1. Disputing at the WTO: Southeast Asian Perspectives

In recent years, trade scholars have drawn attention to the relatively low use by Asian countries of the WTO Dispute Settlement Mechanism (DSM), since it was established in 1995. The existing literature points primarily to the relatively low proportion of WTO disputes initiated by Asian countries, in absolute figures, in order to make this claim. In addition to their participation as complainants, trade scholars have also examined how Asian countries, collectively speaking, have participated in the WTO dispute settlement process in other ways - as respondents and third parties - in the close to 500 trade disputes that have been brought to the WTO DSM thus far.

One limitation (or knowledge gap) is that the discussions on Asian participation in the WTO DSM are heavily focused on three East Asian countries that dominate the region economically (particularly China and Japan and South Korea) and to a lesser extent, on India. In the context of these countries, which are the biggest trade actors in the region, international trade scholars have examined domestic perspectives towards

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1 See Michael Ewing-Chow, Alex W.S. Goh & Akshay Kolse Patil, Are Asian WTO Members Using the WTO DSU ‘Effectively’?, J Int Economic Law (2013) 16 (3):669-705. Asian countries’ ‘reluctance’ to use the WTO DSM was also briefly mentioned by Lo Chang-Fa during his presentation at the ‘Establishing International Judicial Authority in Trade Law’ conference (organized by the Centre of Excellence for International Courts in Copenhagen, 12th December 2013).

2 As of 30 December 2014, 486 disputes have been brought to the WTO DSM. The disputing parties are required to hold consultations within a fixed time period, as prescribed in the Dispute Settlement Understanding (DSU) of the WTO. If the disputing parties are unable to reach an informal settlement, the complainant is able to request for a panel to be composed. Once composed and appointed, the panel is obliged to reach a decision within the timelines articulated in the DSU.

both initiating and defending trade disputes at the WTO. There is a dearth of literature that examines and seeks explanations for how Southeast Asian countries in particular have used the WTO DSM, relative to the rest of the world. The purpose of this article is, therefore, to describe and explain Southeast Asian countries’ use of the WTO DSM.

Another limitation of the existing studies is that looking at absolute figures on the number of disputes initiated at the WTO does not fairly reflect countries’ participation in the WTO DSM, given the disparities in export revenue and years of WTO membership. Therefore, when describing Southeast Asian countries’ behaviour in the WTO DSM in the subsequent section, the number of disputes brought by each WTO member will be corrected for two directly quantifiable factors, namely: i) the number of years of WTO membership and ii) each country’s total export revenues, in the years during which it was a WTO member. While it is not the aim of this article to correct for all the major factors that are likely to impact countries’ use of the WTO DSM, this simple adjusted comparison is meant to provide a more accurate foundation for the analysis that follows.

2. Discussion of Southeast Asian Countries’ Use of the WTO DSM (1995-2014)

This section will discuss, empirically, Southeast Asian countries’ participation in the WTO DSM. Subsequent sections will explain these observations in light of the patterns uncovered and the existing literature on WTO members’ use of the DSM. Southeast Asian countries are highly dependent on international trade and are currently taking steps towards greater regional (i.e. ASEAN) economic integration. With greater trade, one might expect the frequency of trade-related disputes to rise. Southeast Asian countries have also been strong supporters of the WTO DSM and all ten of them are members. Their recognition of the value of formal inter-state adjudicatory mechanisms, in instances when informal diplomatic negotiations fail to resolve a disagreement, led to the establishment of the Enhanced ASEAN Dispute Settlement Mechanism (DSM) in 2005 and its predecessor, the ASEAN DSM, in 1995. The fact that this enhanced ASEAN regional DSM was heavily modelled after the WTO DSM indicates general acceptance by Southeast Asian countries of the latter model. It also suggests that these countries envisioned adjudication - as it exists both in the WTO DSM and ASEAN DSM - to be a viable and necessary option for inter-state disputes to be settled peacefully. Moreover, the fact that Southeast Asian states established a WTO-inspired DSM requiring states to relinquish control to a third party decision-maker, based on a system of legal obligations, represents a sharp departure from the long-established ASEAN norm of decision through consensus and cooperation.

Despite this, Southeast Asian countries, collectively speaking, seem to have used the WTO DSM rather infrequently to address trade barriers. This finding is puzzling for a region that is highly dependent on international trade. Only 29 of the 486 unique dispute settlement cases at the WTO DSM thus far (under 6%
of all disputes\(^7\) were initiated by the ten Southeast Asian countries, all of which are members of the World Trade Organization (WTO) and the ASEAN regional group. Within the region, Thailand, Indonesia and the Philippines have been the most active participants, having brought 13, 9 and 5 bilateral trade disputes to the WTO DSM respectively. Vietnam, which joined the WTO in 2007, is the next most frequent user, having initiated two disputes in total. Both Malaysia and Singapore were early users of the WTO DSM, having brought one dispute each in 1995, when the DSM was first operational. However, both of these countries have not referred any other disputes to the WTO DSM subsequently and appear to be ‘one-shotters’, or one-off users. Lastly, the remaining Southeast Asian countries, namely Cambodia, Laos, Myanmar and Brunei, have never brought a trade dispute to the WTO. Collectively, these ten countries have been complainants in 31 bilateral disputes, or 29 out of the 486 unique disputes that have been referred to the WTO DSM. To date, every inter-state trade dispute that a Southeast Asian country has decided to take to a rules-based tribunal has been brought to the WTO DSM\(^8\), and the ten Southeast Asian countries have not resorted to any other formal adjudicative mechanisms to resolve inter-state trade disputes.

By way of comparison, South American countries\(^9\), which actively use regional economic courts to resolve intra-regional trade disputes, have referred 68 disputes\(^10\) to the WTO DSM in the same time period. The relatively low collective utilization of formal inter-state adjudicative infrastructure by a region that is highly dependent on international trade has led trade scholars to question whether Asian countries - including those in Southeast Asia – are using the WTO DSM ‘effectively’\(^11\).

To re-frame this puzzle more accurately, it is necessary to examine, firstly, which Southeast Asian countries have brought disputes to the WTO DSM. When adjusted for years of WTO membership and the size of national exports, does a different picture emerge of Southeast Asian countries' complainant behaviour in the WTO DSM? Additionally, in the instances where Southeast Asian countries have initiated WTO disputes, which trading partners did they bring challenges against?

In the following discussion, the absolute number of disputes brought by each WTO member has been corrected for two factors, namely: i) the number of years of WTO membership\(^12\) and ii) each country’s total export revenues, in the years during which it was a WTO member. While this correction only takes these two parameters into account, it is intended to eliminate two of the major factors that make comparison of WTO

\(^7\) While 29 distinct WTO disputes have been initiated by Southeast Asian countries, in two of these disputes (DS58 and DS217), two different Southeast Asian countries each were involved as complainants. When there is more than one complainant in a single WTO dispute, each complainant-respondent pair should be counted separately, in order to account for each unique pair of countries engaged in the specific dispute. Hence, in this case, the 29 WTO cases initiated by these countries can be broken down to 31 bilateral disputing pairs (dyads), i.e. there have been 31 individual instances where a Southeast Asian country decided to act as complainant in a dispute. Similar methodology has been consistently used in the literature - see for example Guzman & Simmons (2000), Ewing-Chow, Goh & Patil (2013).

\(^8\) This includes its predecessor, the GATT dispute resolution mechanism.

\(^9\) The following countries are included in the South America regional grouping: Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela (Bolivarian Republic of).

\(^10\) As there were multiple South American complainants in some of these WTO disputes, this figure actually slightly underrepresents the number of instances where a South American country has been a complainant in a WTO dispute. If we separate these instances into bilateral disputing pairs, the total number of bilateral disputing dyads is 71. This figure, however, excludes the high number of regional economic disputes that have been brought by South American countries against each other in regional economic courts. See Laura Gomez-Mera & Andrea Molinari, Overlapping Institutions, Learning, and Dispute Initiation in Regional Trade Agreements: Evidence from South America, *International Studies Quarterly* (2014) 58, 269–281.


\(^12\) Further details on the methodology used to generate Table 1 will be included later in the Appendix.
DSM activity challenging. The first correction ensures that countries that joined the WTO recently (e.g. Vietnam, in 2007) are not automatically ranked against most other WTO members that have been able to bring cases since the WTO came into being in 1995. The second correction is meant to take into account that WTO members that have vastly higher export revenues are more likely to bring disputes on the basis of high trading stakes alone. Conversely, if countries are very active in initiating disputes despite not having very high export revenues, this will be reflected in terms of a higher rating in their dispute initiation behaviour.

Table 1 summarizes how different regions are ranked, when it comes to their adjusted dispute initiation rates. Here, countries have been classified into regions based on the UN country classification system13. The first column in Table 14 (‘Zero’) states the proportion of countries in each given region that has not brought a dispute to the WTO. In Africa, for instance, approximately 0.95 (i.e. 95%) of countries have never brought a dispute to the WTO DSM. A third of countries in Southeast Asia (three out of 10 countries, or 33%) have never filed a single dispute at the WTO. This proportion is similar to that of other regions, such as Non-EU Europe, South America, East Asia and South Asia, as shown in Table 1. In contrast, in Africa, West Asia (i.e. Middle East), Oceania and Central Asia, countries that participate are ‘outliers' rather than the norm. The fact that most Southeast Asian countries have brought disputes to the WTO DSM indicates that most Southeast Asian countries are not completely averse or unable to bring a complaint against another country to the WTO DSM.

