Fixing What "Ain't Broke"?
Third Party Rights, Consultations, and the DSU

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I. Introduction

According to the old adage, "if it ain't broke, don't fix it." Since 2001, the Members of the World Trade Organization (WTO) have been contemplating changes to the Dispute Settlement Understanding (DSU), looking to improve upon a mechanism that many see as the crown jewel of the multilateral trading system. Is the mechanism in need of repair? On the one hand, the Chairman of the committee overseeing these negotiations notes that "the prevailing view of Members is that the DSU has generally functioned well to date." On the other hand, he also explains that a large number of proposals concerning "almost all the provisions of the DSU" have been submitted.[1] Most of these proposals call for fine-tuning, rather than overhauling, the dispute settlement mechanism. The question, though, is whether it wise to tinker with a system that most Members agree "ain't broke." We argue that, in negotiating stronger third party rights, including greater access to join the main parties in consultations, Members should proceed with caution, since their efforts could well do more harm than good.

Of the 45 proposals submitted on DSU reform, fully 26 speak to third party rights.[2] Few issues have garnered as much attention as third party rights, or factored in as many requests for clarification of other issues, from consultations to the "sequencing" problem. Indeed, third party rights are often bundled with concerns for *transparency* more generally, the logic being that disputes should be conducted for all to see, so as to build confidence in the WTO. We dissent from this view. Starting from the premise that

[1] TN/DS/9, paragraph 3.
[2] In keeping with the spirit of these proposals, we broadly refer to "third parties" as being Member governments, not private actors, who are neither complainants nor respondents but who seek a formal role at any stage of a dispute's life, including consultations.

dispute settlement is, first and foremost, about solving disputes,[3] we contend that greater third party rights run the risk of undermining mutually agreed solutions. As we elaborate below, third party participation in WTO disputes has *lowered* the likelihood of "early settlement," by which we mean liberalization of disputed measures in advance of a panel ruling.[4] Moreover, there is no discernible evidence that third party participation has influenced the direction of rulings issued by panels or the Appellate Body (AB). The implication is thus that they do little to shape verdicts that better reflect the wider interests of the Membership as a whole. Given these findings, we urge caution in negotiating enhanced third party rights. Indeed, if *transparency* is the real objective, this should be pursued directly, not through enhanced third party rights.

Many proposals concerning third party rights also implicate DSU 4 consultations. Even though third party status, as a *legal* construct, is recognized by the DSU only at the panel stage, the fact is that nearly all third parties reserving rights under DSU 10 request participation in consultations beforehand. Not surprisingly, Members have thus proposed reforms to expand third parties' access to consultations as well. We contend that these proposals are likely to backfire. The reason is that when parties other than the disputants request to be joined in consultations, the likelihood of early settlement drops precipitously. This is especially problematic because the majority of negotiated settlements, and most of the deepest concessions, are agreed in consultations.[5] As a result, if third parties (again, broadly defined) were to gain unfettered access to consultations, this would jeopardize the lion's share of positive outcomes underwritten by the WTO. In the case of dis-

[3] DSU 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute."
[4] We emphasize that, in our usage, the term "early settlement" *does not count* early withdrawal of a complaint if the status quo ante is left in place.
[5] Busch and Reinhardt 2000, 2003a, 2003b

putes among larger economies like the US and Europe, this problem would be acute. This is because, where concessions have been negotiated in the all-important transatlantic relationship, they have been struck in consultations, or not at all.[6] Yet, since defendants with larger economies inspire more requests to be joined in consultations, these are precisely the disputes that will draw unwanted attention from other Members, impeding the prospects for early settlement. Accordingly, we urge restraint on the part of those Members who would make it easier for third parties to join consultations. Along similar lines, we oppose efforts to increase transparency of consultations more generally, preferring to see a report issued on any settlement reached after the fact. Otherwise, we hold to the view that initiatives aimed at increasing transparency should target the panel and later stages directly, rather than through an expansion of third party rights *per se*.

This paper is in three sections. Section II outlines the proposals concerning third party rights, and offers our critique and recommendations. Section III details the (often related) proposals concerning consultations, and explains our reservations and proposals. Finally, Section IV concludes.

