

Asian Participation in the WTO Dispute Settlement System

ICTSD Programme on International Trade Law

1. Introduction

The World Trade Organization (WTO) dispute settlement system (managed under the Dispute Settlement Understanding, DSU) is undoubtedly one of the principal achievements of the WTO, representing the most widely used intergovernmental dispute resolution system in the world. In its first seventeen years, the WTO DSU has seen 452 requests for consultations made, resulting in 167 panel reports and 103 Appellate Body reports.¹

Underlying its creation was the desire to create a rules-based system whereby every Member has an equal opportunity to bring a complaint and to have it adjudicated upon. Currently, however, the system continues to be predominantly used by only a small group of member states with many developing countries not actively engaging in WTO dispute settlement. It should be noted, however, that the grouping of states which classify themselves as ‘developing countries’ at the WTO is diverse, being at various stages of development and with differing levels of wealth. General figures on the participation of developing countries thus require more detailed analysis, as do regional differences and dynamics. In the following, the World Bank distinction of low income, lower and upper middle income and high income countries will be used to group different WTO Member States.

The purpose of this Information Note is to examine in particular the participation of Asian countries² in the DSU. Predominantly comprised of low income and low middle income countries,³ statistics on the region’s engagement in the DSU will be illustrated and analyzed to look at behavioural patterns in its participation and to determine whether the constraints on capacity often associated with developing states also apply to certain Asian countries.

Most of the data will be considered across three distinct periods: 1995-1999, 2000-2004 and 2005-2011 in order to explore DSU participation over time. It will look at patterns in the number of disputes Asian countries have been involved in, and, as part of a comparative analysis with Latin America, which Asian countries tend to raise complaints against - whether regional or non-regional partners and whether alone or with other trading partners. In a

¹ As of 27 November 2012.

² WTO Members considered to form part of the Asian countries referred to in this note are: Bangladesh, Brunei, Cambodia, China, Chinese Taipei, Hong Kong, India, Indonesia, Japan, Macao, Malaysia, Mongolia, Myanmar, Pakistan, Papua New Guinea, Philippines, Singapore, South Korea, Sri Lanka, Thailand and Vietnam

³ World Bank Income Group classifications: see <http://data.worldbank.org/about/country-classifications>



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comparison with the US and EU, it will be considered how Asian countries behave once they are involved in a dispute, and in what circumstances settlement, rather than adjudication, is seen as appropriate. Finally, the industrial sectors where Asian countries bring disputes, and the legal provisions relied on will be analyzed across the three time periods to identify trends in what is being litigated.

2. Overall litigation intensity

As Figure 1 shows, in the first five years the DSU witnessed the heaviest use by WTO Members, with an average of thirty-seven cases initiated per year; the average for 2000-2004 dropped to twenty-seven, and then further still with a rate of sixteen new disputes over the following five years.

Active participation in the early days was partially due to WTO Members seeking to clarify issues that had not been resolved during the Uruguay Round. Members were allegedly also looking to achieve concessions that were not available during the negotiations and certain disputes were raised with the aim of determining systemic issues relating to

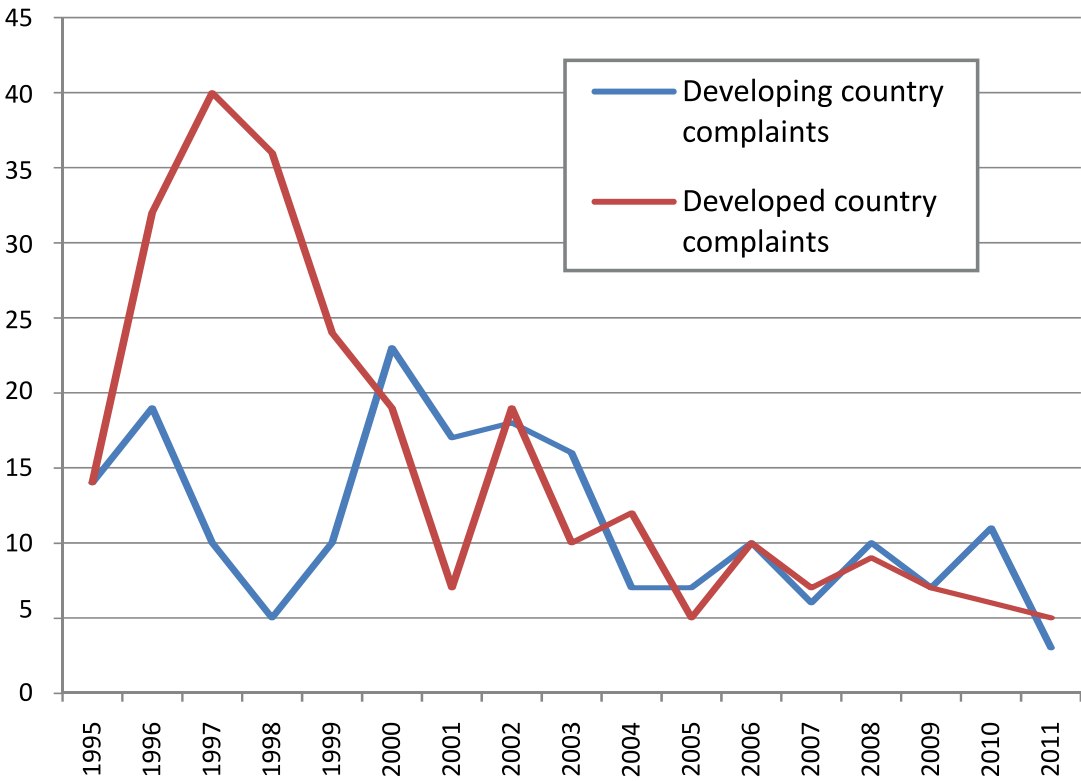
the overall system's functioning. With such issues being clarified over time, fewer cases of such initial systemic nature have been initiated since 2000.

