The Politics of Forum Choice for Trade Disputes: Evidence From U.S. Trade Policy

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Abstract

This paper examines how interest group pressure influences the choice of trade negotiation strategies. Political economy studies have largely focused on explanations of protectionism, and export promotion has received less attention. Similarly, institutional studies give more attention to why states choose to violate or comply with international rules, without examining the decision by states to use an institutional venue to challenge violations. Yet the reciprocal nature of trade policy and member driven enforcement of trade rules both depend upon actions by states to pressure trade partners for market access. This paper presents a framework for understanding how lobbying by interest groups influences the choice of negotiation forum for trade disputes. I argue that governments use choice of negotiation forum to signal commitment to resolve a dispute. I show that this dynamic pushes the most politicized trade problems into WTO fora, while other issues are likely to be dealt with in other negotiation venues. Governments choose the WTO fora because the binding commitments and enforcement mechanism of the WTO show domestic lobby groups that their issue is receiving priority. Industries with high political contributions use their influence to buy litigation to gain market access. The argument is tested with statistical analysis of an original dataset of trade barriers and the selection of negotiation strategies by the United States. Evidence shows that U.S. selection of WTO disputes follows a political logic favoring industries that are highly mobilized in the U.S. and where there is strong opposition by protection interests abroad.
Increasing levels of trade that accompany globalization generate both wealth and conflict as states confront each other with demands for market access and protection for sensitive industries. The World Trade Organization helps states manage this conflict through a common set of negotiated multilateral rules and a formal dispute settlement system. Theories address why states design institutions with adjudication mechanisms and how reputation penalties encourage compliance with legal rulings (Keohane et al., 2000; Maggi, 1999). Research has also shown the domestic political constraints that lead states to violate agreements they have signed (Rosendorff, 2005). Less is known, however, about the conditions that lead states to challenge non-compliance.

By studying the use of WTO adjudication as a trade policy choice taken in a context of multiple negotiation fora, I address a central issue about the monitoring and enforcement of international law.

While a growing literature examines WTO adjudication, few compare the choice of adjudication with alternative strategies. Since its establishment in 1995, the dispute settlement system of the WTO has been used for litigation of over three hundred trade disputes. Research has focused largely on explaining outcomes for these cases (e.g. Busch, 2000; Reinhardt, 2001; Guzman and Simmons, 2002; Bown, 2004a). The complaints filed for adjudication, however, represent a small fraction of the total number of policies in violation of WTO agreements. In trade policy, the parallel process of creating regional trade associations, participating in the multilateral trade system, and concluding bilateral arrangements has resulted in overlapping jurisdictions. Each institutional forum varies in the level of legalization. Yet many trade issues could conceivably come up in any of these negotiation fora. What determines why one trade barrier is raised in a formal complaint for adjudication while others are negotiated in different venues or simply monitored without any action?
Litigation studies often suffer from selection problems because they only analyze the cases that are filed. Theory suggests there is a non-random process by which cases are brought to court ([Priest and Klein 1984](#)). Existing studies of WTO adjudication suffer from this problem because they examine the set of filed cases. More generally, the central critique of institutional theory contends that the selection of easy issues for cooperation in institutions biases findings ([Mearsheimer 1994/5](#), [Downs et al. 1996](#)). By focusing on the forum choice decision, this study explicitly addresses the process that generates issues for institutional cooperation. In some cases, selection effects can be estimated through statistical selection models, but these methods require a valid instrument, which is an especially difficult problem for endogenous policy settings like trade policy. Rather, I use a comprehensive data approach to look at the selection question. Coding a realistic sample of potential trade disputes allows me to evaluate hypotheses to explain the choice of WTO adjudication versus the full range of negotiation options. Modeling the selection of strategies will inform subsequent research into which strategies produce better outcomes.

Political economy studies emphasize the role of political mobilization to influence trade policy. In contrast to models of unitary governments that compare when free trade or protection form the optimal equilibrium policy, endogenous policy models highlight how the influence of organized interests in domestic politics explain protection policies that harm the general welfare ([e.g. Magee et al. 1989a](#), [Grossman and Helpman 1994](#)). This paper contributes to this literature by extending its insights to government strategies to address foreign protectionism, in particular, the choice of whether to use WTO adjudication. The central argument is that influential export industries *buy litigation* to address their market access problems similar to how influential import industries buy protection.

Interest groups offer political contributions in the expectation of influencing policy outcomes.
When states negotiate with a foreign government for market access, however, politicians face a credibility problem in their commitment to deliver a policy outcome. Domestic export industries and their representatives in the legislature lack information about the offers made in the negotiation, so they may suspect their negotiators are backing down too easily. Monitoring policy outcomes is also challenging because unlike protection policies sought by import-competing industries, the policy outcomes sought by exporters depend on foreign government implementation to reduce trade barriers. Uncertainty about whether the government will deliver on market access gains reduces the incentives for export industries to offer political contributions. This credibility problem may lead a government to file a WTO dispute as a costly signal of their commitment to the domestic interest group. The implication is that governments select cases for WTO adjudication according to political influence rather than just economic and legal criterion.

Interest group pressure on both sides of a trade dispute pushes politicized trade topics into multilateral fora and especially dispute adjudication. The ability of the respondent government to refuse negotiations at the bilateral level limits the cases that can be negotiated bilaterally to those where there is not strong opposition. Hence, easier trade problems are addressed in bilateral venues while disputes with strong resistance to liberalization are the most likely to end up in WTO negotiations.

In this paper I will discuss in section 1 the factors that contributed to the formation of overlapping fora in a trade regime complex and the selection dynamic that governments face when addressing potential trade disputes. Section 2 proposes hypotheses about how governments choose

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1 Multilateral trade rules have long banned export subsidies (with exceptions for agriculture) and scholars have remarked on the absence of their use, which leaves the reduction of foreign trade barriers as the central trade policy goal for export industries.
a forum, with particular focus on which issues will be raised in adjudication. Section 3 tests these hypotheses on an original dataset of U.S. complaints about market access barriers by leading trade partners. Section 4 offers concluding remarks.

1 International Institutions for Trade Policy

Institutional Design

Why do we observe such a wide array of different institutions rather than a single form of cooperation? Much of the literature on international institutions focuses on the design of institutions. Keohane (1984) presents a functional theory to explain the establishment of international institutions as a solution to cooperation problems arising from transaction costs and inability to enforce contracts in international society. Institutions overcome these problems by providing information, facilitating issue linkages, and establishing norms that encourage a longer time horizon and reciprocity. Different kinds of cooperation problems lead states to establish an institution with specific features to resolve the obstacles to cooperation (Martin, 1992b). Distributional stakes or enforcement problems explain the variation in centralization, flexibility, and membership of institutions (Koremenos et al., 2001). In collaboration problems such as those presented by trade liberalization among a large number of countries, there is an incentive for a state to allow others to liberalize while it continues to protect its sensitive industries. Given a situation of power asymmetry, there is also a need to reassure smaller states that larger states can be trusted to maintain open markets. Under these circumstances, cooperation may require an institution with a formal organization and extensive monitoring to help enforce compliance. Binding commitments and a monitoring mechanism increase the costs of adopting protection, which deters free-riding
by smaller states or unilateral defection by larger states. The dispute system of the GATT/WTO helps to sustain cooperation by providing information to third parties about violations so that there is a broader reputational effect from punishment (Maggi [1999]).

