Why Adjudicate?
Enforcing Trade Rules in the WTO [*]

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May 11, 2011

[*]This is the introduction chapter of a forthcoming book manuscript that should be cited as Christina L. Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton, NJ: Princeton University Press, forthcoming 2012). The full manuscript is available upon request. cldavis@princeton.edu.

Abstract

The expansion of international law raises the problem of enforcing rules in the absence of a centralized prosecutor and police. What leads some states to challenge violations of their rights through legal action? This book argues that the answer lies in domestic accountability mechanisms and the role of law to facilitate communication. Democratic checks and balances encourage representation of domestic interests and place emphasis on public lawsuits over informal settlements. Whereas demands driven by domestic pressure could imperil international cooperation, adjudication offers a solution. Turning to legal dispute settlement helps states to signal resolve more effectively for better bargaining outcomes. Christina Davis tests this argument with analysis of trade disputes in the World Trade Organization, where democracies lead in the use of dispute settlement as both complainants and defendants. Statistical analysis shows that shifts in domestic political balance that empower the legislature lead to more adjudication. Qualitative evidence based on extensive interviews reveals how trade officials use legal complaints to manage domestic politics without risk of trade war. Case studies of the United States and Japan compare the role of legislative constraints in the trade policy process with detailed examination of disputes ranging from the Boeing-Airbus dispute over aircraft subsidies to Chinese intellectual property rights and U.S. anti-dumping policies for the steel industry. This book demonstrates that enforcement of trade rules is not just the realm of technocrats making decisions based on law and economics. Lobbying by industries, demands from the legislature, and political relations between countries influence which countries and cases appear in court. The politicized selection of legal complaints generates aspects of political theater in trade disputes, but proves effective nonetheless. In analysis of foreign trade barriers against U.S. exports, Davis shows that the United States gains better outcomes for cases taken to formal dispute settlement than for those negotiated. Case studies of Peru and Vietnam reveal that the law can also be an effective tool for developing countries. The power of law arises from the information it provides to actors at home and abroad about resolve to take action and mobilize the legitimacy of rule-based enforcement.

Why do states turn to international courts to resolve their disputes? Liberal protesters on the streets condemn international organizations as servants of corporate interests, while conservative skeptics of international law reject intervention into state decision-making by international bureaucrats. Governments of both large and small states have reason to avoid courts. Powerful states like the United States and EU have tools for leverage in bilateral negotiations. Whether offering side-payments or threatening unilateral sanctions, they can influence the behavior of smaller states without need for a third party. At the same time, small developing countries fear legalization will merely introduce another tool where they lack capacity and cannot defend their interests. It is not as if filing a law suit mobilizes a police force. For all of their "court-like" appearance, international courts are fundamentally different from domestic courts because they lack the authority to impose their rulings in an anarchic international system. Moreover, using courts is costly. Hiring lawyers, preparing formal briefs, and taking a dispute into the public arena costs time and money and it also risks injuring diplomatic relations. Nonetheless, we observe a clear trend toward legalization as more areas of international affairs are regulated by international law and the number and authority of international courts has grown. States are increasingly turning to courts to solve disputes.

They do so in order to achieve better outcomes. The choice of adjudication represents a shift in process – not abdication of sovereignty.[1] Governments negotiate international rules and decide when and how to enforce them. Often states retain gatekeeper status over which legal complaints are filed. They have discretion over whether to comply with rulings issued against them by international judges. Governments give up some control when they enter formal dispute settlement and open themselves to third party involvement, but this sacrifice of autonomy comes as a deliberate choice.

Understanding the decision to use legal enforcement is critical for evaluating how international institutions shape state behavior. The effectiveness of any legal system depends upon the actions of the police, prosecutor, and judge. One must consider the interaction of law with the probability of enforcement. Given the same set of legal commitments and punishment standard, challenges to every small infraction push the system towards strict compliance while imperfect enforcement induces weak compliance. In the absence of a central prosecutor or police force, most international

[1] The literature interchangeably uses the terms litigation and adjudication. Following Abbott et al. (2000) and Trachtman (1999) I will generally use the term adjudication.

regimes depend upon member states to monitor the policies of other states and to challenge specific violations. What are the incentives for states to take on this enforcement role?

This book argues that states use international adjudication in order to manage domestic political pressure and pursue international cooperation. The decision to invoke international law in a dispute does not proceed automatically on merits of the case alone. While the stakes in the outcome and legal standard for each case are important factors in the decision to enforce rules, these are not the only criterion. One must recognize the intensely political nature of filing a law suit against another country. Addressing a dispute in a legal venue raises new costs for the state in terms of legal preparation, diplomatic relations, and risk of precedent that could affect a wider range of issues. Some actors may prefer negotiations that allow flexibility in terms of when and how to resolve the dispute between two states without formal procedures, third parties, and publicity. As a result, many cases that could be taken to court, are instead negotiated. Those states with domestic constraints on executive autonomy, however, will find it hard to accept negotiated compromises. In democracies, and especially those democracies with sharp partisan divisions and institutional checks and balances in the structure of government, the executive faces demands from the legislature to demonstrate its effort to enforce the agreements ratified by the legislature. Domestic constraints limit the flexibility for an executive to reach informal compromises and encourage visible accountability. Engaging in political theater by initiating legal action against a foreign government proves to be an effective strategy not only for dealing with foreign governments but also for managing domestic pressure. Willingness to bear the costs of going to court signals that the government gives priority to enforcement. As a result, incentives to use courts arise from their usefulness as a political tool and not only from their role to interpret the law and allocate punishment.

This book will test the implications of political demand for adjudication in analysis of when and how states have used adjudication to resolve trade disputes. I develop a theory about domestic constraints to explain why democratic states are more likely to file legal complaints against trade barriers and select their cases based on the political influence of the affected industry. Checks on executive autonomy in the domestic institutional framework encourage the government to be responsive to industry interests. Choosing adjudication as a trade strategy allows the government to visibly demonstrate enforcement actions to its domestic audience and signal strong resolve to a

trade partner. Adjudication functions as a response to domestic pressure that promotes settlement of trade disputes by providing information about preferences.

