

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

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## PART I: INTRODUCTION AND THEORETICAL BACKGROUND

There is a common misconception<sup>1</sup> that developing countries come out “behind”<sup>2</sup> in their relationship with the World Trade Organization (WTO).<sup>3</sup> While studies show that litigation between parties in the United States<sup>4</sup> often result in the “haves coming out ahead,”<sup>5</sup> is this also true for WTO litigation? Based on the last twelve

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<sup>1</sup> “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 (New York: Oxford University Press, 2004) at 6 and 9; see e.g. Anti-Globalisation Network, “20 Excellent Reasons Why the WTO is Bad News” (30 March 2001), online: Pesticide Action Network (PAN) Asia and the Pacific <<http://www.poptel.org.uk/panap/latest/wto10.htm>>; see also websites for anti-globalization organizations such as Corp Watch <<http://www.corpwatch.org/>> and Global Research.ca <<http://www.globalresearch.ca/>>.

<sup>2</sup> 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.

<sup>3</sup> 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 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” (28 October 2007), online: Global Exchange <<http://www.globalexchange.org/campaigns/ftaa/TopTenWTO.pdf>>.

<sup>4</sup> See e.g. Richard Lempert, “A Classic at 25: Reflections on Galanter’s ‘Haves’ Article and Work It Has Inspired” (1999) 33 Law & Soc’y Rev. 1099. This article is

years of data from the WTO's Dispute Settlement system, it appears that countries with lower income statistics tend to win WTO cases more often than their "richer" counterparties.<sup>6</sup>

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,"<sup>7</sup> and inspired hundreds of studies measuring the uneven outcomes of legal battles.<sup>8</sup> In his original article Galanter posits the concept of "repeat players" and "one-shotters" within the legal system.<sup>9</sup> 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.<sup>10</sup> An insurance company, for instance, would be an example of a repeat player, while an accident victim would be a one-shotter.<sup>11</sup> Galanter hypothesized that because repeat players tend to litigate more often, they "enjoy economies of scale and have low start up costs."<sup>12</sup> 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.<sup>13</sup>

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.'"<sup>14</sup> 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."<sup>15</sup> 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

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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.

<sup>5</sup> 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," see *infra* note 7.

<sup>6</sup> See discussion below Parts IV-VI.

<sup>7</sup> Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law & Soc'y Rev.* 95.

<sup>8</sup> See e.g., Lempert *supra* note 4.

<sup>9</sup> Galanter, *supra* note 7 at 97-100.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* at 103.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

elsewhere,<sup>16</sup> but it has not yet been applied to the arena of international trade.<sup>17</sup>

Using Galanter's ideas as a framework,<sup>18</sup> the purpose of this empirical paper is to discern whether income levels affect the outcomes of WTO disputes. Specifically, do countries with higher gross domestic product (GDP) and gross national income (GNI) levels fare better than their adversaries?<sup>19</sup> What is the impact of purchasing power parity (PPP) levels?<sup>20</sup> To my surprise, it appears that Marc Galanter's theory does not apply to WTO disputes.<sup>21</sup> In fact, there appears to be a bias toward the underdog in WTO cases, as those with lower income statistics tend to prevail more often.<sup>22</sup>

## 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 field of international trade.<sup>23</sup> 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

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<sup>16</sup> See e.g. Lisa B. Bingham, "Employment Arbitration: The Repeat Player Effect" (1997) 1 *Employee Rts. & Employment Pol'y J.* 189; Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, "Do the 'Haves' Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988" (1999) 33 *Law & Soc'y Rev.* 811; Kathryn Hendley, Peter Murrell & Randi Ryterman, "Do Repeat Players Behave Differently in Russia? Contractual and Litigation Behavior of Russian Enterprises" (1999) 33 *Law & Soc'y Rev.* 833; Beth Harris, "Representing Homeless Families: Repeat Player Implementation Strategies" (1999) 33 *Law & Soc'y Rev.* 911.

<sup>17</sup> 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-Nots' in International Arbitration" (2007) 8 *Nevada Law Journal* 341 (SSRN).

<sup>18</sup> Galanter, *supra* note 7.

<sup>19</sup> Definitions for all economic indicators come from Paul R. Krugman & Maurice Obstfeld, *International Economics: Theory and Policy* 7th ed. (Reading, MA: Pearson Addison Wesley, 2006).

<sup>20</sup> *Ibid.*

<sup>21</sup> See discussion below Parts IV-VI.

<sup>22</sup> *Ibid.*

<sup>23</sup> The WTO was established in 1994. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization (15 April 1994), Art. 1, "Establishment of the Organization".

attempted, and failed, to develop the International Trade Organization.<sup>24</sup> What remained was the General Agreement on Tariffs and Trade (GATT), a treaty-like organization that included longstanding negotiations between its members.<sup>25</sup> The underlying hope in creating such a system was twofold: 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.<sup>26</sup>

While the GATT certainly proved valuable in creating an international law of trade, there was no mechanism with which to enforce its laws.<sup>27</sup> This was addressed in the early 1990's during what is known as the Uruguay Round of negotiations.<sup>28</sup> The seventy-six charter countries<sup>29</sup> agreed to the Dispute Settlement Understanding (DSU) Agreement as a system for trade disputes and thus the WTO was born.<sup>30</sup> 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, and subsidies, to name a few.<sup>31</sup> Once a nation agrees to become a WTO member, it is bound and can "sue" or "be sued" within the WTO for unlawful trade practices.<sup>32</sup> At the time of writing,<sup>33</sup> there were 151 permanent members, 31 Observer

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<sup>24</sup> World Trade Organization, *Understanding the WTO*, 3d ed. (Geneva: WTO Information and Media Relations Division, 2005) at 3 and 15, online: <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf)> ["Understanding the WTO"].

