THE HAVES COMING OUT BEHIND: GALANTER'S THEORY TESTED ON THE WTO DISPUTE SETTLEMENT SYSTEM

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**ABSTRACT:**

In 1974, Marc Galanter wrote a groundbreaking paper “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” in which he suggested (among other things) that those with the most resources are more likely to win litigation suits. Does Galanter's thesis prove true in the WTO Dispute Settlement System? Are countries with higher GDP/GNI/PPP income statistics more likely to win against their lower GDP/GNI/PPP counterparties? The surprising answer is no. It appears that the “underdogs” come out ahead in WTO disputes.

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PART I: INTRODUCTION AND THEORETICAL BACKGROUND

There is a common misconception\(^1\) that developing countries come out “behind”\(^2\) in their relationship with the World Trade Organization (WTO).\(^3\)

While studies show that litigation between parties in the United States\(^4\) often result in the “haves coming out ahead,”\(^5\) is this also true for WTO litigation? Based on the last twelve years of data from the WTO’s Dispute Settlement

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\(^1\) “Unfair trade [is merely a] code phrase used by the protectionists in rich countries to cut off imports from the poor countries...I characterized these fearful attitudes at the time as ‘malign impact’ and ‘malign intent’ paradigms.” See, JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 5,9 (Oxford University Press 2004)(citing JAGDISH BHAGWATI, THE NEW INTERNATIONAL ECONOMIC ORDER Chapter 1 (MIT Press 1978)); see, e.g. Anti-Globalisation Network, 20 Excellent Reasons Why the WTO is Bad News, (Mar. 30, 2001) http://www.poptel.org.uk/panap/latest/wto10.htm (last visited Jan. 23, 2008); see also, websites for anti-globalization organizations such as Corp Watch (http://www.corpwatch.org/) and Global Research.ca (http://www.globalresearch.ca/).

\(^2\) The term “behind” (in quotations), as well other indicated terms refer to the title of Marc Galanter’s famous piece, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” which will be discussed heavily throughout this article and is cited infra note 7.

\(^3\) For example, Global Exchange, a major organizer of the 1999 WTO protests in Seattle, produces a pamphlet, “Top Ten Reasons to Oppose the World Trade Organization.” Among its listed reasons for protesting WTO activities is where it declares: “many countries are too poor to defend themselves from WTO challenges from the rich countries, and are forced to change their laws rather than pay for their own defense.” Global Exchange, Top Ten Reasons to Oppose the World Trade Organization (Oct. 28, 2007) available at http://www.globalexchange.org/campaigns/ftaa/TopTenWTO.pdf (last visited Jan, 22, 2007).

\(^4\) See, e.g., Richard Lempert, A Classic at 25: Reflections on Galanter’s “Haves” Article and Work It Has Inspired, 33 LAW & SOC’Y REV. 95 (1999). This article is part of a wonderful symposium of collected empirical studies related to Marc Galanter’s work (infra note 7) that begins on page 799 of the same journal volume.

\(^5\) The phrase “haves coming out ahead” (in quotations), as well other indicated terms refer to the title of Marc Galanter’s famous piece, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” infra note 7.
system, it appears that countries with lower income statistics tend to win WTO disputes more often than their “richer” counterparties.⁶

The “father” of this field of research is undoubtedly Marc Galanter, who wrote the 1974 article, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,”⁷ and inspired hundreds of studies measuring the uneven outcomes of legal battles.⁸ In his original article, Galanter posits the concept of “repeat players” and “one-shotters” within the legal system.⁹ A repeat player is an entity that litigates regularly, thus following a different pattern of legal strategy than its counterpart, a one-shotter, who litigates rarely but (typically) has more at stake in the case.¹⁰ An insurance company, for instance, would be an example of a repeat player, while an accident victim would be a one-shotter.¹¹ Galanter hypothesized that because repeat players tend to litigate more often, they “enjoy economies of scale and have low start up costs.”¹² Because of these and other advantages, argues Galanter, repeat players are in a “position of advantage” and are thus more likely to win lawsuits than one-shotters.¹³

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⁶ See, discussion infra Parts IV-VI.
⁸ See, e.g., Lempert supra note 4.
⁹ Galanter, supra note 7 at 97-100.
¹⁰ Id.
¹¹ Id.
¹² Id.
¹³ Id. at 103.
Galanter was careful to specify that repeat players “are [not] to be equated with ‘haves’ (in terms of power, wealth and status) or [one-shotters] with ‘have-nots.’”¹⁴ Galanter points out, however, that “[i]n the American setting most [repeat players] are larger, richer and more powerful than are most [one-shotters], so these categories overlap, but there are obvious exceptions.”¹⁵ This statement, along with the title of Galanter’s article (“Why the ‘Haves’ Come Out Ahead”), gave rise to volumes of research on income levels in litigation, United States and elsewhere,¹⁶ but it has not yet been applied to the arena of international trade.¹⁷

Using Galanter’s ideas as a framework,¹⁸ the purpose of this empirical paper is to discern whether income levels affect the outcomes of World Trade Organization disputes. Specifically, do countries with higher gross domestic product ("GDP") and gross national income ("GNI") levels fare