Table 1 – Proportion of countries (in percentages) by region that have brought disputes to the WTO DSM and frequency of use15

<table>
<thead>
<tr>
<th>Region</th>
<th>'Zero': Countries that have never brought a dispute to the WTO DSM (as % of total)</th>
<th>Quartile 1 (% that are the least frequent complainants, out of the countries that have brought a case)</th>
<th>Quartile 2 (%)</th>
<th>Quartile 3 (%)</th>
<th>Quartile 4 (% of countries that are in the top quartile of complainants, out of the countries that have brought a case)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>95</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Caribbean</td>
<td>67</td>
<td>0</td>
<td>8</td>
<td>17</td>
<td>8</td>
</tr>
<tr>
<td>Oceania</td>
<td>75</td>
<td>0</td>
<td>12</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Non-EU Europe</td>
<td>38</td>
<td>0</td>
<td>25</td>
<td>25</td>
<td>12</td>
</tr>
<tr>
<td>Central America</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>12</td>
<td>75</td>
</tr>
<tr>
<td>Northern America</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>100</td>
<td>0</td>
</tr>
</tbody>
</table>

13 The UN country classification is accessible at [http://unstats.un.org/unsd/methods/m49/m49regin.htm](http://unstats.un.org/unsd/methods/m49/m49regin.htm) (date accessed: 27 December 2014). The EU is excluded in Table 1, as member countries function collectively as a single member in the WTO. Thus, all (i.e. 100%) member countries have participated and fall under the highest user quartile (Quartile 4).

15 Note: all values in Table 1 have been rounded to the nearest whole number.
The four right-most columns in Table 1 contain information regarding the proportion of countries in each region that have brought at least one dispute to the WTO DSM\textsuperscript{16}. All WTO members that have initiated at least one dispute have been sorted into four equally-sized quartiles, ranging from the 25% most active (Quartile 4) to the 25% least active (Quartile 1). Therefore, the figures in the four right-most columns in Table 1 state the proportion of countries in each region whose adjusted WTO dispute initiation behaviour falls within each of the stated quartiles. The regions with the highest proportion of high-intensity (Quartile 4) users are Central America, South America and South Asia, followed by non-EU Europe and Oceania. It is significant to note that while four out of ten Southeast Asian countries have never brought a dispute to the WTO, three out of ten (30\%) are in the next most active category of users (Quartile 3). Moreover, based on these adjusted values, Southeast Asian countries are on average slightly more litigious than East Asian countries, as no East Asian countries fall in the top two quartiles.

Based on the adjusted litigation frequency rankings across different regions, the general claim that has been consistently made in earlier literature - that Asian countries on the whole do not actively use the WTO DSM – seems to hold, albeit with some refinements. In East Asia, participation is generally relatively low across the whole region, after controlling for the value exports and number of years of WTO membership. In Southeast Asia and South Asia on the other hand, it is more accurate to note that some countries are actually relatively frequent users, by global standards (e.g. Thailand, Indonesia and India) while others are either one-time users (e.g. Singapore, Malaysia, Bangladesh, Sri Lanka) or completely inactive (e.g. Cambodia, Laos, Brunei and Myanmar).

A greater and more significant puzzle emerges when looking at which specific trading partners Southeast Asian WTO members have initiated disputes against, at the WTO DSM. Table 2 provides a summary of the trading partners that Southeast Asian countries have challenged, through the WTO DSM. The vast majority of these disputes (i.e. 26\textsuperscript{17} out of the 31 bilateral disputes\textsuperscript{18}, or 83.9\%) have been directed against non-Asian respondents. Furthermore, 18 out of these 31 disputes were targeted at three developed 'Western' WTO members\textsuperscript{19} alone.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|}
\hline
Region & 1 & 2 & 3 & 4 & \% \tabularnewline
\hline
South America & 33 & 0 & 8 & 8 & 50 \tabularnewline
Central Asia & 100 & 0 & 0 & 0 & 0 \tabularnewline
East Asia & 33 & 17 & 50 & 0 & 0 \tabularnewline
Southeast Asia & 40 & 10 & 20 & 30 & 0 \tabularnewline
 & (Brunei, Cambodia, Laos, Myanmar) & (Singapore) & (Malaysia, Vietnam) & (Indonesia, the Philippines, Thailand) & \tabularnewline
South Asia & 33 & 0 & 0 & 50 & 17 \tabularnewline
West Asia & 83 & 0 & 8 & 8 & 0 \tabularnewline
\hline
\end{tabular}
\caption{Summary of countries that have brought at least one dispute to the WTO DSM.}
\end{table}

\textsuperscript{16} Here, there is no overlap with the countries that have been counted under the first column.
\textsuperscript{17} This figure rises to 27 if we include Turkey as a non-Asian country. Under the UN system of country classification, which has been adhered to throughout this article, Turkey is included as part of the ‘West Asia’ regional grouping.
\textsuperscript{18} Here, I am counting bilateral dyads, following the convention in the literature on WTO DSM participation (see supra note 10).
\textsuperscript{19} Nine disputes have been brought by Southeast Asian countries against the US, six against the EU and three against Australia (www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. Date accessed: 27 December 2014)
Table 2: Number of WTO disputes brought by Southeast Asian countries, by respondent

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Indonesia</th>
<th>Malaysia</th>
<th>Philippines</th>
<th>Singapore</th>
<th>Thailand</th>
<th>Vietnam</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Australia</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Brazil</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Colombia</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Egypt</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>European Union (formerly EC)</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Hungary</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>South Korea</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Malaysia</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>South Africa</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Thailand</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Turkey</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>United States</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total no. of disputes filed</strong></td>
<td><strong>9</strong></td>
<td><strong>1</strong></td>
<td><strong>5</strong></td>
<td><strong>1</strong></td>
<td><strong>13</strong></td>
<td><strong>2</strong></td>
</tr>
</tbody>
</table>

Even though a significant proportion of Southeast Asian countries’ exports go to other Southeast Asian countries, these countries have only initiated two disputes against each other at the WTO DSM. The first case was brought by Singapore against Malaysia in 1995 and was the very first dispute to be brought to the WTO DSM. The second and only other intra-ASEAN dispute to be referred to the WTO DSM was brought by the Philippines against Thailand, in 2008. Looking at Asia beyond ASEAN, only two disputes in total have ever been filed against all other Asian countries (this number rises to three if you include Turkey as an Asian country). This tendency to resort to the WTO DSM mainly when non-Asian respondents are concerned is best observed in the track record of Thailand, which the most active WTO DSM complainant among the ASEAN countries. Of the 13 trade disputes it has brought to the WTO DSM in the last two decades, not one was against an Asian trading partner.

In contrast, as shown in Table 3, a significantly higher proportion of disputes brought by countries in South America, North America and Central America are against countries that are part of the same region. In contrast, countries in all the Asian regions - East Asia, Southeast Asia, South Asia and West Asia rarely, if ever, bring disputes against trading partners in the same region. Moreover, in most of the other regions - the Caribbean, the European Union (EU), Central America, South America and North America - there are active regional economic courts which offer alternative fora to the WTO DSM, for resolving trade disagreements. While Southeast Asian countries established a regional dispute settlement mechanism - the ASEAN Dispute

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20 DS1- Malaysia — Prohibition of Imports of Polyethylene and Polypropylene.
21 DS371- Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines.
22 If we include Turkey as an Asian country, as suggested in the UN Regional Classification system, the number of disputes brought by Thailand against other Asian countries rises to one. Thailand brought a dispute against Turkey in 1996 (DS47- Turkey - Quantitative Import Restrictions on imports of textile and clothing products).
Settlement Mechanism - in 1995, and made amendments to it in 2005, it has never been used by Southeast Asian countries. Given that there is no active tribunal besides the WTO DSM that has jurisdiction over trade disagreements arising between Asian countries, the differences across regions in Table 3 is likely to be significantly understated. Therefore, the fact that Asian countries have a much lower likelihood of bringing disputes against their regional neighbours at the WTO DSM cannot, unlike in other regions, be attributed to the presence of regional economic courts that have jurisdiction over intra-regional trade disputes.

Table 3: Proportion of intra-regional disputes out of total WTO disputes filed by members of each regional group

<table>
<thead>
<tr>
<th>Regional Group</th>
<th>Intra-regional Disputes as Percentage of Total Disputes Filed at the WTO DSM (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caribbean</td>
<td>0.00</td>
</tr>
<tr>
<td>West Asia</td>
<td>0.00</td>
</tr>
<tr>
<td>South Asia</td>
<td>3.70</td>
</tr>
<tr>
<td>Oceania</td>
<td>6.25</td>
</tr>
<tr>
<td>Southeast Asia</td>
<td>6.45</td>
</tr>
<tr>
<td>East Asia</td>
<td>7.41</td>
</tr>
<tr>
<td>Non-EU Europe &amp; EU</td>
<td>9.35</td>
</tr>
<tr>
<td>Central America</td>
<td>12.96</td>
</tr>
<tr>
<td>North America</td>
<td>13.51</td>
</tr>
<tr>
<td>South America</td>
<td>26.76</td>
</tr>
</tbody>
</table>

In addition, while either China or Japan (and in some instances, both) is consistently ranked within the top five export destinations for eight out of nine countries in Southeast Asia, the latter have never initiated a trade dispute against these two major Asian trading partners. India is another large trading partner against which a dispute has never been initiated. Since these three regional giants have been frequently targeted in complaints raised at the WTO level by other countries, it is highly unlikely that the complete absence of cases being brought for adjudication by Southeast Asian countries against China, Japan and India is because of the virtuousness of these countries' trade policy. It is thus highly puzzling that Southeast Asian countries seem to use the WTO DSM primarily against Western developed countries and very seldom against other Asian countries. This puzzle in particular has not been explored and adequately explained in the literature.

