Dispute Settlement in the WTO

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Introduction

Not long ago, scholars had to justify studying litigation under the General Agreement on Tariffs and Trade (GATT). After all, the institution was derided as a “court with no bailiff.” Today, studying dispute settlement under the World Trade Organization (WTO) is very much in vogue, for good reason. There is no other instance of as many countries delegating as much decision making to an international legal body over the enforcement of binding commitments. Since its creation in 1995, the WTO’s Dispute Settlement Understanding (DSU) has developed a sophisticated body of jurisprudence, leading many to agree with Bhala (1998–1999) that the institution features de facto binding precedent, meaning past rulings constrain current ones. Add to this that compliance with rulings is high, and it is little wonder that the WTO gets so much attention. But how far has the literature come since the old GATT days? And where should it go in the future?

Recent scholarship has delivered some impressive insights. For example, while the literature once took it as a matter of faith that developing countries were at a disadvantage in litigation because of their lack of power, it turns out that weak legal capacity—political, legal, and economic resources—matters more (Busch, Reinhardt, and Shaffer 2009; Davis and Bermeo 2009). Not only are the two variables only loosely correlated, the solutions to addressing this disparity differ dramatically. The record also reveals no disadvantage for developing countries in terms of winning verdicts or compliance from defendants. Rather, they trail rich complainants in rates of settlement: developing countries not only lack legal capacity, but tend to file disputes against large wealthy markets, which draw in other parties, making them harder to resolve in pretrial negotiations (Busch and Reinhardt 2003). These insights are not what the GATT-era literature expected.
We submit, however, that for all of its advances, the literature needs retooling. Three areas stand out. First, scholars have always struggled with the question of selection: Is there something different about the cases that get filed, in relation to the universe of all trade disputes? In the 1990s critics of GATT insisted that cases brought to Geneva were likely less contentious, or “easy,” than those taken up as matters of high politics. This view fit with the prevailing debate over institutions more generally, forcing students of GATT to tease out implications of selection bias to show that these disputes mattered. In recent years more involved statistical methods have been used in making the point, and with some success, as relatively few pages are now devoted to the issue. Yet more can be done. Most important, there are data on so-called specific trade concerns (STCs) raised before the WTO’s committees on technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures. For example, on technical regulations, standards, and conformity assessment, which include some of the most contentious regulatory politics, the WTO’s TBT committee has handled 379 STCs, versus 47 dispute settlement cases referencing this agreement. Similarly, the ratio of STCs to litigation on health and safety standards is almost 10:1. These STCs can shed new light on selection issues, especially because the data are coded according to the type of infraction alleged and whether there was a resolution reported to the WTO. Some scholars are already pursuing this lead (see, e.g., Horn, Mavroidis, and Wijkstrom 2013). GATT-era scholarship could not have imagined this treasure trove.

Second, much of the criticism of the institution’s dispute settlement procedures (DSPs) has consisted of normative claims about a lack of transparency and unequal participation. In this telling, small countries are excluded not only from negotiations during multilateral rounds, but also from participation in disputes that may bear on their interests. These critics bemoan the lack of access to the room during consultations and litigation. They call for open hearings, such as take place in the European Court of Justice (ECJ), and greater access for nongovernmental organizations (NGOs). Yet these calls often ignore the means that members do have to participate, the full costs and benefits entailed, and the drivers of the decision to participate or not. The bottom line is that normative claims, such as the ones made about participation and transparency, carry empirical implications, and these implications can be tested. In doing so, scholars are likely to find the normative case more ambiguous than it appears at first blush. This matters, since it leads to divergent policy solutions.

Third, scholars give insufficient attention to the institution’s words. For all the interest in the acquis of WTO case law, few studies unpack the content of the decisions rendered. It is as if the words matter only because members think they do, not because of the words themselves. But the words do matter. WTO verdicts are longer, and more complicated, than the GATT-era documents, and say things that the field should take seriously. There is, for starters, an inventory of legal precedents, called the WTO Analytical Index, which can guide scholars in making more use of these rulings. Indeed, if the WTO increases the predictability and stability of the global economy, it does so through precedent. The field of American politics has started to take the utterances of courts seriously, as should WTO scholars. It may be the case, for example, that precedent-heavy rulings bear on rates of compliance or settlement. Apart from these outcomes, moreover, WTO panel reports detail procedural aspects of cases that can be important, like the decision not to rule on certain legal claims, which can limit the scope of the resulting precedent. This practice, called judicial economy, is explicitly explained in panel reports and offers a crucial link between the interests of the wider membership and the dispute at hand (Busch and Pelc 2010). Given all of the new methodologies for doing content analysis, the words reasoned by the WTO merit a closer look. GATT-era scholarship could only have dreamed of allowing the institution to speak for itself.

