

## Explaining Early Settlement

What explains early settlement in the shadow of “weak” law? In domestic litigation, the expectation is that plaintiffs withdraw cases lacking merit, and defendants plead meritorious cases. But this happens in the shadow of “strong” law, backed by credible enforcement. Under the GATT, which was long derided as a “court with no bailiff,”<sup>8</sup> rulings could hardly have been argued to carry much legal weight, assuming these rulings were adopted in the first place. Even under the WTO regime, where defendants are more likely to face binding rulings, compliance remains a question mark, given the difficulty of following through on authorization to retaliate, assuming the complainant even asks for such authorization.<sup>9</sup> What, then, explains early settlement in GATT/WTO disputes?

It has been shown that the answer is rooted in the way *uncertainty* about the disputants’ resolve enters into the bargaining process.<sup>10</sup> Consider, for example, a complainant that can file for dispute settlement or resort to unilateral retaliation with a domestic trade measure (e.g., Section 301), which may carry its own domestic political costs. The defendant, meanwhile, must weigh various considerations: the economic damage from potential retaliation; the desire to avoid the normative condemnation elicited by overtly breaking the trade rules; possible strategic concerns about setting a precedent which could, in turn, spark a wave of future non-compliance by others; or narrower tactical considerations (e.g., a defendant’s executive branch, or other liberalizing domestic groups, may be better able to overcome domestic protectionist opposition by “tying hands” with a ruling<sup>11</sup>). There is accordingly inherent uncertainty both as regards the complainant’s will to follow through on costly retaliation and as regards the defendant’s will to bear

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<sup>8</sup> Rossmiller 1994, 263

<sup>9</sup> Five such requests have been made under the WTO, versus one under the GATT.

<sup>10</sup> Reinhardt 2001.

<sup>11</sup> Reinhardt 2002.