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23 Some reason offered by high-ranking Southeast Asian government officials during interviews for the lack of disputes brought to the ASEAN DSM are as follows: i) a low degree of confidence in the ASEAN DSM's institutional capability, due to the very limited resources invested in the ASEAN DSM Secretariat, i) a high degree of ambiguity and uncertainty regarding the procedural and substantive aspects of the ASEAN DSM, and iii) low faith in the impartiality of judges, since unlike in the case of the WTO panel process, disputing countries in the ASEAN DSM would have to bring their case before other ASEAN nationals (in contrast to having the option to select true 'third parties'). Moreover, many disputes are resolved through informal procedures in ASEAN (in-person interviews on 9 May 2014, 13 June 2014 and 9 Dec 2014).

24 Examples include the Court of Justice of the European Union (CJEU), the Caribbean Court of Justice (CCJ), Economic Community of West African States (ECOWAS) and Mercado Común del Sur (MERCOSUR). Erik Voeten notes that unlike in Asia, active regional (supranational) courts in Europe, Latin America, and Africa have issued thousands of legally-binding judgments, http://aric.adb.org/pdf/workingpaper/WP65_Voeten_Regional_Judicial_Institutions.pdf (visited on 27 December 2014).

25 Here, the UN Regional Classification system has been used. Therefore ‘Europe’ encompasses both the countries that are EU members and those that are not.

26 Laos is omitted here, as detailed data on exports by receiving destination is not available.
This article therefore seeks to explain the dispute initiation behaviour of Southeast Asian countries at the WTO, with regard to the two observations listed below. This will be done in light of relevant i) empirical data on WTO disputes, ii) secondary literature and iii) data from interviews conducted personally by the author with high-ranking government officials from selected Southeast Asian countries.

- **Observation 1**: Aside from differences in resource capacity and trading stakes, why have some Southeast Asian countries been active in resorting to the WTO DSM, while others have not?

- **Observation 2**: Most WTO disputes initiated by Southeast Asian countries since 1995 have been brought against non-Asian countries (26 out of 31). Only the remaining five disputes were brought against Asian countries (including Turkey) out of which two disputes have been initiated against other Southeast Asian countries. Why do Southeast Asian countries bring other Asian countries in particular to the WTO DSM so infrequently?

### 3. Potential explanations for the observed behaviour in the existing literature

The WTO DSM allows members that believe they are facing WTO-inconsistent trade barriers to seek recourse against their non-compliant trading partners, based on pre-agreed legal commitments. As each dispute is reduced into primarily technical issues that are to be decided based on objective considerations, other factors that would have a significant determinative impact - such as power asymmetries between disputing countries - do not matter as much as they would if the disputing parties were to reach a negotiated settlement instead. Additionally, when the decision is left in the hands of competent third parties that are viewed as legitimate (WTO panellists and Appellate Body members), this also potentially minimizes the damage to wider bilateral relations, as the decision is in the hands of neither the Complainant nor Respondent. While full compliance is not always achieved, disputing parties are expected to accept the recommendations contained in unreversed Panel reports as well as Appellate Body reports, and retaliation may be authorized against losing Respondent countries that do not comply.

There is a body of existing literature that discusses factors that promote or discourage WTO DSM participation. Most of this research is quantitatively-driven, and some of it also takes into consideration cases that were brought under the dispute settlement system that existed under the GATT, which preceded the WTO. This research identifies factors that generally influence the propensity of WTO members to initiate disputes and might offer potential explanations to the puzzles that have been identified with regard to how Southeast Asian countries have used the WTO DSM.

Much of the recent literature on participation in the WTO DSM is focused on developing countries in the WTO, as most of the 'least developed' WTO members have never brought a single dispute, possibly due to resource constraints. These include the expert capacity to investigate suspected trade barriers, conduct relevant economic analysis and put forth their case, in a highly legalized and technical system. WTO disputes have mainly been brought by developed as well as rapidly industrializing developing countries. Nevertheless, a few low-income developing countries have successfully challenged more powerful and

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27 In-person interviews were conducted by the author on 8 May 2014, 13 June 2014 and 8-9 December 2014 with officials from the Ministry of Trade and/or the Ministry of Foreign Affairs, in the following countries: Singapore, Malaysia, Indonesia and Thailand (*Note to reader: fieldwork is still in progress*).
experienced trading partners at the WTO. Aside from the general literature on developing country participation in the WTO DSM, the country-specific literature is centred on selected developing countries that have invested heavily in building up WTO-related legal capacity and are now active participants, such as Argentina, Brazil, Chile, China, India and Thailand. Additionally, as mentioned earlier, there is some relevant literature that examines Asian countries collectively.

The existing literature offers five main categories of explanations, listed below, that might be useful in explaining Southeast Asian countries’ dispute initiation behaviour in the first two decades of the WTO. The first two explanations are largely connected to either the economics of bringing a dispute to the WTO, or the economics of international trade. The fourth and fifth explanations relate to domestic conditions, with a particular focus on private and public sector actors respectively. While these four explanations generally apply to many developing countries, the third explanation – that of a cultural aversion towards litigation - has been put forth in the literature to specifically explain Asian countries' participation in the WTO DSM.

Explanations 1, 2 and 3 will be dealt with briefly in Sections 3.1 to 3.3, before the discussion turns towards explanations 4 and 5. I argue that the latter explanations allow for a more nuanced understanding of how selected Southeast Asian countries have used the WTO DSM.

- i) resource and capacity constraints
- ii) low trading stakes
- iii) cultural/normative preference for non-litigation
- iv) low participation of the private sector and civil society
- v) low democratic constraints on bureaucratic authority

### 3.1 Resource and capacity constraints

There are two potential ways to view the relationship between Southeast Asian WTO members' legal capacity and their dispute initiation behaviour at the WTO. The first scenario is that government officials view the WTO DSM as a useful system for protecting their interests, but cannot participate in it as frequently as they would like, due to constraints in legal capacity and other resources. The second scenario is that it is precisely because high level officials do not see the WTO DSM as a vital tool for protecting national trade interests that building WTO disputing capacity is deprioritized. In other words, in the latter view, it is this deprioritisation that causes legal capacity (and therefore dispute initiation) to remain low. Rather than being an exogenous factor that is outside the control of governments, it can be argued instead that a WTO Member's domestic legal capacity generally is a reflection of the government's priorities and cost-benefit calculations with regard to the WTO DSM.

Firstly, low participation might be due to resource capacity constraints. Insufficient financial and trained human resource capacity in the public and private sectors is commonly cited as a factor that prevents countries from being able to participate and move from one stage to the next in the WTO extended litigation process. As legal capacity increases, a country is more likely to be able to protect its trade interests through

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29 See supra note 3.

30 Capacity constraints- Chad Bown refers to the ‘extended litigation process’ as encompassing the following 3(or 4??) distinct phases: i) pre-litigation/monitoring, economic and legal analysis, negotiations, litigation phase which involves substantive knowledge of WTO law and procedural knowledge of the WTO DSM process.
Along with legal expertise, analytical expertise, which is required to investigate the extent and impact of suspected trade barriers, might also be insufficient. While countries with insufficient domestic legal capacity have the option to engage experienced international trade lawyers, the cost of engaging these services can be prohibitive, particularly for poorer developing countries. When a developing country engages highly subsidized legal services, such as those provided by the Geneva-based Advisory Centre on WTO Law (ACWL), the estimated cost of legal representation at the WTO can amount to a few hundred thousand dollars.\(^{32}\)

The level of legal capacity that governments possess is likely to vary over time depending on national priorities and budgets, rather than remaining stagnant. Moreover, while there might be many trade and/or legal experts in a country’s trade ministry, capacity constraints can nevertheless arise, due to the demands imposed by other resource-intensive and high-priority commitments, such as FTA negotiations. Investments and capacity-building generally occur when a government views the WTO DSM as being highly relevant for the protection of domestic trade interests. Developing countries that rapidly acquired WTO-specific legal capacity and institutional expertise (e.g. China, Brazil and Thailand) made these investments deliberately, so as to be able to defend their trade interests. It might be the case that certain governments in Southeast Asia simply do not see a strong need to increase WTO disputing capacity, because they do not view the WTO DSM as necessary for defending their trade and overall national interests (e.g. Brunei\(^{33}\)), or do not expect to be directly involved in any WTO disputes in the foreseeable future (e.g. Malaysia and Singapore\(^{34}\)). It is due to the latter belief that Malaysia, unlike many other developing countries, has not opted for ACWL membership, which would allow it to utilize highly subsidized legal services.\(^{35}\)

Looking at various measures of participation in the WTO DSM of the other Southeast Asian countries, it does not seem likely that legal capacity has been the main 'limiting' or constraining factor in dispute initiation, at least in the context of the ASEAN-5\(^ {36}\) countries. This is supported by the observation by Sally (2004) that the ASEAN-5 countries 'are among a score of developing countries with reasonably well-staffed missions in Geneva, who take an active part in WTO committees and working groups, are actively involved in formal and informal coalitions on particular issues, and have initiated anti-dumping actions and dispute settlement complaints', the latter of which are 'complex tasks'. The ASEAN-5 countries started initiating dispute proceedings very soon after the WTO DSM came into being, from as early as 1995 (Singapore and Thailand), 1996 (the Philippines and Malaysia) and 1998 (Indonesia) respectively. These cases were all brought even though subsidized legal services, such as those currently provided for developing countries by the ACWL, were not available at the time.

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\(^{32}\) Advisory Centre on WTO Law, ‘Fees: The ACWL charges modest fees for dispute settlement support’, [http://www.acwl.ch/e/disputes/Fees.html](http://www.acwl.ch/e/disputes/Fees.html) (visited on 27 December 2014).

\(^{33}\) The WTO DSM is likely to be of little relevance to Brunei, as it is primarily an oil-exporting economy, with negligible non-oil exports.

