The Good Case: Decisions to Litigate at the World Trade Organization

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This article draws upon the law-in-action, repeat players, and motive to understand how legal actors construct the "good case" in dispute settlement systems. The construction of "good cases" is examined at the World Trade Organization (WTO), a relatively new and unexplored site for the study of dispute settlement. Findings show that the good case encompasses flexible sets of motives including economic, political, and symbolic characteristics of trade grievances to mobilize WTO law. The flexibility is due to uncertainties associated with litigation, which are manifestations of four features of the WTO: the newness of the system, the organizational and legal structure of the dispute system, the context of the WTO as an intergovernmental agreement, and the persistence of inequality between states. Six variations of the good case are identified.

This article examines the decision to initiate litigation in the dispute settlement mechanism of the World Trade Organization (WTO). Prior empirical research has focused on determinants of participation in WTO disputing but without full consideration of the social processes by which the decision to litigate is made. To the extent that these processes have been subject to study, scholars have presumed that initiation of a formal WTO dispute results from a cost-benefit analysis, and they have conceived of dispute initiation as a way to force "renegotiation" of a trade relationship, eliminate inefficiency caused by protectionist trade policies, and yield outcomes congruent with the quest to maximize national income (Bagwell & Staiger 1999; Bown 2004, 2005; Busch &

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Reinhardt 2003:722–3; Dunoff & Trachtman 1999). This approach strongly presumes the stability of preferences over time and across contexts, and that the decision to litigate originates primarily out of structural relationships, such as the volume of trade and diversity of trade partners (Horn et al. 1999), type of political regime (Busch & Reinhardt 2002, 2003; Davis & Bermeo 2005), gross domestic product (Busch & Reinhardt 2003), or litigation capacity (Bown 2005; Bown & Hoekman 2005; Davis & Bermeo 2005; Hoekman & Mavroidis 2000; Michalopoulos 1998). While recent efforts have sought to incorporate political dynamics into the study of WTO litigation, the empirical literature on WTO dispute settlement is fundamentally dominated by the presumption of market-based rationales.

In contrast, this article adopts a sociolegal approach to understanding the practice of international law-in-action and critiques the market rationality of prior analyses. I argue for a socially based understanding of rational action that attends to the specific social context in which a decision is made. What are the conditions in which the decision to initiate a formal WTO dispute can be claimed as rational behavior? Edelman (2004) articulates this approach in her argument for providing greater attention to the social basis of legal rationality.

> Rational action is not simply responsive to social norms and institutions; rather, it is instituted through social interaction, culture and meaning-making, norms, and rituals. Institutionalized ideas about what is rational develop at the societal level in concert with institutionalized ideas about what is fair, what is legal, what is legitimate, and even what is scientifically or technically possible (2004:186).

The reification of the concept of rationality has precluded thorough understanding of how its meaning is constructed in specific social contexts and institutionalized in norms, values, common sense, and law. To the degree that this construction requires struggle between competing social groups and their "common sense" notions of legitimacy, fairness, and other values and norms, the institutionalization of rationality is fundamentally power-laden (Edelman 2004; Epstein & Knight 2004; Weber 1947:124–32). The concept of motive provides a framework for examining the social meanings that produce rationalities and also for understanding how power struggles and inequalities are institutionalized in legal decisionmaking.

This article examines the social bases of rationality in the decision to initiate disputes at the WTO through identification of what participants in the dispute settlement system described as a "good case." This can take on different meanings depending on

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the facts of the trade grievance, the participants involved, and the political context. Its multiple meanings stem from uncertainties derived from the structure of the WTO dispute settlement system, most notably the close relationship between legal and diplomatic modes of engagement. Taken as a whole, the overlapping and flexible meanings of the good case provide a set of motives for transforming a trade grievance into a WTO dispute. This approach situates rational decisionmaking in WTO legal proceedings in larger organizational, professional, and institutional contexts that reveal the interplay of interpersonal relations, organizational settings, political context, formal law, and cultural meanings that produce the practice of international law. Through invocation of elements of the good case, all members may behave rationally in the context of initiating a WTO dispute. But the meanings authorized by these motives lead to very different expectations about what litigation may likely produce and in turn, which actions make sense. Where the economically powerful may choose to litigate for full legal victory and compliance, weaker members may choose to litigate for symbolic or communicative purposes decoupled from strong expectations of compliance. Understood in this larger context, the rationality of the decision to litigate subsumes and legitimates significant inequalities between member nations.

This article begins by briefly reviewing how the WTO trading system was designed to create quasi-binding requirements on its member states, something lacking under the system it replaced. This is followed by a review of the prior empirical literature on WTO dispute settlement and the presumption of economic rationality that dominates it. There is a lack of direct consideration of the processes by which trade lawyers evaluate potential disputes, and, when considered, these processes have been presumed to be guided by market rationality. This is in part a critique of method and research design. Quantitative analyses of the case history of the WTO do not adequately account for motive; an interpretive approach is required to ascertain why people make the decisions they do. To discover the meanings attributed to the initiation of a dispute and to better understand law and social action, theories of motive as situated action are applied to the notion of the good case. This framework is coupled with a qualitative research design, described in the next section, which elicited motives from informants through in-depth interviews. This is followed by examination of several features of the WTO that render litigation uncertain and introduce flexibility into the meaning of the good case. Six variations of the good case are then described. The article concludes with a discussion of the implications of this study and suggestions for future research.

The WTO Trading System

The dispute settlement process of the WTO is governed by the Dispute Settlement Understanding (DSU) and can be divided into three phases: (1) a consultative phase, where a dispute is formally announced and the parties are required to engage in diplomatic dialogue, before progressing to (2) the adjudication phase, where WTO review panels make determinations about member nations' trade practices, and (3) an implementation phase, where the dispute settlement process focuses on appropriate implementation, enforcement, and compensation (see Palmeter & Mavroidis 2004). This article focuses on the decision to "claim" a trade grievance (Felstiner et al. 1980–81) as a legal problem and transform it into a formal WTO dispute.

Between 1986 and 1994, the Uruguay Round of negotiations between members of the General Agreement on Tariffs and Trade (GATT) produced the agreement establishing the WTO. The GATT system, created in 1947, was intended to foster peace and stability in the postwar trading system through progressive liberalization of national markets. While generally considered successful in this task, at least in terms of trade in goods, by the end of the Tokyo Round of negotiations in 1979, the United States and other major trading nations began pushing for a strengthened and expanded international trade regime that would further the liberalization of the international trading system. These efforts produced the WTO, which came into effect the first day of 1995.

With the establishment of the WTO dispute settlement system, the modes by which member nations engage each other over trade issues were profoundly altered. A primary innovation of the WTO agreements was a new rule-bound system for the settlement of trade disputes that moved it closer toward "hard" law versus the "soft" law of the GATT system (Abbott & Snidal 2000). The reformed dispute settlement system eliminated the ability of any one country to unilaterally block an unfavorable vote, enacted more restricted and rigid time frames for each phase of dispute settlement, instituted panel and appellate reviews by appointed jurists, made panel review an automatic result of initiating a dispute, and expanded WTO jurisdiction beyond trade in goods to include services, foreign investment, and intellectual property rights, among other issue areas.

The new legalism of the WTO dispute system has been touted as the first "worldwide rule-of-law system for international trade" and contrasted with the power politics and "anti-legal culture" of the GATT (Petersmann 2005:5; Ruggiero 1997). While dramatic, this overstates the degree of change; in fact, WTO dispute settlement is at best "quasi-juridical" (Pauwelyn 2000:337–42; see also

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Palmeter & Mavroidis 2004:303–5; Steinberg 2002). That is, the mobilization of WTO law is almost always accompanied by the possibility of recourse to diplomatic modes of engagement. This is an intentional feature of the dispute system and legacy of the GATT. It is meant to promote the settlement of disputes, rather than exact punishments, and to do it without threatening its members' sovereignty (Palmeter & Mavroidis 2004; World Trade Organization 2006a).