The form of the WTO thus addresses the particular kind of cooperation problem presented by trade. During the trade rounds that engage in rule-making, states retain veto power through the consensus decision process. Thereafter, dispute settlement procedures provide the monitoring capacity to enforce commitments. This creates two kinds of negotiation fora nested within the WTO regime, with relatively more flexibility for government control during trade rounds and higher levels of delegation for adjudication under the WTO Dispute Settlement Proceedings (DSP). The U.S. commitment to support GATT at its creation in 1947 was necessary to reassure smaller states that the United States would continue to support free trade. Later, frustration over the growing trade deficit led the United States to accuse other countries of unfair trade policies, and a period of increased U.S. unilateralism in turn led other states to again doubt the U.S. commitment to free trade. Facing a risk that all would turn away from cooperation with the rules, the U.S. supported the strengthening of the organization as a way to signal its continued preference for free trade (Goldstein and Gowa [2002]). The establishment of the WTO added a secretariat and strengthened the enforcement capacity of the dispute settlement process. These changes both facilitated trade negotiations among an increasing membership and renewed confidence in the rules enforcement system. In addition, the past decade has brought a dramatic increase in the number of bilateral and regional preferential trade agreements.

The creation of multiple fora for trade disputes reflects that there is variation in the cooperation problem and domestic interest group demands even within the area of trade policy. In addition to functional pressures, there can also be path dependence in the evolution of a regime complex
One notable example is the use of prior agreements as a template in subsequent agreements in a different fora. This can work in both directions between the bilateral and multilateral level. For example, the United States first negotiated intellectual property right provisions in bilateral agreements, and then pushed for their insertion in the GATT (Helfer 2004, 20). For other trade measures, the terms negotiated in the WTO agreements are often copied verbatim into bilateral agreements.²

The long negotiations that establish an institution prevent frequent renegotiation. Transaction costs, concern about creating conflict with existing institutions, and the status quo inertia all favor using or modifying existing institutions rather than creating new ones (Aggarwal 1998). As Jupille and Snidal (2005, 16) argue, states face a problem of institutional selection that calls for “choice of one institution from a fixed but plural menu of extant alternatives.”

Institutional Selection

Choice of when to use an institution to address specific disputes presents a different dynamic than the establishment of the institution or rule-making processes. The characteristics of the issue will shape preferences over institutional constraints. States will face relatively less uncertainty about domestic interest group demands given that they know the issue at stake. Consequently, decisions about the institutional forum for a given dispute reflect specific goals of the state and interest groups.

Some issues will only fall into the jurisdiction of one negotiation forum such that there is no option of strategic selection. Many issues, however, could be negotiated in more than one venue. The “jurisdictional ambiguity” that arises in these cases resembles the frequent occur-

²See Davis (2006) for example of the TBT agreement text used in the U.S.-Vietnam bilateral trade agreement.
rence in Congress when a new bill could be referred to more than one committee (King, 1994). For example, bills on auto safety could logically fall within the jurisdiction of either commerce or transportation committees. Even in the domestic context where appointed parliamentarians refer bills to committees, there is room for turf wars as committees try to expand the scope of issues within their jurisdiction. The EU policy context frequently raises questions of institutional selection as different actors try to frame an issue so that it will be discussed according to the procedures that would favor their preferred outcome (Jupille, 2004; Meunier and Alter, 2004). In the private sector, selection among multiple institutional fora is observed in commercial transactions by private international traders and investors who choose between pursuit of ad hoc arbitration versus several options for institutional arbitration (Mattli, 2001).

Trade disputes between states also present a wide range of choices that allow for selective use of an international institution. Table 1 provides examples of the available options. While a few studies examine why some trade issues are taken before formal WTO adjudication (Bown, 2004b; Busch and Reinhardt, 2002; Allee, 2003; Davis and Shirato, 2006), more research is needed that compares different institutional venues for negotiations. While there is a large literature on the relative utility of bilateral versus multilateral negotiations, little attention has been given to why countries choose one approach over another (Mansfield and Milner, 1999). As Pekkanen et al. (2005) point out in a study about the shift toward bilateral and regional free trade agreements, states may prefer one venue because institutional features allow them to maximize their flexibility to address domestic political constraints. These factors that influence whether states choose one forum or another need to be examined with explicit comparison of available options. Typically trade officials are not making a decision of whether to adjudicate or do nothing, but rather whether to file a complaint and/or raise the issue in a different venue. The potential for overlap-
Bilateral negotiations involve direct discussions between two parties. The possibility of forum shopping in bilateral negotiations can raise concerns similar to those in public law contexts, where jurisdictions are chosen strategically. Busch (2005) examined forum shopping between NAFTA and WTO dispute venues, but this study focuses on broader categories of trade negotiations, as listed in Table 1. Even with significant differences in institutional forms, these negotiation fora can address similar trade issues.

Table 1: Three Categories of Negotiation Fora for Trade Disputes

<table>
<thead>
<tr>
<th>Category</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bilateral negotiation</td>
<td>Bilateral talks, free trade agreement</td>
</tr>
<tr>
<td>Multilateral negotiation</td>
<td>WTO committee, WTO Trade Round, APEC, OECD</td>
</tr>
<tr>
<td>Adjudication</td>
<td>WTO dispute settlement</td>
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In many trade disputes, a complaint about a particular trade barrier could be raised in multiple fora. For instance, U.S. complaints about Japan’s quantitative restrictions on agricultural imports were addressed in the Tokyo Round, bilateral talks in the early 1980s, a GATT dispute panel in 1987, and in the Uruguay Round. Japan’s restrictions on forestry products were addressed in comprehensive bilateral negotiations, which led to the Market-Oriented Sector-Selective (MOSS) trade agreement in 1986, the Uruguay Round, and later in the APEC talks on Early Voluntary Sectoral Liberalization during the 1998 Kuala Lumpur Ministerial meeting. Some trade topics involve negotiating agreements in new areas, which may not be suitable for an adjudication forum. Nevertheless, this still leaves the option of bilateral, regional, or multilateral talks. For example, in the 1980s and 1990s, Japan and the United States concluded bilateral arrangements on semiconductors. Later semiconductor trade
was subsumed within a sectoral agreement negotiated in a multilateral context. The Information Technology Agreement concluded at the WTO Singapore Ministerial in 1996 eliminated tariffs on semiconductors, telecommunications, software, and computer-related products. Alternatively, such an agreement could have been negotiated as an issue on the agenda of a trade round. Indeed, telecommunication issues were also part of the Uruguay Round service negotiations and commitments for basic service provisions were added in a 1997 Telecom Accord, which represented a sectoral agreement among a subset of 69 WTO members. As a final example, the United States has chosen to pursue investment agreements primarily on a bilateral basis, while Japan lacks bilateral agreements and urges that a strengthened multilateral framework on investment should be adopted as part of the Doha Round.

Many issues are raised in multiple fora simultaneously or sequentially. Indeed, the WTO procedures explicitly encourage bilateral settlement and/or resolution through discussion of trade problems in WTO committees. Even after a complaint is filed, WTO procedures call for a formal process of bilateral consultations in Geneva before entering the panel stage of adjudication. Thus an issue such as the EU policy on bananas had been the subject of the Uruguay Round and bilateral consultations before the United States along with Latin American countries filed complaints and entered the formal consultations of the dispute process that eventually led to a panel ruling and settlement. In another example, during a Summit in June 2000, India and the EU discussed specific problems regarding EU anti-dumping measures against Indian textile exports to the EU and some of these same issues were simultaneously the subject of formal WTO adjudication.

\[^3\text{See Meunier and Alter (2004) for a discussion about how this case raised overlapping institutional commitments for EU members as they weighed the Lome convention and WTO agreement implications for the EU banana import regime.}\]

\[^4\text{See “European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,”}\]
The problems of regulating the steel industry have been addressed simultaneously in several fora: after a surge of steel imports in 1998, the United States engaged in bilateral negotiations with exporters such as Japan, Korea, and Russia; a steel subsidies agreement is being negotiated under the auspices of an OECD Steel Committee; the Doha Round negotiation group on WTO rules will clarify subsidies and anti-dumping rules that affect the steel sector as part of a broad agreement; and, several WTO dispute panels have ruled on steel anti-dumping and subsidies policies.