The Doha Round negotiations, launched in 2001, also provided Members with another forum for discussion, and the dramatic drop in disputes from this period onwards can be explained in part by a desire to address matters in talks rather than under the DSU, as well as reluctance on the part of Members to undermine the already shaky grounds of the Doha Round.

The second period saw a huge drop in complaints being filed by developed countries, while developing countries increased their activity, responsible for nearly 60 per cent of all new disputes. More than half of all complaints over steel took place in the first two years of the second period, accounting for the clustering of disputes seen at that time.

In the third period, the annual rate of cases continued to drop, although developing countries continue to be responsible for a relative increase in new disputes, compared to developed states.

Figure 1: Complaints brought under the WTO Dispute Settlement system: Comparison of developed and developing countries



Since its creation, developing countries have continued to increase their participation in the system, in recent years being responsible for more than half of all complaints lodged. Participation, however, can be largely attributed to a small grouping of frequent developing country complainants. Brazil, Mexico, India and Argentina account for almost half of all developing country complaints, while 75 developing countries - including all but one Least Developed Country (LDC) WTO Member - have never been involved in a WTO dispute, whether as a complainant or as a respondent. Many other developing country complainants have brought only one or two complaints, and there are only around eight developing country participants who regularly get involved in disputes as third parties.⁴ The same can be said about the number of challenges brought against developing economies.

Against this background it is often alleged that the DSU is biased towards the richer Members who have at their disposal greater resources simply not available to many developing countries, constrained by limits to their legal capacity.

The relative lack of DSU experience for a large number of developing states continues at a time when recent developments have seen the trading environment becoming more complex. Some have argued that disputes before the WTO are increasingly seen as an effective way of addressing issues that are not being resolved under the Doha Round negotiations, and that the Dispute Settlement Body is already being confronted with an increasing number of disputes relating to controversial policy objectives rather than pure legal matters. Issues such as access to strategic raw materials, green technology production support, emission reduction measures and consumer information policies have been raised in the past few years, as witnessed in cases such as *China-Raw Materials (2009)*, *Canada-Feed-in-Tariff Programs (2011)* and *US-Tuna (2008)*.

Finally, it has been argued lately that Members are increasingly making use of the adjudicative system to enforce existing, sometimes unexplored, obligations to attempt to achieve through litigation what they could not secure through negotiations. Already in 2012, the number of requests for consultations has

tripled that seen in 2011.⁵ In this environment it is of critical importance that developing countries increase their participation, especially as third parties, given the often far reaching and systemic implications of panel and Appellate Body rulings.

3. Asian participation in perspective

Asian DSU participation by income level

As shown in Table 1, by November 2012, Asian countries had initiated a total of 99 disputes.

The Table further reveals that a broad spectrum of Asian countries, at differing stages of development, have participated in the DSU at some point during their membership. Given that the data reveals a spread in the levels of reliance by Asian countries on the DSU, it is perhaps pertinent to examine whether there is a correlation between a country's wealth or income level and the number of consultations it has initiated over time.

Figure 2 below illustrates that significantly, even low middle income countries, such as the most frequent overall Asian complainant, India, but also medium sized low middle income countries like Indonesia and the Philippines, have actively used the system. Although this has reduced steadily in number and in share over time, these poorer countries do not refrain from protecting their rights under the DSU, with India, the Philippines, Indonesia, Viet Nam and Pakistan all bringing complaints in recent years.

While complaints from high income countries such as Japan and South Korea have dropped considerably in the latter period, China's accession and its enhanced legal capacity in recent years along with Thailand's occasional but consistent use of the dispute settlement procedures largely explain the picture today for the emerging economies in the region.

That the DSU is not the preserve of richer countries such as Japan and South Korea is an indication that concerns for developing countries about the costs of bringing a claim being an often cited obstacle to participation in the DSU is not something which can be said of Asian nations as a whole.

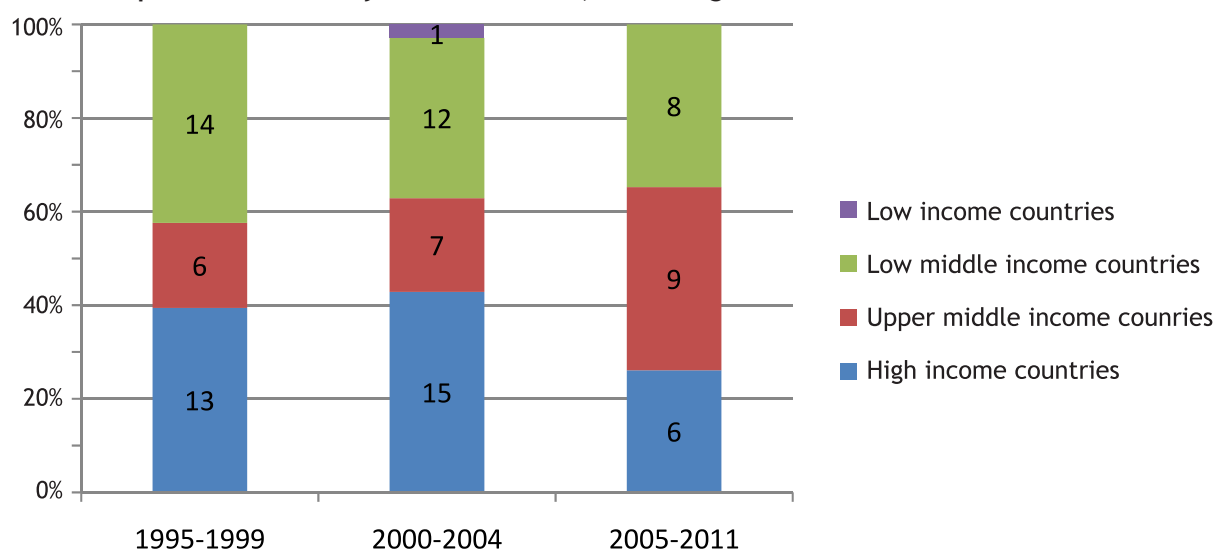
4 These are China, India, Brazil, South Korea, Chinese Taipei, Mexico, Thailand, Turkey, Colombia and Chile.

