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Abstract

This article addresses one prominent expression of the interplay between politics and law in international cooperation: the dynamics of bargaining in the settling of compliance disputes. Our central argument is that the formal structure of dispute settlement systematically shapes the likelihood and terms of negotiated compliance settlements. We introduce an ideal type distinction between interstate dispute settlement, where the authority to sue states for non-compliance resides exclusively with states, and supranational dispute settlement, where this authority is partly or entirely delegated to a commission or secretariat with a prosecutorial function. We hypothesize that systems relying on supranational prosecution are more effective in addressing non-compliance, and more likely to mediate the impact of power asymmetries on dispute settlement outcomes, compared to systems relying on state-initiated complaints only. We find support for this proposition in an in-depth comparison of dispute settlement and compliance bargaining in the World Trade Organization and the European Union, and in a brief survey of experiences from other international organizations.

Keywords

compliance, dispute settlement, European Union, institutional theory, legalization, World Trade Organization

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Introduction

In recent years, students of international cooperation have turned their attention to the legalization of world politics, seeking to better understand the proliferation of binding international treaties, the delegation of dispute settlement powers to international legal bodies, and the dynamics of compliance with international law. Although some International Relations scholars have evoked long-standing debates about the primacy of power versus rules, treating the two as dichotomous alternatives, most in the field today recognize the complex interplay between politics and law, calling for more nuanced and conditional generalizations (e.g. Goldstein et al., 2000; Raustiala and Slaughter, 2002; Reus-Smit, 2004; Zangl et al., 2011; Zürn and Joerges, 2005).

This article addresses one prominent expression of this interplay: the dynamics of bargaining in the settling of compliance disputes. States bargain for settlement at multiple stages of international dispute resolution: before recourse to formal non-compliance procedures; once proceedings have been initiated in an attempt to preclude adjudication; and in the aftermath of international legal rulings. Compliance bargaining constitutes a natural and perhaps necessary component of the increasingly legalized procedures of international dispute settlement.

In this article, we explore how the institutional design of dispute settlement affects the patterns and outcomes of compliance bargaining in international cooperation. We introduce a distinction between two ideal types of third-party dispute resolution: interstate dispute settlement, where the authority to sue states for non-compliance resides exclusively with states and supranational dispute settlement, where this authority is partly or entirely delegated to a commission or secretariat with a prosecutorial function. Our central theoretical argument is that the formal structure of dispute settlement systematically shapes the likelihood and terms of negotiated compliance settlements. Other things equal, systems relying on supranational prosecution are more effective in raising and addressing cases of non-compliance, and more likely to mediate the impact of power asymmetries on dispute settlement outcomes, than systems relying on state-initiated complaints only. By allowing greater leeway for power asymmetries, compliance bargaining in an interstate system skews dispute settlement outcomes even where the system's legal interpretations and decisions are neutral and unbiased.

We test this hypothesis through a comparison of dispute settlement and compliance bargaining in the World Trade Organization (WTO) and the European Union (EU). Among international organizations, the interstate WTO and supranational EU are perhaps best suited for comparison. The two organizations display a set of contextual similarities: both regulate international trade, offer highly developed institutional frameworks, and include memberships of varying relative power. Moreover, both organizations offer active dispute settlement systems on which reliable statistics are widely available. Most importantly, this comparison allows us to hold broadly constant institutional design features highlighted in the literature on legalization as we assess the impact of their divergent rules governing standing.

Both the WTO and the EU have permanent legal bodies with a high degree of independence, compulsory jurisdiction, authority to issue binding rulings, and access to sanctions — and thus are generally described as highly legalized in an international

comparative perspective. However, the two organizations differ in terms of access rules. In the WTO, only member governments have standing to file cases, and interstate bargaining dominates at all stages of the dispute resolution procedure. In the EU, by contrast, the European Commission has been delegated the authority to prosecute infringements, and supranational bargaining over compliance takes place between the Commission and the offending member state.

While these aspects make the WTO and the EU suitable for comparison, we recognize that there are various contextual differences, such as geographical reach, number of members, scope of policy commitments, level of cultural homogeneity, degree of economic heterogeneity, and scale of power disparities. Given inevitable challenges in research design, we discuss a set of prominent alternative explanations that build on these contextual differences between the two organizations.

Drawing on primary and secondary sources, we present empirical evidence on the initiation, settlement, and resolution of compliance disputes in the WTO and the EU. The findings broadly conform to our expectations.