In drafting the Uruguay Round Agreement, negotiators utilized the "constructive ambiguity" of treaty language to build consensus around rules without specifying their precise meaning (Petersmann 2005:128).[1] As a result, member nations have increasingly used the dispute settlement mechanism, rather than negotiations, to obtain clarification of their WTO obligations (Holmes 2001). At the same time, panels and the Appellate Body formally lack the ability to establish precedent, as this is deemed to undermine the right of member nations to negotiate their international obligations. Nonetheless, with the legalization of dispute procedures in the Uruguay Round, panels and the Appellate Body have acquired the "persuasive authority" (Interview with U.S. official, Washington, D.C., 4 March 2005) to clarify members' rights and obligations. While retaining the formal right to negotiate their commitments, member nations were no longer the only authority on the interpretation of their obligations under the WTO agreements. The establishment of juridical review began the de facto evolution of WTO jurisprudence. This evolution, however, remains partial due to the lack of formal authority to establish precedent and the ambiguity of the treaty texts (Holmes 2001; Horn & Mavroidis 2006a).

While a thorough-going comparison is beyond the scope of this article, the novelty of the WTO legal system can be appreciated by contrast with the European Court of Justice (ECJ). Established through the Treaty of Rome in 1957, the ECJ has emerged through the preliminary ruling process[2] into a "symbiotic" (Tallberg 2002:621) relationship with national judiciaries. The development of this relationship, in combination with doctrinal advances in ECJ jurisprudence, has empowered national courts as sites for adjudicating and implementing EC law (Alter 1998; Weiler

[1] Interview with former U.S. negotiator, Chicago, 10 March 2005.

[2] Article 177 of the Treaty of Rome provides that when a question concerning the interpretation of the treaty is raised before a national court, that court can (and if a court of last instance, must) stop the domestic procedure and make a request for a preliminary ruling from the ECJ. Once made, the national court will base its ruling on the interpretation of relevant European Community (EC) law by the ECJ (Weiler 1994; Alter & Vargas 2000).

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1994; Alter & Vargas 2000).[3] Consequently, nonstate actors are able to mobilize EC law to regulate state behavior. The ECJ and the European Commission can monitor member state compliance with EC law and initiate legal procedures in cases of noncompliance. Through the monitorial and prosecutorial authority of the Commission and the ECJ, as well as through the system of preliminary rulings, the ECJ is integrated into the institutional political structure of the European Union (EU) and its member states.

Unlike the ECJ, the WTO is detached from a larger institutional political context that can easily clarify treaty obligations, generate secondary regulations, and ensure compliance (Tallberg 2002). WTO members meet periodically to negotiate and renegotiate their obligations under the WTO treaties, but given the standard of consensus for modifying the treaty, ministerial meetings have proven to be an inefficient political organ for clarification of existent obligations. The WTO Secretariat is a "facilitator" of negotiations and cannot initiate disputes or monitor compliance on its own (Tallberg 2002:637). While the ECJ has a mechanism for member states to initiate actions against one another for noncompliance with EC law, it is not often used (Tallberg 2002). The WTO is an international agreement that relies on its members to enforce its rules on themselves (Holmes 2001). WTO proponents suggest that the low rate of litigated cases (85 Appellate Body rulings adopted by the WTO in the first 10 years versus approximately 1,000 cases litigated annually at the ECJ) is indicative of the success of the system in inducing settlements. An alternative explanation, however, is that WTO members cannot rely on the Secretariat, like the European Commission and ECJ, to demand compliance on behalf of all members. Forced to seek compliance with WTO laws themselves, member nations face risks stemming from direct confrontation with each other. Simultaneously, the judicialization of the dispute settlement in the diplomatic context of the organization as a whole has created "dissonance" in the operation of the WTO between its "diplomatic ethos" and the increasing demand for legal knowledge, expertise, and practice (Weiler 2001). As a result, uncertainties and risks pervade the WTO dispute settlement process to a degree beyond that of the ECJ.

[3] These doctrinal advances include the principles of direct effect and EC supremacy. The principle of direct effect asserts that laws enacted by the European Parliament and regulations adopted by the European Commission have the same status of laws enacted by national parliaments. The principle of EC supremacy asserts that where there is conflict between national and EC law, EC law predominates. The combined effect of these doctrines is to subsume national judiciaries into a European legal system and limit the abilities of national governments to ignore EC law (Weiler 1994; Tallberg 2002).

Costs and Benefits of Litigation

While some hypotheses have been offered to explain why some disputes are initiated and others—even those with sound legal merit—are not, little research has been done given the empirical problem of examining nondisputes (Busch & Reinhardt 2002; Horn & Mavroidis 2006a). Most research on WTO disputing begins with the existing case history and examines dispute settlement participation as a function of trade interests, state power relationships, litigation capacity, political regimes, or other factors. Horn et al. (1999) provide one of the earliest and most well-known empirical evaluations of WTO dispute settlement participation. They explain the decision to initiate a dispute in these terms: "It seems reasonable to assume that litigation involves some fixed costs, and that therefore the trade values involved must exceed some minimum level for litigation to be worthwhile" (1999:6). On this basis, the authors produce a benchmark estimate for participation in the WTO derived from a country's diversity of exported products. Similarly, Bown and Hoekman (2005) assert that

> A potential complainant will file a dispute over a WTO-inconsistent trade restriction . . . if the discounted stream of future profits with the trade barrier removed, less the cost of litigation, are larger than the future profits with the trade barrier remaining in place (2005:8–9).

For these authors, countries will weigh the costs of litigation against gains from increased market access. Dispute participants' decisions to litigate are understood as shaped by impersonal and structural forces, such as the world economy, and evaluation of transaction costs is the primary decisional logic behind initiating a dispute.

There have been efforts to understand disputing as a political practice in the world political economy. While maintaining the same cost–benefit logic, Guzman and Simmons's (2005) conception of cost is expanded to include such potential political fallout as disgruntled domestic constituents, WTO countersuits, or withdrawal of foreign aid. Reinhardt (2000) argues that states initiate disputes as a result of industry pressure and, therefore, democracies are more likely to participate in dispute settlement (see also Davis & Bermeo 2005). These authors complicate the notion of cost and benefit by making political calculations central to participation in dispute settlement.

Even in this line of study there is a central presumption of market rationality, albeit with a wider, political understanding of costs; disputes are initiated based on a grand equation of market evaluation, political circumstance, and legal possibility, each identifiable through aggregate indicators. In part, though not entirely,

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this is a ramification of the data and methods used in this scholarship. While the case history of the WTO is amenable to statistical inference (see Horn & Mavroidis 2006b), it is not easily analyzed for motive. As a result, this research has gravitated toward questions that quantitative methods can answer well, while glossing over the social production of disputes in the first place and the personal, professional, and bureaucratic contexts through which they acquire meaning as a dispute.

The major exception to this critique comes from Shaffer's (2003) analysis of the mobilization of the WTO dispute settlement system through public–private partnerships. Where private firms have the means to devote legal and economic expertise to developing a legal case and political resources to lobby for action, governmental authorities retain the authority to represent national interests before the WTO. A firm or an industry must persuade its government to adopt its grievance as being in the national interest. According to Shaffer, for an industry to convince the U.S. government to champion its cause, it "must present the USTR [United States Trade Representative] with a strong legal case supported by a detailed factual record. The USTR wants a strong partner not only in terms of ensuring broad industry support; it wants a winning case" (2003:34). Governmental authorities retain a monopoly on the decision to initiate a dispute, and in the process of deciding, they frequently ask their lawyers whether or not the case can be won.

How do they determine that a case can be won, and what does it mean to win? It is at this point that this article intervenes to demonstrate that multiple motives are ascribed by practitioners to the initiation of a dispute. Winning a case can take on different meanings for different parties. This is not to argue that disputes are initiated capriciously or that they do not carry significant costs or benefits for a variety of interested parties. Instead, the meanings attached to winning, and thus the motives for initiating, are more varied than prior scholarship would suggest, and they are profoundly impacted by how each member country is able to confront uncertainties associated with WTO litigation. Winning may mean full compliance, but it may also mean triggering diplomatic action; or winning may mean not being embarrassed by the outcome.

The Good Case as Motivated Social Action

While it is true that the perceived existence of a trade grievance is generally (though not always) a central rationale for initiating a formal trade dispute, it is not a sufficient reason by itself. Frequently, the precise effect of the violation is unknown and need not

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be known for litigation to proceed (World Trade Organization 2005:171). This point alone hints at the difficulty of basing the decision of whether to initiate a formal dispute on a precise cost-benefit analysis. When the effect of a violation is unknown or imprecisely known, it is difficult to anticipate the degree of benefit that would accrue from remedying it or the relative costs required to do so through litigation. Indeed, other structural, organizational, issue-specific, personal, and professional factors enter in the decision to initiate a formal dispute.

