members of the Appellate Body (who enjoy relatively longer tenures) to short-term fluctuations in political support for the DSM.

Why would panelists care about or invest in cultivating the DSM’s political capital, given that they are appointed *ad hoc* and hold other, permanent jobs? First, for reasons of professional self-interest, a number are likely motivated by re-appointment. A little over half of the panelists appointed since 1995 have sat on more than one panel, with a few sitting on as many as ten or eleven separate panels. Repeat panelists are likely more integrated in the organizational life of the WTO, and some even go on to become Secretariat officials or Appellate Body members. For this reason, they seek to maintain a respected professional reputation and strive to issue reports that will not provoke widespread political backlash and sanctioning.⁹

Second, panelists integrated into the organizational life of the WTO likely are more sensitive to vacillations in political support for the dispute settlement system and more wary about judicial overreaching into sovereign authority. Those who are concurrently WTO representatives must regularly interact with the individuals representing the complainant or respondent, within meetings of committees and other political bodies. In addition, WTO

⁸To date, the majority of appointed panelists were concurrent or previous government delegates to the WTO. Some were capital-based trade officials, with a few having served previously as WTO Secretariat officials or Appellate Body members. Even fewer have come from private practice or academia.

⁹Repeat panelists have an interest in cultivating support among the *wider* membership—and not always or necessarily with particular governments—because the majority of panelist appointments are made by the WTO Director General, and not by the disputing parties. To date, 60.8% of panels have been composed by the WTO Director General. Moreover, the selection procedure for panelists protects against the operation of a direct nationality bias, given that nationals of a disputing state (or third party) may not serve without the parties’ agreement (Article 8.3, DSU). Since the inception of the WTO, this has only occurred three times, all in the context of EU member state panelists hearing disputes involving the European Union.

delegates likely are more attuned to the need to provide home governments with some sort of political cover to implement adverse judgments. Tellingly, no panels have been composed with all three panelists lacking any prior experience within or interaction with the WTO.¹⁰

Third, even if a panelist is not motivated by re-appointment, she both: (a) possesses imperfect information on how the panel report will impact her long-term professional ambitions; and (b) must reach a collective agreement on the report's findings with two other panelists, who may themselves be motivated by re-appointment.¹¹ More critically, even indifferent or lazy panelists can hedge their bets and engage in low-cost risk-averse decisional behavior. Panelists do not need to conduct extensive and time-consuming research to obtain information on the DSM's political capital because aggregate revealed preferences of governments are pre-assimilated by officials within the Legal Affairs and Rules Divisions of the WTO Secretariat, who are tasked with assisting the dispute panels.

The institutional structure of the WTO, with regular meetings of the political body of the DSB, facilitates the assimilation of these revealed collective preferences. Secretariat officials within the Legal Affairs Division attend every meeting of the DSB and help transcribe the statements made on the record into formal minutes. In addition, they pay particular attention to aggregate revealed views on the DSM's exercise of authority.¹² They effectively

¹⁰Between 1995 and 2013, only seven panels (less than 5%) were composed with the majority of panelists having no prior experience within the WTO, while 62.5% of panels were composed entirely of individuals with some prior experience within or interaction with the WTO. In fact, around 20% of panels were composed of all WTO/GATT representatives and fully two-thirds of the panels consisted of a majority of delegates. At least one individual with prior WTO or GATT Secretariat experience has sat on 22% of panels, and 40% of panels have had at least one academic sitting on them. This data was obtained by collecting any *curriculum vitae* and information on professional and educational history of each individual panelist available on-line and from authoritative sources. This information was then coded for professional experience both pre- and post-panel appointment. Professional backgrounds that entailed acting as a WTO/GATT representative, an official within the WTO/GATT Secretariat or Appellate Body, or working within their home ministry responsible for international trade were coded as prior experience within or interaction with the WTO.

¹¹The organizational norm of consensus decision-making also operates within the DSM, and there is considerable pressure for panel reports to reflect consensus among the three panelists, although individual panelists may—but very rarely do—anonously include a separate or dissenting view.

¹²Secretariat officials indicated that they pay more attention to DSB statements about procedural issues or government signals of systemic concerns about the operation of the DSM, than to individual complaints of the 'losing' party to a dispute. Interview 2.3, Geneva, Switzerland (14 January 2014); Interview 4.3, Geneva, Switzerland (16 January 2014).

provide a low-cost way of transmitting these rhetorical signals to panelists, who are thereby able to pay attention to fluctuations in the DSM's political capital among the wider membership. Secretariat officials are incentivized to do so because they have relatively longer time horizons than individual panelists. Moreover, these officials seem to hold strongly internalized role perceptions, in that they subscribe to the WTO's self-identification as a Member-driven organization and view the Secretariat's role as serving the interests and needs of the member states. In the context of the dispute settlement system, this entails fulfilling its stated purpose: facilitating the settlement of disputes by drafting rulings in a way that will secure compliance.

To summarize, I hypothesize that panels—and the officials within the Secretariat supporting panels—not only pay attention to fluctuations in the DSM's political capital but will, under certain conditions, respond to these rhetorical pressures through the content of their rulings. The DSM's political capital and conversely diffuse political pressures are largely a function of the quantity and quality of recent signals of dissatisfaction with the judicial bodies' exercise of authority. It is not determined solely by the preferences of powerful states or by collective responses to extreme or controversial instances of judicial overreaching. Rather, the shaping of and contestation over the balance of authority between member states and the WTO's judicial bodies occurs on a near-monthly basis within the DSB. For these reasons, I expect panels to exercise greater judicial restraint—thereby shifting the balance of authority slightly away from member states and toward the WTO—when the DSM's support among the broader membership declines.

4.1.2 The Legal Context of Dispute Panels

Judges—including international ones—are not purely political actors. Professional role orientations often motivate judges to consider how their rulings comport with the existing legal framework, which may also contribute to the continued legitimation of their exercise of authority. Compared to many other international judicial bodies, WTO dispute panels occupy a somewhat unique space as they effectively represent the court of first instance, with

their decisions subject to appeal. Unlike the trial chambers of a number of international(ized) criminal courts, however, each panel is appointed *ad hoc*. As argued above, this not only incentivizes panelists to rely on Secretariat officials but also creates shorter time horizons, which we would expect to increase their sensitivity to short-term fluctuations in the DSM’s political capital. More so than many other international judicial bodies, then, we should see panels simultaneously playing to both a legal and a political audience.

Remarkably strong and highly internalized professional norms push international adjudicators and lawyers to follow the “discursive constraints (e.g., procedural rules, interpretive methodologies, and substantive norms)” of their profession (Helfer 2006, 266). In addition, the perceived legitimacy of a court derives partially from the degree to which its rulings are consistent and contain high-quality reasoning motivated by the applicable legal framework (Voeten 2014). Despite the absence of a formal rule of *stare decisis* in WTO dispute settlement (Pelc 2014), we would expect these professional norms motivate panelists to seek consistency across cases and indeed, a type of *de facto* precedent is said to operate within the WTO (Bhala 1999a,b; Palmetier and Mavroidis 2004).¹³ In fact, the Appellate Body has been fairly strict about reversing panel findings that explicitly go against its previous case law, at times explicitly chastising panels that do so.¹⁴ Panelists seeking to avoid appellate reversal of their rulings often look to and cite extensively from relevant Appellate Body case law. The existing legal framework and relevant jurisprudence thus should act as constraints on judicial choice and panel discretion. For this reason, I expect rulings on provisions litigated extensively at the appellate level to cluster and converge, whereas findings under provisions with little existing appellate case law will display greater variance (as panelists

¹³Although the Appellate Body has emphasized that there is no formal doctrine of *stare decisis* in WTO dispute settlement, it has also indicated that panel decisions should create reasonable expectations that similar disputes will be decided similarly. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; WT/DS8/R, WT/DS10/R, WT/DS11/R, 4 October 1996, pp. 13-14; Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 20 May 2008, para. 161.

¹⁴The Appellate Body has also stressed that in order to “ensure ‘security and predictability’ in the dispute settlement system. . . absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.” Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 20 May 2008, para. 160.

have a greater range of discretion within which to act).

4.2 Empirical Strategy

The previous section argued that a primary goal of panels is to increase support for the DSM's continued exercise of authority. If this is the case, we should see panels affording governments greater political cover to implement adverse rulings—by validating more elements of trade regulations within their rulings—as the DSM's institutional legitimacy declines. The previous section argued further that panelists simultaneously assess the degree of legal discretion available and the extent of collective political support for their exercise of authority. For this reason, I hypothesize that panels will first look to any available guidance provided by Appellate Body case law instead of the expressed views of members, as they likely are more concerned about scathing reversals than *post hoc* criticism by states. Still, panels do retain considerable discretion in many areas of WTO law. Thus I also expect that when they have relatively less direction from the Appellate Body, they will look primarily to members' preferences. In this way, panels are able to use the content of their rulings to balance the goal of legal consistency and coherence with the maximization of political support among a broad subset of the DSM's stakeholders (Kelemen 2001).

This section tests these expectations empirically. It first describes the measures used to proxy the outcome variable of interest—panel validation—and the primary explanatory variables. It then outlines the models used to estimate the relationship between political capital and validation and discusses findings.

4.2.1 Data

Panel Validation within Mixed Rulings

Each case that comes before the WTO's judicial bodies raises a number of distinct issues and claims that must be resolved. A single dispute ruling often finds some aspects of a trade measure in breach of WTO rules while simultaneously validating other other aspects. In

fact, only ten of the 188 dispute reports issued between 1995 and 2013 found *no* breach of WTO rules across all claims raised (5.3%).¹⁵ Binary measures of dispute outcomes thus provide very little variation and moreover do not adequately capture the underlying extent to which panels signal to governments judicial restraint within a given ruling.¹⁶

Instead of focusing on case outcomes, I employ a measure of panel validation that seeks to capture the degree of judicial restraint a panel exercises within a ruling, under the assumption that panels are able to signal greater restraint when they make fewer breach findings within each dispute. Take, for example, disputes raised under the Anti-Dumping Agreement. This agreement creates substantive and procedural requirements for a government wanting to impose remedies in response to the ‘dumping’ of imported products that cause material injury to a domestic industry. These disputes often raise claims regarding: whether the national investigating authority relied on sufficient evidence to initiate a dumping investigation; the authority’s use of facts available; the authority’s injury and/or causation analysis; and various procedural obligations, such as disclosure and notification requirements. A panel may find that an investigating authority’s injury and causation analyses conformed to WTO rules, but that the national authority failed to fulfill notification (procedural) requirements. Arguably, the latter finding—while still considered a ‘violation’—is easier to implement than a complete restructuring of the investigating authority’s method-

¹⁵Some studies of WTO disputes code case outcomes along three values: win, loss and ‘mixed’ (Busch and Reinhardt 2006). Nearly 58% of the panel reports issued between 1995 and 2013 are mixed, but there is considerable variance in the mixed category in terms of the number and type of violation findings.

¹⁶Additionally, the strength of the legal case might be determinative of a finding of at least one violation. While this may be a concern for my measure of panel validation as well, the claims raised within the empaneled stage of a dispute have gone through a filtering process. During each stage of a dispute—the decision to request consultations, the consultations themselves, the decision to request establishment of a panel, and arguments before the panel—the complainant may discover that it has an incredibly weak legal basis for one of its claims. Governments have numerous incentives (cost, time, limited resources, and potential negative diplomatic effects) to drop claims they discover are weak and to focus on claims they believe have the strongest chance of succeeding. The consultations stage often helps clarify the legal basis of various claims and provides the complainant with critical information regarding the strength of its legal argument for each of its claims. In fact, a number of complainants raise claims within their requests for consultations that they do not subsequently pursue within their requests for panel establishment or requests for findings at the litigation stage. This suggests that the claims on which the panel ultimately rules are ones for which there does exist reasonable uncertainty over the legal outcome, thus providing the panel with considerable discretion over whether or not to find at least one violation.

ology for conducting its injury or causation analysis.¹⁷ The treatment of discrete national laws or policy decisions within a single ruling directly connects to how a panel is allocating authority in practice. By accommodating some domestic choices—even if ultimately the respondent ‘loses’ the case—a panel can signal to states that it is sensitive to sovereignty concerns, judicial overreaching, and the balance of authority within the regime.¹⁸

To construct this measure of panel validation, each dispute report issued between 1995 and 2013 was assigned a score that represents the proportion of discrete findings made by the panel within which it validated an element or aspect of the trade policy challenged.¹⁹ This VALIDATION SCORE is a continuous variable that ranges from zero to one. Reports receiving a score of one found no instances of breach, signaling complete validation of the trade policy under review, while those receiving a score of zero contain only breach findings across claims, signaling complete invalidation. Panels initially provided very little validation of government’s trade policy choices, but then began to signal increasingly greater judicial restraint—or provide greater political cover—over the first six years of the DSM’s operation. Following this initial sharp increase, however, average panel validation has fluctuated around the 0.5 mark, though with relatively constant variance over those years.

¹⁷A proposal by the United States and Chile within the Dispute Settlement Understanding Review process supports this assumption, or at least that members are very much attuned to the discrete elements of dispute rulings and the relatively higher implementation costs imposed by a greater number of violation findings. See Communication from Chile and the United States: Flexibility and Member Control, WTO Doc. No. TN/DS/W/89 (31 May 2007). The assumption that the number and types of violation findings affect relative implementation costs was further supported through interviews conducted with Member representatives. Interview 2.2, Geneva, Switzerland (14 January 2014); Interviews 5.5, 5.7, Geneva, Switzerland (17 January 2014).

¹⁸Similarly, some scholars have disaggregated the U.S. administrative law *Chevron* analysis (the standard for judicial review of administrative actions) into its discrete steps, coding for whether the reviewing court deferred to the administrative agency at each step of the analysis (Czarnezki 2008). Even if a court ultimately overturns an administrative agency determination, it can choose to signal through its analysis accommodation of some aspects of that decision.

¹⁹Each panel report was coded for the number of claims raised by the complainant for which the panel undertook a legal and factual analysis—that is, claims under which the panel engaged in substantive review of a domestic measure and the national authority’s decisional process (see Appendix for coding instrument). While the number of issues raised and decided will vary by case and by Agreement provision, the percent of non-breach findings provides a standardized measure across all disputes.

Legal Constraints

In order to take into account a panel's range of legal discretion, I collected data on each panel report's existing and relevant Appellate Body case law. The AB CASE LAW variable was constructed for each Agreement provision by first calculating the cumulative count (per year) of Appellate Body reports that made a finding under that provision. For every provision under which the panel made a substantive finding (breach or non-breach), the AB CASE LAW counts for those provisions from the previous year were summed, and then normalized with the panel's total (single) provision findings. While Appellate Body jurisprudence noticeably accumulated for some provisions over the years, there are other agreements and provisions that have not been litigated extensively, which accounts for greater variance in the AB CASE LAW measure over time.

Critically, the hypothesized direction of the Appellate Body's influence on panel validation will depend on how closely it believes panels should review domestic policy choices. For the most litigated provisions at the appellate level (primarily those regarding national treatment and general exceptions to GATT rules, and a few provisions under the three trade remedy agreements), the Appellate Body has tended to push panels to engage in more searching review of government agency decisions, though the extent to which this is the case varies over time.²⁰

The legal constraints and political pressures faced by panels have steadily increased, yet they have also varied across issue areas and groups of member states. This last point is key, as unlike previous examinations of the 'strategic space' of the Appellate Body that focus on the role of the most powerful members (Elsig and Pollack 2012; Steinberg 2004), I seek to identify the role of the full WTO membership in shaping the organization's exercise of judicial authority. In the following sections, I use the measures of political capital

²⁰By December 2013, Article 11 of the DSU (establishing the 'objective assessment' standard of review to be applied by panels) had the highest cumulative AB CASE LAW count. This further supports the importance of studying panels' exercise of judicial review within reports. Panels are not able, however, to make findings under this provision (as it governs panels' obligations in reviewing the claims before them) and thus this case law count is not reflected in any of the scores for AB CASE LAW assigned to each panel report.

and panel validation described above to evaluate the extent to which panels pay attention to and attempt to assimilate the preferences of this wider audience, while simultaneously accommodating the legal constraints imposed by the Appellate Body.

4.2.2 Research Design and Controls

Are WTO dispute panels responsive to diffuse political pressures? Do they tend to exercise greater restraint or signal greater accommodation of trade policy choices when the DSM's political capital declines?²¹ To answer these questions, I rely on the VALIDATION SCORE described above as the outcome variable of interest, a continuous variable that ranges from zero (no validation/all breach findings) to one (complete validation/no breach findings).²²

The primary explanatory variable concerns the political capital of the DSM, which I proxy with half-year estimates of the proportion of statements made by members within the DSB that were critical (POLCAP (CRITICISM)) or supportive (POLCAP (SUPPORT)). For each observation, I use the estimates for one year prior to the date of circulation of a panel report. Panel proceedings typically take around one year, so introducing this time lag captures the DSM's political capital right at the point when panelists are beginning their work.²³ If

²¹Admittedly, my results may suffer from selection bias if there is something about the subset of disputes not settled bilaterally that makes greater validation within panel reports more likely. However, these empaneled disputes are those over which there is reasonable disagreement about the legal outcome of the dispute and considerable ambiguity over what the rules require, as most are filtered through WTO committees and subsequently, at the consultations stage, legal arguments are clarified and information asymmetries reduced. These types of disputes are precisely why the DSM was delegated authority in the first place and the areas in which the boundaries of the DSM's authority remain untested or vague. Given the interpretive discretion such ambiguity provides, we might expect that for these types of disputes, panels would be even more likely to engage in judicial lawmaking and expansive assertions of authority than they would for the more 'clear-cut' disputes that are able to be settled bilaterally.

²²The level of analysis is panel report. A few disputes involve multiple complainants that filed separate requests for consultations, resulting in multiple reports for that dispute. However, as each complainant often raises distinct claims, the validation scores for reports consolidated under the same dispute almost always differ. I exclude one report from the analysis because the panel concluded that the agreement provisions relied on by the complainant were inapplicable to the dispute and did not engage in any substantive review of domestic measures (Panel Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/R, 17 October 1996). The resulting sample includes 187 observations.

²³The average length of time between panel constitution and circulation of the panel report is 373.6 days. Lagging the explanatory variables of interest one year thus captures the political capital of the DSM right

panels are responsive to collective political pressures, we would expect a positive association between the proportion of critical statements and validation. Conversely, panels will likely exercise less restraint as political support for the DSM increases. WTO officials suggested within interviews that the Legal Affairs Division of the Secretariat, which assists panels in dispute settlement, tends to pay more attention to critical statements about the DSM than other statements within the DSB. For this reason, I expect POLCAP (CRITICISM) to be relatively more influential than POLCAP (SUPPORT), and so include these two variables separately. I estimate two models, one with POLCAP (CRITICISM) alone (Model 1) and one including POLCAP (SUPPORT) (Model 2).

Additionally, I control for a range of alternative determinants of panel validation. To account for the influence of party characteristics, I include two variables. First, I control for disputes in which either the United States or the European Union were the respondent (US/EU RESPONDENT). If power politics is determinative, as some studies of the DSM intimate (Elsig and Pollack 2012; Steinberg 2004), panels will provide greater validation to governments whose support is critical to the operation of the DSM. Panels have, on average, been slightly more willing to validate trade measures of the United States than the European Union, and even more willing than all other respondents combined.²⁴ Second, I get at the power of the complainant state, which would on average favor more breach findings, by including its logged GDP per capita (COMPLAINANT GDP).

The nature of review undertaken by panels is intimately related to their ability to validate discrete aspects of a trade policy and varies with the type of measure(s) challenged within a dispute. The extent to which a panel can and will scrutinize the basis for a statute or other legislation may differ systematically from the level of scrutiny applied to an administrative or executive regulation. In addition to legislative or administrative regulations, panels are

around the time of panel constitution. In unreported findings, lagging the POCAP variables by six months did not affect the main results.

²⁴Notably, the average panel validation (within twelve reports) provided to China, the third largest trader, is only slightly higher than that for all other members. However, China has only been a WTO Member since 2001 and has been involved in fewer disputes absolutely (nineteen in total) than the United States or the European Union.

often called upon to assess the WTO-compatibility of investigations undertaken by an administrative body, such as those conducted prior to the imposition of anti-dumping duties. These investigations represent a type of quasi-judicial proceeding that includes notice, participation, and transparency obligations. To account for the variable nature of panel review across types of measures, I include a factor variable (MEASURE TYPE) with three categories: legislation; executive/administrative regulation; executive/administrative investigation(s).

To control for politically sensitive disputes, I include a binary variable (POLITICALLY SENSITIVE AGREEMENTS) for reports that made findings under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) (11 reports), the Agreement on Agriculture (AoA) (14 reports), or the Agreement on Textiles and Clothing (ATC) (4 reports). These agreements seek to regulate internal policies traditionally viewed as core elements of domestic sovereignty, such as measures protecting the health and safety of citizens under the SPS (Guzman 2004; Letsas 2006; Shany 2006). Agreements regulating agriculture and textiles have also generated considerable contestation within the WTO, due to the strength of domestic interest groups lobbying for continued protectionism within these sectors (Davis 2003; Eagleton-Pierce 2013). Some WTO scholars suspect that the DSM is particularly careful about how it handles disputes under these contentious agreements, though one study found that panels are not any more likely to avoid ruling on those claims (under the AoA in particular) than any other claims (Busch and Pelc 2010). In addition, disputes that involve trade remedies (claims falling under the ADA, the Safeguards Agreement (SA), and the Subsidies and Countervailing Measures Agreement (SCM)) are viewed by many trade lawyers as distinct within the WTO, in that they often require panels to engage in a different type of review of administrative agency investigations.²⁵ Moreover, the ADA is the only agreement that contains an explicit standard of review and claims are often brought under the ADA and SCM together. For this reason, I control for whether the report made findings under one or more of these three agreements (TRADE REMEDIES). A

²⁵Within trade remedy disputes, panels effectively act as a court of second-instance, engaging in both substantive and procedural review of the quasi-judicial investigation undertaken by a domestic administrative agency.

little less than half (45.5%) of all panel reports involve trade remedy disputes.

I also take into account panelists' experience with and integration into the life of the WTO by including two binary variables for panels with a majority of REPEAT PANELISTS and majority of WTO DELEGATES. Repeat panelists—whether selected by the disputing parties or the Director General—as well as individuals previously or are concurrently government representatives to the WTO are likely more integrated in its organizational life, and thus more attuned to fluctuations in the political capital of the DSM. Repeat panelists in particular tend to be well-respected by WTO officials and members governments alike, and can be relatively more certain that a controversial decision (or one expanding the DSM's authority) will be met with slightly less criticism than if made by an 'untested' panelist. In contrast, individuals with no prior panel experience have imperfect information about their responsibilities and are likely not as familiar with WTO law, the culture of the Organization, or anticipated responses of members. Additionally, research on "freshman" or acclimation effects in the American context suggests that new judges often follow the lead of their more experienced colleagues (Hagle 1993; Hettinger, Lindquist, and Martinek 2003; Wood et al. 1998). In the WTO context, we might expect novice panelists to defer to their more experienced colleagues, namely repeat panelists and the Legal Affairs Division of the Secretariat, suggesting that panels with mostly repeat adjudicators will tend to signal less restraint. Nearly half of all panels (48%) were composed with a majority of repeat panelists, 68% of all panels were composed with a majority of WTO delegates. Finally, all models include a cubic year trend variable.²⁶

For all models, I rely on ordinary least squares regression with robust standard errors to estimate the effect of political capital on panel validation.²⁷ The base estimation (Model

²⁶I do not include year or half-year fixed effects as the treatment variable of interest—political capital—does not vary across observations within the same half-year.

²⁷I use the term 'effect' as shorthand for 'relationship between,' as identifying a causal relationship between two variables requires further conditional independence assumptions that may not hold. All statistical analyses were conducted using "Zelig" for R. See Imai, King, and Lau 2008. See also Kosuke Imai, Gary King, and Olivia Lau, "Zelig: Everyone's Statistical Software"(2007), available at: <http://gking.harvard.edu/zelig>.

1) includes all the control variables discussed above and the primary explanatory variable POLCAP (CRITICISM), while Model 2 additionally includes POLCAP (SUPPORT). As discussed previously, I expect the influence of criticism to be conditional on the range of legal discretion available to the panel. To test this, I include in Model 3 an interaction term for POLCAP (CRITICISM) and the density of Appellate Body case law (in the previous year) for the provision findings made within a report (AB CASE LAW). Summary statistics on all variables are reported in Table B.1.

4.2.3 Results and Discussion

Across all models, criticism of the DSM (POLCAP(CRITICISM)) is positively correlated with a report's validation score, supporting this article's primary argument (Figure 4.1. See Table B.2 for standard regression tables for all models). Panels do appear to provide government authorities with greater political cover (through non-breach findings) when members have been relatively more critical of the DSM's exercise of authority. The influence of criticism is also substantively significant. When controlling for the level of political support (Model 2), a ten percent increase in criticism increases the average panel validation provided by seventeen percent (Figure 4.1, Model 2). Similarly in line with this article's theoretical argument, support for the DSM is negatively correlated with panel validation, although not significant. The substantive relationship is also less than that of criticism, with a ten percent increase in support associated with around a nine percent decrease in average panel validation, even when taking into account the relative level of member dissatisfaction with the DSM. These findings provide support for the argument that panels are not only paying attention to members' collective views on the WTO's judicial bodies, but also tend to rule more in favor of the defendant when challenges to their institutional legitimacy increase.

However, panels still exercise slightly greater restraint when ruling on the trade measures of the United States or the European Union alone. While disputes brought against one of these two countries are consistently associated with slightly higher validation scores, this relationship is substantively small, and not as significant when controlling for political

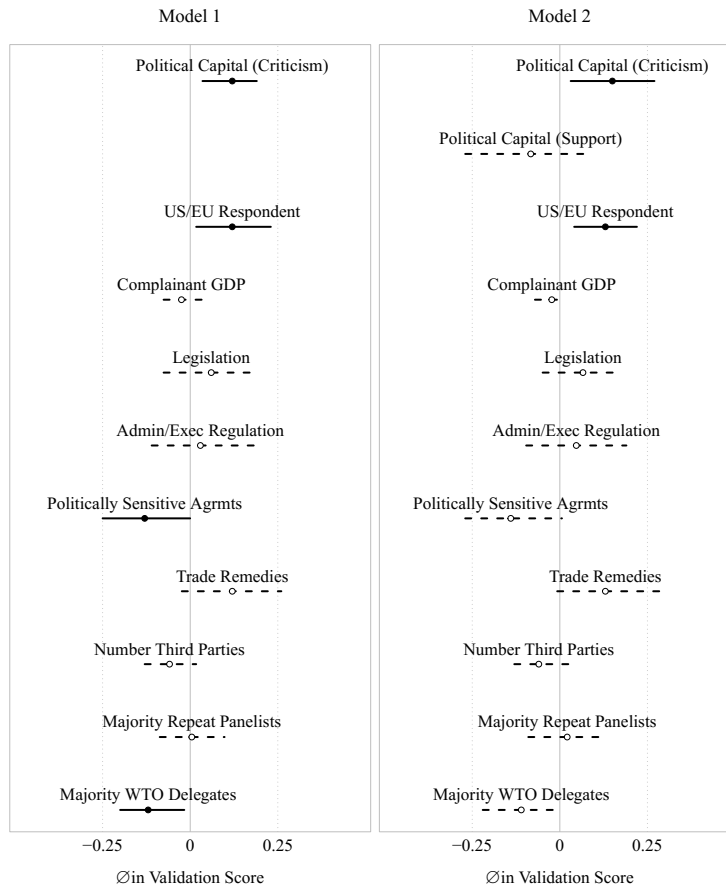


Figure 4.1: Estimated effects on panel validation, Models 1 and 2. The circles are estimates of the expected change in panel validation as the indicated variable changes from 0 to 1 (for binary variables) or from their 25th to 75th percentile values (for continuous variables), and all other variables are held constant at their means. The lines are 90% confidence intervals. The circles and lines are solid when there is at least 90% confidence of a positive or negative effect on panel validation. Otherwise, circles are open and lines are dotted. Estimates obtained from simulated bootstrap parameters of ordinary least squares regression. N=182. Neither model includes Appellate Body case law; both models include a cubic year trend variable. See Table B.2 for standard regression tables.

support within bootstrapped simulations (Figure 4.1). To assess the relationship between a respondent's power or wealth and panel validation further, I control for the respondent's GDP per capita (logged) in a series of robustness checks. When I do so, the significance of

the US/EU RESPONDENT variable washes out completely (see Table B.3). Similarly, there does not appear to be a strong relationship between the wealth of the plaintiff countries and panel validation, though the direction is as expected (panels tend to find relatively more breaches in disputes with a powerful complainant).

In terms of the measure under review, panels tend to validate more aspects of a trade measure when legislation or statutes are challenged than when reviewing administrative regulations or investigations undertaken by executive agencies. In other words, panels appear much less willing to second-guess legislators as decision-makers than executive or administrative agencies, although this association never reaches traditional levels of significance. When reviewing the conduct of and determinations reached by administrative proceedings, panels tend to validate more aspects of the investigation, though these disputes tend to involve a greater number of claims on average and the relationship is not particularly strong across all model specifications.

As for the type of case decided, the indicator for politically sensitive agreements is consistently and significantly associated with lower validation scores. This could be for a number of reasons. First, members have widely divergent preferences on the desirability of regulating agriculture and textiles under the WTO. Panels may be taking advantage of such polarization to assert greater institutional authority. Second, because these issue areas were so politically sensitive, the resulting agreements were likely drafted in more ambiguous terms than the less controversial WTO disciplines. Such vague and general treaty language affords panels greater room to maneuver and provides a legitimate justification for expansive interpretations. Finally, disputes under the ATC and AoA usually entail considerable domestic political ramifications, with governments facing pressures from influential industries or interest groups. For this reason, even if the legal outcome of a dispute is clear or the government prefers to remove the discriminatory measure, it may not be settled at the consultations stage due to domestic political obstacles. A ruling by an external court, however, may help the respondent government overcome these obstacles by allowing it to claim that its hands are effectively tied (Simmons 2002). Panelists are likely aware of these domestic

obstacles and could be seeking to facilitate compliance by providing the government with international legal cover.