In the WTO, compliance bargaining is pervasive at all stages of the dispute resolution procedure, but particularly effective in producing settlements before panel rulings. Interstate power asymmetries shape the process and outcomes of compliance bargaining. The empirical pattern of initiation demonstrates that states of relatively greater market size and institutional capacity are more likely to launch non-compliance suits, whereas developing countries are restrained in the filing of complaints because of resource constraints. Once a case has been initiated, powerful complainants, with advantages in institutional capacity and retaliatory leverage, are more likely to achieve favorable outcomes in negotiated settlements. By the same token, powerful defendants can delay or resist making concessions more effectively than developing countries during the compliance bargaining that follows WTO rulings, at times to the detriment of the WTO system as a whole.

In the EU, compliance bargaining plays an equally prominent role in the resolution of infringement disputes. Yet the delegation of prosecutorial powers to the supranational Commission yields a system that is even more effective in raising and settling cases of non-compliance. Furthermore, this delegation mediates the effect of power asymmetries on bargaining outcomes. Whereas member states with relatively greater economic and political weight carry additional influence in the adoption of EU rules, there is no empirical evidence that power differentials influence outcomes in the post-agreement phase. The Commission does not discriminate between member states in the prosecution of infringement cases, and empirical patterns of initiation and settlement cut across traditional power dimensions. Moreover, the Commission — by virtue of its delegated authority — has a long-term interest in supporting compliance with EU rules to a greater degree than individual member states.

To assess whether bargaining dynamics in the WTO and EU extend beyond this comparison, we briefly survey experiences from other interstate and supranational dispute settlement systems. While this broader group of cases is relatively more heterogeneous, the observed patterns resemble the WTO and EU cases. First, supranational dispute settlement systems have been more effective than interstate systems in raising cases against states suspected of non-compliance. Second, supranational dispute

resolution systems have been less susceptible to the influence of power asymmetries on the initiation and settlement of cases.

The article proceeds as follows. The next section outlines the theoretical argument, explaining why the institutional design of dispute settlement should affect the patterns and outcomes of compliance bargaining. In the third section, we describe the design of dispute settlement in the WTO and EU, summarize evidence on the initiation and settlement of non-compliance cases, and address alternative explanations privileging norms, power differentials, and extant institutional variation. The subsequent section briefly surveys dispute settlement experiences in other international organizations.

The argument

Our premise is that even in highly legalized systems for dispute resolution, conflicts regarding compliance with treaty commitments are resolved primarily through bargaining rather than through adjudication or arbitration alone. The likely outcomes of compliance bargaining, however, depend heavily on the institutional design of the dispute settlement system. This section outlines our argument in two steps. We first elaborate on the basic distinction between interstate and supranational dispute settlement, then we identify the likely effects of each design on the patterns and outcomes of compliance bargaining.

The design of dispute settlement: Interstate versus supranational

The most distinctive characteristic of the legalization of world politics is probably the growing tendency for states to delegate dispute settlement powers to third-party tribunals charged with applying regime rules. Yet, across international organizations, there is considerable variation in dispute settlement design. In recent years, International Relations theorists have offered multiple typologies to capture essential dimensions of variation in dispute settlement design (e.g. Alter, 2011; Keohane et al., 2000; Smith, 2000). The central dimensions are access (who enjoys standing), independence (how judges or panelists are appointed), jurisdiction (compulsory or not), 'bindingness' (extent to which rulings create legal obligations), and remedies (whether sanctions are available).

Like other institutionalists, we hypothesize that variation in dispute settlement design shapes the effectiveness and impact of these institutions. Moving beyond the stage of categorization, we isolate the implications of variation in access rules or legal standing, while holding other dimensions constant at a high level of legalization. Our emphasis on access rules is not unique. In fact, a prominent line of research on legalization theorizes the implications of states granting private parties the right to raise cases (e.g. Helfer and Slaughter, 1997; Keohane et al., 2000).