Understanding the social bases of legal behavior has been a long-standing concern among scholars of law and society. This concern remains pertinent for understanding international trade disputes, including why some grievances are disputed and others are not. Understanding the initiation of disputes requires ascertaining the motive behind it. For Weber (1947), analyzing motive "consists in placing the act in an intelligible and more inclusive context of meaning" (1947:95). He defined the concept of motive as a "complex of subjective meaning" considered "adequate ground for the conduct in question" (1947:98–9). Motives are a critical source of social action; they are not merely intentions about future goals or rationalizations of past actions but reflect current subjective meanings that may or may not be conscious (Campbell 1996).

For Mills, motives were "social instruments" or power-laden verbal constructions impinging on social circumstances with newly situated avenues for meaningful social action (1940:908). The power of motives as social constructs is their ability to impose order through articulation of meanings, which may often be at odds with the motives of others (Hopper 1993). The contestation between motives as they are institutionalized as norms, values, and laws energize and coordinate specific actions, and in so doing they embody forms of socially constructed hegemony.

Mills has been critiqued as a linguistic idealist for arguing that motives did not emerge from "internal states" of individuals but rather are instrumental discursive practices intended to achieve specific goals in specific contexts. Campbell (1996) has charged that this is a distortion of the Weberian concept that "unwisely" rejects the notion of subjective "internal states" as motive forces (1996:101). By rejecting "internal" sources of motive, Mills establishes a false dichotomy between the purely internal and the purely external. Instead, social situations should be understood as making available meanings for actors *as actors*. These are not given a priori; rather, human subjects are inculcated through meanings available in specific situations (see for example Althusser 1972; Foucault 1977, 1982; Willis 1977). In short, not only do motives impute meaning on situations, but they also impose them on individuals

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qua subjects. To the degree that individuals are "interpellated"[4] as situated subjects through specific social situations, attempting to arbitrate between internal or external sources of motive distracts from the important task of seeking sociological understanding. Instrumental motives are social constructs too. Understanding this transforms the sociological question about motives from "Is it an instrumental motive?" to "What is the sociological character of a context that authorizes instrumentality?" The point for sociological analysis is to identify and understand the features of a social situation that permit certain motives to make sense. This can be achieved, following Weber, by placing actions in more intelligible social contexts (1947:95).

This conceptualization of motive offers a socially grounded way of interpreting the action of situated actors, including the making of putatively rational choices. Motives order sets of meanings already available to groups in concrete social situations such that they can make sense of the situation and take action. Decisions obtain their rationality through their relationship to the social situation and conventional beliefs, norms, values, rituals, and institutionalized practices, rather than from "real" motives, or "full" understanding of the situation.

Felstiner et al. (1980–81) have examined motive and rationality in the context of civil law. The perception of a grievance—the understanding of an event as injurious—and the assignment of blame invoke sets of motives and provoke certain kinds of action. The eventual resolution of that grievance requires contest, negotiation, persuasion, and perhaps litigation over conflicting sets of motive. In these situations, motive is shaped by ideas about the "nature, function and operation" (Trubek 1984:592) of the law and legal institutions held by the aggrieved party and their reference groups. Such "agents of transformation" (Felstiner et al. 1980–81) provide information and assign meaning to the grievance and potential actions, including seeking redress through formal legal institutions; they help define the terms by which any given action can be judged as "rational." As Felstiner et al. argue, the reification of disputes by institutions, which "reduc[e] them to records," obscures the unstable and subjective manner by which people assign meaning to specific actions and chart further courses (1980–81:631). In contrast, a motivational understanding of the decision to litigate permits its examination as a social phenomenon formulated through meanings, though perhaps unstable and subjective, available in particular social situations.

[4] Following Althusser (1972), "interpellation" is the process by which individuals are constructed as subjects through material practices, especially ideology, and the "always already" meanings available in a specific situation.

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Where Felstiner et al. (1980–81) and Sarat and Felstiner (1988; 1995) emphasize legal consciousness in the processes through which motives in disputing emerge, Galanter (1974) focuses on structural relationships between parties and the dispute settlement institution. He highlights the impact of experience and unequal resources on parties' motives, strategies, and goals in litigation. Repeat players enjoy many advantages, including greater access to resources, familiarity with the dispute institution's rules and practices, lower start-up costs, and informal relationships with agents of the institution. As a result, repeat players have the strategic option of "playing for the rules" and investing in the shaping of jurisprudence. One-shotters, in contrast, lack these advantages, are less able to identify a "good" case, and are more likely to enter litigation without the strategic ability to affect the ongoing development of law (Albiston 1999). The structural position of parties in relation to the operation of legal institutions shape which sets of motive appear rational, credible, and legitimate.

Similar to the context of civil law, the good case constitutes the complex of meanings that accompany mobilization of WTO law and the transformation of a trade grievance into a formal trade dispute. The process by which a trade grievance is identified as "good" reflects contextual constraints, such as the ability to marshal resources; personal, professional, and organizational goals; and routine knowledge of formal and informal legal mechanisms generated through experience. Taken together, the good case is the set of motives that constitute the rationality of the context in which the decision to litigate is made. The good case depends on context and, as that context changes, so does the meaning of the good case and the motive for litigation. Those disputes that are not good cases will generally not be litigated (with some significant exceptions), WTO law will not be directly mobilized, and the aggrieved parties will have to look to alternative forums.

The situation of the WTO as an international forum of states, the specific structures of its dispute settlement system, and the intertwining of law and politics in its procedures distinguishes the set of motives available to actors in the WTO from other legal contexts. These features of the WTO system, however, also create significant uncertainty about the outcomes of a given dispute. Similar to Galanter's linking of motives and strategies in litigation to the structural relationship of parties to the dispute institution, distinctive features of WTO litigation make different strategies and goals available to WTO members, depending on their relationship to the dispute settlement process. In this way, uncertainties attached to litigation at the WTO create flexible and overlapping meanings of the good case, which in turn shape which grievances are transformed into a dispute and why.

Interviews and Analysis

The data for this article consist of 30 semi-structured interviews conducted with influential WTO actors between May 2004 and May 2006 in four locations: Chicago; Washington, D.C.; Brussels, Belgium; and Geneva, Switzerland. Ten of the interviews were with senior legal counsel or ambassadors working in trade ministries of three major Northern trading countries and five nations of the global South. Interviewees also included a former Appellate Body chair, WTO Secretariat staff in several divisions, private attorneys, and a former ambassador to the WTO working as a private consultant. All interviewees had experience with decisionmaking in WTO dispute litigation. All but three were men.

The sample frame is constituted by an important class of elites. They are global professionals and bureaucrats—global because of the transnational character of their work and elites because of their social location in the institutions of the global economy. The study of elites, however, posed novel methodological difficulties, particularly related to gaining access, the expense of travel, and navigating authority dynamics in the process of interviewing (Hertz & Imber 1995; Hirsch 1995; Odendahl & Shaw 2002; Fitz & Halpin 1994). While this is not the place to examine these issues in depth (see Conti & O'Neil 2007), it is worth noting that these methodological issues shaped the construction and size of the sample as well as the character of the knowledge claims derived from the interviews. Three initial participants were identified through personal networks and the remaining through purposive, "snowball" sampling (Biernacki & Waldorf 1981) and by directly contacting trade ministries and law firms. One interview was conducted over the phone and another through a series of e-mail exchanges; the rest were conducted in person, generally lasting between one hour and one hour and a half. The interviews were conducted in English, a second language for many respondents.[5] Most participants permitted recording of the interview. Almost all insisted that their comments should be considered "off the record" and not attributed to them by name. As such, their names and, in some instances, national affiliations have been omitted.

This study was designed to elicit meanings informants associated with the decision to initiate litigation at the WTO. The interview guide was composed of semi-structured and open-ended questions, which permitted interviewees to speak at length about why specific actions were taken. The interview guide was organized around four primary themes: the role of WTO dispute settlement in the world trading system, the practice of disputing, the case

[5] Quotations have been edited for confidentiality, brevity, and readability.

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history of their country/clients, and professional activities of the interviewee. Questions related to the practice of disputing were organized by two sub-themes: decisions to litigate and uncertainties related to the disputing process. A primary source of data for this analysis came from responses to the following questions: "What is the process by which the decision is made to initiate a dispute?" and "How do you tell whether you have a case that will result in a victory?" These questions were re-asked several times in different forms, such as "Are countries that participate less frequently, less able to identify whether a dispute will be successful?" "How important is reputation in the dispute settlement process?" or "Do panels have a generally consistent orientation towards legal interpretation?" Each of these would be followed by a return to the primary theme: "Does this affect the ability to identify a winning case?" Through this series of questions and an evolving conversation, an understanding emerged of how the respondent thought about the decision to litigate.