In contrast to the politically sensitive agreements, rulings under trade remedy agreements are associated with slightly higher validation scores, which is not surprising, as the ADA contains an explicit standard of review intended to afford greater deference to the decisions of national investigating authorities. Furthermore, disputes involving anti-dumping duties and the standard of review applied by panels therein have been particularly controversial. One reason why anti-dumping disputes have sparked so much controversy is that the United States actively criticized a line of cases ruling against the Department of Commerce's practice of 'zeroing' in anti-dumping investigations.²⁸ Following the Appellate Body's ruling in *United States—Softwood Lumber V*,²⁹ a number of countries filed complaints against the U.S. Department of Commerce's zeroing practice in investigations and reviews. To address the unique nature of this line of cases, I removed all disputes from the sample, following *United States—Softwood Lumber V*, that only challenged the United States' zeroing practices.³⁰ Doing so for Model 2 strengthens the positive association for the US/EU RESPONDENT variable (see Table B.3 for results), but does not alter the relationship between criticism and validation.

Panels with a majority of repeat panelists do not seem to exercise any more or less judicial restraint than those without. Similarly, the relationship between panels with a majority of WTO delegates and panel validation is weak and inconsistent across model specifications. The direction of the relationship is opposite of that expected—WTO delegates appear to

²⁸Anti-dumping authorities calculate the margin of dumping for a product by computing the difference between normal value and export price for each model or type of a particular product, and aggregate the results. 'Zeroing' refers to the practice of omitting the calculations where export price was higher than normal value, thus inflating dumping margins.

²⁹*United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 31 August 2004.

³⁰In five of these cases, the United States did not contest the claims or present counter-arguments. The jurisprudence became so settled around the use of a zeroing methodology in anti-dumping investigations that, absent counter-arguments by the U.S., panels only needed to decide whether the complaining party had provided sufficient evidence to demonstrate that the United States had zeroed in that particular instance.

validate fewer aspects of a trade measure on average—yet controlling for this does not affect the impact of political capital on panel rulings. This could be indicative of the strong hand played by the Secretariat within the crafting of dispute judgments, or simply that the professional background of each individual panelist, on average, might not affect outcomes as much as some of the literature on international judicial behavior might suggest.

Findings are also consistent for Model 3, which includes an interaction term for POLCAP (CRITICISM) and AB CASE LAW (Figure 4.2).³¹ When controlling for the conditional effect of political criticism on panel validation, a ten percent increase in political support for the DSM (POLCAP (SUPPORT)) is associated with a decrease in validation of seventeen percent. Similarly, criticism by members continues to have a strong association with greater validation when there is less existing Appellate Body case law on the rules being litigated.³²

However, the influence of these political pressures declines as appellate case law increases. As seen in Figure 4.3, the impact of criticism on validation is only significant when reports' AB CASE LAW scores fall below three, which includes seventy-five percent of the panel reports issued between 1995 and 2013.³³ This finding does suggest, though, that as appellate jurisprudence accumulates over time around frequently litigated provisions, panels could be expected to increasingly ignore the expressed views of members and instead look to the Appellate Body for guidance in their exercise of authority.

³¹See Table B.4 for results of Model 3 robustness checks similar to those discussed above for Model 2. While the estimated coefficient of the interaction term for POLCAP (CRITICISM) and AB CASE LAW loses statistical significance when removing all disputes from the sample that challenged only the United States' zeroing practices (Models 3b and 3c), Figure B.1 demonstrates that the marginal effect of POLCAP (CRITICISM) is still significant for most (lower) values of AB CASE LAW (compare Figure B.1 with Figure 4.3).

³²Because this model includes an interaction term, the estimated coefficient for POLCAP (CRITICISM) is interpretable as the estimate effect of criticism when there is no existing Appellate Body case law. Only 22.5% of reports received an AB CASE LAW score of zero.

³³Recall that this measure is not just a count variable of Appellate Body findings, but is normalized by the number of (single) provision findings reached by the panel. An AB CASE LAW score of three thus reflects fairly high levels of existing appellate jurisprudence for reports that make findings under multiple provisions.

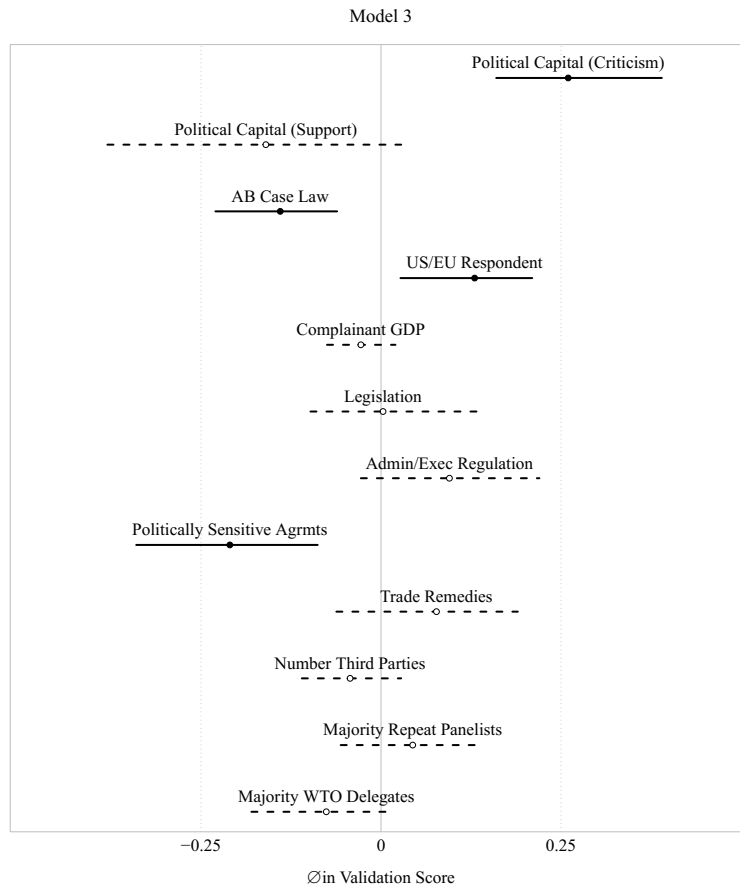


Figure 4.2: Estimated effects on panel validation, Model 3. The circles are estimates of the expected change in panel validation as the indicated variable changes from 0 to 1 (for binary variables) or from their 25th to 75th percentile values (for continuous variables), and all other variables are held constant at their means. The lines are 90% confidence intervals. The circles and lines are solid when there is at least 90% confidence of a positive or negative effect on panel validation. Otherwise, circles are open and lines are dotted. Estimates obtained from simulated bootstrap parameters of ordinary least squares regression. N=182. Includes a cubic year trend variable. See Table B.2 for standard regression tables.

4.3 Conclusion

WTO dispute panels do not operate in a political vacuum, yet they are also not indiscriminately bending to the views of member states. As entities appointed *ad hoc*, panels do

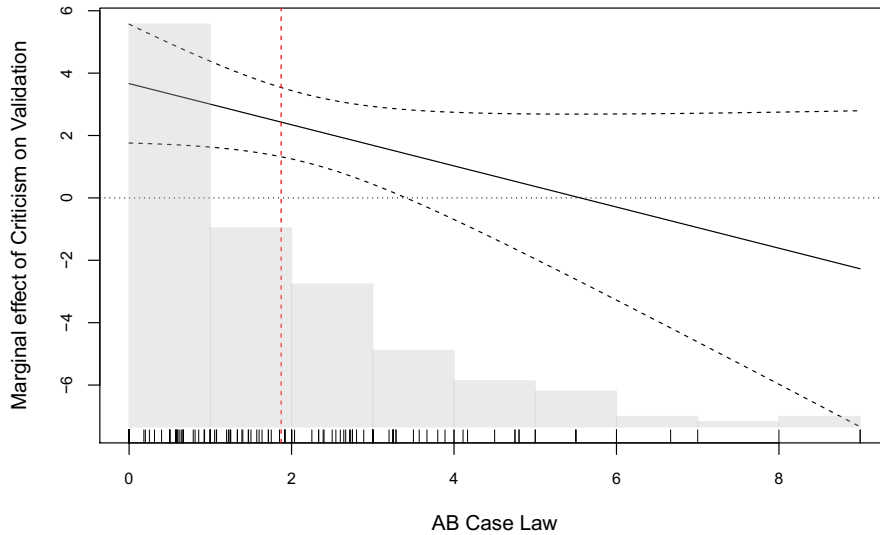


Figure 4.3: Relationship between Political Capital (Criticism) and Panel Validation, for different levels of Appellate Body case law (Model 3).

not enjoy the same degree of permanence or structural independence as the Appellate Body or permanent international courts. The Legal Affairs Division of the Secretariat creates a quasi-permanent foundation in that it provides the requisite institutional memory and legal assistance for panels to engage in consistent adjudication, yet Secretariat officials still very much see their role as one in the service of member states.³⁴ While the majority of panelists have been appointed by the WTO Director General—and not by member states—professional career incentives often push these individuals to attempt to satisfy both member governments and the Appellate Body. In this respect, panels inhabit a unique space in that their institutional design tasks them with finding an acceptable balance between legal rigidity and political realities. Panels establish this balance through their discrete findings that incrementally and subtly shape the allocation of authority over trade-related policies.

Although many claim that international institutions—and courts in particular—attempt to take into account state preferences and will sometimes independently tailor their activities

³⁴Interview 2.4, Geneva, Switzerland (14 January 2014).

to appease member states and preempt more severe forms of backlash (Alter 2009; Ginsburg 2005; Garrett, Kelemen, and Schulz 1998; Steinberg 2004; Weiler 1994), we lack a clear understanding of how exactly international courts obtain information about governments' views. Existing research focuses on the information signaled by parties or third parties to a dispute (Busch and Reinhardt 2006; Busch and Pelc 2010), but as I have argued, panels are strategic actors interested in the views of a wider (more representative) subset of the membership. This chapter provides one of the first empirical attempts to ascertain how panels and governments 'communicate' by systematically examining the rhetorical politics surrounding the DSM's exercise of authority.

I have found that panels, under certain conditions, are responsive to fluctuations in the level of member state support enjoyed by the Dispute Settlement Mechanism. The political capital of the DSM is not necessarily or always determined by the extent to which it has engaged in expansionist or activist judicial lawmaking, as courts can "spark controversy due to the domestic political consequences of their rulings, whether or not those rulings are expansionist" (Helfer and Alter 2013, 502). Yet the way panels respond to these diffuse political pressures is to signal greater deference to political concerns by providing government authorities with slightly more domestic political cover for adverse decisions and subtly reshaping the balance of authority between states and the WTO.

To be clear, the diffuse rhetorical pressures—and the political capital of the DSM—on which this chapter focuses are distinct from the degree of political controversy surrounding an issue area or dispute. This is most strikingly observed in the low levels of validation panels afford challenged trade measures under two of the most controversial WTO agreements—the Agreement on Agriculture and the Agreement on Textiles and Clothing. Members have widely divergent preferences on the scope and desirability of these agreements. Such polarization creates a situation in which panels face multiple principals with extreme views on dispute outcomes. This may embolden a panel to engage in expansive assertions of judicial authority as it provides plausible allies for its ruling. Because these agreements engender such broad disagreement among members, it may be even more important for

panels to adopt a non-deferential stance and assert their authority, particularly if this helps the respondent government overcome domestic political obstacles or save face with influential interest groups. In this way, panels may be using the content of their rulings to ease the domestic political costs of incredibly charged policy changes, thereby acting as ‘partners in compliance’ with a government’s executive branch.

Panels effectively use their rulings under agreement provisions for which there exists considerably less Appellate Body case law to provide members with greater flexibility. In this way, panels help to address one of the primary institutional design concerns over how to balance greater legalism and predictability with the continued stability and adaptability of the regime (Busch and Pelc 2010; Koremenos, Lipson, and Snidal 2001; Koremenos 2005; Rosendorff and Milner 2001). However, the moderating effect of the legal constraints imposed by the Appellate Body suggests that for the most litigated provisions—national treatment under the GATT and review of trade remedy investigations by national authorities—the DSM is providing greater legalism and predictability at the expense of long-term adaptability. This could be due to the fact that the DSM’s scope of authority in these issue areas was acceptably negotiated and contested during the early cases. Greater legalism may not be problematic from an institutional design perspective, so long as this balance continues to serve the interests of members. Still, this does suggest that as appellate jurisprudence accumulates over time, panels may become less responsive overall to the expressed views of members. This chapter’s findings imply, then, that if members wish to avoid or are unable to resort to more drastic forms of re-contracting for policy spaces over which they desire to retain exclusive political authority, they should engage in greater *collective* rhetorical pressure within the DSB. Additionally, these findings sound a cautionary note for panelists and the Secretariat to continue to pay attention to the political capital of the DSM, even when ruling under the most litigated WTO laws, in order to pre-empt more severe forms of political backlash that could undermine the stability of the international trade regime.

5 | The Dynamics of Appellate Reversal in the WTO

The previous chapter demonstrated that WTO dispute panels are sensitive and under certain conditions responsive to the degree of support the DSM enjoys in the eyes of the membership as a whole. Dispute panels respond to dips in the DSM's underlying political capital by providing greater accommodation within their rulings, to assuage concerned governments and signal to the membership that the DSM is taking their concerns into account. However, panel rulings can be and often are appealed. The signals of accommodation within panel rulings thus might not be effective if they are consistently reversed on appeal. This chapter turns to the relationship between the WTO Appellate Body (AB) and dispute settlement panels. Although a little over sixty percent of panel reports have been appealed, the AB rarely changes the basic outcome of a ruling in a significant manner. After summarizing the structure of the AB in Section 5.1, Section 5.2 outlines the nature and scope of appellate review and demonstrates that the validation provided within AB reports does not differ significantly from that provided within panel reports.

Panels' review or scrutiny of domestic policy choices is shaped by their application of the 'objective assessment' standard of review. Their application of this review standard can be—and has been increasingly—challenged on appeal by parties. Section 5.3 analyzes AB case law on Article 11 of the Dispute Settlement Understanding (the 'objective assessment' standard of review) and traces how the AB has responded to appeals challenging panels' application of this standard over time. It describes how during its first decade, the AB had been directing panels to engage in more searching review of the policy choices made by domestic bodies, but that it has encouraged somewhat greater deference to national au-

thorities in recent years. Within interviews, WTO officials indicated that both the Legal Affairs Division of the Secretariat and the AB Secretariat pay close attention to government statements on panels' application of Article 11 (particularly relating to due process concerns). This section thus focuses on how the AB's approach to Article 11 challenges has been shaped by government views expressed within the DSB.

5.1 The Appellate Body and its members

At the beginning of the Uruguay Rounds, negotiators did not foresee creating the Appellate Body (Elsig and Eckhardt 2015, s20). Blocked panel reports under the GATT and dissatisfaction with the United States' resort to unilateralism provided important motivations for pushing forward an appeals process (Shaffer, Elsig, and Puig 2016, 243). As support for legally binding panel reports grew, negotiators began discussing establishing an appellate check on the panels.¹ While some suggest the AB was an “an inspired afterthought, rather than the reflection of a grand design to create a strong, new international court”(Van den Bossche 2006, 294), others find it hard to believe “that the negotiators, in their quest for an ‘effective’ dispute resolution system, put all these other elements into it consciously and deliberately, but that the establishment of the Appellate Body, or rather the appellate review process, crept into it by serendipity” (Ganesan 2015, 525). Notably, many negotiators—including the U.S. negotiators—anticipated that the AB would be used relatively infrequently, to fix manifestly incorrect panel reports (Elsig and Eckhardt 2015; Steger 2015).²

Negotiators believed that only manifestly erroneous reports would be appealed, but countries have appealed panel rulings much more frequently. Since the first panel report was

¹As one such check on binding panel reports, Canada suggested the “establishment of a standing review tribunal.” Meeting of the Negotiating Group on Dispute Settlement held on 7 December 1989, MTN.GNG/NG13/17 (15 December 1989), para. 9.

²The US stressed that appeals should only involve “extraordinary cases where a panel report contains legal interpretations that are questioned formally by one of the parties.” Communication from the United States, MTN.GNG/NG13/W/40 (6 April 1990), p. 5.

issued in 1996 until the end of 2013, more than half of the 142 disputes have been appealed by one or more parties (63.4%).³ Trade scholars recognize that there are any number of systematic and idiosyncratic reasons why a party might challenge a panel finding on appeal, with dispute-specific attributes largely explaining the decision to appeal. Busch and Pelc (2009) suggest that factors such as whether the dispute involved a politically sensitive issue area (such as disputes involving the SPS agreement, agriculture, or non-violation claims) likely affect probability of appeal, although they did not find strong evidence to support this. They did find, however, that disputes in which the claimant cites more provisions are less likely to be appealed, as this could indicate a weaker legal case for which an appeal is viewed as unnecessary. In addition when the EU and the U.S. are the respondents in a dispute, they both are also more likely to appeal a finding than other disputing parties (Busch and Pelc 2010).

The AB is comprised of seven members appointed by the WTO membership for four-year terms, renewable once. Unlike panelists, AB members enjoy permanent status; similar to panelists, they are not full-time and many are not permanently based in Geneva, although they must be available on short notice and must prioritize AB work (Janow 2008, 252). They are provided a monthly retainer, but are otherwise paid on an appeal-by-appeal basis (Steger 2015, 449). For each dispute appealed, a three-member ‘Appeals Division’ is selected. Every AB member is expected to review all submissions regardless of whether they are serving on the Division.

The first AB members wrote their own rules of procedure or ‘Working Procedures,’ which play an important gap-filling role for the DSU’s single provision on the AB.⁴ The Working Procedures largely cover technical and logistical details, but they also laid the groundwork for fairly sensitive issues, such as how the three members of an Appeals Division were to be

³The majority of these (62.6%) involved both the respondent and complainant(s) challenging one or more panel findings, although parties rarely appeal every finding made within the panel report. Twenty-six reports were appealed by the respondent only; eight appealed by complainant only.

⁴Only Article 17 of the Dispute Settlement Understanding (DSU) discusses the appellate process, compared to several provisions and an appendix dealing with the panel process.

selected and the ‘exchange of views’ among all seven AB members that occurs prior to the Division drafting the report. During the exchange of views, each AB member is expected to voice his/her view on the dispute, raise and identify possible approaches, and come to an understanding of how the case stands in relation to relevant panel or AB rulings (Janow 2008, 253). Although the DSU explicitly provides that a panelist may not be a national of any of the parties in the dispute before them, it makes no mention of AB member nationality; the Working Procedures thus established that the nationality of an AB member is not relevant for composition of a Division.⁵

Unlike dispute panelists, the AB has its own dedicated staff—the Appellate Body Secretariat (ABS)—composed predominantly of individuals with legal training. Formally, the ABS is part of the WTO Secretariat but functionally it works under the authority of the AB.⁶ A team of ABS lawyers are assigned to assist an Appeals Division, which entails preparing an ‘issues paper’ that identifies “the parameters of the appeal . . . [and] examines these arguments in light of the legal provisions at issue and—probably more so today than in the early days of the WTO—possible precedents” (Ehlermann 2015, 494). They may also help with the drafting of questions to be asked during the oral hearing. Along with the Director of the ABS, they attend the oral hearing and are present during the exchange of views. Following exchange of views, the chairperson of the Division decides whether to draft the report herself, entrust certain parts to other Division members, or request the Secretariat team to draft it. To date, “[d]rafting by the chairperson has been the exception, drafting by the [ABS] team the rule” (Ehlermann 2015, 498). The ABS also attend meetings of the DSB in which AB reports are being adopted.⁷ As with the Secretariat officials assisting panels, then, the ABS are able to assimilate and transmit to AB members governments’ views on

⁵Working Procedures for Appellate Review, WT/AB/WP/6 (16 August 2010), Rule 6. The method to select the members of an Appeals Division is called rotation and is designed to create random selection. One AB member then acts as the chairperson or Presiding Member for the appeal (Alvarez-Jimenez 2009).

⁶The recommendations of the Preparatory Committee for the WTO on ‘Establishment of the Appellate Body’ emphasized that the Appellate Body and its staff should be independent from the WTO Secretariat. WTO, ‘Establishment of the Appellate Body,’ WT/DSB/1, 19 June 1995.

⁷Interview 4.4, Geneva, Switzerland (16 January 2014).

the AB's exercise of authority.

Compared to many panelists, AB members are considerably more insulated from WTO government representatives. They are located in a separate building and are extremely careful about their interactions with WTO delegates (Ehlermann 2015). In one member's experience "governments have been scrupulous in maintaining the independence of the Appellate Body members" and "U.S. officials would avoid even extended pleasantries at the occasional cocktail party lest even such idle conversation generate any misimpression" (Janow 2008, 251). Some are more skeptical about the extent of this insulation, particularly given the increasingly politicized selection process and the considerable influence powerful WTO members have over individual appointments (Cartland 2003; Elsig and Pollack 2012; Shaffer, Elsig, and Puig 2016; Steinberg 2004).

Despite this relative insulation, it is entirely plausible that AB members may be sensitive to fluctuations in the DSM's political capital. The first members were very aware of the potential authority and responsibility granted to them, and thus approached their task carefully and even "cautiously" (Shaffer, Elsig, and Puig 2016, 252). Many members viewed their common goal as building the authority and credibility of the institution (Ehlermann 2015; Lacarte-Muro 2015). It has even been suggested that compared to panelists, the AB is "more cognizant of, and pays more attention to, the importance of maintaining its legitimacy with WTO members" (Lewis 2012, 9). The remainder of this chapter begins to assess the extent to which AB members are responsive to changes in the DSM's political capital by examining the dynamics of appellate review.

5.2 Appellate Review

While it may not have been anticipated at the time the DSU was negotiated, appeals now play a central role both in resolving individual disputes and in establishing legal clarifications of the WTO Agreement. From its first decisions, the AB has engaged in meaningful and perhaps 'activist' appellate review, in that it "closely examined the reasoning and wording

of the panel reports, and it did not hesitate to modify reasoning or wording with which it disagreed”(Davey 2015, 370). While it often did so in “rather biting terms” it “usually did not change the basic result in the case”(Davey 2015, 370), although Lacarte (2003, 228) contends that the AB “continues to amend or reverse panel findings with relative frequency.” Some have suggested that creating a permanent body of panelists might lead the AB to develop “new policies of judicial restraint” toward panel findings (Cottier 2003), implying that the AB currently does not view judicial restraint as central to its task of appellate review.

Initially, the AB’s tone was “widely perceived as excessively critical, if not derisive, of panel reports” but this has tempered over time, with the exception of a few cases dealing with zeroing in anti-dumping disputes (Davey 2015, 371). For the most part, the AB has also “afforded panels a fair amount of discretion in how they proceeded procedurally,” such as in their use of experts (Davey 2015, 370). And Davey (2003, 180) contends that “while the Appellate Body has often modified panel reports, often significantly, it has very rarely reversed the basic outcome.” Drawing on a report’s validation score as a rough proxy for the ‘basic outcome’ of a dispute, it appears that Davey’s view is the correct one in that the AB rarely shifts considerably the degree of deference signaled within the findings of a panel ruling. I measure the total validation score of a WTO ruling in much the same way as the panel validation score discussed in the previous chapter, but take into account the findings appealed and the Appellate Body’s decisions on those findings. A report’s validation score thus represents the ultimate ruling on the dispute—by how much or how little a government ‘lost’ the case. Over the years, the average total validation afforded does not differ significantly from that afforded by the panel alone (compare Figures C.1 and C.2).

Within most judicial systems, appellate review typically entails the ‘higher’ court showing greater deference to the factual findings made by a ‘lower’ court and generally conducting *de novo* review of legal issues. The WTO dispute settlement system is formally structured the same way, with the scope of appellate review limited to issues of law and legal interpretation.⁸ Early on, the AB stated that the scope of appellate review excluded “findings

⁸DSU, Article 17.6 provides that appeals “shall be limited to issues of law covered in the panel report

of fact, as distinguished from legal interpretations or legal conclusions”⁹ and continues to stress that it has “no authority to consider new facts on appeal.”¹⁰

Aside from being common within many judicial systems, limiting appeals to legal issues was a practical decision, given the AB’s shorter time limits for proceedings and panels’ express fact-finding powers.¹¹ It does, however, create some limitations when the AB modifies or reverses a panel finding and must decide whether to complete the panel’s analysis in order to rule on the consistency of the challenged measure.¹² If the facts on the record are insufficient for the AB to complete the analysis, the DSU does not provide for remand to the original panel to engage in new fact-finding.¹³ Given this limitation, the AB at times relies on facts contained within the panel report but which did not form the basis of the panel finding, so as “not to leave the parties with a legal interpretation hanging in the air that is not then applied to the facts of the case”(Unterhalter 2015, 475).¹⁴ When the panel

and legal interpretations developed by the panel.”

⁹Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (13 February 1998), para. 132.

¹⁰Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment)*, WT/DS217/AB/R, WT/DS234/AB/R (27 January 2003), para. 222; Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada (Softwood Lumber V)*, WT/DS264/AB/R (31 August 2004), para. 9.

¹¹Panel proceedings should not generally exceed six months, although the DSU provides that it may be longer in exceptional situations not to exceed nine months. DSU, Articles 12.8 and 12.9. Appellate proceedings, on the other hand, are not to exceed ninety days. The two oral hearings with panels (compared to the one with the AB) and the panel interim review phase also allows additional scrutiny of facts by all involved. DSU, Appendix 3; DSU, Article 15. The panel’s express fact-finding powers are enumerated in DSU, Article 13.

¹²The AB may “uphold, modify or reverse the legal findings and conclusion of the panel.” DSU, Article 17.3. The AB’s ability to ‘complete the analysis’ often depends on the type and amount of factual material available and whether there are sufficient factual findings or uncontested facts on the record. See Appellate Body Report, *Australia—Measures Affecting the Importation of Salmon*, WT/DS18/AB/R (6 November 1998), paras 103-105, 115.

¹³Why negotiators did not include a remand power within the DSU is not clear, although likely related to the fact that there is not a standing panel system, which remand would presumably require (Matsushita 2015).

¹⁴This may raise due process issues, given that parties are often only made aware that the AB had ruled based on facts not relied upon by the panel when the AB report is circulated, and thus may have not been given a real opportunity to make comments on that set of facts, as occurred in *Canada—Periodicals* (Matsushita 2015, 551).

exercises judicial economy¹⁵ on a claim, however, the AB is often unable to complete the analysis leaving aspects of the dispute unresolved. It is for this reason that, as discussed in Section 5.3.1 below, a panel’s exercise of judicial economy is sometimes challenged on appeal.

The law-fact distinction has become increasingly important over the years, particularly since WTO appellants began to “more frequently claim that the Panel erred in fulfilling its function (e.g., by failing to make an objective assessment of the facts of the case)” (Voon and Yanovich 2006, 239). Within its jurisprudence, the AB began to rely on Article 11 of the DSU in order to allow for issues concerning application of the law to the facts to be subject to limited appeal.¹⁶ Article 11 requires that panels make: (1) “an objective assessment of the matter before it”; (2) including “an objective assessment of the facts of the case”; and “an objective assessment of . . . the applicability of and conformity with the relevant covered agreements.”¹⁷ The following section turns to AB case law reviewing panel duties under Article 11.

5.3 The success and failure of Article 11 challenges

This section examines how the AB has responded to appeals challenging panels’ application of the Article 11 ‘objective assessment’ standard. In doing so, it focuses on when the AB takes into account the views expressed by governments on its Article 11 jurisprudence. As discussed in the previous chapter, panels ‘communicate’ within their rulings to the parties and broader membership, as well as the AB, in order to explain their reasoning.

¹⁵Judicial economy is a principle of whereby an adjudicating body is authorized to deal only with issues necessary to dispose of the dispute in question while skipping other issues raised by the parties. WTO dispute panels are free to exercise judicial economy, but the AB has to address each of the issues raised on appeal, regardless of whether it is necessary to resolve the dispute. DSU, Article 17.12

¹⁶The AB has recognized that “Article 11 of the DSU sets out the standard of review applicable in WTO panel proceedings.” Appellate Body Report, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (5 October 2011), para. 123.

¹⁷Negotiators of the DSU drew this language from the Tokyo Round 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, LT/TR/U/1 (28 November 1979), para. 16.

Similarly, the AB ‘communicates’ within its rulings to the membership in addition to providing guidance for future panelists. A critical element of this guidance is provided through appellate review of a panel’s assessment of the facts of a case under Article 11. Within interviews, WTO officials indicated that both the Legal Affairs Division of the Secretariat and the Appellate Body Secretariat pay close attention to government statements on panels’ application of Article 11 (particularly relating to due process concerns). Despite this close attention, the following sections demonstrate that government representatives have been relatively quiet concerning the AB’s Article 11 jurisprudence but that when these rhetorical pressures do bubble up, the AB has subtly adjusted its approach to Article 11 challenges.

Appeals based on DSU Article 11 have become increasingly common, even as the percentage of panel reports appealed has declined (Figure 5.1). This is partly due to government uncertainty about how and when Article 11 appeals should be made.¹⁸ However, reversals based on Article 11 claims have been relatively rare (Figure 5.2). The already intrusive approach to review exhibited by panels and the reasonably wide discretion afforded to panels in their factual findings largely accounts for this. The AB has repeatedly stated that it will not “interfere lightly” with a panel’s fact-finding authority and discretion and that a party raising an Article 11 appeal must present convincing evidence that the panel exceeded its authority.