5 Overall requests for consultations: in 2011: 8; to 6th November 2012: 24. WTO statistics.

Table 1: Participation of Asian countries in the DSM to date⁶

| Member | Complainant | Respondent | Third party | Total |
|------------------|-------------|------------|-------------|-------|
| Japan | 16 | 15 | 127 | 158 |
| China | 10 | 29 | 92 | 131 |
| India | 21 | 21 | 79 | 121 |
| South Korea | 15 | 14 | 68 | 97 |
| Chinese Taipei | 3 | 0 | 71 | 74 |
| Thailand | 13 | 3 | 57 | 73 |
| Philippines | 5 | 6 | 9 | 20 |
| Indonesia | 6 | 4 | 8 | 18 |
| Vietnam | 2 | 0 | 15 | 17 |
| Hong Kong | 1 | 0 | 13 | 14 |
| Pakistan | 3 | 2 | 9 | 14 |
| Singapore | 1 | 0 | 8 | 9 |
| Malaysia | 1 | 1 | 3 | 5 |
| Sri Lanka | 1 | 0 | 3 | 4 |
| Bangladesh | 1 | 0 | 1 | 2 |
| Brunei | 0 | 0 | 0 | 0 |
| Cambodia | 0 | 0 | 0 | 0 |
| Macao, China | 0 | 0 | 0 | 0 |
| Mongolia | 0 | 0 | 0 | 0 |
| Myanmar | 0 | 0 | 0 | 0 |
| Papua new Guinea | 0 | 0 | 0 | 0 |
| TOTAL | 99 | 95 | 563 | |

Figure 2: Complaints initiated by Asian countries, according to income level: 1995-2011⁷



Certainly, following China's accession to the WTO in 2001, its radically enhanced legal capacity in recent years accounts for its growing reliance on the DSU. Moreover, one factor explaining the trend for a

handful of other less wealthy Asian nations could be the assistance provided since 2001 by the Advisory Centre on WTO Law (ACWL). With a carefully positioned set of hourly rates according to country,

6 ICTSD compilation based on WTO statistics.

7 Wealth determined according to current World Bank ratings. ICTSD compilation from WTO Dispute Settlement statistics by country/region.

ACWL’s fees represent a considerable discount on those found in private law firms, and have given a number of Asian countries the confidence to pursue claims without costs escalating out of control. Both Thailand and the Philippines, for instance, have relied on ACWL’s assistance in the majority of disputes they have taken before DSU panels.

Another explanation for the figures however is the financial assistance governments have received from the domestic industry whose interests are at stake in particular disputes. In the only example of an LDC bringing a claim,⁸ Bangladesh was supported by the affected company who agreed to cover legal fees, which was essential for the dispute moving forward.

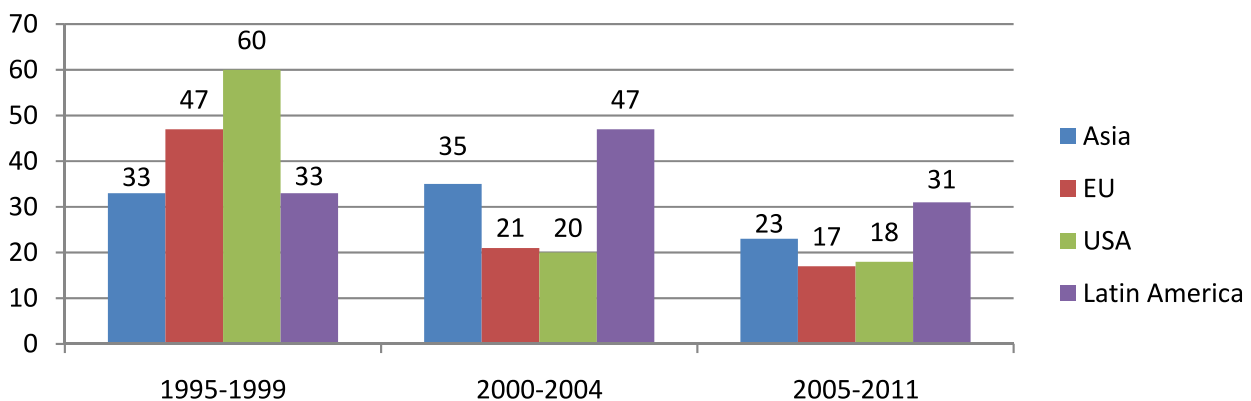
In disputes brought by developed countries, government lawyers often work together with private sector lawyers representing the firms and industry associations with the commercial interests behind the dispute, and this is something which more and more Asian states are taking advantage of. Support extends to the governments of complaining countries, such as that offered by tobacco companies in Indonesia’s challenge of the US law banning the sale of clove cigarettes,⁹ but also to help with defending cases, such as the assistance given by the Distilled Spirits Association of the Philippines in defending complaints against the Philippines from the EU and US over taxes on imported spirits.¹⁰

Nonetheless, interviews and surveys also reveal that many Asian nations continue to struggle with DSU participation, mainly because of a lack of domestic legal capacity, which has been quoted as the main reason for not bringing identified trade disputes to the WTO. The type of capacity affecting these countries does not concern access to legal counsel and legal expertise more generally, but instead, the capacity to address trade barriers at the domestic level and to coordinate action among domestic governmental and non-governmental actors. In this context it is important to also engage in a regional comparison.