Data analysis utilized closed coding of responses to predetermined questions as well as open coding of salient themes. Open coding of interview texts and notes included the following code categories: process of initiating disputes, goals in initiating disputes, types of uncertainties, expectations related to outcomes, expectations related to compliance, noninitiation or abandonment of litigation, resource capacities, and others. The relationship between these codings—between types of uncertainties and goals in initiating disputes or noninitiation, for instance—were subsequently axially coded as types of motives.

While utilizing qualitative data analysis procedures developed in the context of grounded theory (Corbin & Strauss 1990), this research design draws on Burawoy's (1998) discussion of "interventions" made by researchers into the social world of their informants to reflexively elicit nuanced meanings. Important to note, where informants may have offered one characterization in response to a direct question, it was not uncommon for additional dimensions to be revealed through subsequent questioning and discussion. As an example of this interviewing strategy, in an interview with an official from the European Commission, I asked, "When you have a potential case, and you're considering making a formal complaint, do you know in advance whether or not you have a case that you are going to win?" He responded,

> Normally, [we] are quite selective in the legal soundness of the case. We will not do a case lightly. . . . and, it's both in legal terms and economic terms. At the end of the day, one of the things that I tell my people is that I want to be able to impose sanctions. So that means there must be a commercial effect. And also, I think that if we want to use public resources, it's not for fun. . . . We do a

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> cost-benefit analysis. If we believe that our reasoning is correct, what do we win? And if the panel rules totally differently, what do we lose?

The informant reported a cost–benefit approach familiar in the empirical literature on WTO dispute settlement. The legal soundness of the case—though not the cost of litigation in economic terms—was weighed against potential commercial gains and losses. But when asked about the importance of personal and diplomatic relationships in disputing, he provided a different insight into how decisions are made:

> If you have a guy that you know very well, and you [say], "OK, Jim, or Mateo," or whoever, "now let's speak seriously, what can we do on this?" These are not the type of things that will ever be written anywhere.

Personal, diplomatic relationships are an avenue for gauging whether a dispute should be initiated. They are a way to test the possibility of an informal settlement or, if there is to be litigation, whether it would result in compliance. He then described how such personal contacts could be used to convince his own superiors that a case may be unnecessary:

> To convince your own authorities, "wait one month," you need to trust someone from the other side because those things don't happen in writing immediately. So it would be on the side of the meeting or somewhere in between, in a small group, that you will get a non-legally binding commitment, a kind of promise.
>
> And, because it is a small world of government lawyers involved in trade law, if the person makes you a promise, even if it's not legally binding, it's a promise in a small group. But if he makes a false promise just to delay the case, he will do that once, then he is done forever. So people don't do that. . . . They say look, "wait one month. I [will] have something for you." They will do that if they know that they can deliver otherwise they burn their credibility and not only with one country probably, because you will spread the news that "OK, they're false" (Interview with EC official, Brussels, 20 April 2006).

While the initial response cited a cost–benefit analysis, subsequent probing produced more subtle social factors affecting the decision process. To have accepted the first response at face value would have obscured the social process and context through which the decision was made. Personal relationships mediate the decision-making process, as do other much more immediate factors than aggregated conceptions of costs and benefits. These insights only emerged through interviews that elicited how practitioners understood the uncertainties involved in WTO litigation and the actions that made sense in light of them.

Uncertainties in WTO Litigation

The meaning of a good case at the WTO is flexible because of significant uncertainties associated with litigating in the dispute settlement process. Informants varied in their assessments of how difficult it is to predict the outcomes of panel and Appellate Body reviews: one suggested that about 20 percent of cases are unpredictable;[6] others suggested that the majority are unpredictable.[7] Still others reported nearly the opposite—that the result of a legal case could *almost always* be foreseen at the outset of the dispute, though the political outcome could be a different story.[8] Nonetheless, all informants reported significant uncertainties associated with WTO litigation. While most legal systems contain some element of uncertainty, the uncertainties associated with identifying a good case at the WTO are such that participants are inclined to adopt goals other than, or in addition to, seeking full compliance with WTO obligations. Interviewees identified several types of uncertainty that are manifestations of four features of the WTO: the newness of the system, the organizational and legal structure of the dispute system, the WTO as an intergovernmental agreement, and the persistence of inequality between states.

Emergent Jurisprudence and Stare Decisis

The incomplete development of WTO jurisprudence has a tremendous impact on the ability of member nation counsel to predict the outcome of a dispute. While members can clarify and expand WTO treaties, this is extremely difficult given the consensus-based decisionmaking processes of ministerial meetings, the lack of another forum for generating secondary regulations, and the formal prohibition against establishing legal precedent. The WTO is a new legal system, and while some areas of jurisprudence are fairly well established—such as the national treatment provision,[9] trade remedies, or the Most Favored Nation (MFN) provisions, which originated in the GATT system—others, including the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Agriculture, are less developed. One interviewee described these areas as "uncharted ocean" (Interview with Brazilian official, Geneva, 20 May 2005).

[6] Interview with private attorney, Geneva, 9 April 2006.

[7] Interview with U.S. official, Washington, D.C., 3 March 2005; and with Indian official, Geneva, 12 May 2005.

[8] Interview with Argentinean official, Geneva, 19 April 2006; and with EC official, Brussels, 20 April 2006.

[9] See Horn and Mavroidis (2004), however, for a discussion of the continued "haziness" of the national treatment provision.

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In practice, grievances that venture into such "uncharted" areas of WTO jurisprudence are more likely to be avoided. Without developed jurisprudence, legal counsel is less able to predict how an argument will be understood and, in turn, is less able to evaluate the prospects of winning a case. Avoiding underdeveloped areas of WTO law thus simultaneously contributes to the perpetuation of these very same lesser developed areas of jurisprudence.[10] One Washington, D.C.–based private attorney described the state of jurisprudence:

> You have a sitting Appellate Body which does try to take a consistent approach to all the cases, but that's still in the formative phases. A lot of issues just haven't been resolved yet. And so you don't have kind of the precedential value yet of cases, where you would say, "Oh, the Appellate Body has spoken on this issue." There are a handful of those issues where one could say, "Well, it's pretty clear," but even when they speak . . . it's not in a way which one could say, "Well we shouldn't bring that issue because it's definitively closed," because actually it doesn't set this kind of stare decisis that can't be changed. And, you know, they can change, and the facts change a little bit, and they could distinguish [between them]. And so, because we are in such an early stage, I'm not sure yet, that . . . repeat users . . . would know and be secure to say, "Yeah, this is the good argument and that's the bad argument so let's drop that; let's just stay with this one" (Interview with private attorney, Washington, D.C., 28 Feb. 2005).

The emergent and developing character of WTO jurisprudence combined with the lack of formal authority to establish precedent creates considerable uncertainty related to determining what arguments must be made to construct a good legal case. When complainants are unsure of the effectiveness of their arguments and positions that they take on the interpretation of WTO law, they may be inclined to make more arguments.[11] Uncertainty related to how a legal claim will be understood and the weight that it will be given in a dispute hearing results in disputes becoming more complex as parties try everything they can to make their case. Such uncertainty is also linked to how panel reviews are conducted.

WTO Procedures

The uneven development of jurisprudence is not the only source of uncertainty inhibiting the identification of a good case.

[10] Interview with Brazilian official, Geneva, 20 May 2005; with Argentinean official, Geneva, 19 April 2006; and with EC official, Brussels, 20 April 2006.

[11] Interview with private attorney, Washington, D.C., 28 Feb. 2005; and with Indian official, Geneva, 12 May 2005.