Our contribution is to trace the implications of legal standing for a different category of actors: supranational prosecutors. More specifically, we differentiate between two ideal types of dispute settlement: *interstate* and *supranational*. In interstate dispute settlement, the authority to sue states for non-compliance resides exclusively with states. In supranational dispute settlement, by contrast, this authority is partly or entirely delegated

Table 1. Interstate and supranational dispute settlement in world politics

	Interstate	Supranational
Litigants	States	Commissions/Secretariats
Examples	WTO, MERCOSUR, NAFTA, ASEAN, BENELUX, CARICOM, CIS, ICJ, ITLOS	EU, EFTA, AC, ECOWAS, EAC, COMESA, IACHR, ECHR

Note: Andean Community (AC), Association of South East Asian Nations (ASEAN), Benelux Union (BENELUX), Caribbean Community (CARICOM), Commonwealth of Independent States (CIS), Common Market of Eastern and Southern Africa (COMESA), East African Community (EAC), European Court of Human Rights (ECHR), Economic Community of Western African States (ECOWAS), European Free Trade Association (EFTA), European Union (EU), Inter-American Court of Human Rights (IACHR), International Court of Justice (ICJ), International Tribunal for the Law of the Seas (ITLOS), Southern Common Market (MERCOSUR), North American Free Trade Area (NAFTA), World Trade Organization (WTO).

to a commission or secretariat with a prosecutorial function. Table 1 provides an overview of these two forms of dispute settlement in world politics.

Our central claim is that empowerment of supranational prosecutors fundamentally alters the dynamics and outcomes of dispute settlement. Other things equal, systems relying on supranational prosecution of infringement cases will be more effective in addressing non-compliance, and more likely to mediate the impact of power asymmetries on dispute settlement outcomes, than systems relying exclusively on state-initiated complaints.

This essential difference in the institutional dispute settlement design shapes outcomes through its effects on compliance bargaining — processes of post-agreement bargaining over the terms and obligations of international treaties (Jönsson and Tallberg, 1998). Typically, compliance bargaining occurs at three stages of international dispute settlement: (1) before initiation of a formal non-compliance proceeding, for purposes of reaching an early settlement; (2) within the formal dispute settlement procedure, in an attempt to preclude adjudication; and (3) in the aftermath of a legal ruling, where agreement on implementation avoids sanctions. Bargaining in this context should be understood in broad terms, involving not only direct, verbal communication, but also indirect and non-verbal communication, between the parties (Schelling, 1960).

We hypothesize that compliance bargaining patterns and outcomes are systematically shaped by the institutional design of dispute resolution. In this respect, our argument follows Robert Mnookin and Louis Kornhauser's (1979) classic contribution on bargaining in the shadow of the law, which showed how rules and procedures used in court for divorce disputes affected the bargaining process outside of court for the parties. Specifically, we expect delegation to supranational prosecutors to generate higher overall levels of compliance and to mediate the effects of asymmetries in power resources when compared with interstate bargaining.

We define power in terms of market size and institutional capacity. Market size is the customary conceptualization of power in international economic negotiations, on

the assumption that states with relatively larger economies tend to be less dependent on trade and thus better able to wield (as complainants) or resist (as defendants) threats of market closure (Odell, 2000; Steinberg, 2002). Within highly legalized dispute settlement systems, like the WTO and the EU, a second dimension of power is also salient: the institutional capacity to identify treaty violations, marshal supporting evidence, and advance persuasive legal arguments in a formal adversarial process where expertise is prized and litigation costs may be substantial (Guzman and Simmons, 2005; Shaffer, 2003).

Our argument about power asymmetries in interstate systems is not a claim about biased legal interpretations by judicial actors, but rather about the influence of state power in dispute settlement even where legal decisions are neutral and unbiased. We contend that powerful states achieve dispute settlement outcomes closer to their interests because they possess the resources to defend their interests in the process of compliance bargaining. We submit that delegation of enforcement authority to a supranational prosecutor reconfigures the negotiation dyad, compared to interstate bargaining, by introducing a complainant with an entirely different set of preferences and resources.

Interstate dispute settlement provides exclusive access to state complainants whose principals are domestic electorates, whose preferences may fall short of full compliance, who have good reason to fear retaliation by defendants, and who enjoy varying capabilities and resources. Governments are first and foremost responsible to national electorates, and must take domestic political interests and constraints into consideration when deciding whether to initiate and pursue cases alleging violation. State complaints are particularly likely in areas with a concentration of injured and vocal firms, and against markets of large size and economic importance. Where these criteria are not met, governments may elect not to file formal complaints (Sykes, 2005: 347–351). States may also prefer to abstain from pursuing cases for fear of giving international legal bodies opportunities to establish far-reaching precedents, expand the judicial order in question, and limit states' future room for maneuver. The initiation of a non-compliance case exposes the complainant to potential retaliation by the defendant. At a minimum, a complaint may be interpreted as a hostile act, impeding cooperation in other areas. States with large and diversified markets should be relatively less constrained by the threat of retaliation than states of limited market size, given their greater capacity to sustain the costs of sanctions. Similarly, states possessing limited administrative capacity and legal expertise should be relatively less inclined to engage in costly litigation. Even when states do file, their decision may reflect considerations other than improving treaty compliance, such as political signaling to domestic audiences or *quid pro quo* withdrawals of suits filed against them. In sum, interstate dispute settlement is driven by the political preferences of states with unequal endowments in terms of market size and institutional resources.