II. Third Party Rights

Under DSU 10, Members with a "substantial interest" in a dispute can attend the first of (generally) two meetings between the main parties and the panel, at which time they receive the initial submissions of the complainant(s) and defendant(s), and in turn can offer their own written and oral testimony before the panel. Third parties do not receive the interim report along with the main parties, although their views are generally reported in this and the panel's final report. If the panel's report is appealed, DSU 17

[6] Busch and Reinhardt 2003c

permits those third parties that reserved rights at the panel stage to deliver written and oral testimony before the AB as well. Not surprisingly, the thrust of the proposals for reform has been to strengthen third party access to disputes, and ensure that their arguments are more fully taken into account in the reports issued by panels and the AB.

First, some Members have voiced concern that the requirement of demonstrating a "substantial interest" in a case is an unnecessary hurdle to reserving third party rights. In particular, the African Group proposes that developing countries should be exempt from having to demonstrate a trade or economic interest to participate.[7] More broadly, Kenya insists that "substantial interest" be defined as "any trade" or, roughly speaking, any economic impact, direct or indirect.[8] In practice, relatively few third party petitions (just 4 percent of the 600+ submitted) are rejected for any reason. And while it might seem as though a "substantial interest" constitutes an entry barrier that is overly grounded in economic considerations, Members looking to reserve third party rights have often done so by claiming a "systemic interest" in the dispute, such as having a stake in the *interpretation* of a covered agreement. By comparison, Members wishing to gain access to *consultations* face (what on paper is) a higher hurdle, which is why a great deal of attention is paid to DSU 4 in many submissions, even though third party status, as a legal construct, lacks formal meaning at this stage. We return to this concern in the next section.

Second, many Members propose that third parties should have access to all meetings between the parties and panel (or AB), receive all documents (excluding confidential data), and have their testimony more fully taken into account by the panel in both the interim and final reports. Costa Rica, for example, has called for third party access to "all

[7] TN/DS/W/15, p. 4.
[8] TN/DS/W/42, p. 2

the substantial meetings," as well as better "consideration to the arguments" of third parties in panel (and AB) reports.[9] Jamaica proposes "enhanced status" for those Members with a "substantial trade interest" in a dispute, requiring, among other things, that panels consider their views on issues not necessarily raised by the parties themselves.[10] Jordan concurs on the need for unfettered participation,[11] while China favors access, but not necessarily granting third parties the automatic right to speak at the second meeting.[12] For its part, the European Communities (EC) supports improved access, but also argues that the interim report should remain focused on the arguments of the main parties.[13] Along similar lines, Taiwan warns against requiring that panels comment on third party submissions, citing the need for "judicial economy."[14]

If we take the Chairman's text[15] as an indicator of how these negotiations are proceeding, the Members appear more focused on the *quality* of third party participation than on lowering the entry barrier to participation. Most telling, the "substantial interest" criterion in DSU 10.2 is left untouched in this draft. In fact, this is of relatively little consequence, since nearly all Members ultimately reserving third party rights had, indeed, begun by joining the parties in DSU 4 consultations, such that they had already surmounted the higher hurdle of arguing a "substantial trade interest." Put another way, the real action with respect to third party access unfolds *before* a complainant even requests a panel, a matter we address in the next section.

[9] TN/DS/W/12/Rev.1, p. 1.
[10] TN/DS/W/21, p. 3.
[11] TN/DS/W/43, p. 5.
[12] TN/DS/W/51/Rev.1, p. 2.
[13] TN/DS/W/38, p. 4.
[14] TN/DS/W/25, p. 4.
[15] See TN/DS/9, the annex to which includes the Chairman's text contained in Job(03)/91/Rev.1 and incorporates changes in Job(03)/91/Rev.1/Corr.1.

