

Three's a Crowd:
Third Parties and WTO Dispute Settlement

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Abstract

Disputes filed at the World Trade Organization (WTO) are attracting a growing number of third parties. Most observers argue that their participation influences the institution's rulings. We argue that third parties undermine pre-trial negotiations, and that any influence they have on rulings is conditioned by this selection effect. We test our hypothesis against the conventional wisdom, using a dataset of WTO disputes initiated through 2002. Consistent with our argument, we find that third party participation *lowers* the prospects for early settlement, and that this selection effect is crucial in detecting the political influence that third parties have on WTO rulings.

In recent years, cases filed for dispute settlement at the World Trade Organization (WTO) have involved a growing number of *third parties*.¹ Many observers urge that this is a positive development, the argument being that third party testimony gives panels and the Appellate Body (AB) a broader perspective on a case, resulting in rulings that reflect the wider interests of the multilateral trade regime.² A host of WTO members subscribe to this view, as evidenced by the impressive number of recommendations for strengthening third party rights in the current negotiations over the Dispute Settlement Understanding (DSU).³ And yet, despite all the interest in strengthening these rights, there is scant evidence that third parties have any influence on how WTO cases are litigated, let alone how they are decided. This begs the obvious question: Do third parties “matter” in WTO dispute settlement?

The literature tends to rally around the view that third parties do matter. Indeed, the conventional wisdom from studies of the European Court of Justice (ECJ) holds that rulings issued by international legal bodies are typically influenced by the views of member countries, including third parties. For example, Karen Alter explains that where the ECJ anticipates opposition from “key states,” it may choose to “moderate its jurisprudence” to avoid a confrontation over the court’s legitimacy.⁴ Geoffrey Garrett, Daniel Kelemen and Heiner Schultz concur, insisting that “the ECJ is a strategic actor that is sensitive to the preferences of EU [European Union] member governments,” and in the

¹ By third parties, we mean member governments reserving rights in a dispute. This term does not include non-governmental organizations submitting *amicus* briefs. Third parties are also to be distinguished from co-complainants, as we discuss below.

² Lanye 2003, 235.

³ Of the 45 proposals submitted on DSU reform as of August 2004, fully 26 spoke to third party rights. See also WTO 2003.

⁴ Alter 1998, 144.

face of widespread discontent may temper its activism.⁵ Likewise, in the only study of the ECJ to date that focuses on the role of third parties per se, Carrubba et al. provide persuasive statistical evidence that they help to shape the court's decisions.⁶ Applying this logic to the WTO, James McCall Smith casts the AB in a similar light, insisting that political considerations shape whether it errs on the side of striving for legally consistent rulings, or bows to political pressure to gain compliance.⁷ Allan Rosas elaborates this argument with respect to third parties, more specifically, arguing that their input helps keep panels and the AB from becoming "too narrowly focused on the particular interests of the parties to the dispute."⁸ In this way, third party participation is taken as a signal of the preferences of the wider membership, and is thus expected to influence how the WTO, as a strategic actor, decides a case, just like the preferences of member countries are expected to inform ECJ rulings.

This paper proposes an argument quite different from, if not directly opposed to, the conventional wisdom. We argue that third parties increase the bargaining costs of pre-trial negotiations, and thus undermine the prospects for settlement, the result being that, where they participate, disputes are more likely to end in a verdict. The primary focus of our argument — unlike the conventional wisdom — is *not* on the nature of WTO rulings but, rather, on whether cases get ruled upon at all. Keep in mind that the DSU permits third parties to give written and oral testimony to panels and the AB, and while it does not formally regard them as third parties in advance of a panel proceeding, the DSU does allow these "other parties" to intervene in consultations. One concern is that, as

⁵ Garrett, Kelemen and Schulz 1998, 150.

⁶ Carrubba et al. 2005.

⁷ Smith 2003. See also Garrett and Smith 2002; and Kelemen 2001.

⁸ Rosas 2000, 85.

David Stasavage explains, when a settlement might otherwise be possible, third party audiences may prompt negotiators to posture, making them “more reluctant to retreat from initially stated positions....”⁹ Another concern is that, as James Sebenius insists, “[i]t is almost axiomatic that the more parties (and issues), the higher the costs, the longer the time, and the greater the informational requirements for negotiated settlement.”¹⁰ We hypothesize that, by increasing the bargaining costs of pre-trial negotiations, third parties undermine the prospects for “early settlement,” by which we mean liberalization of contested measures prior to a panel ruling.¹¹ By implication, any influence third parties have on rulings themselves — the question addressed by the conventional wisdom — is *conditional on the fact that cases with third parties are more likely to go to rulings in the first place*.

We test our hypothesis, as well as that of the conventional wisdom, using a dataset of WTO disputes initiated through 2002. Consistent with our argument, we find that when third parties participate in a dispute, they *lower* the prospects for early settlement and *increase* the likelihood that a case goes the legal distance to a ruling. The effect of third parties on the *direction* of rulings, however, is less obvious than the conventional wisdom might admit. Among cases in which rulings are issued, there is *no discernible correlation* between third party involvement and ruling direction. Yet our hypothesis about third parties and settlement offers an important clue with which to interpret this evidence. That is, if settlement is more likely when third parties are absent, then relatively few rulings should occur in cases with no third parties. Nearly every case reaching

⁹ Stasavage 2004, 682.

¹⁰ Sebenius 1983, 308. See also Koremenos, Lipson and Snidal 2001, 782.

¹¹ We emphasize that the term “early settlement” does *not* count early *withdrawal* of a complaint if the status quo ante is left in place.

a ruling, however, should exhibit third party involvement. In other words, WTO bodies may indeed condition their rulings on political pressures that come with third party involvement, but we would not necessarily observe this *directly* unless we first account for the selection of cases for rulings. In conducting an analysis that does so, we find support for the conventional wisdom, but only because we first identify how third parties affect rates of early settlement. These results have important implications for the study of the ECJ, and other international institutions.

First, ours is only the second large- n case-level analysis of how political pressures bear on the judgments of international courts,¹² and the first to examine the WTO in particular. Of course, this approach to understanding judicial decisions has extensive precedent in the literature on American and comparative courts. For example, just as Kevin McGuire finds that third party participation influences Supreme Court decisions,¹³ we find that third parties can sway WTO rulings. Hence this paper's evidence is consistent with those studies that find that judgments by international courts are affected by political pressures.

Second, however, our paper emphasizes a well-established point in the American courts literature that has been largely ignored in studies of international courts. Specifically, third parties strongly affect the *selection* of cases for rulings in the first place.¹⁴ To be sure, the mechanism here is quite different than in the case of the US Supreme Court, which, unlike WTO panels and the AB, has discretion over which cases it wishes to rule on. At the WTO, third parties matter because they affect settlement bargaining, not because their participation signals a case's salience to a court making a *certiorari* decision.

¹² The other is Carrubba et al. 2005.

¹³ McGuire 1995.

¹⁴ Caldeira and Wright 1988.

Regardless, the key is that any impact third parties have on judicial decisions is impossible to discern without first recognizing how they shape the court's docket.

Third, our findings indicate that third parties do more harm than good *in the strict sense that they undermine early settlement*. This, of course, is not the only benchmark against which to assess the role of third parties. After all, third party participation could be valued simply because it gives dispute settlement a more “multilateral” flavor, and thus may enhance the WTO's legitimacy. Yet our findings reveal that the influence third parties have on outcomes depends on how they side in a dispute. If they disproportionately side with the complainant or defendant, this increases the odds of victory or defeat, respectively, but if their allegiances are mixed, their impact largely washes out. This suggests that the views of third parties register in a more political way, rather than motivating the panel or AB to stick more rigidly to the letter of the law. In any case, while third parties may have salutary effects on WTO rulings, to crux of the matter is that, as Robert Hudec puts it, “[n]o functioning legal system can wait until then to exert its primary impact.”¹⁵ Up front, the problem is that the prospects for reform by the defendant may actually decrease even after a pro-complainant ruling.¹⁶ Early settlement, which the DSU unmistakably prefers to litigation,¹⁷ tends to yield the most favorable outcomes in dispute settlement.¹⁸ Accordingly, open access for third parties can undermine the legal regime's effectiveness precisely at the point where its opportunity for influence is greatest.

¹⁵ Hudec 1993, 360.