How the AB evaluates a panel’s objective assessment—the panel’s review standard under Article 11—will depend on what precisely the panel is reviewing, which largely depends on the claims raised within the dispute and the WTO rules at issue.¹⁹ Article 11 claims have

¹⁸In a recent case—after sixteen years of WTO dispute settlement practice—the AB noted that “some confusion exists as to when an allegation that the panel erred should be based on Article 11, and when it should be characterized as a claim that the law has been applied to the facts incorrectly and thus violates a substantive legal provision.” Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (1 June 2011), paras. 1313-1316.

¹⁹It is for this reason that the AB has recognized that the “the proper standard of review to be applied by a panel must also be understood in the light of the specific obligations of the relevant agreements that are at issue in the case.” Appellate Body Report, *US—Investigation of the International Trade Commission in Softwood Lumber from Canada (Softwood Lumber VI) (Article 21.5—Canada)*, WT/DS/277/AB/RW (8 May 2006), para. 92; Appellate Body Report, *US—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/AB/R (20 July 2005), para. 183; Appellate Body Report, *US—Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New*

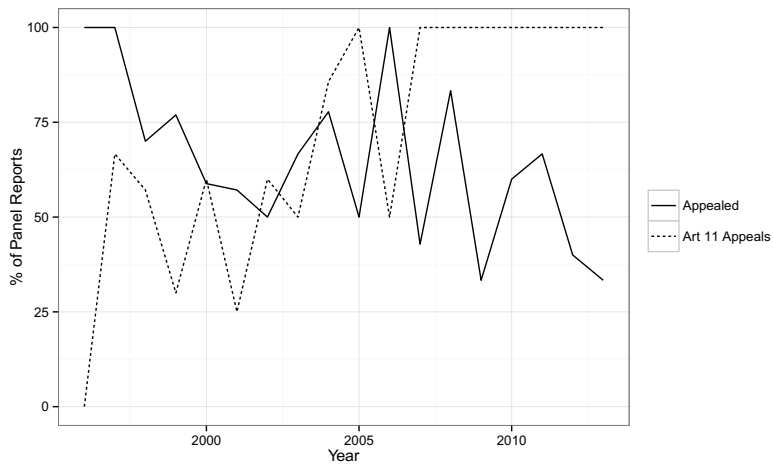


Figure 5.1: Percentage of panel reports appealed and percentage of appeals involving DSU Article 11 claims, by year.

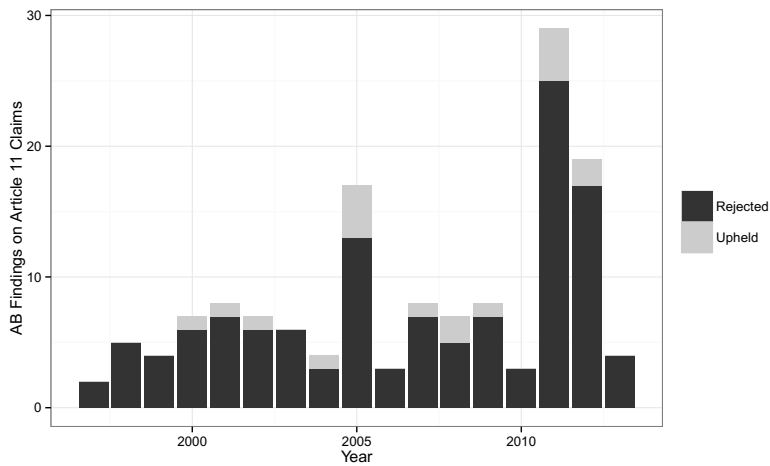


Figure 5.2: Number of Article 11 claims upheld and rejected by the Appellate Body, by year.

typically fallen into two categories: (1) claims regarding panel treatment of the evidence, due process or procedural errors; and (2) panel scrutiny of national authorities' determinations (see Table C.1 for a full list of appeals involving Article 11 challenges).

Zealand, WT/DS177/AB/R (16 May 2001), para. 105.

5.3.1 Category 1 Appeals: Judicial economy, treatment of evidence, and due process

Parties to a dispute increasingly raise Article 11 claims on appeal, arguing that the panel failed to make an objective assessment by exercising false judicial economy or disregarding legal arguments or evidence presented during the dispute proceedings. In fact, the vast majority of Article 11 appeals involve claims regarding how the panel treated and assessed evidence, arguments or claims presented by the disputing parties. Forty-six of the sixty disputes raising Article 11 appeals heard by the AB between 1995 and 2013 deal in some way with the panel’s treatment of the evidence or exercise of judicial economy, sometimes bleeding into due process-type claims.

False judicial economy

The first few disputes that raised Article 11 claims largely dealt with panels’ use of judicial economy. The AB was quick to emphasize that nothing within the DSU or previous GATT practice requires a panel to examine and decide on all claims raised, and that imposing such a requirement would be inconsistent with the purpose of the dispute settlement system: “to secure a positive resolution to the dispute.”²⁰ During adoption of the reports in *US—Wool Shirts*, India disagreed that requiring a panel to rule on all claims was inconsistent with the aims of the dispute settlement system, given that this had “had inadvertently provided scope for the possibility of two further disputes with regard to claims already submitted.”²¹ In contrast, the U.S. approved of the AB’s standard for evaluating panels’ use of judicial economy, as one that makes “a very significant statement regarding the purpose of the dispute settlement system and the function of panels and the Appellate Body within that

²⁰DSU, Article 3.7. Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (23 May 1997), p. 19

²¹Statement by the representative of India, Dispute Settlement Body, Minutes of Meeting held on 23 May 1997, WT/DSB/M33, pp. 8-10.

system.”²²

Since this first decision under Article 11, judicial economy challenges have arisen intermittently and the AB has followed its early principle of evaluating claims in terms of whether the exercise of judicial economy hindered the resolution of the dispute. While it has largely dismissed claims concerning failure to take into account separate *arguments*²³ or *evidence*²⁴ it has not been hesitant to find that a panel exercised ‘false judicial economy’ in instances of separate *claims* it views as central to resolving the matter. In fact, the AB first found a panel incorrectly exercised judicial economy in its 2005 *EC—Export Subsidies on Sugar* decision concerning panel refusal to rule on *claims* under Article 3 of the SCM Agreement. In this case, doing so “precluded the possibility of a remedy being made available to the Complaining Parties, pursuant to Article 4.7 of the SCM Agreement.”²⁵ Prior to report adoption within the DSB, Australia, Brazil and Thailand approvingly welcomed the AB’s recognition that the remedial regime under the SCM Agreement essentially differed from that under the Agreement on Agriculture, although some representatives were frustrated by the inability of the AB to complete the analysis.²⁶

At times the AB has emphasized that panels may still “refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a

²²Statement by the representative of the U.S., Dispute Settlement Body, Minutes of Meeting held on 23 May 1997, WT/DSB/M33, p. 11.

²³A panel is not obligated “to consider each and every argument put forward by the parties, so long as it completes an objective assessment of the matter before it.” Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R (19 May 2005), paras. 125; Appellate Body Report, *United States—Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R (28 November 2005), paras. 134-5; Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (28 July 2011).

²⁴See, e.g., Appellate Body Report, *European Communities—Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R (23 July 1998). Prior to adoption of these reports, Brazil noted that it appreciated that the AB did not want Article 11 to “be abused or become a permanent element of all cases,” but was still concerned about how it had treated its claim. Statement by the representative of Brazil, Dispute Settlement Body, Minutes of Meeting held on 23 July 1998, WT/DSB/M/47, pp. 16-7.

²⁵Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WT/DS283/AB/R (19 May 2005), para. 335.

²⁶Dispute Settlement Body, Minutes of Meeting held 19 May 2005, WT/DSB/M/189, paras. 56-68.

certain number of findings of inconsistency, would suffice to resolve the dispute.”²⁷ Sensitive to member concern about the AB’s inability to complete the analysis in many cases, however, it has closely evaluated whether agreement provisions differ substantively and whether multiple findings are necessary to address fully the substance of the underlying dispute. Recently, for example, the AB found panels used false judicial economy when they refrained from making findings relating to separate claims under different agreement provisions and doing so provided merely a ‘partial resolution’ of the matter because of the fact that agreement obligations substantially differed.²⁸

Treatment of the evidence

The first appeal to address a panel’s treatment of evidence—*EC—Hormones*—dealt with a claim that the panel had ‘disregarded or distorted’ evidence provided by the experts testifying before the panel and evidence submitted by the EC. The AB first articulated the principle that “deliberate disregard of, or refusal to consider, the evidence submitted” and “wilful distortion or misrepresentation of the evidence” would constitute a failure to conduct an objective assessment of the facts under Article 11. After carefully examined the panel record, it concluded that although the panel had at times ‘misinterpreted’ the evidence, this did not rise to the level failure to make an objective assessment of the facts of the case.²⁹ This decision became the standard by which the AB reviewed panels’ factual assessments, in conjunction with the language in *Australia—Salmon* that the panel must commit an

²⁷Appellate Body Report, *US—Anti-Dumping OCTGs*, para. 178; *Canada—Wheat Exports and Grain Imports*, para 133.

²⁸Appellate Body Report, *Philippines—Taxes on Distilled Spirits*, WT/DS396/AB/R, WT/DS403/AB/R (20 January 2012); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Tuna II)*, WT/DS381/AB/R (13 June 2012). The AB has also rejected two claims of false judicial economy when they involved substantially similar agreement obligations. Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R, WT/DS426/AB/R (24 May 2013), paras. 5.86-5.105. Somewhat similar claims were raised on appeal in *US—COOL*, but in this case Canada’s and Mexico’s appeals were conditional on the AB reversing the panel’s findings under the TBT Agreement, which it did not do.

²⁹Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (13 February 1998), paras. 131-144.

“egregious error that calls into question [its] good faith.”³⁰

While no members immediately commented on the standard outlined in *EC—Hormones*, in subsequent years government representatives began to increasingly question this standard as the proper one to evaluate panels’ objective assessments. During adoption of the reports in *Korea—Alcoholic Beverages*, Korea suggested that the AB “should look beyond deliberate disregard or egregious error when reviewing mistakes of panels in evaluating evidence because it was plausible for panels to make erroneous factual determinations, which merited appellate review.”³¹ Prior to adoption of the reports in *Japan—Agricultural Products II*, the EC noted that “the result raised questions as to the discretion left to panels in the evaluation of scientific views.”³² The AB continued to employ this standard, even when it carefully scrutinized the panel’s treatment of the evidence, although it did begin to move away from the more extreme deference language employed within earlier disputes.

Instead, the AB began to emphasize how parties can and should demonstrate on appeal that the panel exceeded “the bounds of its discretion as the trier of facts” or otherwise engaged in inconsistent or inadequate reasoning.³³ In effect, the AB seems to have heeded

³⁰Appellate Body Report, *Australia—Measures Affecting the Importation of Salmon*, WT/DS18/AB/R (6 November 1998), para. 266. See also Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R (17 February 1999), para. 164; Appellate Body Report, *Japan—Measures Affecting Agricultural Products (Agricultural Products II)*, WT/DS76/AB/R (19 March 1999), paras. 140-142.

³¹Statement by the representative of the Republic of Korea, Dispute Settlement Body, Minutes of Meeting held on 17 February 1999, WT/DSB/M/55, p. 9.

³²Statement by the representative of the European Communities, Dispute Settlement Body, Minutes of Meeting held on 19 March 1999, WT/DSB/M/57, p. 7. To this effect, the EC had made a proposal in the DSU review. Hungary also expressed concern regarding fact-law assessments.

³³Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R (10 December 2003), para. 238; Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (27 September 2004), para. 191; Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (27 September 2005), para. 186; Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (17 December 2007), para. 197; Appellate Body Report, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R (17 December 2010), paras. 313-4; Appellate Body Report, *European Communities—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (1 June 2011), para. 1317. In *Brazil—Tyres*, the EC was particularly concerned with how the AB was evaluating panels’ objective assessments. Upon report adoption it stated: “It was not good for the dispute settlement system if panels received the message that they could assess the evidence whatever way they wanted, and effectively disregard important pieces of evidence as long as they listed some of them in footnotes.” Statement by the representative of the European Communities,

concern on the part of WTO members (or was similarly but independently concerned) about the extreme deference that had previously been afforded panel fact-finding. It thus adopted a more nuanced—albeit still difficult—appellate standard of review of panel’s treatment of evidence (Heavin and Hansen 2014). In doing so, however, it has put the onus on the party alleging an Article 11 violation to specify how exactly the panel’s treatment of evidence is inadequate or incoherent and “why the evidence is so material to its case that the panel’s failure to address such evidence has a bearing on the objectivity of the panel’s factual assessment.”³⁴

Due process concerns

The objective assessment test under Article 11 has also been treated by the Appellate Body as a general legal principle with implications for due process. Early on, Argentina raised an Article 11 claim alleging that the panel had accepted evidence submitted by the U.S. after the expiration of the time-limit for submitting rebuttals (and thus undermining Argentina’s right to respond). Although couched in the language of a due process claim, the AB considered this a procedural issue for which it has generally deferred to panels’ discretion.³⁵ The first decision linking an Article 11 claim to a violation of parties’ due process rights arose in *Chile—Price Band System*. In this case, the AB concluded that the panel had acted inconsistently with its duties under Article 11 by making a finding on a claim not before the panel and thereby denying Chile the due process of a fair right of response.³⁶ The EC’s statement upon report adoption approved of this move to link due

Dispute Settlement Body, Minutes of Meeting held on 17 December 2007, WT/DSB/M/243, para. 58.

³⁴ See, e.g., Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Tuna II)*, WT/DS381/AB/R (13 June 2012), para. 254.

³⁵ Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56/AB/R (22 April 1998).

³⁶ Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R (23 October 2002).

process rights and Article 11.³⁷

Subsequently, the AB began to increasingly and explicitly recognize that due process requirements are “fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings”³⁸ and that this requires parties to be afforded adequate opportunities to respond to claims and evidence presented by other parties.³⁹ The AB directly linked Article 11 violations to due process concerns again in *US—Gambling* when it stated that Article 11 panel duties include ensuring that the due process rights of parties are respected.⁴⁰ The AB’s growing reliance on due process language initially did not generate much response from the membership. After the first decade, however, government representatives increasingly began to signal views on this turn to due process language within AB jurisprudence, as demonstrated within Chapter 3.

In particular, some expressed concern that the AB’s linking of due process requirements to Article 11 was vague and confusing, providing little clear guidance to parties. For example, in *US/Canada—Continued Suspension*, the AB explicitly relied on due process requirements inherent in Article 11 to find that the panel had erroneously selected and consulted with experts with apparent conflicts of interest such that it “compromised the Panel’s ability to act as an independent adjudicator.”⁴¹ During report adoption, Canada expressed concern that this approach “would seriously limit the number of internationally recognized scientists who were available for consultations by WTO panels in cases of this kind and thus *would have*

³⁷Statement by the representative of the European Communities, Dispute Settlement Body, Minutes of the Meeting held on 23 October 2002, WT/DSB/M/134, para. 15). Notably, however, the AB has generally permitted the panel to rely on its own legal arguments or reasoning to support its conclusion and rejected claims that this constitutes the AB making the case for a party. See, e.g., Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WT/DS283/AB/R (19 May 2005), para. 286.

³⁸Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (5 April 2001), para. 88

³⁹See, e.g., Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (20 April 2005), paras. 269-273.

⁴⁰Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (20 April 2005), para. 273.

⁴¹Appellate Body Report, *United States/Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R, WT/DS321/AB/R (14 November 2008), para. 482.

*adverse systemic consequences.*⁴² Japan similarly was concerned with the AB's analysis with respect to the experts, but primarily because it considered that the AB shouldn't assume that infringing due process would necessarily lead to an Article 11 violation. Rather, the AB "should have explained how the breach of inherent due process rights, which had been found by the Appellate Body, constituted the Panel's failure to 'make an objective assessment of the matter', as required by Article 11 of the DSU."⁴³ Australia for its part endorsed the AB's recognition of the need for panels to respect due process and apply the appropriate standard of review, which it viewed as essential to maintaining the balance of rights and obligations established in the SPS Agreement.⁴⁴

Despite these admonishments, a few years later the AB employed due process language again in considering an Article 11 challenge. In *Thailand—Cigarettes*, Thailand alleged that the panel had failed to ensure due process and to make an objective assessment of the matter by accepting and relying on an exhibit without affording Thailand any opportunity to respond to that evidence. Although the AB used due process language again, it found that Thailand had not established that the Panel failed to ensure due process and, thus, to comply with its Article 11 duties.⁴⁵ Prior to report adoption, members once again expressed concern with the AB's approach to due process. Given the limited discussion by the AB of the link between due process and the failure to make an objective assessment, the U.S. suggested that the membership "would also benefit from a better explanation of how the discussion of, and focus on, 'due process' in connection with Thailand's appeal under Article 11 of the DSU related to the text of Article 11."⁴⁶ Since then, although the AB has used

⁴²Statement by the representative of Canada, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 43 (emphasis added).

⁴³Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 21.

⁴⁴Statement by the representative of Australia, Dispute Settlement Body, Minutes of Meeting held on 14 November 2008, WT/DSB/M/258, para. 27.

⁴⁵Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R (15 July 2011).

⁴⁶Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, WT/DSB/M/299, para. 10.

the language of due process in relation to other procedural concerns, it has not explicitly linked it to panels' duties under Article 11.⁴⁷

5.3.2 Category 2 Appeals: Review of national authority's determinations

Disputes under the trade remedy agreements as well as those involving some provisions under the SPS and ATC agreements involve panel review of determinations made by a national authority. In these types of disputes, the AB has indicated that the panel should examine whether the authorities have provided a reasoned and adequate explanation regarding: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.⁴⁸

The first Article 11 appeal to challenge panel review of a national authority's determination occurred in *Argentina—Footwear (EC)*. The AB approved of the panel's articulation of the standard of review and its application to a safeguards investigation by the Argentine authorities: to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.⁴⁹ During report adoption, the US (a third party to the dispute) praised:

that both the Panel and the Appellate Body had reaffirmed the long-standing trend to discount de novo reviews of the investigations of competent authorities. The findings of both Reports on this critical issue had confirmed that the WTO was not the forum in which it was possible to re-litigate factual issues that had been fully and effectively examined by domestic competent authorities.

⁴⁷In *EC—Fasteners*, the AB had to address the EU's argument about whether the panel acted inconsistently with its obligations under Article 11 of the DSU and deprived the European Union of its right to due process. In this case, the AB reversed the panel's finding on the basis that China had failed to substantiate its claim, and thus avoided making a separate finding on the Article 11 claim or addressing the due process linkage. *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (28 July 2011), para. 575.

⁴⁸Appellate Body Report, *US—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/AB/R (20 July 2005), para. 186; Appellate Body Report, *US—Lamb*, para. 103.

⁴⁹Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (12 January 2000), paras. 119-121.

The United States was astonished that some Members continued to question this fundamental, well-established principle, and hoped that the current Reports would lay to rest any questions on this issue.⁵⁰

Subsequently, the AB ran with this standard but began to fill out this rather general guidance and encourage more searching review in the first Article 11 reversal on panel review of a national authority. In *US—Wheat Gluten*, the AB found that the panel had acted inconsistently with Article 11 in its assessment of whether the “USITC Report provides an adequate, reasoned and reasonable explanation with respect to ‘profits and losses’.”⁵¹ During report adoption, the EC commended the AB’s clarification of how a panel should review investigating authority’s determination:

panels had to closely verify whether the investigation report provided reasoned conclusions as provided for in Article 3.1 of the Agreement on Safeguards and contained a detailed analysis, including a demonstration of the relevance of the factors examined in accordance with Article 4.2(c) of the Agreement on Safeguards.⁵²

No member explicitly criticized this approach at the time.

AB jurisprudence has since made clear that a panel’s evaluation of the national authority’s conclusions “must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report” and undertaken “in light of. . . other plausible alternative explanations.”⁵³ The panel must not only examine and assess whether the national authority ‘evaluated’ and ‘examined’ all relevant

⁵⁰Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 12 January 2000, WT/DSB/M/73, p. 10.

⁵¹Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (19 January 2001), paras. 160-163.

⁵²Statement by the representative of the European Communities, Dispute Settlement Body, Minutes of Meeting held on 19 January 2001, WT/DSB/M/97, para. 3.

⁵³Appellate Body Report, *United States—Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R (25 March 2011), para. 516.

factors, it must also assess “whether an adequate explanation has been provided as to how those facts support the determination” and “whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data.”⁵⁴

Beginning in the early 2000s, members began to express some concern at the way in which the AB was pushing panels to engage in searching and substantive review of national authorities’ decision-making. Prior to the adoption of reports in *US—Lamb*, a dispute under the Safeguards Agreement, the U.S. in particular expressed considerable concern with the AB’s interpretation of the appropriate standard of review, that it imposed an impossible burden on national authorities:

Presumably, the Appellate Body did not mean to suggest that a Member might submit new interpretations of the facts in dispute settlement, interpretations that the competent authority had never been given an opportunity to address, and that the Panel might fault the competent authority for not addressing those interpretations in its published report. Competent authorities could not reasonably be expected to address in their reports not only all factual arguments that the interested parties raise, but also all conceivable arguments that could possibly be raised, and the Safeguards Agreement could not reasonably be read to require them to do so.⁵⁵

Moving in a slightly more deferential direction in *US—Cotton Yarn*, the first case the AB was asked to evaluate the panel’s application of a standard of review under the Agreement on Textiles and Clothing, the AB applied the same principles concerning the standard of review it had previously developed in relation to the Safeguards Agreement but found that the panel exceeded its mandate by not putting itself in the place of the national authority

⁵⁴Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (5 November 2001), paras. 110-117.

⁵⁵Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 16 May 2001, WT/DSB/M/105, para. 44.

at the time of its determination and by considering evidence not yet in existence.⁵⁶ The EC and U.S. expressed approval of this interpretation during adoption of the reports, but India expressed some disquiet with the narrowness of the AB's approach. Pakistan similarly voiced concern that the AB's interpretation would not allow panels to do anything except to uphold national determination that the conditions for a safeguard action were met even if based on data later realized to be false.⁵⁷

Similarly, in *US—DRAMs* the AB found that the Panel essentially 'second-guessed' the investigating authority's analysis of the evidence and thus overstepped the bounds of its review, by conducting its own assessment of much of the evidence before the USDOC.⁵⁸ The U.S. approvingly highlighted the AB's Article 11 analysis prior to report adoption as "an important reminder to future panels in trade remedy disputes that their task was a limited one. They were not to redo the work of domestic authorities, but instead they were to ask simply whether the determination made by domestic authorities was one that an objective and impartial decision maker could have made—not would have or should have made—based on the evidence before it."⁵⁹

In 2006, in what many consider the "high point" of intensive review of national authorities by the DSM (Du 2010), the Appellate Body in *US—Softwood Lumber VI (Article 21.5—Canada)* found that the compliance panel had not applied the correct standard in reviewing the USITC's determinations in that it "failed to engage in the type of critical and searching analysis called for by Article 11 of the DSU" and criticized the panel's acceptance that the USITC's explanation of the measures provided reasoned support for its conclusion.⁶⁰ Follow-

⁵⁶ Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (5 November 2001), para. 81.

⁵⁷ Dispute Settlement Body, Minutes of Meeting held 5 November 2001, WT/DSB/M/112.

⁵⁸ Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/AB/R (20 July 2005), paras. 189-190.

⁵⁹ Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 20 July 2005, WT/DSB/M/194, para. 80.

⁶⁰ Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada (Article 21.5—Canada)*, WT/DS277/AB/RW (9 May 2006), paras. 113, 124.

ing this high point of intensive review, the AB in *US—Continued Suspension* overturned a key panel finding on the basis that the panel had applied a standard that was not sufficiently deferential to the national authority.⁶¹ Because the panel had sought to determine whether the EU’s risk assessment was based on the correct scientific evidence, rather than whether it was supported by coherent reasoning and reputable scientific evidence, it had not reviewed the EU’s determination with sufficient deference. The *US—Continued Suspension* decision arguably represented a reversal of the AB’s previous position in encouraging panels to adopt a more deferential and procedurally-focused level of review of national determinations (Du 2010).

The approach taken by the AB in *US—Continued Suspension* was subsequently applied by the panel in *Australia—Apples*. In this case, the panel seemed to engage in a less intensive analysis of the issues and their treatment by the national authorities. On appeal, the AB reaffirmed the approach taken in *US—Continued Suspension* and presumably applied by the panel in *Australia—Apples*.⁶² However, during report adoption, Australia expressed concern that the AB’s approach actually pushed the panels to make their own judgment about the appropriateness of alternative measures (as opposed to evaluating the national authority’s determination of appropriateness), and that this “introduced a significant element of uncertainty on standard of review which would make the task of panels more difficult.”⁶³

Notably, both these instances of relatively more deferential review in recent years involved review of national governments’ decisions regarding health and safety measures and whether they possess a reasonable scientific basis. Such potentially more politically sensitive issues do not always arise in disputes under many of the other agreements, which may lead to substantively less deference being afforded to national-level decisions in those types of

⁶¹Appellate Body Report, *United States/Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R, WT/DS321/AB/R (14 November 2008).

⁶²Appellate Body Report, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R (17 December 2010).

⁶³Statement by the representative of Australia, Dispute Settlement Body, Minutes of Meeting held on 17 December 2010, WT/DSB/M/290, paras. 62-64.

cases.⁶⁴ However, recent case law does suggest that after pushing the panels to engage in more substantive and searching review of national authority's determinations during the 2000s, it is now moving more towards emphasizing the procedural elements of national decision-making processes and more willing to reverse under Article 11 panel review that substitutes its own judgment for that of the domestic body.

5.4 Conclusion

Secretariat officials within the Legal Affairs Division and the Appellate Body Secretariat, and to a lesser extent the dispute panelists, are all sensitive to shifts in the underlying institutional support enjoyed by the DSM. The previous chapter demonstrated that panels respond to diffuse political pressures by providing government authorities with slightly more domestic accommodation for adverse decisions. I argued that panels are effectively using their rulings under agreement provisions for which there exists less AB case law to provide members with greater flexibility. Anecdotal evidence and first-hand accounts suggest that the members of the Appellate Body are similarly concerned with establishing and maintaining the authority and credibility of the DSM, but that they also take seriously their role as 'insulated' and independent adjudicators. Thus the flexibility provided within panel reports may not matter if the AB consistently reverses panels' provision of accommodation.

This chapter addressed this issue by examining the dynamics of appellate review. It demonstrated that due to the nature and scope of appellate review within the WTO, the AB has not provided significantly different accommodation (in terms of average validation scores) than that provided within panel reports. The extent to which this is the case has varied over the years and across issue areas. How then, is the AB directing panels to review national

⁶⁴See, for example, the recent trade remedy cases which seem to abide more by the earlier more searching approach: Appellate Body Report, *United States—Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R (25 March 2011); Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (28 July 2011); *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (5 October 2011); Appellate Body Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R (16 November 2012).

policy choices and provide (or refrain from providing) a degree of accommodation? To answer this, this chapter examined how the AB has responded to appeals challenging panels' application of the Article 11 'objective assessment' standard under Article 11 of the DSU. In doing so, it focused on when the AB takes into account the views expressed by governments on its Article 11 jurisprudence. In particular, the AB has begun to closely scrutinize panel's use of judicial economy to address growing concerns about partial resolution of disputes. In addition, although the AB continues to use limited due process language with respect to a number of procedural issues, it has been relatively cautious in clarifying how Article 11 and due process violations are linked.

This chapter also demonstrated that the AB had been directing panels to engage in more searching review of determinations made by national investigating authorities during its first decade of operation. However, it appears to be encouraging somewhat greater deference to domestic bodies in recent years. While the AB Secretariat does pay close attention to government statements on panels' application of Article 11, governments rarely address these issues within the DSB, prior to report adoption. When they do however, the AB's Article 11 jurisprudence shifts in nuanced ways to signal that it has 'heard' these concerns, even if substantively it is directing panels to engage in the same standard of review.

6 | Partners in Compliance: The Political Cover of WTO Rulings

This chapter turns to the impact of the WTO's judicial authority on state behavior, specifically compliance with its rulings. The concept of compliance is central to the study of any legal institution. Nowhere is this more apparent than in the context of international institutions, although disagreement persists over the definition, measurement, and utility of compliance in understanding international law's impact. (Downs, Rocke, and Barsoom 1996; Chayes and Chayes 1993; Howse and Teitel 2010; Kapiszewski and Taylor 2013; Kingsbury 1998; Martin 2012). Despite ongoing debate over whether and how to study international legal compliance, it continues to dominate existing scholarship and proves to be particularly important for research on international courts. Judges, other legal actors, and regime architects all view abiding by the prescriptions of judicial bodies—especially international ones—as central to the rule of law and a system's legitimacy (Franck 1990; Huneus 2014). For this reason, scholars and regime actors consider the dynamics motivating adherence to international judgments to be inherently important, even if the relationship between compliance and a regime's effectiveness remains uncertain (Kapiszewski and Taylor 2013; Shany 2012).

In step with a spectacular growth over the past century in the number of transnational judicial and quasi-judicial bodies, a growing body of scholarship seeks to identify the conditions under which governments implement their rulings. Empirical studies tend to emphasize the structure of the underlying regime and the external or domestic costs incurred by contin-

ued non-compliance.¹ A few have also begun to explore the role of remedy design features and the ability of courts to foster compliance constituencies (Cavallaro and Brewer 2008; Hawkins and Jacoby 2010; Helfer 2008; Huneus 2014; Peskin 2008; Staton and Vanberg 2008). Similar to these latter efforts, this chapter approaches the question of why and when states implement international rulings from the perspective of the judicial bodies themselves and the strategies courts employ to encourage prompt compliance.

