With a Little Help From Our Friends?
Developing Country Complaints and Third Party Participation

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Introduction

In advance of filing for a compliance panel in the latest round of Bananas III litigation, Ecuador surprised many observers by asking for consultations with the European Communities (EC). Indeed, by most accounts, this request was both unnecessary and unprecedented. More interesting still, Ecuador revised its request two weeks later to make a single change: it wanted to pursue consultations with the EC under GATT Article XXII, rather than under GATT Article XXIII. The reason for this was simple: Ecuador hoped that, by holding consultations under GATT Article XXII, it might attract third parties to its side, and in doing so improve the odds that Europe would negotiate a resolution to this dispute. Statistically speaking, Ecuador was right on the first count, but greatly mistaken on the second. In particular, developing country complaints do attract more third parties, but these third parties undermine the prospects for reaching a mutually-agreed solution. This paper explains why, and discusses what might be done to minimize the negative impact of third parties on effective use of dispute settlement by developing countries.

Third parties participate in the majority of WTO disputes and typically outnumber the complainant(s) and defendant (i.e., the “main litigants”) by a substantial margin. The Dispute Settlement Understanding (DSU) extends them the right to give testimony before panels and the Appellate Body (AB), such that they have a voice in the proceedings. Not surprisingly, the conventional wisdom is that third parties influence verdicts by offering a

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3 The WTO, like international law more generally, does not offer an explicit definition of third parties. See Christine Chinkin, Third Parties in International Law (Oxford: Clarendon, 1993), p. 7. Instead, it contrasts third (or “other”) parties with the complainant(s) and defendant, and permits these members to “reserve rights,” a status that means they can directly participate in dispute proceedings, as we detail below. The key is not to confuse third parties with co-complainants (i.e., members who join the complaint as fellow plaintiffs) or with amicus curiae participants (i.e., “friend of the court” submissions by non-governmental organizations), whose role and effects on dispute settlement outcomes are qualitatively distinct.
broader perspective on a dispute. For example, Alan Rosas suggests that third party testimony prevents panels and the AB from becoming too narrowly focused on the main litigants’ claims. James McCall Smith concurs, insisting that third party testimony is taken as an important signal of the wider membership’s preferences, resulting in rulings that are in keeping with these interests. We find, moreover, that this conventional wisdom holds up to statistical scrutiny: the more pro-complainant third parties, the more likely a panel or the AB is to render a pro-complainant verdict.

There is, however, a crucial twist in this story that matters for developing countries, in particular: before third parties exert any influence on the direction of rulings, they dramatically lower the chances that the case ends in early settlement, which we define as trade-liberalizing agreements negotiated before a panel rules. Our argument is that third parties, as a participatory audience, raise the main litigants’ bargaining costs. Indeed, as David Stasavage explains it, third parties, like any audience, can incite negotiators to posture, making them “more reluctant to retreat from initially stated positions,” even where a deal might otherwise be struck. But moreover, since third parties are able to participate in the proceedings, there is the added risk that, as James Sebenius observes, “the more parties (and issues), the higher the costs, the longer the time, and the greater the informa-

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tional requirements for negotiated settlement.” In line with these expectations, we find that third parties do, in fact, influence rulings, but only because they first undermine early settlement. This is especially problematic for developing countries, since poor complainants tend to file against large-market defendants—as in Bananas III—and these cases attract a greater number of third parties, making it harder to reach a negotiated solution.

Two possible objections might be raised at this point. First, that our causal explanation is backwards, since it might be, instead, that harder cases attract more third parties, not that third parties make cases harder to settle. And second, that, even if our causal explanation is correct, early settlement is not the only goal of WTO litigation. As we show below, the first objection is easy to put to rest, since we directly test for endogeneity bias, and clearly find that third parties independently make negotiations more difficult, not that more difficult cases attract third parties. As for the second objection, there is no denying that, at times, complainants may prefer to win a legal verdict, rather than settle early, and third parties can be of some help in this regard. Yet, as we show elsewhere, the challenge is that the fullest concessions on trade liberalization and market access are had by settling early, and rich complainants realize far more early settlement than do poor ones. In fact, developed, but not developing, countries have won greater concessions at the WTO than under GATT precisely because they are more likely to settle early, not because they win more rulings (they do not), or gain better compliance with the rulings that they win (they do not). In short, early settlement is what distinguishes the records of rich versus poor complainants at the WTO, and third parties are the key to this puzzle. Playing on the title

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of our paper, developing countries would do better without a little help from their (third party) friends.