¹⁶ Reinhardt 2001.

¹⁷ DSU 3.7 states that “[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute,” and DSU 3.3 likewise emphasizes that “prompt settlement... is essential to the effective functioning of the WTO...” The Appellate Body's *Wool Shirts and Blouses* report reminds us, “the basic aim” of the institution is “to settle disputes,” not to generate legal judgments. WTO 1997, 19.

¹⁸ Busch and Reinhardt 2001, 2003a, 2003b.

A related counterargument is that third party participation may be valued precisely because it prevents settlements which are discriminatory, which lowers welfare more generally.¹⁹ One purpose of this paper is to test whether third party participation does, indeed, lower the odds of early settlement. And while the extent to which these settlements are discriminatory is an important topic for future study, we submit that there is a countervailing system-wide cost if bilateral negotiations fail to deliver concessions in meritorious cases, since this is likely to undermine the deterrence of future cheating. Indeed, if, in anticipation of third party participation, complainants are less likely to file, fearing that concessions will be hard to negotiate, this will leave more nondiscriminatory violations in place, to the detriment of the membership as a whole. Whether this negative effect of third party access is outweighed by the positive effect of preventing discriminatory settlement is simply unknown at present, but our point is that the tradeoff cannot be ignored.

Finally, our results make clear that third parties wield more influence in disputes *before* they are formally recognized as such, i.e., in consultations. This is more than just a question of terminology; recommendations for stronger third party rights tend to stress the need for greater participation at the panel stage, and yet the “real action” is unfolding before a complainant ever requests a panel. The debate over stronger rights has thus been largely miscast: third parties have a greater impact on dispute settlement before they are formally treated as such. This suggests that institutionalists need to look beyond formal categories—like the legal construct of third parties—to fully appreciate how institutions matter. Michael Tomz, Judith Goldstein and Douglas Rivers make this same point in showing that, to properly assess the influence of the General Agreement on Tariffs and

¹⁹ Bagwell and Staiger 2002.

Trade (GATT) on global commerce, it is crucial to look not only at trade among the institution's formal members, but inclusive of its *informal* members as well.²⁰ Likewise, we submit that the debate over stronger third party rights at the WTO needs to be broadened to account for their influence in consultations, since it is arguably at this stage that they have the greatest influence on WTO dispute settlement.

This paper is in five sections. First, we explain how third parties participate in WTO dispute settlement. Second, we elaborate our hypotheses. Third, we set out the data and methods used to test these hypotheses. Fourth, we discuss our findings. Fifth, we conclude by teasing out some of the more salient implications of our findings for the WTO, and for theories of international relations more generally.

Third Parties at the WTO

A WTO dispute proceeds through three main stages: consultation; formal litigation; and, if necessary, implementation. All disputes start with an initial request for consultations, in which the government bringing the case to the WTO (the *complainant*) sets out its objections to the trade measure(s) of another government (the *defendant*). The two sides are then required to consult for 60 days with the goal of negotiating a mutually satisfactory solution to the dispute. Indeed, a large percentage of cases *are* successfully resolved during consultations: fully 46 percent of all WTO disputes end at this stage, and three-quarters of those yield at least partial concessions from the defendant.²¹

If consultations do not produce a mutually satisfactory solution, the complainant can request a panel proceeding, marking the start of formal litigation. There are typically

²⁰ Tomz, Goldstein and Rivers 2005.

²¹ This and all subsequently cited figures on WTO dispute participation, escalation, and outcomes, are derived from the dataset described and analyzed at length below. See also Busch and Reinhardt 2002, 2003b.

two rounds of testimony, after which the panel circulates an “interim report,” offering the main parties an opportunity to comment and seek clarification. The complainant and defendant can still negotiate a settlement at this point. In fact, another 13 percent of *all* cases—or one-third of the subset of cases going to a panel—end at this stage (i.e., before a panel ruling), meaning that only two-fifths of WTO disputes result in a legal verdict. If the case is not resolved early, the panel issues its final report, which is then adopted by the WTO, unless the two sides agree *not* to adopt the panel report for whatever reason (so-called “negative consensus”), or one or both sides choose to appeal the panel’s report.

If a pro-complainant verdict is upheld on appeal, and the defendant is not perceived to have brought its trade measure(s) into compliance with the WTO, then the implementation phase begins. Here, the complainant can request a “compliance” panel to verify that the defendant remains afoul of its obligations and, if so, can then request authorization to “retaliate” against the defendant, which involves suspending concessions to that country, usually by raising tariffs on imports from the defendant.

Where do third parties fit in? At first glance, the DSU’s provisions for third parties appear rather straightforward. Article 10 of the DSU allows third parties to deliver written and oral testimony before panels during the first round of litigation, and thus to receive the first submissions of the main parties. The interim report is not circulated to third parties, but like the panel decision, it is expected that this document will take into account their views. If the verdict is appealed, DSU Article 17 gives those third parties that reserved rights at the panel stage similar access to proceedings before the AB. As for

the implementation stage, third parties do participate in the first round of hearings before compliance panels, but have not enjoyed access to arbitration over retaliation.²²

The reason that things are not as straightforward as they seem is that, in addition to these rights, which are bestowed upon *formal* third parties, DSU Article 4.11 allows a member “other than the consulting [i.e., disputing] Members” to be joined in consultations, thereby giving rise to *informal* third parties. Put differently, third parties can participate in a dispute before they are officially designated as such. It is essential to take these informal third parties into account for at least three reasons. First, because many, if not most, WTO disputes are solved in consultations, ignoring the role of third parties in the lead-up to a panel would vastly understate their influence. Second, third parties that reserve rights at the panel stage nearly always intervene first in the consultation stage, which is to say that formal third parties almost always start off as informal third parties.²³ Third, the members themselves often do not distinguish between participating as formal or informal third parties, a point made clear by the fact that so many are calling for stronger “third party rights” in *consultations*.²⁴ While we are careful not to conflate third parties and *co-complainants*²⁵ in consultations, the point is that our broader definition is

²² See Palmeter and Mavroidis 2004, 249, 277-8.

²³ There are only four exceptions to this rule of which we are aware, out of 572 instances of third party involvement in our dataset described below. Moreover, each of these four exceptions effectively proves the rule. For example, Thailand’s intervention on the side of the complainants in the *EC—Bananas* dispute (DS158), while initiated only after the panel was established, was also rapidly withdrawn. In the other three instances, the governments in question attempted to join consultations but had their requests to do so denied; however, they later submitted briefs as official third parties at the panel stage (e.g., Thailand and the Philippines in *Turkey—Textile and Clothing Products*, DS34, and the EC in *Korea—Government Procurement*, DS163).

²⁴ See WTO Document TN/DS/W/36. (This and later citations to official WTO documents use only the unique WTO document number. Most are publicly available at <http://docsonline.wto.org/>.)

²⁵ “Complainants” are the plaintiffs of the case; they, not third parties, must file requests for consultations, identifying the disputed policy measure and invoking specific treaty provisions as the basis for challenging it; and they have procedural roles and rights which are distinct from those of third parties. The WTO accordingly distinguishes the two kinds of participants clearly in its documentation of each case.

crucial in examining the influence of third parties at different stages of WTO dispute settlement.

To be joined in consultations, DSU Article 4.11 stipulates that “other Members” must establish that they have a “substantial trade interest” in the dispute. This entry barrier is meant to preserve the main parties’ latitude to negotiate a settlement by excluding informal third parties with no significant economic stake in the dispute, although few requests have been rejected through 2002.²⁶ At times, members also claim to have a “systemic interest” in the dispute, especially those that arise under relatively untested or politically-charged agreements, or where domestic legislation is being challenged. In *US—Section 306*, for example, Canada was quick to explain that the definition of a “trade interest” in DSU Article 4.11 “is not limited to an immediate commercial interest but rather is wide enough to encompass both commercial and systemic interests.”²⁷ When the US denied Japan’s bid to be joined in these same consultations, citing a lack of a substantial trade interest, Japan countered by claiming that its commercial stake included “systemic” concerns.²⁸

This is not to say that systemic interests fill in for a lack of a substantial trade interest. On the contrary, systemic interests are typically a signal that third parties intend to raise broader—and potentially more axiomatic—concerns, and in this regard are the most tangible signal that they intend to “multilateralize” the dispute. In a dispute over oil tubular goods, for example, China, Japan and Taiwan all invoked systemic interests, but also

²⁶ Specifically, only 23 of the nearly 600 requests to join consultations have been rejected. However, many of those rejected—as the examples in footnote 23 testify—subsequently participate as formal third parties at the panel stage, utilizing the lower bar to such participation granted by the DSU’s Article 10.2, described below. Because a third of all cases going to a panel end before a ruling is issued, such late-stage third party participation can still significantly affect the prospects for early settlement.