Regional comparison

As shown in Figure 3 below, comparing the data on Asia as a region with other key regions or large trading nations active in dispute settlement over the course of the first seventeen years of the DSU reveals results consistent with those examined for developing countries as a whole: the initiation of complaints across the board has reduced overall, but the drop in the rate at which Asian and Latin American countries bring complaints has not been as dramatic as the developed countries - and in the latest period examined, the tables have turned, with both Asia and Latin America more active than the US and EU.

Figure 3: Complaints brought by selected countries/regions: 1995-2011¹¹



8 *India - Anti-Dumping Measures on Batteries from Bangladesh (WT/DS306)*.

9 *United States - Measures Affecting the Production and Sale of Clove Cigarettes (WT/DS406)*.

10 *Philippines - Taxes on Distilled Spirits (WT/DS396/1 and WT/DS403)*.

11 ICTSD compilation from WTO statistics.

However, while Asia has thus far accounted for twenty per cent of all complaints, by comparison, the US had made 98 requests for consultations - or twenty-one per cent of all complaints - while the EU had made 85, representing approximately nineteen per cent. Although therefore accounting for similar proportions of DSU usage as complainants, Asia's use of the DSU should arguably be much more given that as a region, it accounts for more than two and a half times the US's share of world merchandise exports.¹² The US is undoubtedly a disproportionately heavy user of the DSU, but the suggestion that Asian countries may be failing to rely on the system to the same extent as other countries is further reinforced when it is considered that WTO Members in the Latin America region, responsible for only four per cent of total world merchandise exports, have initiated twenty-four per cent of all disputes (i.e. four per cent more than Asian countries, despite Asian countries accounting for 20.3 per cent of world merchandise exports). A similar pattern characterizes the participation of Asian economies as third parties or respondents.

4. Litigation patterns

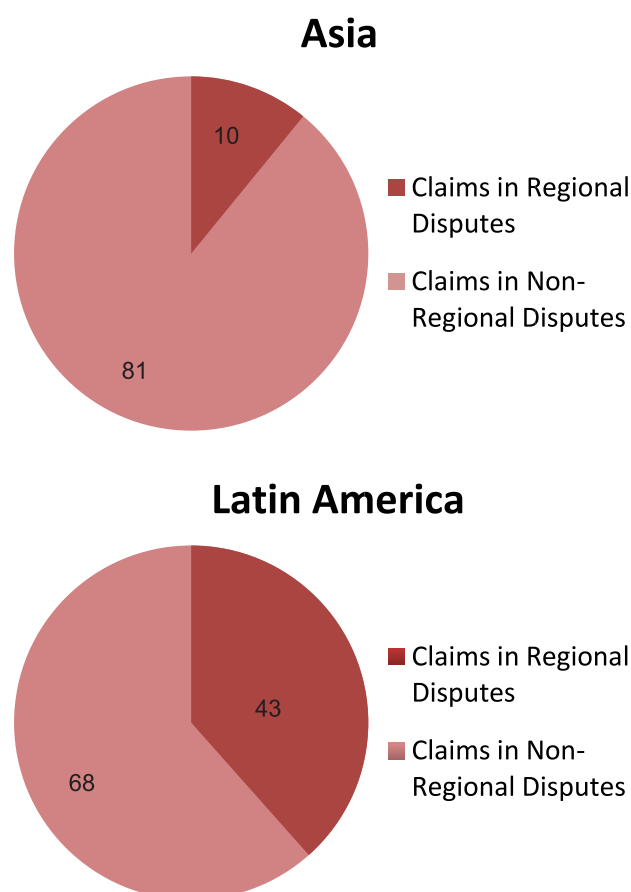
Intra-regional disputes in Asian and Latin America

In Figure 4 below, it can be seen that whereas only ten Asian complaints (approximately eleven per cent) have been against regional partners, forty-three (or nearly forty per cent) complaints by Latin American states have targeted their neighbours. This marked difference between the two regions was at its clearest during the period 2000-2004, when disputes between Latin American states represented nearly half of all disputes launched by the region, while only five local disputes arose in Asia.

It might be assumed that this huge gap between the two regions concerning who they bring complaints against can be explained by the level of trade conducted regionally, and that the lack of regional disputes in Asia can be attributed to Asian trade predominantly taking place with partners outside of Asia. Statistics on world merchandise exports¹³

show, however, that 53 per cent of all merchandise exports go to other Asian countries, whereas the same figure for intra-regional Latin American exports is only twenty-seven per cent. In other words, despite conducting almost twice as much regional trade as Latin America, disputes between Asian countries stand at only a quarter of those occurring between Latin American states.