Supranational dispute settlement, by contrast, offers access to complainants whose principals are the collective of member states, whose preferences are full compliance with regime rules, who have limited reasons to fear retaliatory measures, and who mobilize a constant level of resources in every case. Supranational prosecutors have been empowered to file cases because states want assistance with enforcement to improve the credibility of state commitments (Moravcsik, 1998). The mission is to pursue violations,

and while states may be unhappy when suits are brought against them, they usually do not retaliate against supranational prosecutors for fulfilling this mandate. Maintaining credibility and autonomy vis-a-vis the collective of state principals is important for supranational prosecutors. As a result, they prefer to be perceived as impartial, have incentives to treat the parties in a uniform way, and are expected to resist political concerns other than advancement of the international legal order they serve. Among supranational third parties, there is an empirical parallel to the impartiality of international judges (Voeten, 2008), who similarly enhance the credibility of treaty commitments. To the extent that supranational prosecutors selectively pursue violations because of resource constraints, they are likely to pick cases for their political and legal impact, including their capacity to establish important precedents. Supranational prosecutors generally develop highly specialized legal expertise that can be brought to bear on potential cases. In dispute settlement systems granting access to both supranational prosecutors and states, national governments are likely to let the supranational prosecutor take the lead, thereby escaping the threat of retaliation and incurring no litigation costs. In sum, supranational dispute settlement is driven by the enforcement agenda of independent prosecutors to whom states have given a mandate and the resources to promote compliance.

Hypotheses and expectations

The implications of this variation in the institutional structure of compliance bargaining are significant. Supranational dispute settlement, relative to interstate dispute settlement, should lead to: (1) more frequent initiation of cases when treaty violations occur; (2) less bias in the initiation and settlement of cases; and (3) better compliance with treaty provisions. Each stage at which compliance bargaining occurs — before formal initiation, during the dispute settlement process, and after a legal ruling — offers observable implications of our claims.

In terms of the *initiation* of non-compliance cases, we expect states with relatively larger markets or institutional capacities to initiate more cases than those with fewer economic and political resources. We also expect states to engage in tit-for-tat filings, retaliating against governments that initiate disputes by lodging complaints against them in turn. By contrast, we expect supranational prosecutors to file more cases than states. We also expect supranational prosecutors, when selecting which cases to file, to be less inclined to discriminate across states on the basis of political or economic power.

During dispute settlement proceedings but *prior to a legal ruling*, we expect states with greater retaliatory leverage and institutional capacity to be more likely to reach negotiated settlements that are favorable to their demands as complainants, securing concessions that may not be of value to third parties. By contrast, we expect supranational prosecutors to be relatively more effective than states at persuading defendants to accept settlements that respect regime rules. We also expect supranational prosecutors engaged in settlement negotiations at this stage to be less likely to discriminate between states based on economic or political power.

After a legal ruling has been issued, during *post-ruling negotiations*, we expect states with relatively greater market size and retaliatory leverage to be more likely to reach

settlements that are favorable to their demands as complainants. We also expect states with greater market size and lower vulnerability to sanctions to be better able to resist or delay compliance as defendants. By contrast, we expect supranational prosecutors to be more inclined than states to reach settlements that respect regime rules. We also expect supranational prosecutors engaged in settlement talks or threatening punitive measures to be less likely than states to discriminate on the basis of economic or political power.

Taken together, our expectations suggest that the institutional form of compliance bargaining systematically affects dispute settlement outcomes, in terms of both the level of compliance and the distribution of gains between parties.

Dispute settlement in the WTO and EU

While similar on most dimensions of dispute settlement design, the WTO and EU differ on the rules governing access. In this section, we demonstrate how this variation in institutional design affects the patterns and outcomes of compliance bargaining. We also assess alternative explanations based on other differences between the two organizations.