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¹⁴ Id.
¹⁵ Id.
¹⁷ There is one working paper relating to the outcomes of international arbitration, but no such discussion of the outcomes of WTO disputes. See, Catherine A. Rogers, The Arrival of the 'Have-Not' in International Arbitration, 8 NEV. L. REV. ___ (2007); available at SSRN, http://ssrn.com/abstract=1029290.
¹⁸ Galanter, supra note 2, passim.
better than their counterparties?\textsuperscript{19} What about purchasing power parity ("PPP") levels? \textsuperscript{20} To my surprise, it appears that Marc Galanter’s theory does not apply to WTO disputes.\textsuperscript{21} In fact, there appears to be a bias toward the underdog in WTO disputes, as those with lower income statistics tend to prevail more often.\textsuperscript{22}

**PART II: THE WTO**

In order to understand this study, it is necessary to provide some background on the WTO since it is a relatively new entity in the arena of international trade.\textsuperscript{23} As with many instances of worldwide cooperation, the concept of an organized international trade body came to fruition after World War II, when the international community attempted, and failed, to develop the International Trade Organization.\textsuperscript{24} What remained was the General Agreement on Tariffs and Trade (GATT), a treaty-like organization that included longstanding negotiations between its members.\textsuperscript{25} The underlying

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\textsuperscript{19} Definitions for all economic indicators come from Paul R. Krugman & Maurice Obstfeld, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* (Pearson Addison Wesley 7th ed. 2006).

\textsuperscript{20} *Id.*

\textsuperscript{21} *See*, discussion *infra* Parts IV-VI.

\textsuperscript{22} *Id.*


\textsuperscript{25} *Id.* at 3.
hope in creating such a system was two-fold: that 1) trade disagreements would result in international legal disputes instead of international war, and 2) countries would play by the rules in order to ensure the collective gain that comes from a liberalized economy.\textsuperscript{26}

While the GATT certainly proved valuable in creating an international law of trade, there was no mechanism with which to enforce its laws.\textsuperscript{27} This was addressed in the early 1990’s during what is known as the Uruguay round of negotiations.\textsuperscript{28} The 76 charter countries\textsuperscript{29} agreed to the Dispute Settlement Understanding (DSU) Agreement as a system for trade disputes and thus the WTO was born.\textsuperscript{30} In order to join the WTO, nations must agree to rules and regulations on issues such as tariffs, agriculture, safety standards, textiles, the service industry, intellectual property, anti-dumping, subsidies and many more.\textsuperscript{31} Once a nation agrees to become a WTO member, it is bound and has the ability to “sue” or “be sued” within the WTO for unlawful trade practices.\textsuperscript{32} Today,\textsuperscript{33} there are 151 permanent members,

\textsuperscript{26} Id. at 13-15, 55.
\textsuperscript{27} Id. at 15-21.
\textsuperscript{28} Id. at 18-21.
\textsuperscript{29} Initial members were those who were official members as of Jan. 1, 1995.
\textsuperscript{31} Understanding the WTO, supra note 24 at 23-54.
\textsuperscript{32} DSU art. 3.7. “Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.” Id.
31 Observer Governments and hundreds of intergovernmental organizations given Observer Status during negotiations.\(^{34}\)

The most significant aspect of the WTO’s existence is that for the first time in history, a supranational governing body has the authority to adjudicate trade disputes between nation-states.\(^{35}\) The process begins when a country officially requests consultations with the Dispute Settlement Body (“DSB”), alleging in writing which WTO Articles the offending party is violating.\(^{36}\) From there the countries enter into what is called consultations, which is essentially a 60-day period of mediation.\(^{37}\) If that fails to settle the

\(^{33}\) As of March 5, 2007.


\(^{35}\) See, Understanding the WTO, supra note 24 at 55-58; see also, DSU art 2.1

The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term “Member” as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute. Id.

\(^{36}\) DSU art. 4.4; see also, Understanding the WTO supra note 24 at 56.

\(^{37}\) See, DSU art. 4.3; 7.

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute. Id. See also, Understanding the WTO, supra note 24 at 56.
dispute, the process for creating a Panel begins. A Panel consists of three to five independent “experts” who review the evidence and evaluate the legal arguments. These experts are “well-qualified governmental and/or non-governmental individuals;” they are from all different countries, and they must not be a national of any of the parties in the dispute, including third parties. Parties in the dispute negotiate over Panel selection and if they cannot agree, the Secretary-General appoints a Panel for them. The Panel hears written and oral arguments and rebuttals, and ultimately issues a ruling, which it passes along to the DSB for approval.

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38 Id.
39 Panelists are not to take orders from their government, and they are to act as individuals and not as members of any group. Also, if a party in the dispute is a developing country going against a developed country, the developing country can request to have an expert from a developing country serve on the panel. DSU art 8.9-10.
40 DSU art. 8.5; see also, Understanding the WTO, supra note 24 at 56.
41 DSU art. 8.1.
42 DSU art. 8.2. “Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.” Id.
43 DSU art. 8.3.
44 DSU art. 8.7; see also, Understanding the WTO, supra note 24 at 55.
45 DSU art. 11.

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. Id.; see also, Understanding the WTO, supra note 24 at 55.
reject the Panel’s finding only if there is complete consensus, which is nearly impossible as the Body consists of all 151 WTO members.\(^{46}\)

At that point, either disputing party (but not third parties)\(^ {47}\) may appeal the case to the Appellate Body.\(^ {48}\) The Appellate Body consists of seven permanent members that are selected by the DSB, though only three reside during an appeals case.\(^ {49}\) Since these experts are selected by the 151-member DSB,\(^ {50}\) their nationality, training and experiences are varied.\(^ {51}\) Once the case has been heard through the appeals process, the DSB votes to adopt the Panel Report as-is, or as modified by the Appellate Body.\(^ {52}\) Again, the decision of the Appellate Body can be overturned with complete

\(^{46}\) DSU art. 17.14.