International judicial bodies sometimes purposefully conform their rulings to the expressed preferences of member states, especially politically or economically influential ones (Busch and Pelc 2010; Garrett, Kelemen, and Schulz 1998; Helfer and Alter 2013; Kelemen 2001; Smith 2003; Steinberg 2004). As the previous chapters have demonstrated, the WTO's adjudicative bodies often respond to shifts in their support among the broader membership. They also pay attention to the system's compliance record as indirectly indicative of the regime's effectiveness and their degree of political support. The WTO's Dispute Settlement Mechanism (DSM) responds to such shifts and simultaneously preempts lengthy delays in implementation by, among other strategies, facilitating compliance through the content of their rulings. Judgments that make fewer violation rulings or that make liberal use of judicial economy impose relatively fewer implementation costs on defendant states. Not only does greater validation within mixed rulings require less extensive reforms from the losing party, discrete findings that a state did *not* violate WTO rules provide government officials with domestic political cover to implement the adverse findings. On average then, we would expect greater validation of domestic laws to reduce the time it takes a government to comply with a WTO ruling.

This chapter evaluates this expectation. The following section develops the argument that the WTO's quasi-judicial bodies (the Appellate Body and dispute panels, which together comprise the DSM) attempt to use the content of their rulings to ease the domestic political costs of incredibly charged policy changes, thereby acting as 'partners in compli-

¹I define judgment compliance as when a state or other actor takes or refrains from taking actions as required by a court ruling. Implementation refers to the process and steps undertaken domestically that lead to state-level compliance with the ruling (Huneus 2014).

ance' with a government's executive branch. Yet the extent to which these strategies successfully facilitate swifter implementation is very much conditional on the domestic politics of second-order compliance. Section 6.2 describes the empirical strategy adopted to assess this argument and Section 6.3 discusses the results of a number of statistical analyses.

I find that the degree of political cover provided by WTO rulings has no observable impact on the fact or timing of compliance for disputes that require a government to enact new administrative regulations or that can be implemented through executive action alone. In contrast, validating some elements of a domestic trade measure increases the probability of compliance and swifter implementation when legislative action is required. This suggests that the WTO's quasi-judicial bodies successfully attempt to foster compliance through the content of their rulings, with the goal of improving the effectiveness of and institutional support for the dispute settlement system. Section 6.4 further illustrates how executive officials leverage the political cover of a WTO ruling domestically by tracing Canada's implementation of two adverse decisions on its patent regime. The final section concludes.

6.1 Why Comply?

Assessments of compliance with WTO rulings tend to be fairly positive, with existing studies emphasizing the pressures on or incentives for breaching states to conform to international rules (Bown 2004; Brewster and Chilton 2014; Busch and Reinhardt 2003b; Davey 2005; Davis and Shirato 2007; Hudec 1993; Kono 2007; Shaffer and Ginsburg 2012; Wilson 2007; Zangl 2008). Although overall rates of compliance are high, the same country-dyads resolve some of their trade disputes quickly yet fail to resolve others for decades. This suggests that the *timing* of resolution cannot be explained by state-level characteristics (such as a country's political system or economic power) alone. Some studies do look to factors that vary across disputes and tend to focus on the problem structure of the disputed issue-area or the domestic politics of compliance. Very little attention is paid to dispute-varying strategies adopted by the WTO's adjudicators to facilitate resolution. This is surprising given that

theories of international judicial behavior often claim that judges seek to encourage compliance with their rulings, in order to increase support for their exercise of authority and help secure voluntary compliance in the future (Carrubba, Gabel, and Hankla 2008; Gibson and Caldeira 1995). The questions of what—if any—strategies WTO adjudicators employ to facilitate compliance and whether these strategies foster speedier dispute resolution remain under-explored within the literature.

With the notable exception of Rachel Brewster’s and Adam Chilton’s study of the United States, existing studies also tend to overlook how various domestic actors respond to WTO rulings (Brewster and Chilton 2014). As they argue, this supply-side of compliance is equally important given that government institutions possess different policy preferences, face different demands, and encounter different obstacles when it comes to free trade and trade policy reform (Brewster and Chilton 2014, 217-8). There are thus strong reasons to expect that the government institution responsible for implementation of a WTO ruling will influence the type and speed of compliance achieved.

This chapter combines these two observations and advances the argument that international judicial actors can facilitate swifter compliance with their rulings by providing political cover to domestic actors, but that this matters more for some types of trade measures than for others. Specifically, the political cover of mixed WTO rulings is useful for the executive branch when legislative action is needed to conform domestic measures to trade rules. However, when the executive branch is able to implement a WTO ruling alone—encountering relatively fewer hurdles domestically—the degree of political cover provided does not significantly affect the probability or speed of compliance.

6.1.1 Political Cover

Governments tend to delegate dispute resolution to an international body when they can use its involvement to push through unpopular domestic reforms. International *legal* rulings provide a form of ‘political cover’ for government officials to counter—or at the very least claim that their hands are tied in the face of—domestic political opposition to

a controversial policy change (Allee and Huth 2006; Shaffer and Ginsburg 2012; Simmons 2002; Vreeland 2003). A government's executive—with the primary responsibility for trade policy and cooperation—can face sizable domestic costs or electoral sanctions if it negotiates controversial trade concessions. When the same concessions are ceded in order to comply with a WTO ruling, the executive can claim that the decision was mandated by a judicial authority, which other political actors and domestic groups may view as relatively more 'legitimate' even if unpopular (Allee and Huth 2006, 224). In fact, some studies have found that governments resort to WTO dispute settlement in cases that involve significant political costs or mobilized sectors demanding greater protection, implying that executives often seek out this type of political cover (Davis 2009, 2012; Shaffer and Ginsburg 2012).

International legal rulings all provide *some* degree of domestic cover in that they are issued by a judicial body and are legally binding. Yet not all rulings are equal in this respect because courts can signal different levels of support for a trade policy through the specificity and nature of the remedy prescribed, or the actions a government must take in order to comply with a judgment (Hawkins and Jacoby 2010; Staton and Vanberg 2008). In addition, broad and costly rulings that require extensive changes in a domestic legal system should, on average, take longer to implement and face more domestic roadblocks than narrow rulings requiring low-cost or superficial changes (Helfer 2014; Huneus 2014).

While the nature and extent of reform required will depend largely on the strength of the legal case, the DSM does have some discretion in deciding where on the broad-narrow spectrum to place a ruling. WTO dispute panels and to a lesser extent the Appellate Body use the content of their rulings—through discrete findings that validate aspects of a trade measure or policy—to respond to shifts in their underlying political support among the wider membership. These non-breach findings provide the losing government—and the executive branch in particular—with additional ammunition to overcome domestic political opposition. They do so by allowing the executive to point to reforms it is *not* obligated to make—because it had vigorously defended the interests of the affected industry—while simultaneously claiming that it has no choice but to make the unpopular concessions required

to comply with the WTO ruling.

In practice, governments officials quite frequently use these non-breach findings as evidence that the WTO's DSM has validated some elements of their trade policy or litigation efforts. It is not uncommon to see both parties to a dispute claim that they 'won' the case, despite the fact that the respondent government must still reform some aspect(s) of its trade laws. Take, for example, the protracted and complex dispute between the EU and the U.S. over support provided to the domestic civilian aircraft industry (specifically Airbus in the EU and Boeing in the U.S.). In October 2004, immediately following its withdrawal from a bilateral agreement on support for aircraft producers, the U.S. challenged within the WTO all EU support provided to Airbus since the late 1980s. In response, the EU brought a parallel WTO challenge against support for Boeing provided by American federal, state, and local authorities.²

In the Boeing case, the WTO ruled that some of the assistance provided by the Department of Defense and state governments were trade-distorting subsidies that had adversely affected sales of some lines of Airbus aircrafts. While it did not agree with all of the EU's claims, it did rule that many of the subsidies violated WTO rules and the European Commission welcomed the decision as a victory.³ Yet the United States Trade Representative (USTR) also called the ruling a "tremendous victory for American manufacturers and workers," one which "demonstrates the Obama Administration's commitment to ensuring a level playing field for Americans" because the WTO had rejected claims that it was providing 'massive trade-distorting subsidies' to Boeing.⁴ Both parties claimed that they had prevailed

²See Appellate Body Report, *European Communities—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011; Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, 12 March 2012.

³The Commission publicly characterized the ruling as a confirmation that billions of dollars in U.S. subsidies granted to Boeing are illegal under WTO rules, requiring the U.S. to withdraw its subsidies or remove their adverse effects. European Commission, "WTO confirms Boeing received billions in illegal subsidies from United States," Press Release, 12 March 2012. Available at: http://europa.eu/rapid/press-release_IP-12-238_en.htm.

⁴Office of the United States Trade Representative, "U.S. Trade Representative Kirk Announces U.S. Victory in WTO Aircraft Dispute," Press Release, 12 March 2012. Available at: <https://ustr.gov/us-trade-representative-kirk-announces-us-victory-wto-aircraft-dispute>.

in the dispute, while simultaneously affirming their commitment to implement the WTO's adverse findings.

6.1.2 The Conditional Utility of Political Cover

Ensuring compliance with a WTO ruling often falls to a number of domestic actor(s), each with their own decision-making procedures, levels of engagement in foreign affairs, and constituencies. Which actor(s) have the authority and ability to implement a WTO ruling varies across the policies at issue and the institutional system of the respondent government, but defines the boundaries of what could feasibly constitute 'prompt compliance.' The two primary actors within the realm of trade are the executive branch (and various administrative agencies, regulatory bodies, or departments therein) and the legislature, although the judiciary and subnational political entities in federal systems (and the EU) sometimes play critical roles.

In the U.S., for example, legislative action is required to cure statutes found in breach of WTO rules, while the USTR and relevant agencies must consult with the appropriate congressional committees and follow other mandated steps in order to modify or rescind an administrative agency regulation or practice. In contrast, the Department of Commerce and U.S. International Trade Commission are solely responsible for implementing decisions on trade remedies (safeguards, antidumping, and countervailing duty proceedings).⁵

Theories of 'veto players' suggest that the speed and success of policy making across a wide range of issue areas depends on the number of actors whose consent is needed to implement a change (Brewster and Chilton 2014; Henisz and Mansfield 2006; König, Tsebelis, and Debus 2010; Mansfield, Milner, and Pevehouse 2007; Tsebelis 2002; Vreeland 2006). This implies that compliance with adverse rulings should be highest where the executive branch has greater unilateral discretion to enact trade policy reforms. Executive agencies tend to have greater capacities to act quickly to implement adverse decisions, partly because

⁵See Uruguay Round Agreements Act (URAA), P.L. 103-465, 108 Stat. 4809 (Dec. 8, 1994); Uruguay Round Agreements, Statement of Administrative Action, H.R. Doc. 103-316, reprinted in 1994 U.S.C.C.A.N. 4040.

they face fewer veto points. In addition, executive or administrative bodies—particularly those tasked exclusively with matters of international trade—have greater incentives to maintain positive foreign relations, while legislators—particularly those within relatively democratic systems—tend to cater to the preferences and interests of their constituents, which may push toward greater protectionism in some areas. Take, for example, the dispute between Japan and the U.S. over the latter’s anti-dumping measure on hot-rolled steel products.⁶ In 2002, the Department of Commerce issued a new final determination and the International Trade Commission definitively terminated the measure in 2010, five years after the implementation deadline. However, the dispute remains ongoing because the WTO ruling also requires amendment of the U.S. Tariff Act, which Congress has yet to act on even though the executive continues to affirm its support for legislative action.⁷

WTO adjudicators—and Appellate Body members in particular—are aware that the legislative process works more slowly than other methods of domestic policy-making, as indicated by the factors upon which arbitrators rely when determining the period of compliance time to give a government.⁸ A number of these arbitrations explicitly note that “implementation achieved through administrative processes generally requires less time than implementing legislation” because “legislative action generally requires the participation of additional institutions (typically at least the Legislative Branch—likely to have slower, more deliberative processes—possibly in conjunction with the Executive Branch as well).”⁹

Political cover is not useful for all types of trade measures, in that its utility is conditional on the domestic political actors responsible for enacting reforms. The executive—and the department responsible for international trade—does not always or necessarily benefit from

⁶Appellate Body Report, *United States—Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001.

⁷Status Report by the United States, Addendum, *United States—Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/15/Add.148, 9 April 2015.

⁸WTO arbitrators appointed to determine a reasonable period of time (RPT) for compliance (typically an Appellate Body member) take into account whether curing the violation will require legislative action, as this will likely necessitate a longer period of time.

⁹Award of the Arbitrator, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts (Article 21.3(c) Arbitration)*, WT/DS269/13, WT286/15, 20 February 2006, para. 67.

greater legal validation to push through changes completely within its discretion. Firstly, the general public simply pays less attention to steps taken to cure an executive agency's investigation or determination and thus political cover proves less useful in such instances, although there are notable exceptions. For example, when subsidies or anti-dumping duties involve an industry with particularly strong lobbying power or relate to a politically salient sector, public coverage of the WTO's ruling can be extensive.¹⁰

Secondly, given that implementation can often be achieved within one department or agency, the number of discrete elements of the regulation or practice in need of reform should not have a discernible effect on the timing of compliance. On the other hand, when the executive must work through and with the legislature to implement a ruling, each deficient element of a statute (or multiple laws) is subject to the more deliberative legislative process. For these reasons, each discrete non-breach finding—particularly if a government must enact difficult or controversial reforms—provides the executive branch with something to waive before domestic audiences and legislators as evidence that they vigorously defended domestic interests and indeed even prevailed on some issues.

To summarize, the validation provided within a mixed WTO ruling political cover should be useful for the executive when legislative action is needed to bring domestic measures in line with international trade law. It should be less useful when the executive can bring the country into compliance unilaterally. Greater validation of a trade measure should increase the probability and speed of compliance when the executive must work with and through the legislature to reform impugned laws. The following section briefly describes the compliance phase of dispute settlement within the WTO before outlining the data and methods used to evaluate these expectations.

¹⁰For example, there has been considerable coverage of the U.S. trade conflict with China over solar equipment and the Department of Commerce's imposition of antidumping duties, given extensive disagreement over the benefits of manufacturing solar panels domestically. See Diane Cardwell, "U.S. Imposes Steep Tariffs on Chinese Solar Panels," *The New York Times*, 16 December 2014.

6.2 Empirical Strategy

Are governments more likely to comply with a WTO ruling and cure breaches faster when fewer elements of a law or regulatory mechanism require reform? Does validation of some aspects of a trade measure matter equally for all types of policy reforms? This section addresses these questions by first describing the measure used to proxy the outcomes of interest—dispute resolution and time-to-compliance—and briefly re-introduces one of the explanatory variables of interest discussed in the previous chapter—ruling validation. It then turns the strategy used to evaluate the chapter’s primary argument and discusses results.

6.2.1 Compliance Outcomes

The compliance phase of the WTO’s dispute resolution process begins immediately following the circulation and adoption by the Dispute Settlement Body (DSB) of a ruling. Within thirty days, the losing government must report to the DSB on whether it intends to implement the ruling and the actions it has taken to comply. In many disputes, immediate compliance (within the thirty day period) is impracticable given that implementation may require extensive restructuring of a regulatory system or the passage of controversial legislation.¹¹ For this reason, a government often is afforded a reasonable period of time (RPT) to enact the necessary reforms.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) provides a number of alternative methods to determine the RPT, though it encourages and parties appear to prefer negotiation, with mutual agreement reached for more than half of the disputes (67.6%). If the parties cannot reach agreement on the RPT, the time frame is determined through binding arbitration, which has occurred in twenty-seven disputes

¹¹Governments have notified implementation within thirty days of report adoption in a mere fourteen disputes (11.2%). The following analysis covers 141 total disputes, with the unit of analysis at the dispute- and not report-level to avoid artificially inflating the data by counting all disputing dyads. Although disputes are initiated by different parties at different times, the timeline applies uniformly to all disputing parties once it moves to the compliance stage.

(24.3%).¹² An Appellate Body member is typically appointed as the arbitrator, with nearly three-quarters of RPT arbitrations decided by a sitting member and the remainder decided by a member who had just finished his/her term.¹³ In terms of length of the RPT, it varies only slightly across types of disputes and methods of determination.¹⁴ The average RPT determined by arbitrators stands at 11.38 months, which is slightly higher than the average negotiated RPT (10.74 months).¹⁵

A losing party is considered in ‘breach’ of its WTO obligations and liable to be subject to retaliatory concessions only if it fails to comply before the expiration of the RPT. Notably, governments can claim that they are in compliance with a ruling after making minimal—and perhaps insufficient—reforms to the challenged policy or measure. The increasing tendency of governments to do so—either strategically or due to ambiguity concerning what implementation requires—has led to a rise in so-called ‘compliance proceedings.’ Complainant governments initiate these proceedings to challenge alleged implementation of a ruling when they view it as insufficient in some respect. Compliance proceedings effectively delay the date of dispute resolution for several years, with some even suggesting that governments use deficient implementation to extend the time during which they can retain WTO-inconsistent measures without the added costs of authorized trade retaliation (Brewster 2011; Horlick and Coleman 2007). Compliance proceedings have been initiated for nearly a quarter (23.2%) of disputes requiring implementation, a little over half of which were subsequently appealed.

¹²In nine disputes, parties relied on the RPT stipulated by the panel, as provided for within the Agreement on Subsidies and Countervailing Measures (SCM). See SCM, Article 4.7. The RPT can also be the time proposed by the respondent government, if approved by the DSB, although this option has never been used successfully. See DSU, Article 21.

¹³One arbitrator is appointed by agreement within ten days; if parties are unable to agree, one is appointed by the WTO Director General, which has occurred in nearly 45% of the cases submitted for RPT arbitration.

¹⁴For the nine SCM disputes, panels consistently have specified an RPT of either three or six months, with one exception. Panel Report, *United States—Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/R, 8 October 1999.

¹⁵While the DSU provides a guideline of fifteen months for an arbitrated RPT, this has been treated as the maximum period and not the default. There are three notable outliers in terms of average RPT, due to subsequent agreements to extend the compliance deadline. In *US—Hot Rolled Steel*, the final period was 47.27 months (nearly four years); 41.9 months in *US—Section 211 Appropriations Act*; and 40.33 months in *EC—Biotech Products*.

Not surprisingly then, these disputes take on average twice as many days to reach resolution compared to those for which compliance panels are not requested.

Assessments of compliance with WTO rulings tends to be fairly positive, particularly when this record is compared to other state-to-state dispute settlement systems (Davey 2009; Ginsburg and McAdams 2004). Yet if one examines the quality and timing of dispute resolution, the record becomes a bit murkier. As discussed previously, the compliance phase can take up to several years and involve various proceedings still considered part of the dispute settlement process. More critically, the parties can negotiate a resolution to the dispute at any point during these proceedings in order to achieve partial—but still acceptable—compliance. In other words, WTO disputes can and often are concluded in ways that do not always result in the offending measure being withdrawn. While recognizing that this may problematize the concept of second-order compliance within the WTO, this article focuses on two outcome variables of interest related to the broader concept of dispute resolution. The first is whether the dispute is considered resolved—effectively removed from the DSB’s agenda—or whether it is considered ongoing. The second consists of the amount of time (in days) it takes for the dispute to be considered resolved (time-to-compliance).

Within the first category of dispute outcomes (RESOLVED), ‘compliance’ is achieved when a government notifies the WTO that it has fully implemented a ruling and this is not contested by the complaining party.¹⁶ While public notification of implementation by the losing party—and implicit or even explicit acquiescence by the winning party—does not always capture perfect compliance with a judgment, it does provide a close approximation given the winning party’s incentives to see full compliance following a lengthy and costly litigation. A little more than half of the WTO empaneled disputes between 1995 and 2014

¹⁶A dispute is coded as resulting in compliance when the government notifies full implementation of the ruling, which is not challenged or questioned by the complaining state(s) within the DSB meeting during which implementation is notified or any subsequent DSB meetings (up to December 2014), and/or when implementation is not challenged subsequently through compliance proceedings. In a few cases following notification of implementation, the complaining party expressed dissatisfaction during a DSB meeting with the steps taken but did not subsequently insist on DSB surveillance or initiate compliance proceedings. While these cases represent a form of accepted breach, they are still coded as ongoing given that compliance proceedings can and may be initiated at any point in time.

have been resolved through compliance (Table 6.1).

Table 6.1: Status of WTO Disputes, as of December 31, 2014. Figures calculated using only those disputes for which implementation was required (n=125).

Outcome Type	% Non-Compliant Disputes	Average Time of Non-Compliance (days)
Compliance (implicit or explicit acceptance)	55.2	387.2
Mutually Acceptable Solution	20.8	1452
Ongoing	23.2	2459
New Dispute	0.8	904

This type of outcome differs from a Mutually Accepted Solution (MAS), which nonetheless indicates that the dispute has been RESOLVED in that all parties found the negotiated solution acceptable. However, quite frequently the agreed-upon solution does not conform fully to the WTO ruling.¹⁷ The agreement reached in October 2014 between the United States and Brazil to terminate their decade-long dispute over American subsidies to domestic cotton growers is a good example. Although the U.S. modified the previous subsidy program within the 2014 Farm Bill, it did not eliminate support to cotton farmers and instead agreed to make a one-time contribution of \$300 million to the Brazil Cotton Institute and provide other technical assistance and capacity building activities.¹⁸ Parties reached a MAS in slightly less than a quarter of all disputes, roughly the same number of disputes that were ongoing by the end of 2014 (Table 6.1). Disputes coded as ongoing may also fall into one of a number of categories: under surveillance within the DSB, in the compliance proceeding or retaliatory concessions phases, or subject to continuing bilateral negotiations.

Out of the 125 disputes requiring compliance, nearly a quarter (twenty-nine disputes

¹⁷Mutually agreed solutions likely represent instances in which the WTO ruling facilitated dispute resolution by changing the bargaining dynamics, positions, or information asymmetries within subsequent negotiations (Ginsburg and McAdams 2004).

¹⁸“U.S.-Brazil cotton deal perpetuates an unhealthy status quo of subsidies,” *The Washington Post*, 7 October 2014; Office of the United States Trade Representative, “United States and Brazil Reach Agreement to End WTO Cotton Dispute,” Press Release, 1 October 2014, available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/October/United-States-and-Brazil-Reach-Agreement-to-End-WTO-Cotton-Dispute>.

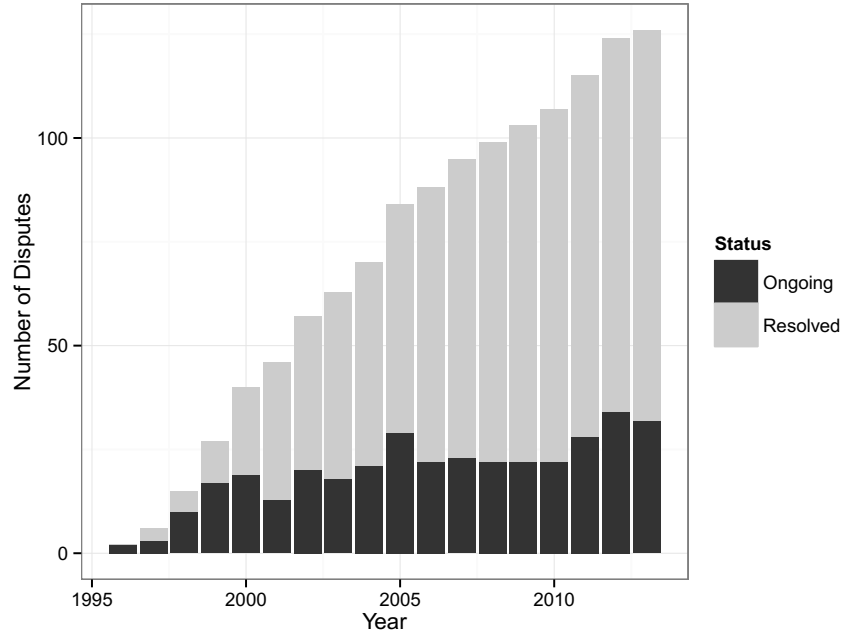


Figure 6.1: Dispute Status, by Year. Figures calculated using only those disputes for which implementation was required (n=125).

in total) remain ongoing or unresolved as of December 2014. In other words, over three quarters of disputes submitted to the WTO’s adjudicative bodies have been resolved in a manner mutually satisfying to all parties. Notably, the percentage of disputes considered ongoing in a given year has not fluctuated considerably since 2002, despite the fact that the total number of empaneled disputes has steadily increased over time (see Figure 6.1).

The second type of outcome—time-to-compliance—is equally important in terms of the quality of implementation and the discriminatory effects of continued breach. TIME-TO-COMPLIANCE is calculated as the number of days from the date of final report adoption to the date a dispute is coded as RESOLVED. Although the interim review phase at the panel stage and appellate proceedings both provide some indication of potential reforms, it is not until the final ruling is circulated that ‘official notice’ of the steps needed to bring delinquent measures into compliance with WTO obligations begins. Date of resolution is based on the date provided by the losing government in its compliance report, when notifying implementation or a MAS. In cases where compliance is contested, the compliance date is

coded as the date of final and unchallenged notification of implementation. A dispute is considered ongoing and coded as right-censored if compliance was not established by December 31, 2014.

For resolved disputes, TIME-TO-COMPLIANCE has ranged from as few as twenty-seven days to as long as 15.2 years in the case of the *EC—Bananas III* dispute,¹⁹ with the average closer to two years (679 days). Notably, the average time-to-compliance for disputes ultimately resolved through mutual agreement is nearly four times as long as that for those concluded through implementation of the WTO ruling (Table 6.1). Trade conflicts ending in MAS include some of the WTO’s most intractable cases, such as the above-mentioned Bananas dispute and the challenge to the EU’s import restrictions on hormone-treated beef.²⁰ The longest unresolved dispute—*United States—Section 110(5) of US Copyright Act*²¹—has been ongoing for 14.6 years and under DSB surveillance since 2004, although the average for ongoing disputes by the end of 2014 is less than half that (6.5 years). Mean TIME-TO-COMPLIANCE remained fairly constant for disputes resolved during the first decade of the system’s operation, but increased noticeably when parties to the *EC—Hormones* dispute reached a MAS in 2009, and again in 2012 with settlement of the Bananas dispute.

6.2.2 Political Cover and Ruling Validation

All adverse WTO rulings provide the executive with the political cover of a binding legal judgment issued by a third-party. Yet rulings vary in the extent to which they provide discrete elements of a trade measure with a legal validation, in that the DSM upholds parts of the challenged measure as conforming to a country’s trade obligations. I use the measure described within the previous chapter to measure the degree of validation afforded within a ruling. A dispute’s VALIDATION score thus measures the proportion of total findings

¹⁹Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997.

²⁰The parties notified a temporary MAS in 2009 (extended in 2013) that suspended retaliatory tariffs in exchange for duty-free import quotas for high-quality beef.

²¹Panel Report, *United States—Section 110(5) of US Copyright Act*, WT/DS160/R, 27 July 2000.

that held that a government's trade laws or practices do *not* violate WTO rules. The VALIDATION score thus represents the ultimate ruling on the dispute—by how much or how little a government 'lost' the case.

Notably the panel and/or Appellate Body found the defending country in breach of its trade obligations for every single claim raised in thirty-four disputes, resulting in a VALIDATION score of zero. The strength of the legal case supporting each claim and the extent to which the challenged law clearly violated the rules cited likely explain the outcome for a number of these disputes. Moreover, twenty of these were decided within the first five years of the WTO's existence (pre-2001). During the early years of the new dispute settlement system, parties raised fewer claims and cited fewer agreement provisions within their complaints. Over the years, and particularly for disputes involving trade remedy proceedings, governments have raised more discrete claims and cited more treaty provisions within their challenges. In addition, nearly half of these disputes involved national treatment or quantitative restriction claims under the General Agreement on Tariffs and Trade (GATT), which typically entail fewer total findings compared to those implicating trade remedies.

In these slam dunk cases, no validation can be given without inciting charges of blatant bias. Moreover, no validation needs to be given as these disputes likely represent those cases where the executive allowed the dispute to reach the panel stage due to strong domestic pressures against making voluntary concessions. The average time-to-compliance for these disputes is less than two years, nearly half as long as the average for disputes that afforded some political cover. In fact, save in two instances,²² these disputes are coded as resolved, suggesting that the executive was looking for the political cover of an adverse legal ruling to implement trade reforms. For these reasons, I expect the factors that influence compliance in these cases to differ from those present in cases where *some* validation is given, however little.

²²No validation was provided in two ongoing disputes—*EC—Export Subsidies on Sugar* and *US—Shrimp and Sawblades*—although the former remains in a continuing state of accepted breach.

6.2.3 Research Design

To evaluate the relationship between a ruling's VALIDATION score and the likelihood and speed of compliance, I rely on the measures described above. Because I expect political cover will be more useful for disputes that require legislative action, I interact VALIDATION with a binary variable indicating whether at least one of the measure(s) found to contravene WTO rules requires action by the legislature to bring it into compliance (LEGISLATION).²³ Because disputes in which the DSM rules against the defendant government on all claims raised are distinct in terms of the legal strength of claims and compliance dynamics, I include a dummy variable for whether any (greater than zero) legal validation was provided within the final ruling (ANY VALIDATION). I also separately estimate the effect of legal validation on the subset of non-compliant disputes that resulted in at least one non-violation finding, excluding those for which VALIDATION equals zero.

