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Why litigate? The role of political, bureaucratic and strategic incentives on recourse to trade litigation:

Comparing the experiences of Indonesia, Malaysia, Singapore and Thailand in the WTO Dispute Settlement Mechanism

PhD Dissertation 2019

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Abstract

English

In this dissertation, I systematically explain why certain Southeast Asian countries have been active in bringing trade disputes to the WTO dispute settlement mechanism (DSM), while others have avoided going down that route. More specifically, I account for the observed patterns of dispute initiation behaviour, using four ASEAN countries - Singapore, Malaysia, Indonesia and Thailand - as case studies. While Singapore and Malaysia were very early users of the DSM, they have only referred one trade dispute each to the DSM (1995 to present), unlike Indonesia and Thailand, which have been significantly more litigious, having referred 11 and 14 disputes to the WTO respectively over the same time period[1].

Building upon the existing literature - particularly on recent findings on the political utility of filing WTO disputes - I present my own theoretical framework to explain the very different rates of recourse to the WTO DSM. My central argument that emerges, based on my empirical research, is that while economic fundamentals matter, the specific relations and networks

[1]As a peripheral contribution, I have also developed a standalone quantitative model, based on existing predictive models of DSM participation, which also confirms that Singapore and Malaysia are 'underutilising' the DSM, while Indonesia and Thailand have referred slightly more disputes to the WTO than might be expected.

between firms, politicians and bureaucrats that have arisen based on the respective political settings in the four countries have created incentives that have either pushed domestic decisionmakers towards or away from WTO litigation. In my analysis, I use novel empirical data I have gathered, which includes interviews with 19 government officials and international trade experts, most of whom have directly been involved in one or more WTO disputes.

Through my in-depth analysis of each country, I also identify peripheral factors that are likely to have encouraged or deterred the four case countries from bringing trade disputes to the DSM. These include the following: the central role of transnational corporations in fuelling litigation; the preferences of government agencies and domestic trade policy elites; strategic motives that have encouraged decisionmakers to bring even disputes with seemingly low utility to the DSM; the four case countries' adoption of differentiated strategies when dealing with different trade partners; and how various challenges – ranging from enforcement, the fear of retaliation and litigation capacity – have shaped the propensity to litigate. With respect to each specific case country, I also explain any observed evolution in their respective approaches towards WTO litigation, since 1995.

Dansk

I denne afhandling forklarer jeg systematisk hvorfor nogle Sydøst-Asiatiske lande aktivt har bragt handelstvister for WTO's domstolssystem for handelsttvister (DSM), mens andre har undladet at gå denne vej. Mere specifikt redegør jeg for de observerede mønstre i initieringen af tvister i systemet, ved at kigge på fire ASEAN lande - Singapore, Malaysia, Indonesien og Thailand - som cases. Selvom Singapore og Malaysia var meget hurgtige til at anvende DSM'en, så har de kun initieret en tvist hver

hos DSM siden 1995, i modsætning til Indonesien og Thailand, som har været betydeligt mere aktive og har fremsendt henholdsvis 11 og 14 tvister til WTO over den samme tidsperiode [2].

Byggende på den eksisterende literatur - specielt på nylige resultater om den politiske effekt af at initiere WTO tvister - så præsenterer jeg min egen teoretiske model for at forklare de meget forskellige anvendelsesgrader af WTO DSM'en. Mit centrale argument, baseret på min empiri, er at selvom fundamentale økonomiske forhold betyder noget, så har specifikke relationer og netværk imellem firmaer, politikere og bureaukrater, som er opstået som følge af de respektive politiske forhold i de fire lande, skabt incitamenter der har skubbet nationale beslutningstagere tættere eller længere væk fra anvendelsen af WTO DSM'en. I min analyse bruger jeg nye empiriske data som jeg har samlet, der inkluderer interview med 19 embedsmænd og internationale handelseksperter, de fleste af dem med direkte involvering i en eller flere WTO tvister.

Igennem min dybdegående analyse af hvert land, har jeg også identificeret faktorer der sandsynligvis har opmuntret eller afskrækket de fire lande fra at bringe handelstvister til WTO DSM'en. Disse inkluderer følgende: Den centrale rolle som transnationale virksomheder har i at instigere tvister; regeringens og den nationale elite indenfor handelspolitik's præferencer; strategiske motiver som har tilskyndet beslutningstagere til at fremføre tvister med selv en meget lav mulig gevinst ved DSM'en; de fire landes anvendelse af differentierede strategier når det kommer til håndteringen af forskellige samhandelspartnere; og hvordan de forskellige udfordringer - fra håndhævelse af domme til frygt for gengældelse og juridiske kapacitet - har formet tendensen til at bringe tvister. Jeg gennemgår også den observede udvikling i hvert enkelt lands tilgang til anvendelsen af WTO DSM'en siden 1995.