Indeed, pressure from one negotiation forum may encourage settlement in another forum on the same or related issues. In the case of the steel negotiations, the victory by the EU and other complainants in a WTO panel against U.S. safeguard tariffs protecting its steel industry was cited as adding more momentum to the OECD talks. The United States has also tried to use pursuit of bilateral and regional FTA agreements as a means to apply pressure on nations to do more in trade rounds – during the Uruguay Round, U.S. engagement in NAFTA, several key GATT panels, and threats of bilateral retaliation on specific issues all pressured other states to become more serious about making the compromises necessary for a Uruguay Round agreement. Similarly, following the impasse at the Cancun meeting of the current Doha trade round, the United States increased efforts to achieve a Free Trade Area of the Americas both as an alternative forum for trade liberalization and as a means to pressure states to be more compromising in future Doha Round talks. When these regional talks themselves also stalled with disagreements between the United States and Brazil, the U.S. Trade Representative Zoellick said he would exert pressure on Brazil through negotiating bilateral trade deals with other Latin American states.

A review of the scholarly literature, however, shows mixed evidence about whether liberalization through

WT/DS141/R 30 October 2000.

5 The Financial Times, 6 December 2003.
6 The Financial Times, 6 December 2003.
bilateral and regional free trade agreements promotes multilateral liberalization (Mansfield and Milner 1999, 595).

While it is not uncommon for an issue to be addressed in multiple fora, few are addressed in all possible fora – some selection is made. Trade authorities have limited resources to engage in negotiations on all fronts for all issues. A kind of triage is necessary to direct specific trade disputes to the most appropriate negotiation forum. Just as hospitals hold different criteria for the level of patient treatment such as ability to pay or nature of medical condition, governments formulate criteria for the treatment of diverse trade problems. The next section proposes two such selection principles, one based on political influence and the other on the nature of the issue.

2 Towards an Explanation of Forum Choice

Interest Group Pressure as Selection Principle

Political lobbying is a central force to shape trade policy. Schattschneider (1935) uses the infamous Smoot-Hawley Act of 1930 to show how the deals made to accommodate narrow interests can produce protectionist policies harmful to the general interest. These insights are central to theories of endogenous policy formation in economics and political science (e.g. Magee et al., 1989b, Gourevitch, 1986). In their seminal work on the politics of interest group lobbying for trade policy, Grossman and Helpman (1994, 1995, 2002) model politicians as choosing trade policies to maximize their interest in political contributions from special interests and votes gained through serving aggregate welfare. Industries offer a contribution schedule in order to influence policy outcomes, buying protection. Government policy choices are a function of the weight given to aggregate welfare relative to contributions, the organization level of the demanding industry,
and the degree to which economic constraints force a trade-off given the particular demands from industry.\footnote{Goldberg and Maggi (1999); Gawande and Bandyopadhiyay (2000) conduct empirical tests that provide support for the main parameters of the model.} Not only do interest group politics by import-competing industries explain protection policies, but mobilization by export industries contributes to pressure for liberalization (Milner\footnote{Others explain the liberalization trend by looking beyond pressure politics at the importance of other factors such as ideas and institutional arrangements delegating authority to the executive branch (Goldstein 1993).} 1988; Destler and Odell 1987; Gilligan 1997). Indeed, the wide movement to liberalize policies since 1945 suggests the strength of the latter.\footnote{USTR officials instruct companies seeking help from the USTR to resolve trade disputes with foreign countries that companies are expected to commit resources by providing a detailed rationale for their complaint, hiring lawyers and economists to conduct relevant analyses, and lobbying of agencies and politicians to support the USTR strategy (Inside U.S. Trade, 3 February 2006).}

Yet interest group lobbying is not restricted to the simple dichotomy of favoring free trade or protection. Political pressure also influences the choice of negotiation forum to pursue a policy goal. There is close coordination between interest groups and trade officials regarding strategies for any particular negotiation. Earlier research has shown the utility of examining different strategies used to pursue market access (Milner and Yoffie 1989; Bayard and Elliott, 1994). These studies focused on demands for reciprocity and threats of retaliation, but such unilateral strategies have been constrained by the rules established by the WTO in 1995. States face a new array of trade strategy options including a strengthened multilateral adjudication system as well as the proliferation of bilateral trade agreements. Public-private partnership is especially important in the highly technical area of WTO adjudication (Shaffer 2003). Interest groups help to identify specific trade problems and urge governmental action, lobby for selection of a particular institutional forum, and use their resources to support the chosen negotiation strategy.\footnote{USTR officials instruct companies seeking help from the USTR to resolve trade disputes with foreign countries that companies are expected to commit resources by providing a detailed rationale for their complaint, hiring lawyers and economists to conduct relevant analyses, and lobbying of agencies and politicians to support the USTR strategy (Inside U.S. Trade, 3 February 2006).}
I argue that governments use choice of forum to signal their commitment to act as a tough negotiator for their domestic industry. This dynamic leads governments to send the most politicized trade disputes that involve influential industries into WTO trade rounds or dispute adjudication, while addressing other trade problems in bilateral venues. Governments demanding liberalization prefer the WTO fora because the binding commitments and enforcement mechanism of the WTO address the fear of noncompliance while signaling to domestic lobby groups that their issue is receiving priority.

In their response to lobbying pressure by export industries, governments face a credibility problem to show that they are taking the requested actions to deliver improved market access. Whereas protection policies for import industries are unilaterally granted by the government as tariffs or subsidies that can be easily monitored in the domestic context, the promise to increase market access for export industries requires government intervention by means of negotiations with foreign governments. More direct export promotion policies in the form of export subsidies were foregone as a result of earlier decisions to ban them in the GATT rules.\(^{10}\) Use of export subsidies is notably absent as a major policy tool \(^{11}\) Rather, increase of market access through the reduction of foreign trade barriers is a frequent policy demand of export industries. Through negotiations, governments seek to gain commitments from foreign governments to lower trade barriers. Outcomes depend upon the interaction between the

\(^{10}\) Goodhart (2006) provides a theory for why the geographic mobility of export industries relative to import industries makes politicians favor import subsidies over export subsidies.

\(^{11}\) There have been occasional disputes over indirect export subsidies, such as the foreign sales corporation tax case raised before the WTO adjudication. The GATT and now WTO have also made explicit exceptions to allow export subsidies for agricultural products, although the Uruguay Round Agriculture Agreement set constraints on the amount.
two governments. Trade negotiations are conducted at the diplomatic level with much of the real
deal-making occurring in private between government representatives. Governments may make
concessions that sacrifice the interests of one industry for the sake of other industries, aggregate
welfare, or diplomatic concerns. In addition, trade partners can stymy an activist export promotion
agenda through refusing to negotiate, granting only minor concessions, or making promises that
are not fulfilled due to poor implementation. This raises two sources of uncertainty for the industry
that has lobbied its government to improve market access. First, it cannot distinguish whether
a poor outcome results from inadequate effort by its own government or resistance by the trade
partner. Second, it is not able to verify whether the promised policy change will be implemented
by the foreign government. To address these uncertainties, governments must credibly commit
to their domestic lobby that they will negotiate for market access and monitor implementation by
the foreign government.