This chapter first surveys some of the main themes in the literature on WTO dispute settlement and provides an aperçu of the stages of a typical dispute. It then proposes tackling trade specific concerns, participation, and the WTO’s words. Finally, the conclusion.

The Literature on WTO Dispute Settlement

The study of WTO dispute settlement is a multidisciplinary venture. Lawyers, economists, and political scientists have drawn on each other’s research more in this than in most other areas of international affairs. Like many, we attribute this to Robert Hudec, a legal scholar by training but a political economist at heart. Hudec (2000) set a high standard, demanding that research be grounded in the institution’s mechanisms, but sensitive to the “theater” he saw domestically and internationally, reflecting governments’ efforts to curry favor at the ballot box. This same high standard is no less relevant today.
Dispute Settlement in the WTO

The defining feature of dispute settlement is that it is decentralized. This distinguishes the WTO from domestic courts or supranational enforcement, the latter of which, in the European context, boasts at least some centralized prosecutorial functions. In contrast, WTO disputes begin when a member considers that its rights have been impaired. Disputes are typically responses to domestic interest groups that lobby for better market access abroad (Davis 2012), although some are pursued for “systemic” interests, including cases over measures that have never been used.

In keeping with its decentralized character, the WTO has no enforcement power to speak of. It merely produces legal rulings, which are referred to as “recommendations” but considered binding on states. The WTO cannot force compliance; it cannot punish violators. The WTO can only authorize a complainant to “suspend concessions” to a defendant, by raising tariffs so that foreign exporters lobby for compliance.

In truth, retaliation never happens. Less than 1 percent of cases result in the suspension of concessions. In fact, only 40 percent of cases ever go to a panel. This is because most cases are solved or withdrawn in consultation, a mandatory sixty-day period preceding the request for a panel. Consultations are a holdover from the GATT days, when the system was (purportedly) more about diplomacy than law. Consultations are held behind closed doors, and this is essential to their success. Indeed, countries are more likely to reach an agreement if they do not need to pander to powerful domestic interest groups. The design of the WTO’s DSU, more generally, reflects the fact that governments negotiate with domestic interest groups as much as they do with one another. Consultations, in particular, shield negotiators from these demands at home.

Consultations are not completely closed off to all comers, however. Other WTO members can enter as “third parties” if they have a substantial trade interest in the dispute at hand, such as when they are affected by the barrier at issue (Busch and Reinhardt 2006). Yet this only happens if both the complainant and the defendant agree to have those other countries present. Complainants welcome such third parties in about half of all cases, and defendants rarely block them, for the simple reason that a blocked third party can always bring a suit of its own, which leads to greater trouble for the defendant (Johns and Pelc 2014). The one most telling finding about the effect of privacy on negotiations is that the greater the number of third parties present, the less likely is a negotiated solution (Busch and Reinhardt 2006; Davey and Porges 1998). Indeed, third parties add voices and issues to the disputes, and they may also create an incentive on the part of litigants to posture, to “act tough” and demonstrate resolve, with an eye toward subsequent disputes (Stasavage 2004).

The high rate of settlement is good news. Litigation is an inefficient outcome (Gilligan, Johns, and Rosendorff 2010): it entails considerable legal and bureaucratic costs, and from the point of view of litigants, it throws a spotlight on the underlying issue. Litigants no longer enjoy insulation from domestic interests, since the outcome of litigation—the panel report—is made public, along with both litigants’ full arguments. Governments can no longer claim that they wrought a “hard won deal” and misrepresent any losses as wins. The panel report lays it out for all to see. For these reasons, concessions on the part of the defendant are most likely to take place prior to the ruling. This is a sign of a functioning legal system: most of the action takes place in the shadow of the law.

These beliefs are empirically supported. On average, complainants are more likely to obtain concessions if they can reach a settlement than if the case moves on to litigation and results in a ruling, even if the complainant wins on all counts (Busch and Reinhardt 2001). Indeed, what pushes respondents to concede is the benefit of doing so privately, which allows governments to shape the perception of these concessions domestically. That, together with governments’ desire to avoid the normative condemnation that comes with a ruling by the WTO, explains why the odds of agreement are greatest before the panel hands down a ruling. This, in short, is the institution’s single greatest forte.