[2]Som et underordnet bidrag, har jeg også udviklet en selvstændig kvantitativ model, baseret på eksisterende prædiktive modeller af deltagelse i DSM'en. Modellen bekræfter at Singapore og Malaysia underanvender DSM'en, mens Indonesien og Thailand har fremsendt flere tvister til WTO end hvad man kunne forvente.

Contents

List of Figures

List of Tables

Chapter 1

Introduction to the Puzzle

Since the creation of the World Trade Organization (WTO) in 1995, its members have brought close to 600 inter-state trade disputes to the organization's Dispute Settlement Mechanism[1] (DSM). G. C. Shaffer (2013) observes that international trading relations have been 'governed increasingly through law—or, better stated, through power mediated by law—with all countries, developed and developing alike, initiating more legal complaints against one another'. Legalization[2] of trade relations has provided a means through which countries can, and regularly have, challenged their more powerful counterparts[3].

[1]As of 31st December 2018 (the cut-off date for my analysis), 573 distinct disputes have been brought to the WTO DSM. The disputing parties are required to hold consultations within a fixed time period, as prescribed in the Dispute Settlement Understanding (DSU) of the WTO. If the disputing parties are unable to reach an informal settlement, the complainant is able to unilaterally request for a panel to be composed. Once composed and appointed, the panel is expected to reach a decision within the timelines articulated in the DSU.

[2]The term 'legalization' refers to the processes by which international relations have become increasingly organized through rules and norms related to law (Abbott et al. 2000).

[3]Former WTO Director Pascal Lamy notes, rather optimistically: "All the political muscle-flexing and grandiloquence is discarded at the door once the case enters the WTO" (*WTO disputes reach 400 mark* 2009). However, as noted by Guzman and Simmons, less powerful countries may face structural impediments (e.g. insufficient resources) to

While the DSM has been hailed as the 'crown jewel' of the WTO system, it has attracted its share of criticism over the two decades of its existence. For instance, legitimate concerns remain regarding developing countries' access to the WTO DSM and their ability to pressure respondents to comply with rulings issued by WTO panels and the Appellate Body (Conti 2010b; G. C. Shaffer 2008; Zeng 2013). Much criticism has also been levelled at the emphasis on forward-looking compliance, as complainants are only able to seek remedies for prospective losses and not those already incurred prior to or during the WTO DSM process. In recent years, the US administration's unilateral threats to, *inter alia*, block the appointment of new Appellate Body members upon the expiry of existing members' terms while disallowing outgoing members to continue working on ongoing appeals has challenged the organization's very existence.

Still, many scholars consider the WTO DSM to be the only comprehensive system of international[4] third-party adjudication that operates with compulsory jurisdiction. This compulsory (as opposed to voluntary) jurisdiction allows WTO members to defend their trade interests as complainants in the system without requiring the consent of the target of these complaints (i.e. respondents), unlike in other international adjudicative bodies. Moreover, even with the proliferation of free trade areas, WTO members are still turning to the WTO DSM[5] and bringing increasingly complex issues to the Appellate Body, to the extent that the system is unable to keep up with the caseload[6].

In recent years, attention has been drawn to Asian countries' relatively limited use of international courts. It has been noted for instance that an

disputing or fear retaliation (through a counter-dispute or other methods) and may be therefore unable to demand compliance (Guzman and Simmons 2002).

[4]This is in contrast to regional courts, such as the Court of Justice of the European Union (CJEU).

[5]See Li and Qiu (2015) and Horn, Mavroidis, and Sapir (2010)

[6]See remarks made by WTO DG Roberto Azevedo on the high DSM caseload in recent years (Azevêdo 2017)

'attitude of reticence and reserve towards international adjudication appears to have been prevailing for many years in Asia' (Owada 2005). While Asian countries have historically been underrepresented in the development and use of international law, Asia's rising global political and economic presence has made this underrepresentation increasingly apparent, and more frequently questioned. Concurrently, trade scholars have raised questions about the 'missing' cases, given that there are grounds to expect even greater use of the WTO DSM than what has been observed (Bown and Hoekman 2005; Bown 2005b; Elsig and Stucki 2012). Moreover, while there is abundant research on WTO DSM participation, Bièvre, Poletti, and Yildirim (2017) note that the existing research 'has so far been largely unable to develop systematic explanations for how governments choose whether or not to file a dispute with the WTO DSM'.