In order to adjust for confounders, I include a number of variables likely to influence overall levels of legal validation in addition to the probability and timing of compliance. The most obvious potential confounder is the strength and market size of the parties to the dispute. Previous studies on the WTO have found that economically powerful countries are better able to use the dispute settlement system to their advantage, with wealth providing a rough proxy for legal capacity as well Busch and Reinhardt 2003a; Davis and Bermeo 2009; Guzman and Simmons 2002, 2005. Dispute panels also tend to reject a higher percentage of claims brought against wealthier defendants within ultimately adverse rulings. Yet wealthier governments may also be less willing to comply (quickly), particularly if the complaining party is a much smaller economy, as the threat of retaliation will not be seen as particularly detrimental for large economies. To capture the economic strength of each party, I include

²³A dispute is coded as requiring legislative action when a report's *Conclusions* section rules against at least one aspect of a trade measure that was enacted by a country's legislature. This is determined by examining the report's description of challenged measure(s), and then identifying those aspects of a measure that the panel and/or Appellate Body found to violate WTO rules. For challenges against EU trade measures, a dispute is coded as requiring legislative action only when approval by the European Parliament is required. In unreported analyses, I recode disputes necessitating the *opinion* of the European Parliament on new regulations as requiring legislative action.

separate measures for the GDP per capita (logged) of the respondent and complainant(s) at the time the ruling was issued (RESPONDENT GDP and COMPLAINANT GDP).²⁴

I also account for disputes in which either the U.S. or the EU were the respondent (US/EU RESPONDENT). We would expect the DSM to afford the two most frequent users of the system with the largest shares of world trade greater validation given that their support is critical to the system's operation (Elsig and Pollack 2012; Steinberg 2004). As frequent traders, we might expect these two countries to be particularly invested in the continued effectiveness of the WTO and its dispute settlement system, and thus may be relatively more incentivized to promptly implement its rulings. Given their frequent use of the system, prompt implementation may be relatively easier (in terms of capacity and experience). Yet each is party to a number of disputes that have dragged on for years, which suggests that even after controlling for wealth, they may be *less* incentivized to promptly comply given that their market size makes efficient breach of WTO rules more palatable and less costly.

In terms of dispute-level confounders, I include an indicator variable for whether the dispute reached the Appellate Body (APPEALED), as a ruling issued by the Appellate Body may exert slightly greater compliance pressures on government officials given that it emanates from an independent, standing, 'court-like' body as opposed to *ad hoc* panels.

The issue area of a dispute likely influences both a ruling's degree of legal validation and the probability of compliance. To account for this, I include an indicator variable for rulings under one or more POLITICALLY SENSITIVE AGREEMENTS.²⁵ The WTO's judicial bodies tend to reject fewer claims under these agreements. Additionally, these agreements seek to

²⁴Data for GDP per capita was obtained from the World Bank's World Development Indicators database, available at: wdi.worldbank.org. For disputes involving multiple complainants, this variable measures the sum of all individual complainants' GDPs per capita. Disputes involving multiple complainants include those for which a number of countries filed a request for consultations together (and thus were assigned the same DS number) as well as those consolidated (with different DS numbers assigned). For disputes involving the European Union, this variable sums the GDP per capita for all EU member states.

²⁵Politically sensitive agreement disputes are coded as those rulings containing findings under one or more of the following agreements: the Agreement on Agriculture (AA), the Agreement on Textiles and Clothing (ATC), or the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

regulate internal policies traditionally viewed as core elements of domestic sovereignty and sectors with strong domestic interest groups lobbying for continued protectionism, both of which should make prompt compliance significantly more difficult (Davis 2003; Eagleton-Pierce 2013; Guzman 2004; Letsas 2006; Shany 2006). I similarly include an indicator variable for disputes involving TRADE REMEDIES.²⁶ Trade remedy cases often involve complex protectionist measures, in contrast to the all-or-nothing character of tariffs or quotas, and may require extra domestic effort and time to reform (Guzman and Simmons 2002). Moreover, trade remedy cases often entail more total findings than non-trade remedy cases and typically challenge a national-level quasi-judicial proceeding such as an administrative agency’s investigation into whether certain facts exist (i.e. dumping, subsidization, or injury to a specific industry).

6.3 Results

6.3.1 Discussion

A number of factors likely influence the probability that a WTO dispute will be satisfactorily resolved. I have argued above that resolution is more likely when the DSM validates more aspects of a trade measure but that this matters more for cases necessitating statutory reforms. If this is true, the probability of resolution should increase along with greater validation for those disputes that require legislative action. To evaluate this expectation, I first model the relationship between validation—conditional on legislative action—and the probability of compliance with a logistic regression, using the binary outcome variable of RESOLVED DISPUTE. I include all potential confounders discussed in Section 3.3. As seen within Figure 6.2, the marginal effect of legal validation on the probability of compliance is slightly higher for cases that involve legislative action than for those that can be implemented via executive or administrative action alone.

²⁶Trade remedy disputes are coded as those for which a finding was made within the final report under the Agreement on Subsidies and Countervailing Measures (SCM), the Anti-Dumping Agreement (ADA), or the Agreement on Safeguards (SA).

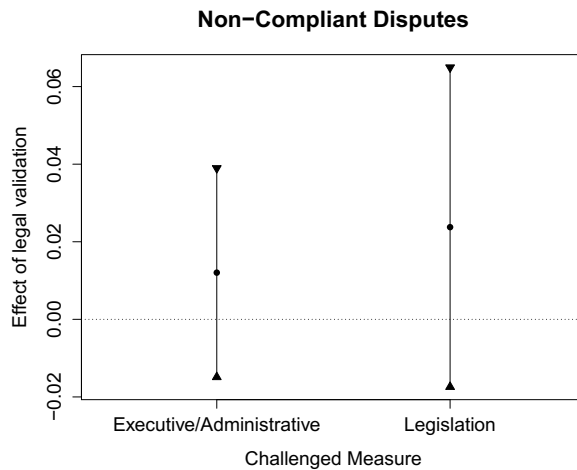


Figure 6.2: Interaction between Validation and Challenged Measure on probability of dispute compliance or resolution. The marginal effect reported is the logged odds of resolution given a one-unit increase in legal validation, with the bar depicting 95% confidence intervals. See Table D.2 for standard regression tables.

To be sure, the greater likelihood of compliance is small and only reaches significance for the sample of rulings that provided any—even if minimal—support for some aspects of a trade policy (i.e. excluding those for which VALIDATION equals zero. See Figure 6.3). In other words, conditional on at least one non-breach finding, greater validation slightly increases the probability of dispute resolution when compliance requires legislative action (see Table D.2 for regression tables).

To estimate the relationship between validation—conditional on legislative action—and total number of days until compliance, I use an event history model, specifically a Cox proportional hazards model for duration outcomes.²⁷ Ruling validation—interacted with legislative involvement—is assumed to influence compliance through the hazard rate—the instantaneous probability that resolution occurs given that it has not yet occurred. The estimated coefficients are interpretable as hazard ratios, or the proportional increase or

²⁷The Cox proportional hazards model is a semi-parametric model that permits evaluation of the influence of a variable of interest on the rate of a particular event happening. It easily handles censoring in the outcome variable, of which there is a non-negligible amount in WTO dispute compliance (Box-Steffensmeier and Jones 2004). Of the 125 Non-Compliant Disputes, twenty-nine are ongoing and considered censored observations as of December 31, 2014.

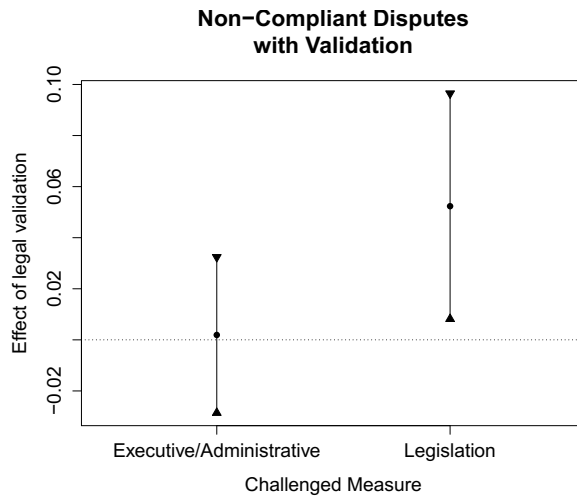


Figure 6.3: Interaction between Validation and Challenged Measure on probability of dispute compliance or resolution. The marginal effect reported is the logged odds of resolution given a one-unit increase in legal validation, with the bar depicting 95% confidence intervals. See Table D.2 for standard regression tables.

decrease in the hazard rate in response to a one unit change in the covariate. All models include robust standard errors, clustered on the respondent country.

Figure 6.4 depicts the simulated marginal effects of ruling validation on time-to-compliance for disputes curable through executive action alone and those requiring legislative action.²⁸ The figure plots the quantity of interest (the marginal effect) as well as its visually-weighted probability distribution, with darker points representing areas of the distribution with higher probability. The edges of the distribution reflect the central 95% confidence interval. Where both the upper and lower bounds of the confidence interval fall above (or below) the zero line, validation has a statistically significant marginal effect on time-to-compliance. The marginal effects are interpretable as hazard ratios, with values greater than one representing increases in the hazard rate, or the tendency for compliance to occur. Conversely, values less than one represent decreases in the tendency for compliance to occur.

When controlling for ANY VALIDATION, a 1% increase in ruling validation is associated

²⁸On the utility of post-estimation simulation techniques to estimate the uncertainty of quantities of interest, in this case the marginal effect of interaction terms, see King, Tomz, and Wittenberg (2000). Simulated marginal effects were calculated and plotted using the simPH package in R (Gandrud 2014).

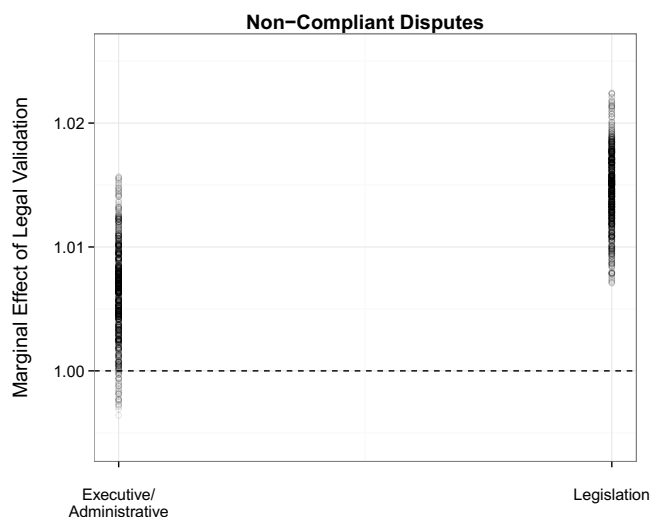


Figure 6.4: Simulated marginal effect of validation on time-to-compliance. The marginal effect reported is the hazard ratio, or the increase in instantaneous probability of compliance as ruling validation increases by one percent. Hazard ratios greater than one correspond to an increase in the tendency for compliance to occur. The visually-weighted probability distribution, with darker points representing areas of the distribution with higher probability, reflect the central 95% confidence interval. See Table D.3 for standard regression results.

with a slightly shorter period of time-to-compliance when the dispute requires legislative action (Figure 6.4). This marginal effect is slightly stronger when conditioning on some (greater than zero) validation being afforded (Figure 6.5). While this relationship is substantively small for both dispute samples, it should be noted that it reflects a mere one-unit (one percent) increase in the proportion of non-breach findings, with the difference in validation between ordered disputes usually consisting of around a 3% increase.²⁹ While a number of factors likely facilitate prompt implementation of WTO rulings, these findings do suggest that the degree of validation provided executives who need to work through the legislature is a significant one.

²⁹For example, the smallest percentage of non-breach findings in a dispute necessitating legislative action (aside from zero) was 11.8% (*Thailand—Cigarettes (Philippines)*), with the next highest coded as 15% of total findings. Although the final adverse rulings in the first dispute were made largely against executive agency actions in assessing customs valuation and imposing taxes, implementation of the ruling still required changes in, *inter alia*, Thailand’s Revenue Code and Tobacco Act. See *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011.

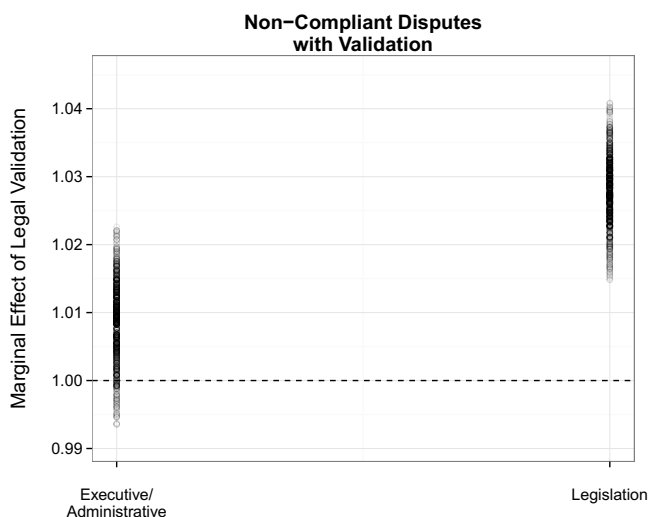


Figure 6.5: Simulated marginal effect of validation on time-to-compliance. The marginal effect reported is the hazard ratio, or the increase in instantaneous probability of compliance as ruling validation increases by one percent. Hazard ratios greater than one correspond to an increase in the tendency for compliance to occur. The visually-weighted probability distribution, with darker points representing areas of the distribution with higher probability, reflect the central 95% confidence interval. See Table D.3 for standard regression results.

6.3.2 Robustness Checks

Given the small number of empaneled WTO disputes, the above analyses included only the most obvious confounders. To ensure that the small but significant relationship found between ruling validation and time-to-compliance is not driven solely by model specification, this section considers a number of checks and alternative variables.

First, a number of studies on WTO dispute settlement control for the parties' relative power in place of or in addition to absolute economic power (Brewster 2013; Elsig and Stucki 2012; Guzman and Simmons 2002). Replacing GDP per capita with a measure of the complainant country's retaliatory power (the difference between the complainant's and respondent's GDP per capita) does not alter the estimated marginal effect of validation on time-to-compliance. Similarly, controlling for trade dependency in addition to GDP per capita does not significantly change results.³⁰

³⁰Trade dependency is proxied with the logged value of respondent's exports to the complainant state(s).

Second, we might expect wealthier countries to possess greater regulatory capacity, which would facilitate swifter compliance. Moreover, WTO adjudicators are likely aware of the capacity of governments to implement efficiently their rulings. Replacing the respondent's wealth with direct measures of government effectiveness and regulatory quality increases slightly the positive marginal effect of validation on time-to-compliance and the relationship remains significant.³¹

Third, disputes that involve more than one complaining party may put greater pressure on the respondent state to comply in addition to the pressure exerted by their combined wealth and retaliatory capacity. While a greater number of complainants may increase the external pressures to comply, it could also make dispute resolution more difficult to achieve since the losing party must take compliance steps that satisfy more than one country. Similarly, some studies have found that high levels of third party participation signal the preferences and concern of the broader membership and thus may influence both the bargaining dynamics between disputing parties and the legal ruling itself. However, including an indicator for whether the dispute involved more than one complainant or controlling for the number of third parties to a dispute does not significantly alter the main findings.

Fourth, again in terms of dispute-level characteristics, it may be more appropriate to proxy disputes concerning particularly sensitive sectors with a direct measure of the good or industry implicated. Existing studies have found that the agricultural sector is very effective at organizing politically, in order to lobby for protectionism and publicize a dispute (Bernauer 2003; Davis 2003; Davis and Shirato 2007; Eagleton-Pierce 2013). The DSM could afford disputes involving agriculture greater validation in order to help overcome domestic opposition to freer trade. Simultaneously, agricultural disputes may also tend to last longer

Data for Export Trade Value (in thousands of USD) was obtained from the World Bank's World Integrated Trade Solution database, available at: wits.worldbank.org.

³¹Data for regulatory quality and government effectiveness obtained from the World Bank's Worldwide Governance Indicators (WGI) project. Government effectiveness measures perceptions of, *inter alia*, the quality of policy formulation and implementation. Regulatory quality captures citizens' perceptions of the government's ability to formulate and implement policies that promote private sector development. Data and detailed description of the coding and aggregation methodology can be found at: www.govindicators.org.

than manufacturing disputes, due to higher compliance obstacles. To this end, I replace POLITICALLY SENSITIVE AGREEMENTS with an indicator variable for whether the dispute involved the agricultural sector.³² When I re-estimate the models, the substantive value and significance of the marginal effect of legal validation remains largely unchanged.

Fifth, the line of zeroing cases against the United States following the Appellate Body's ruling in *United States—Softwood Lumber V* have proven particularly intractable and controversial.³³ Four of these nine disputes ruled against the U.S. on all claims (no validation),³⁴ and none of the judgments required legislative action to cure the violation. The unique nature of this line of cases may be driving the estimated marginal effect of validation. While the U.S. complied with a few of the zeroing rulings relatively quickly, others remain unresolved to date due to American recalcitrance to abandon the methodology. To address this concern, I re-estimate all models excluding the nine zeroing disputes against the U.S. following *United States—Softwood Lumber V*. Doing so slightly increases the size and significance of the relationship between validation and speed of compliance.

Sixth, this chapter has adopted a binary conceptualization of veto point in order to evaluate whether validation is more useful when trade policy reforms require legislative action. In doing so, it has assumed that legislatures are equally as significant a check across different separation of powers systems. Yet a number of studies emphasize that presidential systems, as compared to parliamentary or hybrid ones, create different behavioral incentives for actors in each branch. In particular, policy change is expected to be slower and less decisive under presidentialism than other systems, all else being equal (Cheibub, Przeworski, and Saiegh 2004; Cox and McCubbins 2001). Within parliamentary or even hybrid systems,

³²This is coded based on the product or industry at issue identified by the WTO and whether it qualifies for coverage under the WTO's Agriculture Agreement (Annex 1). This definition excludes, for instance, fish and forestry products, but includes various degrees of processing for different commodities.

³³*United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 31 August 2004.

³⁴In five of these zeroing cases, the U.S. did not contest the claims or present counter-arguments. The jurisprudence became so settled around the use of zeroing in anti-dumping investigations that, absent counter-arguments by the U.S., panels only needed to decide whether the complaining party had provided sufficient evidence to demonstrate that the U.S. had zeroed in that particular instance.

greater policy branch coordination may make it easier for the executive to achieve statutory reforms to implement a WTO ruling. Controlling for whether a government is a presidential system, however, does not change the marginal effect of validation on time-to-compliance. Similarly, directly controlling for the number of checks or veto players does not eliminate and in fact slightly increases legal validation's relationship with time-to-compliance for disputes requiring legislative action.³⁵

Finally, the findings could be sensitive to the coding of TIME-TO-COMPLIANCE. As discussed in Section 3.1, it is only after the RPT expires that the additional pressures of DSB surveillance, compliance proceedings, and the looming threat of retaliation begin, factors that may alter the dynamics of compliance. To ensure that results are not driven by the few disputes that never reach the 'in breach' stage, I re-calculate TIME-TO-COMPLIANCE as the number of days from the date of RPT expiration. Replacing the outcome variable with this alternative coding slightly reduces the sample size but does not significantly alter the marginal effect legal validation on time-to-compliance, conditional on at least one non-breach finding (Table D.3, model (4) and Figure D.1).

6.4 Political Cover and Patents

Do executive officials actually use the validation provided by mixed WTO rulings to push through controversial legislative reforms? This section illustrates this logic by tracing implementation within the Parliament of Canada of two adverse rulings on intellectual property and patents. Intellectual property rights continue to be a controversial topic within the WTO, particularly regarding patents on pharmaceutical drugs and the ability of generic drug manufacturers to provide low-cost alternatives to name-brand medications. In fact, the only treaty amendment agreed upon by WTO members concerned licensing exceptions

³⁵Data for Political Checks was obtained from the World Bank's Database of Political Institutions (Beck et al. 2001).

for generic drugs.³⁶

Since the WTO's inception, ten disputes concerning patents have been initiated although only three reached the panel stage. The U.S. and the EU separately brought two of these against Canada in 1999, challenging different aspects of its patent regime in an effort to push the federal government to increase protection provided brand-name drug companies. Both cases drew considerable public attention and sparked exceptional outrage, with some arguing that the WTO was permitting multinational pharmaceutical companies to take policy making authority away from Canadians and their government. Implementation of the adverse findings of both disputes occurred simultaneously through legislative amendment, although the executive initially brought Canada into temporary compliance with the EU's challenge through regulatory action.

The EU's challenge focused on two provisions within Canada's Patent Act concerning stockpiling and regulatory review exceptions.³⁷ Canadian government officials were understandably concerned, as the provisions were important ones and they had accepted the WTO Agreement with the understanding that the regulatory review exception in particular was consistent with TRIPs.³⁸ Before the dispute panel, Canada conceded that the exceptions violated WTO rules but argued that they fell within the scope of permissible 'limited exceptions' to exclusive patent rights.

The outcome of the dispute was by no means certain, and the panel leveraged its in-

³⁶This amendment was adopted in 2005 but is not currently in effect, with two thirds of the WTO membership yet to formally deposit their instrument of acceptance. General Council, *Amendment of the TRIPS Agreement: Decision of 6 December 2005* (8 December 2005) WT/L/641.

³⁷Prior to a patent's expiration, generic drug manufacturers were permitted to undertake research and development and go through the regulatory process of approval (the 'regulatory review exception'), ensuring that the development regulatory approval process (which could take anywhere from three to six-and-a-half years) was completed during the patent term. Generic companies were also allowed to manufacture and stockpile products six months before patent expiration (the 'stockpiling exception'). Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R, 7 April 2000, paras. 7.1-7.10.

³⁸Department of Foreign Affairs and International Trade (DFAIT), "Agreement Establishing the World Trade Organization, Canadian Statement on Implementation," *Canada Gazette*, Part I, Vol. 128, No. 53 (31 December 1994), pp. 4934-4940. The U.S. also considered that its own regulatory review exception, known as the 'Bolar exemption,' was consistent with TRIPs. 103d Congress, 2d Session, House Document 103-316, 1, 986.

interpretative discretion to afford the Canadian government some leeway in determining how best to manage its patent regime. Moreover, the panel's legal analysis in finding that the regulatory review exception fell within the purview of the limitations clause but that the stockpiling provision did not is a bit difficult to reconcile. The panel found that the stockpiling measure was not limited because it did not impose restrictions on the quantity produced or stockpiled, which abrogated the rights to *make* or *use* the product exclusively during the last six months of the patent term. In contrast, the panel ruled that the regulatory process exception did qualify as limited because it was 'narrowly bounded,' even though the approval process may require substantial amounts of test *production*. In the panel's view, this exception did not curtail the patent owner's exclusive right to make or use the product so long as this production is solely for regulatory purposes. It assumed, then, that no commercial use would be made of these final (test) products, unlike those produced under the stockpiling provision.³⁹

While Canada was "disappointed" that the stockpiling provision had been found in breach of its WTO obligations,⁴⁰ government officials saw the decision as a victory, with the Minister of International Trade, the president of the Canadian Drug Manufacturers Association, and some generic drug manufacturers expressing both relief and satisfaction with the ruling.⁴¹ It provided the Canadian government with the political cover needed domestically to remove the stockpiling provision because it could retain the regulatory process exception, which federal officials and the Canadian generic drug industry saw as the more important of the two challenged provisions.⁴² The executive initially repealed the underlying manufacturing

³⁹Panel Report, *Canada—Pharmaceutical Patents*, paras. 7.34-5, 7.45.

⁴⁰Statement by the representative of Canada, Dispute Settlement Body, Minutes of Meeting held on 25 April 2000, WT/DSB/M/79, para. 13.

⁴¹Sandra Cordon, "Drug Ruling Favours Canada," *Toronto Star* (18 March 2000); Heather Scoffield, "WTO upholds drug patent rule: Decision favors Canadian generic firms in developing copies," *Globe and Mail* (18 March 2000).

⁴²Ian Jack, "WTO ruling boosts generic drug makers: Patent expiry dispute," *National Post* (18 March 2000); Shawn McCarthy, "WTO Upholds Patent Rules for Generic Drugs," *The Globe and Mail* (25 January 2000).

and storage regulations,⁴³ and later amended the Patent Act to achieve full compliance when it implemented the ruling on the second patent dispute.

The central issue of this second challenge to Canada's patent law concerned the applicability of the TRIPs Agreement to patents awarded prior to 1989, under the old patent regime. Canada's law clearly violated its WTO obligations because pre-1989 patents were not guaranteed the full twenty years of protection as clearly required by TRIPs. The DSM was asked to rule on one claim—whether the patent term extension should be retroactive—and on this single issue it provided Canada with no validation but did provide it with the political cover of an adverse ruling by a *legal* body which allowed the government to claim its hands were tied.

Despite the fact that its position within the dispute was not strong and it was unlikely to prevail against the U.S., the government vigorously defended the law, forcing the dispute's empanelment and ultimately appealing the panel's adverse decision. It was easier for Canadian executive officials to litigate a conclusion to the dispute than to voluntarily concede an issue about which the public was so concerned and legislators so divisive. It also made economic sense to litigate for as long as possible so that more American patents would expire before a ruling was issued. For example, Briston-Myers Squibb's patent on the cholesterol-lowering drug Pravachol expired in July 2000. Extending its patent for the full twenty-year term represented a \$110 million benefit for the U.S.-based drug company.⁴⁴ The panel's adverse ruling was issued on 5 May 2000, with Canada's decision to file an appeal effectively ensuring that this patent would expire prior to the dispute's conclusion.⁴⁵

As a result of this ruling and in response to the prior decision on the stockpiling provision, Canada swiftly adopted an *Act to Amend the Patent Act*. In introducing the bill, the

⁴³*Regulations Repealing the Manufacturing and Storage of Patented Medicines Regulations*, SOR/00-373 (28 September 2000).

⁴⁴Heather Scofield, "Patent-drug trade ruling called costly for Canada: Consumers will pay higher prices for longer," *The Globe and Mail* (8 March 2000).

⁴⁵James Baxter, "Drug makers consider lawsuit over patent delay," *The Ottawa Citizen* (20 September 2000).

Minister of Industry explicitly acknowledged that it had one purpose: “to bring Canada’s Patent Act into compliance with two rulings of the World Trade Organization.”⁴⁶ He pointed to the DSM’s validation of the regulatory review exception as critical to Canada’s patent regime and its balance between global patent standards and the needs of consumers, industry, and innovators. He further reassured members of Parliament that the discrete amendments—removing the stockpiling provision and making retroactive the twenty-year patent term—would not affect this balance.

While the proposed legislative amendments were narrow, the underlying issue was contentious with both Senate and House committees hearing testimony from nearly twenty individuals or organizations. In the House debates, a member of the New Democratic Party criticized the bill as a “loss of democracy through the WTO” and presented as if the government did not have a choice “because the WTO is forcing us to do this,” a sentiment echoed by a few other members as well. Others stressed that Canada “may not like all the decisions coming out of the WTO but there is no question that overall we benefit from the stability and clarity the organization provides to world trade.”⁴⁷

Many more echoed the view expressed by the leader of the opposition during the Senate debate, that the amendments needed “little discussion as they are the result of the fact that the World Trade Organization has upheld the challenges to certain features of our Patent Act.”⁴⁸ The bill moved swiftly through the Canadian parliament, taking a little over five months for adoption, with a number of parliamentarians and the Ministry of Industry emphasizing that it dealt solely with implementing Canada’s WTO obligations and nothing more. In pushing for its timely passage, officials from the Ministry of Industry repeatedly stressed that the WTO had validated the regulatory review exception and that this represented a critical victory for the country’s patent regime.

⁴⁶Brian Tobin, Minister of Industry, *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, Issue No. 4, First Session Thirty-seventh Parliament (21 March 2001).

⁴⁷*Debates of the House of Commons (Edited Hansard)*, 37th Parliament, 1st Session, Number 072 (5 June 2001).

⁴⁸*Debates of the Senate (Hansard)*, 1st Session, 37th Parliament, Volume 139, Issue 30 (1 May 2001).

6.5 Conclusion

Studies abound on the politics of trade conflicts in terms of the decision to initiate a dispute and their outcomes, but we know much less about the politics underlying the compliance stage of a legalized dispute settlement process. The few existing studies tend to emphasize rational incentives to abide by rulings or the exogenous costs of non-compliance, approaching the issue from the perspective of the complier. This chapter flipped this perspective in order to shed light on the strategies available to the actors mandating compliance. In particular, it emphasized one way in which an international court can encourage prompt implementation of adverse rulings: by providing the executive—within and through its legal ruling—political cover and legal validation to enact domestic reforms. In doing so, this chapter begins to fill a surprising gap in the extant literature on the WTO, which has paid little attention to the ways in which the Organization’s quasi-judicial bodies seek to facilitate compliance with adopted reports.

Judges seek to avoid blatant acts of breach because such acts erode a court’s authority and may further contribute to public criticism and declining levels of institutional support. This dissertation has documented how the WTO’s DSM has at times provided governments with greater validation in response to shifts in its broader institutional support. Declining levels of political capital and increased criticism by the membership can and under certain conditions does act as a type of political constraint on the WTO’s exercise of authority. Dispute panelists and to a limited extent Appellate Body members respond in this way out of concern that dips in their political capital might encourage or provide justifications for prolonged and willful noncompliance. In this way, members of the WTO’s quasi-judicial body are effectively engaging in ‘court-building,’ similar to many national high courts during their formative years.

International courts can facilitate compliance with their rulings by providing political cover to domestic actors. To a certain extent, all legal decisions allow a government actor to claim that their hands are tied. In contrast to existing studies that have focused on

whether such rulings uniformly facilitate dispute settlement, this chapter has argued that international judicial bodies can provide different levels of domestic cover by validating certain aspects of a challenged law. One way in which the WTO does so is through discrete—but politically useful—non-breach findings within an ultimately adverse ruling. Of course, there are a number of instances in which the the legal or factual basis for a claim raised was so blatantly lacking that the DSM had no choice but to rule that there was no breach of WTO law. Conversely in other instances, a trade measure so clearly violated WTO rules that the DSM could not and did not need to afford the defending government any legal validation. As discussed above, compliance with these slam dunk cases is surprisingly quick, arguably because they represent disputes the executive allowed to reach the panel stage due to its unwillingness to be seen as making voluntary concessions. For the vast majority of cases, however, the DSM possesses considerable discretion to decide where on the broad-narrow spectrum to place a ruling.