²⁷ DS200/8.

²⁸ DS200/12.

had a substantial trade interest, in that the three are sizable producers of the product. Invoking a systemic interest indeed indicated a more axiomatic concern about the dispute, as is suggested by the fact that the panel had to devote over 48 pages to third party submissions in this case.²⁹ On the other hand, Canada participated as a third party in a dispute over desiccated coconut, a product the country scarcely imports, and yet, despite the lack of a substantial trade interest, it did *not* invoke a systemic interest.³⁰ Our point is this: by citing a systemic interest, members are signaling their deep interest in the dispute, and not, as a general fact, engaging in cheap talk.

Another would-be hurdle to third party participation centers on the specific article under which the complainant requests consultations with the defendant. In particular, the complainant can request consultations under DSU Article 4 together with Article XXII:1 or Article XXIII:1 of GATT 1994, the latter, in theory, being more permissive of excluding third parties.³¹ This choice was of some import during the GATT years, when Article XXIII:1 kept third parties at bay in a number of high profile disputes. Under the WTO, this difference may also be borne out to a certain extent.

However, invoking a complaint using Article XXII is *neither necessary nor sufficient* to permit and attract third party participation; the relationship is far from deterministic. About half of all WTO complaints utilize Article XXIII:1, and half of these end up drawing third parties. Likewise, a sizable proportion of complaints invoked solely under Article XXII fail to pull in third parties. Hence this technical distinction regarding a complaint's article of invocation provides little substantive leverage in predicting which cases experience third party intervention. That is because the primary practical distinc-

²⁹ DS/282

³⁰ DS/22

³¹ See Porges 2003, 158.

tion between the two articles has nothing to do with third parties. Rather, complainants have always perceived Article XXIII:1 as the more formal and rapid road to adjudication. Complainants bent on achieving a decisive ruling — for whatever reason — tend to invoke Article XXIII:1 rather than Article XXII, as Busch (2000) demonstrates. This point has helpful implications for our empirical tests, and we will explicitly control for the article of invocation in our analyses of dispute outcomes. Regardless, the key is that third parties can and do participate in disputes invoked through either article.

If consultations fail and the dispute goes to a panel, DSU Article 10.2 sets a lower bar for third party requests to join a dispute: namely, a “substantial interest,” rather than a substantial *trade* interest. At this stage, as we note above, third parties can deliver written and oral testimony during the first round of hearings, and receive the first submissions of the complainant and defendant. If the panel ruling is appealed—and this happens roughly 70 percent of the time—DSU Article 17 says that these same third parties can deliver both written and oral testimony to the AB as well.

Conventional Wisdom on Third Parties

By reserving rights, third parties clearly wish to influence the outcome of the dispute. The belief that their participation matters likely explains why third parties reserved rights in 65 percent of WTO disputes through 2002. But do third parties, in fact, matter? And if so, how?

If there is a conventional wisdom about third party influence on WTO disputes, it is that they help shape panel and AB rulings because the “court” is a strategic actor. Just as Garrett, Kelemen and Schulz insist that it is no longer controversial to ascribe strategic

decision-making to the ECJ,³² few WTO observers doubt that political expediency guides panels and the AB in crafting verdicts.³³ The tension, as Smith explains with respect to the AB, is to balance the need to render legally consistent decisions with the desire to bolster the likelihood of compliance, the latter being a function not just of whether the defendant will abide by the verdict, but how the membership as a whole will receive it. Alter posits much the same argument with respect to the ECJ, explaining that “political consensus” is a key predictor of the court’s latitude for activism.³⁴ Citing a similar quest for legitimacy on the part of the WTO, Smith sees an opportunity for third parties, pointing out that the AB has sought to encourage their participation “to gain access to valuable information regarding the views of the broader WTO membership.”³⁵ Does this happen?

A glance at some of the WTO’s rulings would seem to lend support to the court-as-strategic-actor hypothesis. In *Chile—Alcoholic Beverages*, for example, the panel explained its rejection of one of the defendant’s legal arguments by citing that the EC, “as well as third parties, objected that such a notion was absurd,” nodding to the role played by third parties in this dispute.³⁶ In *Canada—Aircraft*, third party testimony by the US was deemed so germane to the dispute that the panel refused to let it be withdrawn, not least because the panel “had asked the parties to submit comments *on specific aspects of the US submissions*.”³⁷ More telling still, in *Canada—Patents*, the panel chose not to rule on a key question of law, insisting that it did not want to adjudicate “a normative policy issue that is still obviously a matter of *unresolved political debate*.”³⁸

³² Garrett, Kelemen and Schulz 1998, 152.

³³ Weiss 1998; Covelli 2003.

³⁴ Alter 1998.

³⁵ Smith 2003, 75, 85.

³⁶ DS87, 7.136.

³⁷ DS70, 7.47, fn. 4. Emphasis added.

³⁸ DS114/R, 7.82. Emphasis added.

Yet no prior study has examined the impact of third parties on the full set of rulings by the WTO. Garrett and Smith analyze some case studies of WTO Appellate Body decisions, focusing on the AB's sensitivity to the political stakes of US-EC cases, though without attention to third parties, in particular.³⁹ Kelemen conducts a similar examination of another small set of WTO decisions.⁴⁰ In the only study to focus specifically on third parties, Carrubba et al. explore their impact on ECJ decisions in a single year.⁴¹ This is not surprising: while growing rapidly, the body of decisions by the WTO since 1995 remains small, such that any empirical investigation will necessarily have limited statistical power. However, the chief complication, as our argument below suggests, is that the set of cases on which judgments are issued is systematically biased, complicating inference about the effect of third parties on rulings.

Argument

Theories of bargaining have long made clear that more parties to a dispute make negotiations difficult. This suggests that, in sharp contrast to the court-as-strategic-actor hypothesis, the real action with respect to third parties is most likely unfolding before a panel is ever requested, let alone before it rules. Specifically, third parties increase the disputants' bargaining costs in two complementary ways. First, third parties serve as the complainant's and defendant's audience and, in this regard, increase transparency. And while, as Stasavage observes, it is almost universally agreed that greater transparency is "good," our concern, like his, is that transparency can be detrimental to the fate of negotiations. Second, because third parties constitute an active audience, participating directly

³⁹ Garrett and Smith 2002.

⁴⁰ Kelemen 2001.

⁴¹ Carrubba et al. 2005.

in dispute settlement, they increase the transaction costs incurred by the main protagonists in negotiating a resolution.

In conjecturing about the challenges of transparency, Stasavage contrasts the effects of open- versus closed-door bargaining on negotiators. Under the former rule, the fear is that negotiators will *pander* to, and *posture* for, their audiences, be they domestic or foreign. Like Stasavage, our main concern is the latter: namely, that audiences motivate negotiators to posture, meaning they “adopt uncompromising positions during negotiations, to demonstrate to their constituents that they are effective or committed bargainers.”⁴² James Fearon, too, argues that higher audience costs lead states to more credibly dig in their heels, and that, when it comes to signaling resolve in this way, they seldom bluff.⁴³ Groseclose and McCarty show that a third party’s presence can induce posturing and deadlock negotiations even when the disputants are fully informed about each other’s preferences.⁴⁴ This is why, as one former trade dispute negotiator has put it, “Privacy for the negotiating process can be essential....”⁴⁵ In our view, third parties comprise a mobilized audience and thus may inspire intransigence in consultations and at the panel stage before a ruling. To be sure, the disputants’ own domestic audiences may likewise inspire posturing; the point here is that, when settlement *is* otherwise feasible, the addition of third parties complicate matters.

Second, the concern about transaction costs follows from the fact that, unlike other audiences, third parties can actively participate in dispute settlement. In this regard, they can induce not only posturing by the protagonists, but influence the content of what

⁴² Stasavage 2004, 673.

⁴³ Fearon 1997.

⁴⁴ Groseclose and McCarty 2001.