This paper proceeds as follows. First, we discuss what the DSU allows by way of third party participation. Second, we elaborate our hypothesis on how third parties shape rulings, conditional on the fact that they first undermine early settlement, and then turn to our findings. Third, we look at the evidence concerning third party participation in cases filed by poor complainants, and conclude by examining the various proposals for reforming third party rights under the DSU, and how these might bear on developing countries, in particular.

Third Parties at the WTO

Members join disputes as third parties for a variety of reasons. Chad Bown finds that countries with sizable exports to the disputed market that are affected only indirectly by the defendant’s policy, in market share rather than volume terms, are likely to become third parties, while countries with large exports, the volume of which is directly affected by the disputed policy, are more likely to become co-complainants.\footnote{Chad P. Bown, “Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders,” \textit{World Bank Economic Review} 19 (2) 2005.} There also exists a “learning-by-watching” incentive to file for third party rights, inasmuch as Members, and developing countries, more specifically, can benefit simply by observing the proceedings first hand. Related to this, we would add that a lack of transparency concerning the terms of early settlement motivates governments to participate as third parties, the logic being that they can better monitor concessions offered, and protect their interests. What, then, do third parties do?
At first blush, the WTO’s provisions for third parties are simple enough. DSU 10 permits them to offer both written and oral testimony before panels during the first of two rounds of litigation, and DSU 17 ensures that the same third parties reserving rights at the panel stage have similar access to proceedings before the AB in the event that a verdict is appealed, which happens roughly 70% of the time.

And yet, things are not quite as simple as they seem. This is because third parties almost always get involved in disputes long before the DSU formally designates them as such: namely, in consultations. Indeed, DSU 4.11 allows Members “other” than the main litigants to be joined in consultations, paving the way for what we call informal third parties. In truth, though, the two are one in the same; in our dataset of 507 instances of third party participation in disputes through 2002, fully 99% started in consultations. In other words, nearly every formal third party began as an informal one. In this sense, it is little wonder that, in proposing reforms of the DSU, Members have spent a good deal of effort debating third party rights in consultations.

It is at this point that observers usually respond that, while third parties may be interested in a case, the main litigants can choose to allow them to participate or not. There is something to this, but not much. Starting with consultations, the first potential obstacle is DSU 4.11, which stipulates that, to be joined, informal third parties must have a “substantial trade interest” in the dispute. This entry barrier is meant to give the main litigants more latitude to negotiate a resolution by excluding “other” Members with no real eco-

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12 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).

13 See WTO Document TN/DS/W/36.
omic stake in the outcome. And yet, through 2002, few requests to be joined in consultations have been rejected; of the 507 instances of third party participation in our dataset, only 19 were declined. Of those that were, moreover, many were just re-filed when the case was subsequently brought before a panel, given that, at this stage, the DSU requires only a “substantial interest,” rather than a substantial *trade* interest, the former being defined more broadly than just a commercial stake.

That said, in addition to, or instead of, a substantial trade interest, a Member can also claim a “systemic interest” to be joined in consultations. Indeed, systemic interests are often raised when disputes are likely to hinge on the interpretation of untested or politically-charged WTO texts, for example, or where domestic legislation is challenged. In this sense, a systemic interest is *not* just a substitute for the lack of substantial trade interest, but a signal that third parties plan to raise broader—and potentially more axiomatic—issues. Along these lines, China, Japan and Taiwan cited systemic and substantial trade interests in a dispute over oil tubular goods, even though all three, as sizable producers of these products, had much at stake commercially. They chose to claim systemic interests, however, because they had more fundamental concerns about the dispute, as suggested by the 48 pages dedicated to their submissions in the final panel report.\footnote{WTO Document DS282.} More generally, in cases targeting measures that do *not* specifically apply to any identifiable good, and thus could *not* attract other Members with a substantial trade interest, we find that third parties are no more likely to claim a systemic interest than in cases where the measure in dispute does bear on an identifiable good. This lends considerable weight to the view that claims of systemic interests are signals of a third party’s intent to participate fully in the dispute, and not simply substitutes for a substantial trade interest. To be sure, even the exceptions