\(^{34}\) Based on in-person interviews with two high-ranking and experienced trade ministry officials representing Malaysia (13 June 2014) and Singapore (9 May 2014).

\(^{35}\) *Ibid.*

\(^{36}\) ASEAN-5 refers to the five founding members of ASEAN, namely, Indonesia, Malaysia, the Philippines, Singapore and Thailand.
Many of the initial disputes brought by Thailand, Indonesia and Malaysia were brought with other, more experienced co-complainants. In addition, in the other early disputes that Indonesia and Thailand initiated individually, both countries are likely to have been inspired to file these disputes because more experienced users of the WTO DSM had earlier filed disputes concerning the same products, measures and respondent countries. Hence, their participation as complainants in the early days of the WTO DSM was marked by a preference for jumping onto the ‘bandwagon’ rather than challenging a trading partner single-handedly. However, after gaining expertise in the initial years of WTO membership, Thailand and Indonesia started to bring disputes against major trading partners, such as the EU and US, on their own. This trend of going at it alone has persisted. Commenting more generally on Southeast Asian countries in the WTO system, Sally (2004) notes that ‘ASEAN countries individually feel better able to defend and advance (increasingly differentiated) national positions on their own. The imperative for fledglings to flock together... seems to be a thing of the past’.

Additionally, many ASEAN-5 nationals have been selected by disputing countries to serve as panellists in the WTO DSM, particularly from Singapore, the Philippines and Thailand. A basic search of these Southeast Asian panellists’ career profiles indicates that many of these experts work in government administration in their respective countries. It is therefore likely that these experts are available to assist their governments, in the event where there is bilateral disagreement regarding market access conditions. Interestingly, while Singapore and Malaysia have produced many internationally-recognized experts who have served as WTO DSM panellists, it is these two countries in the ASEAN-5 that appear to be the most restrained when it comes to initiating disputes at the WTO. In fact, both of these countries have had very limited experience in single-handedly defending their interests in the WTO DSM. While Singapore has initiated one dispute, this was settled during the consultation stage, and in the single dispute that was initiated by Malaysia against the US, there were many experienced co-complainants. Therefore, despite possessing sufficient legal capacity, both Singapore and Malaysia have never brought and litigated a dispute against a trading partner completely on their own. In the context of these two countries in particular, the capacity-based argument therefore does not seem valid.

Turning to the five Southeast Asian countries that have not produced a single WTO panellist (i.e. Vietnam, Brunei, Laos, Myanmar and Cambodia), it is more reasonable to assume that these countries, rather than the ASEAN-5 countries, might have been hindered from participating in WTO DSM due to legal capacity constraints. With the exception of Vietnam, which has initiated two disputes, the other four countries have not shown any signs of participation in the WTO DSM. While Vietnam only joined the WTO in 2007, it initiated two disputes against the US within its fifth year of WTO membership. Moreover, in both instances, it defended its interests without ACWL’s assistance and through the panel litigation process, rather than settling earlier. This suggests that developing countries that view the WTO DSM as important to their interests have been able to quickly bring disputes to the WTO, using domestic or international private law firms, or the highly subsidized legal services of the ACWL.

Razeen Sally, 'Southeast Asia in the WTO', No.5, Southeast Asia Background Series (Singapore, Institute of Southeast Asian Studies, 2004), pp.13

A table with Southeast Asian nationals who have participated as panellists in WTO disputes as well as those who are on the indicative list of panellists is included in the Appendix, as Table I.

37 DS1 - Malaysia- Import prohibition on polyethylene and polypropylene (prohibition on imports)
38 DS58- US- Import prohibition of certain shrimp and shrimp products. In this dispute, there were multiple co-complainants (Australia, the EU, Hong Kong, India, Japan, Pakistan and Thailand), some of which were more experienced in using the WTO DSM at the time.
39 DS1- Malaysia.
40 DS404 - US-Antidumping measures on certain shrimp from Viet Nam
Therefore, the capacity-based explanation does not seem convincing in the context of the ASEAN-5 countries. On the other hand, when looking at the remaining five Southeast Asian countries in particular, it cannot be conclusively ruled out that legal capacity constraints have not prevented them from bringing disputes to the WTO DSM. Lastly, even if capacity constraints have indeed resulted in an under-filing of disputes by Southeast Asian countries, this explanation does not offer insight regarding the selection of respondents against which Southeast Asian countries have chosen to bring disputes against.

3.2 Low Trading Stakes

The second reason that has been offered to explain the low rate of WTO dispute initiation by certain countries is that these countries might have lower stakes in international trade, of which export revenue is one proxy measure. If this is the case, one might expect that there are fewer domestic interests that are significant enough for these countries to defend at the WTO, and that there are fewer chances of them encountering and being significantly affected by trade barriers. Therefore, if the conditions are as described with regard to a given WTO member, these explanations suggest that the likelihood of it defending its trade interests at the WTO DSM will be low. This section examines whether the trading stakes hypothesis offers convincing explanations for the dispute initiation behaviour of Southeast Asian countries.

According to the ‘trading stakes’ hypothesis, WTO members' aggregate import and export values should be a good predictor of their dispute initiation behaviour in the WTO DSM. Countries with higher export values should be more likely to encounter WTO-inconsistent trade barriers and hence more likely to initiate disputes at the WTO. In the same vein, larger export destinations should be more frequently targeted as respondents, because the anticipated economic cost to an exporting country of not confronting a larger export market is higher. By extending this hypothesis, the large disparity observed between the number of disputes brought by Southeast Asian countries against Asian trading partners and those brought against the rest of the world might perhaps be explained by looking at import and export flows. If it is the case that very low proportions of Southeast Asian exports, by value, are sent to trading partners in Asia, this might provide a straightforward explanation for why Southeast Asian countries bring so few disputes against Asian countries.

Having examined data on absolute trade flows (imports and exports) between all WTO members, the observed patterns of dispute initiation do not reflect what the trading stakes hypothesis would suggest. In fact, this empirical data suggests a very different pattern of dispute initiation, compared to what is observed. From 1995 to 2013, 70.9% of Southeast Asia’s exports went to Asian countries (i.e. East, West, Southeast and Central Asia). Yet, only 5 out of 31 disputes (16.1%) of the WTO disputes initiated by Southeast Asian countries were directed against an Asian trading partner (see Table III in Appendix).

It has been suggested, in support of the trading stakes hypothesis, that the low proportion of cases involving both Asian complainants and respondents might be explained by the fact that a high share of trade in Asia is associated with trade in supply chains, rather than finished goods. The reasoning goes that in supply chain trade networks, the economic interest of exporting and importing countries are more aligned, relative to trade in finished products for direct consumption. There are two flaws in this argument with regard to Asia.

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44 This figure has been manually compiled by the author. The relevant data is summarized in Table II (Appendix).
Firstly, many trade disagreements between Asian countries concern not just finished goods, but also raw materials and supply chain trading of intermediate goods. One recent example is the Indonesian export ban on certain raw mineral ores, implemented in January 2014 so that more those raw minerals could be processed domestically, to create jobs and move Indonesian exports up in the value chain. The second flaw in the argument is that the amount of trade in consumer goods within Asia has surged, due to growing middle classes in Southeast Asia and East Asia. Yet, WTO dispute initiation against other Asian countries has actually fallen over time.

Moreover, Bown and Reynolds (2014) observe, with regard to the trading stakes hypothesis, that the absolute economic value of a given dispute is an unreliable determinant of the probability of litigation, given that 14% of disputes at the WTO DSM involve products with bilateral trade-flows of less than US$1 million annually. An example of a dispute that was brought to the WTO over a relatively low trading stake is South Africa - Anti-Dumping Measures on Uncoated Woodfree Paper (DS374). Here, Indonesia brought South Africa to the WTO DSM over a market access restriction that was under US$1 million in value. Moreover, the economic stakes in a market access issue concerning a given sector can be high in relative terms (i.e. comprising a high proportion of a country’s export earnings), despite not being so in absolute economic terms. An example of the latter category of cases is when a country, or specific region therein, is highly dependent on selected industries for exports revenue or employment. In the dispute EU - Measures on Atlanto-Scandian Herring (DS469), for instance, Denmark brought the EU to the WTO DSM, regarding a ban on herring exports from the Faroe Islands. While this represents an insignificant category of exports for Denmark as a whole, the basis for bringing the dispute was that many Faroese are employed in this sector.

Based on the above arguments, the trading stakes hypothesis in itself does not offer a convincing explanation for the very low rate at which Southeast Asian countries bring disputes against other Asian countries.

### 3.3 Cultural/Normative Preference for Non-litigation

One explanation that has been identified as being specific to the Asian context is that there might be a cultural ‘aversion’ towards litigation. Strong cultural preferences for amicable and informal negotiated settlements are often cited as a deterrent against taking a trading partner to an international tribunal. Unlike capacity-based explanations for low WTO DSM participation that focus on material constraints, the culture-based argument focuses on normative constraints that prevent countries from bringing disputes to the WTO DSM, even in the absence of material constraints (e.g. litigation and resource capacity constraints). It has been suggested that East Asian societies strongly prefer to avoid litigation, and that this is based on the Confucian premise that ‘litigation causes irrepairable harm to relationships and should be pursued only as a last resort’ or avoided altogether.

It is argued that this cultural aversion to litigation is projected onto the decision-making processes of Asian governments, who regard litigation as hostile behaviour that is damaging to bilateral relations. This mindset translates into a preference for seeking resolution through informal bilateral negotiations, rather than through rule-based adversarial modes of judicial settlement, such as the WTO DSM process. China’s reservation in the early years of membership to adjudicate at the WTO DSM, despite having invested heavily in building

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litigation capacity, has been attributed to this mindset. Extending this argument, it might be the case that normative constraints have shaped how Southeast Asian countries use the WTO DSM.