The trade regime effectively relies on self-enforcement. One reason this is achievable in international politics is that countries have a wealth of information about each other’s behavior. When there is reason for ambiguity about the legality of a given country’s policies, litigation is a means of resolving it. In this light, the main function of WTO verdicts is to clarify the meaning of the institution’s rules, lending greater predictability and stability to the global economy.

Another reason self-enforcement is achievable is that governments continually interact with one another; the trade regime, after all, is nearly seventy years old. And while it remains the prerogative of a sovereign country to ignore a WTO ruling if it chooses, it does so at the risk that a subsequent ruling it wins may be spurned; that its demands
will be less likely to be met; and that the concessions it offers during trade rounds will be devalued. In short, countries join the institution knowing that in some cases the rules will work against them, but on average, membership is a net benefit (Pelc 2010). This is also the reason why, despite the ability to block unfavorable rulings during the GATT, surprisingly few countries availed themselves of this option over the half century prior to the WTO’s inception. Just as countries can spurn rulings now, they could block rulings then. In both cases, they avoid doing so for analogus reasons.

To avoid normative condemnation, defendants will dig in their heels once an unfavorable ruling is handed down. Indeed, there is little left to lose at that point. As Schelling (1960) noted, a threat that needs to be exercised has lost all potency; it is an ineffectve threat. As a result, concessions are most likely to occur at the prelitigation stage. Of course, whether cases proceed to litigation and result in a panel report is not a random occurrence. Some cases stand little chance of settling early. Disputes like US—Cotton or EC—Hormones touch on such sensitive issues that the domestic political costs of conceding, even behind closed doors, would have been prohibitive (Heinisich 2006; Rountree 1998–1999; Shumaker 2007; Sien 2006–2007). Some disputes, in other words, are launched even though it is known that they will not settle. Moreover, it is likely that countries sometimes file cases not principally for the sake of the aggrieved domestic industry, but rather because they are seeking a favorable interpretation of the rules (Pelc 2013). This is why a country that “wins” at the panel stage may still appeal the verdict, looking to secure more favorable legal logic from a body new to the WTO: the Appellate Body (AB).

The AB is comprised of seven full-time jurists, three of whom hear any given case. Insofar as the WTO establishes precedent, this is the body that does it. The AB weighs the validity of the appealed portion of a contested panel report. It has no fact-finding power, in that it cannot collect additional information or ask questions, and it cannot send a case back to a panel to complete unfinished analysis. Some 70 percent of panel verdicts are appealed.

If the defendant loses its appeal, and the complainant perceives that the policy at fault has not been remedied, the next step is a compliance panel, where the same panelists from the panel report now address a single question: Has the defendant followed the panel’s recommendations? If the defendant is found not to have complied, then the complainant can ask for the authorization to retaliate.

This final step, the DSU’s last resort, has preoccupied much of the literature, despite its rarity. One thing is readily agreed on: retaliation serves no balancing function, because it does not remedy the harm done (Hudec 2000, 22). In economic terms, it amounts to shooting oneself in the foot. Indeed, it is worth reflecting on the apparent irony of a system built on the principle of free trade that allows aggrieved countries to respond to injury by raising tariffs in turn.

Adam Smith foresaw retaliation for what it was: economic folly in the service of potentially rational politics, belonging “not... so much to the science of a legislator,... as to the skill of that insidious and crafty animal, vulgarly called a statesman or politician” (1937, 435). Although nearly 250 years old, this view is not out of date. As the representative from Ecuador put it recently, retaliation at the WTO “does not restore the balance lost,... but rather tends to inflict greater injury on the complaining party, as occurred in the banana dispute.”2 Indeed, retaliatory tariffs end up hurting end-users in the complaining country, who, as Ecuador further explains, “have nothing to do with the dispute. [N]ever mind consumers.”3 This is not the position of developing countries alone. The European Union (EU) has declared that “the use of suspension of trade concessions involves a cost not only for the defending party, but also for the economy of the complaining Member.”4

Most important, however, the threat most likely to drive behavior is that of an unfavorable ruling, rather than the suspension of concessions, no matter how credible the latter may be. The GATT period, wherein the trade system successfully resolved trade conflicts, serves as good evidence on this count. Despite the lack of any credible threat of retaliation—since defendants could always block a case—the system worked. It did so because it led countries to settle their disagreements, to avoid being branded as violators.

Selection and Specific Trade Concerns

The methodological challenge that has gnawed at WTO scholars most systematically is the issue of selection (see Rosendorff, this volume). While the problem of endogeneity plagues much of social science inquiry, selection is a particular obstacle for the study of courts, since disputes only become observable once they are officially
launched, and observers rarely have any sense of what potential disputes were not acted on.