\footnote{WTO Document DS282.}
prove the rule: when the US rejected Japan’s request to be joined in consultations on the
grounds that it had no substantial trade interest, Japan responded that its commercial inter-
estests included “systemic” concerns.15

A second potential hurdle to third party participation concerns the specific article
under which the complainant requests consultations with the defendant. This, after all, is
why Ecuador chose to revise its first request for consultations with the EC in advance of a
compliance panel in Bananas III. Here, the issue is whether, along with DSU 4, the com-
plainant invokes GATT XXII:1 or GATT XXIII:1. Since GATT XXIII, in general, pro-
vides for bilateral dispute settlement, the intuition is that a complainant will request
consultations under this article if it wants to exclude third parties, but invoke GATT
XXII:1 if, like Ecuador, it wants to attract them.16 Empirically, the relationship is far
from clear cut: roughly half of all WTO complaints start with GATT XXIII:1 consulta-
tions, and half of these attract third parties. The practical difference between the two ar-
ticles has nothing whatsoever to do with third parties per se, but rather with the com-
plainant’s ex ante intention of “paneling” its dispute; in the GATT years, for example,
those cases brought under GATT XXIII:1 were 40 percent more likely to go before a
panel.17 That said, it is true that GATT XXII:1 consultations do attract more third parties,
but the point is that, as we show below, even controlling for which article consultations
are held under, third parties still undermine early settlement.

The final potential obstacle is found in DSU 10, which says that third parties must
have a substantial interest in the dispute. This, of course, is a lower entry barrier than the

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15 WTO Document DS200/12.
on Dispute Resolution (19) 2003, p. 158.
17 Marc L. Busch, “Democracy, Consultation, and the Paneling of Disputes Under GATT,” Journal of Con-
flict Resolution 44 (4) 2000.
one found in DSU 4, which, as above, requires a substantial trade interest. Much like in consultations, a defendant could choose to block a third party on the grounds that it lacks the relevant interest, though at the risk that this rejected third party would, in turn, simply file as a co-complainant. Regardless, the fact is that, empirically, third parties are seldom resisted. This gives us license to ask whether third parties really matter? On this, there is no doubt.

**Hypotheses and Findings**

The conventional wisdom says that third parties help shape panel and AB rulings because these are strategic actors. Just as Geoffrey Garrett, Daniel Keleman and Heiner Schulz insist that it is no longer controversial to ascribe strategic decision-making to the European Court of Justice (ECJ), few if any WTO observers doubt that political expediency guides panels and the AB in rendering decisions. The tension, as Smith explains it with respect to the AB, is to balance the need to render legally consistent decisions with a desire to increase the likelihood of compliance. Here, compliance is not just a function of whether the defendant will abide by the ruling, but how the membership, as a whole, will receive it. Smith, like Rosas, identifies a key opportunity for third parties in this regard, observing that the AB has sought their participation “to gain access to valuable information regarding the views of the broader WTO membership.”

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20 Rosas (fn. 5).
21 Smith (fn. 6), pp. 75, 85.
Even a cursory glance at WTO panel reports seems to bear out these expectations. In *Chile—Alcoholic Beverages*, for example, the panel explained that it had rejected one of the defendant’s legal arguments because the EC, “as well as third parties, objected that such a notion was absurd,” nodding to the import of their intervention in this dispute.\(^{22}\) In *Canada—Aircraft*, the US’s third party testimony was deemed to be so germane to the case 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.”\(^{23}\) More telling still, in *Canada—Patents*, the panel decided not to rule on a key question of law, explaining that it did not want to adjudicate “a normative policy issue that is still obviously a matter of unresolved political debate,” a conclusion it reached in large measure because of the participation of third parties in the case.\(^{24}\) The question, however, is whether these examples are representative? Taken at face value, they are not. To see why, let us turn to our argument.