Dispute settlement design in the WTO and EU

The dispute settlement system of the global trade regime stems from 1995, when the WTO replaced the General Agreement on Tariffs and Trade (GATT). While the GATT dispute settlement system was known as diplomatic and power-oriented, because it gave defendant states the right to veto the adoption of panel reports and the authorization of sanctions, the Dispute Settlement Understanding (DSU) of the WTO was a distinct step in the direction of legalism. Notably, it guaranteed the right to a binding panel ruling; created a standing Appellate Body to review panel decisions; specified deadlines for compliance with adopted rulings; and, if compliance did not occur on time, automatically authorized bilateral sanctions up to the level of economic injuries sustained by the complainant.

The WTO dispute settlement procedure consists of multiple stages at which conflicts may be resolved. Disputes begin when a complainant files a formal request for consultations with a defendant. Other countries with some commercial or systemic stake in the dispute can seek to join the case by reserving rights as third parties. If bilateral consultations fail to resolve the issue, the complainant can request the formation of an arbitral panel to rule on alleged violations of WTO rules. Once a panel report is issued, either side may refer it to the Appellate Body. Panel and appellate rulings are then adopted automatically by the Dispute Settlement Body (DSB) — at which point, presuming a ruling of violation, the reasonable time period for compliance begins. If timely compliance does not occur, the complainant has the right to impose retaliatory sanctions up to the level that benefits promised to it have been nullified or impaired by the defendant.

Compliance bargaining takes place throughout the formal dispute settlement process. The most intense and often productive negotiations take place before a ruling on the basic issue of violation (Busch and Reinhardt, 2002, 2003b). Yet compliance bargaining in the WTO continues long after the initial rulings enter into force. Disputing governments often continue to litigate the length of the reasonable time period for

implementation; whether a replacement measure is consistent with WTO rules; and the appropriate level of retaliatory sanctions. While the DSU aims to insulate the legal process from political dynamics, the dispute settlement system, at its core, remains focused on the resolution of bilateral disputes to the satisfaction of the contending states. In the words of former WTO Director-General Michael Moore (2000), settlement remains the 'key principle' in a system whose purpose is to 'maintain the delicate balance of international rights and obligations.'

Ultimately, the authority to define compliance in the WTO rests with the disputing member states, not the Appellate Body or the DSB, even after a ruling of violation has been adopted. WTO decisions typically do not specify exactly how compliance should be achieved. Moreover, although the DSU expresses a preference for full implementation, it also allows for compensation as a second-best outcome. Finally, disputing governments are free to reach settlements that tolerate ongoing violations of WTO rules even after formally binding panel and appellate rulings have entered into force. If in agreement, disputants have the right to request that the issue of implementation be removed from the agenda of the DSB without disclosing the specific terms of their settlement, which may or may not conform to WTO rules.

WTO member states vary tremendously in both market size and institutional capacity. And apart from these power asymmetries, the preferences of individual governments regarding compliance vary substantially, given that case-specific political considerations strongly influence decisions to file (Davis, 2008). All this means that management of compliance disputes in the WTO lies in the hands of member states with unequal power and divergent preferences.

With some modifications, the dispute settlement system of the EU stems from the 1950s. The treaties provide for two alternative ways of settling compliance disputes at the centralized EU level, in addition to a decentralized system of private litigants in national courts.¹ On the one hand, member states may sue each other for non-compliance in the European Court of Justice (ECJ). On the other hand, they may leave the task of ensuring compliance to the Commission, which enjoys independent authority to initiate infringement proceedings and refer non-compliance cases to the ECJ. Although the institutional design provides for both interstate and supranational dispute settlement, the historical record demonstrates an overwhelming preference on the part of member states to let the Commission take the lead. The Commission has initiated more than 30,000 cases over the 32-year period 1978–2009, while member states have brought less than a handful (Table 5). For a prospective complainant state, supranational dispute settlement saves litigation costs, eliminates the risk of retaliation, satisfies the preference for diplomatic courtesy, and offers the legitimacy that flows from cases initiated by an institution representing the whole (Audretsch, 1986; Tallberg, 2003).

The EU dispute settlement procedure, too, consists of consecutive stages where conflicts may be resolved. It begins with the Commission informally notifying a member state of a suspected infringement. If the case is not quickly solved, the Commission initiates an infringement proceeding by sending a 'letter of formal notice' informing the member state of its substantive grounds for complaint. The second formal stage consists of the Commission giving a 'reasoned opinion' that develops legal arguments in the case. If the member state persists in its actions, the case is subsequently referred to the ECJ.