How can a government persuade a domestic industry to believe that the government will be
a tough negotiator? A large literature has grown about the role of costly signals as a way to
give information about underlying type. Through accepting self-imposed costs that are tied
to fulfilling the promise, an actor increases the credibility of its commitment. In this case, a
government chooses a costly negotiation strategy in an effort to convince its export lobby that

\footnote{Schelling (1980) notes that promises depend upon two conditions for enforcement: capacity to punish
and ability to discern when punishment is called for. In the context of the promise by a leader to serve industry
interests in exchange for political contributions, punishment is possible in future iterations of the exchange through
withdrawal of contributions. But the problems noted here impinge on the ability to make an enforceable agreement
because the industry cannot tell when it should punish a government for a failure to achieve market access gains.

\footnote{Spence (1973) started the focus on this issue in economics with his study about the role of investments in
education as a signal of quality to employers. The concept has been extended in international relations to address
state efforts to demonstrate high resolve in foreign policy crises (Martin 1992a; Fearon 1997).}
it will fulfill its promise to negotiate a reduction in a foreign trade barrier. This simultaneously signals the trade partner of the government’s high priority for the issue.

Adjudication represents a solution to this problem. Filing a WTO complaint represents a high cost activity in terms of government resources, diplomatic relations, and audience costs. WTO disputes last anywhere from two months to four years depending on the case, and extensive legal resources are necessary to support building the case. The public nature of suing a trade partner can contribute to acrimonious rhetoric harmful to diplomatic relations (Alter, 2003). Finally, the state that files a legal complaint suffers both international and domestic audience costs if it backs down after a trade partner fails to offer early concessions or refuses to comply with a ruling.\footnote{See Fearon (1994) and Sartori (2005) for discussion of domestic and international audience costs.}

Even the most active users of WTO adjudication such as the United States and EU only file seven cases in a typical year. Consequently, the act of filing a complaint signals to the domestic industry that their issue is receiving high priority in the government’s trade policy agenda. It also initiates a process with scheduled time deadlines in which the respondent government cannot veto the negotiation or ruling, and in which retaliatory measures are authorized in the case of noncompliance.

In the U.S. context, the domestic credibility problem has given rise to explicit institutional checks by Congress intended to force the executive branch to serve the interests of export industries. While Congress delegated negotiating authority to the executive in the Reciprocal Trade Agreement Acts of 1934, it uses both informal requests and its formal authority to ratify trade agreements as leverage to push the executive to support an aggressive trade agenda against foreign trade barriers. Destler (2005, 112) notes that “If U.S. trade negotiators were to keep their mandate from Congress and product interests, they had to appear tough in advancing and defending
specific U.S. commercial interests.” In the 1970s, dissatisfaction with apparent passiveness by the executive branch in the face of spiraling trade deficits widely blamed on foreign protectionism led Congress to enact a new provision for aggressive export promotion, Section 301 of the Trade Act of 1974. The measure called for the executive to respond to industry petitions about foreign trade barriers by negotiating with foreign governments and enacting trade sanctions when the foreign government refused to cooperate. Subsequent amendments strengthened the measure by adding timetables and criteria for targeting foreign trade barriers. In what came to be termed “aggressive unilateralism” the United States used this policy tool extensively in the 1980s to pressure trade partners to increase market access (Bhagwati and Patrick, 1990). Bayard and Elliott (1994, 331) analyze 72 Section 301 cases and conclude that the policy was “reasonably successful in opening foreign markets.” Congress also mandated that the U.S. Trade Representative office publish annual reports listing foreign trade barriers and the status of U.S. efforts to address these problems.

The WTO rules against unilateral sanctions have reduced the power of coercive bilateral negotiations. While the United States continues to act on Section 301 petitions, initiation of retaliation must be conditional on a WTO panel ruling. This was tested most explicitly in the U.S.-Japan negotiations about U.S. demands for greater access to the Japanese auto and auto parts market in 1995. When the breakdown of bilateral negotiations led the U.S. government to threaten retaliation against Japanese auto exports to the United States, Japan filed a WTO complaint against the retaliation measures. Recognizing it would lose the case, the U.S. instead backed down on its major demands to make a deal. Since then Japan has used WTO rules to reject U.S. pressure in bilateral negotiations (Schoppa, 1999; Pekkanen, 2001). Separately the EU won a WTO ruling on
the Section 301 measure that mandated retaliation could only follow WTO rulings. In effect, by
taking the teeth out of bilateral negotiations and establishing a retaliation threat within multi-
lateral rules, the WTO has channeled these hard disputes that had been addressed by aggressive
unilateralism in bilateral talks during the 1980s into the multilateral forum.

The strength of the interest group demanding export promotion will influence government
response. The government incentives to signal willingness to act as a tough negotiator are greater
for issues that affect strong industry groups. Political contributions are a key indicator of industry
political influence on trade policy (Grossman and Helpman 1994, Hansen and Drope 2004). Collec-
tive action is also important (Olson 1965). Lobbying is greater for policies with private
good effects that allow a small group to capture the benefits than for policies where public good
effects generate free-rider problems (Magee et al. 1989a, 8). Organized groups can more effec-
tively coordinate for lobbying and political contributions. These classic models of lobbying for protection
apply equally to lobbying for export promotion. One would thus expect more lobbying for industry
specific trade barriers (e.g. a quota on a particular good) than for cross-industry barriers (e.g.
cumbersome customs clearance procedures). Trade measures that directly affect an industry with
high political contributions would be the most likely to trigger the government choice to use WTO
adjudication.

The economic and political conditions of the trade partner also influence choice of negotiation
strategy. Ultimately the trade partner must agree to change its foreign trade barrier for there to

15“United States - Sections 301-310 of the Trade Act of 1974” WTO DS152. The complaint was filed November
1998 and the panel ruling adopted January 2000. The ruling found that the U.S. law itself was not a violation,
but noted that this conformity was contingent on the U.S. implementing Section 301 in conjunction with a WTO
ruling and authorization of retaliation as stated by U.S. officials to the panel. See http://www.wto.org/english/
tratop_e/dispu_e/cases_e/ds152_e.htm
be any realization of market access gains. On the one hand, the state seeking market access may be less likely to adopt costly adjudication strategies for cases where high trade partner resistance reduces the likelihood of success. This logic of strategic restraint suggests that states would only bother to file WTO cases for those where they anticipate low trade partner resistance. This is the logic of critics who suggest that cooperation in institutional fora occurs for easy issues that are ripe for cooperation (Downs et al. 1996). On the other hand, the interest group pressure argument of this paper suggests that resistance by a trade partner pushes politicized cases to WTO adjudication. Respondent governments can refuse to negotiate an issue at the bilateral level, but they have less flexibility in a multilateral setting. WTO rules in the Dispute Settlement Understanding eliminated the GATT loophole that had allowed a defendant to block a panel against its own policies. WTO members are obligated to participate in the WTO adjudication process. Indeed, respondent states may favor this option for dealing with trade disputes involving strong resistance to liberalization. Similar to governments that initiate a legal dispute to signal their willingness to take a high cost negotiation strategy for their export industry, respondent states will refuse bilateral settlements and wait for a WTO ruling as a way to signal their willingness to accept high cost adjudication in defense of their import industry. The two propositions about high trade partner resistance offer opposite predictions about whether adjudication is more or less likely as a strategy against high trade partner resistance. This can be tested as an empirical question. Studies point to comparative advantage (measured by import penetration ratios) as a key variable to influence demand for protection (e.g. Trefler 1993), which allows one to identify the industries in which trade partners are the most likely to resist lowering their trade barriers.