⁴⁵ Porges 2003, 176.

the protagonists argue about. As Bill Davey points out, third parties often interpret disputes in ways that may be at odds with the complainant's and defendant's position, and thus distract from the main points of contention in a dispute.⁴⁶ Jeff Waincymer concurs, observing that while third parties are not able to raise claims outside the terms of reference, they can draw attention to other arguments that fit within the terms of reference, but which the complainant and defendant had not thought to introduce or—worse still—do not favor.⁴⁷ Along these lines, the Dominican Republic complained that Honduras had been prodded by third parties to expand the terms of reference in a dispute over cigarettes, insisting that “[i]t was not until the first meeting of the Panel that Honduras suddenly included all of the products in the complaint, taking the idea from the written submissions of certain third parties.”⁴⁸ Likewise, in defending itself in the on-line gambling dispute, the US complained that “Antigua and the third parties are expending a great deal of rhetorical energy in an effort to seek to modify the text of the US Schedule through dispute settlement.”⁴⁹ The involvement of third parties in consultations poses similar risks, in that they may desire a settlement that is at odds with the preferences of the complainant or defendant, or introduce new issues to be resolved which might put a settlement out of reach.

Third parties may also raise “systemic” legal questions about the dispute, further circumscribing the grounds on which the disputants might seek a settlement. In such cases, the third parties may have little stake in changing the specific measure in dispute,

⁴⁶ See, for example, Davey 2003, 15. Davey warns, in particular, against the recommendation that panels and the AB be required to address all the points raised by third parties, since this “could potentially lead to abuse where a third party views the case completely differently than the parties”

⁴⁷ Waincymer 2002, 339. See also Smith 2003, 85.

⁴⁸ DS302/R, 4.351.

⁴⁹ D

preferring instead a broader legal judgment that might bear on concrete policies of their own, or policies of others they might challenge in the future.⁵⁰ If they believe the current case's outcome has important implications for the future, the disputants' positions will become further entrenched, thereby reducing the opportunity for settlement.

That third parties add to the transaction costs of an otherwise bilateral bargaining process, and thereby undermine the efficiency of its outcome, has been widely established in economic models.⁵¹ Keep in mind that, unlike in the multilateral trade negotiations (MTNs), or "rounds," dispute talks do not encourage, and in fact specifically *discourage*, issue-linkage or side payments by one or more of the parties, which could otherwise serve as a vehicle for achieving efficient bargaining outcomes among multiple parties.⁵²

In addition to drawing the attention of scholars, this concern about greater third party access also resonates with a number of WTO members. To be sure, several proposals regarding third parties express grave reservations about strengthening these rights, warning that greater participation could undermine early settlement. Most notable, in this regard, is Taiwan's proposal, which favors retaining the "substantial trade interest" criterion as an entry barrier under DSU Article 4.11, arguing that "[t]his is to ensure that the necessary space and simplicity for the disputing parties is retained in the consultation stage, and that *consultation is preserved as an important method of settling trade disputes*."⁵³ Similarly, Canada's proposal advocates against increased transparency in con-

⁵⁰ As Porges astutely observes, "In the absence of a stakeholder with a financial interest in early settlement, the government may have no incentive to have a bargaining position oriented toward settlement" (2003, 155).

⁵¹ See Milgrom and Roberts 1992; Speier 2002; Cai 2002; Manzini and Ponsati forthcoming.

⁵² Davis 2004, 155. As Jackson (2004) argues, the WTO treaty texts discourage "compensation" as a solution to a dispute, calling strictly, instead, for remedies that eliminate the violation itself.

⁵³ WTO Document TN/DS/W/25, 3. Emphasis added.

sultations more generally, noting that this “could undermine Members’ ability to reach negotiated solutions to disputes.”⁵⁴

Accordingly, we hypothesize that third party participation makes early settlement *less* likely. By extension, we also expect that third party participation increases the likelihood of a panel ruling. Furthermore, both of these consequences should be especially likely when a third party raises “systemic” issues. By implication, any test of the conventional wisdom—namely, that third parties affect the direction of a ruling—must be conditional on this prior effect on the pattern of cases reaching that stage at all.

Data and Methods

To test our hypotheses on the impact of third parties on settlement, along with the conventional wisdom’s expectation about third parties and ruling outcomes, we compile a dataset of 200 WTO disputes. Following Robert Hudec⁵⁵, we only count complaints in which formal WTO proceedings were explicitly invoked, i.e., naming defendants and alleging the infringement of specific legal rights, most often in the form of a request for consultations. Our list includes all 200 such complaints filed from 1995 through 2002, inclusive, for which litigation had been concluded as of January 2004. (As apart from ruling issuance and direction, *policy* outcomes, and hence the nature of any settlements, were only accessible for 120 of these 200 cases. Our settlement variable thus cannot incorporate data on many disputes, begun within two or three years from the end of the period, for which we nonetheless observe ruling details.)

⁵⁴ WTO Document TNDS/W/41, 6.

⁵⁵ Hudec 1993.

Since our interest lies in how third parties influence the prospects for early settlement, the likelihood of a ruling, and the direction of a ruling, our unit of observation is the “dispute,” defined as follows. We combine all pairs of complainant-defendant filings into a single dispute observation if they participate in the same panel proceeding. So, for example, we would take the current dispute over genetically modified foods, which involves Argentina, Canada and the US filing against the EC, and collapse this into a single dispute observation, since all three complainants are participating in the same panel proceeding. Of the 200 disputes in our dataset, a panel was established in 99 (50%). If no panel was established, then we combine complainant-defendant pairs in a similar way on the basis of their requests for consultations.

We seek to explain three outcomes across our analyses. The first outcome is *Early Settlement*, by which we mean concessions offered in advance of a ruling, either in consultations or at the panel stage. This dependent variable is coded 1 if full concessions were offered by the defendant before a ruling was issued, using data on these policy outcomes reported in prior research,⁵⁶ it is zero otherwise. The second outcome is *Ruling Issued*, which is coded 1 if a verdict was issued, and 0 otherwise. Of the 99 panel proceedings in our dataset, a ruling was handed down in 65 (66%). The third outcome is *Pro-Complainant Ruling*, which we code in line with the initial panel report or, if an appeal was made, the initial AB report, according to whether it (1) substantially favored the complainant, or, in contrast, (0) was mixed (i.e., both the complainant and defendant won parts), or favored the defendant. Of the 65 rulings in our dataset, 39 favored the complainant, net of any appeal. Summary statistics for all variables are displayed in Table 1.

⁵⁶ See Busch and Reinhardt 2003b.

[insert Table 1 about here]

Our main explanatory variables concern the participation of third parties in a dispute, and the direction of their support. In both cases, we combine all the third parties under the relevant dispute observation. For example, while Mexico has only reserved third party rights in the US filing over genetically modified foods, we would code it as a third party participating in the combined Argentina-Canada-US dispute, which more fully reflects its potential to influence the case at hand. For the sake of robustness, we code the resulting variable *Third Party* as both a simple dummy (1 for one or more, 0 for none) as well as a full count. Of the 200 disputes in our dataset, third parties participated in 130 (65%), with a sample mean of 2.9 third parties per dispute.

Of course, not all third parties are alike. Thus we also construct a third version of *Third Party*, in order to correct for their varying levels of economic significance. This is done by weighting third parties by their gross domestic product (GDP), relative to the defendant(s), all in comparable prices. The precise measure is thus

$$\text{Log}\left(1 + \frac{\text{Summed GDPs of All Third Parties}}{\text{Summed GDPs of All Defendants}}\right).$$

Note that, because $\text{Log}\left(1 + \frac{0}{1}\right) = 0$, the resulting index takes on a value of zero if no third

parties participate in a given dispute. It is $\text{Log}\left(1 + \frac{1}{1}\right) = 0.693$ if the third parties'

summed GDP equals that of the defendant(s). In the median dispute *with* third parties in our dataset, the third parties' GDP was one and a half times as large as the defendants' summed GDP. Hence, a one-unit change in this GDP-index version of *Third Party* re-

flects the difference between a dispute *without* third parties and a typical dispute *with* third parties.