When a state continues its violation even after an ECJ ruling, the Commission since 1993 has been able to initiate a sanctioning proceeding with the possibility of fines. These monetary penalties, which are set at punitive levels, are proposed by the Commission and decided by the ECJ.

Compliance bargaining takes place at all stages of the EU dispute settlement procedures (Tallberg and Jönsson, 2005). In letters and meetings, the Commission attempts to persuade member states to comply by explaining their violations under EU law, by threatening to bring the case to the next step in the procedure, and by reminding states that sanctions may be imposed if they fail to comply with ECJ judgments. The member states, for their part, attempt to explain to the Commission the political, economic, social, or administrative reasons behind the challenged measures. They may also present alternative interpretations, suggest compromise solutions, or signal their intention to let a case run its course. Since the late 1980s, compliance bargaining has become institutionalized through the practice of regular review meetings between the Commission and individual member states designed to produce amicable solutions to non-compliance cases. Hence, for the Commission, the ‘main form of dispute settlement... is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process’ (Snyder, 1993: 30).

The Commission enjoys full discretion regarding whether to initiate proceedings, what time limits to impose on governments before a case moves to the next stage, and what state measures justify closing a case. This independence grants the Commission a strong hand in compliance bargaining, enabling it to threaten further legal moves, and ultimately sanctions, if states do not budge. Obviously, the credibility of these threats is contingent on the ECJ sharing the Commission’s legal interpretations — which it almost always does.

While the Commission in the early years of European integration was sensitive to the political reactions that infringement suits might elicit, it shed these concerns in the late 1970s (Tallberg, 2003). Infringement proceedings were made automatic on the finding of non-compliance, and enforcement procedures thereby stripped of their earlier political stigma. This policy has been in place for more than three decades, and the overwhelming numbers of cases initiated annually reveal that the Commission does not fear political retaliation. Member governments, for their part, appear to recognize that a strong supranational prosecutor serves their long-term interest, even if they dislike being charged with non-compliance on occasion. Despite several opportunities, no attempt has been made in the EU’s treaty revisions over the years to repeal or reduce the Commission’s prosecutorial powers. In sum, compliance disputes in the EU are controlled by a supranational prosecutor that brings considerable institutional resources to the table and holds a strong and consistent preference in favor of compliance.

Interstate dispute resolution in the WTO: The empirical record

After 15 years of operation, the dispute settlement system of the WTO has generated a case record that permits us to summarize and assess patterns of compliance bargaining. The evidence demonstrates that dispute settlement in the WTO is heavily shaped by the political incentives and constraints of member states, which control the process from beginning to end. While states are more likely to bring non-compliance cases in the

legalized WTO than in the GATT, enduring asymmetries in market size and institutional capacity influence the decisions of states to initiate or participate in disputes. Fundamental inequalities across states in retaliatory leverage and legal expertise also affect their ability to forge favorable settlements as complainants and to resist or delay compliance as defendants.

At first glance, the expectation that legalization would reduce the effects of power has been borne out in several respects. Developing countries have utilized the WTO system more frequently than GATT, participating to an extent at least comparable to, and perhaps slightly greater than, what their shares of world trade would predict (Bown, 2004a: 64; Guzman and Simmons, 2005; Horn et al., 2005). As complainants, developing countries have been equally effective at securing rulings of violation from WTO panels, often filing cases against more powerful defendants despite the potential for retaliation (Busch and Reinhardt, 2003a: 732; Guzman and Simmons, 2005). Powerful countries, such as the United States, are more willing to act in accordance with WTO procedures than with previous GATT procedures (Zangl, 2008). But these encouraging findings are offset by other evidence revealing the ways in which international power asymmetries continue to influence compliance bargaining in the WTO. We survey this evidence across three stages of WTO dispute settlement: initiation, early settlement, and post-ruling settlements.

In terms of the *initiation* of disputes, although disputes are more numerous than under GATT, the total remains low in comparison with the EU, especially given the larger number of WTO member states. In the first 16 years, there were 439 complaints among 153 WTO members (Table 2). In terms of the distribution of filings, the majority of complaints (259 of 439) came from a small set of members classified by the World Bank as high-income countries. The remaining cases were spread across developing countries, with fewer cases filed by those with lower per capita income. Using three broad groups of WTO member states — industrialized (29), developing (74), and least developed (31) — Table 3 identifies each group's share of bilateral disputes, as complainant and respondent, from 1995 until 25 October 2006. The pattern is striking: industrialized states have filed two-thirds of all WTO complaints, the bulk of which target other industrialized states. A handful of middle-income developing countries — with prior experience in the system, and thus lower information barriers — account for the bulk of filings within that grouping (Davis and Bermeo, 2009). Most developing countries and nearly all least-developed countries have never initiated a WTO dispute.