The text is more assertive with respect to the quality of third party participation. In particular, the draft of DSU 10.2 permits third parties to attend all substantive meetings prior to the interim report, meaning both rounds of litigation. Importantly, DSU 10.3 has been redrafted to allow third parties to receive all submissions delivered by the complainant(s) and defendant(s) before the issuance of the interim report. This simply means that the correspondence between the main parties and the panel concerning the interim report itself would not be shared with third parties. While this may not go far enough for some Members, it does accord with the EC's and Taiwan's urging that reports stay focused on the main parties' arguments, since otherwise tangential issues may prove distracting, and undermine efforts at dispute settlement.

This begs the larger question: do third parties influence panel or AB rulings? After all, the hypothesis underlying most of these proposals is that they do. What little scholarly literature exists on the subject echoes this conventional wisdom.[16] Moreover, at first glance, it seems clear that third party participation is a salient factor in the eyes of panels, for example. Indeed, the panel in *Bananas III* explained that it was struck by the sheer number of third parties reserving rights, observing that "[t]here are six parties (one representing 15 member States) and 20 third parties, meaning that almost one-third of Members are involved in this case."[17] In *Canada—Aircraft*, third party input from the US was seen as so central that the panel had refused to allow the US to withdraw its submissions, not least because the panel "had asked the parties to submit comments *on specific aspects of the US submissions*."[18] More telling still, the panel in *US—Section 301* remarked that, "[g]iven the intense criticism of Sections 301-310 articulated in the sub-

[16] See, for example, Weiss 1998, Covelli 2003
[17] DS27, 7.1
[18] DS70, 7.47 fn. 4; emphasis added

missions of third parties before this Panel, we expressly invited the EC and all third parties to submit to us any evidence of WTO inconsistent conduct by the US …."[19]

On closer inspection, however, the empirical record lends little weight to the hypothesis that third parties influence the *direction* of panel or AB rulings. To examine this question, we built a dataset of 200 concluded WTO disputes filed through 2002, fully 65% of which witnessed third party participation. Of these 200 disputes, 99 were argued before a panel (the majority having been concluded in consultations), resulting in 65 rulings. We coded these rulings according to whether the initial panel report or (if appealed) the initial AB report substantially favored the complainant, was mixed, or fully favored the defendant. Of the 65 rulings in our dataset, 39 substantially favored the complainant(s), while 26 fully or partially favored the defendant(s), net of any appeal. Of those disputes with rulings, 43 had more third parties intervening *against* rather than for the defendant, 7 had more for the defendant than against, and 15 had an equal amount intervening on both sides (of which 6 witnessed no third party participation at all). If rulings did, indeed, take the balance of third parties into account, we might expect more pro-complainant judgments where pro-complainant third parties predominate. Yet complainants win about 60 percent of rulings *no matter which side, if any*, receives the bulk of third party support.[20]

[19] DS152, 7.129

[20] This question clearly calls for a more thorough examination in the future, given (among other things) the relatively small number of disputes with rulings (65). However, even if the evidence *did* show that third party support was associated with legal victories, this would not necessarily imply causation. As we argue below, third party participation greatly selects the subset of cases that escalate to rulings in the first place. No doubt defendants are more likely to settle when the complainant's case has strong legal merits, *ceteris paribus*. Yet, if the presence of third parties increases the likelihood of rulings, regardless of the merits of these cases, then those cases ending in rulings with (most often, pro-complainant) third parties will disproportionately be those complainants are most likely to win. So rulings could be blind to third parties and still exhibit a directional association with their intervention, merely due to selection bias.

Does this mean that third parties do not matter in WTO dispute settlement? Here too, the answer is *no*, but for two different reasons. First, third parties may matter more broadly, in that their participation itself "multilateralizes" disputes in ways that bolster the credibility of the institution. In this sense, even if third parties do not influence decisions rendered by panels or the AB, their presence might still shine a spotlight on issues that warrant the attention of the Membership as a whole. We concur with this view, but disagree with those who would pursue greater *transparency* through stronger third party rights, rather than directly. For example, Japan suggests that all non-confidential submissions be made available to the full Membership,[21] a proposal that gets at transparency directly, and thus avoids the risk of congesting a dispute with third parties. Canada's proposal[22] also argues for greater transparency with respect to submissions and proceedings at the panel stage, explaining that these efforts would not undermine the prospects for negotiated settlement. However, Canada is quick to point out that greater transparency *would* undermine DSU 4 consultations, and should thus be avoided at this stage of dispute settlement.