<sup>25</sup> *Ibid.* at 2.

<sup>26</sup> *Ibid.* at 13-15, and at 55. However, this underlying purpose has not been universally accepted as a positive addition. For counter authorities criticizing WTO policy see Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton & Company, 2003), and Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (London: Zed Books Ltd., 2003). See also Bhagwati, *supra* note 1.

<sup>27</sup> "Understanding the WTO", *supra* note 24 at 15-21.

<sup>28</sup> *Ibid.* at 18-21.

<sup>29</sup> Initial members are those who were official members as of Jan. 1, 1995.

<sup>30</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [DSU], at Art. 3.6.

<sup>31</sup> "Understanding the WTO", *supra* note 24 at 23-54.

<sup>32</sup> DSU, *supra* note 30, at Art. 3.7. "Before bringing a case, a Member shall exercise its judgment 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."

<sup>33</sup> As of March 5, 2007.

governments and hundreds of intergovernmental organizations given observer status during negotiations.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup> From there the countries enter into what is called consultations, which is essentially a 60-day period of mediation.<sup>37</sup> If that fails to settle the dispute, the process for creating a panel begins.<sup>38</sup> A panel consists of three (possibly five) independent<sup>39</sup> "experts" who review the evidence and evaluate the legal arguments.<sup>40</sup> These experts, also called panelists, are "well-qualified governmental and/or non-

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<sup>34</sup> WTO, "Understanding the WTO: Members and Observers", online: World Trade Organization

<[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

<sup>35</sup> See "Understanding the WTO", *supra* note 24 at 55-58; see also *DSU*, *supra* note 30, at 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.

<sup>36</sup> *DSU*, *supra* note 30, at Art. 4.4; see also "Understanding the WTO", *supra* note 24 at 56.

<sup>37</sup> See *DSU*, *supra* note 30, at Arts. 4.3 and 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.

See also "Understanding the WTO" *supra* note 24 at 56.

<sup>38</sup> See *DSU*, *ibid.* at Art. 4.3.

<sup>39</sup> 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 the parties to the dispute are a developing and a developed country, the developing nation can request to have an expert from a developing country serve on the panel. *Ibid.* at Art 8.9-10.

<sup>40</sup> *Ibid.* at Art. 8.5. See also "Understanding the WTO", *supra* note 24 at 56.

governmental individuals;<sup>41</sup> they are from different countries<sup>42</sup> and must not be a national of any of the parties (including third parties) to the dispute.<sup>43</sup> Parties to the dispute negotiate over panel selection and if they cannot agree, the WTO director-general appoints a panel for them.<sup>44</sup> The panel hears written and oral arguments and rebuttals, and ultimately issues a ruling, which it passes along to the DSB for approval.<sup>45</sup> The DSB can reject the panel's finding only if there is complete consensus, which is nearly impossible as the DSB consists of all 151 WTO members.<sup>46</sup>

At that point, either disputing party (but not third parties)<sup>47</sup> may appeal the case to the Appellate Body.<sup>48</sup> The Appellate Body consists of seven permanent members that are selected by the DSB, though only three reside during an appeals case.<sup>49</sup> Since these experts are selected by the 151-member DSB,<sup>50</sup> their nationality, training and experiences are

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<sup>41</sup> *DSU*, *supra* note 30, at Art. 8.1.

<sup>42</sup> *Ibid.*, at 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."

<sup>43</sup> *Ibid.*, at Art. 8.3.

<sup>44</sup> *Ibid.*, at Art. 8.7; see also "Understanding the WTO", *supra* note 24 at 55.

<sup>45</sup> *DSU*, *supra* note 30, at 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.

See also "Understanding the WTO", *supra* note 24 at 55.

<sup>46</sup> *DSU*, *supra* note 30, at 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.

See also "Understanding the WTO", *supra* note 24 at 56-57.

<sup>47</sup> *DSU*, *supra* note 30, at Art. 17.4.

<sup>48</sup> *Ibid.*; see also "Understanding the WTO", *supra* note 24 at 56-57.

<sup>49</sup> *DSU*, *supra* note 30 at 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.

<sup>50</sup> *Ibid.* at Art 17.1; see also "Understanding the WTO", *supra* note 24 at 56-57.

varied.<sup>51</sup> 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.<sup>52</sup> Again, the decision of the Appellate Body can be overturned with complete consensus of the Dispute Settlement Body,<sup>53</sup> but most often the panel report is adopted as modified by the Appellate Body.<sup>54</sup>

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

**A**s of 5 March 2007, there were 369 cases listed on the WTO website.<sup>55</sup> I began with a simple chart of each case's name, litigation date(s), and parties.<sup>56</sup> From there I looked at the outcome of the cases, specifically, the litigated versus settled cases.<sup>57</sup> The WTO provides six categories of outcomes on its website:

1. *consultations requested – no panel established nor settlement notified*, referring to cases where a suit was filed but no official panel has been established (or in some cases, no panel will ever be established);<sup>58</sup>

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<sup>51</sup> DSU, *supra* note 30, at 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."

<sup>52</sup> *Ibid.*, at 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."; see also "Understanding the WTO", *supra* note 24 at 56-57.

<sup>53</sup> DSU, *supra* note 30, at Art. 17.14.

<sup>54</sup> See "Understanding the WTO", *supra* note 24 at 56-57.

<sup>55</sup> WTO home page, online: World Trade Organization <[www.wto.org](http://www.wto.org)>; the chronological listings of disputes are available online: <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)>.

<sup>56</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet "Complete Data" (2007) [unpublished, archived with author] [WTO Study "Complete Data"].

<sup>57</sup> *Ibid.*

<sup>58</sup> See e.g. *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products (Complaint by Canada)*, online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds369\\_e.htm](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.