The question of how states maintain cooperation in anarchy without centralized enforcement has been a major theme in international relations scholarship. Leading theories account for why states agree to a rule framework. Powerful states have incentives to provide public goods that benefit systemic stability and they have the capacity to supply centralized enforcement (e.g. Gilpin, 1981; Kindleberger, 1986). In the face of market failures that could prevent cooperation, states establish institutions that lower transaction costs (Keohane, 1984). Distributional conditions along with the externalities of the issue influence how these institutions are designed to balance the interests of states (Martin, 1992; Koremenos, Lipson and Snidal, 2001). Legalization, defined in terms of the obligation for compliance, precision of rules, and delegation to third party dispute settlement, represents one dimension of variation in the form of international institutions (Abbott et al., 2000, p. 401).[2]

High levels of legalization that include delegation to third party dispute settlement are evident across security, human rights, and economic issue areas. War crimes have been challenged by international tribunals since the Nuremberg Trials and more recently by the International Criminal Court. The International Court of Justice has a varied set of cases including territorial disputes and claims regarding mistreatment of foreign nationals. The United Nations Convention on the Law of the Sea refers disputes that cannot be resolved amicably to the International Tribunal for the Law of the Seas. The European Human Rights Convention established a court that has a large docket of cases brought by individuals against their own governments. Regional integration has deepened as economic regulations for a common market are enforced by courts: the European Court of Justice is the most prominent regional court, but many other regional communities including the Andean Pact and Mercosur in Latin America and the Common Market of Eastern and Southern Africa have courts that hear cases related to economic disputes among member states. Bilateral investment treaties provide for dispute settlement by third parties such as the International Court of Arbitration or International Center for Settlement of Investment Disputes. Finally, trade as the area that is the subject of this book, offers an example of legalization with hundreds of trade disputes addressed in a formal dispute settlement process by members of the General Agreements

[2] See special issue of the journal *International Organization* (Goldstein et al., 2000) for comprehensive analysis of the concept of legalization and its application across issue areas.

on Tariffs and Trade (GATT) and now the World Trade Organization (WTO).

The legalization of international affairs has attracted growing attention, but there is need to explain why states use courts. Research has primarily focused on when states comply with their commitments (Downs, Rocke and Barsoom, 1996; Chayes and Chayes, 1995; Simmons, 2000). Less attention has been given to how other states respond to violations. When the harm from cheating and benefits of cooperation are shared broadly across states, enforcement represents a public good where each state may seek to free-ride on actions of others rather than "play the role of policeman"(Axelrod and Keohane, 1986, p. 235). One of the main functions of international institutions is to provide information about compliance in order to increase the reputational costs of noncompliance (Keohane, 1984; Dai, 2007). Yet many regimes rely upon decentralized enforcement. The states that challenge violations play an important role in establishing regime effectiveness because their actions trigger the material and reputational mechanisms for compliance in the institution.

Litigation also serves domestic purposes. Democratization and legalization have grown as two parallel trends in international politics. The increase in the number of democratic states since 1970 has been accompanied by an increase in the use of international courts across a range of policy areas from human rights to trade and investment. The close connection between democracy and judicial institutions within a state is widely recognized (e.g. Larkins, 1996; Widner, 2001; La Porta et al., 2004; Stephenson, 2003). More recently it has become evident that democratic states also show an affinity for the use of courts to resolve international disputes. The advanced industrial democracies have taken the leading role in the establishment of international courts. Democratic regime type increases the likelihood that a pair of states will seek legal dispute settlement of a territorial dispute (Allee and Huth, 2006). In the area of trade adjudication, research has highlighted the positive relationship between democracy and trade complaints in both the GATT and WTO periods (Busch, 2000; Reinhardt, 2000; Davis and Bermeo, 2009; Sattler and Bernauer, Forthcoming). Indeed, during the first decade of WTO adjudication, authoritarian governments brought only ten disputes.[3] The democratic preference for legalized dispute settlement is one dimension of a broader complementarity between democracy and multilateralism highlighted in several recent studies (e.g. Moravcsik, 2000; Mansfield and Pevehouse, 2006; Keohane, Moravcsik and Macedo, 2009; Simmons, 2009).

[3]This counts distinct dispute matters with a WTO complaint filed between 1995 and 2004. Authoritarian governments are classified as those with a score below 6 on the Polity 2 measure of democratic institutions.

The emergence of China as a major player in the trading system raises new questions. China has begun to take part in adjudication as both complainant and defendant in several cases. Although it only filed one complaint during its first five years as a new WTO member, China initiated five cases over the period 2008-10. Such action demonstrates that authoritarian states may also use international courts. Domestic constraints arise within the authoritarian context and future research must explore more carefully such variation. Nonetheless, WTO adjudication by China continues to lag behind its democratic counterparts and is small relative to the growing share of protection measures imposed on Chinese exports. According to one measure of trade barriers, Chinese exports at the global level face nearly four times the level of barriers imposed against the exports from other countries (Bown, 2010, p. 5). Such high levels of protection give rise to potential demand for adjudication. Against this backdrop, the five cases by China over three years are moderate relative to six cases filed by EU and nine cases filed by US during the same period. Notably, other developing countries such as Brazil and Argentina have in past years initiated as many as five cases in one year! Finally, it is illustrative to compare China and Taiwan WTO challenges of anti-dumping investigations against their firms since they joined the WTO nearly at the same time (December 2001 and January 2002 respectively) and this is the most frequently challenged type of trade barrier in WTO adjudication. At first glance, China appears more active with five complaints against anti-dumping investigations relative to two complaints by Taiwan. Yet China confronted 410 investigations and Taiwan only 92 making Taiwan nearly twice as likely as China to use adjudication against any given barrier.[4] While China's evolving approach to trade enforcement strategies is important to watch carefully, the overall pattern across countries remains one in which democracies are the leading litigators.

This book will focus on the use of adjudication in the enforcement of trade rules. Both the theory and empirical analysis compare the choice of adjudication with the alternative to resolve disputes outside of the legal forum. I ask two questions: Under what conditions do states choose legal venues for dispute settlement, and how does the legal context change the outcome? My answers will highlight the role of domestic politics to generate demand for adjudication as an enforcement strategy.

[4]The data here for the period through end of 2008 is from Bown (2009b, p. 81-82) who describes variation in which European Community challenges nineteen percent of initiations against its firms relative to India challenging seven percent, both of which are much higher than either Taiwan or China.

1 The Enforcement of International Trade Law

Trade represents a promising area to examine the role of courts in international affairs. The multilateral trade regime now regulates over twenty-four trillion dollars in trade on the basis of formal treaty agreements.[5] Although much research focuses on the role of the WTO in liberalizing bilateral trade flows (Rose, 2004; Gowa and Kim, 2005; Goldstein, Rivers and Tomz, 2007), the WTO conflict resolution mechanism plays a critical role in the ability of states to reach agreements and maintain cooperation (Kovenock and Thursby, 1992; Maggi, 1999; Busch and Reinhardt, 2002; Rosendorff, 2005). Increasing levels of trade that accompany liberalization generate both wealth and conflict as states confront each other with demands for market access and protection for sensitive industries. States established the GATT and then the WTO in order to manage this conflict through a common set of negotiated multilateral rules and a formal process for dispute settlement.