Third party participation is, like involvement in WTO dispute settlement more generally, skewed towards the largest trading states, especially the US and EC. For example, the US reserved third party rights in 54 of the 200 disputes; the EC in 62; and either the US or EC (or both) in 92. However, at one point or another in our dataset, 61 different countries have filed as third parties. The list of frequent third parties, besides the two economic superpowers, is topped by Japan, Canada, India, Australia, Mexico, Brazil, Korea, Norway, Chile, and Switzerland. Perhaps somewhat surprisingly, a large number of smaller Latin American countries (Guatemala, Honduras, Costa Rica, Ecuador, Colombia, Cuba, Nicaragua) have each acted as third parties on eight or more occasions.

These third party measures, while appropriate for a model of early settlement and the issuance of a ruling, do not capture the directional thrust, if any, of the third party intervention. To get at this issue, albeit only for the purposes of the model of ruling direction itself, we categorize each third party by its orientation, either pro-complainant, pro-defendant, or mixed, drawing on close readings of their submissions to the WTO in the dispute. This is a relatively easy task for nearly all cases, especially those ending in panel reports, because each report neatly itemizes the arguments of third parties. (We were unable to code the direction of support for a few third parties intervening in cases which did not reach the ruling stage, however. These few, then, do not enter the ruling direction model below.) In our dataset, fully 70 percent of all third parties intervene in support of

the complainants, 23 percent for the defendants, while 6 percent intervene with a mixed position.

We construct the variable *Systemic Issues* to test our hypothesis that settlement will be especially more difficult when third parties complicate the dispute bargaining with “systemic” legal considerations. This variable, a dummy, is 1 if third parties, in their submissions, explained that the dispute raised broad questions of relevance beyond the complainant and defendant per se, typically because the measure(s) had been broadly applied (i.e., *US—Section 301*) or had precedential value (i.e., *Canada—Patents*); it is zero otherwise. Hence it is zero in all cases lacking third parties. In making such arguments, third parties literally use the word “systemic,” making our coding judgment quite transparent. This variable is one in 51 of the 200 cases, which is 39 percent of those with third parties participating.

We include a number of additional variables which may potentially influence the prospects for settlement, or the issuance and/or direction of a ruling.⁵⁷ Specifically, the variable *US/EC Dispute* is one for any dispute in which the US or EC participated as complainant or defendant (0 otherwise). If disputes involving either of the two WTO giants are exceptional in some way, this variable will capture it. Likewise, we add two variables, *Log Defendant GDP* and *Log Complainant GDP*, to speak to the market power of each side in a more generalizable way. These variables include all formal disputants on the relevant side (though not third parties, of course). Note that they thus address, albeit crudely, the economic (and thus political) stakes likely to be in dispute. The variable, *Number of Complainants*, counts the number of states acting as complainants in the dispute. If this is correlated with the number of third parties, controlling for it should en-

⁵⁷ For more information about sources and coding of these variables, see Busch and Reinhardt 2003b.

sure that any finding regarding third parties per se is not an artifact of the multiplicity of complainants in a given case. *Discriminatory Measure* is 1 if the dispute solely targets measures that discriminate among the defendant's trade partners, 0 if not. Such disputes may, or may not, be more amenable to settlement. As noted earlier, the article (XXII or XXIII:1) under which a complaint is invoked is often a signal of the complainant's resolve to push to a ruling (Busch 2000). We control for this using the dichotomous variable, *Article XXII*, which should have a positive impact on settlement rates. It is one in about half the cases.

We include two dummies, *Agriculture* and *Politically Sensitive Case*, to identify cases thought to be especially difficult to resolve due to the types of sectors or measures they target. Agricultural protections are often said to be particularly inviolable.⁵⁸ *Politically Sensitive Case* flags disputes over measures concerned with national security,⁵⁹ environmental regulations, biosafety (so-called sanitary and phytosanitary) rules, "cultural protection," preferential trade agreements (PTAs), as well as policies falling in the domain of subnational authorities in federal states. Fully 34 percent of our cases involve agriculture, but only 18 percent in total address the other "politically sensitive" matters. Finally, to speak to the (lack of) legal merits of the complainant's position in the model of ruling direction,⁶⁰ we also include the dummy variable *Nonviolation Complaint*, which is 1 if the complainant(s) appended a catch-all nonviolation "nullification or impairment" claim, proof of which must meet a far higher standard.

⁵⁸ Davis 2004.

⁵⁹ Porges 2003, 155.

⁶⁰ Given the *prima facie* inconsistency of discriminatory trade measures with the WTO's core principle of nondiscrimination, our variable *Discriminatory Measure* should also bear on legal merits.

Before turning to the results, it is important to speak to the question of whether third party participation is, itself, conditioned by the nature of a dispute. It may occur to some readers to think of this issue in selection model terms, asking first whether third parties get involved, and, given that they do, what happens to the case afterwards. Such thinking maps neatly to the empirical technique of a Heckman selection model. Yet that model is an inappropriate analogue for this empirical problem. Such an approach, after all, assumes that we *only* observe case outcomes when third parties do get involved, yet in fact we observe outcomes even when there are *no* third parties. The Heckman model also does not allow for the first-stage outcome, which would be third party participation, to be included itself as an explanatory variable in the second-stage, dispute, outcome. Doing so, however, is the chief objective of this study. Hence, to the extent that third party involvement is strategic, it is best dealt with as an endogeneity matter, not selection bias.

With that in mind, one could object that complicated cases touch on a wider variety of members' trade, making these disputes harder to settle early and more likely to end in a ruling. We are not especially concerned about this for three reasons. First, if disputes have substantial *direct* implications for other member's trade with the defendant, they would be more likely to file as *co-complainants*, and not third parties, so that they can share in any settlement or partake in authorization to retaliate. After all, this is a common occurrence: 27 of these 200 disputes had multiple complainants. In any case, our analyses explicitly control for the number of complainants. Second, we control for whether disputes have substantial *indirect* implications for other members by including the variable *Systemic Issues*, as noted above.

Third, to be certain, we estimate a separate probit model of which disputes attract third parties. (See Table 4, in the appendix.) This model shows that disputes invoked using Article XXII and those against larger defendants disproportionately tend to draw third party participation. It is not surprising that the greater the market at stake, the more third parties are involved. That the article of invocation matters is also consistent with intuition, as noted earlier. Neither of these facts necessarily implies that such disputes intrinsically are less amenable to *settlement*, however.⁶¹ In fact, as we shall see, both variables (*Log Defendant GDP* and *Article XXII*) are *positively* associated with settlement rates. This is the key to addressing the question of endogeneity bias in the results to follow. If the kinds of cases that draw third parties also tend, for other reasons, to settle more, then any endogeneity bias should *attenuate*, not accentuate, the estimated impact of third parties on settlement. That should make any positive results all the more, not less, credible. Hence, while third parties no doubt strategically choose what cases to get involved in, this should not bias our results in favor of finding an effect of third parties on settlement. If we find that third parties are indeed associated with lower rates of settlement, it is thus doubtful that this is because third parties are drawn to “hard” conflicts, but rather that third parties make conflicts “hard” to begin with.

Results

Our hypotheses about third party participation are vividly borne out in the data. First, consider the simple bivariate relationships depicted in Figure 1, which maps the

⁶¹ Furthermore, none of the other variables bearing on the political stakes and intractability of a dispute—*Agriculture*, *Politically Sensitive Cases*, *US/EC Dispute*—turns out to be a statistically significant predictor of third party participation. Indeed, third parties participate in exactly the same percent of otherwise “politically sensitive” disputes (65 percent) as they do in all other disputes.

prospects for early settlement, and the likelihood that a ruling is issued, against the involvement of third parties. Here, 61 percent of disputes with no third parties ended in early settlement, in contrast to 26 percent of disputes with third parties. Likewise, nine percent of disputes without third parties ended in a ruling, whereas fully 45 percent of disputes with third parties went the legal distance.

[insert Figure 1 about here]

The impact of third parties on the *direction* of rulings is, however, more conflicted in this bivariate analysis. Figure 2 shows the decline in the likelihood of pro-complainant rulings as a percentage of all rulings issued, as a function of different categories of third party involvement. Moving from left to right, the columns indicate the percentages for cases with *no* third parties, third parties only on the complainant's side, third parties intervening for both sides (or making mixed arguments), and third parties siding only with the defendant, respectively. While the number of observations in the first column is small, the graphic is nonetheless intriguing; counter to the conventional wisdom, complainants appear more likely to prevail when no third party supports them.