Second, and following on this point, third parties *do* influence dispute outcomes, if not *rulings* themselves, though not for the better. That is, third parties undermine the prospects for early settlement in *consultations*, a stage at which they are not even formally recognized as third parties. Legal definitions aside, many Members insist on stronger third party rights under DSU 4 consultations. Reform on this front, however, could jeopardize the recognized core objectives of WTO dispute settlement.

[21] TN/DS/W/22, p. 4.
[22] TN/DS/W/41, p. 6.

III. Consultations

One of the best kept secrets about dispute settlement under the WTO is that it still works much as it did under the General Agreement on Tariffs and Trade (GATT). This is particularly true with respect to the role of consultations, which remain the bedrock of the system. Indeed, the majority of disputes brought to Geneva never go to a panel, let alone end in a verdict. Rather, the parties typically negotiate a settlement in consultations (or, more rarely, the complainant withdraws the case without a change from the status quo). The expectation, of course, has long been that the WTO's greater legalism was going to change all this. With a more stream-lined panel process, in particular, the thought was that consultations would become *pro forma*, amounting to little more than pre-trial discovery. The data tell a very different story: consultations still yield many of the most favorable outcomes, and deepest concessions, at the WTO. In some trading relationships, most notably involving the US and EC, the simple fact is that if the parties do not settle in consultations, they do not settle.[23]

Given that dispute settlement largely unfolds before a panel is even requested, it is hardly surprising that third parties would seek to participate in consultations. Under DSU 4, Members other than the parties—or what we, like many proposals, *informally* call third parties—can request to be joined in consultations so long as they have a "substantial trade interest" in the dispute. This is meant as a higher hurdle than under DSU 10, which stipulates only a "substantial interest."[24] As a result, DSU 4.11 is the focus of many proposals for reform. Costa Rica's much-discussed submission, for example, calls for deleting the "trade" qualifier and, more provocatively, the potential to block any requests to be

[23] Busch and Reinhardt 2003c.
[24] On the genesis of this criterion, see Rosas 2000, Porges 2003.

joined in consultations.[25] Jamaica likewise insists that a "substantial interest" should suffice for the purposes of joining consultations under DSU 4.11, and that Members ought to agree on "appropriate" rules by which parties might reject such requests.[26]

Other Members are leery of making consultations more accessible to third parties. Most interesting, in this regard, is Taiwan's proposal, which argues in favor of the "substantial trade interest" criterion, reasoning 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*."[27] Like Jamaica, however, Taiwan endorses the establishment of clear rules by which the parties may exclude third parties from consultations.

Where are the negotiations heading on DSU 4? Turning once again to the Chairman's text, the "substantial trade interest" criterion still figures prominently under DSU 4.11. In fact, the draft calls on those wishing to join in consultations to indicate their reasons for claiming a substantial trade interest.[28] That said, there is also added text requiring parties to notify the Dispute Settlement Body (DSB) of their reasons for rejecting such a request within ten days of its receipt. Can these provisions balance the need to give those Members with a credible stake in a dispute access to consultations, without leaving consultations too open to unsolicited input? On the one hand, these edits may seem cosmetic, in that they fall well short of defining a substantial trade interest, or the grounds on which a party might deny such a claim. On the other hand, these edits help,

[25] TN/DS/W/12/Rev.1, p. 2.
[26] TN/DS/W/21, p. 2.
[27] TN/DS/W/25, p. 3. Emphasis added.
[28] TN/DS/9, p. 4.

even if only by establishing a "paper trail" of the reasoning behind claims of substantial trade interests and the reasons for rejecting them.