2. *panels established by DSB/reports not yet circulated*, referring to cases where a panel was officially established, yet the case is still being heard or was otherwise dropped;<sup>59</sup>
3. *panel reports circulated but not yet adopted by the DSB*,<sup>60</sup> referring to two cases that were on appeal at the time of the study;<sup>61</sup>
4. *mutually agreed solutions notified under Article 3.6 of the DSU*, referring to cases officially settled under Article 3.6 of the DSU Agreement;<sup>62</sup>
5. *other settled or inactive cases*, referring to dropped or other unusual cases;<sup>63</sup> and finally,
6. *Appellate Body and panel reports adopted*, referring to cases that were fully litigated and finalized.<sup>64</sup>

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<sup>59</sup> See e.g. *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (Complaint by Mexico)* (2005), WTO Doc. WT/DS282/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds282\\_e.htm](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.

<sup>60</sup> See e.g. *United States – Subsidies on Upland Cotton (Complaint by Brazil)* (2005), WTO Doc. WT/DS267/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds267\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm)>.

<sup>61</sup> The Appellate Body has since released its final judgments on both cases. For an update, see *Brazil – Measures Affecting Imports of Retreaded Tyres (Complaint by the European Communities)* (2007), WTO Doc. WT/DS332/R (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm)>; and see *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea (Complaint by Korea)* (2007), WTO Doc. WT/DS336/R (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds336\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds336_e.htm)>.

<sup>62</sup> DSU, *supra* note 30, at 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.” 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).

<sup>63</sup> See e.g. *United States – Measure Affecting Government Procurement (Complaint by the European Communities)* (1997), WTO Doc. WT/DS88, online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds88\\_e.htm](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).

<b>WTO Categories (369 cases)</b>	<b>Cases with this outcome</b>	<b>Percentage</b>
<b>Appellate Body and Panel Reports Adopted</b>	<b>132</b>	<b>35.8%</b>
Consultations requested – no panel established nor settlement notified	125	33.9%
Mutually Agreed Solutions notified under Article 3.6 of the DSU	53	14.4%
Panels established by DSB/reports not yet circulated	28	7.6%
Other settled or inactive cases	29	7.8%
Panel Reports circulated but not yet adopted by the DSB	2	0.5%

**Figure 1:** *WTO Outcome Categories*<sup>65</sup>

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.<sup>66</sup>

The next step of analysis involved figuring 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.<sup>67</sup> Thus, for the purposes of this study, I define “loser” as a party who is required to change a WTO-violating practice.<sup>68</sup> Even if it is convenient for the violator to change its practice,<sup>69</sup>

<sup>64</sup> See e.g. *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by Australia)* (2000), WTO Doc. WT/DS169/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/English/tratop\\_e/dispu\\_e/cases\\_e/ds169\\_e.htm](http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds169_e.htm)>.

<sup>65</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheets “Outcome 1” and “Outcome 2” (2007) [unpublished, archived with author] [WTO Study “Outcome 1” and “Outcome 2”].

<sup>66</sup> See *ibid.* For 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%.

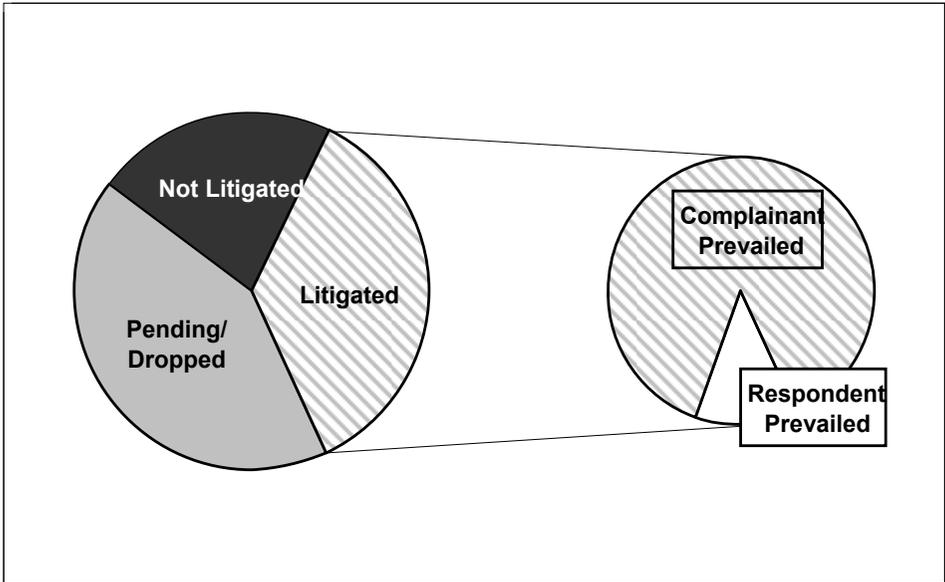
<sup>67</sup> See e.g. *Indonesia – Certain Measures Affecting the Automobile Industry* (1998), WTO Doc. WT/DS59/R (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds59\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds59_e.htm)>.

<sup>68</sup> See Kopczynski, WTO Study “Outcome 1” and “Outcome 2”, *supra* note 65.

<sup>69</sup> See e.g. *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India (Complaint by India)* (1997), WTO Doc. WT/DS33/R (Panel

and even if the party is only required to change one practice out of many allegedly harmful practices, I still consider this submission to the WTO to be a “loss.”<sup>70</sup>

Using this rubric, I found the following statistics for the 132 litigated cases:<sup>71</sup>



**Figure 2:** *Breakdown of Litigated Cases*<sup>72</sup>

As you can see from *Figure 2*, complainants appear to “win” disproportionately more cases than respondents.<sup>73</sup>

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Report) online: WTO

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds33\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds33_e.htm)>.