Figure 4: Complaints brought against regional partners and non-regional partners: Asia - Latin America comparison, 1995-2011¹⁴



A look at the types of products being exported in the respective regions undoubtedly sheds some light on the stark difference between the export destination data. In Latin America, agricultural and fuels and mining products account for the majority of merchandise exports, while manufactured goods represents only twenty-six per cent. In Asia, the same figure is 77 per cent, with fuels/mining and agricultural exports at only thirteen per cent and seven per cent respectively. The importance of

12 ICTSD compilation from 2011 figures in World Trade Organization International Trade Statistics 2012; share of world merchandise exports - US: 8%; Asian states: 20.3%

13 2011 figures used, available from the WTO Secretariat

14 ICTSD compilation from WTO Dispute Settlement statistics by country/region.

manufactured goods to the Asian economy reinforces the fact that much of Asia’s export base relies on intra-regional production networks involving a far greater exchange of intermediate goods than that seen in places like Latin America where final-traded consumption goods are often exported within the region, and raw materials - which account for the majority of exports - outside the region.

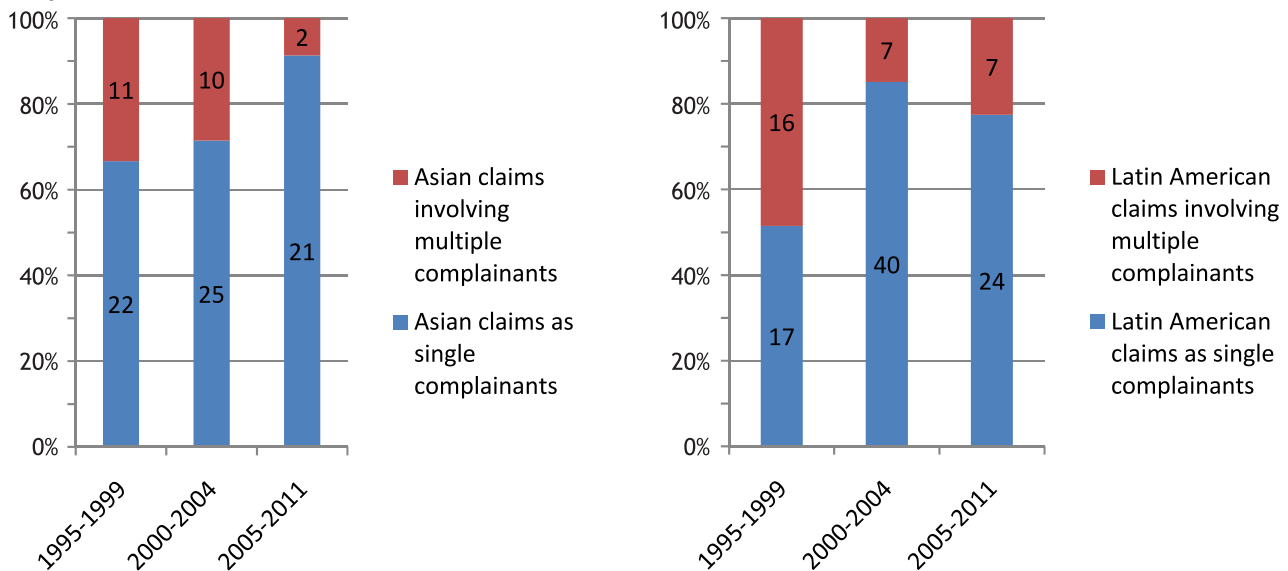
The production chains for Asian manufactured products, often found exclusively within Asia, means that despite the prospect for more disputes to arise simply because more business is being done together, intra-region conflicts are in reality more likely to be settled without resort to the DSU. This could potentially be explained by the desire to preserve good trade relations, avoiding the long term damage sometimes brought about by a WTO dispute.

Single-complainant vs multiple complaint disputes in Asia and Latin America

Figure 5 below clearly shows that although claims brought by states as single complainants has, in Asia, remained consistent, the number of claims brought as part of a multiple-complainant case has fallen in both regions over time.

While claims as part of multiple-complainant disputes represented a third of all claims initiated by Asian nations up to 1999, this fell to just under nine per cent for the most recent period. As a whole for the period 1995-2011, Asia and Latin America have brought about the same share under both categories.

Figure 5: Single complainant cases compared with multiple complainants cases: Asia-Latin America comparison, 1995-2011¹⁵



Arguably this signifies a growing confidence of countries in Asia to ‘go it alone’ and to bring complaints without relying on the support of neighbours or states seeking to protect the same interests. Equally, it could demonstrate a growing diversity in the industry-base of local economies, with complaints concerning country-specific interests not shared with other Member States.

than multilateral nature, thus requiring individual action. The fact that more of such bilateral ‘as applied’ disputes are brought is testimony to the fact that the use of the DSU is increasingly accepted as a normal means of resolving conflicts, no longer reserved for controversial political disputes, but available to even less-impacting and re-occurring trade barriers.

Most importantly, however, fewer cases against ‘measures as such’ and more and more cases against the means by which measures are applied are brought by all WTO Members. In these cases, disputes often tend to be of bilateral nature rather

Proportions of disputes proceeding to panel stage: an Asia-EU-US comparison, 1995-2011

Rather than simply examining the quantity of complaints and disputes, it is possible to learn

¹⁵ ICTSD compilation based on WTO data.

more about how Asian countries tackle disputes in which they are involved by examining the proportion of disputes which have, over the three time periods, proceeded to the dispute settlement

panel stage. To look at this in context, in Figure 6 and 7 a comparison is made with countries in Latin America, as well as the EU and USA, both of whom are frequent dispute settlement users.