[insert Figure 2 about here]

Do these patterns stand up to closer empirical scrutiny in multivariate analyses? First, consider Models I, II, and III (in Table 2), which explain the prospects for early settlement as a function of *Third Party* coded in our three different ways. Overall, these models fit the data adequately. They correctly predict some 77 percent of the cases, as

against a naïve success rate of 61 percent.⁶² Collinearity among the explanatory variables is not a problem.⁶³ Importantly, *Systemic Issues* and *Third Party*, in all three forms, are negatively signed and statistically significant, consistent with our hypotheses. Other variables that affect settlement rates are *Politically Sensitive Case* and *Article XXII*, and disputes involving the US or EC are also less amenable to settlement, all of which are consistent with prior research.

[insert Table 2 about here]

The substantive effect of third party participation is also significant. Drawing on our Model I estimates, for the average case (i.e., holding all other variables at their sample means) with no third party involvement, and thus no systemic issues raised by third parties, the predicted probability of early settlement is a reasonably high 0.70 [0.53, 0.83].⁶⁴ If we take the same case and bring in third parties, still with no systemic issues raised, the predicted probability of early settlement drops precipitously to 0.31 [0.17, 0.48]. If we then add the complication of systemic issues being raised by those third parties, the predicted probability of early settlement plummets again, to 0.03 [0.00, 0.17]—a remote prospect, at best. These figures are echoed in comparable proportion for the alternative codings of *Third Party* in Models II and III.

⁶² Heteroskedastic probit models with variance functions conditioned on the third party variables, as well as, separately, the control variables, fail to reject null hypotheses of homoskedasticity when they are estimable. The Model I, II, and III findings regarding our third party variables are also qualitatively identical if we use Newey-West standard errors robust to first-order autocorrelation.

⁶³ Auxiliary regressions of each explanatory variable on all the others yield R-squareds no higher than 0.33, except for the correlated trio of the separate GDP variables and *US/EC Dispute* (which reach 0.6–0.7).

⁶⁴ In this and later uses, the square brackets give the lower and upper bounds of the 95 percent confidence interval.

Next consider Model IV, which explains the likelihood of a ruling being issued.⁶⁵ Again, the model fits the data well, correctly predicting 77 percent of the cases. *Third Party* is positively signed and statistically significant, the upshot being that, by reserving rights, third parties make a ruling more likely. *Systemic Issues* also increases the probability of a ruling. Interestingly, however, none but one of the control variables speaking to the subject, economic and political stakes, and legal merits of the case appear to affect the chances for escalation into a ruling. The exception is *Article XXII*, which (holding *Third Party* constant, naturally) decreases the odds that a case will proceed to a ruling.

In terms of the substantive importance of these findings, Model IV tells much the same story as the first three columns in Table 2. With no third parties and the other variables held at their sample means, the probability that the dispute goes to a ruling is just 0.05 [0.02, 0.12]. With third parties, the odds rise to 0.31 [0.21, 0.43]. Add to this the complication of systemic issues, however, and the likelihood of witnessing a ruling soars to 0.75 [0.61, 0.86]. In short, third party participation makes all the difference between whether a dispute gets settled early or goes to a ruling.

What about ruling *direction*? Recall that our argument is agnostic on this question: it is, rather, the concern of the conventional wisdom. To start, let us see how the conventional wisdom fares empirically if we *ignore* our paper's posited selection effect. To that end, we estimate a simple probit model of *Pro-Complainant Ruling* as a function of the directional third party dummies and controls (Model V in Table 3), using the 65 cases in which rulings were issued. This model is such a poor fit that the test statistic

⁶⁵ As a reminder, we note that cases ending in early settlement are an *incomplete subset* of cases that end prior to a ruling: some, if relatively few, complaints are merely withdrawn, after all. We include Model IV simply to validate our settlement model findings, in part also because it can draw on a larger set of cases (including those where we know if a ruling has been issued but do not know the policy outcome yet).

fails to reject the null hypothesis that its variables collectively have zero impact on ruling direction. Keep in mind that this *says nothing about our argument*, although it does at least superficially challenge the *conventional wisdom*. The key is that Model V fails to correct for the fact that, as established by the models in Table 2, third party participation dramatically skews the set of cases that reach rulings in the first place. We show these Model V estimates, accordingly, to establish a useful reference point for an *improved test* of ruling direction that also controls for the impact of third parties on which cases go to rulings at all.

[insert Table 3 about here]

The follow-up is Model VI in Table 3, in which we estimate a selection model, with ruling issuance as the first stage outcome and ruling direction as the second. This model allows us to make inferences about the conventional wisdom hypothesis, *corrected* for the selection bias in ruling direction which our argument explicitly predicts. A selection model is the correct technique here because we do not observe ruling direction when no ruling is issued, naturally.

The results of Model VI are compelling.⁶⁶ For starters, the model's collective fit passes the test of adequacy, as noted in the table. The correlation of population errors in its two equations, ρ , is statistically discernible from zero, meaning that the simple *ruling direction* probit estimates did indeed suffer from selection bias. Consistent with Model IV, the first equation here shows that *Third Party* and *Systemic Issues* do, in fact, increase the probability that a case will end in a ruling. Controlling for that, in the second equa-

⁶⁶ Model VI's estimates were produced using Stata 9.1's heckprob command with the difficult technique(bfgs) maximization option.

tion, both *Pro-Complainant Third Parties* and *Pro-Defendant Third Parties* have statistically significant coefficients, with a positive and negative effect, respectively, on the odds of a pro-complainant ruling. As a result, we can confidently reject the null that the coefficients of these three directional third party variables are *equal to each other*, with $p < 0.01$, while also rejecting the null that they collectively equal *zero*, likewise at $p < 0.01$. Hence, third party intervention *matters* for ruling direction, and *what side* third parties support also affects the decision. Furthermore, it appears that, when third parties raise systemic issues, the WTO bodies are significantly more likely to rule in favor of the complainant. Interestingly, Model VI also shows that complaints not containing a non-violation claim and complaints on politically sensitive issues are also more likely to be upheld if a ruling is issued.

The substantive impact of third party participation on ruling outcomes can be considerable. For an otherwise average “politically sensitive” case that goes to a ruling, the chance that ruling will favor the complainant is just 0.13 [0.03, 0.39] if there are no third parties involved. It rises to 0.46 [0.27, 0.66] if only pro-complainant third parties intervene, and to 0.67 [0.44, 0.86] if those parties raise systemic issues in addition. It drops, however, to 0.53 [0.29, 0.75] if we add pro-defendant third parties to those already in the mix.

Clearly, this evidence is broadly consistent with the conventional wisdom. The outcomes of rulings issued by the WTO bodies do indeed appear to be influenced by third party participation. Moreover, the fact that pro-complainant rulings are more likely when the case raises systemic considerations or concerns politically “hot-button” issues also meshes with the conventional wisdom’s perception of the court as a political actor. But

the key is that none of this is apparent unless we first consider the selection effect at work, which in turn begs closer attention to the role third parties play in undermining early settlement.

Implications

In the current round of negotiations over the DSU, countless submissions make an argument for stronger third party rights. These submissions are predicated on an untested faith in the influence of third parties, typically with respect to the direction of a panel and (or) AB ruling. And while it is not difficult to find evidence that panels and the AB take notice of third party input, little systematic evidence to date has been offered to suggest that they influence the course of litigation, let alone rulings. We conduct one of the first empirical studies of the influence of third parties in WTO dispute settlement, or, for that matter, on any international adjudicative body. Our findings bear out the concerns that some Members express about extending stronger third party rights. Most importantly in this regard, we find that third party participation undermines the prospects for early settlement, as well as making it more likely that disputes go the legal distance to a ruling. And while third parties do appear to have an impact on WTO rulings, it is not clear that this effect goes beyond a distributive one (favoring liberalization). Moreover, rulings, themselves, are no guarantor of compliance in this self-help enforcement system; several studies show that ruling direction, as an explanatory variable, is often negatively related to concessions.⁶⁷ In any case, it could be argued that the legitimacy of the institution is damaged just as much by making its jurisprudence responsive to the interests of powerful member states as it is by failing to take the views of these states into account. This is par-

⁶⁷ See Busch and Reinhardt 2003a, 2003b.

ticularly true given the distributive politics at play, in the sense that third party influence on panel and AB rulings largely cancels out when they weigh in on competing sides.⁶⁸ This leads us to the conclusion that easy access for third parties does more harm than good.