An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. \(\text{Id.};\) see also, Understanding the WTO, supra note 24 at 56-57.

\(^{47}\) DSU art. 17.4.

\(^{48}\) \(\text{Id.};\) see also, Understanding the WTO, supra note 24 at 56-57.

\(^{49}\) DSU art. 17.1.

A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body. \(\text{Id.}\).

\(^{50}\) DSU art 17.1; see also, Understanding the WTO, supra note 24 at 56-57.

\(^{51}\) DSU art 17.3. “The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO.” \(\text{Id.}\).

\(^{52}\) DSU art. 17.14. “An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.” \(\text{Id.};\) see also, Understanding the WTO, supra note 24 at 56-57.
consensus of the Dispute Settlement Body,\textsuperscript{53} but most often the Panel Report is adopted as modified by the Appellate Body.\textsuperscript{54}

**PART III: METHODOLOGY OF THE STUDY AND BASELINE STATISTICS**

As of February 17, 2008, there were 369 cases listed on the WTO website.\textsuperscript{55} I started with a simple chart of each case name, date, and parties.\textsuperscript{56} From there I looked at the outcome of the cases, specifically, the litigated versus settled cases.\textsuperscript{57} The WTO provides six categories of outcomes on its website:

(1) **Consultations requested — no panel established nor settlement notified**, which refers to cases where a suit was filed but no official Panel has been established (or in some cases, no Panel will ever will be established);\textsuperscript{58}

(2) **Panels established by DSB/reports not yet circulated**, which refers to cases where a Panel was officially established, yet the case is still being heard or was otherwise dropped;\textsuperscript{59}

(3) **Panel Reports circulated but not yet adopted by the DSB**,\textsuperscript{60} which refers to two cases currently on appeal; \textsuperscript{61}

\textsuperscript{53} DSU art. 17.14.

\textsuperscript{54} See, *Understanding the WTO*, supra note 24 at 56-57.

\textsuperscript{55} Main WTO website at www.wto.org; the chronological listings of disputes are available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

\textsuperscript{56} See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).

\textsuperscript{57} Id.

\textsuperscript{58} See, e.g., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds369_e.htm. It is noteworthy that a number of cases filed in the mid-90’s still have this status and appear to have no resolution.

\textsuperscript{59} See, e.g., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds282_e.htm. Again, it is interesting that a number of these cases from the mid-90’s still have no resolution.

\textsuperscript{60} See, e.g., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.
(4) Mutually Agreed Solutions notified under Article 3.6 of the DSU, which are cases officially settled under Article 3.6 of the Dispute Settlement Understanding (DSU) Agreement”);\(^{62}\)

(5) Other settled or inactive cases, which refers to dropped or other unusual cases;\(^{63}\) and finally,

(6) Appellate Body and Panel Reports Adopted, which are fully litigated and finalized cases.\(^{64}\)

Based on this information, I was able to calculate that approximately 36% of the cases were litigated before a Panel and 14% were officially settled.\(^{65}\)


\(^{62}\) DSU art 3.6. “Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.” *Id.* These settlements typically involve concessions on the part of the respondent that are enough to satisfy the complainant (i.e. a timeline for the removal of a tariff).

\(^{63}\) See, e.g., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds88_e.htm . This typically happens when the issue becomes moot (i.e. respondent country removes offending trade barrier before a Panel was established) or the parties drop the case after the dispute has been settled in an alternative manner (i.e. a similar suit by another party resolved the issue in another way). http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds169_e.htm

\(^{64}\) See, e.g., http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds169_e.htm.

\(^{65}\) See, WTO Study 8-7.doc, Sheets “Outcome 1” and “Outcome 2” (on file with author). For purposes of the litigated cases, I included the two cases on appeal, as they are obviously being litigated. However, even if I remove them, the percentage remains 36%.
<table>
<thead>
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<th>WTO Categories</th>
<th>Cases with this outcome</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appellate Body and Panel Reports Adopted</td>
<td>132</td>
<td>36%</td>
</tr>
<tr>
<td>Consultations requested — no panel established nor settlement notified</td>
<td>125</td>
<td>34%</td>
</tr>
<tr>
<td>Mutually Agreed Solutions notified under Article 3.6 of the DSU</td>
<td>53</td>
<td>14%</td>
</tr>
<tr>
<td>Panels established by DSB/reports not yet circulated</td>
<td>28</td>
<td>8%</td>
</tr>
<tr>
<td>Other settled or inactive cases</td>
<td>29</td>
<td>8%</td>
</tr>
<tr>
<td>Panel Reports circulated but not yet adopted by the DSB</td>
<td>2</td>
<td>1%</td>
</tr>
</tbody>
</table>

**Figure 1: WTO Outcome Categories**

The next step of analysis was to figure out the actual outcome of the disputed cases so I could establish a baseline for the average “win” versus “lose” rate. This poses a significant fork in the statistical decision-making road: what is the definition of “winning” versus “losing” a WTO dispute? After all, in a typical WTO case, parties allege multiple violations of the WTO Articles; however the Panel and Appellate Report may only agree with some of the arguments. Thus, for the purposes of this study, I defined “loser” as a party who was required to change a WTO-violating practice. Even if it was convenient for the violator to change its practice, and even if the party

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66 See, WTO Study 8-7.doc, Sheets “Outcome 1” and “Outcome 2” (on file with author).