The question of enforcement arises after states conclude a liberalization agreement through negotiating rules and then disagree over whether a trade partner is in compliance with those rules. Such disputes may arise through either a failure of implementation in which exporters never gained the promised market access or through a new barrier that has been imposed in response to changed economic or political conditions. The disputed measure may represent a clear violation of rules or a policy where there could be different interpretations of the agreement. These barriers that present potential inconsistency with the rules may be overlooked by trade partners, negotiated in bilateral talks or multilateral committees, or raised for adjudication. The three steps of liberalization, cheating, and enforcement are inter-related. Low levels of liberalization would be less likely to lead to widespread cheating since compliance is easy, and as a result enforcement would rarely be a problem (Downs, Rocke and Barsoom, 1996). Deep liberalization commitments are more likely to give rise to incentives for cheating and encounter serious enforcement challenges, but states would not have accepted such commitments in the first place without some assurance regarding enforcement (Fearon, 1998). While recognizing the feedback between enforcement and

[5] According to *International Trade Statistics 2010* (data for Charts 8 and 10 at `http://www.wto.org` accessed 17 February 2011), WTO members total merchandise trade was $17.86 trillion and total trade in commercial services was $6.24 trillion for the year 2009 (trade measured as exports plus imports among WTO members, excluding intra-EU trade). This represents 93.7 percent of world trade in merchandise and 94.8 percent of trade in services.

liberalization promises in the first stage and between enforcement and the likelihood of cheating in the second stage, explaining the question of why states make liberalization commitments and why they subsequently impose protection is not my main purpose. Rather, I am interested to explain when and how states choose to enforce rules. By examining the variation in demand for enforcement within a single issue area and existing rules framework, I am able to take into account many factors that influence the first two stages even as my central argument points to independent factors that influence enforcement decisions.

Background on Adjudication of Trade Disputes

The General Agreement on Tariffs and Trade (GATT) began as a provisional agreement in 1947 with informal consultations to resolve disputes, but within less than a decade practice had evolved to rely upon an appointed panel of experts who issued independent rulings on formal legal complaints about noncompliance. Although commonly referred to as *dispute settlement*, this is simply "a nice sort of nonadversarial, nonthreatening, look-at-the-positive-side phrase for what most people would call a lawsuit" according to Hudec (1987, p. 214). The ability of the defendant to block the establishment of the panel or adoption of a ruling limited the enforcement capacity of states under GATT, but its dispute procedures were nonetheless invoked in over two hundred cases and states generally complied with rulings (Hudec, 1993). Dispute settlement became more legalistic when the World Trade Organization (WTO) replaced the GATT procedures with a reformed dispute settlement understanding that ended the de facto veto right of defendants and added a standing Appellate Body of judges to review panel decisions.[6] Now a highly legalized dispute settlement process enforces regulations over a wide range of economic policies for a membership of more than 150 states. Since its establishment in 1995, states have addressed over four hundred trade disputes within the WTO dispute settlement process.[7] The issues before the court have ranged from the labeling of sardines to the amount of subsidies received by Boeing and Airbus.

The WTO dispute settlement system is a technical legal process. The initial complaint consists of a request for consultations stating the legal basis for the complaint. All complaints are public

[6] For analysis of changes from GATT to WTO see Jackson (1997); Barton et al. (2006); Krueger (1998).

[7] The WTO has assigned a distinct dispute number for 419 disputes as of the end of 2010. Sometimes a new number is assigned for a repeat filing on the same issue so the actual number of distinct disputes would be slightly lower.

information and become part of the official record of WTO disputes. Consultations take place as confidential negotiations in Geneva between the two parties, and if settlement is not reached the Dispute Settlement Body will approve the request from the complainant for a panel. The panel process then requires written submissions from both parties to the panel. These submissions are complex legal arguments about the interpretation of WTO law and the facts related to the trade impact of the policy.[8] The three meetings of the panel include opening and closing statements from the two parties and any third parties with interest in the case, and response to questions from the panel. The process can be ended through mutual agreement at any stage. In the case of an appeal of the panel ruling, both sides again present new submissions to the Appellate Body before a final ruling is issued on the case. A small number of cases continue with further proceedings to determine the amount for compensation and to evaluate compliance. Panel and Appellate Body rulings are detailed legal documents that are typically hundreds of pages in length.

Costly Enforcement

The trade regime relies on decentralized enforcement in which states bring forward claims. In contrast with domestic legal systems or the European Court of Justice, there is no central public prosecutor. Some treaty organizations, such as the IAEA in the Non-proliferation Treaty regime, provide centralized monitoring to coordinate enforcement actions.[9] Although the Trade Policy Review Mechanism of the WTO provides information on member policies, it has not been used as a means to reveal noncompliance (Hoekman and Mavroidis, 2000; Patel, 2008). The WTO Secretariat explicitly remains neutral on member inquiries about compliance questions, and the reviews are too infrequent to represent an alarm system alerting members about noncompliance. Only panels and the Appellate Body render judgments on compliance, and these are in response to member complaints. While strategic action by the court as an agent is possible in the ruling

[8] Although the written submissions are generally not public documents, some governments such as the United States make them publicly available (see `http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Section_Index.html`).The U.S. first submission as complainant for one relatively minor case, "Mexico– Definitive Antidumping Measures on Beef and Rice" was 91 pages in length. Its first submission as defendant for the case, "United States–Definitive Safeguards Measures on Imports of Certain Steel Products" was 373 pages in length.

[9] See Dai (2002) for discussion of the conditions that lead to different institutional design in monitoring functions.

phase, the court cannot solicit or refuse to hear a case. This institutional design means states remain the central actor for enforcement because only states have the authority to enforce the agreement through filing a complaint under the dispute settlement provisions of the agreement. As a result, enforcement will only be as high as the willingness and capacity of states to monitor and challenge the trade barriers of their trade partners.

If enforcement were costless, we would see all violations brought forward as complaints. Instead, the number of potential trade disputes is large, and only a small proportion are raised for adjudication. Although there have been over 400 WTO complaints, many more WTO inconsistent policies are not challenged. The barriers are either ignored or addressed in other venues. For example, the United States National Trade Estimate Report, which monitors the trade barriers of U.S. trade partners that harm U.S. exports, listed 126 trade barriers by Japan during the years 1995 to 2004, of which only 6 were addressed in WTO dispute settlement. Most were addressed in other negotiation venues, but these often continued to be reported as serious problems without resolution of the complaint. Partial progress is reported for some cases, but 41 barriers continued to be reported after more than two years of negotiations and no report of any progress to resolve the complaint. Yet the United States is the *most* active complainant in WTO dispute settlement! The number of potential WTO disputes that are never filed may be even larger for developing countries, which face greater obstacles for filing cases. Costs at the level of industry and government inhibit filing all potential cases.