This has considerable consequences for empirical analysis. Imagine a research design that seeks to investigate whether panel recommendations that require legislative approval in the defendant country are less likely to be complied with, if we believe that WTO members are rational, we would then also expect them not to file such cases as complainants, or to file them with much less frequency. Those filed might have higher legal merit, making compliance more likely, all things being equal. What WTO scholars lack, in sum, is a sense of the disputes that are not filed: the proverbial nonbarking dogs.

A range of new statistical approaches has sought to deal with such selection effects, chief among them being the search for valid instrumental variables, which is of limited use in getting a sense of nonfiled disputes in the study of courts. Others have attempted to delve into the process of selection itself. Davis (2012), for example, looks at the step prior to dispute initiation in the United States by examining the petitions of industries for enforcement of trade rules in Congress.

In recent years another promising avenue for exploring the issue of selection has become available. Specifically, the WTO collects data on STCs reported to the TBT and SPS committees. The key is that these are not (yet) formal dispute settlement cases. Rather, they are complaints brought to the attention of the committee with the aim of seeking a resolution. The data are organized just as in a dispute settlement case: the member(s) raising the concern is identified; the member(s) implementing the measure at issue, and its description, are recorded; and the case’s “status” is listed, including whether it was partially or fully resolved or an outcome was not reported. These data are instructive in thinking about selection issues.

The first thing that stands out about STCs is the numbers. With respect to TBT measures, there have been 379 STCs versus 47 dispute settlement cases. In terms of SPS, STCs outnumber instances of formal litigation by a wide margin: 350 to 40. So what exactly are STCs? Horn, Mavroidis, and Wijkstrom (2013, 1) describe them as an “informal form of resolution of trade conflicts” over TBT and SPS measures. These measures are complex because they involve regulatory politics. The stakes are thus often high, and the WTO invests in making these measures transparent. Since TBT and SPS measures can act as nontariff barriers, members are required to “notify” others of any changes in policy. Many STCs arise as a result of these notifications, but STCs can also be brought in reaction to measures that are not notified. As the WTO explains it, STCs “relate normally to the proposed draft measures... or to the implementation of existing measures” (WTO, 2011 Document G/TBT/1/Rev.10).

The point is that STCs are informal and cheap to bring, and there is little incentive for governments not to let them proceed. The bureaucratic processes that select disputes to initiate formally are not yet at play. Indeed, because the WTO equates notifications with transparency, governments are likely to err on the side of more, not fewer, STCs. Data on STCs can thus be expected to be rather inclusive, permitting a look at easy and hardest-test cases, and everything in between.

This brings us to the second aspect that stands out about STCs: the subject matter. Unsurprisingly, some are partly, or wholly, probative. Most basically, a member has a question about a measure(s) that has an impact on its trade. For example, in 261 STCs concerning TBT, one or more parties asked for “further information” on, or “clarification” of, the measure. But many STCs invoke the sort of language that one expects to read in a dispute settlement case. Staying with TBT, fully 100 STCs cite a measure’s discriminatory effect; 151 question the rationale and/or legitimacy of a given measure; and 141 ask how the measure relates to international standards, the sinea non of a case litigated under TBT Article 2.

Turning to SPS, Australia, Canada, and the United States brought the first STC on January 6, 1995, over Korea’s shelf-life requirements. A day later the WTO recorded a partial resolution. A year later the EU brought an STC concerning Brazil’s import requirements for wine. No resolution has been reported. These STCs are a window on the dogs that did not bark. True, STCs still involve a decision to go to Geneva. There is still a selection issue in that something motivated the EU to bring its worry to the SPS committee, even if it opted not to litigate this case right away. The point is that STCs help us understand why certain contentious trade conflicts, once brought to the WTO, go to litigation, but not others. It is in this sense that STCs flesh out the cases that weren’t.

Then again, STCs sometimes precede cases that were. Returning to TBT, STC 42, raised on February 25, 2000, by Brazil, Mexico, and Egypt, concerns US dolphin-safe labeling. In 2008 Mexico requested consultations with the
United States, commencing for formal dispute settlement. The case, *US—Tuna II*, is one of the most important TBT cases to date, involving core aspects of the agreement. There is little doubt that the STC was focused on these issues; in addition to requesting information and clarification, Brazil, Mexico, and Egypt focused on the non-product-related process and production methods that trigger the label “dolphin-safe.” These measures are increasingly widespread and the subject of much debate. That this STC preceded formal litigation is not surprising.