This discussion begs two questions. First, are third parties being prevented from joining in consultations? Second, when they do participate, what effect are they having? The answer to the first question is largely *no*. Very few Members have had a request to join consultations denied: in our data, the statistic is a mere 4 percent. One explanation is that it is not overly difficult to claim a "substantial trade interest." In *US—Section 306*, for example, Canada insisted that the relevant definition "is not limited to an immediate commercial interest but rather is wide enough to encompass both commercial and *systemic interests*."[29] Similarly, when the US denied Japan's bid for third party rights in this case, citing a lack of a substantial trade interest, Japan countered by claiming that its commercial stake included "systemic" concerns.[30] More generally, third party participation in consultations has been common, even when DSU 4 is first invoked using GATT Article XXIII:1, which in theory, if not in practice, makes it easier than Article XXII for the parties to exclude others.

The answer to the second question, especially in light of the answer to the first, is cause for concern: third party involvement in consultations significantly *lowers* the prospects for early settlement. Using the dataset described above, let us start with a few simple statistics. The first thing that stands out is that 61 percent of disputes with no third parties ended in early settlement, in contrast to only 26 percent of those *with* third parties. We can see the propensity for third party involvement to cause disputes to escalate from

[29] WT/DS200/8, emphasis added.
[30] WT/DS200/12

another angle: whereas a mere 9 percent of disputes without third parties ended in a ruling, fully 45 percent of those *with* third parties went the legal distance.

Does this pattern stand up to closer empirical scrutiny? To find out, we ran a statistical model that explicitly controls for other factors explaining early settlement. Our main variable of interest is third party participation. We measured this in several different ways, from a simple yes/no indicator of third party involvement, to a count of the number of third parties, to an index of the economic size of third parties relative to the disputants. Other variables in the model included the number of complainants, whether the third parties cited any "systemic issues," whether the case involved the US or EC, concerned agriculture, bio-safety, environmental protection, cultural preservation, or national security issues, and the complainants' and defendants' GDPs. Our results are unambiguous: regardless of which measure of their participation is used, third parties undermine the prospects for early settlement. Indeed, for the average case with no third parties, the predicted chance for early settlement is a reasonably high 60 percent. If we take the same case and introduce third parties, the predicted chance of early settlement drops significantly, to 38 percent. If we then introduce the added complication of third parties citing systemic issues, the predicted chance of early settlement plummets to 7 percent.

A related point, which lends weight to this finding, is that third party participation makes it far more likely that a dispute will end in a ruling. In other words, when the main parties are joined by third parties in consultations, there is less negotiated settlement, including at the panel stage. Using the same model above, we find that the chance of prolonging a dispute through a ruling is just 8 percent with no third parties involved. With

third parties, the likelihood of a ruling rises to 29 percent. Add to this the extra complication of third parties citing systemic issues, however, and the odds of a dispute resulting in a ruling soars to 71 percent. In short, third parties make early settlement much less likely, and a ruling far more likely.

To be sure, the kinds of disputes that attract third party interest in the first place are not identical to those lacking such involvement. A statistical analysis parallel to the one above, but focused on explaining third party intervention itself, reveals an intuitive pattern. More third parties are drawn to disputes against larger-market defendants (not just the US or EU),[31] a larger number of complainants (not just *Bananas*), and disputed measures that discriminate across partners.[32] Yet none of these characteristics themselves are associated with a lower probability of settlement in the analysis summarized earlier; if anything, the latter two variables have a positive effect on settlement rates. In addition, disputes over what are widely seen as more politically charged matters—such as biosafety, environmental protection, cultural preservation, national security, trade preferences, federalism, or even agriculture—are *not* more likely to draw third parties.[33] Such disputes, unsurprisingly, experience lower rates of settlement.[34] Consequently, the evidence suggests strongly that "hard" disputes do not particularly attract third parties. Rather, the opposite is true: third party involvement, itself, makes disputes "harder" to settle.