**Interest Group Hypothesis:** Trade disputes involving strong interest group pressure are more likely to be raised in WTO adjudication.
Observable implications:

- Industry political contributions will increase the likelihood of an issue being selected for WTO adjudication.

- Industry organization and the narrow scope of a trade barrier will facilitate collective action that increases the likelihood of an issue being selected for WTO adjudication.

- High import penetration in the trade partner will generate more resistance and make an issue more likely to be selected for WTO adjudication.

**Economic and Legal Efficiency as Selection Principles**

The null hypothesis is that states choose the forum according to the economic stakes and potential for winning a legal ruling given the nature of the trade issue. While the previous hypotheses emphasize political factors that influence the cost benefit calculation for a dispute, a more narrow focus would dictate simply weighing the costs of the dispute against the likely gains from ending the trade barrier. In the selection among industries, large export industries are more likely to present sufficient benefits to justify the cost of litigation. In the selection of trade partners to target, those with larger markets promise greater potential gains from any market access gains. A unitary state acting to maximize economic gains would favor large export industries and its largest trade partners in its expenditure for export promotion activities such as WTO adjudication.

Studies of the litigation behavior of administrative agencies suggest that legal certainty pushes bureaucracies to prioritize their win-rate over the actual economic gains per case (Posner 1972). See Guzman and Simmons (2005) on the hypothesis that in WTO adjudication states should target large market defendants in order to maximize economic gains.
In the record of WTO jurisprudence, some issues, such as anti-dumping measures or import quotas that directly limit imports, have led to consistently strong positive rulings and have transparent implementation. Such measures are more likely to represent clear legal cases with high probability of gains compared with issues on technical standards or intellectual property where there are fewer case precedents and greater difficulty to evaluate implementation. Several policy areas such as investment and services have weak commitments in the WTO agreement that make it less likely that a trade barrier in these areas would represent a strong legal case.

**Economic Maximization Hypothesis:** Trade barriers with greater economic stakes will be more likely to be selected for adjudication.

Observable implications:

- The government will file WTO cases for industries of large production and high export value.
- The government will file WTO cases against trade partners with the largest market size.

**Legal Certainty Hypothesis:** strong legal cases will be more likely to be selected for adjudication.

- The government will file WTO cases for quantitative import policy measures that have high transparency and strong WTO rules.

- The government will be less likely to file WTO cases for technical standards, intellectual property rights, and service barriers that have less transparency and weaker WTO rules.

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\[17\text{See Tarullo (2004) for review of trend for positive rulings in anti-dumping cases.}\]
3 Analysis of U.S. Trade Negotiation Strategies

Data

This section will present analysis of an original dataset of potential trade disputes based on coding government reports by the USTR that provide annual lists of trade barriers by US trade partners that are harmful to the interests of U.S. exports. This data offers three major advantages that will contribute to the study of trade policy. First, the trade barriers which are listed in the government reports meet a minimum threshold of demand that makes them potential issues for a negotiation agenda. This facilitates analysis of a politically relevant set of cases, unlike studies that generate cases by using a gravity model of trade and “measure” trade policy barriers as the residual for any product trade flow that has a deviation from expected free trade levels.\(^{18}\) Second, the data includes a broader range of trade barriers than found in existing empirical studies of trade policy because it reports on not only tariff or non-tariff barriers in manufactured goods but also service industry trade, investment policies, and qualitative non-tariff barriers related to technical standards and intellectual property rights protection. For example, the UNCTAD dataset that is the most frequent source in analysis of non-tariff barriers does not include intellectual property policies. Third, the data is reported from the U.S. perspective as a “victim” of the trade measures that has an interest in full disclosure of the barriers taken by other countries. In contrast, the UNCTAD dataset relies on official national reports of governments about their own trade policies, and as a consequence understates barriers where governments do not desire transparency.\(^{18}\)

\(^{18}\)Such gravity model studies are also subject to the critique that poor fit of the model would erroneously suggest that there are high trade barriers (Laird and Yeats, 1990, 35).
obfuscation” by hiding their successful influence on policy from the larger society that pays the costs (Magee et al. 1989a, 2). Thus it is problematic to rely on NTB user self-reporting as the source for measuring trade barriers. In short, the data will allow me to examine the full range of trade protection whereas existing datasets focus on a small number of basic protection tools that no longer reflect the current trade agenda.

A brief background on the creation of the reports is necessary. They represent one tool by which Congress monitors the executive branch actions on trade policy. In the Trade Act of 1974, Congress mandated that every year the Office of the U.S. Trade Representative submit to the Senate Finance Committee, appropriate House Committees, and the President “The National Trade Estimate Report (NTE),” which should analyze market access barriers that adversely affect exports of U.S. goods and services. The report represents an inventory of trade barriers that was originally intended to help generate cases for the Section 301 process in which the U.S. Congress had mandated the government target particular foreign barriers for negotiation on a time schedule leading to possible economic sanctions. Noland (1997, 369) uses the report to measure U.S. government attention to bilateral trade problems. The NTE is drafted in consultation with U.S. embassies abroad, trade policy advisors (academic and industry officials with formal clearance to participate in the trade policy process), USTR officials of the relevant area and policy specialties, and a public comment process in which industries make submissions. Carmén Suro-

\[19\] He counts the number of pages in the report devoted to each trade partner for a single number measuring the attention given to the aggregate trade problems with a specific trade partner. In contrast, my dataset codes the individual trade barriers.

\[20\] For example, there were 39 new submissions for the 2006 NTE from associations such as the California Avocado Commission and the National Electrical Manufacturers Association as well as from companies such as Pepsico and Walmart.
Bredie, the Assistant U.S. Trade Representative for Policy Coordination, confirmed that the NTE trade barriers represent the politically relevant trade barriers and said that briefing reports for U.S. officials going to a particular trade negotiation draw upon the information in the NTE. This report is complemented by the “Annual Report on Trade Agreements Program and National Trade Policy Agenda” that provides information on the goals and reported actions and progress for specific trade agenda items.

The data was coded in three stages. First, a list of barriers was created from each annual NTE report for the five countries. Any reference to government negotiation was recorded. Second, these cases were aggregated into a single list of discrete trade barriers by a particular U.S. trade partner with description of the first and last year of its inclusion in the reports. Third, the notes on government negotiation activities drawn from the NTE reports are confirmed against the USTR Annual Reports and the WTO dispute settlement data.

Since some industries have several trade barriers stacked on top of each other, distinct policy measures are coded separately. For example, the NTE report on Korea lists discriminatory tax policies, standards, and anti-import bias generated by media campaigns as policies affecting U.S. auto exports to Korea. These are coded as three separate cases. This is necessary to preserve information on the variation of negotiation strategies. While some negotiations cluster industry policy issues, others address such issues separately in different negotiation fora.

The data scope is for all U.S. complaints about trade barriers by five top trade partners: Canada, EU, Japan, Korea, and Mexico. These trade partners are those with the highest trade volumes with the United States that have also been WTO members since 1995 (note that while China is a major trade partner, it only joined the WTO in November 2001). All are democracies

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and members of the OECD with close political relations, which allows the study to focus on the three proposed hypotheses while partially controlling for factors related to regime and diplomatic relations that may influence trade policy. The time period begins with the establishment of the WTO in 1995 and continues to 2003, which is the most recent year for which industry level data from the OECD is available. The unit of analysis is a complaint about a trade barrier affecting U.S. exports listed in the NTE.