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The organization of the panel review stage of the dispute settlement system produces uncertainty about how a case should be pleaded. While the Appellate Body is composed of jurists who serve a set term on the bench, each panel is assembled on an ad hoc basis for each dispute. The DSU permits the parties involved in the dispute to nominate potential panelists, with the final panel composition requiring the consent of both parties. In practice, however, the Director General plays a large role in the selection of panelists because the disputants are unable to reach an agreement (Cottier 2003; Davey 2003a; Bourgeois et al. 2003). This process creates incentives to select panelists who are perceived as being more likely to take favorable positions on the arguments made by the disputants and leads to the disqualification of otherwise competent panelists based on their nationality, work experience, or positions taken in prior cases (Shoyer 2003; Bourgeois et al. 2003).[12] As a result, the ad hoc system favors newer and less experienced panelists who may or may not have legal training or expertise in the relevant details of the dispute.[13] Even if the panelists have legal training, they tend to come from diverse legal traditions and have little or no experience adjudicating legal matters, particularly diplomatic texts that contain inherent ambiguities.[14] Roessler reports that in practice, very few people are elected to serve as panelists more than three times (see Bourgeois et al. 2003). There has been significant discussion, driven by proposals from the EC, to change the panel system into a permanent body (World Trade Organization 2002, 2003; Davey 2003a, 2003b, 2004; Cottier 2003; Petersmann 2003; Bourgeois et al. 2003). The aim of this proposed reform is multifaceted, and the likely effects are much debated. But increasing the competency and experience of panelists as well as increasing the consistency of rulings are persistent themes in the arguments favoring a permanent panel body (Davey 2003a, 2004; Cottier 2003).

Uncertainties in the panel process persist despite countervailing sources of consistency and predictability. The Legal Affairs and Rules divisions of the WTO Secretariat provide legal advice and institutional memory for changing and sometimes inexperienced panelists (World Trade Organization 2006b). Legal officers review submissions of members in dispute and offer analyses to panelists that identify key legal issues and relate the current case to prior rulings. At times, legal officers may draft the text of the rulings based on consultations with the panelists. In practice, however, consistency can be difficult to achieve. Panelists are not required to

[12] Interview with Argentinean official, Geneva, 19 April 2006.

[13] Interviews with WTO Secretariat officials, Geneva, 4 and 10 April 2006.

[14] Interview with WTO Secretariat official, Geneva, 10 April 2006.

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adopt the advice of the Secretariat, and different divisions within the Secretariat may at times offer conflicting advice.[15] For instance, two identical disputes initiated by Korea about countervailing duties placed on its exports of computer memory to the United States and the European Communities were reviewed simultaneously by two panels and received the same advice from the legal officer managing both cases.[16] However, divergent views of the substance of the dispute within the Secretariat produced distinct manifestations of that advice. As a result, the efforts of the Secretariat failed to result in consistent rulings in the two cases.[17]

These features of the ad hoc panel system interact with the emergent character of WTO jurisprudence to create significant uncertainties for how a trade delegation manages its case before a panel review. A Washington, D.C.–based private attorney described the effects of this on his approach to pleading before a panel:

> It's difficult to know what you'll win and what you'll lose. . . . You get panelists of different quality, of different backgrounds, of different technical expertise. And so, the panelists will react differently to the legal and factual issues based upon their background, placing more or less emphasis on fairness to the extent that they don't have the technical expertise. So, depending upon your panel, you'll get different results. . . . it's almost impossible to know in advance which are your winners and losers of your arguments, and it forces you . . . to make very broad arguments because we are in the beginning of building the system (Interview with private attorney, Washington, D.C., 28 Feb. 2005).

In his view, the weight given to "fairness," that is, to resolving the dispute through compromise rather than through adjudication of wrongdoing, depends in part upon the expertise of the panelists. And since panelists change from dispute to dispute, it is difficult to know in advance how legal arguments will be received. An American official concurred with this assessment, describing litigation before a panel as a "crap shoot sometimes" (Interview with U.S. official, Washington, D.C., 3 March 2005).

Law Without a State

While the emergent nature of the WTO system and its particular organization create uncertainties related to identifying a good case, the single most significant source of uncertainty is derived

[15] Interview with WTO Secretariat official, Geneva, 10 April 2006.

[16] *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (DS296) and *European Communities—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (DS299). See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

[17] Interview with WTO Secretariat official, Geneva, 10 April 2006.

from the intergovernmental treaty basis of the WTO. The ability of counsel to identify a good case is limited by this structural feature of the WTO dispute settlement system that makes ensuring compliance with WTO rulings difficult. A Washington, D.C.–based private attorney suggested that the potential for protracted litigation to not result in any significant compliance threatens to undermine WTO dispute settlement altogether:

> But probably the biggest problem is implementation. You win cases and . . . there's a good chance you will not get any kind of successful implementation to satisfy your client. That will continue to be a problem, and will ultimately undermine the system unless something is done to fix it (Interview with private attorney, Washington, D.C., 28 Feb. 2005).

This comment also points to the tenuous meaning of winning in the context of WTO litigation. A legal victory may not in any automatic way translate into compliance.

Another direct result of the stateless context of the WTO is the quasi-juridical relationship between legal procedures and diplomatic engagement prior to and throughout the formal processes of dispute settlement (Jackson 1998; Abbott 1999). The rules of dispute settlement offer numerous opportunities to return to diplomatic engagement. This is evidenced in several features of the process, including mandatory consultation between the parties prior to a panel review, the release of preliminary panel findings to the parties before the review is made final, and the difficulty of securing complete compliance with panel and appellate body determinations.

Concern with diplomacy pervades even the most legalistic of dispute settlement proceedings. An American official described the influence of "diplo," or diplomacy, in the orientation of the panelists to a dispute. He argued that the dominant norms of diplomatic engagement orient the panelists away from a strict legal approach to resolving disputes and instead promote "settlement" of disputes that emphasizes compromise rather than the determination of right and wrong, winner and loser:

> Either we violated the agreement or we did not, and if we did not then that's all there is. But there is a bit of—and I'm always say[ing] this to my colleagues when they get a little excited about some of this stuff that the panelists might say or their approach—I said there's a lot more of the U.N. diplomacy . . . view of how . . . the dispute is supposed to be resolved. . . . Because we're all lawyers . . . we come with the legal view, and we all practice in court and so we come to . . . the idea that these guys are like three judges, like a three-judge panel and they're not. There's a lot of diplomo-, I call it "diplo" . . . you know, "We're all colleagues, let's

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> all talk about this, let's ponder it intellectually, let's see what it's all about, see if we can't solve this problem," right?. . . . I think their mindset is more diplomacy. There's no winner, there's no loser. What we're trying to do here is settle a dispute. Settle. You know, it's not resolve, it's settle (Interview with U.S. official, Washington, D.C., 3 March 2005).

The quasi-juridical character of the dispute system and the influence of diplomatic norms on litigation disrupt expectations that WTO panels should operate according to formal legal principles. In practice, panels may shift away from strict adherence to legal principles and standards, incorporating diplomatic norms for resolving disputes. The relative weight of legal claims and evidence are not fully given beforehand and depend upon the approach taken by the panels and the parties involved.

At the end of the dispute process, the rules governing compliance with WTO panel and appellate panel decisions revert almost entirely to diplomacy and power politics. While rich countries have greater latitude in deciding whether to comply with dispute settlement rulings, informants reported that the strongest force behind compliance is not necessarily the threat of economic sanctions alone, especially for affluent countries. Rather, a powerful motivation for compliance is the stigma of being labeled as in violation of treaty commitments. This Geneva-based official described the importance of compliance with international treaty obligations to his government:

> It never occurred to policy makers at high levels that facing your damnation and just suffering is an option. . . . We as a nation are a very complying kind. We want to respect international relations, international law. After independence one of the main policies was to determine how would the world characterize us—look at [us] as a nation. We should be considered as a credible, respected, international player in everything. And trade certainly did not count anywhere in the kind of credible deal that we were looking for. Trade could be, if I may use the term, trade could be sacrificed on the altar of . . . this credibility. This was not only policy makers in terms of the executive guys and the bureaucracy, but even the parliament (Interview with official, Geneva, 19 May 2005).

Understanding the role of credibility in disputing is very important and difficult, if not impossible, to measure. Yet it is a consistent theme in explanations for how members engage the dispute settlement system. Being a "bad international citizen" can undermine credibility within negotiations and in forums beyond the WTO.[18]

[18] Interview with U.S. official, Washington, D.C., 4 March 2005; with EC official, Geneva, 12 May 2005; with Costa Rican official, Geneva, 11 April 2006; and with EC official, Brussels, 20 April 2006.

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For officials of the United States and EU, their countries' compliance with WTO determinations—to the degree they comply—is motivated by concern for enhancing the stability and effectiveness of the WTO system such that they may, in the future, claim wrongdoing and deploy the normative pressure of "international citizenship" to force changes in the trade policies of trading partners.[19] While there is some evidence that reputational pressures encourage early settlement of disputes (Busch 2000; Busch & Reinhardt 2003), they are not so strong as to generate predictable outcomes of the dispute settlement system in terms of compliance with WTO panel rulings. Some member nations may choose to "pay their bill" (Interview with U.S. official, Washington, D.C., 4 March 2005)—or accept the punitive sanctions authorized by the WTO rather than modify domestic trade law or practice. But this option, in practice, is not equally open to all members.