Our results have broader implications for thinking about institutions more generally. First, and most obviously, they bolster Stasavage's claim that openness to a broader audience is not necessarily good for negotiations. On the contrary, as such an audience, third parties at the WTO lower the prospects for early settlement. This, of course, is not the only benchmark against which to evaluate their involvement in dispute settlement, although it is an important one, suggesting that too much transparency can be a liability, notably in consultations.

Second, our results suggest that third party participation may deter disputes from being filed at the WTO. It is often taken for granted that institutions help lower the transaction costs of negotiating, and in this sense their expanding jurisdictional reach is widely regarded as a positive development. Third parties are a potential wrinkle in this story, in that they increase the transaction costs of reaching a mutually agreed solution. This does not mean that countries would be better served negotiating outside the WTO's "compulsory jurisdiction," since bargaining in the shadow of the law is likely to be more efficacious than brawling in the back alleys of the global economy, at least most of the time. That said, there are disputes that are likely to draw third parties (e.g., those filed against discriminatory trade measures used by larger economies) which might be more difficult to resolve at the WTO than in other forums, such as regional trade agreements, which

⁶⁸ The firestorm of controversy ignited by the Appellate Body's decision to allow the WTO organs to accept *amicus* briefs testifies in favor of our view that legitimacy derives as much from *institutional independence* as from any attempts at political sensitivity.

may limit third party participation, particularly by non-members. In other words, third party rights at the WTO are likely to inform patterns of “forum shopping” for dispute settlement, and not necessarily in a way that proponents of the multilateral trade system would prefer.⁶⁹

Third, our results demonstrate that *informal* third parties leave a clearer imprint on WTO dispute settlement than *formal* ones. To be sure, third parties are influential long before they are recognized as such, and have a greater impact on proceedings at a stage where they seldom elicit much attention. The implication is that institutions often matter in ways not anticipated by their design. This is in keeping with Tomz, Goldstein and Rivers, who show that GATT’s impact on trade can only properly be gauged by looking at flows involving members and non-members alike.⁷⁰ In a similar vein, we show not only that third parties are more influential before they are recognized as such, but that, by the time they are formally conferred third party rights, they have been participating informally for some time.

Fourth, this paper’s findings lend plausibility to the conventional wisdom that the decisions of international courts are strategic or political, rather than purely a function of legal merits. Evidence to this effect, however, is impossible to find in the WTO context without adjusting for the selection of cases into rulings in the first place. In this sense, our results mesh with the literature on American judicial politics. That literature, including McGuire’s important work on the influence of the Solicitor General on Supreme Court decisions, raises a telling point worthy of future research. While our findings about the impact of third parties on ruling *directions* are consistent with the conventional wis-

⁶⁹ Busch 2005

⁷⁰ Tomz, Goldstein and Rivers 2005.

dom about courts as strategic actors, there is an alternative interpretation that remains to be refuted. Namely, the impact of third parties (and large-market defendants) on WTO rulings could be due to legal experience and capacity, rather than concerns, on the WTO's part, about noncompliance or disuse. Perhaps third parties matter only—or especially—when they have a lot of prior experience in WTO dispute settlement, or when they command bureaucratic resources sufficient to master the intricate technical details and data regarding trade policies, on the one hand, and WTO treaty law and jurisprudence, on the other. Put another way, it may be that these third parties, and large-market defendants, affect rulings because their arguments have better legal merits. Regardless, while this question remains for future research, the key contribution of this paper is to highlight the fact that third party participation affects settlement and dispute escalation and, conditioned by this important selection effect, the direction of rulings issued by the WTO.

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Figure 1. Percent of WTO Disputes Escalating, by Third Party Participation Status