Table 2. Number of WTO complaints, January 1995–March 2011

<i>Complainant</i>	<i>Respondent</i>				<i>Totals</i>
	<i>High income</i>	<i>Upper-middle income</i>	<i>Lower-middle income</i>	<i>Low income</i>	
High income	165	42	31	21	259
Upper-middle income	49	27	19	0	95
Lower-middle income	31	12	13	2	58
Low income	18	6	2	1	27
Totals	263	87	65	24	439

Source: WorldTradeLaw.net (March 2011).

Table 3. Share of bilateral WTO disputes, January 1995–25 October 2006

Complainant	Respondent			Totals
	Industrialized (29 countries)	Developing (74 countries)	Least developed (31 countries)	
Industrialized	46%	20%	0%	66%
Developing	27%	6%	0%	33%
Least developed	1%	0.1%	0%	1%
Totals	74%	26%	0%	100%

Source: Horn and Mavroidis (2008b) at Table 2b.

While a small number of high-income countries utilize the WTO system far more than their more numerous and poorer counterparts, the totals reveal a rough symmetry within each category between cases filed and defended. It is difficult to determine whether larger, richer countries file more complaints because of purely economic interests or political power. It is also difficult to establish a reliable baseline for the incidence of violations and thus the distribution of potential cases. Nonetheless, evidence suggests that aspects of power shape the decisions of member states to enforce their rights. Decisions to join as complainant or third party positively correlate with the capacity to retaliate against the defendant (based on the defendant's bilateral trade dependence) and the ability to bear the costs of litigation (based on GDP) (Bown, 2005a, 2005b).

Aspects of power also affect the selection of defendants in WTO disputes. Given a decision to file, there is an inverse relationship between the economic size of disputing governments: the lower the GDP of the complainant, the higher the GDP of the defendant (Guzman and Simmons, 2005). This pattern reflects fundamental inequalities in institutional capacity. With only scarce administrative resources and legal expertise, developing countries tend to file only cases with the highest expected value: namely, those against their largest export markets, which are developed countries. The corollary is that large, rich countries may also be targeting smaller, poorer countries. Under the WTO, wealthy countries have filed far more frequently against developing countries, with developing countries going from 8% of the defendant pool under GATT to 37% in the WTO (Busch and Reinhardt, 2003a: 730). Controlling for market power and trade dependence, developing countries were one-third less likely to file complaints against developed states — and up to five times more likely to be filed against — in the early years of the WTO than under GATT from 1989 to 1994 (Reinhardt, 2000: 19).

With regard to the *early settlement* of WTO disputes, a majority of cases are resolved or abandoned prior to a panel ruling. Table 4 summarizes the record of early settlement or termination in the WTO Dispute Settlement Database, a World Bank study that includes 351 disputes from the system's first decade. By far the most complaints, almost half (45%) are resolved or withdrawn during the consultations phase, prior to any request for a panel ruling. Another sixth settle after the panel request but before a panel is established (11%); after panel composition but before any ruling (4%); or after the ruling but before its adoption and entry into force (1%). This record suggests how important the process of

Table 4. WTO disputes settled or dropped by stage in the procedures, January 1995–December 2006

Stage	Number	Share
Before panel request	158	45%
Before panel establishment	38	11%
Before panel ruling	15	4%
Before panel report adoption	4	1%
Total dropped/settled	215	61%
Total disputes	351	100%

Source: Horn and Mavroidis (2008a).

compliance bargaining can be during consultations. WTO cases that proceed to a panel typically produce a ruling of violation. Still, governments have been reluctant to settle beyond a certain point in the proceedings, perhaps because they value the domestic political cover provided by an international ruling (Allee and Huth, 2006).

Developed countries have proven far more able than developing countries to obtain full concessions during early settlement negotiations. Part of the explanation rests with the limited legal and administrative capacities of poor states. This capacity differential is not as obvious during appearances before panels (poor states often hire experienced private counsel) as during the earliest stages of planning, even before a consultation request, when the level of development shapes a state's 'capacity for recognizing, and aggressively pursuing, legal opportunities' (Busch and Reinhardt, 2003a: 720). Public-private partnerships in the US and EU — where the private sector bears substantial costs in identifying, lobbying for, and supporting cases to remove trade barriers abroad — place developing countries at a clear disadvantage in the WTO system (Shaffer, 2003: 156–162). Differences in industry-level participation meaningfully influence use of WTO dispute settlement procedures (Bown, 2009; Busch et al., 2009; Davis and Shirato, 2007).