<sup>70</sup> See Kopczynski, WTO Study “Complete Data”, *supra* note 56.

<sup>71</sup> See Kopczynski, WTO Study “Outcome 1” and “Outcome 2”, *supra* note 65. I chose not to include the results of the two cases on appeal mentioned *supra* note 61.

<sup>72</sup> See Kopczynski, WTO Study “Outcome 1” and “Outcome 2”, *supra* note 65.

<sup>73</sup> *Ibid.*

<b>Total Cases</b>	<b>369</b>	<b>Percent</b>
Completely Litigated	132	36%
<b>Complainant Prevailed</b>	<b>116</b>	<b>88%</b>
Respondent Prevailed	16	12%

**Figure 3:** *Breakdown of Prevailing Parties*<sup>74</sup>

While a whopping 88% win rate appears to be a green light for countries to file WTO suits, the numbers may be skewed. For one, it may indicate that the WTO is a “court of last resort”; that is, complainants file suit in only the most egregious of trade violations. Additionally, the numbers may be skewed because my definition of “winning” is (arguably) too broad.<sup>75</sup> For example, when a country files a suit for an action that alleges multiple WTO violations, it is possible that the conduct only violated one WTO provision.<sup>76</sup> Case in point: in a dispute between the European Union and Korea, the EU complained that Korea’s tariff on imports of dairy products violated six different WTO articles.<sup>77</sup> 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.<sup>78</sup> Because Korea lost on at least one count, I categorize it as a “loser” in this case and the EU as a “winner.”<sup>79</sup>

The definition of “winning” may also be too broad because in some circumstances, the loser “loses” the case, but is not penalized for

<sup>74</sup> *Ibid.*

<sup>75</sup> See Kopczynski, WTO Study “Complete Data”, *supra* note 56; see also discussion above, page 13-14.

<sup>76</sup> See e.g. *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Complaint by the European Communities)* (1999), WTO Doc. WT/DS98/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds98\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds98_e.htm)>.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* 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 Safeguards; and concluded that Korea violated Article 12.2 of the Agreement on Safeguards, thereby reversing in part the panel’s finding.”

<sup>79</sup> See Kopczynski, WTO Study “Complete Data”, *supra* note 56.

its policy because the issue solved itself.<sup>80</sup> For example, when India complained that a U.S. policy was violating its obligations under the WTO, the United States ended its policy before the conclusion of the panel's investigation.<sup>81</sup> Despite this, the panel found that the U.S. policy did indeed violate its obligations under the WTO, and I categorized the United States as the loser and India the winner in this case.<sup>82</sup>

Finally, a number of cases that arguably should have been consolidated<sup>83</sup> are treated separately.<sup>84</sup> Multiple different parties sued the same violator in separate cases,<sup>85</sup> and the outcome, though it amounted to one "loss," created many "wins."<sup>86</sup> For example, in 1996 the European Union, Japan, and the United States filed three separate claims against Indonesia for its special tax breaks for domestic cars.<sup>87</sup> Because Indonesia was named in three separate cases that were not consolidated, Indonesia is counted as a loser on three separate counts.<sup>88</sup>

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<sup>80</sup> See e.g. *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India (Complaint by India)* (1997), WT/DS33/AB/R (Appellate Body Report) online: WTO

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds33\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds33_e.htm)>.

<sup>81</sup> *Ibid.*

<sup>82</sup> See Kopczynski, WTO Study "Complete Data", *supra* note 56.

<sup>83</sup> See e.g. *United States – Continued Dumping and Subsidy Offset Act of 2000 (Complaint by Australia; Brazil; Chile; the European Communities; India; Indonesia; Japan; Korea; and Thailand)* (2003), WTO Doc. WT/DS217/AB/R (Appellant Body Report) online: WTO

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds217\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm)>; and *United States – Continued Dumping and Subsidy Offset Act of 2000 (Complaint by Canada; Mexico)* (2003), WTO Doc. WT/DS234/AB/R (Appellate Body Report), online: WTO

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds234\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds234_e.htm)>.

<sup>84</sup> See Kopczynski, WTO Study "Complete Data", *supra* note 56.

<sup>85</sup> See *supra* note 83.

<sup>86</sup> See Kopczynski, WTO Study "Complete Data", *supra* note 56.

<sup>87</sup> *Indonesia – Certain Measures Affecting the Automobile Industry (Complaint by the European Communities)* (1998), WTO Doc. WT/DS54/R (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds54\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm)>;

*Indonesia – Certain Measures Affecting the Automobile Industry (Complaint by Japan)* (1998), WTO Doc. WT/DS55/R (Panel Report), online: WTO

<[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds55\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds55_e.htm)>; and *Indonesia – Certain Measures Affecting the Automobile Industry (Complaint by the United States)*, *supra* note 67.

<sup>88</sup> *Ibid.*; see also Kopczynski, WTO Study "Complete Data", *supra* note 56.

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

With the outcome data compiled, the next step was to resolve the big question: does Galanter's theory that the "haves come out ahead" hold true for international trade disputes?<sup>89</sup> To determine this, I collected statistics by year from the World Bank Indicator Database<sup>90</sup> for each complainant and respondent and compared the results for the winners and losers.<sup>91</sup> In addition to the aforementioned difficulties in defining winner and loser, the data I selected for the analysis required further statistical decision making.<sup>92</sup>

First, I removed the only two litigated cases where there were multiple complainants,<sup>93</sup> as it seemed unfair to add or average the income statistics of the total group against a single respondent.<sup>94</sup> This resulted in a total of 128 qualifying cases.<sup>95</sup> Second, I categorized the year selected for each dispute as the year the dispute was *filed*.<sup>96</sup> 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.<sup>97</sup> Put simply, this study does not take into account any changes in income which may have occurred throughout the dispute.<sup>98</sup>

Third, I selected the following statistics for analysis:

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<sup>89</sup> Galanter, *supra* note 7.