Figure 6: A comparison of the proportion of disputes proceeding to panel stage (%): as Complainants¹⁶

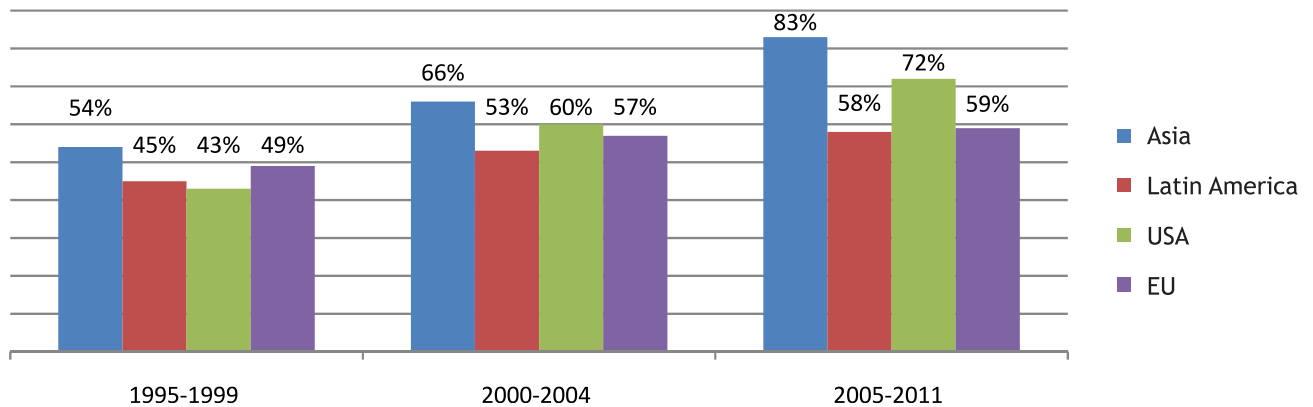


Figure 7: A comparison of the proportion of disputes proceeding to panel stage (%): as Respondents¹⁷

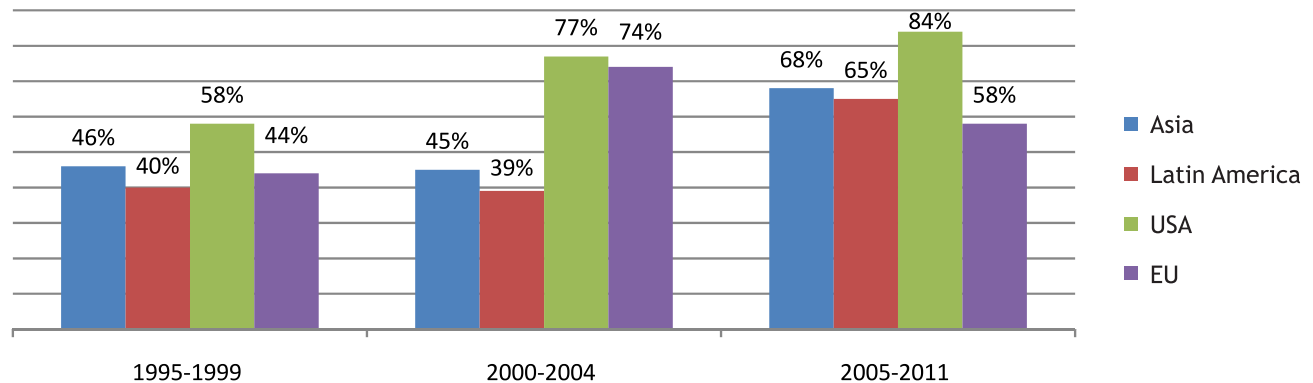


Figure 6 shows that complainants across the board are steadily converting more and more of their cases to the panel stage. Significantly, however, it is Asian complainants that have, at all times in the history of the DSU, been far more inclined than any of their counterparts to not settle their complaint at the consultation stage and instead to put their dispute before a panel. Both the US and EU, as well as countries in Latin America, are generally much more likely than Asian complainants to resolve their cases during consultations.

a growing desire to defend disputes against them before a panel, the EU and the US in particular have, on average, been far more comfortable than developing regions like Asia and Latin America in allowing claims against them to proceed to the panel stage.

In the history of the DSU, Asian countries as a whole have in fact made more panel requests in the cases they initiated than either the US or the EU, the two most prolific complainants.¹⁸

Interestingly, however, the proportions of disputes which countries in both Asia and Latin America have been prepared to defend have broadly grown in tandem, with the statistics indicating that both regions are, in recent years, far more prepared to fight cases against them rather than to settle during consultations. Between 2005 and 2011, twenty-one of thirty-one complaints brought against Asian countries were converted into empanelled disputes.

The picture is not the same where Asian states are the subject of WTO disputes. Figure 7 shows that while all four regions have over time shown

In comparing the two sets of data, one interpretation of the behaviour shown could be that Asian countries are relatively less likely to successfully

¹⁶ ICTSD compilation.

¹⁷ ICTSD compilation.

¹⁸ According to WTO statistics, Asian countries sought panels in 60 of their own cases; the EU converted only 45 of their 85 complaints to the panel stage, the US, 51 of their 98 complaints

negotiate or drop cases when they themselves initiate the dispute, but are more likely than the more powerful Member States to settle cases where they are defendants. The relatively low conversion rates as Asian defendants might suggest that Asian states simply do not possess the same bargaining power as the likes of the USA to successfully settle cases brought against them.

Alternatively, the lower conversion rates as defendants could in fact reflect the conciliatory attitude of Asian states, keen to settle disputes rather than to fight costly battles before the WTO. One might argue that this is consistent with the relatively high conversion rates in Asian-led disputes, which could be said to show a desire to use the DSU not as a threat, but only as a last resort after earlier negotiations outside the DSU, and only in cases which they are confident of winning.