This chapter has provided evidence that political cover and legal validation matters more for some types of trade measures than for others. Specifically, it found that greater validation is useful for the executive branch when legislative action is needed to conform trade measures to WTO rules and is correlated with swifter compliance in these instances. However, when the executive branch is able to implement a WTO ruling unilaterally—encountering relatively fewer hurdles domestically—the degree of validation provided has no discernible influence on the probability or speed of compliance. To a certain extent this is not surprising, given that existing studies tend to emphasize the efficiency of executive policy making and the relatively lumbering albeit deliberative nature of legislative policy making. Yet this chapter provides new insight into whether and how international institutions and law impact the domestic level by identifying the conditions under which national authorities more readily ‘take up’ their international trade obligations and alter domestic policies.

This chapter’s findings have broader implications in that they suggest that national authorities may be able to adopt strategies during the implementation phase of dispute settlement to limit the reach of WTO rulings while still effectively resolving the dispute.

Although the DSM can suggest ways to implement a decision, national officials possess absolute discretion in deciding how to respond to the ruling. This provides domestic political elites with the ability to limit the potential reach and minimize the effect of an adverse decision. Because the primary purpose of the WTO's dispute settlement system is to mitigate trade conflicts, this article focused on resolution of the dispute as the outcome of interest which tells us little about the extent to which WTO rulings have a significant policy impact domestically. While this chapter uncovered important insights regarding how different national authorities influence the probability and speed of dispute resolution, a pressing line for further inquiry is whether legislatures and executives adopt different strategies to mitigate a ruling's impact. For example, a government can alter formal or technical aspects of a trade measure without changing the underlying policy objective, thereby complying with the letter but not necessarily the spirit of WTO law. Or it can decide to pay some penalty to the winning party in order to maintain one or more of the WTO-inconsistent aspects of the measure, as typically occurs when a dispute is resolved through a mutually acceptable solution. The extent to which executives and legislatures are able to adopt these different strategies is critical to future understanding of the conditions under which international trade rules significantly impact the substance and quality of domestic policies.

7 | Conclusion

This dissertation addressed an enduring question for the study of law and politics: what, if any, independent power do international legal institutions have to affect domestic laws or practices? It addressed this question with respect to international judicial and quasi-judicial bodies through empirical research situated firmly at the intersection of law and politics. Conventional wisdom among political scientists is that states—and particularly powerful countries—can sufficiently control courts. Lawyers, on the other hand, tend to emphasize courts’ judicial independence and lawmaking capacity. This stark dichotomy—that global legal institutions are either completely determined by or unaffected by politics—is often recognized as a false one, yet both lawyers and political scientists continue to rely on it as a useful analytical device.

I have argued that much like their domestic counterparts, international adjudicative bodies are strategic legal actors that operate in a highly political context. Politics matters for legal outcomes—the rulings of dispute settlement bodies—but its impact is moderated by legal constraints in fairly systematic ways. Within the context of the WTO, I specified the conditions under which one dynamic dominates the other and additionally demonstrated that politics do not predominantly matter through our traditional understanding of power politics. Rather, the WTO’s DSM is more sensitive to the degree of institutional support they enjoy among both the collective membership and a broader set of relevant stakeholders. Collective political support for or challenges to a court’s institutional legitimacy—what I call its level of political capital—affect judicial outcomes more than the preferences of dominant stakeholders.

How courts assimilate through their rulings sometimes complementary, sometimes competing, legal and political considerations on a regular basis shapes the scope of their international authority. The previous chapters developed this argument in the context of the World Trade Organization’s judicial bodies. In this conclusion, I briefly highlight the distinct contributions this research makes to our understanding of the politics of international judicial authority.

7.1 Contributions

First, this dissertation represents one of the first empirical attempts to ascertain how exactly international courts and governments ‘communicate,’ by systematically examining the rhetorical politics surrounding one court’s exercise of authority. I used automated text and content analysis on original datasets of relevant stakeholders’ public statements to capture how these constituents signal support for or challenges to the institutional legitimacy of a court. I supplemented this unique approach to measuring a court’s political capital with interviews and surveys. In doing so, I specified how courts obtain information about stakeholder values and preferences. It is often claimed that international institutions—and international courts in particular—attempt to take into account state preferences and will sometimes independently tailor their activities to appease member states and preempt more severe forms of re-contracting. Yet we lack a clear understanding of how exactly international courts obtain information about governments’ views on their exercise of delegated authority. While parties to a dispute possess a direct means to reveal their preferences to international judges, strategic courts are often interested in the views of a wider (more representative) subset of the membership. The previous chapters demonstrate that the politics of international adjudication are not simply dictated by the interests and preferences of powerful member states, but by the collective political capital of a court as determined by a broader range of stakeholders.

Second, I specified the mechanism through which international courts respond to chal-

lenges to their institutional authority and demonstrated how judges often use their rulings to ‘communicate’ or signal back to various audiences. International judges use the reasoning within their decisions to convey to member states and other relevant constituents the extent to which they are taking into account sovereignty concerns and the relative authority of domestic bodies vis-a-vis international ones. That is, judges use their rulings to ‘communicate’ to various audiences, and judges intend their legal reasoning to communicate their underlying views on the institutional relationship between a tribunal and its stakeholders. A court’s ruling constitutes the only part of the adjudicative process transparent to all potential stakeholders. Even parties to a case are not privy to judicial deliberations within chambers, much less the internal thought process of individual judges. Skeptics might argue that a decision’s reasoning may not perfectly reflect internal deliberations and that it may distort the case facts to justify results. Even if this is true, judges still choose to present certain facts and provide particular reasoning within their opinions. And judges are very much aware that this is all stakeholders have to evaluate developing legal norms and assess the regime’s legitimacy and currency. For this reason, their rulings constitute the primary means for judges to signal judicial authority or deference to constituents. In this way, the content of a ruling—and not simply its outcome—is one of the primary mechanisms through which international courts respond to diffuse political pressures.

Third, this dissertation contributes to our understanding of the factors that shape a court’s balancing of international and national authority. By examining when and how the WTO’s Dispute Settlement Mechanism accommodates political and legal considerations, especially when they conflict, this project provides insight into how international authority is created and sustained within the world trade regime. More centrally, I show that the allocation of authority by international courts is patterned, and that there are identifiable conditions under which political considerations dominate legal constraints. By identifying the structural conditions under which international legal authority reflects collective political preferences, this dissertation provides critical insights for the institutional design of courts and the tradeoff between flexibility and predictability within international regimes.

Finally, the previous chapters advance nascent scholarship on the broader effects of international judicial authority. When courts use the content of their rulings to respond to diffuse pressures, they subtly influence the overall stability of the underlying regime. More critically, in some instances courts use the content of their rulings to facilitate second-order compliance as well. By identifying the conditions under which courts act as ‘partners in compliance?’ through their rulings, I contribute to our understanding of the factors that shape the effectiveness of an international regime.

This dissertation’s findings have important implications for our understanding of the way in which authority is created and sustained within international institutions, and particularly international judicial bodies. The politics underlying how the WTO’s judicial bodies exercise their delegated authority also has implications for debates regarding sovereignty costs and the accountability of international courts more generally (Hathaway 2008; Lake 2007a). The ability of these bodies to affect the everyday lives of citizens is not trivial. Take, for instance, WTO rulings on policies enacted to protect human health, safety and the environment, areas long considered central domains of state authority. In the United States, such rulings have weakened consumer protection measures regulating the packaging of meat products and tuna labeling requirements under dolphin protection laws. They have also interfered with the ability of the Food and Drug Administration and Congress to decrease the risk of smoking in youth populations.¹ These rulings have sparked heated criticism by politicians and public advocacy groups that the WTO is encroaching on the right of sovereign states to decide how best to protect their citizens.² By identifying how—and under what conditions—dispute panels and the Appellate Body accommodate political and legal considerations in deciding where to allocate authority over domestic regulatory decisions, these findings suggest that

¹Even though the U.S. took steps to comply with the WTO rulings, for all three disputes the complaining government challenged these steps as unsatisfactory. International Centre for Trade and Sustainable Development, “Compliance Questions Tabled in Country-of-Origin, Clove Cigarettes Disputes,” 17(28) *Bridges* (5 September 2013); International Centre for Trade and Sustainable Development, “Mexico Files Compliance Challenge to Revised US Tuna Labelling Policy,” 17(39) *Bridges* (21 November 2013).

²See, for example, Tom Miles and Doug Palmer, “WTO dents U.S. ban on clove cigarettes,” *Reuters* (4 April 2012); Tim Carman, “Tuna, meat labeling disputes highlight WTO control,” *The Washington Post* (10 January 2012).

the WTO's authority is neither completely dependent on nor entirely divorced from member state support. Governments seeking to retain exclusive sovereign authority over such policy decisions can actively—and more critically *collectively*—use diffuse rhetorical means to signal to the DSM that it has exceeded the scope of international authority member states are willing to support, which may in turn pre-empt more severe forms of political backlash that could undermine the stability of the international trade regime.

A | Appendix to Chapter 3: Political Capital

A.1 Coding & Classification of DSB Statements

To construct the measures for the political capital of the DSM, all individual Member statements made within the DSB since the WTO's inception were collected. Statements made on the record within DSB meetings (as transcribed within meeting minutes) are considered the verbatim official view of the member government. Official minutes of the 340 DSB meetings held between February 1995 and December 2013 were obtained from *WTO Documents Online* (<https://docs.wto.org/>), from which individual Member statements were extracted. The unit of analysis for this dataset is statement made within a DSB meeting, coded for relevant meta-data, including: Member's name, date of statement, meeting number, whether the statement was made on behalf of a group of Members, the DSB Agenda item under which the statement was made, whether the statement was made about a specific dispute, and if so the dispute name and official WTO document number. Only statements made by Members were coded; statements made by the Chair or any other observers invited to speak have been excluded from the analysis. The dataset includes 9,883 individual statements in total.

Supervised methods of text classification were then employed to identify Members' expressed views on the DSM. First, a coding scheme was developed to identify statements made by Members that explicitly express a view—criticism or appreciation—of the DSM and those not directly related to the WTO's judicial bodies. While a large number of the statements are only one or two paragraphs long, some may span up to several pages. The coding scheme takes this into account by creating clear rules regarding categorization of

statements that may signal both satisfaction and dissatisfaction. The original coding instrument consisted of six categories: (1) Strongly Critical; (2) Predominantly Critical; (3) Neutral; (4) Predominantly Supportive; (5) Strongly Supportive; and (6) Other/None of the Above.

Statements that fall within the *Strongly Supportive* category express strong support for the dispute settlement system as a whole, and panel and/or Appellate Body proceedings or reports. To fall within this category, the language employed in relation to the DSM must convey strong support, despite the inclusion of one or two indirectly critical comments. For example, Members may emphasize that a report is of a “high quality... setting a high standard for future panels,”¹ or that the “sound legal reasoning underlying the Appellate Body’s conclusions made a significant contribution to the dispute settlement system.”² This category also includes statements that exclusively express support for the DSM, even if the statement does not employ strongly supportive language.³ Similarly statements that fall within the *Strongly Critical* category include both those that express strong criticism of the DSM despite the presence of indirectly supportive comments and exclusively critical statements. These statements often include phrases through which a Member conveys that it is “seriously concerned about the Report” or “was extremely disappointed [with the findings].”⁴

Statements that fall within the *Predominantly Supportive* category express both criticism and support for the DSM, but overall—both qualitatively and quantitatively—convey greater support. For example, Members often state that they are “in general very satisfied

¹Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 17 February 1999, WT/DSB/M/55, p. 11.

²Statement by the representative of Guatemala, Dispute Settlement Body, Minutes of Meeting held on 25 November 1998, WT/DSB/M/51, p. 19.

³For example, Members often stress that the report under adoption was “generally well-reasoned” or that the Member “support[s] the Appellate Body’s interpretation” on a specific question, and uses the rest of the statement to recap the findings, without expressing any further view on the issue. See, for example, statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 18 August 2003, WT/DSB/M/154, para. 40; Statement by the representative of Japan, Dispute Settlement Body, Minutes of Meeting held on 25 November 1998, WT/DSB/M/51, p. 19.

⁴See for instance, statement by the representative of Brazil, Dispute Settlement Body, Minutes of Meeting held on 20 April 2004, WT/DSB/M/167, para. 71; Statement by the representative of Côte d’Ivoire, Dispute Settlement Body, Minutes of Meeting held on 11 December 2008, WT/DSB/M/260, para. 16-17.

with the Report of the Appellate Body” or that “these reports were on the whole excellent,” but that they “wished to register its concern regarding one element of the Report” or “wished to address two concerns.”⁵ Such statements signal weaker support for the DSM and represent qualitatively different views than Strongly Supportive statements. Statements made in the context of adoption of an Appellate Body report that also include comments on the panel report often fall into this category. A Member may be supportive of the Appellate Body report, and in particular Appellate Body rulings that overturned panel findings with which the Member disagreed, yet still express criticism of the panel’s reasoning or findings. In such cases, the coding scheme provides that expressed views on the Appellate Body should be accorded more weight than expressed views on the panel report, because the Appellate Body is the standing judicial body of the WTO and its reports represent the final legal ruling for a particular dispute. In addition, AB reports tend to have more *de facto* precedential value than panel reports. These statements do not qualify as Strongly Supportive, however, given that the Member is also expressing dissatisfaction with the operation of the first tier of adjudication.

Similarly, statements that fall within the *Predominantly Critical* category express both criticism and support for the DSM but overall convey greater criticism.⁶ Such statements include those that express criticism of the Appellate Body report but support for the panel’s findings. This category also includes statements that are not primarily about the DSM, or panel and/or Appellate Body proceedings, but nevertheless signal criticism of the effectiveness or operation of the system as whole. For example, Members may express frustration over the lack of implementation of DSB recommendations by another Member, which is not necessarily about the DSM itself and would be coded as Other. However, if the Member additionally highlights the systemic negative effects that long delays in implementation

⁵Statement by the representative of Norway, Dispute Settlement Body, Minutes of Meeting held on 23 January 2007, WT/DSB/M/225, para. 81; Statement by the representative of the United States, Dispute Settlement Body, Minutes of Meeting held on 10 December 2003, WT/DSB/M/160, para. 8.

⁶See for instance, statement by the representative of Hong Kong, China, Dispute Settlement Body, Minutes of Meeting held on 27 July 2000, WT/DSB/M/86, para. 71.

or continued non-compliance has for the operation of the DSM, the statement is coded as Predominantly Critical. Statements that express concern over the detrimental effects that continued non-compliance has for the interests of certain Members or groups of Members, such as developing countries, also fall within this category.

Statements classified as *Neutral* in some way reference the DSM, by mentioning the dispute or the report at hand, but without expressing criticism or support for it or the DSM.⁷ Finally, the *Other* category ensures that statements not about the operation of the DSM are excluded from the analysis. This category includes statements that discuss other issues, such as the trading system in general but not the DSM in particular,⁸ or refer to the actions or lack thereof of a Member, such as (non)implementation of DSB recommendations.⁹ As mentioned previously, if a statement primarily about the actions of Members but also explicitly signals criticism of or support for the system as a whole or a panel/AB report, it is coded as Predominantly Critical or Predominantly Supportive.

For the training set, 527 statements were randomly selected, and two coders manually assigned each statement to a category. Random selection is preferable for supervised methods of text analysis (Grimmer and Stewart 2013; Hopkins and King 2010) and in this case provided sufficient variation across four critical dimensions: (1) year in which statement made; (2) the Agenda Item under which the statement was made; (3) usage of the dispute

⁷For example: “The representative of the United States said that references had been made to the reports of the panel and the Appellate Body adopted on 16 January 1998 in the case of the US-India dispute on the same matter. The United States still awaited India’s action to comply with the DSB’s recommendations concerning this issue. He therefore wished to ask India whether it could provide any information on steps to be taken towards compliance.” Statement by the representative of United States, Dispute Settlement Body, Minutes of Meeting held on 22 September 1998, WT/DSB/M/48, p. 19.

⁸For example: “Multilateral trade rules could not, and should not force Members to allow a product that caused an alarming and unacceptable number of deaths to continue to be sold packaged like a sweet to attract new victims. This would undermine the credibility of the multilateral trading system. Those who depended on the WTO’s multilateral trading system felt obliged to defend it from the detrimental effect from an industry that had caused irreparable social and economic damage to countries and was an obstacle to sustainable development.” Statement by the Representative of Uruguay, WT/DSB/M/322, 28 September 2012, at para. 69.

⁹For example, the following statement would fall within the Other category: “Norway would also prefer immediate implementation, but in view of the complexity of the matter some time was needed. He requested the United States to inform Members in which issue of the Federal Register the notice of the EPA would be published.” Statement by the representative of Norway, WT/DSB/M/19, 18 June 1996, at p. 3.

settlement system by the Member making the statement (high, medium, low and non-usage of the DSM); and (4) geographical region of the Member country making the statement.

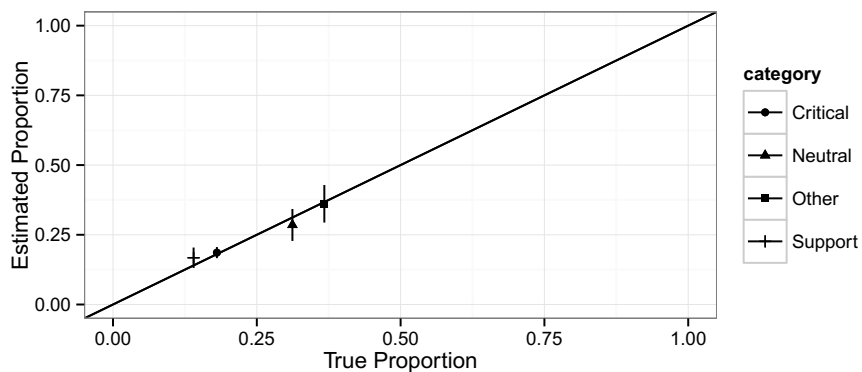


Figure A.1: This graph displays the accuracy of ReadMe in recovering the distribution of critical, neutral, supportive, and other category statements within the DSB, using 10-fold cross-validation on the training set (527 statements in total). 95% confidence intervals are displayed as vertical lines. Estimates closer to the 45°line are more accurate.

Individual classification methods¹⁰ and proportion classification methods using ReadMe, the method of automated text analysis developed in Hopkins and King (2010), were both employed. Due to initial poor model performance of individual classification methods, I collapsed the original six categories to four final classification categories: Critical, Supportive, Neutral, and Other. Because ReadMe performed better than individual classification methods, the former was used to obtain final half-year estimates for the out-of-sample statements. Figure A.1 displays the accuracy of the ReadMe estimates using 10-fold cross-validation on the training set.

¹⁰For individual classification, the RTextTools package in R was used, which provides basic preprocessing functionality, nine machine algorithms, and analytics to enable classification of large amounts of texts (Jurka et al. 2013).

A.2 Probability of Issuing a Critical Statement

Table A.1: Estimated Probability of Making a Critical Statement

	All Reports	Non-Compliance Reports	Appellate Reports
Third Party	0.182 (0.179)	0.164 (0.197)	0.034 (0.244)
Non-Party	0.741*** (0.218)	0.755*** (0.238)	0.729*** (0.275)
GDP per capita (logged)	-0.185*** (0.066)	-0.248*** (0.075)	-0.232*** (0.090)
Population (logged)	0.024 (0.078)	-0.042 (0.085)	-0.124 (0.107)
Medium Usage	-0.505 (0.310)	-0.591* (0.345)	-0.544 (0.429)
Low Usage	-0.595 (0.459)	-0.787 (0.512)	-0.847 (0.624)
Non-Users	-0.106 (0.552)	-0.266 (0.586)	-0.842 (0.689)
Number of Dispute Third-Parties	-0.018 (0.014)	-0.007 (0.018)	0.044* (0.024)
DSU Art. 11 Appeal			0.942*** (0.279)
Anti-Dumping Disputes	-0.573*** (0.221)	-0.552** (0.236)	-0.009 (0.337)
U.S. Zeroing Disputes	-0.816* (0.466)	-1.131** (0.558)	-1.410* (0.779)
Appellate Body Report	-0.128 (0.171)	-0.107 (0.201)	
Constant	0.158 (2.123)	2.057 (2.400)	2.773 (2.920)
Observations	995	829	621
Log Likelihood	-587.028	-481.992	-350.770
Akaike Inf. Crit.	1,232.055	1,021.983	759.541

Note: *p<0.1; **p<0.05; ***p<0.01
 Logistic odds regression, with individual report statement (critical or not) as the dependent variable. All models include year fixed effects, with robust standard errors in parentheses. The first column provides estimates for statements on all types of reports, including Article 21.5 compliance reports. The second column provides estimates for statements on non-compliance reports only (excluding statements on Article 21.5 rulings). The third column provides estimates for statements on Appellate Body reports alone (excluding statements on disputes not appealed).

Table A.2: Estimated Probability of Making a Critical Statement

	All Reports	Non-Compliance Reports	Appellate Reports
Third Party	0.250 (0.175)	0.216 (0.197)	0.047 (0.246)
Non-Party	0.763*** (0.212)	0.750*** (0.228)	0.648** (0.275)
GDP per capita (logged)	-0.083 (0.080)	-0.128 (0.085)	-0.083 (0.100)
Population (logged)	0.091 (0.063)	0.044 (0.068)	0.040 (0.082)
Cumulative Experience (Respondent)	0.059*** (0.019)	0.053*** (0.020)	0.059** (0.025)
Cumulative Experience (Complainant)	-0.084*** (0.028)	-0.078*** (0.030)	-0.087** (0.038)
Number of Third Parties	-0.017 (0.014)	-0.005 (0.018)	0.045* (0.024)
DSU Article 11 Appeal			0.898*** (0.281)
Anti-Dumping Disputes	-0.585*** (0.217)	-0.569** (0.234)	-0.107 (0.335)
U.S. Zeroing Disputes	-0.810* (0.462)	-1.111** (0.546)	-1.382* (0.787)
Appellate Body Report	-0.112 (0.172)	-0.078 (0.207)	
U.S.	0.553 (0.459)	0.669 (0.505)	0.530 (0.637)
EU	1.032* (0.572)	0.923 (0.608)	0.764 (0.787)
Constant	-2.726 (1.853)	-1.435 (1.941)	-2.408 (2.347)
Observations	995	829	621
Log Likelihood	-582.162	-478.588	-347.040
Akaike Inf. Crit.	1,224.324	1,017.176	754.080

Note:

*p<0.1; **p<0.05; ***p<0.01

Logistic odds regression, with individual report statement (critical or not) as the dependent variable. All models include year fixed effects, with robust standard errors in parentheses. The first column provides estimates for all types of report statements; the second column provides estimates for statements on non-compliance reports only (excluding statements on Article 21.5 rulings). The third column provides estimates for statements on Appellate Body reports alone (excluding statements on disputes not appealed).

B | Appendix to Chapter 4: Panel Authority

B.1 Panel Validation Score

To construct the VALIDATION SCORE of panel reports, each report issued between 1995 and 2013 was first coded for the number of claims or issues raised by the complainant and for which the panel undertook a legal and factual analysis—that is, claims under which the panel engaged in substantive review of a domestic measure and thereby undertook to review the national authority’s decisional process. The denominator of VALIDATION SCORE was based on coding the number of Agreement provisions under which the panel made an explicit finding within the Conclusions and Recommendations section of its report, and supplemented if necessary with findings made within the report itself. The numerator of this measure is based on the number of Agreement provisions under which the panel made an explicit finding of consistency (or no violation).

This coding excludes provisions for which the panel explicitly refrained from making a finding, exercised judicial economy, or found that the claim fell outside its terms of reference. The number of issues or claims for which the panel exercised judicial economy or refrained from making a finding were noted separately, but not included within the construction of the measure, as this is one ‘issue avoidance’ technique available to panels that arguably signals a different type of judicial restraint (Busch and Pelc 2010), but that do not require panels to undertake a substantive review. That is, the judicial economy doctrine does *not* allow panels to diminish the scope of the challenge—merely the number of WTO-based reasons for finding a particular element of a trade measure incompatible with WTO rules. Once a particular element is found WTO-inconsistent on one legal theory, a panel may

stop considering other asserted bases for the same claim. However, it still must continue examining all other elements of the laws being challenged.

This coding also excludes provisions cited regarding recommendations, such as specific recommendations under the Subsidies and Countervailing Measures Agreement (Article 4.7, SCM Agreement). Citation of a Dispute Settlement Understanding (DSU) provision is also excluded unless the panel made a finding with respect to (no)violation of that DSU provision.

For affirmative defenses or exceptions, the provision cited is coded as an additional “Violation” finding if the panel rejected the defense or exception. If the panel accepted the defense or exception, it is coded as a “No Violation” finding. For example, if the panel found that a measure was inconsistent with GATT Article III:4, but was justified under GATT Article XX(d), GATT: III:4 is coded as a “Violation Finding” but GATT: XX(d) is coded as a “No Violation Finding.” Finally, a provision may be cited multiple times within one particular finding, but is coded only once if the subsequent references are merely elaborating the finding requested or describing the provision’s relationship with other provisions. The provision is coded more than once if an additional finding is made with respect to a different domestic measure or product at issue. For example, the following would be coded as one “Violation Finding” for GATT: XX(b): “The Panel finds that China may not seek to justify the application of export duties to forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT1994. Even assuming *arguendo* that China could seek to justify the application of export duties, the Panel finds that China has not demonstrated that the application of export duties to forms of magnesium, manganese and zinc is justified pursuant to Article XX(b) of the GATT 1994.”

The final VALIDATION SCORE is a continuous measure that represents the proportion of explicit findings under Agreement provisions made by the panel within which it validated the trade measure, with 0 representing no validation and 1 representing complete validation.

B.2 Regression Results and Robustness Checks

Table B.1: Summary Statistics

	N	Mean	St. Dev.	Min	Max
VALIDATION SCORE	187	0.367	0.343	0.000	1.000
POLCAP (CRITICISM)	187	0.158	0.068	0.040	0.351
POLCAP (SUPPORT)	187	0.153	0.059	0.049	0.242
AB CASE LAW	187	1.868	1.861	0.000	9.000
US/EU RESPONDENT	187	0.535	0.500	0	1
COMPLAINANT GDP (logged)	187	10.106	1.899	6.018	13.728
MEASURE TYPE	187	2.064	0.884	1	3
POLITICALLY SENSITIVE AGREEMENTS	187	0.155	0.363	0	1
TRADE REMEDIES	187	0.455	0.499	0	1
REPEAT PANELISTS	187	0.476	0.501	0	1
WTO DELEGATES	182	0.681	0.467	0	1

Table B.2: Regression Results

	Validation Score		
	Model 1	Model 2	Model 3
POLCAP(CRITICISM)	1.011** (0.435)	1.498** (0.607)	3.653*** (0.968)
POLCAP(SUPPORT)		-0.873 (1.023)	-1.650 (1.056)
AB CASE LAW			0.046 (0.058)
US/EU RESPONDENT	0.090* (0.049)	0.100* (0.052)	0.111** (0.053)
COMPLAINANT GDP	-0.011 (0.013)	-0.012 (0.013)	-0.014 (0.013)
MEASURE TYPE (Legislation)	0.096 (0.064)	0.105 (0.068)	0.093 (0.066)
MEASURE TYPE (Admin investigation)	0.028 (0.083)	0.027 (0.083)	0.074 (0.079)
POLITICALLY SENSITIVE AGRMTS	-0.144* (0.073)	-0.144** (0.072)	-0.224*** (0.067)
TRADE REMEDIES	0.138* (0.076)	0.146* (0.078)	0.085 (0.076)
REPEAT PANELISTS (Majority)	0.011 (0.058)	0.016 (0.059)	0.045 (0.057)
WTO DELEGATES (Majority)	-0.104** (0.050)	-0.104** (0.051)	-0.061 (0.048)
POLCAP(CRITICISM)*AB CASE LAW			-0.666* (0.377)
Constant	0.213 (0.162)	0.292 (0.187)	0.224 (0.183)
Observations	182	182	182
R ²	0.231	0.236	0.325

Note: *p<0.1; **p<0.05; ***p<0.01
Ordinary least squares regression, with panel report VALIDATION SCORE as the dependent variable. Estimated coefficient values reported, with robust standard errors in parentheses. Model 2 adds POLCAP (SUPPORT) to Model 1's base estimation; Model 3 includes the interaction term between POLCAP (CRITICISM) and AB CASE LAW. All models include a cubic year trend.

Table B.3: Robustness Checks: Regression Results for Model 2

	Validation Score		
	Model 2a	Model 2b	Model 2c
POLCAP(CRITICISM)	1.478** (0.608)	1.742*** (0.590)	1.707*** (0.597)
POLCAP(SUPPORT)	-0.829 (1.013)	-1.375 (0.989)	-1.316 (0.982)
US/EU RESPONDENT	0.038 (0.075)	0.109** (0.053)	0.052 (0.076)
RESPONDENT GDP (logged)	0.023 (0.020)		0.021 (0.020)
COMPLAINANT GDP (logged)	-0.011 (0.013)	-0.018 (0.014)	-0.018 (0.014)
MEASURE TYPE (Legislation)	0.104 (0.068)	0.089 (0.071)	0.088 (0.070)
MEASURE TYPE (Admin Investigation)	0.011 (0.084)	-0.0003 (0.087)	-0.015 (0.087)
POLITICALLY SENSITIVE AGRMTS	-0.160** (0.073)	-0.153** (0.070)	-0.167** (0.071)
TRADE REMEDIES	0.147* (0.078)	0.146* (0.080)	0.146* (0.079)
REPEAT PANELISTS (majority)	0.018 (0.059)	0.019 (0.060)	0.021 (0.060)
WTO DELEGATES (majority)	-0.100* (0.051)	-0.074 (0.052)	-0.070 (0.052)
Constant	0.084 (0.236)	0.393** (0.189)	0.203 (0.240)
Observations	182	173	173
R ²	0.242	0.253	0.259

Note: *p<0.1; **p<0.05; ***p<0.01
Ordinary least squares regression, with panel report VALIDATION SCORE as the dependent variable. Estimated coefficient values reported, with robust standard errors in parentheses. Model 2a includes respondent GDP in addition to US/EU RESPONDENT. Model 2b removes the ten U.S. anti-dumping zeroing cases from the initial Model 2 specification sample. Model 2c includes within Model 2b respondent GDP, in addition to US/EU RESPONDENT. All models include a cubic year trend.