<sup>90</sup> All data come from "World Development Indicators 2007" (run 25 November 2007), online: The World Bank <[http://publications.worldbank.org/ecommerce/catalog/product-detail?product\\_id=6355166&](http://publications.worldbank.org/ecommerce/catalog/product-detail?product_id=6355166&)> [The World Bank]. European Communities were calculated using the European Monetary Union.

<sup>91</sup> See Kopczynski, WTO Study "Complete Data", *supra* note 56.

<sup>92</sup> See discussion *supra* page 13-14.

<sup>93</sup> *Supra* note 85.

<sup>94</sup> See Kopczynski, WTO Study "Complete Data", *supra* note 56. It would have added 11 additional losses to the U.S.

<sup>95</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet "GDP 2 – All Cases" (2007) [unpublished, archived with author] [WTO Study "GDP All Cases"].

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

1. Gross Domestic Product (constant 2000 currency): gross domestic product (GDP) is a measurement of a country's volume of production within its borders.<sup>99</sup>
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).<sup>100</sup>

While GDP and GNP typically do not differ greatly,<sup>101</sup> I chose to include statistics for both so I could check the results against each other. I also included statistics for purchasing power parity (PPP) for both GDP and GNI:<sup>102</sup>

3. GDP, PPP (constant 2000 international currency)<sup>103</sup>
4. GNI, PPP (current international currency)<sup>104</sup>

Purchasing power parity is a measurement of a country's currency in relation to the ability of its citizens to purchase like items.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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

5. GDP per capita (constant 2000 US currency)<sup>108</sup>

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<sup>99</sup> Paul R. Krugman & Maurice Obstfeld, *International Economics: Theory and Policy* 7th ed. (Reading, MA: Pearson Addison Wesley, 2006).

<sup>100</sup> *Ibid.* at 280.

<sup>101</sup> *Ibid.* at 283.

<sup>102</sup> The World Bank, *supra* note 90.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Krugman and Obstfeld, *supra* note 99 at 371-373.

<sup>106</sup> *Ibid.*

<sup>107</sup> The World Bank, *supra* note 90.

<sup>108</sup> *Ibid.*

6. GDP per capita, PPP (constant 2000 international currency)<sup>109</sup>
7. GNI per capita, Atlas method (current US currency)<sup>110</sup>

Per capita statistics often say more in regards to a country's population and wealth distribution policies than about its overall wealth.<sup>111</sup> However, I included these statistics to show the theoretical wealth of an average inhabitant of the country.<sup>112</sup> For variety I included the various measurements of currency: constant U.S. currency, constant international currency from the year 2000, and the current U.S. currency.<sup>113</sup> Calculating all the different variations of these similar statistics further ensures that the results are accurate in describing the income levels of the litigating parties.<sup>114</sup>

Once I gathered the statistics for each country based on the year in which the dispute occurred, I found the average financial data of the winner and compare it to the average financial data of the loser.<sup>115</sup> If the winner had a higher value than the loser, it could be concluded that winning a WTO dispute is correlated with a country's financial data.<sup>116</sup> Here is what I discovered:

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> Krugman and Obstfeld, *supra* note 99 at 371-373.

<sup>112</sup> See Kopczynski, WTO Study "GDP All Cases", *supra* note 95.

<sup>113</sup> The World Bank, *supra* note 90.

<sup>114</sup> See Kopczynski, WTO Study "GDP All Cases", *supra* note 95.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<b>Income Statistics for Average Winners and Losers (128 cases)</b>	<b>Average Winner Statistics</b>	<b>Average Loser Statistics</b>	<b>Difference (+/-)</b>
<b>GDP</b> (constant 2000 USD)	\$3.8 trillion	\$4.8 trillion	-\$1.0 trillion
<b>GNI</b> (current USD)	\$4.0 trillion	\$5.1 trillion	-\$1.1 trillion
<b>PPP (GDP-based)</b> (constant 2000 international \$)	\$4.2 trillion	\$5.2 trillion	-\$1.0 trillion
<b>PPP (GNI-based)</b> (current international \$)	\$4.2 trillion	\$5.3 trillion	-\$1.1 trillion
<b>GDP per capita</b> (constant 2000 USD)	\$18,964	\$21,080	-\$2,117
<b>GNI per capita</b> Atlas method (current USD)	\$19,506	\$21,570	-\$2,064
<b>PPP per capita (GDP-based)</b> (constant 2000 international \$)	\$21,116	\$23,028	-\$1,912

**Figure 4:** *Income Statistics for Average Winners and Losers*<sup>117</sup>

As Figure 4 shows, the average winner has a smaller income than the loser in every category of statistic.<sup>118</sup> The loser's average GDP, GNI and PPP was over one trillion higher than the winner and the per capita results showed the average loser's per capital income is at least one thousand higher than the winner.<sup>119</sup> Taken at face value, these results show that the "haves" do *not* come out ahead in WTO disputes!<sup>120</sup>

## PART V: REMOVING DISTORTIONS

**W**hile 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

<sup>117</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet "GDP 1 – Results" (2007) [unpublished, archived with author] [WTO Study "GDP 1 Results"].