68 See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).

was only required to change one practice out of many allegedly harmful practices, I still considered this submission to the WTO to be a “loss.”

Using this rubric, I found the following statistics for the 132 litigated cases:

![Figure 2: Breakdown of Litigated Cases](image)

As you can see readily from Figure 2, complainants appear to “win” disproportionately more than respondents.

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70 See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).
71 See, WTO Study 8-7.doc, Sheets “Outcome 1” and “Outcome 2” (on file with author). I chose not to include the results of the two cases on appeal mentioned supra note 61.
72 See, WTO Study 8-7.doc, Sheets “Outcome 1” and “Outcome 2” (on file with author).
73 Id.
<table>
<thead>
<tr>
<th>Total Cases</th>
<th>369</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Completely Litigated</td>
<td>132</td>
<td>36%</td>
</tr>
<tr>
<td>Complainant Prevailed</td>
<td>116</td>
<td>88%</td>
</tr>
<tr>
<td>Respondent Prevailed</td>
<td>16</td>
<td>12%</td>
</tr>
</tbody>
</table>

**Figure 3: Breakdown of Prevailing Parties**

While a whopping 88% win rate appears to be a green light for countries to file WTO suits, the numbers may be skewed based on my definition of “winning.” For example, when a country files a suit for an action that violates many WTO provisions, it is possible that the action was only found to violate one WTO provision. For example, in a case between the European Union and Korea, the E.U. complained that Korea’s tariff on imports of dairy products violated six different WTO articles. The Appellate Body reversed the initial WTO Panel on one count and found Korea to be in violation of only five of the six articles. Because Korea lost on at least one count, I categorized it as a “loser” in this case and the E.U. as a “winner.”

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74 Id.
75 See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author); see also, discussion supra page 13-14.
77 Id.
78 Id. The summary on the WTO website explains:

The panel found that Korea’s measure is inconsistent with Articles 4.2(a), and 5 of the Agreement on Safeguards, but rejected the EC claims under Article XIX of GATT 1994, Articles 2.1, 12.1 (although it found that Korea’s notifications to the Committee on Safeguards were not timely, and to that extent were inconsistent with Article 12.1), 12.2 and 12.3 of the Agreement on Safeguards. The Appellate Body reversed one of the panel’s conclusions on the interpretation of Article XIX of GATT 1994 and its relationship with the Agreement on Safeguards; upheld one, but reversed another of the panel’s interpretations of Article 5.1 of the Agreement on
In other cases, however, the loser may “lose” the case, but not be penalized for its policy because the issue solved itself.\textsuperscript{80} For example, in one case, India complained that a U.S. policy was violating a WTO obligation.\textsuperscript{81} Despite the fact that the U.S. had ended its policy before the conclusion of the Panel’s investigation, the Panel concluded that the U.S. policy did indeed violate its obligations under the WTO.\textsuperscript{82} Regardless, I categorized the U.S. as a loser and India a winner in this case.\textsuperscript{83}

Finally, a number of cases that arguably should have been consolidated\textsuperscript{84} were treated separately.\textsuperscript{85} Multiple different parties sued the same violator in separate cases,\textsuperscript{86} and the outcome, though it amounted to one “loss” created many “wins.”\textsuperscript{87} For example, in 1996, the European Union, Japan, and the United States filed three separate claims against

\begin{flushleft}
\textsuperscript{79} See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).
\textsuperscript{85} See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).
\textsuperscript{87} See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).
\end{flushleft}
Indonesia for its special tax breaks for national cars.\textsuperscript{88} Because Indonesia was named in three separate cases that were not consolidated, Indonesia was counted as a loser on three separate counts.\textsuperscript{89}

**PART IV: LOOKING AT GDP, GNI AND PPP RESULTS**

Now that the outcome data was complied it was time to move to the next step: could Galanter’s theory that the “haves come out ahead” hold true for international trade disputes?\textsuperscript{90} To determine this, I collected statistics by year from the World Bank Indicator Database\textsuperscript{91} for each complainant and respondent and compared the results for the winners and losers.\textsuperscript{92} In addition to the aforementioned difficulties with defining winner and loser, the statistics I selected for the analysis required further decision-making.\textsuperscript{93}

First, I removed the only two litigated cases where there were multiple complainants,\textsuperscript{94} as it seemed unfair to add the income statistics of the total


\textsuperscript{89} Id.; see also, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).

\textsuperscript{90} Galanter, *supra* note 7.

\textsuperscript{91} All data comes from the World Bank – World Development Indicators Database available at www.worldbank.org (run Nov. 25, 2007). European Communities were calculated using the European Monetary Union.

\textsuperscript{92} See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author).

\textsuperscript{93} See, discussion *supra* page 13-14.

group against a single respondent. This resulted in a total of 128 qualifying cases. Second, the year selected for each dispute was the year the dispute was filed. This means that if a country’s wealth did have something to do with its ability to win or lose a WTO dispute, the country’s wealth was prominent at the beginning of the dispute. Put simply, this study does not take into account any changes in income which may have occurred throughout the dispute.

Third, the statistics I selected to analyze are the following:

1. **Gross Domestic Product (constant 2000 currency):** Gross domestic product ("GDP") is a measurement of a country’s volume of production within its borders.