Table B.4: Robustness Checks: Regression Results for Model 3

	Validation Score		
	Model 3a	Model 3b	Model 3c
POLCAP(CRITICISM)	3.610*** (0.988)	3.651*** (0.999)	3.596*** (1.018)
AB CASE LAW	0.045 (0.060)	0.045 (0.062)	0.044 (0.064)
POLCAP(SUPPORT)	-1.604 (1.051)	-1.925* (1.044)	-1.862* (1.038)
US/EU RESPONDENT	0.061 (0.071)	0.108** (0.053)	0.057 (0.073)
RESPONDENT GDP (logged)	0.019 (0.020)		0.019 (0.021)
COMPLAINANT GDP (logged)	-0.014 (0.013)	-0.021 (0.013)	-0.021 (0.013)
MEASURE TYPE (Legislation)	0.092 (0.066)	0.091 (0.068)	0.090 (0.067)
MEASURE TYPE (Admin Investigation)	0.061 (0.079)	0.066 (0.084)	0.052 (0.083)
POLITICALLY SENSITIVE AGRMTS	-0.236*** (0.067)	-0.222*** (0.066)	-0.235*** (0.067)
TRADE REMEDIES	0.086 (0.075)	0.087 (0.078)	0.087 (0.077)
REPEAT PANELISTS (majority)	0.046 (0.056)	0.049 (0.056)	0.050 (0.056)
WTO DELEGATES (majority)	-0.058 (0.048)	-0.035 (0.049)	-0.032 (0.049)
POLCAP(CRITICISM)*AB CASE LAW	-0.657* (0.389)	-0.629 (0.414)	-0.620 (0.431)
Constant	0.057 (0.239)	0.313* (0.186)	0.144 (0.252)
Observations	182	173	173
R ²	0.329	0.322	0.327

Note: *p<0.1; **p<0.05; ***p<0.01
 Ordinary least squares regression, with panel report VALIDATION SCORE as the dependent variable. Estimated coefficient values reported, with robust standard errors in parentheses. Model 3a includes respondent GDP in addition to US/EU RESPONDENT. Model 3b removes the ten U.S. anti-dumping zeroing cases from the initial Model 3 specification sample. Model 3c includes within Model 3b respondent GDP, in addition to US/EU RESPONDENT. All models include a cubic year trend.

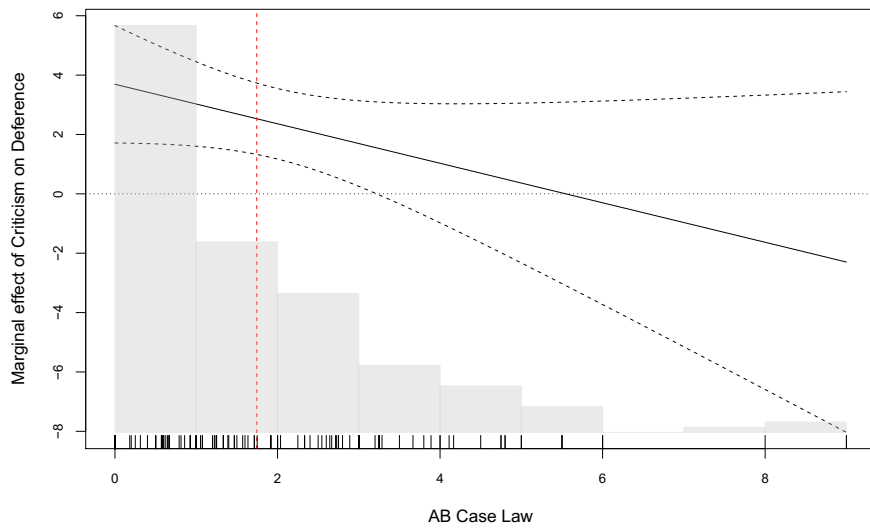


Figure B.1: Relationship between Political Capital (Criticism) and Panel Validation, for different levels of Appellate Body case law (Model 3b).

C | Appendix to Chapter 5: Appellate Body

C.1 Ruling Validation Scores

To construct the total validation score of a WTO ruling, I coded each discrete finding for whether or not it found a violation of WTO rules. A dispute's VALIDATION score measures the proportion of total findings that held that a government's trade laws or practices do *not* violate WTO rules. For those disputes that reached the Appellate Body, the ultimate decision (violation or non-breach) is coded for each panel finding appealed. For each panel finding not raised on appeal, the panel's ruling stands and is combined with those appealed. Figures C.1 displays the average yearly validation score within panel reports alone while Figure C.2 displays the average yearly total validation score of a WTO ruling. The sharp drop in legal validation in 2010 is partly attributable to the fact that a mere five reports were issued that year, two of which found against the U.S. for all claims related to its practice of zeroing in anti-dumping investigations.

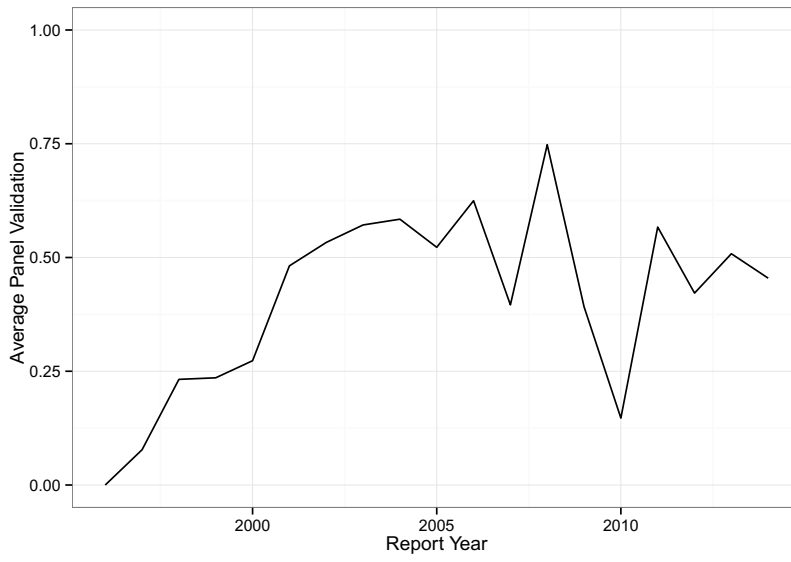


Figure C.1: Mean panel validation, by year report disseminated.

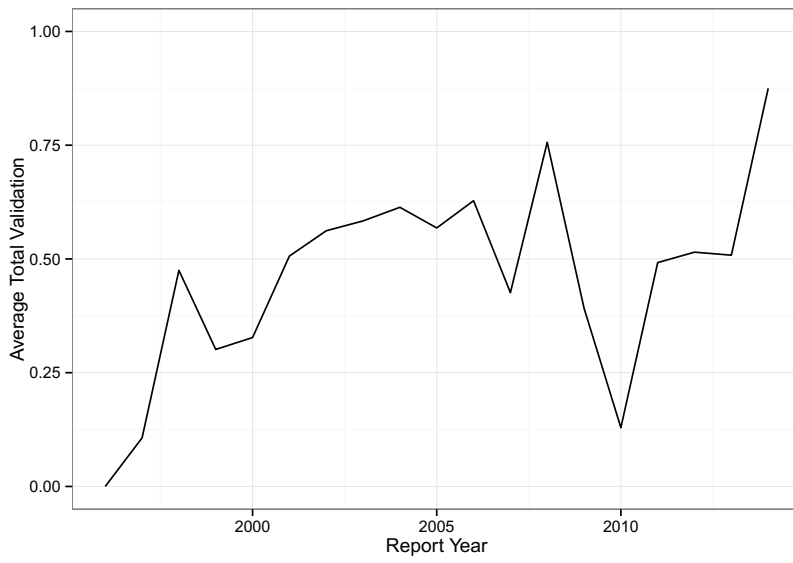


Figure C.2: Mean total validation, by year final report disseminated.

C.2 Article 11 Appeals

Table C.1: DSU Article 11 and ADA Article 17.6 Appeals (Standard of Review (SoR) claims)

Dispute	Number SoR Issues Raised	SoR Claim Type
1997		
<i>US—Wool Shirts and Blouses</i> (DS33)	1	judicial economy
<i>India—Patents (US)</i> (DS50)	1	judicial economy
1998		
<i>Australia—Salmon</i> (DS18)	1	treatment of evidence
<i>EC—Hormones</i> (DS26/48)	1	treatment of evidence
<i>Argentina—Textiles and Apparel</i> (DS56)	2	treatment of evidence; due process
<i>EC—Poultry</i> (DS69)	1	judicial economy
1999		
<i>Korea—Alcoholic Beverages</i> (DS75/84)	1	treatment of evidence
<i>Japan—Agricultural Products II</i> (DS76)	1	treatment of evidence
<i>India—Quantitative Restrictions</i> (DS90)	1	treatment of evidence
<i>Argentina—Footwear (EC)</i> (DS121)	1	review of national authority
2000		
<i>US—Lead and Bismuth II</i> (DS138)	1	review of national authority
<i>Canada—Autos</i> (DS139/142)	1	judicial economy
<i>US—Wheat Gluten</i> (DS166)	5	review of national authority; treatment of evidence
2001		
<i>Thailand—H-Beams</i> (DS122)	3	review of national authority
<i>EC—Asbestos</i> (DS135)	1	treatment of evidence
<i>EC—Bed Linen</i> (DS141)	1	review of national authority
<i>US—Lamb</i> (DS177/178)	2	review of national authority
<i>US—Cotton Yarn</i> (DS192)	1	review of national authority
2002		
<i>Chile—Price Band System</i> (DS207)	1	due process
<i>US—Carbon Steel</i> (DS213)	2	treatment of evidence
<i>EC—Sardines</i> (DS231)	4	treatment of evidence
2003		
<i>EC—Tube or Pipe Fittings</i> (DS219)	1	treatment of evidence
<i>Japan—Apples</i> (DS245)	4	admissibility
<i>US—Steel Safeguards</i> (DS248 et al)	1	treatment of evidence
		review of national authority
2004		
<i>US—Softwood Lumber V</i> (DS264)	1	review of national authority
<i>US—OCTG Sunset Reviews</i> (DS268)	2	review of national authority
<i>Canada—Wheat and Grain</i> (DS276)	1	treatment of evidence
2005		
<i>EC—Export Subsidies on Sugar</i> (DS265/266/283)	2	judicial economy; due process
<i>EC—Chicken Cuts</i> (DS269/286)	1	treatment of evidence
<i>US—Anti-Dumping OCTGs</i> (DS282)	5	review of national authority; judicial economy
<i>US—Gambling</i> (DS285)	4	treatment of evidence; due process
<i>Mexico—Rice</i> (DS295)	1	treatment of evidences
<i>US—DRAMs</i> (DS296)	2	review of national authority
<i>Dominican Republic—Cigarettes</i> (DS302)	2	treatment of evidence; judicial economy
2006		
<i>US—Zeroing(EC)</i> (DS294)	2	treatment of evidence
<i>Mexico—Soft Drinks</i> (DS308)	1	treatment of evidence
2007		
<i>US—Zeroing(Japan)</i> (DS322)	1	treatment of evidence
<i>Brazil—Retreaded Tyres</i> (DS332)	2	treatment of evidence
<i>Japan—DRAMs(Korea)</i> (DS336)	5	review of national authority
2008		
<i>US/Canada—Continued Suspension (Hormones)</i> (DS320/321)	3	review of national authority; due process
<i>China—Auto Parts</i> (DS339/340/342)	1	treatment of evidence
<i>US—Stainless Steel(Mexico)</i> (DS344)	1	precedent
<i>US—Customs Bond Directive</i> (DS345)	1	treatment of evidence; due process
<i>India—Additional Import Duties</i> (DS360)	1	treatment of evidence
2009		
<i>US—Continued Zeroing</i> (DS350)	4	treatment of evidence; SoR
<i>China—Audiovisual Products</i> (DS363)	4	treatment of evidence
2010		
<i>Australia—Apples</i> (DS367)	3	treatment of evidence; review of national authority
2011		
<i>EC—Large Civil Aircraft</i> (DS316)	11	treatment of evidence; review of national authority
<i>Thailand—Cigarettes(Philippines)</i> (DS371)	1	treatment of evidence; due process
<i>US—AD and CV Duties(China)</i> (DS379)	4	treatment of evidence; review of national authority
<i>Philippines—Distilled Spirits</i> (DS396/403)	3	treatment of evidence; judicial economy
<i>EC—Fasteners(China)</i> (DS397)	9	treatment of evidence; judicial economy
<i>US—Tyres(China)</i> (DS399)	1	review of national authority
2012		
<i>US—Large Civil Aircraft(2nd Complaint)</i> (DS353)	4	treatment of evidence
<i>US—Tuna II(Mexico)</i> (DS381)	3	treatment of evidence; judicial economy
<i>US—COOL</i> (DS384/386)	3	treatment of evidence; judicial economy
<i>China—Raw Materials</i> (DS394/395/398)	6	treatment of evidence
<i>US—Clove Cigarettes</i> (DS406)	2	treatment of evidence
<i>China—GOES</i> (DS414)	1	review of national authority
2013		
<i>Canada—Renewable Energy</i> (DS412)	4	treatment of evidence; judicial economy

D | Appendix to Chapter 6: Political Cover

D.1 Regression Results and Robustness Checks

Table D.1: Summary Statistics

	Mean	St. Dev.	Min	Max
<i>Non-Compliant Disputes (n=125)</i>				
VALIDATION	39.830	31.705	0.000	97.561
LEGISLATION	0.400	0.492	0	1
ANY VALIDATION	0.728	0.447	0	1
RESPONDENT GDP	10.135	1.738	6.018	13.774
COMPLAINANT GDP	13.179	8.775	6.018	78.543
US-EU RESPONDENT	0.528	0.501	0	1
APPEALED	0.656	0.477	0	1
TRADE REMEDIES	0.536	0.501	0	1
POLITICALLY SENSITIVE AGREEMENTS	0.120	0.326	0	1
RESOLVED DISPUTE	0.768	0.424	0	1
TIME-TO-COMPLIANCE (NON-COMPLIANT)	1,093.464	1,323.439	27	5,539

Table D.2: Logistic odds regression, with dispute status (resolved) as the dependent variable

	<i>Dispute Resolved</i>			
	(1)	(2)	(3)	(4)
LEGAL VALIDATION (%)	0.011 (0.013)	0.001 (0.018)	0.004 (0.013)	-0.009 (0.017)
LEGISLATION	-0.696 (1.170)	-2.967* (1.668)	-0.539 (1.268)	-3.176* (1.823)
LEGAL VALIDATION x LEGISLATION	0.012 (0.019)	0.051* (0.028)	0.012 (0.020)	0.058** (0.030)
ANY VALIDATION	-2.959** (1.215)		-2.698** (1.230)	
RESPONDENT GDP (per capita, logged)	-0.132 (0.208)	-0.100 (0.211)	-0.114 (0.214)	-0.133 (0.206)
COMPLAINANT GDP (per capita, logged)	0.013 (0.019)	0.012 (0.019)	-0.009 (0.029)	-0.010 (0.024)
US/EU RESPONDENT	-1.200 (0.924)	-1.419 (1.057)	-1.396 (0.929)	-1.533 (1.085)
APPEALED	0.070 (0.363)	-0.155 (0.291)	0.160 (0.379)	-0.109 (0.350)
POLITICALLY SENSITIVE AGREEMENTS	0.830 (0.788)	1.814** (0.797)	0.603 (0.962)	1.836* (1.049)
TRADE REMEDIES	0.840* (0.482)	0.983 (0.662)	1.049* (0.550)	1.323* (0.762)
Constant	4.561* (2.358)	2.062 (2.338)	4.509* (2.611)	2.894 (2.155)
Observations	125	91	111	82
Log Likelihood	-57.238	-47.718	-53.139	-43.992
Akaike Inf. Crit.	136.476	115.435	128.278	107.985

Note: *p<0.1; **p<0.05; ***p<0.01
Robust standard errors in parentheses. Model 1 includes all disputes for which implementation required following adoption of report—the non-compliant disputes. Model 2 includes the subset of non-compliant disputes for which some (greater than 0) legal validation was provided within the final ruling. Model 3 includes the subset of non-compliant disputes that reached the ‘in breach’ stage (implementation not satisfactorily achieved by expiry of the RPT). Model 4 includes the subset of these in-breach disputes for which some (greater than 0) legal validation was given.

Table D.3: Cox proportional hazards model, with time-to-compliance as the dependent variable

	<i>Time-to-compliance:</i>			
	Non-Compliant Days		In-Breach Days	
	(1)	(2)	(3)	(4)
LEGAL VALIDATION (%)	0.007 (0.006)	0.011 (0.008)	0.006 (0.007)	0.005 (0.008)
LEGISLATION	-0.691** (0.335)	-1.189* (0.737)	-0.016 (0.369)	-1.127 (0.785)
LEGAL VALIDATION x LEGISLATION	0.010** (0.007)	0.017** (0.012)	0.0001 (0.008)	0.018** (0.013)
ANY VALIDATION	-1.473*** (0.395)		-1.307*** (0.428)	
RESPONDENT GDP (per capita, logged)	-0.124* (0.099)	-0.103 (0.128)	-0.058 (0.109)	-0.202*** (0.147)
COMPLAINANT GDP (per capita, logged)	0.031 (0.016)	0.050*** (0.018)	0.027 (0.019)	0.046** (0.023)
US-EU RESPONDENT	-0.635*** (0.341)	-0.743*** (0.419)	-0.836*** (0.364)	-0.620*** (0.458)
APPEALED	-0.191 (0.234)	-0.241 (0.280)	-0.083 (0.255)	-0.189 (0.312)
POLITICALLY SENSITIVE AGREEMENTS	0.027 (0.347)	0.887** (0.543)	-0.424 (0.404)	0.571 (0.582)
TRADE REMEDIES	0.320* (0.250)	0.432* (0.305)	0.070 (0.261)	0.414 (0.333)
Observations	125	91	111	82
R ²	0.237	0.222	0.255	0.214

Note: *p<0.1; **p<0.05; ***p<0.01
 Logged odds coefficient values reported, with robust standard errors, clustered on respondent country, in parentheses. Model 1 includes all disputes for which implementation required following adoption of report—the non-compliant disputes. Model 2 includes the subset of non-compliant disputes for which some (greater than 0) legal validation was provided within the final ruling. Model 3 includes the subset of non-compliant disputes that reached the ‘in breach’ stage (implementation not satisfactorily achieved by expiry of the RPT). Model 4 includes the subset of these in-breach disputes for which some (greater than 0) legal validation was given.

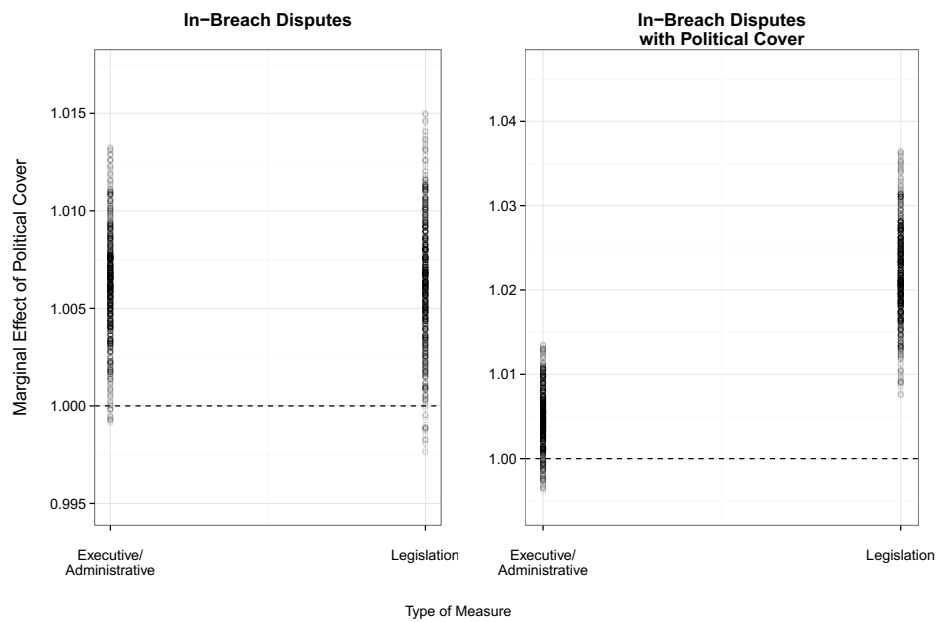


Figure D.1: Simulated marginal effect of legal validation on time-to-compliance. Sample only includes the subset of non-compliant disputes that reached the ‘in breach’ stage (implementation not satisfactorily achieved by expiry of the RPT). See Table D.3, Models (3) and (4), for standard regression results.

Bibliography

- Abbott, Kenneth W., and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54 (3): 421-456.
- Alford, Robert P. 2006. "Reflections on US—Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body." *Columbia Journal of Transnational Law* 45 (1): 196-220.
- Allee, Todd, and Paul Huth. 2006. "Legitimizing Dispute Settlement: International Adjudication as Domestic Political Cover." *American Political Science Review* 100 (2): 219-234.
- Alter, Karen J. 2006. "Delegation to international courts and the limits of re-contracting political power." In *Delegation and Agency in International Organizations*, ed. Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney. Cambridge University Press.
- Alter, Karen J. 2008. "Agents or Trustees? International Courts in their Political Context." *European Journal of International Relations* 14 (1): 33-63.
- Alter, Karen J. 2009. "The European Union's Legal System and Domestic Policy: Spillover or Backlash?" In *The European Court's Political Power: Selected Essays*. Oxford University Press.
- Alter, Karen J. 2014. *The New Terrain of International Law*. Princeton University Press.
- Alvarez-Jimenez, Alberto. 2009. "The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?" *Journal of International Economic Law* 12 (2): 289-331.
- Annus, Taavi, and Margit Tavits. 2004. "Judicial Behavior after a Change of Regime: The Effects of Judge and Defendant Characteristics." *Law and Society Review* 38 (4): 711-736.
- Avant, Deborah D., Martha Finnemore, and Susan K. Sell, eds. 2010. *Who Governs the Globe?* Cambridge Studies in International Relations Vol. 114 Cambridge University Press.
- Barnes, Jeb. 2007. "Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policymaking." *Annual Review of Political Science* 10: 25-43.
- Barnett, Michael N., and Martha Finnemore. 2004. *Rules for the World: International Organizations in Global Politics*. Cornell University Press.

- Barnett, Michael N. and Raymond Duvall, eds. 2004. *Power in Global Governance*. Cambridge University Press.
- Beck, Thorsten, George Clarke, Alberto Groff, and Patrick Walsh. 2001. "New tools in comparative political economy: The Database of Political Institutions." *World Bank Economic Review* 15 (1): 165-176.
- Bernauer, Thomas. 2003. *Genes, Trade, and Regulation: The Seeds of Conflict in Food Biotechnology*. Princeton University Press.
- Bhagwati, Jagdish and Hugh T. Patrick, eds. 1990. *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*. University of Michigan Press.
- Bhala, Raj. 1999a. "The Myth About Stare Decisis and International Trade Law: Part One of a Trilogy." *American University International Law Review* 14 (4): 845-956.
- Bhala, Raj. 1999b. "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication: Part Two of a Trilogy." *Journal of Transnational Law and Policy* 9 (1): 1-151.
- Bickel, Alexander. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Bobbs-Merrill.
- Bodansky, Daniel. 1999. "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law." *American Journal of International Law* 93 (3): 596-624.
- Bodansky, Daniel. 2008. "The Concept of Legitimacy in International Law." In *Legitimacy in International Law*, ed. Rüdiger Wolfrum and Volker Roben. Heidelberg: Springer.
- Bodansky, Daniel. 2013. "Legitimacy in International Law and International Relations." In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack. Cambridge: Cambridge University Press.
- Bown, Chad. 2004. "On the Economic Success of GATT/WTO Dispute Settlement." *The Review of Economics and Statistics* 86 (3): 811-823.
- Box-Steffensmeier, Janet M., and Bradford S. Jones. 2004. *Event history modeling: A guide for social scientists*. Cambridge University Press.
- Bradley, Curtis A. 2003. "International Delegations, the Structural Constitution, and Non-Self-Execution." *Stanford Law Review* 55 (5): 1557-1596.
- Bradley, Curtis A, and Judith G. Kelley. 2008. "The Concept of International Delegation." *Law and Contemporary Problems* 71 (1): 1-36.
- Brewster, Rachel. 2006. "Rule-Based Dispute Resolution in International Trade Law." *Virginia Law Review* 92: 251-288.
- Brewster, Rachel. 2011. "The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement." *George Washington Law Review* 80 (1): 102-158.

- Brewster, Rachel. 2013. "Pricing Compliance: When Formal Remedies Displace Reputational Sanctions." *Harvard International Law Journal* 54 (2): 259-314.
- Brewster, Rachel, and Adam S. Chilton. 2014. "Supplying Compliance: Why and When the United States Complies with WTO Rulings." *Yale Journal of International Law* Forthcoming.
- Brower, Charles N. 2009. "The Evolution of the International Judiciary: Denationalization Through Jurisdictional Fragmentation." *Proceedings of the Annual Meeting (American Society of International Law)* 103: 171-186.
- Brunee, Jutta, and Stephen Toope. 2010. *Legitimacy and Legality in International Law: An Interactional Account*. Cambridge University Press.
- Buchanan, Allen, and Robert O. Keohane. 2006. "The Legitimacy of Global Governance Institutions." *Ethics and International Affairs* 20 (4): 405-438.
- Burley, Anne-Marie, and Walter Mattli. 1993. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47 (1): 41-76.
- Busch, Marc, and Krzysztof Pelc. 2010. "The Politics of Judicial Economy at the World Trade Organization." *International Organization* 64 (2): 257-279.
- Busch, Marc L. 2007. "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade." *International Organization* 61 (4): 735-761.
- Busch, Marc L., and Eric Reinhardt. 2003a. "Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement." *Journal of World Trade* 37 (4): 719-735.
- Busch, Marc L., and Eric Reinhardt. 2003b. "Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement." In *Transatlantic Economic Disputes: The EU, the US, and the WTO*, ed. Ernst-Ulrich Petersmann and Mark A. Pollack. Oxford University Press.
- Busch, Marc L., and Eric Reinhardt. 2006. "Three's a Crowd: Third Parties and WTO Dispute Settlement." *World Politics* 58 (3): 446-477.
- Busch, Marc L., and Krzysztof J. Pelc. 2009. "Does the WTO Need a Permanent Body of Panelists?" *Journal of International Economic Law* 12 (3): 579-594.
- Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102 (4): 435-452.
- Cartland, Michael. 2003. "Comment on a WTO Permanent Panel Body." *Journal of International Economic Law* 6 (1): 214-218.
- Cavallaro, James L., and Stephanie Erin Brewer. 2008. "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court." *American Journal of International Law* 102 (4): 768-827.

- Chang, Seung Wha. 2000. "Taming Unilateralism under the Trading System: Unfinished Job in the WTO Panel Ruling of United States Sections 301-310 of the Trade Act of 1974." *Law and Policy in International Business* 31 (4): 1151-1226.
- Chayes, Abram, and Antonia Handler Chayes. 1993. "On Compliance." *International Organization* 47 (2): 175-205.
- Cheibub, Jose Antonio, Adam Przeworski, and Sebastian Saiegh. 2004. "Government Coalitions and Legislative Success Under Presidentialism and Parliamentarism." *British Journal of Political Science* 34 (4): 565-587.
- Cogan, Jacob Katz. 2008. "Competition and Control in International Adjudication." *Virginia Journal of International Law* 48 (2): 411-449.
- Cole, Wade M. 2011. "Individuals v. states: The correlates of Human Rights Committee rulings, 1979-2007." *Social Science Research* 40 (3): 985-1000.
- Conti, Joseph A. 2010. "Producing Legitimacy at the World Trade Organization: The Role of Expertise and Legal Capacity." *Socio-Economic Review* 8 (1): 131-155.
- Cottier, Thomas. 2003. "The WTO Permanent Panel Body: A Bridge too Far?" *Journal of International Economic Law* 6 (1): 187-202.
- Cox, Gary W., and Matthew D. McCubbins. 2001. "The Institutional Determinants of Economic Policy Outcomes." In *Presidents, Parliaments, and Policy*, ed. Stephan Haggard and Matthew D. McCubbins. Cambridge University Press.
- Cronin, Bruce and Ian Hurd, eds. 2008. *The UN Security Council and the Politics of International Authority*. Routledge.
- Czarnezki, Jason J. 2008. "An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law." *University of Colorado Law Review* 79 (3): 767-824.
- Dannenbaum, Tom. 2012. "Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed." *Cornell International Law Journal* 45 (1): 77-184.
- Danner, Allison, and Erik Voeten. 2010. "Who is running the international criminal justice system?" In *Who Governs the Globe?*, ed. Deborah Avant, Martha Finnemore, and Susan Sell. Cambridge: Cambridge University Press.
- Davey, William J. 2003. "The Case for a WTO Permanent Panel Body." *Journal of International Economic Law* 6 (1): 177-186s.
- Davey, William J. 2005. "The WTO Dispute Settlement System: The First Ten Years." *Journal of International Economic Law* 8 (1): 17-50.
- Davey, William J. 2009. "Compliance Problems in WTO Dispute Settlement." *Cornell International Law Journal* 42 (1): 119-128.