Failure of export industries to mobilize for government intervention against foreign trade barriers may contribute to imperfect enforcement of trade agreements. Governments rely upon industry to inform them of foreign trade barriers, and WTO adjudication typically goes forward as a public private partnership in which industry demand begins the process (Shaffer, 2003). The affected industries represent a critical "enforcement constituency" (Iida, 2006, p.29). To initiate the process, they must identify barriers, determine the economic value of replacing the barrier with WTO-consistent policy, and use resources to lobby government (Bown, 2009a). So the question is when will an export industry have incentives to lobby its government to challenge foreign trade barriers? Export industries may find that a trade barrier represents too small of a hindrance to justify mobilization. Competitive markets generate a collective action problem – when the foreign trade barrier is nondiscriminatory, its removal would equally benefit all exporters so that no individual

firm has incentive to mobilize for its removal. Those in high velocity business environments will face opportunity costs for lobbying and enforcement strategies that take years to achieve results (Davis and Shirato, 2007). For example, the Japanese firm NEC chose not to challenge U.S. anti-dumping duties on its supercomputers in the WTO because it had already moved on with other strategies to improve market share and did not want to wait for WTO verdict (ibid., p. 303). Finally, firms that have invested in building good relations with foreign governments and developing their market image with buyers in foreign markets worry that lobbying in favor of legal action could produce backlash in other areas against their interests. These factors related to industry demand reduce enforcement levels where industry interests are insufficient to produce mobilization. Cheating by the trade partner may go unobserved by a government because their industry fails to inform them of the negative impact, or the government will give low priority to the matter if their own industry responds passively to inquiry about the problem.

Nonetheless, many export interests do lobby to demand government intervention against foreign trade barriers. In some cases, export firms do not face collective action problems for mobilization because they compete in oligopolistic markets (e.g. aircraft manufacturers) or face narrow discriminatory trade barriers (e.g. antidumping duties which are assessed on specific firms).[10] Less diversified industries with a narrow range of products and long time horizons such as steel and agriculture will find it worthwhile to invest in lobbying for trade barrier removal. Industry associations help to overcome collective action problems. In a poor country like Pakistan, coordination by the All Pakistan Textile Mills Association led to the necessary support of industry to split the burden of legal fees with the government for a WTO case against U.S. restrictions on cotton yarn exports filed in April 2000 (Hussain, 2005, p. 465). Mobilization is most likely against barriers for industries that are a principal supplier, meaning that they a sufficiently large share of market to recoup benefit from improved access even when exporters from other countries could free ride on their effort. Powerful associations that represent a broad set of export interests (e.g. the American Chamber of Commerce, UNICE, and *Keidanren*) lobby for removal of barriers that may not cause severe damage to any single industry but nonetheless worsen the export environment. Dai (2007, p. 56) argues that the ready availability of industry as low-cost monitors willing to inform governments about non-compliance accounts for why states chose a decentralized compliance mechanism

[10] See Bown (2009a, pp. 100-104) for list of firms associated with backing specific WTO disputes.

in the WTO.

A second factor behind imperfect enforcement is the government role as a filter. In these cases, the harmed export industry may lobby for action against a foreign trade barrier but its government chooses not to act. Officials from countries as diverse as the United States and Canada to Costa Rica and Pakistan said during interviews that they face more potential cases raised by industry than the government will decide to file. Governments do not have the same incentives as their export industry to challenge foreign trade barriers. In a comprehensive study of economic negotiations, Odell (2000, p.25) demonstrates that officials pursue multiple objectives including economic gains for the industry as well as relational influence with foreign countries and domestic political interests.

Adjudication raises costs related to administrative burden, legal precedent, and diplomatic stakes that concern the government more than industry. Legal fees for hiring an international law firm to handle case preparation are estimated to range from $500,000 to over $1 million depending on the case (The US and EU will commonly hire outside legal assistance, and it is routine for Japan and even some developing countries to do so as well). Some of these costs are shared with the affected industry, but government personnel and financial resources are still dedicated to support the litigation effort.[11] Precedent represents a double-edged sword - victory to win the ruling may come back to haunt the government as a precedent against its own policies on related issues in the future (Busch, 2007, p. 743). Governments also worry about the risk of losing the ruling, which represents a worse outcome than the status quo because a behavior that had been questionable before the ruling now stands publicly legitimated to be adopted by others.

Diplomatic stakes represent a key reason for imperfect enforcement. Srinivasan and Levy (1996) show in a simple model that governments may favor lower use of a dispute system to challenge foreign trade barriers than demanded by their export industry because the government has a utility function that includes political relations with a trade partner in addition to their shared utility with their export industry for removal of the foreign barrier. Leaders may want to overlook the sins of their trade partners in 'tacit collusion' where both agree to tolerate some cheating (Hoekman and Mavroidis, 2000, p. 529).[12] They may fear that challenging a trade partner's barrier would

[11]This burden accounts for the evidence that many developing countries struggle to use legal enforcement to their advantage (e.g. Kim, 2008; Davis and Bermeo, 2009)

[12]This follows the logic of efficient breach in contract theory where not all provisions are completely enforced.

be linked to other economic policies, whether by counter-suits in WTO adjudication or in other policy areas.[13] The public nature of suing a trade partner can contribute to acrimonious rhetoric harmful to diplomatic relations. The country imposing a trade barrier provokes resentment from producers in the trade partner whose interests are harmed, but may nonetheless be hostile to the decision of the trade partner to challenge the measure in public as a violation. The tendency to view complaints as a diplomatic insult is not new with the WTO - the view of legal complaints as aggressive actions had suppressed the number of GATT complaints in the 1960s, and it led some members during Tokyo Round negotiations to call for specific wording in the new understanding on dispute settlement noting that complaints should not be intended or considered as contentious acts (Hudec, 1980, p. 178). The WTO Dispute Settlement Understanding (Article 3.10) states "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts ..." The sense that this provision is necessary acknowledges the fear of negative consequences. Beyond this formal exhortation there is little the regime can do to prevent the kinds of subtle linkages feared by industry and governments that contemplate suing a trade partner. The foreign government could easily adopt small measures that may worsen the business environment for exporters or investors related to the dispute or those in completely different economic sectors without engaging in actual violation of rules. A tense summit between leaders or rebuff of a foreign policy initiative would be even more difficult to directly connect with a trade dispute, but officials acknowledge concerns that such ripple effects could occur.