This culture-based explanation is useful in that it questions something that is implicitly assumed in studies of participation in the WTO DSM, i.e. that countries generally have similar normative perceptions towards WTO disputing. However, when looking at the actual pattern of dispute initiation by Southeast Asian countries, this explanation appears to have limited explanatory value. Firstly, some Southeast Asian countries such as Thailand and Indonesia rank among the top developing countries when it comes to WTO dispute initiation. Secondly, the idea of a general cultural aversion towards litigation does not explain why Southeast Asian WTO members have not shied away from bringing disputes against Western developed WTO members, but seem reluctant to bring cases against other Asian countries.

A second type of normative constraint that can prevent countries from bringing disputes against one another is that which is produced in institutional contexts. In the sociological approach towards international relations, multilateral institutions (e.g. WTO, ASEAN) are viewed as social environments, where members’ interactions with each other, over time, have effects on their behaviour. Looking specifically at ASEAN, the regional diplomatic norm (or unspoken agreement) of avoiding open confrontation is one that has been accepted for decades. It has been noted that ‘instead of building supra-national institutions to ensure cooperation, ASEAN regionalism (has) relied on socialization processes, such as consultation and consensus, leading to mutual empowerment among sovereignty-conserving states’. This latter explanation suggests that it is not just the potential Complainant’s identity and normative views towards WTO disputing that matters, but also that of the potential Respondent. This will be addressed later in this article.

3.4 Low Participation of Private Sector and Interest Groups

While the public sector generally handles dispute initiation as well as bilateral negotiations and subsequent proceedings at the WTO, the private sector also plays a crucial role, particularly in the pre-litigation phase. This role includes monitoring foreign market access barriers, assessing the magnitude of losses incurred and potential damages, gathering information from domestic and foreign business partners and other stakeholders, coordinating with other firms in the industry and finally, petitioning the government to take up the matter bilaterally and/or multilaterally. Often, the private sector also provides its own resources to encourage the local Ministry of Trade to investigate the matter and to seek recourse on their behalf at the WTO, if bilateral negotiations fail or are suboptimal.

Bown & Hoekman (2005) provide a summary of the wide and varied range of tasks that stakeholders in an affected private sector are typically required to do in order to convince the government to pursue their interests, and the list reads as follows: ‘organize export interests, estimate the size of improved market access payoffs, prioritize across potential cases, engage domestic governments, prepare legal briefs, assist in evidentiary discovery, and pursue the public relations effort required to induce foreign political

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In light of this, they also observe that while the private sector, interest groups and non-governmental organisations in developed countries play 'important and substantial' roles in WTO litigation, their counterparts in lower-income developing countries have, 'with very limited exception (...) not taken the lead' in contributing to the WTO pre-litigation and litigation process. Shaffer (2003) observes that private sector groups in the EU and US actively work with government officials, petition them to fight for their interests at the WTO, and are heavily involved in formulating litigation strategies. Shaffer also notes that the bulk of the pre-litigation and analytical work is done by the private sector and industry associations, often with the assistance of private-sector lawyers and consultants that they have hired. This means that even though the disputes are filed and argued in Geneva by government officials, much of the resources required to bring a dispute are borne, in developed countries, by the private sector and interest groups.

If private sector and interest groups in certain developing countries are indeed more passive in the pre-litigation process when facing WTO-inconsistent trade barriers, this might explain why their governments do not bring more complaints to the WTO DSM. Since Southeast Asian countries range from low- to middle- and high-income developing countries, it is expected that private sector involvement in the pre-litigation and litigation process falls at different points between the two extremes described, in each of these countries.

Many disputes brought to the WTO were done so due to pressure from either well-resourced and well-organized industry groups or large transnational corporations. To offer a few examples from the US context, these have ranged from associations of cotton, cigarette, shrimp, beef and steel producers, to corporations such as Boeing and Chiquita. This suggests that even in these developed countries, where public sector expert capacity is high, disputes tend to be initiated at the WTO when private interests have been able to successfully lobby governments to take up their case, and to contribute to and support the litigation process.

One way to examine the role played by the private sector in explaining WTO dispute initiation is to ascertain whether firms and industry groups in Southeast Asian countries approach the relevant national authorities when they face market access barriers. According to a senior government official from the Malaysian Ministry of International Trade and Industry (MITI), the ministry has not had to seriously consider bringing a trading partner to the WTO DSM because Malaysian companies have not actively sought help from MITI regarding trade barriers. An experienced government official from the Singaporean Ministry of Trade and Industry (MTI) observed that while local firms have approached the ministry for assistance regarding market access conditions, their primary concern is the immediate survival of their business. Therefore, local firms tend to approach the ministries with highly pragmatic requests, such as for financial assistance to help them adapt to changing market conditions (for example, through restructuring or modifying their operations). The main priority of these affected firms tends to be to overcome their financial difficulties, and they do not, of their own initiative, draw attention to WTO rules or WTO litigation. The same government official who was interviewed explained that from the perspective of small- and medium- enterprises (SMEs) in particular, WTO dispute settlement is generally not the most optimal cause of action for SMEs, since the process takes years, is resource-intensive, does not result in compensation for all losses incurred prior to the panel decision, and does not guarantee a positive outcome (in terms of the panel recommendation and the respondent's compliance).

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51 Supra
52 Supra
53 This is aside from the one instance in October 1996 where Malaysia, along with Thailand, India and Pakistan, brought a dispute to the WTO against the US. This dispute was eventually brought to the WTO Appellate Body. See DS58- US- Import prohibition of certain shrimp and shrimp products.
This view that businesses play a minor role in relation to the government is confirmed in the Singaporean context by Sally (2004), who notes, in general, that 'the lack of business input is the Achilles heel of Singapore trade policy-making'. This could be due to the following reasons: i) these firms simply do not face many market access barriers, ii) even if the affected firms detect a fall in export revenue, they lack the expertise to determine if this is due to market access barriers or to other reasons, such as changes in demand, iii) the affected firms are not well-organized into industry associations that are able to exert pressure on the government, and iv) they are generally content to seek financial assistance and to leave bureaucrats to resolve the issue through either bilateral negotiations, or the WTO dispute settlement process. Moreover, in the ten Southeast Asian countries, there are no domestic statutory provisions that guarantee the private sector with a direct point of access to policymakers, when they face trade barriers (i.e. similar to Section 301 in the US, as well as the Article 133 process and Trade Barrier Regulation in the EU).

This appears to be in sharp contrast to private sector groups in the EU and the Americas, which often exert pressure on government officials to fight for their interests at the WTO during the consultation and litigation phases. Moreover, these groups often send their own representatives to closely follow every step of the bilateral negotiations, to ensure that their interests are being protected. This can make it more challenging for governments to seek bilateral concessions instead. Therefore, it appears that local firms in some Southeast Asian countries are less active and/or able to petition governments to challenge trade barriers.

3.5 Low Democratic Constraints on Bureaucratic Authority

Moving beyond the explanations listed above, the role of government decision-makers is often not discussed when examining WTO DSM participation. Government decision-makers play a central gatekeeping role throughout the WTO DSM process. When a trade barrier has been identified, they are faced with various possible ways to respond as well as different degrees of freedom to pursue each of these responses. The decision to bring a dispute at the WTO against a trading partner is, therefore, not one that is automatically determined when bilateral negotiations over an alleged trade barrier fail, but one that involves conscious and strategic assessment by governments. How this assessment takes shape is influenced in part by various domestic stakeholders’ preferences – both normative and strategic - regarding how the affected trade interest(s) should be addressed. Even within an affected country, stakeholders’ preferences are not necessarily aligned. This section argues that when a country is affected by an allegedly WTO-inconsistent measure, whether the matter is taken to the WTO DSM depends on the degree of bureaucratic discretion available to decision-makers (i.e. high-ranking civil servants and politicians).

Existing literature that examines the link between democracy and WTO participation suggests that domestic political conditions shape whether countries refer bilateral trade disputes to international tribunals. Busch & Reinhardt (2000) find that the presence of democratic domestic institutions has a positive effect on dispute initiation. Moreover, they observe that WTO disputes that have been initiated between democratic complainant and respondent pairs have a significantly higher empanelment rate (i.e. higher rate of proceeding to the panel litigation stage) than that of WTO disputes, on the whole. Guzman and Simmons

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54 This was related during an in-person interview with an experienced Singaporean trade official (9 May 2014).
also find that democracies resolve their disputes less cooperatively, preferring to fight or defend their position all the way, rather than compromising and reaching mutually agreed settlements\textsuperscript{56}.

One explanation for the above observation is that democracies are more willing to use, trust and abide by decisions made by adjudicative bodies and systems, due to greater familiarity with them in their domestic settings. Allee (2006) suggests that there is a greater perception in democratic countries that the WTO DSM is a legitimate and beneficial means of settling trade disputes\textsuperscript{57}.

The second argument is the audience cost argument. It states that democratic governments are under pressure to signal to their domestic audiences that they will not give in to the other country during negotiations. Since they are under pressure to visibly signal their commitment to their domestic audience, reaching a negotiated settlement rather than fighting all the way for the interests of their domestic audience might be perceived as a sign of weakness or lack of loyalty to domestic constituencies. This might explain the finding that democratic countries are more likely to proceed to the panel litigation stage in WTO disputes, rather than reaching a bilateral settlement or dropping the matter. Allee and Huth (2006) argue that this stems from the stronger ability of interest groups in democracies to petition governments to fight for their interests.