**Hypotheses**

Our argument is *not* that this conventional wisdom is wrong, but that it misses all the real action. One of the most axiomatic tenets of bargaining theory is that more parties to a dispute make negotiations increasingly difficult. Add this to the fact that third parties almost always participate in consultations, and it becomes hard to imagine that whatever impact they are having on dispute settlement is not unfolding long before a panel is even requested. We hypothesize that third parties increase the main litigant’s bargaining costs in two complementary ways. First, third parties, as an audience, make negotiations more

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\(^{23}\) WTO Document DS70, para 7.47, footnote 4. Emphasis added.

\(^{24}\) WTO Document DS114/R, para 7.82. Emphasis added.
transparent, which is likely to motivate the protagonists to posture. James Fearon argues, for example, that audiences inspire states to dig in their heels, and that, when it comes to signaling resolve in this way (i.e., by raising “audience costs”), they seldom bluff. Tim Groseclose and Nolan McCarty also show that third parties can induce posturing and, as a result, deadlock negotiations, even when the parties are fully informed about each other’s preferences. As one former trade lawyer explains, this is why “[p]rivacy for the negotiating process can be essential….”

Second, as an audience that can actually participate in the dispute, third parties are not only likely to induce posturing by the main litigants, but influence the content of what they argue about. As Bill Davey points out, third parties can interpret cases in ways that may be at odds with the complainant’s and defendant’s positions, and thus prove distracting. Jeff Waincymer agrees, observing that while third parties are not supposed to raise claims of their own, they can nonetheless draw attention to other arguments that fit within the terms of reference, but which the complainant and defendant had not introduced or—worse still—do not favor. 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 writ-

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28 William 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 ….” See Davey, “The WTO Dispute Settlement Mechanism,” (University of Illinois: Illinois Public Law and Legal Theory Research Papers Series No. 03-08, 2003), p. 15.
ten submissions of certain third parties.\textsuperscript{30} Similarly, the US insisted in the on-line gambling dispute 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.”\textsuperscript{31} The involvement of third parties in consultations poses similar risks, in that they may desire a settlement that the main litigants find unacceptable, or introduce new issues to be resolved which might put a settlement out of reach.

Finally, third parties may also raise systemic legal questions about a dispute, further circumscribing the grounds on which the main litigants might negotiate. In particular, third parties might have little commercial stake in changing a specific measure(s), but prefer, instead, a broader legal decision that bears on their own policies, or the policies of those against whom they might file future disputes.\textsuperscript{32} If the main litigants believe that the outcome of their dispute is likely to cast a long shadow, they are likely to become further entrenched, thereby reducing the opportunity for early settlement.

Accordingly, we hypothesize that third party participation makes early settlement \textit{less} likely and, by extension, increases the likelihood of a panel ruling. We further argue that both of these consequences should be especially likely when a third party raises systemic issues. Taken together, this means that any test of the conventional wisdom—i.e., that third parties affect the direction of a ruling—must be conditional on the fact that they undermine early settlement, thus making rulings more likely in the first place. We conduct one of the first tests of this sort.

\textsuperscript{30} WTO Document DS302/R, para 4.351.
\textsuperscript{31} WTO Document DS285.
\textsuperscript{32} 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” See Porges (fn. 17), p. 155.
Data and Model

To test our hypotheses, we compiled a dataset of 202 WTO disputes filed through 2002, for which litigation had concluded as of January 2004. Our coding procedures are discussed elsewhere; here we briefly describe the data and review our results.

Of the 202 disputes in our dataset, a panel was established in 99 (49%). Our main interest is in how third parties affect early settlement, and in this regard it is interesting to note that the defendant offered liberalizing concessions before a ruling was issued (either in consultations or at the panel stage) in 40% of the 120 cases where we can code the policy outcome. Of the 99 panel proceedings, a ruling was issued in 65 cases, of which 39 favored the complainant, net of any appeal. Third parties participated in 64% of the cases in our dataset; averaging 3.9 per dispute. In all, 61 different Members are counted among these third parties. True, the economic superpowers frequently are well represented; the US was a third party in 43 cases (of the 86 in which it was not one of the main litigants); the EC in 52 (of 120), and Japan in 52 (of 183). Other frequent third parties include Australia, Brazil, Canada, Chile, India, Korea, Mexico, Norway, and Switzerland. That said, developing countries account for 52% of all third parties, whereas they tally for only 36% of all complainants. In this light, if a Member has any experience with WTO dispute settlement, chances are it is as a third party.