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

possible that the *average* WTO dispute involves economies valued over three trillion dollars?<sup>121</sup> The answer to this has more to do with the WTO members that choose to participate in WTO disputes than the average income level of the WTO members themselves.<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup>

<b>Country</b>	<b>U.S.</b>	<b>EU</b>	<b>Japan</b>	<b>Canada</b>
as Complainant	88	76	12	29
as Respondent	99	59	15	15
as a Third Party	76	91	91	70
<b>Total Cases as a party</b>	<b>263</b>	<b>226</b>	<b>118</b>	<b>114</b>
Total WTO Cases	369			
<b>Percentage of Involvement</b>	<b>71%</b>	<b>61%</b>	<b>32%</b>	<b>31%</b>

**Figure 5:** *Percentage of Involvement in WTO Disputes*<sup>125</sup>

While the U.S. level of involvement as a third party may seem unusual (76 cases), this is relatively “normal” for repeat players.<sup>126</sup> Canada, for example, has participated as a third party in 70 cases, and the EU and Japan have tied for the highest number of third party suits (91 each).<sup>127</sup> Moving on to litigated cases, however, the United States was involved in almost *every* case that went into litigation.<sup>128</sup>

<sup>121</sup> See Kopczynski, WTO Study “GDP 1 Results”, *supra* note 117.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet “Participation Level” (2007) [unpublished, archived with author] [WTO Study “Participation Level”].

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

U.S. as Complainant	29
U.S. as Respondent	50
U.S. as a Third Party	53
<b>Total Litigated Cases with U.S. as party</b>	<b>132</b>
Total Litigated Cases in the WTO	134
<b>Percentage U.S. Involvement in Litigated Cases</b>	<b>98.5%</b>

**Figure 6:** *Percentage of U.S. Involvement in Litigated Cases*<sup>129</sup>

Originally I had hoped to remove the United States from the study to avoid any distortion it caused, but due to its extensive involvement this seemed almost impossible.<sup>130</sup> Nevertheless, I removed all cases in which the United States was a complainant or respondent, and recalculated the differences based on the remaining 54 cases.<sup>131</sup>

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<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet "GDP 3 - U.S. Removed" (2007) [unpublished, archived with author] [WTO Study "GDP U.S. Removed"].

<b>Income Statistics – U.S. Removed (54 cases)</b>	<b>Average Winner Statistics</b>	<b>Average Loser Statistics</b>	<b>Difference (+/-)</b>
<b>GDP</b> (constant 2000 USD)	\$2.1 trillion	\$2.4 trillion	-\$283 billion
<b>GNI</b> (current USD)	\$2.4 trillion	\$2.9 trillion	-\$442 billion
<b>PPP (GDP-based)</b> (constant 2000 international \$)	\$2.7 trillion	\$3.1 trillion	-\$365 billion
<b>PPP (GNI-based)</b> (current international \$)	\$2.7 trillion	\$3.1 trillion	-\$483 billion
<b>GDP per capita</b> (constant 2000 USD)	\$12,901	\$13,526	-\$624
<b>GNI per capita</b> Atlas method (current USD)	\$14,121	\$14,527	-\$406
<b>PPP per capita (GDP-based)</b> (constant 2000 international \$)	\$16,151	\$17,204	-\$1,053

**Figure 7:** *Income Statistics - U.S. Cases Removed*<sup>132</sup>

As Figure 7 shows, the difference between the winners decreases 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.<sup>133</sup> However, the numbers clearly show that the average winner still has lower income levels than the average loser.<sup>134</sup>

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 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.<sup>135</sup> Then I ran a model using only the cases where repeat players were in a

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet “GDP 4 - OS” (2007) [unpublished, archived with author] [WTO Study “GDP OS”].

dispute with other repeat players.<sup>136</sup> Using all five of these models, I found the differences to be the following:

<b>Average Income Statistics of Winners Less Average Income Statistics for Losers</b>	<b>All cases</b> (128 cases)	<b>U.S. Removed</b> (54 cases)	<b>One-Shotters Only</b> (17 cases)	<b>Repeat Players Only</b> (46 cases)
<b>GDP</b> (constant 2000 USD)	-\$1 trillion	-\$283 billion	<b>+\$16 billion</b>	-\$307 billion
<b>GNI</b> (current USD)	-\$1.1 trillion	-\$442 billion	<b>+\$21 billion</b>	-\$345 billion
<b>PPP (GDP-based)</b> (constant 2000 international \$)	-\$10 trillion	-\$365 billion	<b>+\$174 billion</b>	-\$73 billion
<b>PPP (GNI-based)</b> (current international \$)	-\$1.1 trillion	-\$483 billion	<b>+\$149 billion</b>	-\$145 billion
<b>GDP per capita</b> (constant 2000 USD)	-\$2,000	-\$624	-\$434	-\$1,615
<b>GNI per capita</b> Atlas method (current USD)	-\$2,000	-\$406	-\$417	-\$1,441
<b>PPP per capita (GDP-based)</b> (constant 2000 international \$)	-\$1,000	-\$1,053	-\$710	-\$931

**Figure 8:** Average Income Statistics for Winners less Losers<sup>137</sup>

Figure 8 shows the average income statistics for winners minus the average income statistics for losers.<sup>138</sup> 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.<sup>139</sup> When the resulting number is positive, it

<sup>136</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet "GDP 4 – RP" (2007) [unpublished, archived with author] [WTO Study "GDP RP"].

<sup>137</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheets "GDP 1B – Results" (2007) [unpublished, archived with author] [WTO Study "GDP 1B Results"].

<sup>138</sup> *Ibid.*

<sup>139</sup> The phrase "haves coming out ahead" (in quotations), as well other indicated terms refer to Galanter, *supra* note 7.

means the average winner is wealthier compared to the average loser, supporting Galanter's theory.<sup>140</sup>

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.<sup>141</sup> Thus, one could argue that in a world consisting exclusively of one-shotters, the haves do come out ahead.<sup>142</sup> I decline to draw any such conclusion based on this model because the representative sample is comprised of only 17 cases, which is not enough data to derive any predictive value:<sup>143</sup>

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<sup>140</sup> *Ibid.*

<sup>141</sup> See Kopczynski, WTO Study "GDP 1B Results", *supra* note 137.