A prerequisite condition to this audience cost argument is that there are channels through which affected companies can petition the government and hold their political leaders accountable. In the US, private sector access to domestic government is facilitated through Section 301, a statutory provision that allows private industries to petition relevant government authorities to investigate and take action regarding potential market access concerns\textsuperscript{58}. Similar statutory provisions exist in the EU, namely the Article 133 process and Trade Barrier Regulation (TBR)\textsuperscript{59}. Not all WTO members offer a comparable degree of access, or provide avenues for the private sector to convey their concerns to the relevant government authorities.

Table 4 outlines how the degree of discretion that bureaucrats have, in a given case, is likely to be influenced by the strength of the affected private sector and the degree of democracy\textsuperscript{60}. When private sector interests are less powerful and when the level of democracy (which can be measured by various existing indices\textsuperscript{61}) is relatively low, bureaucrats are likely to have a greater degree of discretion. As illustrated in the last row of Table 4 (‘Scenario D’) this results in government officials having greater flexibility regarding how to address and act on industry concerns. Ceteris paribus, government officials are likely to have greater discretion and freedom to negotiate. As they have greater flexibility in making and accepting offers during bilateral negotiations, the relative likelihood of bilateral settlement rises, as opposed to WTO litigation.

Table 4: Theoretical framework summarizing relationships between two domestic factors (i. Strength of Private Sector, ii. Degree of Democracy) and three types of outcomes (i. Resulting Degree of Bureaucratic Discretion, ii. Resulting Trade Policy Features, iii. Resulting Enforcement Strategy)

\begin{center}
\begin{tabular}{|c|c|c|c|c|}
\hline
Strength & Degree of Democracy & Resulting Degree of Bureaucratic Discretion & Resulting Trade Policy Features & Resulting Enforcement Strategy \\
\hline
\end{tabular}
\end{center}


\textsuperscript{57} Todd L. Allee and Paul K. Huth, ‘‘Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover’’, (2006) 100 American Political Science Review 219, 222.

\textsuperscript{59} Details on TBR in the EU can be found here- [http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150984.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150984.pdf)

\textsuperscript{60} This table has been adapted, with some additions and modifications, from Davis (2012) - 'Why Adjudicate? Enforcing Trade Rules in the WTO', Princeton University Press, 57.

<table>
<thead>
<tr>
<th>Scenario</th>
<th>of Affected Private Sector</th>
<th>democracy</th>
<th>Degree of Bureaucratic Discretion</th>
<th>Features</th>
<th>Enforcement Strategy (i.e. Outcome)</th>
</tr>
</thead>
</table>
| Scenario A | High                         | High      | Low                              | • Affected industry monitors developments, petitions for government action and contributes own resources  
• Bureaucrats' lower flexibility limits their bargaining position in bilateral negotiations | Adjudication |
| Scenario B | High                         | Low       | Medium                           | • Affected industry monitors developments and contributes own resources  
• However, bureaucrats largely retain flexibility to decide on the next steps | Adjudication or Negotiation |
| Scenario C | Low                          | High      | Medium                           | • Affected industry might bring concerns to the government, but is much less coordinated and powerful, has fewer resources to contribute, and has less specific demands  
• However, bureaucrats retain some flexibility to decide on the next steps | Adjudication or Negotiation |
| Scenario D | Low                          | Low       | High                             | • Affected industry might bring concerns to the government, but is much less coordinated and powerful, has fewer resources to contribute, and has less specific demands  
• Bureaucrats have a high degree of freedom to make informal bilateral deals/concessions | Negotiation |
Conversely, the first row of Table 4 depicts the opposite scenario, where private interest groups are more powerful and coordinated and have greater ability to petition politicians and where the degree of democracy is higher. Under these conditions, the specific demands from the industry might be harder to ignore, and politicians might be under immense pressure to signal their commitment. As a result, their degree of bureaucratic autonomy, or discretion, is lowered. All else being constant, this makes it more challenging to reach bilateral settlements, and the disagreement is more likely to be brought to the WTO for litigation.

Several clarifications are in order, with regard to the theoretical framework presented in Table 4. Firstly, the strength of the affected private sector is not a constant, and can vary from case to case. Some relevant factors include the size of the industry (in terms of revenue and employment), the degree to which interests of firms in the same industry are organized (for example, in the form of strong industry associations), whether the industry is of high national significance (for example, strategic or cultural), and whether more powerful foreign stakeholders are involved, such as in the case of multinational companies (MNCS).

Bown & Hoekman (2005) note a general tendency for the private sector in developing countries to be weaker, in the sense that they play less active roles in petitioning for, coordinating and providing resources for WTO dispute initiation. This, when combined with the generally lower levels of democracy in developing countries, suggests that bureaucrats in developing countries have greater bureaucratic discretion to address market access barriers through negotiation, rather than WTO litigation. This leads to the question of whether bureaucratic discretion can help explain the Southeast Asian countries’ dispute initiation behaviour. This argument for the affirmative, in a nutshell, suggests that in a country where political leaders are effectively held accountable at the ballot box – and where there are powerful, vocal and well-organized industry groups - bureaucrats are likely to enjoy a lower degree of flexibility and discretion when deciding how to address trade barriers. Countries that are active in the WTO DSM usually have strong domestic lobby groups that regularly send representatives to Geneva to follow WTO negotiations and dispute settlement proceedings very closely, and put pressure on their governments to protect their industry interests. This can make it challenging for political leaders and government officials to hold out in hope of bilateral settlements, especially if the latter involve compromising on the specific demands articulated by the affected industry.

As outlined in the preceding section, the private sector generally plays a more subdued role in relation to governments in Southeast Asia. The state of private-public sector relations appears to vary from one Southeast Asian country to the next. Felker (2008) observes that there is ‘party control in Singapore’, ‘party-business networks in Malaysia, family-oligarchic business structures and business-backed political parties in Thailand and the Philippines, and political-oligarchic business groups in Indonesia’s transitional democracy’. Due to the strong links between certain business elites and politicians in Thailand, the Philippines and Indonesia, these businesses in particular might wield a disproportionately large degree of power over policymakers, as compared to most other businesses in the country.

Southeast Asian countries are, in general, rather lowly-ranked in global democracy rankings. According to these rankings, Indonesia, Thailand, Malaysia and the Philippines are the countries in the region that are the most highly ranked, and they are classified in the category of ‘Flawed democracies’. Singapore and Cambodia are classified as 'Hybrid regimes', while Vietnam, Myanmar and Laos are 'Authoritarian

regimes\textsuperscript{64}. Therefore, both of the input variables, namely the strength of the affected private sector and the degree of democracy, are, in most cases, rather low in Southeast Asian countries. Exceptions to this might perhaps occur when certain powerful businesses are involved, or when an incumbent government believes that it stands to lose domestic votes if it does not take the alleged offender to the WTO DSM. However, given that this is not usually the case, it is likely that create conditions where governments generally have some bureaucratic discretion to decide how to handle a market access barrier (this interaction was described in Table 4). While affected firms are likely to inform their governments regarding market access barriers, these governments generally possess some flexibility in defining an optimal outcome, in their own terms, rather than facing very specific pressure and demands from the industry.

In the context of Singapore, this is supported by the following observation by Sally (2004) that in Singapore, 'trade policy is effectively depoliticized and treated in a technocratic fashion. This is highly exceptional: trade policy is politicized almost everywhere in the world'. Moreover, Sally observes that 'depoliticized trade policy in Singapore means that the bureaucracy, largely insulated from interest group pressure, can speedily implement policy objectives\textsuperscript{65}. In the context of settling trade disagreements, there have been several instances in the last two decades where Singaporean industrial interests have been affected\textsuperscript{66}. Given the relatively high degree of bureaucratic discretion and flexibility, civil servants have been able to work with offending trade partners to obtain bilateral concessions and achieve 'win-win' solutions. These bureaucrats are therefore able to prioritize overall bilateral relations over strict enforcement of the agreed rules at the WTO DSM, even if the latter might be more beneficial to the affected industry. This is likely to explain why Singapore has only brought one dispute to the WTO DSM.

(Note: I will re-write this section after conducting more interviews with other ASEAN gov’t officials)

4. Synthesis / Proposed model for explaining WTO dispute initiation behavior

In Section 3, the validity of possible explanations in the literature has been discussed, in light of the Southeast Asian context. While each trade disagreement is handled by WTO members on a case-by-case basis, different countries proceed differently when they are facing similar market access restrictions. Even when looking at a single country, the values associated with the different variables are likely to vary from one case to another, depending for example on the industrial sector(s) involved as well as the domestic political situation and states’ views on bilateral relations at the given point in time. Nevertheless, given that each decision to initiate a WTO dispute is one that has been made by certain identifiable domestic actors over the last two decades, rather than by disparate individuals in the private sector, one might expect the decision to be guided by relatively consistent principles and pre-conditions.

This concluding section explains how these various explanations come into play when a country is facing trade barriers and is unsuccessful in seeking their removal through bilateral negotiations. This is explained with the aid of a simplified decision-making model, illustrated in Figure 1.

\textsuperscript{64} The Democracy Index that is referred to here is that published by the Economist Intelligence Unit in 2013. \url{http://pages.eiu.com/rs/eiu2/images/Democracy-Index-2012.pdf}, accessed on 23 December 2014. Brunei has not been mentioned as it is not included in this index.

\textsuperscript{65} Razeen Sally, ‘Southeast Asia in the WTO’, No.5, Southeast Asia Background Series (Singapore, Institute of Southeast Asian Studies, 2004), pp. 23. Italics are my own, for emphasis.