What is surprising is that Brazil and Egypt did not join as co-complainants, and only Brazil reserved its third-party rights. Moreover, all of this took place in full knowledge of what happened in the GATT-era case *US—Tuna I*. This suggests that STCs can offer insights into the politics and legal strategy leading up to the request for consultations.

STCs can teach us still more. Horn, Mavroidis, and Wijkstrom (2013), for example, find that the relationship between the number of STCs and dispute settlement cases is not obvious. Our instinct would be to match the content of STCs to the specific legal claims raised in dispute settlement cases, an effort that, to our knowledge, has yet to be undertaken. Not that this is easy. In the case where an STC precedes dispute settlement, a litigant is likely to learn from the responses to its initial inquiries and adjust its legal claims accordingly. This may make it difficult, at times, to directly map dispute settlement cases onto STCs. On the other hand, in cases like *US—Tuna II*, this mapping is fairly straightforward.

The payoff for doing the mapping promises to be significant. Not only will it give us a better sense for selection issues, but it will tell us new things about the protagonists. Horn, Mavroidis, and Wijkstrom (2013) observe that developing countries are disproportionately involved in STCs, relative to their trade volumes. Do STCs teach developing countries how to prosecute trade conflicts? Busch and Reinhardt (2006) suggest that the high rates of developing-country participation as third parties might be part of a “learning by watching” strategy. Perhaps the same is true of STCs. Or perhaps developing countries derive something quite different from bringing STCs.

To be sure, it would be a mistake to view STCs as just the prelude to litigation. The fact that they get the TBT and SPS committees involved in interpreting rules is tremendously valuable. This may be especially helpful for developing countries. One intriguing possibility is that STCs get the TBT and SPS committees to reflect on the implications of ongoing litigation. If so, lessons may be incorporated into a resolution faster than if members had to wait out the verdicts issued by the WTO’s judicial bodies. Consider, for example, Cuba’s involvement in the dispute over Australia’s tobacco measures. Cuba filed this case in May 2013, joining the Dominican Republic, Honduras, and Ukraine, all of which filed in 2012. Interestingly, Cuba, the Dominican Republic, and Honduras, together with nine other developing countries, raised TBT STC 377 in March 2013 against EU measures on tobacco, including packaging restrictions. We submit that the TBT committee has some latitude to informally discuss the litigation, anticipate the politics of an outcome, and suggest the contours of a negotiated settlement in the shadow of the law. This is exactly the logic behind DSU Article 5, “Good Offices, Conciliation and Mediation,” another informal provision to be used alongside formal dispute settlement, but one that is almost never used. Given the technical subject of TBT and SPS, and since STCs are not a part of formal dispute settlement per se, perhaps they fill in where DSU 5 has fallen short.

Studying STCs will not end concerns about selection bias, but it will go a long way in getting at the sources of potential bias. The data speak explicitly to those cases that look more like information gathering than allegations of discrimination. This in itself is a win that GATT-era scholars found elusive.

Finally, there are alternative means of addressing our inability to observe the cases that weren’t. Imagine a typical empirical claim, drawn from the political economy of trade literature, that politically powerful industries get more enforcement of their grievances. The difficulty of testing such a claim rests in the same problem of selection. If we look at the cases filed and find that they disproportionately concern politically powerful industries, what are we to conclude? This could be a sign of domestic institutions favoring such industries, or it could be that, for example, the type of industry that is politically powerful is also more likely to be faced with WTO-inconsistent import barriers abroad. How are we to know if we cannot inspect the pool of potential cases from which disputes are drawn? One way of getting at such a story is to invert conditional hypotheses (Johns and Pelc 2014). If domestic institutions favor politically powerful cases, then conditional on such a case being filed, it should have on average lower legal merit than a case not favored for this reason. This institutional bias should then have observable effects at the settlement and ruling stages—all things being equal, cases representing politically powerful industries should result in less favorable panel rulings. If, instead, those cases are filed because the industries genuinely face more trade barriers abroad, then there should be no difference in panel outcomes.
In sum, the literature has reached the stage where it needs to take methodological concerns such as selection bias seriously. Although no one solution is a panacea, there are different ways of addressing these concerns. Selection effects can sometimes be identified by examining subsequent legal outcomes. Or scholars can examine the data that have emerged about that prior step, by looking at domestic petitions or STCs within the WTO itself.