**Forum Choice**  The dependent variable is the choice of negotiation forum for addressing the trade barrier. While the primary quantity of interest is whether a case is raised for WTO adjudication, the relative comparison group includes the full range of other venues for addressing trade barriers as described earlier in section 1 (see table 1). In addition, many complaints are mentioned in the reports without any reference to negotiation activity, and this is included as a forum choice. The negotiation strategy coding reflects the highest level of negotiation taken during the period that the barrier is listed in the NTE. For example, a trade barrier that was listed without mention of any government action in the 1995 report and was an item in bilateral talks for the 1996 to 1997 reports before a WTO complaint was filed in 1998 would be coded as a WTO adjudication case, whereas if the reports had returned to simply mentioning the trade barrier in the 1998 and subsequent reports, the case would be coded as a bilateral negotiation.

Although most barriers are negotiated in some forum, a third of the cases are mentioned in the reports with no explicit record of negotiation activity. Simply being included in the National Trade Estimate Report itself represents public criticism of the policy that applies some pressure for resolution. Some of these “no action” cases may have actually been raised at a low level in bilateral or multilateral talks, but the lack of any specific mention of the negotiation in the report
suggests that these cases received less attention. Some cases are mentioned in the report for several years before action is taken, which makes it important to control for the duration of a trade barrier (measured as the number of years the trade barrier continues to receive mention in the NTE). The longer the trade barrier has persisted, the higher the likelihood that the government would take some negotiation action.

Bilateral negotiation is the most frequently taken negotiation strategy, used for over forty percent of the cases. Multilateral negotiation is the next most common negotiation strategy, and WTO adjudication is only used for a small share of the cases. This is because WTO adjudication represents a costly negotiation strategy as previously discussed, and because some cases address policies outside of the existing rule framework. One could try to filter out the latter cases, but there is no clear criterion given the possibility to stretch the interpretation of existing rules to fit a broad range of policy issues. States can initiate WTO disputes even in a grey area of law. For example, the United States filed a WTO complaint against Japanese business practices despite the lack of specific competition policy rules in the WTO.\(^{22}\) Since it seems unlikely that the “grey law” cases are systematically correlated with the key variables for interest group pressure, their inclusion will not bias results.

Table 2 shows the variation in forum choice in the dataset. The first column summarizes all barriers including those that affected several industries such as general tax policies or customs administration procedures. The second column includes only those barriers that address a single industry that could be coded at the 2 digit International Standard Industry Classification (ISIC)\(^{22}\)See “Japan-Measures Affecting Consumer Photographic Film and Paper (DS44).” The United States filed the complaint in the so-called Kodak-Fuji film case in June 1996 charging that Japan’s distribution measures discriminated against imports in violation of GATT article 3 and nullified and impaired expected benefits. The panel ruled against the United States in April 1998.
level (e.g. textiles or motor vehicles) and where data was available for key economic indicators and political contributions. Table 1 shows a consistent pattern of negotiation strategies across the two data samples. The industry pressure argument of this paper would suggest that a higher percentage of the industry specific cases should be forwarded to WTO adjudication as collective action problems hinder industry lobbying for trade barriers that affect a range of industries. While there is a slightly higher percentage of WTO cases among the industry-specific sub-sample, it is not a sharp distinction and the U.S. government initiates many WTO cases on issues that are not industry specific. Despite potential collective action problems, the broad scope of a trade barrier also increases the number of affected industries and potential that some will lobby for government action. Acting independently of industry, the government may also see these barriers as representing substantial economic harm to justify a high cost negotiation strategy. In order to control for economic indicators and political contributions to explain the industry pattern of selection, this paper hereafter focuses on the subset of data shown in column 2.

Contributions Industry lobbying is measured by the level of political contributions. The data is from the Center for Responsive Politics (CRP), a non-partisan research group that tracks money in U.S. politics. The CRP collects the publicly listed data from the Federal Election Commission and summarizes the total contributions by individuals, PACs, and soft money contributions.

23 The 2 digit level is used because this is the aggregation at which data is most consistently available for both political contributions and economic control variables. Some trade barriers are more narrow (e.g. dairy rather than agriculture or woolen coats rather than textiles). Data availability forces this aggregation, but one would also expect that lobbying influence draws upon the larger industry aggregation. For five industries data was available to code the more appropriate 4 digit level: pharmaceuticals, steel, aircraft, ship-building, and railroad transport equipment.

Table 2: U.S. Choice of Forum Data. The data represents trade barrier cases coded from the National Trade Estimate Reports of the USTR from 1995 to 2003 for trade barriers affecting U.S. exports to five top trade partners (Canada, EU, Japan, Korea, and Mexico). Percentages are given to the right of the column listing the frequency. The first column includes horizontal cases across industries such as general customs barriers or tax policies. The second column only includes the industry specific cases for which data could be coded on industry level production and political contributions and analyzed in regression results presented below.

<table>
<thead>
<tr>
<th>Negotiation strategy</th>
<th>All cases frequency</th>
<th>All cases percent</th>
<th>Industry-specific cases frequency</th>
<th>Industry-specific cases percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No action</td>
<td>203</td>
<td>36.12</td>
<td>78</td>
<td>29.21</td>
</tr>
<tr>
<td>Bilateral</td>
<td>226</td>
<td>40.21</td>
<td>114</td>
<td>42.70</td>
</tr>
<tr>
<td>Multilateral negotiation</td>
<td>87</td>
<td>15.48</td>
<td>47</td>
<td>17.60</td>
</tr>
<tr>
<td>WTO adjudication</td>
<td>46</td>
<td>8.19</td>
<td>28</td>
<td>10.49</td>
</tr>
<tr>
<td>Total cases</td>
<td>562</td>
<td>100.00</td>
<td>267</td>
<td>100.00</td>
</tr>
</tbody>
</table>

The amount of contributions ranges from high levels of 99.8 million dollars by the finance industry and 24.6 million dollars by agricultural producers to lower values of 2.6 million by the auto industry and 859 thousand dollars by the TV production industry. The log of the U.S. dollar value is taken to smooth high values.

Section 301 Fifteen of the 267 trade barriers in the data used for regression analysis are Section 301 cases. As described earlier, the U.S. Congress created a tool for export promotion in Section 301 of the U.S. Trade Act. The law mandates that the USTR investigate the complaints of industries that file petitions and initiate a Section 301 case for those evaluated to have sufficient merit. Congress also added provisions for the USTR to initiate Section 301 cases on its own.

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25 Similar results are found when using the total contributions over the period 1990 to 2006.

26 The CRP industry categories have been adjusted when necessary to provide the closest match with the ISIC level industry used for economic variables.
without an industry petition when unfair trade policies by a trade partner called for such action.\footnote{See Bayard and Elliott (1994) for description of the use of Section 301.} Section 301 cases follow specific deadlines for government action to request negotiations with the foreign government. When met by continued resistance by the trade partner, the government must resort to unilateral sanctions or initiate a GATT/WTO dispute. Given the institutional constraint one would expect that Section 301 cases would be more likely to have an adjudication strategy chosen. Since the government is legally obligated to act for the petitions that it has accepted as Section 301 cases, this variable is constrained to zero for estimating the probability of “no action” as the forum choice.

**Economic Control Variables** Industry size is an important control variable since larger industries represent greater economic stakes. I use the production value as reported by the the OECD STAN database for Industrial Analysis for the U.S. industry affected by the foreign trade barrier. Since the analysis focuses on government policies to increase market access for exports, it is also important to control for export interests. Industries with more exports will have more at stake in policies to improve market access. I use the world export value as reported by the The OECD STAN Bilateral Trade Database (thousand U.S. dollars). For both variables, data is for the U.S. industry at the 2 digit ISIC industry category in 1995 and the log is taken to smooth high values.