\textsuperscript{66} One example is when the Philippines decided to maintain its protective tariffs on petrochemical products, in 2003. It was required to have reduced these tariffs, under the ASEAN Free Trade Area common effective preferential treatment scheme (AFTA-CEPT).
Figure 1: Model of a potential Complainant’s decision-making trajectory

The purpose of this simplified model is to demonstrate the path or trajectory a detected trade barrier takes, depending on selected variables as they appear in the present case. The starting point of the model is that the trade barrier has already been detected and brought to the attention of the competent domestic ministries and that the complaint has been assessed to have legal and economic merit. The point of depicting the decision-making process as a flowchart is not to predict the behaviour of countries with full accuracy but rather, to present concise arguments as to when and why countries opt for (or against) bringing other countries to the WTO. While the model is meant to be universal in its application, the discussion will focus on aspects of Southeast Asian countries’ WTO DSM participation that have not been explored in the literature.

There are four levels in the model, as indicated by the four numbered circles in the left of Figure 1. These first three levels represent considerations in the decision-making process, while the fourth represents the likely outcome. The question at each level has a binary outcome (i.e. ‘yes’ or ‘no’) and influences the final likelihood of a potential Complainant country pursuing WTO adjudication against a potential Respondent country, at the end stage (Level 4). There are eight possible scenarios in the model, represented by numerals (i) to (viii) in the final row of the model, and these state whether WTO adjudication (A) or a bilateral negotiated settlement (S) is more likely.

To illustrate, outcome (iii) represents cases where a potential Complainant country has a high level of bureaucratic discretion (level 1) and does not have a holistic view of bilateral relations (level 2). In this scenario, the potential Complainant anticipates that the potential Respondent country will respond in a hostile manner to being brought to the WTO (level 3). The individual outcomes of these four levels culminate in a singular probability of adjudication that applies to specific cases (level 4). The meaning and significance of these levels will be explained in the following paragraphs.
At level 1, the binary outcome concerning bureaucratic discretion is decided. Generally, the degree of bureaucratic discretion can be envisioned as being a moving point on a continuous scale. However, in an actual case concerning a specific industry and a given political environment, the question of how much discretion government decision-makers have, in dealing with a suspected trade barrier, might be reducible to a simple ‘high’ or ‘low’. In an actual case that arises, the state of this variable will be determined based on the facts of the case. The two main determinants, or ‘input variables’, are i) the strength of the private sector, and ii) degree of democracy. These two input variables, which have been discussed individually in Section 3, interact to determine whether bureaucrats in a given case have discretion in deciding whether to bring a trading partner to the WTO DSM. When bureaucratic authority is limited due to the interplay of these two input variables, this allows local decision-makers less flexibility in opting for negotiated settlements, and increases the likelihood of WTO litigation.

At level 2 of the model, the binary outcome of whether a potential Complainant country has a ‘holistic’ view of bilateral relations is determined. Here, the word ‘holistic’ does not bear any normative significance and simply denotes that a country views bilateral relations as a single unit. States with a ‘holistic’ or unitary approach to bilateral relations are those that view being involved in a WTO dispute against a trading partner as posing a serious threat to their bilateral relationship, rather than simply being part and parcel of the rule-based international trading system. The converse scenario is when a country is able to ‘detach’ or compartmentalize disputing in the WTO against a trading partner, from the broader bilateral relationship. Countries’ foreign policy paradigms change over time. Hence, level 2 specifically addresses whether the potential Complainant, at the point in time when the scenario arises, views WTO disputing as an indicator of a damaged bilateral relationship, or as a way to resolve a relatively specific matter while containing or guarding against harm to the wider bilateral relationship. In the model, if a potential Complainant views WTO disputing in such a manner, this is likely to reduce its probability of initiating a WTO dispute.

On the other hand, a country might be able to compartmentalize the fact that it is involved in a dispute against trading partner at the WTO from their wider bilateral relationship, by viewing the WTO dispute as being a specific matter that should be isolated, or ‘contained’. Countries that typically view WTO disputing in this manner see it as part of the rough and tumble of the global trading system and do not view it as necessarily damaging to bilateral relationships. One example is the US, which expressed that bringing a dispute against China to the WTO was ‘a sign of a maturing trade partnership’ and that ‘fortunately, we have the WTO to sort out tensions in a rational manner’. If a potential Complainant county holds this latter view of bilateral relations, the answer to the question at level 2 is 'No', and the overall probability is likely to shift towards litigation as an end-result, in the model.

Next, the question being asked at level 3 of the model is how the potential Complainant imagines that the potential Respondent would react, if the former brings a case against the latter at the WTO DSM. This perception is based on how the latter usually reacts to requests by other governments, with whom they are engaged in disagreements with, to seek recourse to third party adjudication. Here, as in level 2, the outcome depends on whether bringing a trading partner to the WTO DSM is viewed as harmful to the entire bilateral relationship. While level 2 is focused on the potential Complainant, level 3 is shaped by the Respondent.

China’s response to being challenged by the US at the WTO DSM in April 2007 offers cause for other countries to view it as a ‘hostile’ Respondent. Here, Chinese officials responded in a combative manner, saying that this move would ‘seriously damage’ bilateral co-operation and harm business relationships, and


that the US' decision was 'against the consensus reached between the two countries' leaders on developing bilateral trade relations and properly handling trade problems'. Another example is the high degree of hostility observed by a third party delegate during the dispute that Singapore brought against Malaysia at the WTO DSM, in 1995. Here, the delegate was 'puzzled' by the 'note of acerbity injected into the quarrel', and 'hazarded a guess that something more than commercial interests could (have been) involved'. These two examples indicate that in some scenarios, either the Complainant or Respondent (or both) view WTO disputing as not simply a matter that is confined to bilateral trade relations, but one where other grievances in the bilateral relationship between the disputing parties readily come into play.

4.1 Level 1 of the model explains the disparity in dispute initiation frequency across Southeast Asian countries

The model offers a strong explanation for why certain Southeast Asian countries (e.g. Thailand, Indonesia and the Philippines) have been active in bringing disputes against trading partners at the WTO, while others which do not face significant capacity constraints (e.g. Malaysia and Singapore) are, nevertheless, rather non-litigious. As discussed earlier, the degree of discretion available to bureaucrats in dealing with a particular trade barrier (level 1) determines the extent to which they can opt for negotiated bilateral solutions, rather than bringing a dispute to the WTO.

Looking at the domestic political landscape in Thailand, Indonesia and the Philippines, it is likely to be the case that a relatively lower degree of discretion is available to bureaucrats than is the case in Singapore and Malaysia. This is because the two input variables that determine bureaucratic discretion are strong in the former countries, namely: i) strength of private sector and ii) degree of democracy. With regard to the first input variable, in Thailand, Indonesia and the Philippines, there are several primary industries - such as tropical agriculture, fishing and manufacturing - that provide substantial employment and support livelihoods, and which are highly dependent on export earnings. These sectors are generally represented by large, organized industry associations and corporations that are able to exert pressure on politicians.

With regard to the second input variable, politicians in Thailand, Indonesia and the Philippines are likely to face greater pressure to display their commitment to the private sector. In these countries, power is won and lost by contesting political parties over election cycles, and coalition government is not uncommon. As ruling parties face strong party competition in the subsequent elections, failing to signal commitment, both to affected industry stakeholders and to the wider domestic audience by not fighting hard enough for their interests against another country at the WTO, can be very costly. As a result, politicians in these countries are likely to be under pressure to pursue the interests of affected industry groups, through WTO dispute initiation. While the extent of this pressure in Thailand, Indonesia and the Philippines is unlikely to be as strong as that observed in the case of developed Western democracies, it is nonetheless slightly higher than in Singapore and Malaysia. Therefore, since domestic industry groups have, on multiple occasions, been able to push for trade barriers to be challenged at the WTO, it is believed that bureaucrats in the former countries face some limits in being able to resist industry pressure for WTO litigation.

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70 DS1-Malaysia-Import prohibition on polyethylene and polypropylene (prohibition on imports).

In Singapore and Malaysia, on the other hand, bureaucrats generally have a higher degree of discretion. In both of these countries, the same ruling party has been in power for decades, since independence. Moreover, as discussed in Section 3.4, the private sector in both of these countries generally has not placed pressure on the government to specifically take a trading partner to the WTO and is also less connected to political parties. One might therefore argue that incumbent leaders in these countries do not have to incur ‘audience costs’ or signal their commitment to the same extent, as compared to in countries where politicians are under greater pressure to signal their commitment to domestic audiences. As a result, bureaucrats in Singapore and Malaysia are likely to face higher discretion and flexibility in resolving market access barriers through bilateral means. This generally high degree of bureaucratic discretion could explain why both countries have been generally able to resolve trade disagreements bilaterally.

4.2 Levels 2 and 3 of the model explain the low number of disputes brought by Southeast Asian countries against other Asian countries

Looking at Level 2 in the model, if there is some merit to the culture-based argument that Asian countries are litigation-averse in general, one might posit that Southeast Asian countries lean towards having a holistic or unitary view of bilateral relations. However, rather than displaying an universal aversion towards litigation, Southeast Asian countries (and Asian countries on the whole, for that matter) have simply displayed a high degree of selectiveness in terms of which trading partners they are willing to challenge at the WTO.

Referring to Figure 1, if a government faces great pressure to bring a trade barrier to the WTO DSM, and has limited bureaucratic discretion, bureaucrats’ perspectives towards how bilateral disagreements should ideally be resolved are unlikely to hold much weight. Therefore, when there is ‘low bureaucratic discretion’ (level 1), the potential Complainant government’s view regarding levels 2 and 3 is unlikely to be of high importance in determining the likelihood of WTO litigation. This might explain why WTO members that are developed Western democracies, such as the US and EU, do not seem to display a conspicuous reluctance to bring disputes against Asian or other countries.