When do governments in Asia - a region that appears relatively 'ambivalent' towards the use of international courts (Chesterman 2015) - actually turn to international courts to resolve inter-state disputes? In the context of trade, scholars have recently questioned whether Asian countries as a whole, which are highly dependent on trade, are using the WTO DSM 'effectively' (Ewing-Chow, Goh, and Patil 2013; Moon 2013) and offered explanations based on law, economics and culture. These scholars primarily point to the relatively low proportion of WTO disputes initiated by Asian countries as a collective, relative to their stakes in international trade, in order to make this claim of underutilisation.

Discussions on Asian participation in the WTO DSM have been almost exclusively focused on three East Asian countries that dominate the region economically – China, Japan and South Korea (Ahn 2003; Davis and Shirato 2007; Ji and C. Huang 2011; Moon 2013; Peng 2000) - and to a lesser extent, on another Asian WTO member, India (Hoda 2012; Hsu 2010). In the context of these countries, which are the dominant trade actors in the region[7], trade scholars have examined the evolving domestic

[7]When measured by total import and export values.

perspectives over time towards both initiating and defending trade disputes at the WTO. Trends have also been observed with regard to the specific industrial sectors that tend to be the subject of dispute initiation activity as well as these countries' increasing willingness to use the DSM to defend domestic interests(Ahn 2003; Ewing-Chow, Goh, and Patil 2013; Peng 2000; Curran 2012).

There is a dearth of research examining how the 10 ASEAN countries[8] in particular have used the WTO DSM. A further puzzle emerges when it comes to the variation across the ASEAN WTO members' respective rates of engagement in the WTO DSM. Most ASEAN countries' utilisation of the WTO DSM has not been examined in the literature even two decades on, either at a country- or region-specific level[9]. Interestingly, while a handful of ASEAN members have repeatedly defended their interests through the WTO DSM over their two decades of membership, either as complainants or respondents, others have been much less active in doing so, as will be discussed in the following paragraphs.

In any discussion of ASEAN countries and their use of international law and courts, the regional preference for 'quiet diplomacy', characterised by the 'ASEAN way' of informal and consensus-based settlement, is invariably mentioned[10]. I argue that while culturally-premised explanations might not be off the mark, particularly when it comes to explaining why ASEAN countries have largely avoided pursuing WTO litigation against each other (i.e. intra-ASEAN disputes), the coexistence of both highly active and relatively dormant WTO litigants in the region leads one to question the validity of culture-based generalisations. Singapore and Malaysia for instance were the very first complainant and respondent respectively to

[8]These ten countries are: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

[9]There are some exceptions to this - see for example Le (2013)

[10]This regional preference has been noted not just by academics such as Amitav Acharya, but also many current and former leading ASEAN diplomats and political appointees themselves e.g. Rodolfo Severino, Tommy Koh, Mahathir, CL Lim. It has also been articulated in my interviews with civil servants.

refer a trade dispute to the newly-created WTO DSM in 1995. This suggests a willingness to overlook the cultural preference for informal bilateral settlement if the circumstances call for it. However, both countries have *not* used this mechanism in over two decades of WTO membership, even though there have been opportunities to do so. In contrast, other neighbouring ASEAN countries (e.g. Thailand, Indonesia, Vietnam and the Philippines) have emerged as very active and repeat users of the WTO DSM during the same period, in spite of greater initial capacity constraints.

One could argue that ASEAN countries generally face significant power asymmetries vis-à-vis their major trading partners (such as the United States, European Union and China) and therefore have strong incentives to challenge market access barriers through the WTO DSM. This is because they are likely to gain better outcomes through the rule-based WTO DSM than through bilateral negotiations alone with these asymmetrically powerful trade partners outside the WTO (Busch and Reinhardt 2000; Davis 2006).

The advantage of challenging market access barriers through the WTO DSM - which is particularly pronounced for developing countries - has been attributed by Davis (2006) to the following four factors:

1. the obligation for the respondent to participate in negotiations at the first stage of the DSM process
2. the existence of a common standard for evaluating outcomes
3. the option for other countries to join a dispute either as co-complainant or third party, thereby increasing pressure on defendants, and
4. international pressure on states to change policies that are found to violate trade rules.

Moreover, while trade merely constitutes one aspect of bilateral relations,