

Does Legal Capacity Matter?

Explaining Patterns of Protectionism in the Shadow
of WTO Litigation

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So what? Does the DS Matter?

- Individual Cases
- Terms of Trade Effects
- Shaping WTO Law's Meaning
- Bargaining in Shadow of Potential Case
 - Shadow effect of law's meaning
 - Shadow effect in settlement negotiations
 - Countering protection

Does it matter differentially?-

Yes: Three Reasons Given

- Reflection of trade size
- Reflection of market power, and in particular ability to retaliate
- Reflection of legal capacity
 - Challenging trade barriers before WTO
 - Settlement negotiations in law's shadow
 - Being subject to protection in first place

Motivation

- WTO's DSU often seen as a triumph of law over the power politics of GATT
- Downside of DSU is that participation hinges, in part, on members having sufficient *legal capacity*
- Most agree legal capacity probably matters, but proxy measures to date are far from ideal

Implications of Question

- For Member's internal institutional decisions and TA-CB requests
- For WTO jurisprudential considerations (enhanced evidence requirements)
- For DSU Review (Nordstrom/Shaffer on small claims procedure)

The Question

We examine whether countries with less legal capacity are:

1. Less likely to challenge AD cases brought against them
2. More likely to be targeted by AD filings in the first place

What is Legal Capacity?

We define legal capacity as *the institutional resources required to prepare, prosecute and monitor a case, including legal, economic and diplomatic staff.*

This includes:

- Things you can count, like lawyers and budgets
- But also experience and support of the government

Survey of Legal Capacity

- Administered 21 page, 48 question survey to 150 members of the WTO between 5/05 and 5/07
- Survey consisted of questions asking about both objective facts and subjective views
- 52 delegations responded, including 10 “low income,” 16 “lower middle income”

Views on Legal Capacity

- In explaining why their country hadn't filed a past case, more cited the cost of litigation (56%) than a lack of market power with which to retaliate (49%)
- In explaining the advantage of powerful members using the DSU, 88% cited legal capacity versus 48% who cited issues related to market power

Measuring Legal Capacity

Sum of Standardized Values on:

- Specialized DS group?
- If so, how many?
- Tenure of senior staff?
- Staff turnover a problem?
- % costs defrayed by firms/trade groups?
- # WTO meetings attended?

Is This the Same Old Measurement?

Our variable is more precise. Its relationship to:

- World Bank income category (regression $R^2 = 0.19$)
- Size of Geneva delegation (regression $R^2 = 0.20$)
- International Country Risk Guide's *Bureaucratic Quality* variable (regression $R^2 = 0.21$)

Empirical Tests

- Data on 1,321 AD investigations against 33 target countries, which is ½ world action 1995-2005
- Selection model's first DV is *AD Action* (1 in 64% of cases); second is *Complaint* (1 in 9%)
- To isolate role of legal capacity, key is to control for *export dependence*, as market power

Models

Other Controls:

Log of both states' GDP

Per capita GDP

Non-market economy
status

Time-varying Real GDP
growth

Country fixed effects

■ Stage 1: *AD Action*

■ Stage 2: *Complaint*

Substantive Effects: AD Action

- Probability of AD Action is 0.72 for country with legal capacity in 10th percentile, 0.67 for average country, and 0.60 for country scoring in the 90th percentile
- This is equal to the difference in odds of being subjected to an AD action for a non-market and a market economy

What Could Have Been?

- Question: How many more WTO disputes would we have seen challenging ADs from 1995-2005 if every country had the legal capacity of the US?

- Answer: 134

This would constitute a 174% increase in litigation

Substantive Effects: Complaint

- Probability of WTO complaint 0.008 for country in 10th percentile of legal capacity, 0.034 for average country, and 0.11 for country in the 90th percentile
- This difference is at least as great as what we observe for a country in the 90th percentile of market power versus the 10th percentile

What Could Have Been?

- Question: How many fewer AD cases would we have seen challenging ADs from 1995-2005 if every country had the legal capacity of the US?

- Answer: 87

This would constitute a 10.2% reduction in AD action