**Participation**

A significant portion of the literature on the WTO is made up of normative claims. This is not surprising, given how the institution brings together developed and developing countries under an agreement with common objectives that addresses increasingly sensitive political issues. One of these normative assessments has grown particularly salient: observers have claimed that developing countries are effectively excluded from the system.\(^5\)

As with multilateral negotiations during trade rounds, most countries are kept outside of the room during WTO legal proceedings, even if their interests are at stake (Smythe and Smith 2006; Steinberg 2002; Heisenberg 2007). And neither domestic interest groups nor NGOs have any access to DSU hearings.\(^6\) As the literature has begun addressing these claims empirically, some unexpected conclusions have emerged.

It is worth noting that in many respects the WTO’s level of transparency compares favorably with that of other international organizations. Public access to adopted panel reports, by itself, constitutes a unique window on decision making in the institution, the likes of which does not exist in the sister Bretton Woods institutions. The comparison is less favorable with other courts, such as the European Court of Justice, where hearings are open to the public. And there is far from a harmony of interests among participation advocates. The often-overlooked truth is that while developing countries demand greater representation in negotiations and greater access to legal proceedings, they also seek to prevent opening up the process to NGOs, such as through the acceptance of amicus briefs, submissions from “friends of the court.” Now that they are engaged in the process of governance, developing countries resist the entrance of another set of actors that would dilute their influence (Kahler 2004). In other words, every increase in participation also holds distributional effects.

The institution offers opportunities for empirical assessment of the claims underlying the participation debate. Indeed, the WTO has championed the option of third-party participation during disputes. Third-party status, whereby nonlitigant countries can join a dispute from its very beginning, is one means of allowing developing and least-developed countries to be in the room when an issue in which they may have a stake is being negotiated. It is also a means for countries to learn the intricacies of trade law and build their legal capacity (Busch, Reinhardt, and Shaffer 2009).

There is also evidence that the presence of third parties has a positive effect on the content of settlements. Whereas complainants are found to capture a disproportionate portion of gains from settlement when consultations are conducted entirely in private, this is not the case when third parties are present (Kucik and Pelc 2013). In those instances, the complainant, on average, gains no more than the remainder of the membership. Third parties, in other words, perform an unwitting enforcement function, by ensuring that the gains reached in a settlement are extended to the remainder of the membership, per DSU rules.\(^7\) Naturally countries do not join as third parties out of altruism; above and beyond the desire to have their views recorded and building legal capacity, countries join as third parties to ensure that they are not left out of an otherwise private settlement.

Indeed, countries that choose not to sign on as third parties run the risk of being left out of potential concessions if the parties reach early settlement (Nakagawa 2007; Alschner 2014; Bown 2009). When parties settle before proceeding to the panel stage, the terms of the settlement remain private. Defendants wary of increasing market access across the board can carefully design concessions to appease the complainant, while limiting benefits to the broader membership. Such discriminatory settlements are prohibited by the rules of the DSU. Nevertheless, the secrecy surrounding settlements makes this difficult to enforce (Nakagawa 2006). A country that has an interest in the dispute but elects not to sign on as a third party may find itself out in the cold unless it follows up by filing a new dispute. In sum, third parties join to ensure that they get their share of a settlement, yet in doing so, they also have a positive effect on the equity of the deal for everyone else.

There is a catch. These beneficial effects of third parties pertain to those disputes in which a settlement is reached. Yet it turns out that the presence of third parties also affects the odds of such a settlement being reached in the
first place. Despite all the benefits of third-party participation, this step toward greater inclusivity thus comes at a cost. The presence of an audience makes settlement significantly less likely (Busch and Reinhardt 2006; Davey and Porges 1998; Stasavage 2004). There is enough incentive to posture for the sake of these other member states that the odds of reaching agreement between the litigants decline precipitously as the number of other countries in the room rises. In fact, beyond five third parties, the odds of agreement are effectively nil (Busch and Reinhardt 2006). In other words, if settlement is the goal of the system, then greater inclusiveness through third-party participation exerts a cost. And this is the case even when the audience in the room is made up of other countries, rather than NGOs and domestic interest groups.

The effect of third parties on the odds of prelitigation settlement, it turns out, is a special concern for developing countries. Herein lies one of the true cleavages between rich and poor countries in dispute settlement. It is not found in the odds of winning a case, which are statistically indistinguishable for rich versus poor countries. The true difference is that, on average, developed countries settle, and developing countries litigate. This happens for two reasons. First, developing countries tend to file cases against large, rich countries with whom countless others trade, meaning that third parties are more likely to join, with their participation undermining the prospects for early settlement (Busch and Reinhardt 2006). Second, developing countries generally lack the legal capacity to make the most of consultations (Busch, Reinhardt, and Shaffer, 2009), further reducing these odds.