Inequality and Litigation

The challenge of identifying a good case posed by the quasi-juridical character of the WTO dispute settlement system is made more difficult by unequal distribution of legal and human resources between member nations. This feature of WTO dispute settlement is a product of historic inequities in the international system and affects nearly all activity at the WTO. Participating in the dispute settlement system is a time-consuming and sophisticated legal and political task, requiring teams of lawyers, economists, diplomats, and politicians. Inequality operates through various institutional forms including the direct costs of litigation, the requisite expertise and experience, and administrative and bureaucratic infrastructure to support the process. The fees for a single case can reach into the millions of dollars.[20] The Advisory Centre on WTO Law (ACWL), a Geneva-based intergovernmental legal aid center, estimates that a WTO case of "medium" complexity requires nearly 340 hours of work to prepare the case and take it through the first round of review by a WTO dispute settlement panel (Advisory Centre on WTO Law 2004).

The ability to identify the good case is in part a reflection of the steep learning curve associated with litigation at the WTO. Those members who do not regularly participate are at a disadvantage in identifying whether a case is good.[21] The already steep learning curve is made more difficult by personnel changes within trade delegations. While some diplomats and attorneys remain in

[19] Interview with private attorney, Geneva, 9 April 2006.

[20] Interview with private attorney, Washington, D.C., 28 Feb. 2005.

[21] E-mail exchange with a former U.S. official, 8 Feb. 2005.

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Geneva for extended periods, more common is a frequent rotation of mission personnel back to the capitol to prevent them from, in the words of one Geneva-based diplomat, "going native" (Interview with Canadian official, Geneva, 3 April 2006) and losing track of their country's interests.[22]

Another barrier to acquiring experience for effective participation in the dispute system is the increasing factual and legal complexity of disputes, which are requiring greater time, expertise, and expense. One indicator of this is the lengthening of panel reports from routinely 20 to 50 pages during the GATT to more than one thousand pages under the WTO. Another is the shift in personnel handling WTO affairs. While diplomats typically filled these roles under the GATT, WTO affairs are increasingly handled by personnel trained in international law.[23]

Other new categories of personnel are increasingly important for identifying a good case. Participants in dispute settlement are turning to econometric modeling as evidence and for arbitration over damages caused by WTO-illegal trade practices (see for example, Keck et al. 2006; Keck & Raubold 2006; World Trade Organization 2005). As such, they are requiring the expertise of quantitative economists to identify a good case.[24] Expert knowledge is necessary to sort through complex factual issues, including scientific issues related to sanitary measures or environmental health and safety regulations (Pauwelyn 2002). Disputes over the regulation of beef hormones,[25] genetically modified organisms,[26] and shrimp[27] are indicative of the increasing scientific and environmental complexity of trade disputes.[28] All these trends have contributed to the increasing prominence of private attorneys in WTO dispute settlement. Although private attorneys offer acquired expertise, experience, and institutional knowledge to mem-

[22] Interview with Mexican official, Geneva, 19 May 2005.

[23] Interview with Mexican official, Geneva, 12 May 2005; and with Indian official, Geneva, 19 May 2005.

[24] Telephone interview with WTO official, 13 April 2006.

[25] *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, complaints by the United States (DS26) and Canada (DS48) and counter-disputes: *United States—Continued Suspension of Obligations in the EC* (DS320) and *Canada—Continued Suspension of Obligations in the EC* (DS321) by the European Communities. See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

[26] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, complaints by the United States (DS291), Canada (DS292), and Argentina (DS293). See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

[27] *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, complaints by India, Malaysia, Pakistan, Thailand (DS58), and the Philippines (DS61). See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

[28] Interview with private attorney, Geneva, 9 April 2006; and with EC official, Brussels, 20 April 2006.

ber nations who rarely participate in WTO dispute settlement, they are expensive. Moreover, the presence of private attorneys has reinforced the trend in dispute settlement toward procedural complexity—or, in the words of an EC official, the use of "procedural trickery" (Interview with EC official, Brussels, 20 April 2006), which further amplifies the necessity of employing highly skilled legal personnel for WTO dispute settlement.[29]

International inequality also affects the capacity to dispute through the character of public–private linkages over trade issues (Shaffer 2003). Effective participation at the WTO is enhanced through close cooperation between industry and government because industry can provide evidentiary data as well as subsidize the cost of attorneys and other personnel. While the EU, United States, and other countries, including advanced developing countries such as Brazil, have cultivated strong public–private links, other countries, such as India, rely nearly exclusively on the human and economic resources of the government to manage WTO cases (Shaffer 2003, 2006).[30] This has tremendous impact on the ability of trade delegations to identify a good case and then manage it through the dispute settlement process. For instance, while a country may contract with a private law firm to assist in litigation, the decision to do so presumes the prior identification of a legal argument. Where countries lack domestic international trade professionals and a competent private sector, the identification of a trade grievance in the first place may pose difficulty. This is why lack of legal capacity is not merely reducible to a question of economic resources: utilization of legal services requires the experience, understanding, and orientation—besides the money—to perceive a grievance as a legal problem and then mobilize the law. As with domestic legal reform, increased access to the disputing stage of litigation likely shifts the impact of inequality to earlier, less transparent stages of the disputing pyramid (Felstiner et al. 1980–81:636–7; Zemans 1982).

Yet another dimension of international inequality is related to the organization of international trade activities within the member nation government. Larger trading nations are more likely to have a specialized government unit for handling international trade affairs. As a former Appellate Body panelist reported, the ability to identify a good case corresponds to those delegations that are "more socialized" into the WTO legal system. This socialization includes expansive internal structures for evaluating the possibilities of WTO jurisprudence:

[29] Interview with private attorney, Brussels, 21 April 2006.

[30] Interview with Indian official, Geneva, 12 May 2005; and with Brazilian official, Geneva, 20 May 2005.

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> A: The difference between let's say the United States and the EU on the one hand, Japan also, is that they have very elaborate internal structures dealing only with these issues. So they are more socialized in that they can make greater prediction . . . as you know, the proceedings are confidential . . . and about half the membership has never participated in a litigation so they don't know how it works because unless you are a [third] party . . . intervening in the case because there is a systemic issue which is of interest to you, you don't know how it works.
> Q: Can that be a liability for a first-time participant?
> A: Of course, of course, and it is one of the handicaps of the system (Interview with Appellate Body member, Geneva, 25 May 2004).

Failure to systematically cultivate public–private partnerships and to create specialized governmental units for international trade affairs places national trade delegations at a significant disadvantage because it restricts access to resources, including legal and economic expertise, administrative support, evidentiary data, and experience with WTO processes. In turn, these limitations limit the ability of legal counsel to foresee the likely outcome of a case and to manage it effectively while in process.

In sum, many member nations lack the basic requirements for effective participation in dispute settlement, particularly well-trained and experienced trade law attorneys with sufficient administrative support. One official described what can happen when the decision is made to join a dispute without consideration of the resources required to manage it effectively:

> The problems that have to be grappled with are on my lap, and I have to somehow manage it, and [if] my counterparts, my colleagues, in other relevant ministr[ies] or departments are helpful, I am happy. If they're not helpful, then I have to run along and do my own research or study to find out how we should react or file submissions. This has led to sometimes . . . [to] not even filing the written submission. . . . I mean, not having had adequate progress in the decisionmaking process on what to file within the time limits, and fail to file it (Interview with trade delegation official, Geneva, May 2005).

In this case, the burden of paperwork led to the inability to participate—participation in a dispute was abandoned for lack of adequate administrative and legal staff. This is a prime example of what Hoekman and Kostecki (2001) have termed "dispute fatigue," which shapes the ways in which poorer nations perceive the possibilities of mobilizing WTO law. Such fatigue, however, does not occur in the trade agencies of the United States and Europe. A Washington, D.C. private attorney, when asked about whether dispute fatigue could ever be induced on the part of the United States, responded:

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> The fact is, you can't overwhelm the United States. First of all, if you bring ten thousand claims, you know, we have ten thousand people. There's no limit really at the Department of Commerce or USTR. They'll get it done. They'll just do it. You know, if you make more that's fine, we'll just put more people on it (Interview with private attorney, Washington, D.C., 28 Feb. 2005).