On the other hand, if bureaucrats have a relatively high degree of discretion in a given scenario, their views regarding levels 2 and 3 are likely to matter and will determine whether a dispute goes to the WTO. At level 2, for instance, if a country has a holistic view of bilateral relations, this indicates a general preference to avoid WTO litigation. However, this is also dependent on the potential Respondent’s identity. If the potential Respondent is expected to react in a hostile manner (level 3), it is likely that the potential Complainant will avoid bringing a dispute to the WTO DSM, to prevent harm to the wider bilateral relationship.

The fact that Southeast Asian countries have never challenged China, Japan or India at the WTO DSM and have only brought disputes against other ASEAN countries on two occasions appears to support this. Some Southeast Asian trade ministry officials mentioned, in separate interviews, that they would not be willing to bring disputes against China even though there has been much frustration – or ‘rumblings in the region’ over China’s potentially WTO-inconsistent measures (such as dumping steel at artificially low prices). The reason cited by these officials for not wishing to bring a dispute against China was the fear of negative repercussions and damage to the wider bilateral relationship, and the belief that China would ‘hold a

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72 In Malaysia, Barisan Nasional (National Front, and formerly the Alliance Party) has been the ruling party since independence in 1957, and this is the longest continuously ruling party in the democratic world. The People’s Action Party (PAP) has been Singapore’s ruling party since 1959.

73 This is a direct quote from an in-person interview with a high-ranking Singaporean trade official (9 May 2014).

74 Based on in-person interviews with two high-ranking and experienced trade ministry officials representing Malaysia (13 June 2014) and Singapore (9 May 2014).
This fear is substantiated by China's unexpectedly hostile response when the US brought a dispute against it in 2007\textsuperscript{76} - the Chinese commerce ministry stated that this decision by the US would ‘seriously damage’ bilateral co-operation and harm business relationships. Furthermore, Southeast Asian government officials expressed the view that it would be costly to suffer damage to bilateral relations with these trading partners, since these countries – in particular, China and Japan – are, to most Southeast Asian countries, major sources of foreign-direct investment, are major export destinations and also regularly contribute aid and developmental assistance to the region\textsuperscript{77}. As these three countries are ‘power players’ in the geopolitics of the region, maintaining good overall bilateral relationships with them is paramount and is generally believed to take precedence over resolving the concerns of a specific domestic industry stakeholder. It therefore makes perfect sense that Southeast Asian countries are not challenging these countries at the WTO, for very pragmatic reasons.

On the other hand, Southeast Asian countries have brought many disputes against Western developed countries. Referring back to level 2 of Figure 1, Southeast Asian governments that have a high degree of discretion and which view litigation as being damaging to the overall bilateral relationship might, nonetheless, be comfortable with bringing a trading partner to the WTO DSM if they feel that the Respondent country is one that is used to WTO litigation, and will not respond in a hostile manner. Government officials in Southeast Asian countries generally believe that these Western developed countries will not hold similar grudges and that they view WTO disputing as a non-threatening and legitimate way to resolve disagreements\textsuperscript{78} (i.e. non-holistic view, at level 3). Therefore, Southeast Asian countries are generally not held back from initiating disputes against these countries to the same extent that they appear to be when it comes to Asian superpowers, such as China, Japan and India. China’s participation as a Complainant in the WTO DSM offers some additional insight with regard to this. Within its first decade of WTO membership, China has brought 12 disputes to the WTO, and all of which have been against either the EU or the US. This suggests that far from being universally litigation-averse, China’s strategy is to bring disputes against trading partners that have brought WTO disputes against China, and which view being challenged at the WTO as a routine part of the global trading system.

Lastly, the fact that only two disputes have been filed by a Southeast Asian country against a Southeast Asian respondent is likely to be a result of the socialization processes and community norms in ASEAN, rather than a result of a more amorphous culture of ‘litigation avoidance’. Due to the socialization processes in ASEAN that diplomats and government officials are exposed to, there is an unspoken consensus among the ASEAN member countries that disagreements should be resolved through consensus. In ASEAN, a strong emphasis is also placed on member states’ retaining their individual sovereignty, as well as on informality. Government officials who were interviewed stated that given that there is a strong sense of ‘adik beradik\textsuperscript{79}’, or brotherhood, among ASEAN members, challenging one another at a forum such as the WTO DSM is almost inconceivable, or is something that should only be contemplated when everything else fails. That many ASEAN diplomats are not just colleagues but also have close personal friendships with each other, and have ‘grown up (together) in the system’, has also led to a preference for disagreements to be

\textsuperscript{75} This is a direct quote from an in-person interview with a high-ranking Singaporean trade official (9 May 2014). The same sentiment was expressed in an in-person interview with a high-ranking Malaysian trade official (13 June 2014).


\textsuperscript{77} Interviews conducted with Singaporean, Malaysian and Indonesian trade and foreign affairs ministry officials (9 May 2014, 13 June 2014, 8-9 December 2014)

\textsuperscript{78} Ibid.

\textsuperscript{79} This phrase translates to ‘sibling-like’ in the Malay language.
resolved amicably and with ‘win-win’ outcomes that do not necessarily involve a clear winner and loser\textsuperscript{80}. This had led to many ASEAN trade disagreements being ‘resolved quietly, and out of the limelight, by officials working in a cooperative manner’. As a result, only two disputes involving both an ASEAN complainant and respondent have been brought to the WTO DSM, in the last two decades. Both of these disputes are likely to have been brought to the WTO because the affected companies - Philips Petrochemicals\textsuperscript{81} and Philip Morris International\textsuperscript{82} - were large MNCs that are likely to have been more familiar with the WTO DSM than most other domestic companies, and which were of high importance to both countries. Consequently, the strength of the affected private sector in both of these instances could have led to lower bureaucratic discretion than usual (i.e. level 1 in the model). This could explain why these two intra-ASEAN disputes in particular were brought to the WTO, despite strong normative constraints.

In conclusion, it appears that Southeast Asian countries hold back from initiating disputes not so much because of their own cultural aversion to litigation, but more so because they fear that certain respondents will respond in a hostile manner. Given that there might be calls from the private sector governments might be make this decision when they have bureaucratic discretion. This is a pragmatic decision that is calculated to minimize the likelihood of experiencing strong negative diplomatic repercussions, the cost of which can far outweigh the benefits of a legal victory regarding a specific trade barrier at the WTO DSM.

\textbf{--------- Appendix----------}

\textbf{Table I: Southeast Asian nationals who have served as panellists on WTO disputes or are on the indicative list of WTO panellists\textsuperscript{83}}

<table>
<thead>
<tr>
<th>Country of Nationality</th>
<th>Individuals who have served as panellists in WTO disputes (\textit{Note: information is only included for panels composed until 2011})</th>
<th>Individuals on indicative list of panellists\textsuperscript{84} (submitted by national governments)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>• Nugroho Wisnumurti (DS394/395/398)</td>
<td>None submitted</td>
</tr>
<tr>
<td>Malaysia</td>
<td>• Salmiah Ramli (DS206)</td>
<td>• Hiswani Harun</td>
</tr>
<tr>
<td></td>
<td>• Subash Bose Pillai (DS355)</td>
<td>• Merlyn Kasimir</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Muhammad Noor Yacob</td>
</tr>
</tbody>
</table>


\textsuperscript{81} The present-day company, Chevron Phillips Chemical Company LP, is one of the world leaders in the production of oil, gas, petrochemicals and related products. Singapore is the regional headquarters for its downstream operations in the Asia-Pacific region, including its manufacturing, supply and trading, marketing, and lubricants businesses.

\textsuperscript{82} Philip Morris International Inc. (PMI) is the leading international tobacco company, with products sold in more than 180 countries. In 2013, it held an estimated 15.7\% share of the total international cigarette market outside the US, or 28.3\% excluding the People’s Republic of China and the U.S.

\textsuperscript{83} This data on panellists’ identities and nationalities has been gathered with the aid of an open access excel database prepared by Henrik Horn and Petros C. Mavroidis (2011), http://www.econ-law.se/Papers/Horn\%20and\%20Mavroidis\%20Dispute\%20Set-Manual\%20-\%206\%20Nov\%202011-MMM.pdf (viewed on 26 December 2014).

\textsuperscript{84} List is from the WTO website and is dated 29 April 2014.
### The Philippines
- Antonio Buencamino (DS60, DS156, DS179, DS322, DS405)
- Florentino P. Feliciano (DS363)
- Luis M. Catibayan (DS399)
- Anthony Abad (DS414)

**None submitted**

### Singapore
- Tommy Koh (DS38, DS103, DS113)
- Margaret Liang (DS231, DS248/249/251/252/253/254/258/259, DS269, DS391)
- Elizabeth Chelliah (DS243, DS286, DS381)
- Minn Naing Oo (DS396, DS403)
- Sivakant Tiwari (DS362)

**None submitted**

### Thailand
- Kajit Sukhum (DS46)
- Yanyong Phuangrach (DS50, DS79, DS184)
- Virachai Plasai (DS192, DS285, DS353, DS413)

**None submitted**

### Vietnam, Brunei, Laos, Myanmar, Cambodia
- None

**None submitted**

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**Table II**\(^{85}\): The following table shows the average percentage distribution, by value, of exports sent by exporting regions (rows) to each of the destination regions (columns). Only trade flows between WTO members are included in the table, and they are included only for years between 1995 and 2013, where both the importing and exporting country were WTO members.

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<th>CAR</th>
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<th>C.AS</th>
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\(^{85}\) Table compiled by the author, using individual country-level trade data compiled by the WTO. Regional classifications are based on the UN Regional Classification Scheme.
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<th>Complainants (by regional group)</th>
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**Table III: Total number of WTO disputes, sorted by Complainant's and Respondent's region**