We constructed three variables to look at third party participation: a dummy variable (i.e., whether or not a third party participated), a count (i.e., how many participated), and an index of their economic significance, which weights the participating third parties by their gross domestic product (GDP) in relation to the defendant (this is 0 if the dispute

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33 Busch and Reinhardt (fn. 7).
34 The data on policy outcomes in these cases are taken from Busch and Reinhardt (fn. 10).
attracts no third parties). A fourth variable accounts for which side a third party took in a dispute to help determine if they bear on the direction of rulings; we coded this as either pro-complainant, pro-defendant, or mixed, based on their submission to the WTO. In our dataset, 66 percent of all third parties intervene in support of the complainant, 27 percent for the defendant, and 7 percent offer mixed testimony.

We also constructed a variable to test whether early settlement is especially more difficult when third parties cite systemic interests in their submissions, literally using this term (which makes our coding very straightforward). In our dataset, third parties invoke systemic interests 40 percent of the time, again suggesting that such claims are not simply filling in where arguments about a substantial trade interest fall short.

To round out our model, we added several other variables that are expected to influence the prospects for settlement, or the issuance and/or direction of a ruling. These include: (1) a dummy for US-EC cases, given the belief that transatlantic disputes are different for a variety of reasons, ranging from the volume of trade at stake to the resources these members can invest in litigation, including over fundamental questions of law; (2) the (log) of the complainant’s and defendant’s GDP, to control for their market power; (3) the number of complainants (the average is 1.3), to ensure that our findings concerning third parties are not attributable, instead, to the multiplicity of complainants in a given case; (4) whether the complainant requested consultations under GATT XXII:1, which is the article chosen in about half of all WTO disputes; (5) whether the complainant alleged a non-violation offense, since these charges are more vague, and may thus greatly com-

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35 For more information about sources and coding of these variables, see Busch and Reinhardt (fn. 7).
36 See, for example, the contributions to Ernst-Ulrich Petersmann and Mark A. Pollack, eds., Transatlantic Economic Disputes: The EU, the US, and the WTO (Oxford: Oxford University Press, 2003).
37 These are calculated for the year the complaint was first filed, using constant (1995) US dollars, from the World Bank’s World Development Indicators.
plicate negotiations;\textsuperscript{38} (6) whether the contested measure discriminates against some, but not all, Members, as these likely run afoul of the WTO’s most axiomatic principles (such as GATT I and GATT III); (7) the legal complexity of the case, proxied by the number of distinct treaty articles cited in the complaint,\textsuperscript{39} as these may be harder for the complainant to argue coherently and effectively, and are generally viewed as being less meritorious;\textsuperscript{40} and (8) five case-specific attributes, including: dummies for agricultural disputes; politically-sensitive disputes (i.e., those concerned with national security, environmental regulations, sanitary and phytosanitary rules, cultural protection, and policies falling under the jurisdiction of subnational authorities in federal states); the volume of trade at stake, or, if no trade volume is at stake, we code it as a non-merchandise dispute; and last, the stakes for (potential) third parties, which is the share of imports into the disputed market for the affected product, in the year prior to the complaint, which is supplied by countries other than the main litigants.\textsuperscript{41}

Findings

The data bear out our two hypotheses: third parties sharply lower the odds of early settlement, and any impact they have on the direction of rulings is conditional on the fact that they first make it more likely that disputes go the legal distance to a ruling. Consider the prospects for early settlement. For the average case (i.e., holding all other variables at


\textsuperscript{39} Specifically, as cited in the complainant’s request for consultations and, where applicable, request(s) for a panel. \textit{Number of Articles Cited} ranges from 1 to 39, averaging 7, in our dataset.