Wider participation, as in other fora, also has the effect of politicizing outcomes (see Rosendorff, this volume). It takes away from the unambiguous legal condemnation that is intended to drive country behavior. Courts are intended to shift disputes and decision making from the political to a legal arena. These bodies can promote cooperation by creating a “functional domain to circumvent the direct clash of political interests” (Burley and Mattli 1993, 44). Third-party participation achieves the opposite. And such repoliticization has distributional effects: the ambiguity it generates over legal rulings helps the losing party in a dispute and hurts the party that prevails on the legal merits (Johns and Pelc 2014).

Yet the most striking aspect of third-party participation is that for all its benefits—voicing one’s interests, building legal capacity, ensuring one is not left out of a settlement—relatively few countries avail themselves of the opportunity (Horlick 1998, 690). Despite its low cost, the average dispute counts about four third parties, while estimates suggest that based on countries’ trade stakes, the number should be closer to fourteen (Johns and Pelc 2014). This outcome would seem to complicate the simple prescription of allowing for greater access: the option to participate exists, yet relatively few countries exercise it. The reason seems to be that countries take the aforementioned consequences of participation in settlement into account. Given that more countries in the room means lower odds of settlement, and litigation is an inefficient outcome for all involved, countries appear to exercise restraint. Rather than try to capture a larger slice of a potentially smaller pie, states strategically choose to settle for a potentially smaller slice of a larger pie. The literature until now has focused on how power considerations may deter participation: Elsig and Stucki (2012) describe in detail the reluctance of African countries to join the cotton dispute filed by Brazil against the United States, for fear of jeopardizing US aid. What these recent findings suggest, however, is that controlling for such power considerations, a greater driver of nonparticipation, on average, appears to be every country’s interest in avoiding the negative consequences of overcrowding. The result is that paradoxically, every additional third party makes everyone else less likely to participate. In short, low rates of participation may be the result not of power plays and exclusionary rules, but of strategic country behavior.

In sum, cleavages between rich and poor countries exist. Yet they do not lie where we most often look for them. Success in dispute settlement hinges most of all on the ability to assess the legal merit of potential cases (Busch, Reinhardt, and Shaffer 2009) and to settle disputes in the shadow of the law, before a ruling is handed down. Developing countries are at a disadvantage in this respect, as they tend to settle less and litigate more. Yet scholars have shown that countries can rapidly learn to use dispute settlement (Davis and Bermeo 2009). Gaining legal capacity is more easily achievable than growing one’s market power or retaliatory capacity. Finally, there are institutional solutions to the participation deficit. The option of joining as a third party is beneficial, as it allows poor countries to be present and participate in proceedings, to voice their views and potentially affect legal outcomes, and to protect their trade interests in so doing. Yet third-party participation also comes at a cost to the institution: as diplomats know, audiences make agreement less likely (Keohane and Nye 2001). There exists an observable trade-off between inclusiveness and the odds of settlement, meaning that there is no easy solution to the participation deficit. The challenge of the institution is to balance these competing objectives.
Words

With a wink and a nod at the role of precedent, economists and political scientists reduce WTO rulings to which country won or lost a case (e.g., Busch and Reinhardt 2001; Petersmann 1994). There is a sense that more predictable legal decisions, through precedent, make the system work, but there is seldom much attention paid to what the rulings actually say or the structure of the legal arguments rendered. Lawyers generally do a better job mulling over the references to past cases, but tend to focus on one or two disputes, offering little perspective on broader trends, which after all are at the heart of the matter. To capture these trends, we need to combine the wider accounting of economists and political scientists with the attention to detail of the lawyers, something the literature has yet to do. Put simply, we need both the forest and the trees if we are to measure the extent to which past rulings hold sway over present ones.

Law is a fundamentally rhetorical exercise. And while the rules have remained constant since the WTO’s inception, their agreed-upon meaning has changed. This has taken place through rulings spanning the GATT and WTO periods.

The traditional search for sources of law falls short in trying to delimit between what binds countries and what does not. Despite DSU Article 3.2 explicitly stating that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements,” echoing Article 59 of the ICJ Statute, panel rulings plainly shape members’ understanding of the meaning of the rules. Even unadopted GATT panel reports, such as the ones for the Tuna—Dolphin decision against the United States, have shaped the interpretation of subsequent WTO law concerning nontrade issues, taken up in some of the WTO’s most important disputes (Venzke 2012). And this is in spite of having no actual legal standing whatsoever. Indeed, WTO rulings have had most to say about issues that countries find hard to arrive at a consensus on during negotiations. In this way, it is legal rulings that have created expectations about how policies addressing nontrade concerns must be “primarily aimed at” addressing these concerns (whereas the text of Article XX[g] merely states that they must be “related to” these policies) and that such measures must be “least trade restrictive” (whereas the text at issue in Article XX[d] states that the policy must be “necessary”) (Venzke 2012). Where the legislative function of an institution falls short, judges often step in. The way they do so cannot be captured by looking at who wins and who loses.