Does this apparent conciliatory attitude along with the comparative lack of regional disputes in Asia derive from a cultural reluctance to litigate? It is often said that Asian states, particularly those in East Asia, have an aversion to litigation. This is not, however, supported by the statistics on DSU use: except for Bangladesh, all the regional disputes in fact arose in East and South East Asia, while reliance on the DSU from the start by countries such as India and Thailand shows that a reluctance to litigate is simply not reflected in the data.

A better possible explanation for the propensity of Asian complainants to press on with their disputes rather than settling at the consultation stage is the increasing likelihood that powerful domestic industry actors are behind the original complaint, supporting and even funding the case

to its conclusion. Equally, when states are called on to defend their trade practices, the impact on domestic industry may be less obvious, leaving the government of the defending country to pay for its own defence. It is more likely that the temptation in such circumstances is to settle rather than defend a case.

At the same time, there may also be a lack of legal capacity in certain Asian countries to fully understand the compatibility of their own legislation. Unlike developed nations, the trade officials of countries suffering from a lack of legal capacity or larger countries with a complicated array of domestic rules and regulations, such as India and China, often cannot be confident that their own laws are WTO-compliant; consequently, when faced with a challenge to a particular domestic measure, it can be easier to simply amend the regulation and settle the case. This phenomenon can be observed in numerous developing countries, though, and is by no means unique to some Asian nations.

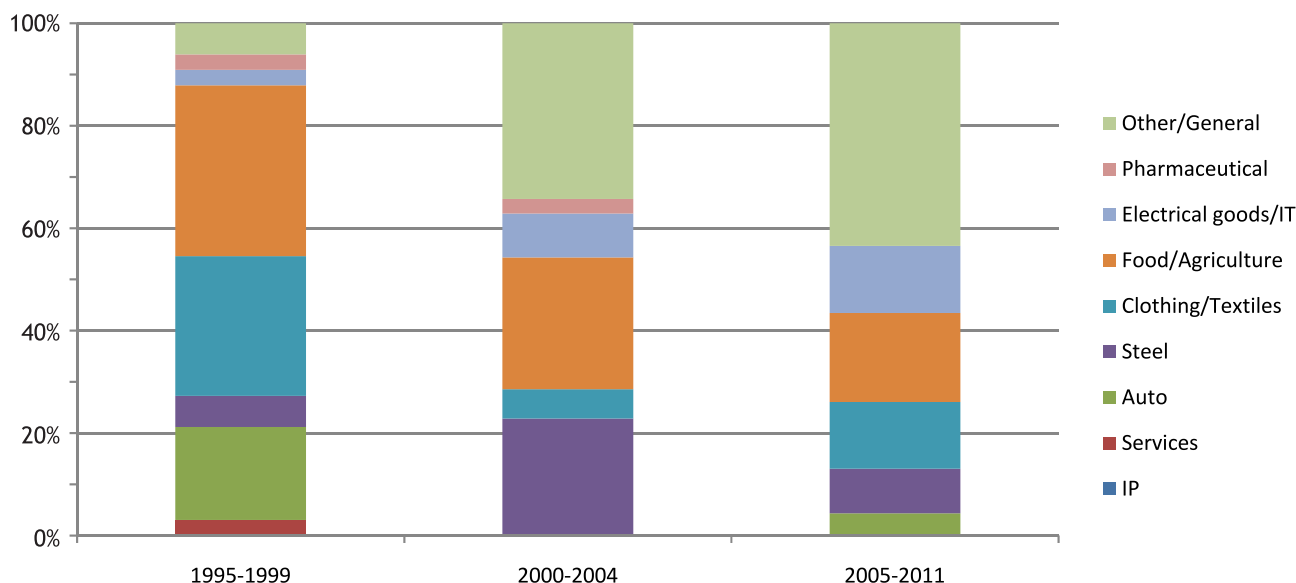
5. What is litigated?

Asian complaints according to industrial sector

In Figure 8 it can be seen that there has been a dramatic change over time in the types of disputes being brought by Asian states, with disputes about traditional sectors, like agriculture & food, and textiles & apparel, continuing to drop consistently over time. As referred to above, disputes in the steel industry experienced a huge rise in the first few years of the second period, reflecting the import-restricting policies implemented through domestic US legislation in 2000 and 2002.



Figure 8: Distribution of Asian country complaints by industrial sector 1995-2011¹⁹



The category of ‘non classifiable’ disputes, not readily associated with any particular industry, has increased hugely over time. This reflects the picture more widely seen across the WTO with countries tending more often to make broad challenges to measures which are not industry-specific or which straddle a number of industries. An Asian dispute falling into this category would be the *EC -Tariff Preferences* dispute launched by India,²⁰ and more recently, South Korea’s complaint about the US’s ‘zeroing’ practices in anti-dumping measures.²¹

Moreover, the broad range of disputes since 2005 that do not neatly fall into any of the typical industrial categories simply appears to reflect the diversification of industry in many parts of Asia. For example, measures being taken principally by developed states on Asian exports of carrier bags, matches and cigarettes have all been challenged by the exporting states.

The growing number of disputes launched by Asian countries to combat importing state legal measures that do not target any particular industry arguably reflects a corresponding growth in confidence in the

poorer economies to rely on the DSU and the WTO agreements in a more sophisticated way. In order to explore this further, it is necessary to examine which agreements are typically invoked in Asian-led disputes and how this has evolved over time.