Restraint motivated by diplomatic relations can affect both large and small states. Concern about maintaining good relations with its allies during the Cold War led the United States to tolerate some trade violations under the GATT regime as a small cost in a larger grand strategy (Low, 1993). For example, the development of the European Common Market and especially its Common Agricultural Policy harmed U.S. economic interests and raised several points of violation with GATT rules, but also represented a pillar of U.S. foreign policy to support the integration and strength of Europe as an ally against the Soviet Union. The decision not to challenge the

The literature has mostly focused on the formal exceptions written into agreements such as safeguard policies and restraints on punitive measures (Rosendorff and Milner, 2001; Schwartz and Sykes, 2002; Downs and Rocke, 1995, e.g.). Lax enforcement represents a more informal means of achieving flexibility in agreements.

[13]Busch and Reinhardt (2002) find evidence that there is a pattern of *counter-suits* in GATT/WTO adjudication.

onset of these policies was as much about foreign policy as economic interests or international law. Smaller countries feel even more need to think twice about the possible diplomatic ramifications of suing trade partners. For developing countries, dependence on foreign aid has been shown to reduce initiation of WTO complaints (Bown, 2005).

The potential for trade disputes to exacerbate diplomatic relations is clear from a few examples. Alter (2003, p. 789) notes that the long-standing U.S. conflict with Europe's ban against hormone-treated beef "continues to anger US beef producers, while raising the ire of the European public." When the United States filed two WTO complaints alleging that China offered inadequate protection of intellectual property rights, the Chinese spokesman for the Ministry of Commerce protested that "The decision runs contrary to the consensus between the leaders of the two nations about strengthening bilateral trade ties and properly solving trade disputes. It will seriously undermine the cooperative relations the two nations have established in the field and will adversely affect bilateral trade."[14] Although such protests may be more rhetorical than serious, governments still feel a need to take into account potential harm to diplomatic relations from their trade policy actions. Interviews with trade lawyers and officials involved in disputes suggest that diplomatic concerns are a factor that can either delay the timing for when a case is initiated or prevent one altogether.[15]

Diplomatic stakes are more likely to deter enforcement actions than to deter defection from the trade agreement by a protectionist trade partner because of the differences in policy-making venue. Trade barriers are typically enacted as a domestic economic policy. The policy process privileges the affected producer groups. The regulatory agencies in charge of trade remedies or the legislature that authorizes new standards or subsidies are favorable to serving producer interests. Enforcement of trade agreements, however, is conducted as foreign economic policy. Here the executive holds agenda control. While typically an executive is more pro-free trade than a legislature for the negotiation of trade agreements, their sensitivity to diplomatic relations makes the executive less tough on enforcement. This point will be further developed in this book as a key variable for why domestic constraints may shift preferences for enforcement.

As an action within agreed upon rules, however, WTO adjudication is *less costly than unilateral*

[14] Xinhua news report, "China Expresses Regret, Dissatisfaction over U.S. Complaints at WTO" (10 April 2007) available at People's Daily Online, `http://english.people.com.cn/`.

[15] Interviews with USTR official, lawyer at leading international law firm, Geneva October 2007.

retaliation. Both from the perspective of diplomatic relations and the consumer loss incurred by raising tariffs, market closure is an extreme tactic to gain market access. Threatening complete withdrawal from the trade regime (as in the "grim trigger" strategy that upholds cooperation over repeated games) is so costly that it does not represent a credible response to a single act of defection by a trade partner raising a trade barrier. In a more proportional "tit for tat" response, states may simply raise their own tariff on similar goods to those harmed by the partner's trade barrier. Yet even a proportional punishment strategy encounters problems. Small states lack the power to make effective threats and raising tariffs would harm their own interests. Large states with sufficient market share to influence world prices and benefit from setting an optimal tariff nonetheless have reasons to be cautious about unilateral retaliation. At the international level, trade partners resent the perception that another state is acting as judge and jury to punish what they may consider a justifiable policy. Threats can provoke negative backlash as the target state domestic audience unifies in opposition to foreign criticism (Odell, 1993). Unilateral retaliation may spiral into a trade war if the partner responds with their own "tit for tat" sanctions. The risk of excessive response in retaliation looms large, especially for states sensitive to interest group pressures. Retaliatory policies have the potential to become a vehicle for a log-roll between export industries seeking competitive advantage through lowering foreign barriers and import-competing domestic industries seeking to use the retaliatory tariffs for protection.

The costs of unilateral retaliation for both the large state choosing to use it and the smaller states in the system were a primary motivation for strengthening adjudication as an alternative strategy. As the United States experienced domestic pressure to address its growing trade deficit in the 1980s, aggressive trade enforcement actions were demanded by Congress and industry. Macroeconomic conditions were the driving force of trade imbalances, but politically the demand for retaliation against foreign protection had a more powerful appeal than recommendations for policies to encourage domestic savings (Bergsten and Noland, 1993). The use of unilateral retaliation by the United States had moderate success to open foreign markets but was met by hostility of trade partners (Bayard and Elliott, 1994). The costs of unilateral retaliation produced a convergence of interests for reforms of dispute settlement system in the Uruguay Round negotiations as the United States advocated a strengthened legal system for adjudication of disputes in the hopes it would legitimize enforcement efforts, while its trade partners sought a strengthened legal

system to restrain U.S. unilateral measures (Barton et al., 2006, p. 71).[16]

The WTO rules make unilateral retaliation even more costly by framing the act as a violation of international trade law punishable by sanctions. Bayard and Elliott (1994, p. 351) conclude their study of U.S. trade retaliation policies to say that the strengthened WTO dispute system presented the United States with a choice of whether it would act as a "sheriff, aggressively enforcing multilateral rules from within the system" or a "vigilante, turning its back on the system and using force to pursue its unilateral demands." This was tested most explicitly in the 1995 U.S.-Japan negotiations in which the United States issued demands for guarantees of increased market share in the Japanese auto and auto parts market. When the breakdown of bilateral negotiations led the U.S. government to threaten retaliation against Japanese auto exports to the United States, Japan filed a WTO complaint against the U.S. retaliation measures. Recognizing it would lose the case, the U.S. instead backed down on its major demands to make a deal. Separately the EU won a WTO ruling on the Section 301 measure that mandated retaliation could only follow WTO rulings.[17] The WTO has raised the costs of unilateral retaliation to the point where this no longer represents a routine trade policy strategy even for the United States. At the same time, filing a complaint in the dispute settlement process represents a moderate cost trade strategy that allows a government to take enforcement action without resorting to unilateral trade sanctions.

Forum Choice for Trade Disputes

While a growing literature examines WTO adjudication, few compare adjudication with alternative strategies. Research has focused largely on explaining why states implement WTO-inconsistent policies and the outcomes of observed legal disputes (e.g. Busch, 2000; Reinhardt, 2001; Rosendorff, 2005; Bown, 2004b; Guzman and Simmons, 2002; Bown, 2004a). Several studies examine why some trade issues are taken before formal WTO adjudication (e.g. Horn, Mavroidis and Nordstrom,

[16]The United States had often justified unilateral actions with reference to the weakness of the GATT dispute system that allowed defendants to block negative panel rulings. Trade partners wanted to remove this excuse with the establishment of a robust adjudication process (Hudec, 1993, p. 193).