2. **Gross National Income (current U.S. currency):** Formerly known as gross national product ("GNP"), gross national income ("GNI") is a measurement of a country’s output, including its consumption, investment, government purchases, and the current account balance (the amount of net exports of goods and services.)

While GDP and GNP typically do not differ greatly, I chose to include statistics for both so I could check the results against each other. I also

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95 See, WTO Study 8-7.doc, Sheet “Complete Data” (on file with author). It would have added 11 additional losses to the U.S. Id.

96 See, WTO Study 8-7.doc, Sheet “GDP 2 – All Cases” (on file with author).

97 Id.

98 Id.

99 Id.


101 Id. at 280.

102 Id. at 283.
included statistics for Purchasing Power Parity ("PPP") for both GDP and GNI: \(^{103}\)

3. \textit{GDP, PPP (constant 2000 international currency)} \(^{104}\)

4. \textit{GNI, PPP (current international currency)} \(^{105}\)

Purchasing power parity is a measurement of a country’s currency in relation to the ability of its citizens to purchase like items. \(^{106}\) For example, if an item costs ten dollars in Country A but five dollars in Country B, this results in a ratio, which is useful to compare the general wealth of countries in terms of their ability to purchase goods. \(^{107}\) Again, in order to ensure the outcome of this study was accurate, I used two versions of this statistic, one based on GDP and the other based on GNI. \(^{108}\)

Finally, I looked at all the same information on a per capita basis using the following:

5. \textit{GDP per capita (constant 2000 US currency)} \(^{109}\)

6. \textit{GDP per capita, PPP (constant 2000 international currency)} \(^{110}\)

---

\(^{103}\) All data comes from the World Bank – World Development Indicators Database (run Nov. 25, 2007). European Communities were calculated using the European Monetary Union.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) Krugman and Obstfeld, \textit{supra} note 100 at 371-373.

\(^{107}\) Id.

\(^{108}\) All data comes from the World Bank – World Development Indicators Database (run Nov. 25, 2007). European Communities were calculated using the European Monetary Union.

\(^{109}\) Id.

\(^{110}\) Id.
7. **GNI per capita, Atlas method (current US currency)**

Per capita statistics often say more about a country’s population and wealth distribution policies than its overall wealth. However, I included these statistics to show the theoretical wealth of an average inhabitant of the country. For variety’s sake, I included the various measurements of currency: constant U.S. currency, constant international currency from the year 2000 and finally, the current U.S. currency. Again, calculating all the different variations of these similar statistics would further ensure that the results were accurate in describing the income levels of the litigating parties.

Once I gathered the statistics for each country based on the year in which the dispute occurred, I could find the average financial data of the winner and compare it to the average financial data of the loser. If the winner had a higher number than the loser, it could be concluded that winning a WTO dispute is correlated with a country’s financial data. Here is what I found:

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111 Id.
112 Krugman and Obstfeld, *supra* note 100 at 371-373.
113 See, WTO Study 8-7.doc, Sheet ”GDP 2 – All Cases” (on file with author).
114 All data comes from the World Bank – World Development Indicators Database (run Nov. 25, 2007). European Communities were calculated using the European Monetary Union.
115 See, WTO Study 8-7.doc, Sheet ”GDP 2 – All Cases” (on file with author).
116 Id.
117 Id.
<table>
<thead>
<tr>
<th>Income Statistics for Average Winners and Losers (128 cases)</th>
<th>Average Winner Statistics</th>
<th>Average Loser Statistics</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDP (constant 2000 USD)</td>
<td>3.8 trillion</td>
<td>4.8 trillion</td>
<td>-1.0 trillion</td>
</tr>
<tr>
<td>GNI (current USD)</td>
<td>4.0 trillion</td>
<td>5.1 trillion</td>
<td>-1.1 trillion</td>
</tr>
<tr>
<td>PPP (GDP-based) (constant 2000 international $)</td>
<td>4.2 trillion</td>
<td>5.2 trillion</td>
<td>-1.0 trillion</td>
</tr>
<tr>
<td>PPP (GNI-based) (current international $)</td>
<td>4.2 trillion</td>
<td>5.3 trillion</td>
<td>-1.1 trillion</td>
</tr>
<tr>
<td>GDP per capita (constant 2000 USD)</td>
<td>$18,964</td>
<td>$21,080</td>
<td>-$2,117</td>
</tr>
<tr>
<td>GNI per capita Atlas method (current USD)</td>
<td>$19,506</td>
<td>$21,570</td>
<td>-$2,064</td>
</tr>
<tr>
<td>PPP per capita (GDP-based) (constant 2000 international $)</td>
<td>$21,116</td>
<td>$23,028</td>
<td>-$1,912</td>
</tr>
</tbody>
</table>

**Figure 4: Income Statistics for Average Winners and Losers**

As Figure 4 shows, the average winner had a smaller income than the loser in every category of statistic. The average GDP, GNI and PPP was over one trillion higher in the loser and the per capita results showed the average loser having over one thousand of a per capita income than the winner.

Taken at face value, these results show that the “haves” do not come out ahead in WTO disputes! In fact, it is the “have-nots” who are winning!