**Partner, Import Penetration (MPEN)** Negotiations are a strategic interaction between two states, and the demand for protection in the trade partner for its industry influences whether the government will be more or less likely to remove the trade barrier. The literature suggests that import penetration increases demand for protection, and I use this to measure the strength of trade partner resistance to liberalization demands affecting a particular industry. The data on
1995 import penetration ratios for Canada, the EU, Japan, Korea, and Mexico at the 2-digit ISIC level is from the OECD STAN Indicators database.

**Trade Partner Effects** Including indicator variables for the trade partner imposing the trade barrier against U.S. exports controls for the possibility that other country specific factors such as market size or preferential trade agreements influence the choice of strategy. In a larger sample with more variation in the number of partners and time period, variables measuring GDP and trade relations would be appropriate. Given the structure of the data analyzed in this paper as a single cross-section of U.S. trade complaints against five major trade partners, however, indicator variables can help to control for such country specific factors. The indicator variables allow us to examine whether the pattern shows that the U.S. favors WTO adjudication against its largest trade partners, Canada, EU, and Japan over the smaller markets of Korea and Mexico.

On the other hand, the U.S. could be less likely to initiate disputes against Canada and Mexico because NAFTA provides an alternative venue that makes bilateral negotiations more effective. Industries that face trade problems with a NAFTA partner do not need to rely on U.S. government intervention because companies are empowered to initiate disputes directly under NAFTA Article 19. Indeed, the U.S. government has only initiated one NAFTA dispute under the Article 20 provision for government to government adjudication while there have been over thirty Article 19 disputes initiated by U.S. companies against Mexico and Canada.\(^{28}\) The distribution of trade complaints varies by trade partner with the EU, Japan, and Korea having more trade barriers

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\(^{28}\)The Article 20 dispute was initiated against Canada, “TARIFFS APPLIED BY CANADA TO CERTAIN U.S.-ORIGIN AGRICULTURAL PRODUCTS” CDA-95-2008-01. It is included in the dataset as a bilateral negotiation. The Article 19 NAFTA cases initiated by companies are not mentioned in the NTE and are not included in the dataset.
This may also reflect that in negotiating NAFTA, Canada and Mexico agreed to lower many trade barriers against U.S. exports.

**Import Policy** To analyze the selection of disputes for adjudication, one wants to control for the legal strength of a potential complaint. Unfortunately this is rarely possible. Evaluation of the legal status of a trade barrier requires both extensive WTO legal expertise and knowledge about the specific policy and its impact on trade; even when governments conduct such internal analysis, they treat their conclusions as private information. Coding legal status was not possible for this project, which involves over two hundred distinct trade barriers. Rather, I use a proxy variable for strong legal cases based on the nature of the trade barrier. Protection measures directly targeting imports represent a straightforward application of existing WTO rules. These policies have always been at the core of the trade regime regulations, so there is a large body of jurisprudence based on previous cases under both GATT and the WTO that can help governments to build a legal case. In contrast, policies regarding intellectual property rights, service barriers, investment, and technical standards refer to parts of the trade agreements that are both weaker in the depth of the agreement and the body of existing case law. A conservative government looking for strong legal cases is more likely to favor import policies over these other areas. The NTE divides the report on each trade partner into sections for the type of trade barrier, and I code an indicator variable for those described as import policies.

Of the 267 trade barriers in the data for regression analysis, twenty-six percent were EU measures, twenty-five percent were Korean, twenty-four percent were Japanese, thirteen percent were Mexico, and twelve percent were Canadian.
Results

Table 3 presents the results from multinomial logit regression analysis. The four outcomes are treated as unordered choices, and bilateral negotiation is the base outcome so other coefficients represent the comparison of each alternative with the bilateral negotiation forum choice.\(^{30}\) The results confirm that political pressure influences the choice of cases for WTO adjudication. Both political contributions by the industry and the Section 301 mechanism by which Congress applies pressure on the executive branch have a statistically significant positive effect on the likelihood that a complaint will be raised as a WTO dispute.

The substantive effect of the variables is large, as can be seen through a comparison of how changing the variable influences the predicted probability for initiating a WTO dispute when all other variables are held constant.\(^ {31}\) As an illustrative example, I compare the probability of initiating a WTO dispute when setting the political contributions variable at the level of the computer industry, which gave 9.5 million dollars in the 1996 election cycle, with the probability of initiating a WTO dispute when setting the political contributions variable to the level of the agriculture industry, which gave 24.6 million dollars in the 1996 election cycle.\(^ {32}\) This relatively

\(^{30}\)The base outcome affects the coefficient interpretation but not the estimated probability of a particular outcome.


\(^{32}\)Note that the CRP data on contributions aggregates computer and software industries together, whereas in other economic control variables measured by the OECD these are separate. Here, agriculture industry, includes the CRP category for agribusiness minus the donations from food processing industries, tobacco, and forestry.
large shift from low to high levels of donations increases the probability of initiating a WTO dispute from 0.03 to 0.14 (first difference 0.109 with standard error 0.042). The same shift in political contributions increases the probability of a trade measure being raised in multilateral negotiations from 0.11 to 0.15 (first difference 0.044 with standard error 0.036), and it decreases the probability that the trade measure will be addressed in bilateral negotiations from 0.56 to 0.46 (first difference of -0.101 with standard error of 0.49). While WTO adjudication appears to be a preferred strategy for industries with high political contributions, the evidence also shows that multilateral rather than bilateral fora are chosen as the second best strategy. By negotiating an issue in a multilateral forum, the government engages in the multilateral rule system so that later problems may be addressed through adjudication.

Table 3: Multinomial Logit Model of U.S. Choice of Trade Strategy. The first column presents coefficients for the choice of multilateral negotiation and no action respectively. These three sets of coefficients are relative to the base category of bilateral negotiation. The Section 301 variable is constrained to zero in the estimation of the no action model since the government is legally mandated to take some action in these cases. Standard errors are in parentheses. The data has 267 observations for trade barriers listed in the National Trade Estimate Reports during the period 1995 to 2003 that were industry specific. Trade barriers with Canada, the EU, Japan, Mexico, and Korea are included with indicator variables for the trade partner (Canada is the omitted category). *Significant at the 10 percent level. **Significant at the 5 percent level. ***Significant at the 1 percent level.
An alternative measure of political influence that examines the level of organization within the industry also has a significant positive effect on the probability that a case will be raised in either WTO adjudication or multilateral negotiations. I measure organization by a variable that counts the number of industry associations within the aggregate 2-digit ISIC industry. For example, there was one industry association for ISIC 30 computer and office equipment, five associations for ISIC 34 motor vehicles, twenty-one associations for ISIC 17 textiles, and forty-two associations for ISIC 1 agriculture. I expect that more associations corresponds with more lobbying activity. For industries with more associations there is a greater probability that any given trade barrier will affect exporters that have close ties with an industry association that will lobby for their interests. The variables for number of associations and level of political contributions are highly correlated (0.72 correlation) and would be expected to measure the same underlying concept of industry political lobbying. Therefore I treat them as alternatives rather than including them jointly. I used the same model presented in table 3 and replaced the political contributions measure with the organization measure. The full results are not presented here; the coefficient for the associations variable in the WTO adjudication outcome estimates is 0.098 (standard error 0.030, significant at the 1 percent level) and in the multilateral negotiation outcome estimates is 0.028 (standard error 0.014, significant at the 5 percent level). This additional test shows that political influence is robust to measures of contributions or organization.