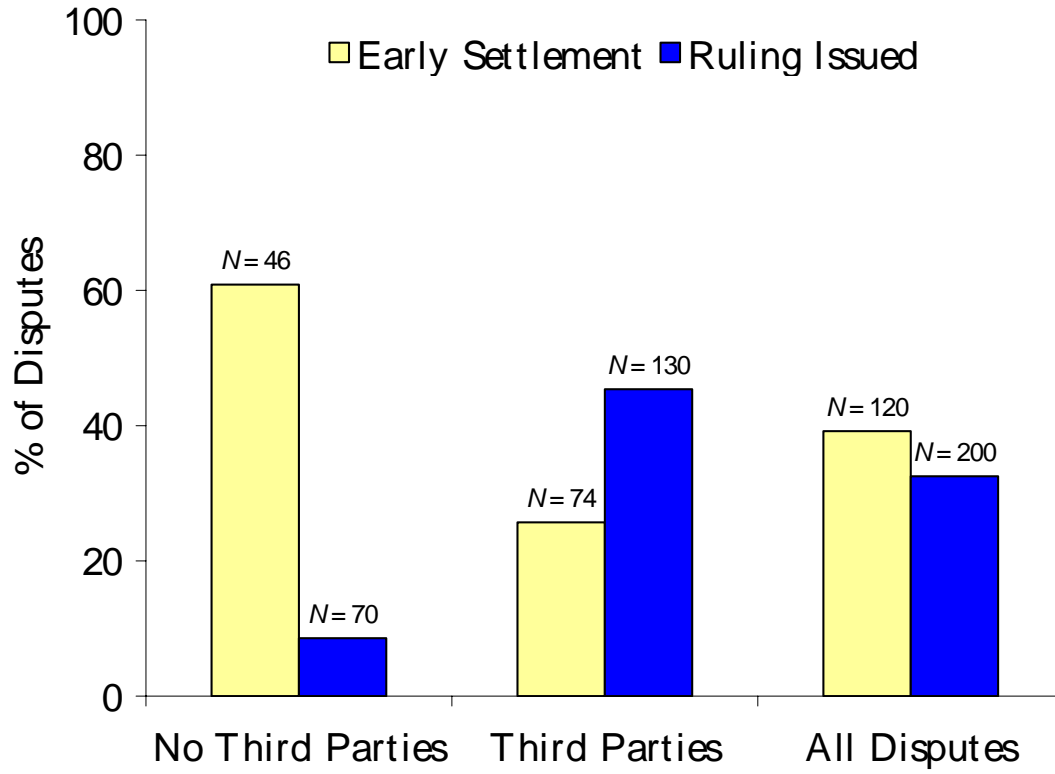


Figure 2. Ruling Direction by Third Party Participation Status

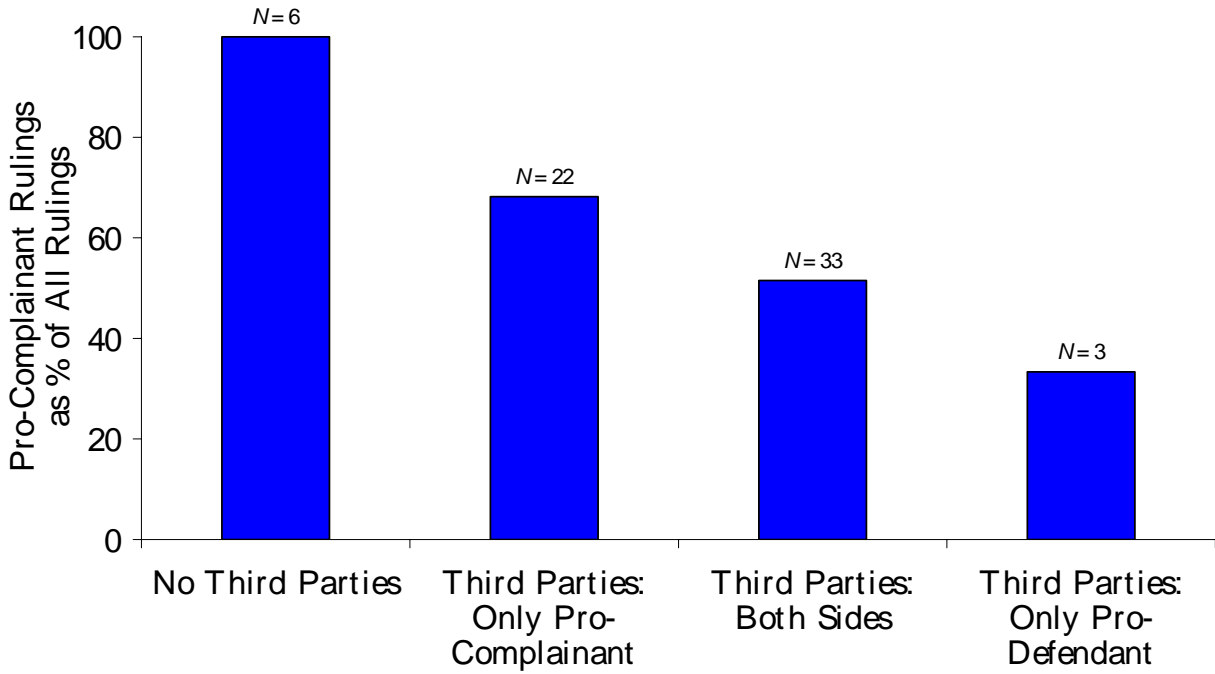


Table 1. Descriptive Statistics

Variable	All 200 Cases (Models IV, VI)				Concluded Cases (120) (Models I, II, III)				Cases with Rulings (65) (Model V)			
	Mean	SD	Min	Max	Mean	SD	Min	Max	Mean	SD	Min	Max
Early Settlement	—	—	—	—	0.39	0.49	0	1	0	0	0	0
Ruling Issued	0.33	0.47	0	1	0.41	0.49	0	1	1	0	1	1
Pro-Complainant Ruling	0.20	0.40	0	1	0.25	0.43	0	1	0.60	0.49	0	1
Third Parties (Dummy)	0.65	0.48	0	1	0.62	0.49	0	1	0.91	0.29	0	1
Third Parties (Count)	2.86	3.90	0	26	2.71	3.94	0	26	4.48	4.62	0	1
Third Parties (GDP Index)	1.19	1.69	0	6.88	1.21	1.73	0	6.88	1.99	1.86	0	6.88
Systemic Issues	0.26	0.44	0	1	0.23	0.42	0	1	0.54	0.50	0	1
Pro-Complainant Third Parties (Dummy)	0.56	0.50	0	1	0.53	0.50	0	1	0.85	0.36	0	1
Pro-Defendant Third Parties (Dummy)	0.27	0.44	0	1	0.26	0.44	0	1	0.48	0.50	0	1
Mixed Third Parties (Dummy)	0.12	0.32	0	1	0.10	0.30	0	1	0.28	0.45	0	1
US/EC Dispute	0.78	0.42	0	1	0.81	0.40	0	1	0.83	0.38	0	1
Number of Complainants	1.33	1.18	1	11	1.35	0.98	1	6	1.51	1.08	1	6
Log Defendant GDP	27.64	2.05	21.48	29.91	27.64	2.06	21.48	29.91	28.03	1.83	23.45	29.91
Log Complainant GDP	28.19	1.90	23.18	30.66	28.45	1.83	23.18	30.66	28.42	1.80	23.18	30.66
Discriminatory Measure	0.55	0.50	0	1	0.52	0.50	0	1	0.57	0.50	0	1
Agriculture	0.34	0.47	0	1	0.33	0.47	0	1	0.26	0.44	0	1
Politically Sensitive Case	0.18	0.39	0	1	0.20	0.40	0	1	0.17	0.38	0	1
Article XXII	0.52	0.50	0	1	0.48	0.50	0	1	0.52	0.50	0	1
Nonviolation Complaint	0.11	0.31	0	1	0.15	0.36	0	1	0.12	0.33	0	1

Table 2. Probit Models of WTO Dispute Escalation, 1995-2002

Model	I	II	III	IV
Dependent Variable	Early Settlement	Early Settlement	Early Settlement	Ruling Issued
Third Parties Measure	Dummy	Count	GDP Index	Dummy
Constant	-5.356 (4.147)	-8.663* (4.251)	-3.055 (4.383)	-0.054 (3.390)
Third Parties	-1.012** (0.340)	-0.255** (0.087)	-0.343** (0.110)	1.132** (0.307)
Systemic Issues	-1.347** (0.486)	-1.370** (0.493)	-1.692** (0.511)	1.173** (0.255)
US/EC Dispute	-1.263* (0.602)	-1.537* (0.630)	-1.391* (0.632)	0.636 (0.474)
Number of Complainants	-0.128 (0.176)	0.023 (0.190)	-0.027 (0.185)	0.006 (0.100)
Log Defendant GDP	0.174 (0.090)	0.207* (0.088)	0.087 (0.095)	-0.098 (0.070)
Log Complainant GDP	-0.061 (0.104)	0.140 (0.108)	0.062 (0.106)	0.036 (0.087)
Discriminatory Measure	-0.000 (0.316)	0.302 (0.333)	-0.121 (0.311)	0.070 (0.223)
Agriculture	0.554 (0.343)	0.544 (0.349)	0.522 (0.330)	-0.431 (0.263)
Politically Sensitive Case	-0.858* (0.397)	-0.875* (0.427)	-0.979* (0.400)	0.040 (0.303)
Article XXII	1.054** (0.345)	0.961** (0.338)	0.961** (0.318)	-0.580* (0.244)
Number of Observations	120	120	120	200
Model χ^2	27.8** (10)	26.3** (10)	28.3** (10)	59.0** (10)
Pseudo- R^2	0.261	0.273	0.271	0.252
% Correctly Predicted	78.3	75.8	77.5	76.5

* 2-tailed $p < 0.05$; **, $p < 0.01$. Robust standard errors in parentheses.

Table 3. Models of Ruling Direction in WTO Disputes, with and without Selection

Model	V	VI	
Estimation	Probit	Heckman Probit	
Dependent Variable	Pro-Complainant Ruling	Ruling Issued	Pro-Complainant Ruling
Constant	5.221 (6.279)	-0.969 (2.577)	3.592 (4.814)
Third Parties (Dummy)	—	1.087** (0.246)	—
Pro-Complainant Third Parties (Dummy)	0.259 (0.505)	—	1.005** (0.340)
Pro-Defendant Third Parties (Dummy)	-0.628 (0.434)	—	-0.388* (0.173)
Mixed Third Parties (Dummy)	-0.089 (0.467)	—	0.237 (0.271)
Systemic Issues	-0.539 (0.415)	1.176** (0.179)	0.567* (0.258)
US/EC Dispute	1.167 (0.830)	0.634 (0.360)	1.146 (0.695)
Number of Complainants	-0.094 (0.191)	0.002 (0.045)	-0.008 (0.056)
Log Defendant GDP	-0.174 (0.152)	-0.084 (0.051)	-0.177 (0.094)
Log Complainant GDP	-0.008 (0.137)	0.052 (0.071)	-0.028 (0.127)
Discriminatory Measure	0.171 (0.376)	0.145 (0.176)	0.045 (0.282)
Agriculture	0.346 (0.520)	-0.314 (0.212)	-0.222 (0.232)
Nonviolation Complaint	-2.210* (0.873)	-0.007 (0.216)	-1.467* (0.650)
Politically Sensitive Case	1.130* (0.560)	0.048 (0.257)	0.656* (0.299)
Article XXII	-0.706 (0.478)	-0.533** (0.169)	-0.660 (0.403)
Number of Observations	65	200 (65)	
Model χ^2	20.4 (13)	64.5** (13)	
H ₀ : $\rho=0$	—	$\chi^2(1)=13.5**$	
Pseudo- R^2	0.265	—	

* 2-tailed $p < 0.05$; **, $p < 0.01$. Robust standard errors in parentheses.

Appendix

Table 4. Probit Model of Third Party Participation in WTO Disputes

Model VII		
Dep. Var.: Third Parties (Dummy)	Coefficient	Robust SE
Constant	-7.624*	3.321
US/EC Dispute	-0.809	0.441
Number of Complainants	0.460	0.259
Log Defendant GDP	0.239**	0.073
Log Complainant GDP	0.033	0.082
Discriminatory Measure	0.152	0.206
Agriculture	-0.179	0.240
Politically Sensitive Case	0.215	0.300
Nonviolation Complaint	0.015	0.373
Article XXII	1.150**	0.216
Number of Observations	200	
Model χ^2	40.03** (9)	
Pseudo- R^2	0.202	

* 2-tailed $p < 0.05$; **, $p < 0.01$. Robust standard errors in parentheses.