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118 See, WTO Study 8-7.doc, Sheet “GDP 1 – Results” (on file with author).
119 Id.
120 Id.
121 Id.
122 Id.
PART V: REMOVING DISTORTIONS

While it appears that the average winner is typically the financial “underdog,” there are some obvious issues with the averaging methodology that must be explained. For example, how is it possible that the average WTO dispute involves economies valued over three trillion dollars? The answer to this has more to do with the WTO Members who choose to participate in WTO disputes than the average income level of the WTO Members themselves. Specifically, the United States, the European Union, Canada, and Japan are “repeat players” in all WTO disputes, if not as main litigants, as third parties.

On that note, it is useful to have a separate discussion about the United States since it is involved, either as complainant, respondent or third party, in approximately 71% of all WTO cases.

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123 See, WTO Study 8-7.doc, Sheet “GDP 1 – Results” (on file with author).
124 Id.
125 Id.
126 See, WTO Study 8-7.doc, Sheet “Participation Level” (on file with author)
<table>
<thead>
<tr>
<th>Country</th>
<th>U.S.</th>
<th>E.U.</th>
<th>Japan</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>as Complainant</td>
<td>88</td>
<td>76</td>
<td>12</td>
<td>29</td>
</tr>
<tr>
<td>as Respondent</td>
<td>99</td>
<td>59</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>as a Third Party</td>
<td>76</td>
<td>91</td>
<td>91</td>
<td>70</td>
</tr>
<tr>
<td><strong>Total Cases as a party</strong></td>
<td><strong>263</strong></td>
<td><strong>226</strong></td>
<td><strong>118</strong></td>
<td><strong>114</strong></td>
</tr>
<tr>
<td>Total WTO Cases</td>
<td></td>
<td></td>
<td></td>
<td>369</td>
</tr>
<tr>
<td><strong>Percentage of Involvement</strong></td>
<td>71%</td>
<td>61%</td>
<td>32%</td>
<td>31%</td>
</tr>
</tbody>
</table>

**Figure 5: Percentage of Involvement in WTO Disputes**

While the U.S. level of involvement as a third party may seem unusual (76 cases), this is relatively “normal” for repeat players. Canada, for example, has participated as a third party in 70 cases, respectively, and the E.U. and Japan have tied for the highest number of third party suits at 91.

Moving on to litigated cases, however, the U.S. was involved in almost every case that went into litigation.

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127 Id.
128 Id.
129 Id.
130 Id.
Originally I had hoped to remove the U.S. from the study to avoid any distortion it caused, but due to its extensive involvement, this seemed almost impossible.\textsuperscript{132}

However, I removed all cases in which the U.S. was a complainant or respondent, and recalculated the differences based on the remaining 54 cases.\textsuperscript{133}

\begin{figure}[h]
\centering
\begin{tabular}{|l|c|}
\hline
U.S. as Complainant & 29 \\
U.S. as Respondent & 50 \\
U.S. as a Third Party & 53 \\
\hline
\textbf{Total Litigated Cases with U.S. as party} & \textbf{132} \\
\hline
Total Litigated Cases in the WTO & 134 \\
\hline
\textbf{Percentage U.S. Involvement in Litigated Cases} & \textbf{98.5\%} \\
\hline
\end{tabular}
\caption{Percentage of U.S. Involvement in Litigated Cases\textsuperscript{131}}
\end{figure}

\textsuperscript{131} Id.

\textsuperscript{132} Id.

\textsuperscript{133} See, WTO Study 8-7.doc, Sheet “GDP 3 – US Removed” (on file with author).
### Income Statistics – U.S. Removed (54 cases)

<table>
<thead>
<tr>
<th></th>
<th>Average Winner Statistics</th>
<th>Average Loser Statistics</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GDP</strong> (constant 2000 USD)</td>
<td>2.1 trillion</td>
<td>2.4 trillion</td>
<td>-283 billion</td>
</tr>
<tr>
<td><strong>GNI</strong> (current USD)</td>
<td>2.4 trillion</td>
<td>2.9 trillion</td>
<td>-442 billion</td>
</tr>
<tr>
<td><strong>PPP (GDP-based)</strong> (constant 2000 international $)</td>
<td>2.7 trillion</td>
<td>3.1 trillion</td>
<td>-365 billion</td>
</tr>
<tr>
<td><strong>PPP (GNI-based)</strong> (current international $)</td>
<td>2.7 trillion</td>
<td>3.1 trillion</td>
<td>-483 billion</td>
</tr>
<tr>
<td><strong>GDP per capita</strong> (constant 2000 USD)</td>
<td>$12,901</td>
<td>$13,526</td>
<td>-$624</td>
</tr>
<tr>
<td><strong>GNI per capita</strong> Atlas method (current USD)</td>
<td>$14,121</td>
<td>$14,527</td>
<td>-$406</td>
</tr>
<tr>
<td><strong>PPP per capita (GDP-based)</strong> (constant 2000 international $)</td>
<td>$16,151</td>
<td>$17,204</td>
<td>-$1,053</td>
</tr>
</tbody>
</table>

**Figure 7: Income Statistics - U.S. Cases Removed**

As Figure 7 shows, the difference between the winners decreased significantly, from the GDP/GNI/PPP levels in the trillions to the range of 283-483 billion, and the per capita levels from the thousands to the hundreds. However, the numbers clearly show that the average winner still has lower income levels than the average loser.