Scholars lag behind policy makers in the realization that words affect the obligations that bind them. There is growing evidence that countries recognize the importance of words in their behavior. Countries sometimes appeal favorable rulings, because the particular language employed by the panelists does not suit their long-term interests. They have strong preferences about judges’ use of judicial economy, even as it is meant to leave the final verdict unaffected (Busch and Pelc 2010). And they file some cases not with the typical goal of satisfying some export-oriented industry, but rather with a longer-term goal of modifying the meaning of the rules in a way that favors their interests (Pelc 2013).

The EU’s pursuit of safeguards disputes successfully achieved such a change. Safeguards are the institution’s quintessential escape clause. The EU, an infrequent safeguards user, filed a number of low-profile cases soon after the WTO’s inception, targeting Korean skim powdered milk and Argentinean footwear—insignificant markets by any measure. It successfully argued for an interpretation of the new Agreement on Safeguards through its predecessor, GATT Article XIX. In doing so, it significantly raised the threshold for the use of safeguards, reenlisting the GATT’s mention of “unforeseen developments” as a prerequisite for any exercise of a safeguard (Pelc 2009). As soon as this legal strategy bore fruit, the EU turned to bigger fish: it took on the United States in a series of safeguards cases that rank among the WTO’s most important in terms of their commercial value. The United States lost these cases and immediately cut its reliance on safeguards. The rules did not change, but their meaning did, as the EU convinced the AB to adopt its interpretation of the text. Scholars need to recognize the importance of words: their ability to affect state behavior.

While this discussion emphasizes how words figure in countries’ strategic behavior, the same can naturally be said of judges themselves. Judges have preferences: panelists would rather not have their rulings overturned on appeal; both panelists and AB judges would rather see compliance with their recommendations. More subtly, WTO judges may have some preferences about the evolution of the institution that differ from those of states. Words are the means by which judges act on these preferences. While the interplay between legislative politics and judicial decisions has been studied most closely in the European context (Burley and Mattli 1993), similar conclusions have...
obtained in other contexts. American legal scholars have recently shown that US Supreme Court judges write less “readable” opinions when they anticipate a hostile reaction in the House (Owens, Wedeking, and Wohlfarth 2013). All of this variation gets lost when one reduces rulings to wins or losses, as the literature has largely done up to now. The time is ripe for taking words seriously.

Conclusion

The literature on WTO dispute settlement has come a long way. It is richer and deeper in so many ways than its earliest contributors could have imagined. It is also more multidisciplinary than many would have predicted. But along the way, as issues like selection and participation have preoccupied scholars, some of the institution’s most axiomatic features have been overlooked. As a matter of course, the literature controls for things like trade dependence or dummy SPS measures as being especially politically contentious. But it does not always ask about what the litigants argued or what the panel’s verdict did or did not say. It has been a long time since the literature moved beyond the question of whether institutions matter and turned to the question of why they matter. If we are to take dispute settlement seriously, part of the answer to why they matter must be the words uttered in a panel or AB report, the calibration of legal arguments to key precedents, and the acquis of case law that extends the longest shadow on the decision to file in the first place. None of this will be as easy to code as variables like trade dependence. But then again, nothing was ever easy about coding GATT disputes back in the day. The methods and technology that we have today make it possible to be as creative as we are rigorous in studying WTO dispute settlement. It is an institution of laws that renders legal judgments. It is time to let the institution speak for itself.

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References


**Notes:**

(\(^1\)) Rossmiller (1994, 232).


(\(^3\)) WTO, TN/DS/W/9.

(\(^4\)) WTO, TN/DS/W/1.

(\(^5\)) For instance, at a WTO meeting in 2011, the representatives of Bolivia, Cuba, Ecuador, and Nicaragua complained that “in practice, the WTO has become an organization that is not led by its Members, in which decision-making based on facts is not governed by consensus, and negotiation meetings are not open to participation by all Members.”

(\(^6\)) Oxfam International and WWF International, together with eight other NGOs, released a memo in 2003 claiming that the WTO features “proliferation of ‘informal’, undocumented and exclusive meetings, amounting to lack of transparency and inability of many countries to participate.”

(\(^7\)) See Article 3.2 of the DSU.

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