- Davey, William J. 2015. "The first years of WTO dispute settlement: Dealing with controversy and building confidence." In *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge University Press.
- Davis, Christina L. 2003. *Food Fights over Free Trade: How International Institutions Promote Agricultural Trade Liberalization*. Princeton University Press.
- Davis, Christina L. 2009. "Overlapping Institutions in Trade Policy." *Perspectives on Politics* 7 (1): 25-31.
- Davis, Christina L. 2012. *Why Adjudicate? Enforcing Trade Rules in the WTO*. Princeton: Princeton University Press.
- Davis, Christina L., and Sarah Blodgett Bermeo. 2009. "Who Files? Developing Country Participation in GATT/WTO Adjudication." *The Journal of Politics* 71 (3): 1033-1049.
- Davis, Christina L., and Yuki Shirato. 2007. "Firms, Governments, and WTO Adjudication: Japan's Selection of WTO Disputes." *World Politics* 59 (2): 274-313.
- deGuzman, Margaret M. 2009. "Gravity and the Legitimacy of the International Criminal Court." *Fordham International Law Journal* 32 (5): 1400-1465.
- Downs, George W., David M. Rocke, and Peter N. Barsoom. 1996. "Is the good news about compliance good news about cooperation?" *International Organization* 50 (3): 379-406.
- Du, Michael. 2010. "Standard of Review under the SPS Agreement After EC-Hormones II." *International and Comparative Law Quarterly* 59 (2): 441-459.
- Eagleton-Pierce, Matthew. 2013. *Symbolic Power in the World Trade Organization*. Oxford University Press.
- Easton, David. 1975. "A Re-Assessment of the Concept of Political Support." *British Journal of Political Science* 5 (4): 435-457.
- Ehlermann, Claus-Dieter. 2015. "Revisiting the Appellate Body: The first six years." In *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge University Press.
- Ehlermann, Claus-Dieter, and Lothar Ehring. 2005. "The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements." *Journal of International Economic Law* 8 (4): 803-824.
- Elsig, Manfred, and Jappe Eckhardt. 2015. "The Creation of the Multilateral Trade Court: Design and Experiential Learning." *World Trade Review* 14 (s1): s13-s32.
- Elsig, Manfred, and Mark A. Pollack. 2012. "Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization." *European Journal of International Relations*: 1-25.

- Elsig, Manfred, and Phillipp Stucki. 2012. "Low-income developing countries and WTO litigation: Why wake up the sleeping dog?" *Review of International Political Economy* 19 (2): 292-316.
- Ely, John H. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Harvard University Press.
- Epstein, David, and Sharyn O'Halloran. 1999. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers*. Cambridge: Cambridge University Press.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Congressional Quarterly Press.
- Epstein, Lee, and Jack Knight. 2000. "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead." *Political Research Quarterly* 53 (3): 625-661.
- Epstein, Lee, Jack Knight, and Andrew D. Martin. 2001. "The Supreme Court as a Strategic National Policymaker." *Emory Law Journal* 50 (2): 583-612.
- Epstein, Lee, and J.F. Kobylka. 1992. *The Supreme Court and Legal Change: Abortion and the Death Penalty*. University of North Carolina Press.
- Eskridge, William N. 1987. "Dynamic Statutory Interpretation." *University of Pennsylvania Law Review* 135 (6): 1479-1555.
- Ferejohn, John, and Barry Weingast. 1992. "Positive Theory of Statutory Interpretation." *International Journal of Law and Economics* 12 (2): 263-279.
- Fisher, Louis. 1988. *Constitutional Dialogues: Interpretation as Political Process*. Princeton University Press.
- Flango, Victor Eugene, Lettie McSpadden Wenner, and Manfred W. Wenner. 1975. "The Concept of Judicial Role: A Methodological Note." *American Journal of Political Science* 19 (2): 277-289.
- Footer, Mary E. 2006. *An Institutional and Normative Analysis of the World Trade Organization*. Martinus Nijhoff.
- Franck, Thomas M. 1990. *The Power of Legitimacy among Nations*. Oxford University Press.
- Franck, Thomas M., ed. 2000. *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty*. Transnational Publishers, Inc.
- Friedman, Barry. 1993. "Dialogue and Judicial Review." *Michigan Law Review* 91 (4): 577-682.
- Gandrud, Christopher. 2014. "simPH: Tools for simulating and plotting quantities of interest estimated from Cox Proportional Hazards models." *R package version 1.2.2*, <http://christophergandrud.github.io/simPH/>.

- Ganesan, A.V. 2015. "The Appellate Body in its formative years: A personal perspective." In *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge University Press.
- Gargarella, Roberto. 2004. "In Search of Democratic Justice: What Courts Should Not Do: Argentina, 1983-2002." In *Democratization and the Judiciary: The Accountability of Function of Courts in New Democracies*, ed. Siri Gloppen, Roberto Gargarella, and Elin Skar. London: Frank Cass.
- Garrett, Geoffrey, R. Daniel Kelemen, and Heiner Schulz. 1998. "The European Court of Justice, National Governments, and Legal Integration in the European Union." *International Organization* 52 (1): 149-176.
- Gibson, James L., and Gregory A. Caldeira. 1995. "The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice." *American Journal of Political Science* 39 (2): 459-489.
- Gibson, James L., Gregory A. Caldeira, and Vanessa A. Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92 (2): 343-358.
- Gilligan, Michael, Leslie Johns, and B. Peter Rosendorff. 2010. "Strengthening International Courts and the Early Settlement of Disputes." *The Journal of Conflict Resolution* 54 (1): 5-38.
- Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge University Press.
- Ginsburg, Tom. 2005. "Bounded Discretion in International Judicial Lawmaking." *Virginia Journal of International Law* 45 (2): 631-674.
- Ginsburg, Tom, and Richard McAdams. 2004. "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution." *William and Mary Law Review* 45 (4): 1229-1339.
- Ginsburg, Tom and Tamir Moustafa, eds. 2008. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge University Press.
- Gloppen, Siri. 2003. "The accountability function of the courts in Tanzania and Zambia." *Democratization* 10 (4): 112-136.
- Goldstein, Judith L., and Joanne Gowa. 2002. "US National Power and the Post-War Trading Regime." *World Trade Review* 1 (2): 153-170.
- Goldstein, Judith L., and Richard H. Steinberg. 2008. "Negotiate or Litigate? Effects of WTO Delegation on U.S. Trade Politics." *Law and Contemporary Problems* 71 (1): 257-282.
- Goodman, Ryan, and Derek Jinks. 2013. *Socializing States: Promoting Human Rights through International Law*. Oxford University Press.

- Grant, Ruth W., and Robert O. Keohane. 2005. "Accountability and Abuses of Power in World Politics." *American Political Science Review* 99 (1): 29-43.
- Grimmer, Justin, and Brandon M. Stewart. 2013. "Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts." *Political Analysis* 21 (3): 267-297.
- Grossman, Nienke. 2009. "Legitimacy and International Adjudicative Bodies." *George Washington International Law Review* 41 (1): 107-180.
- Guzman, Andrew T. 2004. "Food Fears: Health and Safety at the WTO." *Virginia Journal of International Law* 45 (1): 1-39.
- Guzman, Andrew T. 2008. "International Tribunals: A Rational Choice Analysis." *University of Pennsylvania Law Review* 157 (1): 171-235.
- Guzman, Andrew T., and Beth A. Simmons. 2002. "To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization." *Journal of Legal Studies* 31 (1): 205-235.
- Guzman, Andrew T., and Beth A. Simmons. 2005. "Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes." *Journal of Legal Studies* 34 (2): 557-598.
- Guzman, Andrew T., and Jennifer Landside. 2008. "The Myth of International Delegation." *California Law Review* 96 (6): 1693-1723.
- Hagle, Timothy. 1993. "'Freshman Effects' for Supreme Court Justices." *American Journal of Political Science* 37 (4): 1142-57.
- Hammond, Thomas H., Chris W. Bonneau, and Reginald S. Sheehan. 2005. *Strategic Behavior and Policy Choice on the U.S. Supreme Court*. Stanford University Press.
- Hathaway, Oona A. 2008. "International Delegation and State Sovereignty." *Law and Contemporary Problems* 71 (1): 115-150.
- Hawkins, Darren G., David A. Lake, Daniel L. Nielson, and Michael J. Tierney, eds. 2006. *Delegation and Agency in International Organizations*. Cambridge University Press.
- Hawkins, Darren G., and Wade Jacoby. 2010. "Partial Compliance: A Comparison of the European and Inter-American Court of Human Rights." *Journal of International Law and International Relations* 6 (1): 35-85.
- Heavin, Heather, and Robin Hansen. 2014. "'Objective Assessment of the Facts': A Principled Approach to WTO Appellate Body Review of Panel Fact-Finding." *Asper Review of International Business and Trade Law* 14 (189-222).
- Helfer, Laurence R. 2006. "Why States Create International Tribunals: A Theory of Constrained Independence." In *International Conflict Resolution*, ed. Stefan Voigt, Max Albert, and Dieter Schmidtchen. Tübingen: Mort Siebeck.

- Helfer, Laurence R. 2008. "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime." *European Journal of International Law* 19 (1): 125-159.
- Helfer, Laurence R. 2014. "The Effectiveness of International Adjudicators." In *The Oxford Handbook of International Adjudication*, ed. Cesare P.R. Romano, Karen J. Alter, and Chrisanthi Avgerou. Oxford University Press.
- Helfer, Laurence R., and Karen J. Alter. 2013. "Legitimacy and Lawmaking: A Tale of Three International Courts." *Theoretical Inquiries in Law* 14 (2): 479-504.
- Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Judicial Decision-Making in Argentina under Dictatorship and Democracy." *American Political Science Review* 96 (2): 291-230.
- Helmke, Gretchen. 2003. "Checks and Balances by Other Means: Strategic Defection and the 'Re-Reelection' Controversy in Argentina." *Comparative Politics* 35 (2): 213-228.
- Helmke, Gretchen, and Mitchell Sanders. 2006. "Modeling Motivations: A Method for Inferring Judicial Goals from Behavior." *Journal of Politics* 68 (4): 867-878.
- Henisz, Witold J., and Edward D. Mansfield. 2006. "Votes and Vetoes: The Political Determinants of Commercial Openness." *International Studies Quarterly* 50 (1): 189-211.
- Hensley, Thomas R. 1978. "Bloc Voting on the International Court of Justice." *The Journal of Conflict Resolution* 22 (1): 39-59.
- Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. 2003. "Acclimation Effects and Separate Opinion Writing on the U.S. Courts of Appeals." *Social Science Quarterly* 84 (4): 792-810.
- Hooghe, Liesbet, and Gary Marks. 2014. "Delegation and Pooling in International Organizations." *Review of International Organizations* Forthcoming.
- Hopkins, Daniel, and Gary King. 2010. "A Method of Automated Nonparametric Content Analysis for Social Science." *American Journal of Political Science* 54 (1): 229-247.
- Horlick, Gary N., and Judith Coleman. 2007. "The Compliance Problem of the WTO." *Arizona Journal of International and Comparative Law* 24 (1): 141-147.
- Howse, Robert, and Ruti Teitel. 2010. "Beyond Compliance: Rethinking Why International Law Really Matters." *Global Policy* 1 (2): 127-136.
- Hudec, Robert E. 1993. *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. Butterworth Legal Publishers.
- Hudec, Robert E. 1999. "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years." *Minnesota Journal of Global Trade* 8 (1): 1-54.

- Huneeus, Alexandra. 2014. "Compliance with International Court Judgments and Decisions." In *Oxford University Handbook of International Adjudication*, ed. Karen Alter Cesare Romano and Yuval Shany. Oxford: Oxford University Press.
- Hurd, Ian. 2008. "Myths of Membership: The Politics of Legitimation in UN Security Council Reform." *Global Governance* 14 (2): 199-217.
- Iaryczower, Matias, Pablo Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935-1998." *American Journal of Political Science* 46 (4): 699-716.
- Imai, Kosuke, Gary King, and Olivia Lau. 2008. "Toward A Common Framework for Statistical Analysis and Development." *Journal of Computational and Graphical Statistics* 17 (4): 892-913.
- Jackson, John H. 1994. "Remarks on 'The WTO and the New Dispute Settlement'." *Proceedings of the Annual Meeting (American Society of International Law)* 88 (131-139).
- Jackson, John H. 2001. "The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisted." *Journal of International Economic Law* 4 (1): 67-78.
- Janow, Merit. 2008. "Reflections on Serving on the Appellate Body." *Loyola University Chicago International Law Review* 6 (1): 249-258.
- Johns, Leslie. 2012. "Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication." *The Journal of Conflict Resolution* 56 (2): 257-289.
- Jurka, Timothy P., Loren Collingwood, Amber E. Boydston, Emiliano Grossman, and Wouter von Atteveldt. 2013. "RTextTools: A Supervised Learning Package for Text Classification." *The R Journal* 5 (1): 6-12.
- Kapiszewski, Diana, and Matthew M. Taylor. 2013. "Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings." *Law and Social Inquiry* 38 (4): 803-835.
- Kelemen, R. Daniel. 2001. "The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU." *Comparative Political Studies* 34 (6): 622-650.
- Kiewiet, D.R., and Matthew D. McCubbins. 1991. *The Logic of Delegation: Congressional Parties and the Appropriations Process*. The University of Chicago Press.
- King, Gary, Michael Tomz, and Jason Wittenberg. 2000. "Making the Most of Statistical Analyses: Improving Interpretation and Presentation." *American Journal of Political Science* 44 (2): 347-361.
- Kingsbury, Benedict. 1998. "The Concept of Compliance as a Function of Competing Conceptions of International Law." *Michigan Journal of International Law* 19 (2): 345-372.
- Koh, Harold Hongju. 1997. "Why Do Nations Obey International Law?" *The Yale Law Journal* 106 (8): 2599-2659.

- König, Thomas, George Tsebelis, and Marc Debus, eds. 2010. *Reform Processes and Policy Change: Veto Players and Decision-Making in Modern Democracies*. Springer.
- Kono, Daniel Y. 2007. "Making Anarchy Work: International Legal Institutions and Trade Cooperation." *Journal of Politics* 69 (3): 746-759.
- Koppell, Jonathan G.S. 2008. "Global Governance Organizations: Legitimacy and Authority in Conflict." *Journal of Public Administration Research and Theory* 18 (2): 177-203.
- Koremenos, Barbara. 2005. "Contracting around International Uncertainty." *American Political Science Review* 99 (4): 549-565.
- Koremenos, Barbara, Charles Lipson, and Duncan Snidal. 2001. "The Rational Design of International Institutions." *International Organization* 55 (4): 761-799.
- Kratochwil, Friedrich V. 1989. *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge University Press.
- Ku, Julian G. 2006. "International Delegation and the New World Court Order." *Washington Law Review* 81 (1): 1-70.
- La Porta, Rafael, Florencia Lopez-de Silanes, Andrei Schelifer, and Robert W. Vishny. 1998. "Law and Finance." *Journal of Political Economy* 106 (6): 1113-1155.
- Lacarte, Julio. 2003. "Comment on a WTO Permanent Panel Body." *Journal of International Economic Law* 6 (1): 227-230.
- Lacarte-Muro, Julio. 2015. "Launching the Appellate Body." In *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge University Press.
- Lagomarsino, Jeffrey. 2011. "WTO Dispute Settlement and Sustainable Development: Legitimacy Through Holistic Treaty Interpretation." *Pace Environmental Law Review* 28: 545-567.
- Lake, David A. 2007a. "Delegating divisible sovereignty: Sweeping a conceptual minefield." *The Review of International Organizations* 2: 219-237.
- Lake, David A. 2007b. "Escape from the State of Nature: Authority and Hierarchy in World Politics." *International Security* 32 (1): 47-79.
- Lake, David A. 2010. "Rightful Rules: Authority, Order, and the Foundations of Global Governance." *International Studies Quarterly* 54 (3): 587-613.
- Larkins, Christopher M. 1998. "The Judiciary and Delegative Democracy in Argentina." *Comparative Politics* 30 (4): 423-442.
- Lauterpacht, Hersch. 1933. *The Function of Law in the International Community*. Oxford: Clarendon Press.

- Legg, Andrew. 2012. *The Margin of Appreciation in International Human Rights Law: Defiance and Proportionality*. Oxford University Press.
- Leib, Ethan, David Ponet, and Michael Serota. 2013. "A Fiduciary Theory of Judging." *California Law Review* 101 (3): 699-753.
- Letsas, George. 2006. "Two Concepts of the Margin of Appreciation." *Oxford Journal of Legal Studies* 26 (4): 705-732.
- Letsas, George. 2013. "The ECHR as a living instrument: its meaning and legitimacy." In *Constituting Europe: the European Court of Human Rights in a National, European and Global Context*, ed. Andreas Føllesdal, Birgit Peters, and Geir Ulfstein. Cambridge: Cambridge University Press.
- Lewis, Meredith Kolsky. 2012. "Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement." *Stanford Journal of International Law* 48 (1): 1-45.
- Lupu, Yonatan, and Erik Voeten. 2012. "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights." *British Journal of Political Science* 42 (2): 413-439.
- Mackenzie, Ruth, Kate Malleson, Penny Martin, and Philippe Sands. 2010. *Selecting International Judges: Principle, Process, and Politics*. Oxford University Press.
- Majone, Giandomenico. 2001. "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance." *European Union Politics* 2 (1): 103-122.
- Maltzman, Forrest, James F. Spriggs II, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge University Press.
- Mansfield, Edward D., Helev V. Milner, and Jon C. Pevehouse. 2007. "Vetoing Co-operation: The Impact of Veto Players on Preferential Trading Arrangements." *British Journal of Political Science* 37 (3): 403-432.
- Martin, Lisa L. 2012. "Against Compliance." In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack. Cambridge University Press.
- Matsushita, Mitsuo. 2015. "Reflections on the functioning of the Appellate Body." In *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge University Press.
- Mavroidis, Petros C., and Thomas Cottier. 2003. "The Role of the Judge in International Trade Regulation: An Overview." In *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO*, ed. Thomas Cottier and Petros C. Mavroidis. University of Michigan Press.
- Meernik, James. 2007. "The Evolving Application of International Law: Insights from the Appeals Chamber of the Ad Hoc International Tribunals." *International Criminal Law Review* 7 (1): 117-132.

- Meernik, James, and Christopher Farris. 2006. "The influence of attorney background on judicial decision making at the International Criminal Tribunal for Rwanda." *Judicature* 89 (6): 326-333.
- Meernik, James, Kimi Lynn King, and Geoffrey Dancy. 2005. "Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors*." *Social Science Quarterly* 86 (3): 683-703.
- Mueller-Holyst, Bozena. 2005. "The role of the Dispute Settlement Body in the dispute settlement process." In *Key Issues in WTO Dispute Settlement: The First Ten Years*, ed. Rufus Yerxa and Bruce Wilson. Cambridge: Cambridge University Press.
- Neustadt, Richard E. 1990. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. Free Press.
- Nielson, Daniel L., and Michael J. Tierney. 2003. "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform." *International Organization* 57 (2): 241-276.
- Oesch, Matthias. 2003. *Standards of Review in WTO Dispute Resolution*. Oxford University Press.
- Onuf, Nicholas Greenwood. 1989. *World of Our Making: Rules and Rule in Social Theory and International Relations*. University of South Carolina Press.
- Palmeter, David N., and Petros C. Mavroidis. 2004. *Dispute Settlement in the World Trade Organization: Practice and Procedures*. 2d ed. Cambridge University Press.
- Pelc, Krzysztof. 2010. "Constraining Coercion? Legitimacy and Its Role in US Trade Policy, 1975-2000." *International Organization* 64 (1): 65-96.
- Pelc, Krzysztof. 2014. "The Politics of Precedent in International Law: A Social Network Application." *American Political Science Review* 108 (3): 547-564.
- Peskin, Victor. 2008. *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*. Cambridge University Press.
- Peters, Birgit, and Johan Karlsson Schaffer. 2013a. "Introduction: The Turn to Authority beyond States." *Transnational Legal Theory* 4 (3): 315-335.
- Peters, Birgit, and Johan Karlsson Schaffer. 2013b. "The Turn to Authority beyond States." *Transnational Legal Theory* 4 (3).
- Pollack, Mark. 2014. "Political Science and International Adjudication." In *The Oxford Handbook of International Adjudication*, ed. Cesare P.R. Romano, Karen J. Alter, and Chrisanthi Avgerou. Oxford University Press.
- Pollack, Mark A. 1997. "Delegation, agency, and agenda setting in the European Community." *International Organization* 51 (1): 99-134.

- Posner, Eric A., and John C. Yoo. 2005. "Judicial Independence in International Tribunals." *California Law Review* 93 (1): 1-74.
- Posner, Eric A., and Miguel de Figueiredo. 2005. "Is the International Court of Justice Biased?" *The Journal of Legal Studies* 34 (2): 599-630.
- Raustiala, Kal, and Anne-Marie Slaughter. 2002. "International Law, International Relations and Compliance." In *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons. 1st ed. Sage.
- Reus-Smit, Christian, ed. 2004. *The Politics of International Law*. Cambridge University Press.
- Richards, Mark, and Herbert Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96 (2): 305-320.
- Richards, Mark, and Herbert Kritzer. 2003. "Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases." *Law and Society Review* 37 (4): 827-840.
- Richards, Mark, and Herbert Kritzer. 2005. "The Influence of the Supreme Court's Search-and-Seizure Jurisprudence." *American Politics Research* 33 (1): 33-55.
- Roe, Mark J. 2006. "Legal Origin and Modern Stock Markets." *Harvard Law Review* 120 (2): 460-527.
- Romano, Cesare P.R. 2005. "The Price of International Justice." *The Law and Practice of International Courts and Tribunals* 4 (2): 281-328.
- Rosenau, James N. and Ernst Czempiel, eds. 1992. *Governance Without Government: Order and Change in World Politics*. Cambridge University Press.
- Rosendorff, B. Peter, and Helev V. Milner. 2001. "The Optimal Design of International Trade Institutions: Uncertainty and Escape." *International Organization* 55 (4): 829-857.
- Rosenfeld, Michel. 2004. "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts." *International Journal of Constitutional Law* 2 (4): 633-668.
- Schauer, Frederick. 2000. "Lecture: Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior." *University of Cincinnati Law Review* 68 (3): 615-636.
- Schubert, Glendon. 1965. *The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices, 1946-1963*. Northwestern University Press.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model: Revisited*. Cambridge University Press.
- Shaffer, Greg, Manfred Elsig, and Sergio Puig. 2016. "The Extensive (but Fragile) Authority of the WTO Appellate Body." *Law and Contemporary Problems* 79 (1): 237-273.

- Shaffer, Gregory, and Joel Trachtman. 2011. "Interpretation and Institutional Choice at the WTO." *Onati Socio-Legal Series* 1 (4): 1-43.
- Shaffer, Gregory, and Tom Ginsburg. 2012. "The Empirical Turn in International Legal Scholarship." *American Journal of International Law* 106 (1): 1-46.
- Shany, Yuval. 2006. "Toward a General Margin of Appreciation Doctrine in International Law?" *European Journal of International Law* 16 (5): 907-940.
- Shany, Yuval. 2012. "Assessing the Effectiveness of International Courts: A Goal-Based Approach." *American Journal of International Law* 106 (2): 225-270.
- Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. University of Chicago Press.
- Simmons, Beth A. 2002. "Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes." *Journal of Conflict Resolution* 46 (6): 829-856.
- Smith, Adam M. 2005. "'Judicial Nationalism' in International Law: National Identity and Judicial Autonomy at the ICJ." *Texas International Law Journal* 40: 197-231.
- Smith, James McCall. 2003. "WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings." *World Trade Review* 2 (1): 65-100.
- Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court—Circuit Court Interactions." *American Journal of Political Science* 38 (3): 673-696.
- Songer, Donald R., and Stefanie A. Lindquist. 1996. "Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making." *American Journal of Political Science* 40 (4): 1049-1063.
- Spaeth, Harold J. 1979. *Supreme Court Policy Making: Explanation and Prediction*. W.H. Freeman.
- Spiller, Pablo T., and Rafael Gely. 1992. "Congressional control or judicial independence: the determinants of U.S. Supreme Court labor-relations decisions, 1949-1988." *RAND Journal of Economics* 23 (4): 463-492.
- Staton, Jeffrey K. 2004. "Judicial Policy Implementation in Mexico City and Merida." *Comparative Politics* 37 (1): 41-60.
- Staton, Jeffrey K., and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." *American Journal of Political Science* 52 (3): 504-519.
- Steger, Debra P. 2015. "The founding of the Appellate Body." In *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge University Press.
- Steinberg, Richard. 2004. "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints." *American Journal of International Law* 98 (2): 247-275.

- Steinberg, Richard. 2013. "Wanted-Dead or Alive: Realism in International Law." In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack. Cambridge University Press.
- Stoler, Andrew. 2003. "The Current State of the WTO." Paper Presented at the Workshop on the EU, the US and the WTO, Stanford University.
- Stone Sweet, Alec, and Thomas L. Brunell. 2012. "The European Court of Justice, State Non-compliance, and the Politics of Override: Reply to Carruba, Gabel, and Hankla." *American Political Science Review* 106 (1): 204-213.
- Stone Sweet, Alec, and Thomas L. Brunell. 2013. "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism." *Journal of Law and Courts* 1 (1): 61-88.
- Swaine, Edward T. 2004. "The Constitutionality of International Delegation." *Columbia Law Review* 104 (6): 1492-1614.
- Terris, Daniel, Cesare P.R. Romano, and Leigh Swigart. 2007. *The International Judge: An Introduction to the Men and Women who Decide the World's Cases*. Brandeis University Press.
- Tsebelis, George. 2002. *Veto Players: How Political Institutions Work*. Princeton University Press.
- Tyler, Tom R. 2006. *Why People Obey the Law*. Princeton University Press.
- Unterhalter, David. 2015. "The authority of an institution: The Appellate Body under review." In *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, ed. Gabrielle Marceau. Cambridge University Press.
- Van den Bossche, Peter. 2006. "From afterthought to centrepiece: the WTO Appellate Body and its rise to prominence in the world trading system." In *The WTO at Ten: The Contribution of the Dispute Settlement System*, ed. Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes. Cambridge University Press.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45 (2): 346-361.
- Voeten, Erik. 2007. "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights." *International Organization* 61 (4): 669-701.
- Voeten, Erik. 2008. "The Impartiality of International Judges: Evidence from the European Court of Human Rights." *American Political Science Review* 102 (4): 417-433.
- Voeten, Erik. 2009. "The Politics of International Judicial Appointments." *Chicago Journal of International Law* 9 (2): 387-405.

- Voeten, Erik. 2013. "International Judicial Independence." In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey Dunoff and Mark Pollack. Cambridge University Press.
- Voeten, Erik. 2014. "International Judicial Behavior." In *Oxford University Handbook of International Adjudication*, ed. Cesare P.R. Romano, Karen J. Alter, and Chrisanthi Avgerou. Oxford University Press.
- von Bogdandy, Armin. 2001. "Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship." *Max Planck Yearbook of United Nations Law* 5 (1): 609-674.
- von Bogdandy, Armin, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann, and Matthias Goldmann, eds. 2010. *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*. Springer.
- von Staden, Andreas. 2012. "The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review." *I-CON* 10 (4): 1023-1049.
- VonDoepp, Peter. 2006. "Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zimbabwe." *Political Research Quarterly* 59 (3): 389-399.
- VonDoepp, Peter. 2008. "Context-Sensitive Inquiry in Comparative Judicial Research: Lessons from the Namibian Judiciary." *Comparative Political Studies* 41 (11): 1515-1540.
- Voon, Tania, and Alan Yanovich. 2006. "The Facts Aside: The Limitation of WTO Appeals to Issues of Law." *Journal of World Trade* 40 (2): 239-258.
- Vreeland, James Raymond. 2003. "Why Do Governments and the IMF Enter into Agreements? Statistically Selected Cases." *International Political Science Review* 24 (3): 321-343.
- Vreeland, James Raymond. 2006. "IMF program compliance: Aggregate index versus policy specific research strategies." *The Review of International Organizations* 1 (4): 359-378.
- Weiler, J.H.H. 1994. "A Quiet Revolution: The European Court of Justice and its Interlocutors." *Comparative Political Studies* 26 (4): 510-534.
- Weiss, Thomas G., and Rorden Wilkinson. 2014. "Rethinking Global Governance? Complexity, Authority, Power, Change." *International Studies Quarterly* 58 (1): 207-215.
- Wilson, Bruce. 2007. "Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date." *Journal of International Economic Law* 10 (2): 397-403.
- Wood, Michael. 2007. "The Selection of Candidates for International Judicial Office: Recent Practice." In *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Thomas A. Mensah*, ed. Tasfir Malik Ndiaye, Rüdiger Wolfrum, and Chie Kojima. Martinus Nijhoff.

- Wood, Sandra L., Linda Camp Keith, Drew Noble Lanier, and Ayo Ogundele. 1998. "'Acclimation Effects' for Supreme Court Justices: A Cross-Validation, 1888–1940." *American Journal of Political Science* 42 (2): 690-97.
- WTO. 2011. "Understanding the WTO." Geneva, Switzerland: .
- Zangl, Bernhard. 2008. "Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO." *International Studies Quarterly* 52 (4): 825-854.
- Zaum, Dominik. 2014. *Legitimizing international organizations*. Oxford: Oxford University Press.
- Zimmerman, Thomas A. 2006. *Negotiating the Review of the WTO Dispute Settlement Understanding*. Cameron May.
- Zürn, Michael, Martin Binder, and Matthias Ecker-Eckhardt. 2012. "International authority and its politicization." *International Theory* 4 (1): 69-106.