Intrigued by this decrease in income gaps, I decided to further narrow the source data by cutting other possible distortions in the model. First, I

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134 *Id.*
135 *Id.*
136 *Id.*
ran a model using the 17 cases involving “one-shotters” that did not involve
the following repeat players as main litigants: (1) the United States, (2) the
European Union, (3) Canada, and (4) Japan.\(^\text{137}\) Then I ran a model using
only the cases where repeat players were in a dispute with other repeat
players.\(^\text{138}\) Using all five of these models, I found the differences to be the
following:

<table>
<thead>
<tr>
<th>Average Income Statistics of Winners Less Average Income Statistics for Losers</th>
<th>All cases (128 cases)</th>
<th>U.S. Removed (54 cases)</th>
<th>One-Shotters Only (17 cases)</th>
<th>Repeat Players Only (46 cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDP (constant 2000 USD)</td>
<td>-1 trillion</td>
<td>-283 billion</td>
<td>+16 billion</td>
<td>-307 billion</td>
</tr>
<tr>
<td>GNI (current USD)</td>
<td>-1.1 trillion</td>
<td>-442 billion</td>
<td>+21 billion</td>
<td>-345 billion</td>
</tr>
<tr>
<td>PPP (GDP-based) (constant 2000 international $)</td>
<td>-10 trillion</td>
<td>-365 billion</td>
<td>+174 billion</td>
<td>-73 billion</td>
</tr>
<tr>
<td>PPP (GNI-based) (current international $)</td>
<td>-1.1 trillion</td>
<td>-483 billion</td>
<td>+149 billion</td>
<td>-145 billion</td>
</tr>
<tr>
<td>GDP per capita (constant 2000 USD)</td>
<td>-2 thousand</td>
<td>-$624.09</td>
<td>-$434.00</td>
<td>-$1,615.35</td>
</tr>
<tr>
<td>GNI per capita Atlas method (current USD)</td>
<td>-2 thousand</td>
<td>-$406.11</td>
<td>-$416.92</td>
<td>-$1,441.37</td>
</tr>
<tr>
<td>PPP per capita (GDP-based) (constant 2000 international $)</td>
<td>-1 thousand</td>
<td>-$1,052.80</td>
<td>-$710.85</td>
<td>-$931.41</td>
</tr>
</tbody>
</table>

**Figure 8**: Average Income Statistics for Winners less Losers\(^\text{139}\)

\(^{137}\) See, WTO Study 8-7.doc, Sheet “GDP 4 – OS” (on file with author).

\(^{138}\) See, WTO Study 8-7.doc, Sheet “GDP 4 – RP” (on file with author).

\(^{139}\) See, WTO Study 8-7.doc, Sheets “GDP 1B - Results” (on file with author).
Figure 8 shows the average income statistics for winners less the average income statistics for losers.\(^{140}\) When the resulting number is negative, it means the average winner was less wealthy in comparison to the average loser, presumably disproving Galanter’s theory that the “haves” come out ahead.\(^{141}\) When the resulting number is positive, it means the average winner is wealthier compared to the average loser, supporting Galanter’s theory.\(^{142}\)

As it turns out, the only instance where the winner appears to be wealthier than the loser is in the cases of one-shotters only.\(^{143}\) Thus, one could argue that in a world consisting exclusively of one-shotters, the haves do come out ahead.\(^{144}\) However, I decline to draw any such conclusion based on this model because the representative sample is comprised of only 17 cases, which is clearly not enough data to derive any predictive value:\(^{145}\)

\(^{140}\) Id.

\(^{141}\) The phrase “haves coming out ahead” (in quotations), as well other indicated terms refer to Galanter, supra note 7.

\(^{142}\) Id.

\(^{143}\) See, WTO Study 8-7.doc, Sheets “GDP 1B - Results” (on file with author).

\(^{144}\) Id.; see also, Galanter, supra note 7.

\(^{145}\) See, WTO Study 8-7.doc, Sheet “GDP 4 – OS” (on file with author).
### Figure 9: List of Cases with One-Shotters Only<sup>146</sup>

<table>
<thead>
<tr>
<th>Dispute ID Number</th>
<th>Date of Complaint</th>
<th>Outcome</th>
<th>Winner</th>
<th>Loser</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS22</td>
<td>30-Nov-95</td>
<td>Respondent prevailed</td>
<td>Brazil</td>
<td>Philippines</td>
</tr>
<tr>
<td>DS34</td>
<td>21-Mar-96</td>
<td>Complainant prevailed</td>
<td>India</td>
<td>Turkey</td>
</tr>
<tr>
<td>DS60</td>
<td>17-Oct-96</td>
<td>Respondent prevailed</td>
<td>Guatemala</td>
<td>Mexico</td>
</tr>
<tr>
<td>DS122</td>
<td>6-Apr-98</td>
<td>Complainant prevailed</td>
<td>Thailand</td>
<td>Thailand</td>
</tr>
<tr>
<td>DS156</td>
<td>5-Jan-99</td>
<td>Complainant prevailed</td>
<td>Mexico</td>
<td>Guatemala</td>
</tr>
<tr>
<td>DS169</td>
<td>13-Apr-99</td>
<td>Complainant prevailed</td>
<td>Australia</td>
<td>Korea</td>
</tr>
<tr>
<td>DS207</td>
<td>5-Oct-00</td>
<td>Complainant prevailed</td>
<td>Argentina</td>
<td>Chile</td>
</tr>
<tr>
<td>DS211</td>
<td>6-Nov-00</td>
<td>Complainant prevailed</td>
<td>Turkey</td>
<td>Egypt</td>
</tr>
<tr>
<td>DS238</td>
<td>14-Sep-01</td>
<td>Complainant prevailed</td>
<td>Chile</td>
<td>Argentina</td>
</tr>
<tr>
<td>DS241</td>
<td>7-Nov-01</td>
<td>Complainant prevailed</td>
<td>Brazil</td>
<td>Argentina</td>
</tr>
<tr>
<td>DS302</td>
<td>8-Oct-03</td>
<td>Complainant prevailed</td>
<td>Honduras</td>
<td>Dominican Republic</td>
</tr>
<tr>
<td>DS312</td>
<td>4-Jun-04</td>
<td>Complainant prevailed</td>
<td>Indonesia</td>
<td>Korea</td>
</tr>
<tr>
<td>DS331</td>
<td>17-Jun-05</td>
<td>Complainant prevailed</td>
<td>Guatemala</td>
<td>Mexico</td>
</tr>
</tbody>
</table>