The effect of a trade measure being selected for Section 301 investigation is even larger. In the aggregate data used in the regression analysis, there are fifteen section 301 cases, and eight were selected for investigation. I thank Wendy Hansen for sharing this data. I have aggregated her industry associations data from 4 digit NAICS level to 2-digit ISIC by using the concordance provided by the U.S. Department of Commerce and summing the total number of 4 digit NAICS industry associations that fall within the corresponding ISIC category. See Hansen et al. (2005) for the original data explanation.
raised as WTO disputes for adjudication, while two were addressed in multilateral negotiations
and five in bilateral negotiations. There were no Section 301 cases in which the government did
not take any action (the regression estimation constrains the coefficient to zero for this outcome as
shown in the third column). When using multivariate regression to control for other factors, the
pattern for Section 301 to encourage WTO adjudication is even more stark. Moving the variable
for Section 301 from zero to one increases the predicted probability of initiating a WTO dispute
from 0.05 to 0.69 (first difference of 0.645 with standard error of 0.180). Similar to the pattern
noted above for political contributions, the positive effect of Section 301 on the probability of a
WTO dispute contrasts with a significant negative effect on the probability that the measure will
be addressed through bilateral negotiations (first difference of -0.402 with standard error of 0.096).
Most negotiations have a bilateral stage before WTO adjudication, but the analysis shows that
those measures targeted through Section 301 are more likely to be taken to the next level with
initiation of WTO dispute.

The choice of Section 301 cases itself is influenced by some of the same variables included in
the regression, but not by political contributions. In logit regression analysis of the dichotomous
outcome for Section 301 case selection, export value and duration of the dispute have significant
positive effects while the import penetration ratio of the trade partner has a significant negative
effect, and political contributions do not have a significant effect. This finding is in itself puzzling
as one would expect this policy tool to be used to benefit more politically influential industries,
but it reassures that the effect of political contributions on negotiation choice is not endogenous
with the Section 301 case selection.

The political resistance to liberalization by the trade partner also influences choice of negoti-
ation forum. Trade measures for an industry with high import penetration in the trade partner’s
domestic market are significantly more likely to be raised in WTO adjudication. As an example, I compare the effect of shifting the import penetration ratio from a low level of 8.2, which is equivalent to Japan’s pharmaceutical industry, to a relatively high import penetration ratio of 40.3, which is equivalent to the EU pharmaceutical industry. This shift increases the probability of WTO adjudication from 0.04 to 0.12 (first difference of 0.076 with standard error of 0.054). This variable does not have a significant impact on the choice of other negotiation fora. Rather than avoiding WTO adjudication for cases that are likely to encounter trade partner resistance, it appears that the U.S. government is more likely to use WTO adjudication as the forum where the trade partner has the least capacity to veto the negotiation process.

Surprisingly, economic variables measuring industry size and export value have little impact either independently or jointly. The evidence does not offer support for the economic maximization hypothesis. Exploring alternative measures of industry size and export interests did not yield different results. Replacing production value with employment share or replacing world export value with bilateral export value for the industry does not have a significant effect on choice of any negotiation outcome. One should not conclude that economic factors are irrelevant, since these variables are also correlated with whether an industry gives more political contributions and is likely to be selected as a Section 301 case. Moreover, the level of industry aggregation introduces noise in the measurement of the economic stakes. Therefore, these findings are useful to show that the effect of political contributions holds even when controlling for industry size and trade interests, but not for drawing conclusions about the effect of economic indicators on negotiation choices.

34 In a likelihood ratio test that compares the full model presented in the table with a reduced model omitting the production and export variables, the chi squared statistic of 5.13 is not significant.
Neither is there a consistent pattern of economic maximization by using the more costly WTO adjudication forum for trade partners with the largest domestic market. On the one hand, the EU as the largest market is a favorite target for WTO adjudication, but the United States also favors using an adjudication strategy with much smaller Mexico. On the other hand, the two countries that are significantly less likely to have their trade barriers ignored are Japan and Korea. To the extent that the United States pursues a distinct trade strategy approach for specific trade partners, it differs in the choice of whether to do something versus whether to choose WTO adjudication.

The legal efficiency hypothesis receives stronger confirmation. The import policies that represent the core of WTO regulations are also the most likely trade measure to be targeted in either WTO adjudication or multilateral negotiations. Government agencies trying to maximize their win-rate will prefer these measures as easy legal cases where WTO rules and jurisprudence offer more clarity about the legal standard compared with newer areas of trade regulations such as services, IPR, and technical standards.

The results shown in table 3 are also tested with different approaches for treating possible clustering of observations. First, I obtain similar results when I run the same model while calculating robust standard errors clustered on industry. Second, I obtain similar results when I run the model omitting the trade partner country indicators and instead calculate robust standard errors clustered on trade partner. In both cases, the political contributions, Section 301, and Import penetration variables have a significant positive effect on the choice of WTO adjudication as predicted by the interest group hypothesis.
4 Conclusion

Political lobbying is a key factor in the selection of institutional forum for trade negotiations. As a costly negotiation strategy, WTO adjudication represents a useful signal to domestic lobbies and foreign governments of government commitment to address the foreign trade barrier. Those industries with high political contributions along with cases in which Section 301 investigation triggers institutional constraints from Congressional pressure are the most likely to be chosen for adjudication. This contrasts with the expectation that a government maximizing economic gains would only resort to the costly WTO adjudication strategy for large industries with high value exports and trade partners with high value markets. While import policies with the most transparent rules are also favored for adjudication, political pressure influences WTO case selection independent of the policy issue. This dynamic works on both sides of the dispute as WTO adjudication is also more likely when the respondent state faces high resistance to liberalization. Adjudication may be the technocratic domain of trade lawyers, but they must heed political pressure in order to serve the interests of elected government leaders.

The evidence presented here has been from U.S. trade policy, and further research is necessary to investigate whether the trade policy choices of other states follow a similar political logic. In addition, this study has been limited to U.S. negotiations with five major trade partners all of whom have close political relations with the United States. The concern about diplomatic costs may be an important factor in choice of negotiating strategies with other trade partners.

This paper has offered two contributions to the existing literature. First, I have demonstrated that insights from the political economy literature about setting domestic trade policies can also be applied to address the choice of trade negotiation forum. As the strengthened multilateral rules restrict the options for unilateral policy choices, it has become more important to understand
how states advance their trade interests within the multilateral rules. Second, by focusing on the choice of forum for trade disputes, I confront the selection issue that has long troubled theories about institutions. While the literature on institutions has focused on the creation and design of these institutions, skeptics have countered that states only use the institutional forum when cooperation will be easy. To resolve these debates, more theoretical and empirical research is needed to explain how states select among existing institutions. This study shows one approach through analyzing data on a wide range of potential disputes and institutional choices. The evidence here that trade disputes with high political stakes on both sides are most likely to be selected for WTO adjudication counters the concern that only issues “ripe for cooperation” are being raised in institutional venues.

Given that the most politicized cases are channeled into the WTO forum, it is remarkable that the dispute system has been relatively successful. Instead of choosing easy cases where the government can settle for small compromises or expects the trade partner to compromise easily, governments are sending the cases with the greatest political stakes on both sides to the legal forum. In light of the selection model presented in this paper, one has to give greater weight to the successes that have been achieved through WTO adjudication. As the lightening rod for politicized disputes, the system both functions to open markets and to satisfy domestic political demands for fair trade.
References