[17]"United States - Sections 301-310 of the Trade Act of 1974" WTO DS152. The complaint was filed November 1998 and the panel ruling adopted January 2000. The ruling found that the U.S. law itself was not a violation, but noted that this conformity was contingent on the U.S. implementing Section 301 in conjunction with a WTO ruling and authorization of retaliation. See `http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm`.

1999; Reinhardt, 2000; Bown, 2005; Busch and Reinhardt, 2002; Allee, 2003; Sattler and Bernauer, Forthcoming), but more research is needed that compares alternative strategies (Davis and Shirato, 2007). Positive assessments of WTO adjudication as an effective means of dispute settlement in its early years have since given way to more cautious evaluations as several prominent cases have dragged on without resolution (Butler and Hauser, 2000; Iida, 2004). The complaints filed for adjudication, however, represent a small fraction of the total number of policies in violation of WTO agreements. We can only evaluate the effectiveness of adjudication in comparison with outcomes that would have been achieved had an alternative strategy been chosen for the same issue.

In trade policy, the parallel process of creating regional trade associations, participating in the multilateral trade system, and concluding bilateral arrangements has resulted in overlapping jurisdictions (Davis, 2009). Many trade issues could be addressed in any one of these negotiation fora, or in informal bilateral negotiations. For example, U.S. agricultural exports to Japan have long faced quarantine measures that restrict import of several products. The United States filed multiple legal complaints at the WTO against measures affecting apples while relying on diplomatic meetings at bilateral level and technical discussions among agriculture department officials to address the import ban prohibiting U.S. potatoes.[18] U.S. complaints about European subsidies to its aircraft industry were addressed through both multilateral negotiations and bilateral talks for nearly four decades with intervening periods of litigation in the late 1980s, more bilateral talks in 1990s, and return to litigation that has continued from 2004 to 2011. What determines why disputes are sometimes brought into the formal legal process while others are negotiated in different venues and some are ignored? While no two cases are identical, it is important to consider which differences are most important to affect the choice of enforcement strategy. Would the nature of the trade barrier, economic stakes, or political pressures be most relevant to account for the divergent approaches in each case?

The standard response would be that states go to court when they need a third party to

[18]Two disputes related to quarantine policies for apples led to rulings against Japan by the Appellate Body (WT/DS76/AB/R 22 February 1999 "Japan-Measures Affecting Agricultural Products"; WT/DS245/AB/R 26 November 2003 "Japan-Measures Affecting the Importation of Apples"). The 2000 USTR *National Trade Estimate Report* (p. 203) documents the U.S. complaint about Japan's policy to ban import of fresh potatoes from the United States as way to prevent introduction of golden nematode virus.

determine whether a policy is a violation. Courts perform two functions. First, rulings help states to interpret the trade agreement. Given the complexity of issues and large number of members, trade agreements are negotiated as incomplete contracts that leave open gaps for flexible interpretation. From this perspective, trade disputes are taken to court when there is uncertainty about the law. Second, rulings permit the injured party to take retaliatory action against those who commit a violation. Some states deliberately cheat even while they remain committed to the agreement because they face changing domestic political or economic conditions. For example, rising import competition leads some states to impose trade barriers. Third party authorization of proportional countermeasures allows flexibility to punish the single defection and facilitate return to normal business (Schwartz and Sykes, 2002; Lawrence, 2003; Rosendorff, 2005). According to this logic, litigation is driven by the demand for protection and compensation.

These explanations would suggest that we should account for the variation observed in enforcement strategies toward the trade dispute examples previously mentioned in terms of law and economics. From the law-based perspective, one could emphasize that legal status of Japan's apple quarantine was more complex than its potato import ban, and disagreement over the law prevented either side from making a settlement until there had been an Appellate Body ruling. Rules for subsidies have been problematic because vague definitions leave room for interpretation over which set of domestic policies constitute subsidies. The aircraft case raised concerns that both sides could be found to violate rules. From the economic-based perspective, the level of import competition and export stakes matter such that rising import competition for Japanese apple growers mandated support for trade barrier and U.S. export stakes justified its high enforcement action for apple industry. For the aircraft dispute, the erosion of U.S. market share and release of new European models shifted strategies. Such conditions were indeed important for the cases and drive some of the overall pattern in trade enforcement. But the next section will highlight why law and economics alone are insufficient to understand when and why states use courts to address their trade disputes. Differences in the political influence of the specific industries and shifts in legislative attention to trade enforcement issues were also important for the choices in these specific disputes and more generally.

Puzzles in the Pattern of Trade Adjudication

Several puzzles appear in the empirical pattern of trade disputes that suggest the need to look beyond the role of courts to provide legal clarity and allocate punishment. More than half of all WTO disputes are settled during the period after filing a legal complaint but before a panel issues a ruling on the legal claim.[19] For these cases, the adjudication process has not taken on any role to interpret the law or authorize retaliation. Furthermore, there is little uncertainty about the legal outcome for those cases that proceed to a formal ruling by a panel: nearly ninety percent of panel rulings have found that the challenged policy is in violation of the agreements.[20] The high pro-plaintiff pattern of WTO rulings goes against litigation theories that parties would settle out of court all of the obvious legal cases such that courts would only be asked to issue rulings for those cases close to the legal standard, which would produce on average a fifty-percent win-rate (Priest and Klein, 1984). One might suspect that the high violation rate reflects intransigence by the defendant. Yet retaliation against noncompliance is rare. In all but a handful of cases the defendant changes the policy within the required period before authorization of retaliation takes place. Through the end of 2010 there had been eighteen instances in which the WTO authorized retaliation, and countries had gone forward to implement retaliation in only nine of these cases. In sum, the role of the panels and Appellate Body to provide legal interpretation that leads to authorization of retaliation appears to be quite modest for most disputes.

The pattern of which states use adjudication raises further questions for standard explanations based on power and interest. In economic negotiations, market size is the most relevant measure of power. When bargaining over market access, those with a larger market have more to offer as both

[19] Busch and Reinhardt (2003, p. 724) find that 58 percent of WTO cases between 1995 and 2000 were dropped or resolved before a panel ruling. As of the end of 2010, 132 panel rulings had been circulated to members relative to 419 complaints registered at WTO. Since cases filed in 2009 and 2010 would still be working through the legal process and multiple complaints by countries are often grouped into a single panel ruling, the appropriate denominator for comparison with 132 rulings is 286 distinct "matters" subject to complaint by one or more countries over the period 1995-2008. From this set of cases with potential to have had ruling, 54 percent have been dropped or settled through mutual agreement without a panel ruling. The data for rulings and complaints grouped by matter is from `worldtradelaw.net` accessed 24 February 2011.