There are, of course, volumes of material written about the lack of participation in the WTO by developing countries.<sup>147</sup> While I will not address the subject here, I will mention that the results of this study confirm the observations of many regarding the missing players in WTO disputes.<sup>148</sup> The average GDP of a complainant is over $3.8 trillion USD and the average GDP of a respondent is $4.8 trillion USD; these cases are clearly not made of up countries with developing economies.<sup>149</sup>

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<sup>146</sup> *Id.*


<sup>148</sup> *See*, WTO Study 8-7.doc, Sheet “GDP 2 – All Cases” (on file with author).

<sup>149</sup> *Id.*
PART VI: CONCLUSION: THE HAVES COME OUT BEHIND

Based on the above research, it appears the commonly held belief that the “haves come out ahead”\(^{150}\) does not hold true in the realm of WTO disputes.\(^{151}\) Of course there are always cases where the underdog beats the repeat player,\(^{152}\) but the purpose of this study was to determine if it is more common for the underdog to beat the repeat player.\(^{153}\) The numbers show that the average income statistics for the winner are higher than the loser.\(^{154}\) Just to be sure, however, I ran a few more tests to confirm the results.

First, I tested whether the winner had lower income statistics than the loser in a higher number of cases.\(^{155}\) Sure enough, it is clear that in the majority of cases, the “have-nots” come ahead:\(^{156}\)

\(^{150}\) The phrase “haves coming out ahead” (in quotations), as well other indicated terms refer to Galanter, supra note 7.

\(^{151}\) See, discussion supra Parts IV-V.

\(^{152}\) In 2002, for example, New Zealand, with a GDP of only $56 million, took on the United States with its then $10 trillion dollar GDP, and won. Appellate Body Report, Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS258/AB/R (Jul. 11, 2003). The case with the largest disparity in GDP levels (a difference of over $10 trillion) is a current case against the United States by Antigua and Barbuda. The U.S. lost but failed to comply with the DSB recommendations, which led to a long series of compliance negotiations. Appellate Body Report, Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (Apr. 7, 2005). For an update on the case, See, also, http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Mar. 7, 2007).

\(^{153}\) See, discussion infra page 5-6.

\(^{154}\) See, discussion supra Parts IV-V.

\(^{155}\) See, WTO Study 8-7.doc, Sheet “GDP 1C – Results” (on file with author).

\(^{156}\) Id.
As every model in Figure 10 shows, the winners of WTO disputes clearly have lower income statistics that the losers in the majority of the cases.\textsuperscript{158}

It does not matter if it is a group of repeat players versus repeat players,
one-shotters versus one-shotters or a combination of the two: the have-nots on average win more than 50% of the time.\textsuperscript{159}

The second test I ran was a spread of the incomes from lowest to highest to determine if the opponents in the cases tend to be at a high spread versus a low spread:\textsuperscript{160}

\textbf{Figure 11: Spread of Incomes (Highest Negative Spread to Highest Postive Spread)}\textsuperscript{161}

The cases on the far left of Figure 11 are the cases where the winner had much lower income statistics than the loser.\textsuperscript{162} The cases on the right are

\textsuperscript{159} Id.
\textsuperscript{160} See, WTO Study 8-7.doc, Sheet “Incomes by Spread” (on file with author).
\textsuperscript{161} Id.
\textsuperscript{162} Id.
cases where the loser had much higher income statistics than the winner.\textsuperscript{163} The cases in the middle are cases where the winner and loser had somewhat similar statistics.\textsuperscript{164} It is evident that the spreads are somewhat even on both sides, but there is clearly more area in the negative section (left side), showing that the winners tend to have lower income statistics than the losers a little more than 50\% of the time.\textsuperscript{165}

In my final test, I looked at the spread in cases based on time, to see if the overall litigation pattern was changing.\textsuperscript{166}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Spread_of_Incomes_by_Date.png}
\caption{Spread of Incomes by Date\textsuperscript{167}}
\end{figure}

\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} See, WTO Study 8-7.doc, Sheet “Incomes by Date” (on file with author).
As Figure 12 shows, the shape of litigation has evolved slightly over the past 12 years. On the left side of Figure 12, the cases where the winners have lower income statistics appear sparse. On the right side of Figure 12, the cases where the winners have lower income statistics appear to thicken, showing that in recent litigation, it is becoming more common for winners to have lower income statistics.

While the data sample of WTO litigation is small, it appears to be consistent. The “have-nots” are certainly gaining advantages from WTO disputes, showing that Galanter’s theory does not hold in this venue.

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167 Id.
168 Id.
169 Id.
170 Id.
171 See, discussion supra Parts IV–VI.
172 Id.