An American official put it more bluntly: "We're big and we're rich and we can hire lots of people to do the dirty work" (Interview with U.S. official, Washington, D.C., 3 March 2005). As a result, more-affluent members of the WTO system are more inclined to take advantage of WTO law and more likely to engage the process fully prepared, with a well-developed sense of what can be achieved.

Uncertainties are pervasive and significant in the WTO dispute settlement system. But these are not experienced in the same way by each delegation, which has different capacities to effectively adapt to them. Member nations may be forced to abandon litigation or to not initiate litigation at all. A Geneva-based private attorney, when asked about whether some members may be inhibited from participating in dispute settlement, responded:

> Yes, countries are inhibited because they don't have the resources, they don't have the understanding, they don't have the personnel, they have higher priorities. But, they are also inhibited because they know that there are political sensitivities; they're getting something in return, that . . . they might get more aid if they keep their position, if they're quiet (Interview with private attorney, Geneva, 9 April 2006).

As the next section shows, "quiet" is not the only alternative to full-fledged litigation. The meanings assigned to the good case reflect these differences and shape the rationality of mobilizing WTO law.

Meanings of the Good Case

One of several important adaptations to uncertainty within dispute settlement is flexibility in the meaning of the good case that enables and encourages participants to adopt more modest, alternative goals that may be something considerably less than complete legal victory and full compliance. A trade issue alone may not be sufficient by itself for a case to go forward and instead must align with other situational features. The "damage" of a trade problem must be of an appropriate magnitude or match with various goals and priorities of the government.[31] An otherwise good case that is of relatively small economic or political impact may not be litigated unless it furthers some goal of the government. On the other hand,

[31] Interview with Brazilian official, Geneva, 20 May 2005.

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a dispute with enormous economic or political stakes may be avoided due to risks associated with disputing.[32] At the same time, the dispute where a legal victory is most likely may *not* be litigated. Instead, according to respondents, "best cases" are more likely to result in mutually agreed settlements prior to the completion of litigation.[33]

Other disputes may be initiated to satisfy an influential domestic constituency, but these cases do not qualify as good cases unless they are understood as fulfilling one or more of the criteria below. *Japan–Measures Affecting Consumer Photographic Film and Paper*, a complaint by the United States (DS44), was cited as an example of a "bad case" initiated largely to satisfy the demands of a powerful domestic lobby.[34] Several informants lamented that their countries had taken on similar political cases and tended to view them as mistakes. Just as disputes defined primarily by their trade interest may not be litigated, so may those defined solely by their political content. In contrast, respondents identified six elements of the good case. By themselves or together, these are the meanings that motivate the initiation of a formal WTO dispute.

All-Out Victory

The first type of good case is one that involves a substantive trade issue that can be argued in reference to WTO jurisprudence to produce a favorable judgment on critical issues and that will trigger full compliance with WTO rulings. As a prerequisite, the legal and economic resources must be available to identify the grievance and fully prosecute the case. Many participants identify this type of good case as the ideal, and the best are frequently settled before litigation is begun.

Relative Gain

Another type of good case is one that is expected to result in relative gains through partial compliance. It is based on the expectation of a legal victory on critical issues that will, in turn, pressure the losing government to make substantive changes to its trade policies. But the complaining member realizes that the prospects of full compliance may be low for reasons out of its control: the issue may be highly politicized or involve a highly mobilized lobby in the respondent country, or the respondent may be able to

[32] Interview with U.S. official, Washington, D.C., 3 March 2005.

[33] Interview with U.S. official, Washington, D.C., 4 March 2005; and with WTO Secretariat official, Geneva, 10 April 2006.

[34] E-mail exchange with a former U.S. official, 8 Feb. 2005. See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

comply superficially. One attorney from a developing country commented that even marginal compliance could be beneficial and worth pursuing:

> I'm not very optimistic of compliance in [this case], to be very, very frank with you. . . . But, if they do something . . . in an interval between zero and one hundred that might be important. . . . it will be very far from what we think they should do, but anyway can be very helpful (Interview with trade delegation official, Geneva, May 2005).

It may also be the case that the burden of litigation taxes the trade delegation to such a degree that its effectiveness is diminished and its prospects for a favorable outcome decline.[35] Still, it may be advantageous for economic or political goals to seek partial compliance over none.

Any member nation, by virtue of its national sovereignty, retains the formal right to not comply with WTO rulings. In practice, however, noncompliance is less of an option for poorer states that are more vulnerable not only to WTO mechanisms for inducing compliance, but also to extralegal pressures, such as withdrawal of foreign aid. The United States, followed by the EC, are the most frequent noncompliers with panel and Appellate Body rulings (Marega 2007). As a result, rich countries are more likely to litigate with an expectation of full compliance, while less affluent members find themselves in the situation, especially when disputing the trade policies of more powerful countries, of anticipating the value of something less.

Sending a Message

A case may be worth pursuing because it communicates a message. The type of message and the intended target may vary. A good case may facilitate the "education" of the citizenry and political leadership of a trading partner about a trade problem and create pressure for action through visibility in mass media. This is especially important when expectations of compliance are weak.[36] For instance, the recent dispute over U.S. cotton subsidies[37] led by Brazil served as a platform for disseminating information to civil society about the effects of U.S. agriculture policies on Third World cotton growers.

[35] Interview with trade delegation official, Geneva, May 2005.

[36] Interview with trade delegation official, Geneva, May 2005.

[37] *United States—Subsidies on Upland Cotton*, complaint by Brazil (DS267). See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

> The cotton case showed, not only internationally but I think mostly domestically in the U.S., how unfair for the U.S. consumer and for the U.S. taxpayer, such a regime of agriculture support is. . . . You have this very important effect of creating or strengthening awareness [in] American public opinion [about] how distorting and how unfair their agriculture policies are. And that may be in [the] long run, a very positive element (Interview with Brazilian official, Geneva, 20 May 2005).

A second form of disputing-as-communication intends to trigger diplomatic action to resolve the grievance. Referencing scholarship on civil litigation, this has been termed negotiating in "the shadow of the law" (Mnookin & Kornhauser 1979; see also Busch & Reinhardt 2003; Petersmann 2005; Steinberg 2002; Weekes 2004). The initiation of a formal complaint can thus contribute to an informal settlement. Consultations can help formulate the trade issue and legal obligations and, as a former Appellate Body chair observed, contribute to a settlement:

> They have to negotiate. They have to go through mediation and the intercession and sometimes they go through litigation but the litigation itself reduces or, let's say, formulates more completely the issues so that the parties end up settling (Interview with Appellate Body member, Geneva, 25 May 2004).

Disputes may also be litigated to the point where the panel makes a ruling; but because the WTO permits panels to release their findings to the parties before they are made official, the parties have the opportunity to settle quickly, avoiding a formal and public loss.[38] In other situations, the complainant's intent may not necessarily be to see a dispute through litigation and seek a suspension of concessions; but threats of litigation can be effective. A Washington, D.C.–based private attorney remarked:

> Sometimes people will abandon [disputes]. They bring the claim for political reasons and . . . really never intend to pursue it but want to make their point. You know, they go through consultations. They decided they don't want to go forward there; they're not going to go forward anyway. They just wanted to make their point to the other government (Interview with private attorney, Washington, D.C., 28 Feb. 2005).

To make the threat viable, however, the dispute must seem likely to prevail before panel and Appellate Body reviews. A European Commission official described the effect of initiating a dispute on

[38] The dispute *European Communities—Trade Description of Scallops* (DS7, 12, 14) clearly fits this pattern, as does *European Communities—Measures affecting Butter Products* (DS72). See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

the balance of power within the responding nation and how that can facilitate a settlement:

> The advantage of moving to the modality of consultations is it means that it is the ministry of trade, or foreign affairs that is now the interlocutor on the measure . . . therefore you shift the balance of decision within the national government . . . you give more power to the ministry of foreign affairs [who] will go to the president . . . and say, "Look, I told you it was a WTO violation and now we're in deep shit because of those guys from ministry of industry; let's find a settlement" (Interview with EC official, Brussels, 20 April 2006).

A dispute may be a good case because of its capacity to signal the importance of a particular trade relationship, to draw attention to a trade grievance, or to motivate diplomatic action in related contexts; a good case may be "political theater" (Hudec 1996, 1999:26).

Not all members are equally vulnerable to pressures exerted through the "theatrics" of dispute initiation. Referring to the two biggest participants, the United States and Europe, the same Commission official continued his remarks: "I don't think the two elephants do care. I mean we say, 'poof.' We have so many cases that one no way taxes on our main duties. . . . We say, 'Fine, yea. Business as usual'" (Interview with EC official, Brussels, 20 April 2006). Given the expense and sophistication required by the process, not all members can equally participate in the politics of threat, nor are all members equally vulnerable to it.