\textsuperscript{41} It takes on a value of 100 for disputes not naming a specific merchandise product(s).
their sample means) with no third party involvement, and thus no possibility of systemic interests being raised, the predicted probability of early settlement is a reasonably high 69 percent. If we then take this same case, but add third parties, still with no systemic issues raised, the predicted probability of early settlement drops precipitously to 31 percent. If we then add the complication of third parties citing systemic interests, the predicted probability of early settlement plummets to a mere 4 percent—a remote prospect, at best. By comparison, again holding all other variables at their sample means, the predicted probability of early settlement is 16 percent for politically sensitive cases, and 40 percent for those cases that are not politically sensitive. In short, third party participation is the single most important influence on early settlement in our model.

Moreover, these findings are robust; they hold for all three coding variants of our third party variable, and are not merely an artifact of frequent third party participation by the US and the EC, a dummy for which is not even statistically significant when included in our model. In addition, these results hold up if we recode the outcome variable to distinguish partial from full concessions in defining early settlement, and are not sensitive to the inclusion of variables that strongly predict third party participation, notably the share of the contested market held by economies other than the main litigants, and—to a lesser extent—whether the complainant requested consultations under GATT XXII:1.

The strongest predictor, however, is this non-disputant market share variable. In fact, going from its sample minimum to maximum and holding all other variables at their sample means, non-disputant market share increases the predicted number of third parties from 1.2 to 2.8. That is, third parties get involved when they supply a large percent share of the disputed market’s imports of the affected product. Because this variable can influ-
ence early settlement only through third parties, but is not itself correlated with early settlement, it serves as an ideal “instrumental variable” which we can use to test directly for endogeneity bias. In doing so, we find that the process causing third party intervention is independent of that driving early settlement, and thus that our primary finding—that third parties reduce the prospects for reaching a negotiation solution prior to ruling—cannot be attributed to endogeneity bias.42

What about ruling direction? First, we ran a model that ignored our hypothesized selection effect, using the 65 cases in which rulings were issued. The results were starkly at odds with the conventional wisdom; the model failed to reject the null hypothesis that its variables’ coefficients were collectively zero. We then ran a model that explicitly incorporated our hypothesized selection effect, with the issuance of a ruling as its first stage and the direction of the ruling as its second. In other words, the model asks about ruling direction conditional on their being a ruling in the first place, which we hypothesize to be the result of third parties participating, since they undermine early settlement. The model tells us that there is, indeed, selection bias; third parties and systemic increase the odds of a ruling, and controlling for this, pro-complainant third parties increase the odds of a pro-complainant ruling. The substantive effects are impressive: for an average case, the marginal probability of a pro-complainant ruling is just 6 percent if there are no third parties, but this rises to 29 percent if only pro-complainant third parties intervene, and to 55 percent if those parties also raise systemic issues, yet drops back to 33 percent if we add pro-defendant third parties to the mix.

We also find evidence that non-violation charges, and the number of articles cited, bear on the direction of rulings. With all other variables at their sample means, the mar-

42 For a detailed discussion of this instrumental variable approach, see Busch and Reinhardt (fn. 7).
ginal probability of a pro-complainant ruling is 45 percent if the complaint makes no non-violation claim and cites only one article. But if this complainant alleges a non-violation infraction and cites 10 articles (which is not an extreme value), its odds of prevailing fall to 3 percent.

In sum, our findings support the conventional wisdom, but this is only because we model for the fact that, before third parties have any influence on rulings, they undermine early settlement.

Developing Countries and Third Parties

While third parties pose obstacles for complainants in general, the problem is only compounded for developing countries. This is because poor complainants typically challenge large-market defendants, and these cases attract more third parties, resulting in less early settlement. As Andrew Guzman and Beth Simmons conjecture, poor complainants are likely to target bigger economies since, net the costs of litigation, the expected payoff from defeating these defendants is greater.43 While we do not disagree with this intuition, our concern is that, by filing these disputes, developing countries end up contending with about 60% more third parties than the average complainant, and thus are far less likely to win concessions in advance of a ruling. Since early settlement is the source of the gap in concessions secured by rich versus poor complainants,44 this is arguably the most important problem that developing countries face when litigating at the WTO.