[20] A summary of the 122 adopted reports for standard WTO disputes shows that 108 (88.5 percent) involved at least one finding of violation with agreements. See `http://www.worldtradelaw.net/dsc/database/violationcount.asp` accessed on 3 March 2011.

carrot and stick. In addition, foreign policy tools connected to alliances, foreign aid, and other sources of influence may also confer power resources through linkage tactics. Across any of these measures, the United States and EU stand out as the dominant powers within the trade system. Despite having leverage to generate strong "outside options" in bilateral negotiations, the US and EU have filed more complaints than any other government. While one could explain their role as trade police in terms of free trade interests and provision of a public good through enforcement of multilateral rules, such an explanation is inconsistent with the fact that the US and EU are also the most frequent targets of complaints. Moreover, smaller states are also active. In recent years, over half of the states filing complaints have been developing countries. Adjudication appears to be used as a tool by both powerful and weak states.

Enforcement policies respond to industry demand for the removal of foreign trade barriers. A trade interest explanation suggests that states challenge barriers that affect sufficient economic value to justify the cost of enforcement action. States with many large export industries are more likely to file cases because they encounter more trade barriers that meet this threshold of value to justify action.[21] Important cross-national variation in dispute patterns, however, does not fit the predictions of a trade interest model. For example, the Japanese export sector is large relative to its modest use of adjudication and despite a small economy, the Philippines has used adjudication more often than its larger neighbors Indonesia and Malaysia. In addition, the variation over time in use of adjudication by a large trading state like the United States, which has filed as many as seventeen cases in some years and as few as one case in other years, cannot be explained by the relatively small shifts of trade volumes.

Interest may fail to produce action if governments do not believe they can bring a change in the offending policy. Those who emphasize the role of retaliation as the force behind compliance with trade agreements suggest that market power matters because it provides more force behind the threat of retaliation.[22] Yet the emergence of several small developing countries that are repeat

[21] Horn, Mavroidis and Nordstrom (1999) use a measure of trade diversity to show that states with a larger trade portfolio initiate more WTO disputes. Sattler and Bernauer (Forthcoming) show that "gravity" in terms of trade flows between states and their economic size are significant variables to explain which states initiate more cases, with similar results when measuring export diversity.

[22] Bown (2004a, 2005) finds that states with greater retaliatory power to restrict imports from the defendant in a dispute are more likely to initiate a dispute and gain larger trade liberalization outcomes.

players in WTO adjudication counters the idea that retaliatory capacity is a necessary condition for active enforcement policies (Davis and Bermeo, 2009). Contrary to the expectations of power arguments, developing countries are not reluctant to challenge the violation of larger trading partners; Guzman and Simmons (2005) show that poor states are more likely to file against rich countries because there is more at stake when a trade barrier restricts access to a large market. Fundamentally, power offers an incomplete explanation of why states use adjudication because powerful states have credible retaliatory threats outside of the legal venue.

2 Overview

This book presents a theory to explain why democratic institutions for accountability encourage use of adjudication to resolve trade disputes. I argue that adjudication serves as a release valve that allows governments to respond to multiple competing interests while avoiding a trade war. On the complainant side, governments file formal legal complaint for WTO adjudication as a costly signal to domestic and foreign audiences of the government's support for exporter interests that have been harmed by foreign protectionism. On the defendant side too, allowing oneself be dragged into court signals support for importer interests that benefit from the trade barrier.

Use of adjudication as a signaling mechanism is most likely in democracies where different interests between the executive and legislature generate uncertainty about whether the government will deliver on market opening commitments. The key independent variable is constraints on executive autonomy by the legislature. An autonomous executive will have more flexibility to reach negotiated agreements without the need to resort to public litigation as a costly signal. Constraints on the executive reduce the flexibility to accept negotiated compromises and generate demand for visible accountability. These constraints can arise in a presidential system where the executive faces strong checks and balances from the legislature and may face an opposition party majority. Yet even parliamentary systems can experience high constraints when there is fragmentation among parties in the legislature and coalition rule that forces the executive to respond to demands from multiple parties. The division of interests at home increase constraints on the executive for many policy issues including foreign economic policy. Legal action offers a visible measure of effort that helps the executive demonstrate to a skeptical legislature its resolve to defend domestic export interests. I hypothesize that democratic states will have the greatest

demand for adjudication and initiation of cases will vary as a function of electoral balance and government structure. Executives who must govern within a context of constraints arising from partisan and/or institutional divisions will be more litigious than their counterparts who enjoy a majority in the legislature and wide discretion over policy.

My argument about the role of domestic constraints also explains why governments select cases for WTO adjudication according to political influence rather than just economic and legal criterion. Domestic export industries and their representatives in the legislature suspect the executive will be too dovish in negotiations with foreign trade partners and/or the foreign government will not comply. Uncertainty about whether the government can deliver market access reduces the incentives for export industries to offer political contributions and other forms of support. This credibility problem may lead a government to file a WTO dispute as a costly signal of their commitment to the domestic interest group. At the same time, the import industry of the respondent state influences forum choice by encouraging resistance to settlement. Here too, adjudication signals commitment to the industry. As a result, interest group pressure on both sides of a trade dispute pushes politicized trade topics into dispute adjudication.

Chapter two develops the argument described above and places it within the context of related literature. The empirical chapters test my argument at the cross-national level and through comparison of U.S. and Japanese trade policies. In chapter three, statistical analysis of the use of adjudication by eighty-one states over thirty years from 1975 to 2004 shows that democracies are more likely to file legal complaints while controlling for their market size and trade structure. I use the data to examine different dimensions of democratic politics and evaluate whether demand for adjudication reflects electoral preference for free trade, legal norms, or accountability mechanisms arising from legislative constraints on executive autonomy. The domestic constraints hypothesis receives support from evidence that states with high checks and balances at home are the most frequent users of adjudication. I also show that the same dynamic generates a positive correlation between democracy and the likelihood for a state to be targeted as a defendant in WTO disputes. These findings at the country level are then extended to dyadic data of bilateral relationships to show that domestic politics in terms of institutions of the complainant and defendant and geopolitics in terms of alliance relations between trade partners shape the pattern of disputes.