Complementary Goals

A good case furthers government goals and priorities in areas beyond the dispute at hand. National governments may prioritize issues such as intellectual property rights or obtaining greater market access. Disputes will be chosen that further those goals.[39] More dramatic, a good case may be intended to affect ongoing WTO negotiations.[40] In this scenario, a dispute will be chosen with the intent of altering the bargaining position of the participants by clarifying obligations under the WTO treaties. This strategy is particularly useful when members are not ready to reach consensus on a negotiating issue (Petersmann 2005). In the cotton case mentioned above and in the EC-Sugar[41] ruling, Brazil and its

[39] Interview with Brazilian official, Geneva, 20 May 2005; and with Argentinean official, Geneva, 19 April 2006.

[40] Interview with Brazilian official, Geneva, 20 May 2005; and with Argentinean official, Geneva, 19 April 2006.

[41] *European Communities—Export Subsidies on Sugar*, complaint by Brazil (DS266). See http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed 19 Nov. 2007).

co-complainants impacted the Doha Round negotiations over agriculture by clarifying the legal obligations of the United States and the EC to eliminate agriculture subsidies. These high-profile cases improved the bargaining position in the Doha Round negotiations for those nations seeking elimination of Northern agricultural subsidies. This meaning of a good case draws on the close relationship between litigation and negotiation (Petersmann 2005; Odell 2000; Weekes 2004; Davis 2003). Congruency with other national goals is a motive utilized by all members, given the basic ability to participate, and one reason why a trade interest alone is frequently insufficient reason to initiate a case.

Systemic Issues

Although informants reported that disputes are rarely initiated for purely systemic reasons, concern for shaping WTO jurisprudence and the procedures of the dispute system are factors considered in combination with substantive trade issues. A U.S. official reported that systemic disputes are unlikely unless vigorously pushed by private industry.[42] More likely are grievances that are not taken forward because of the risk that the complaining party may be subject to the same complaint in the future.[43]

Shame Avoidance

While generally underexamined in international relations, sociologists of emotion have argued that shame and its avoidance play a prominent role in shaping social action (Scheff 1988, 2000; Goffman 1982). At the WTO, legal counsels appear particularly attuned to the risks of political embarrassment for themselves and their superiors and, as a result, will only take good cases to litigation. This concern underpins all other considerations of a good case. Informants reported that embarrassment is attached to losing a case among Geneva-based officials.[44] Other informants reported a sense of *national* shame associated with high-profile losses at the WTO.[45] While this may be conceived as "bad publicity" for public officials, on one occasion the respondent suggested a deeper, affective response to having complied with a WTO ruling:

[42] Interview with U.S. official, Washington, D.C., 4 March 2005.

[43] Interview with Brazilian official, Geneva, 20 May 2005; and with EC official, Brussels, 20 April 2006.

[44] Interview with EC official, Geneva, 12 May 2005; with Indian official, Geneva, 12 May 2005; and with Brazilian official, Geneva, 20 May 2005.

[45] Interview with Indian official, Geneva, 12 May 2005; and with EC official, Brussels, 20 April 2006.

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> It was a very difficult compliance process that we went through, politically and even from a technical point of view. ... We felt quite ashamed doing it, because it was a reversal of national policy in both cases (Interview with trade counsel, Geneva, May 2005).

Here, shame and embarrassment are the inverse of the reputational pressures for nations to behave as good international citizens, and they act as strong motives for seeking to litigate only good cases. Nonetheless, the experience of being "shamed" in an earlier dispute increased pressure to mobilize WTO law to its fullest extent in a later one. The same legal counsel described how his country's embarrassment at having to comply with a ruling in one dispute manifested in a strong demand to seek full redress in a later case against the same country:

> We paid a rough price to comply. And I think this weighed in when the political decision to retaliate in [this] case was taken ... the industry will come up to you, and through the parliamentarians, and others, and say ... "What's this WTO about then?" ... you know, "We gave in to a Northern compliance demand in our cases, so at least, we should carry this through to its logical conclusion in the WTO" (Interview with trade counsel, Geneva, May 2005).

While the decision to retaliate was also based on a technical estimate of the injury experienced by his country's exporters, the politics of shame motivated the decision to strike back and mobilize WTO law to the fullest extent possible. Loss as a defendant motivated the initiation of a dispute as a complainant; redress of shame manifested as imperative for litigation.

All members of the WTO do not likely participate in such a political economy of shame to the same degree. Scheff (1988) has described powerful mechanisms for hiding shame, so it would not be surprising that many trade personnel would not report affective motives in an interview. Galanter's (1974) theory suggests that repeat litigants—in this case, trading nations such as the United States and the EC—would likely be less to be emotionally invested in a given dispute to the same degree. Indeed, the "elephants" perceived participation in WTO litigation as routine. Perhaps more problematic is the understanding of emotion when assigned to complex organizations. While it is unclear how a complex organization emotes, affective states were nonetheless offered as meanings for the actions taken by a government; they were motives for the avoidance of a dispute in some cases and, in others, for subsequent initiation of litigation.

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Discussion and Conclusion

The good case draws on economic, political, and symbolic characteristics of trade grievances and the specific structures of the WTO treaties to mobilize WTO law. The meanings of the good case used by participants in legal proceedings explain their actions and the outcomes that the dispute mechanism produces. In practice, the good case is flexible and multidimensional, reflecting the close relationship between diplomacy and law in dispute settlement proceedings and the uncertainties that relationship creates for litigation. The good case makes sense of uncertainties as meaningful bases for action, permitting the transformation of trade grievances into formal disputes that are intended to achieve more modest compliance goals, trigger diplomatic action, affect ongoing negotiations, or achieve other goals.

The set of motives constituting the good case include emotions, such as stigma, reputation, and shame. These were offered by informants as personal and organizational dispositions. In the context of international relations, consideration of the situated sets of motive in dispute settlement reorients the coherence of dominant conceptions of "national interests." States pursue their "interests" through the legal mechanism of the WTO, but these are constructed through specific situations and persistently intersected by the personality, judgment, and training of personnel occupying the organizational spaces of governments. Viewing the decision to initiate litigation at the WTO through the concept of motive illuminates the social constructedness of rationality in legal decisionmaking. This contrasts with the presumption of market rationality found in economic approaches to legal decisionmaking.

The good case defines the contours of rational decisionmaking for trade delegations considering initiating a dispute at the WTO. Whether a case is "strong" or "weak" will be evaluated through the lens of at least one, but more likely many, meanings of the good case. The meaning of rational action, however, varies across members along with the human and economic resources that they bring to bear in identifying and developing a good case. Litigating for legal victory and full compliance is the highest standard of the good case, and disputes that most closely approximate this tend not to be litigated. At the same time, this motive is less frequently available to members from developing countries. Like Galanter's typology of repeat players and one-shotters, unequal access to human and legal resources, unequal experience with the processes of the dispute settlement system, and lower expectations of compliance shift the good case toward emphasis on relative gain, symbolic victory, and communicative power, particularly among the "have-nots." In these instances, it is no longer rational to expect the "benefits" of

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litigation to exceed the "costs" in terms of economic gain. While each participant confronts uncertainties in WTO litigation, the flexibility of the good case covers over differential capacities of unequal members to confront them. The good case provides a basis for action while institutionalizing inequality in the practice of international trade law. The multiple elements subsumed in the good case thus demarcate the limits of rational behavior in disputing for each member of the WTO. In this fashion, the good case reflects the hegemony of the economically powerful in WTO proceedings, who have the greatest latitude for rational behavior, while legitimating the dispute settlement mechanism as a formally fair and open forum for settling disputes for all.

The WTO is a highly complex social arena in which personal, professional, and bureaucratic motives mediate the historical structures of the global economy and international relations. The task of better understanding the claiming process at the WTO through qualitative approaches is a valuable complement and corrective to the prior empirical literature. While the generalizability of these findings to other international forums may be limited, they nonetheless provide a model for the study of international law-in-action. The law and society approach to understanding law-in-action provides a fruitful and relatively underutilized framework for analyzing international legal fields and has the potential to reshape the existent terrain of scholarship on international law and organizations. Future research should extend this approach, utilizing qualitative methods, seeking larger samples, and conducting comparative evaluations of other international legal forums as a basis for revisiting the production of law-in-action, now at the global level.

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