Agreements cited in complaints by Asian countries

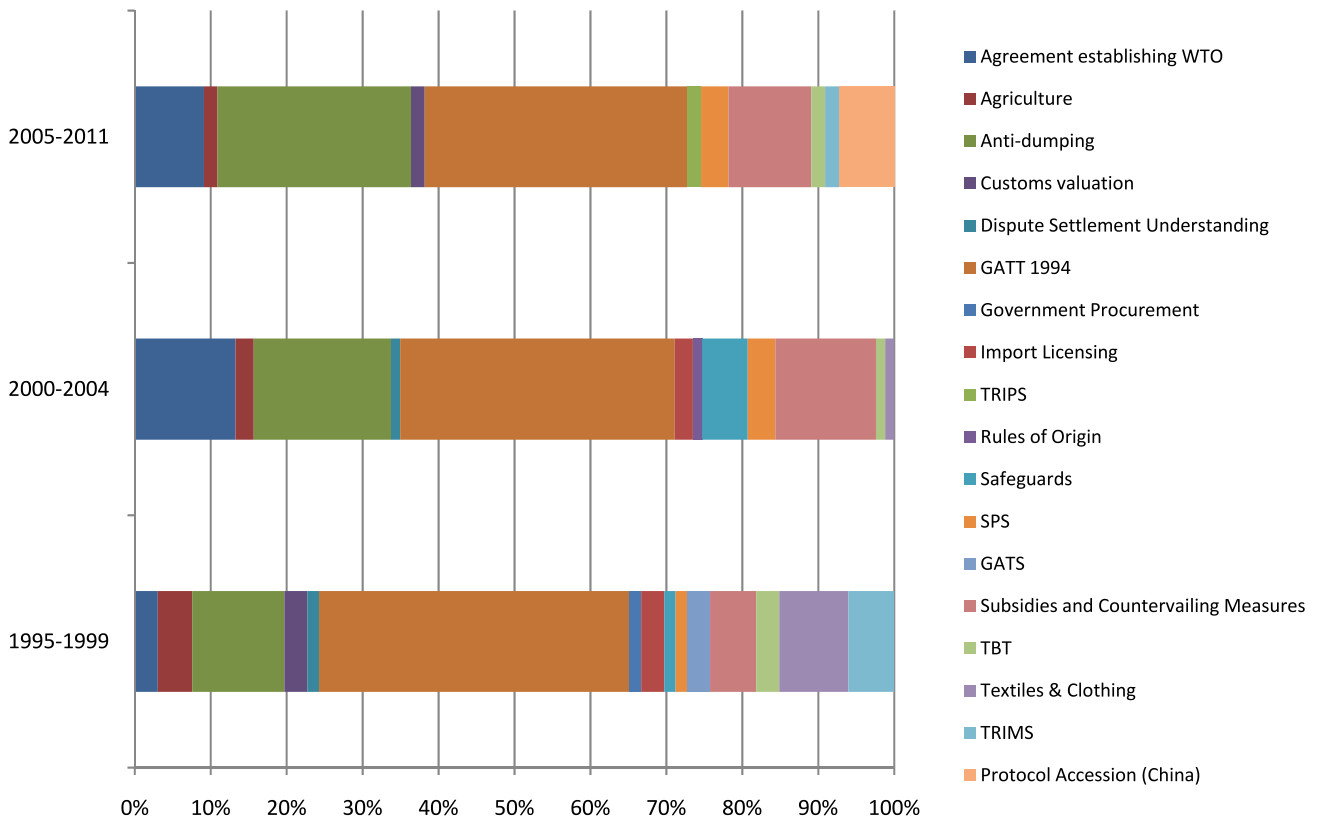
Apart from China’s reliance on its own Protocol of Accession - which featured in four of the disputes it brought in the latter period - the statistical patterns seen in Figure 9 indicate that Asian countries, like other more prolific developed country participants, are focusing on the WTO agreements on which states tend to successfully litigate. From a broad spread of agreements relied on in the early years, Asian complainants today far less frequently - if at all - invoke agreements such as those on Customs Valuation, TRIMS and Government Procurement, and instead tend to rely on agreements frequently cited by WTO Members where there has perhaps been more knowledge and experience garnered over the course of time, and where greater legal security exists.

¹⁹ ICTSD compilation based on WTO statistics.

²⁰ *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/1)*

²¹ *United States - Use of Zeroing in Anti-Dumping Measures Involving Products from Korea (WT/DS402/1)*

Figure 9: Agreements cited in Asian country complaints over time²²



The spread of complaints broadly reflects that seen for WTO disputes overall, except in one key respect: the growth in disputes that concern anti-dumping measures by importers of Asian goods is considerable. It features overall in as much as eighteen per cent of all complaints from Asian states, and is nearly twice that of the average for all WTO disputes.

This would seem to confirm that Asian countries are more and more willing to use the DSU to address ‘daily matters’ as opposed to only large controversial measures. The nature of anti-dumping measures means that they are rarely, if ever, reversed as a result of a request for consultations; this goes some way towards explaining why Asian complainants frequently have no alternative but to escalate their dispute over anti-dumping measures to the panel stage.

The increase in complaints in this area is perhaps also a reflection of the growing challenge Asian economies consider they face in exporting their products, and what they continue to claim is the abuse of anti-dumping mechanisms by developed states in particular - something which they have become more skilled at identifying and more ready to challenge.

22 ICTSD compilation based on WTO statistics.

The ICTSD Programme on International Trade Law Programme seeks to facilitate access to dispute settlement systems to enable developing countries to make use of the options that are available to defend their trade rights and advance trade objectives.

One of its priority areas focuses on strengthening legal capacity in developing countries. Over the years, the Legal Capacity Project has established a unique role in the trade law community. It generates research and analysis on the challenges posed by a rules-based system and builds the necessary international, regional and domestic networks for stakeholder cooperation and interaction.

For further information please visit: www.ictsd.ch/dsu

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