[31] Bown 2003
[32] In addition, third parties are more likely to participate in disputes first invoked under the terms of GATT or GATS Article XXII than in those begun under the cover of Article XXIII:1. Nonetheless, as noted earlier, about 45 percent of Article XXIII:1 complaints still experience third party involvement.
[33] Nor, for that matter, are disputes over trade remedies cases.
[34] Busch and Reinhardt 2004

What can or should be done? The challenge is to afford the parties latitude to negotiate, while giving voice to the interests of other Members, where appropriate. We applaud the retention in the Chairman's draft of the "substantial trade interest" language in DSU 4.11, and the proposal that *reasons* to join in consultations, and denials of these requests, be more clearly articulated. While a more precise definition of "substantial trade interest" and "systemic interest" might further insulate consultations, this would be hard to negotiate *ex ante* and—in the absence of an adjudication process—be of little help *ex post*. Since many would-be third parties request to be joined in consultations to keep apprised of any deal struck, we recommend that the parties be required to explain the details of their settlement to the DSB,[35] and that this report be accessible to the Membership as a whole. This accords with the spirit of Japan's proposal, for example, that submissions be shared with *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.[36] A report to the DSB on the terms of any early settlement would accomplish this same goal, not least for those Members denied access to consultations, for whom filing a case is their only recourse. In this sense, greater transparency after the fact may reduce the need to reserve third party rights beforehand.

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 proposed,[37] since this would only lessen the incentive to make concessions, fearful that offers may be interpreted as an omission of non-compliance, for example.[38]

[35] TN/DS/W/18, p. 2.
[36] TN/DS/W/22, p. 4.
[37] TN/DS/W/21, p. 1.
[38] Daughety and Reinganum 1995; Davey 2003, 11.

We also anticipate that opening up consultations to public scrutiny would be a mistake, even though we agree that this idea has promise with respect to panel and AB proceedings.[39] In our view, Canada's proposal was correct in saying that public scrutiny of consultations "could undermine Members' ability to reach negotiated solutions to disputes,"[40] raising the domestic political cost of negotiating a deal that might not be popular at home.[41]

IV. Conclusion

The fact that the DSU negotiations are inspiring so many submissions is a nod to the system's efficacy. Indeed, the mechanism has been widely touted as the most formidable of any international institution.[42] Not surprisingly, most of the proposals speak to the need for adjustments and clarifications, rather than wholesale change. Still, it is useful to keep in mind the old adage that "if it ain't broke, don't fix it." This is particularly true in the case of third party rights, and consultations. In both cases, fine-tuning the DSU could easily do more harm than good. In terms of third party rights, we are not arguing against third party access, but rather against *easier* access. More importantly, we would urge that third party rights be decoupled from much broader concerns about transparency. More to the point, efforts to increase transparency should be taken up directly, not by enhancing third party rights. In fact, we suspect that greater transparency, at both the panel and AB stages, would lessen the incentive to reserve third party rights, and thus help decongest more disputes.

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[39] Former Appellate Body member James Bacchus has made a similar argument ("Open Up the WTO," *Washington Post*, 20 February 2004, A25).
[40] TNDS/W/41, p. 6.
[41] Busch 2000.
[42] Lowenfeld 2002, 150.

The more pressing concern is consultations. Even though third party status is not formally recognized in consultations, the fact is that those who reserve rights at the panel stage are likely to have hurt the chances for a negotiated settlement before a panel is even requested. This is worrisome, since early settlement in consultations is typically the most favorable outcome underwritten by the WTO. Once again, we are not arguing against the right of Members to request to be joined in consultations, but rather against the removal of any block on their participation. This is a modest issue, since few third parties are, in any case, blocked. On a more substantive note, we are opposed to efforts that would increase transparency in consultations more generally, from opening negotiations to public scrutiny to issuing a written record of these talks. That said, we support the idea of circulating a report to the full Membership on the terms of any negotiated settlement struck in consultations. In our view, such a report would ease the pressure on Members to reserve third party rights, since they would be kept apprised of negotiations bearing on their own interests without necessarily participating directly. This would help the main parties by leading to more early settlement. In this regard, those opting not to reserve rights would have little reason to fear the establishment of a prejudicial precedent, since most disputes lacking third party involvement end in early settlement, not rulings. This proposal carries little risk, since, as we have sought to demonstrate, third parties have little positive influence on rulings in any case. In conclusion, we suggest that the DSU will be made stronger by striving for more early settlement and (targeted) transparency, as opposed to stronger third party rights.

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