To put this in perspective, recall that the average dispute attracts 3.9 third parties, lowering the odds of early settlement by more than half (from 69 percent to 31 percent),

44 Busch and Reinhardt (fn. 10).
and this assuming that none cites a systemic interest. By way of comparison, the average developing country complaint attracts 6.15 third parties, enough to virtually foreclose any opportunity of achieving early settlement. Figure 1 speaks to this, plotting the number of third parties per dispute against instances of early settlement. The key here is the precipitous decline in negotiated solutions when more than five third parties participate, setting a tipping point that is below the developing country average. Most telling, in this regard, is that, of the 11 disputes that attracted more than five third parties, only one ended in early settlement. With this tipping point in mind, it is interesting to note that Ecuador’s consultations with the EC drew 18.

[insert Figure 1 about here]

These findings are all the more striking when considering that many of the attributes of cases filed by developing countries are associated with more early settlement. For example, in marked contrast to their wealthy counterparts, poor complainants tend not to file disputes that are politically-sensitive, concern agriculture, call into question domestic legislation, or challenge broad legal principles, all of which reduce the odds of reaching a negotiated solution. In fact, not only are developing country cases more focused on tangible commerce, but implicate less trade; whereas poor complainants, on average, contest product-specific measures on US$447 million in trade (1995 prices), the comparable figure for developed countries is US$1.2 billion (1995 prices). This suggests that, if anything, poor complainants litigate disputes that ought to be easier to settle early.

45 i.e., those concerned with national security, environmental regulations, sanitary and phytosanitary rules, cultural protection, and policies falling under the jurisdiction of subnational authorities in federal states.
Add to this that developing country cases are (at least) as meritorious as those of developed countries, and it becomes clear that third parties are the reason poor complainants fail to realize early settlement. The competing explanation would be that poor complainants bring legally weak cases, and that, as a result, defendants have little incentive to settle early, preferring, instead, to be vindicated by a panel. On the one hand, developing countries cite about 50% more articles in their complaints, which, as we explain above, is suggestive of weaker legal merits. On the other hand, they make far fewer non-violation claims than rich complainants (3 versus 13 percent), which, as we also explain above, do vastly more to undermine early settlement than the number of articles cited. In short, differences in the legal merits of cases brought by rich versus poor complainants are doubtful to shed much light on the gap in early settlement.

While this rightly puts the spotlight back on third parties, some might ask whether our focus on early settlement is misguided. After all, our results indicate that third parties can help complainants win at trial, and this, more than early settlement, may be valued by developing countries. Our response is in two parts. First, the influence of third parties on rulings largely washes out when they offer mixed testimony, or when some side with the complainant and others with the defendant. This is not surprising; if panels and the AB are politically astute and take third party testimony as a signal of the wider membership’s preferences, divisions among them ought to be expected to limit the impact of their input. Of the 18 third parties reserving rights in Ecuador’s consultations with the EC, about half shared interests with the defendant.

Second, and more importantly, a legal ruling is not a guarantee that the defendant will grant concessions. On the contrary, our research shows that, regardless of how pan-
els or the AB decide a case, rulings are associated with fewer concessions. Indeed, in our study of the concessions had by developed and developing countries under the GATT and WTO, variables for pro-complainant, mixed, and pro-defendant rulings are all negatively signed and, at least for the latter two, statistically significant. Much the same is true in our study of US-EC disputes, where all three rulings variables are negatively signed, statistically significant, and substantively important: pro-defendant rulings lower the odds of concessions by 63 percent, mixed rulings by 43 percent, and even pro-complainant rulings by 25 percent. Our point is this: concessions are far more likely to be had through early settlement than by winning a ruling, and while third parties might better the chances of the latter (assuming they all side with the complainant), they are guaranteed to undermine the former.

If this argument is hard to accept, it is only because it runs counter to all received wisdom on third parties. To be sure, it has long been taken as an article of faith that third parties help, rather than hinder, complainants. Ecuador is no exception in this regard; in a proposal for reforming DSU 21 that foreshadows its strategy in Bananas III, Ecuador not only calls for consultations in the lead up to a compliance panel, but for “an adequate opportunity” for any third party “to express its views.” Following through on its own proposal, Ecuador went looking for third party input by filing for GATT XXII consultations, the aim being to motivate the EC to settle early in the face of wider political pressure. In particular, Ecuador was purportedly looking to negotiate a €130/ton tariff, a figure lower than Europe’s current €176/ton tariff, but markedly higher than the €33/ton tariff Ecuador

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46 Busch and Reinhardt, (fn. 10), p. 728.
estimates would fulfill the “total market access” criterion set out by the WTO.\textsuperscript{49} With 18 third parties participating in its dispute, however, the odds were stacked against Ecuador realizing early settlement in consultations. Since many of these third parties side with the EC,\textsuperscript{50} moreover, their potential to influence a pro-complainant ruling is likely to be small.