<sup>142</sup> *Ibid.*; see also Galanter, *supra* note 7.

<sup>143</sup> See *supra* note 135.

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

**Figure 9:** *List of Cases with One-Shotters Only*<sup>144</sup>

There are, of course, volumes of material written about the lack of participation in the WTO by developing countries.<sup>145</sup> While I do not address the subject here,<sup>146</sup> it is noted that the results of this study confirm the observations of many regarding the missing players in WTO

<sup>144</sup> *Ibid.*

<sup>145</sup> See e.g. Chad P. Brown and Bernard M. Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector" (2005) 8 J. Int'l Econ. L. 861.

<sup>146</sup> The author is currently researching those disputes that did not make it to a WTO panel. As this information is not easily ascertainable and requires correspondence with individual countries, it will be published in a later study.

disputes.<sup>147</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 composed of countries with developing economies.<sup>148</sup> Thus, while I can conclude with reasonable confidence that the “haves” do not come out ahead in WTO disputes; I cannot yet validate the corollary argument that the underdogs are necessarily “winning.”

## 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”<sup>149</sup> does not hold true in the realm of WTO disputes.<sup>150</sup> Of course there are always cases where the underdog beats the repeat player,<sup>151</sup> but the purpose of this study was to determine if it is more *common* for the underdog to beat the repeat player.<sup>152</sup> The numbers show that the average income statistics for the winner are higher than the loser.<sup>153</sup> To be sure, 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.<sup>154</sup> Sure enough, it is apparent that in the majority of cases, the “have-nots” come out ahead.<sup>155</sup>

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<sup>147</sup> Kopczynski, WTO Study “GDP All Cases”, *supra* note 95; see also Brown and Hoekman, *supra* note 145.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Supra* note 7.

<sup>150</sup> See discussion *supra* Parts IV-V.

<sup>151</sup> 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. *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (Complaint by New Zealand)* (2003), WTO Doc. WT/DS258/AB/R (Appellate Body Report), online: WTO

<[http://www.wto.org/English/tratop\\_e/dispu\\_e/cases\\_e/ds258\\_e.htm](http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds258_e.htm)>. 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. For an update on the case see *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint by Antigua and Barbuda)* (2005), WTO Doc. WT/DS285/AB/R (Appellate Body Report), online: WTO

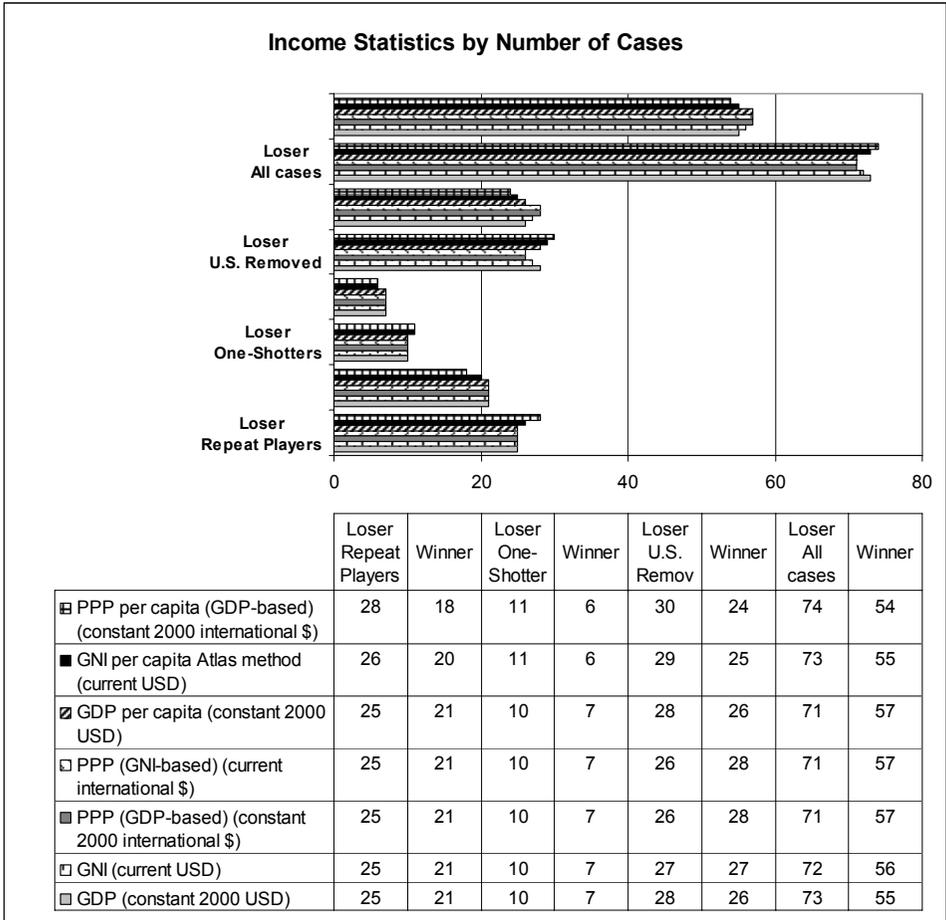
<[http://www.wto.org/English/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds285_e.htm)>.

<sup>152</sup> See discussion above page 5-6.

<sup>153</sup> See discussion above Parts IV-V.

<sup>154</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet “GDP 1C - Results” (2007) [unpublished, archived with author] [WTO Study “GDP 1C Results”].