The empirical analysis of U.S. and Japanese trade policy provides closer examination of policy

process and outcomes. These two countries are similar as two of the largest advanced industrial economies that both enjoy stable democratic governance and commitment to rule of law. But they present a useful contrast because they lie at opposite extremes among the advanced industrial democracies in terms of legislative constraints on trade policy. Both chapters four and five begin with qualitative assessment of the policy context for trade policy based on examining trade legislation, testimony in the legislature, and interviews of business and government officials. The evidence demonstrates how Congress grants conditional authority to the executive on trade policy. In this context of low delegation from the legislature to the executive the theory predicts more frequent use and politicization in selection of cases for WTO adjudication. By contrast, the Japanese legislature grants considerable autonomy to the bureaucracy for management of foreign trade policy. As a result, there should be lower demand for adjudication and less politicization of case selection. In a parallel structure the chapters then incorporate statistical analysis of enforcement strategies. Using original data based on US and Japanese government reports about foreign trade barriers, I analyze why some potential trade disputes are ignored or negotiated in alternative venues while others are raised for formal adjudication in the WTO. Whereas the United States has been very active in WTO adjudication and consistently uses this strategy for industries that are major sources of political contributions and during periods of divided government, Japan follows a more selective adjudication strategy and only initiates a few cases for large industries with less obvious political influence on selection. The insights are further tested in case studies about specific disputes.

The U.S. case studies show how Congress intervenes to shape U.S. adjudication choices. First, Kodak's battle with Fuji Film for access to the Japanese market illustrates how politicization by an influential firm and its allies in Congress pushed the administration to file a case even when there was a high risk of losing the legal battle (as it did). More complex dynamics arose for the second case study, the Boeing-Airbus dispute. The long saga of U.S. trade policy toward European subsidies for the commercial aircraft industry has culminated in both sides claiming a legal victory in the Boeing-Airbus WTO disputes, but there were decades of false starts with disagreement among industry, Congress, and within the administration about the best approach to a threat to the leading export industry. The case study examines each decision juncture since 1970 that raised the question of whether to use adjudication against European aircraft subsidies.

By 2004 with Airbus as the new market leader, Boeing came around to favor adjudication and the political pressure rose as the issue became a topic in presidential campaign and subject of a Senate resolution demanding action. The U.S. filed a WTO complaint in 2004 that opened up seven years of adjudication. The case study helps to illustrate across one issue over time how variation in political pressure influences the choice of trade strategy. The final case study of U.S. policy looks across a set of issues with one trade partner. China now takes the place as lead punching bag for the Congressional criticism of foreign trade policy, and here too the administration has used adjudication to manage domestic pressure. The administration refuses Congressional demands to take legal action against China for its undervalued currency policy, but carefully selects cases to raise for adjudication on other issues as part of a strategy to defuse political pressure to "do something" against China. The disputes over Chinese industrial policy for semiconductors and automobiles and enforcement of intellectual property rights have a broader purpose than to advance a specific legal claim or economic interest. They are signals that the administration is not afraid to challenge China when it does not comply with the rules, and this tough message is equally important to reassure Congress as it is to warn the Chinese. Each of the case studies also examines the outcomes in terms of how adjudication helped to diffuse political pressure at home and improve bargaining at international level with trade partner.

The Japanese case studies in Chapter five demonstrate the absence of political pressure on foreign economic policy. The government has focused several WTO complaints on U.S. anti-dumping policies that harm the Japanese steel industry. When filing complaints, bureaucrats and industry take the lead with little interest from the legislature. Whereas U.S. officials face pressure to get tough with China, Japan has been able to pursue patient negotiations without the need to resort to adjudication to satisfy domestic demands. A cultural aversion to litigation could contribute to less frequent use of WTO adjudication by Japan, but this explanation seems implausible given that the Japanese government was a central advocate for legalization of the WTO dispute system and that variation over time in Japan's complaints follows the shift in political constraints.

Where the early chapters focus on how political constraints shape selection of cases for legal complaints, chapters six and seven turn to assess the impact of using legal process. Chapter six with quantitative data from the United States, and chapter seven with qualitative evidence for

developing countries, show that when comparing similar kinds of disputes and trade partners, states gained better outcomes through the dispute mechanism. Building on the model of forum choice and data on potential trade disputes, Chapter six evaluates the effectiveness of the different strategies for bringing policy change and ending disputes. Conditioning on the fact that the most politicized cases are selected for WTO adjudication, the legal forum is quite effective to resolve disputes. I apply statistical techniques of matching to the sample of negotiated trade barriers to adjust for their propensity to be raised in adjudication, and then conduct regression analysis of dispute outcomes in terms of policy change. The results show that adjudication increases the probability of progress to resolve the complaint by one third. Furthermore, a duration model that controls for the variables that influence strategy selection, shows that adjudication is correlated with a reduction in the time to removal of the barrier.

Chapter seven demonstrates how even poor states benefit from adjudication. I follow the logic of the book that one must assess the choice of law relative to what would have transpired if the case did not go to legal venue. Evidence is from a controlled case comparison of a dispute by Peru against EU labeling policies for sardines and a dispute by Vietnam against US labeling policies for catfish. The two small states had identical legal text in trade agreements as basis for their claim to change the discriminatory labeling rules against fish exports and both were involved in an asymmetric dispute with a major trading partner. But since Vietnam was not yet a WTO member at the time, it could not follow the same strategy as Peru to file a WTO complaint. Thus in this case study, I take the different choice of enforcement strategy as exogenous and highlight how the use of adjudication by Peru allowed it to win the requested change from Europe while Vietnam's demands were entirely ignored by the United States.[23]

The conclusion chapter eight reviews the theory about the political role of adjudication. It explores the tension in how adjudication represents both conflict and cooperation between states as they escalate a trade dispute but do so within agreed upon rules. The tendency to sue friends reflects this dynamic - within a broadly cooperative relationship trade adjudication can be part of business as usual. Yet the case studies for both the United States and Japan revealed that adjudication against China as a potential rival brought fears of unwanted tensions arising from

[23]This case study is a revised version of a chapter that first appeared as "Do WTO Rules Create a Level Playing Field for Developing Countries? Lessons From Peru and Vietnam" in John Odell ed. *Negotiating Trade: Developing Countries in the WTO and NAFTA.* (Cambridge: Cambridge University Press, 2006) pp.219-256.

the public action of filing legal complaints. A final section extends the implications of the argument for a broader theory of legalization in international relations.

By looking at domestic and international institutions, I show how the two levels fit together. Market failures that domestic problems generate can be resolved through the use of international institutions. This occurs not just in terms of how states design the charter of an international institution, but in their ongoing effort to enforce agreements and maintain cooperation. The political conditions that generate demand for strong enforcement could undermine cooperation, but when they are channeled through dispute settlement they provide leverage for higher levels of enforcement. My conclusions challenge the view of courts as primarily an instrument for legal interpretation and allocation of punishment and highlight their role to mediate domestic political pressure and provide information helpful to settlement.

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