Many developing countries share this view that third party participation should be encouraged, including in consultations. Jamaica proposes, for example, that the requirement for joining consultations should be a substantial interest, not a substantial trade interest (in which case it proposes “enhanced status” as a third party); that a written record of consultations be given to the panel; that the main litigants not be allowed to reject third party participation; and that panels be required to consider third party views on issues not necessarily raised by the main litigants.\textsuperscript{51} Jordan concurs on the need for unfettered third party participation,\textsuperscript{52} as does the African Group, which insists that developing countries, in particular, should “not be required to demonstrate a \textit{trade or economic interest}” to join as a third party, and that they should be allowed to testify during all rounds of litigation.\textsuperscript{53} Along these same lines, Costa Rica calls for more third party access to “all the substantial meetings” and, provocatively, for more “consideration to the arguments” of third parties in panel reports.\textsuperscript{54}

Other developing countries are not convinced. A group led by Taiwan stands out in this regard, arguing for the substantial trade interest criterion to “ensure that the necessary space and simplicity for the disputing parties is retained in the consultation stage,” in

light of the fact that “consultation is an important method of settling trade disputes.” The group goes on to warn against requiring panel reports to dwell on third party submissions, as these may often prove to be orthogonal to the issues raised by the main litigants.\textsuperscript{55} We could not agree more.

First, we favor the requirement that third parties notify a substantial \textit{trade} interest to be joined in consultations. This will go some distance in balancing the need for access with the desire to give the main litigants more latitude to negotiate. In fact, we see merit in having third parties explain their reasons for wanting to participate, as this will help the main litigants better anticipate their input, and evaluate whether to accept their requests to be joined. At the same time, we agree with the Chairman’s draft text on DSU reform that the main litigants should provide reasons for denying these requests, if simply to prevent others from registering as third parties on the suspicion that something is amiss.

Second, we concur with several developing countries that the main parties should report the details of any early settlement to the DSB ex post.\textsuperscript{56} Given that many third parties request to be joined in consultations in order to keep apprised of any deal struck, this might temper interest in reserving rights ex ante, and thus result in more early settlement. This same logic is at work in Japan’s proposal that submissions be shared with \textit{all} Members so that this information can be used to help interpret decisions, and be used by others in deciding whether to file their own disputes.\textsuperscript{57} A report to the DSB on the terms of any early settlement would accomplish the same goal, not least for those Members denied access to consultations, for whom filing a case is their only recourse. In this sense, greater

\textsuperscript{55} WTO Document TN/DS/W/25, p. 3.
\textsuperscript{56} WTO Document TN/DS/W/18, para. 2.
\textsuperscript{57} WTO Document TN/DS/W/22, para. 4.
transparency after the fact may reduce the need for Members to reserve third party rights in the first place.

That said, we oppose proposals to increase transparency during consultations. In particular, we are especially troubled by calls for a written record of these negotiations, as Jamaica has suggested,\(^58\) since this would only lessen the incentive to make concessions, fearful that offers might be interpreted as an omission of non-compliance, for example.\(^59\) The key is that, as Canada explains it, public scrutiny of consultations “could undermine Members’ ability to reach negotiated solutions to disputes,”\(^60\) raising the domestic political costs of negotiating a deal that might not be popular at home.\(^61\) Since this is precisely what third parties do internationally, the same logic would argue against increasing transparency (indirectly) through stronger third party rights.

\(^{60}\) WTO Document TN/DS/W/41, para. 6.
\(^{61}\) Busch (fn. 18).
Figure 1. Proportion of Complaints Settled Early, by Number of Third Parties ($N=120$)

Note: the size of the circles is proportional to the number of cases having the stipulated number of third parties.