<sup>155</sup> *Ibid.*



**Figure 10:** *Income Statistics by Number of Cases*<sup>156</sup>

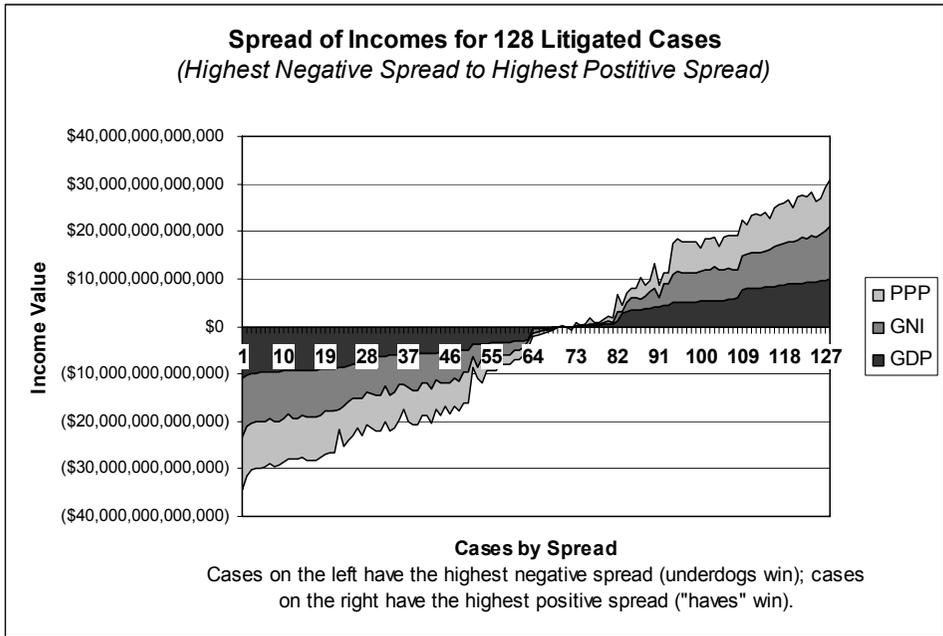
As every model in Figure 10 shows, the winners of WTO disputes have lower income statistics than the losers in the majority of the cases.<sup>157</sup> It does not matter if it is a group of repeat players versus repeat players, one-shotters against one-shotters or a combination of the two: the have-nots on average win more than 50% of the time.<sup>158</sup>

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

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:<sup>159</sup>



**Figure 11:** *Spread of Incomes (Highest Negative Spread to Highest Positive Spread)*<sup>160</sup>

The cases on the far left of Figure 11 are the cases where the winner had much lower income statistics than the loser.<sup>161</sup> The cases on the right are cases where the loser had much higher income statistics than the winner.<sup>162</sup> The cases in the middle are cases where the winner and loser had somewhat similar statistics.<sup>163</sup> 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.<sup>164</sup>

<sup>159</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet "Income by Spread" (2007) [unpublished, archived with author] [WTO Study "Income by Spread"].

<sup>160</sup> *Ibid.*

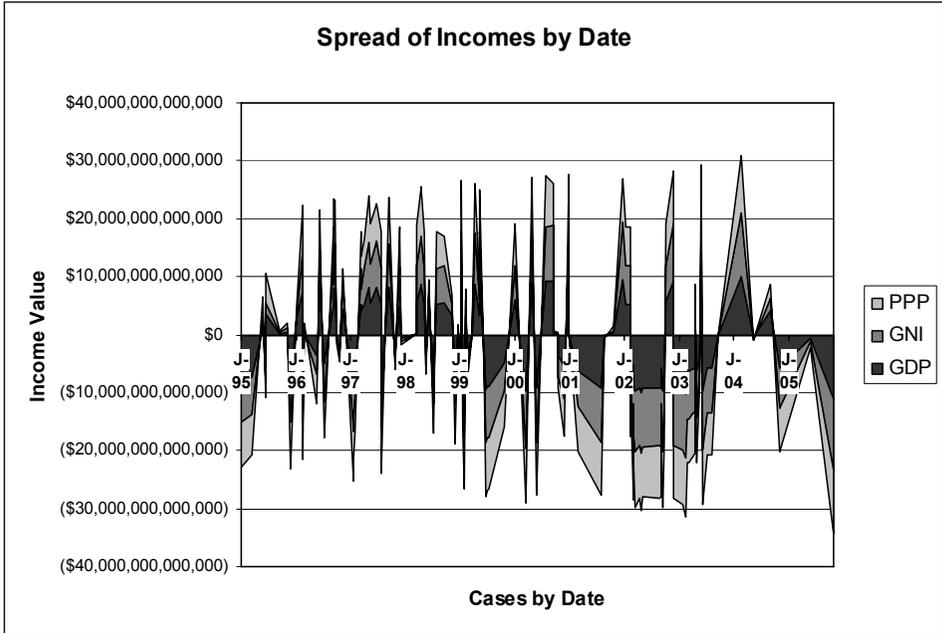
<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

In my final test, I looked at the spread in cases based on time, to see if the overall litigation pattern was changing.<sup>165</sup>



**Figure 12: Spread of Incomes by Date**<sup>166</sup>

As Figure 12 shows, the shape of litigation has evolved slightly over the past 12 years.<sup>167</sup> On the left side of Figure 12, the cases where the winners have lower income statistics appear sparse.<sup>168</sup> 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.<sup>169</sup>

While the data sample of WTO litigation is small, it appears to be consistent.<sup>170</sup> The “have-nots” are certainly gaining advantages from WTO disputes, showing that Galanter’s theory does not hold in this venue.<sup>171</sup>

<sup>165</sup> See Mary Kopczynski, WTO Study 8-7.doc, Sheet “Incomes by Date” (2007) [unpublished, archived with author] [WTO Study “Incomes by Date”].

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> See discussion above Parts IV-VI.

<sup>171</sup> *Ibid.*