Moreover, asymmetries in market power influence the division of gains in early settlements. In disputes from 1973 to 1998, traditional power measures, such as the defendant's level of dependence on exports to the complainant, had a significant impact on the successful economic resolution of disputes, measured in terms of subsequent market liberalization (Bown, 2004b). Developing-country complainants have been more effective at opening markets in the WTO than in GATT because of strategic decisions to target defendants more susceptible to retaliation threats (Bown, 2004a: 61). Studies reveal a direct link between the capacity of a complainant to threaten credible, costly sanctions and the extent of market liberalization by the defendant. Similarly, illegal forms of protection are more likely to be imposed against countries with limited retaliatory ability (Bown, 2005a).

In terms of *post-ruling settlements*, powerful defendants are more likely to delay or avoid making concessions than developing countries. The post-ruling phase of WTO dispute settlement does not always produce timely and effective implementation for three reasons. First, compliance reviews under the DSU and ad hoc procedural agreements

between disputants routinely extend the deadline for implementation and delay the imposition of any sanctions. Appeals are routine among disputes that produce panel rulings (71%), and requests for additional compliance panels, after the reasonable time period for implementation has expired, are far from rare (16%) (Horn and Mavroidis, 2008a). Among 30 disputes that reached the Appellate Body in its first seven years, there were only four cases of protracted non-compliance (Garrett and Smith, 2003). But in another seven cases, compliance did not occur within the reasonable period agreed upon by the disputants or determined by an arbitrator. The average delay in those seven cases (more than 10 months) was significant, especially when added to the already generous implementation period of up to 15 months. Not surprisingly, the majority of these 11 failed or delayed cases were against the US or EU. And this count does not include cases in which complainants voluntarily agreed to extend the time period for implementation or to delay the onset of sanctions — an accommodation often extended to powerful defendants such as the US or EU.

Second, despite occasional requests for authority to retaliate, sanctions remain a limited and rarely utilized tool for inducing compliance. Stark imbalances in the capacity to impose and withstand retaliation imply basic asymmetries in the capacity of WTO member states to enforce their rights after obtaining a favorable legal result. In 15% of disputes with adopted rulings (19 of 130), complainants at least formally requested the authority to ‘suspend benefits’ (Horn and Mavroidis 2008a). Only very rarely, however, were sanctions imposed — and in certain cases, such as US sanctions against EU restrictions on hormone-treated beef, settlements proved no easier to achieve.

Finally, disputing governments are free in practice to reach settlements contrary to WTO rules even after a binding ruling has been adopted. Among Appellate Body cases, multiple settlements delayed or denied full implementation of DSB recommendations (Garrett and Smith, 2003). The most significant example is *EC – Bananas*, in which the US and then Ecuador agreed to a deal in which the EU increased access for their producers or traders during its gradual transition toward a WTO-compliant regime. The tariff-only scheme that was to constitute full compliance was not in place until 2006, more than eight years after the ruling of violation entered into force — and Latin banana producers challenged it, too, for failing to preserve their market access (Smith, 2006). The cases of *Turkey – Textiles* and *Thailand – Iron & Steel* constitute additional examples of settlements being resolved and removed from the DSB agenda without disclosure of terms and apparently short of full compliance (WTO, 2001, 2002). In yet other cases, *US – Sec. 110(5) of the Copyright Act* and *US – Gambling*, the United States — rather than complying — has offered compensation to the complainant or affected third parties (WTO, 2003; Lester, 2008).

In sum, interstate dispute resolution in the WTO is more effective at raising and settling cases than under GATT, but remains influenced and limited by power asymmetries between member states in terms of market size and institutional capacity.

Supranational dispute resolution in the EU: The empirical record

Evidence from several decades of dispute settlement in the EU suggests that the supranational design of this system produces distinct patterns of compliance bargaining. First, this system is extremely effective in settling cases of non-compliance (Tallberg, 2002).

The stages of the infringement and sanctioning procedures progressively increase the pressure and costs of non-compliance, thereby encouraging governments to find bargaining solutions acceptable to the Commission. Second, it mediates the influence of power asymmetries on outcomes. Whereas member states with advantages in power resources carry disproportionate influence in the adoption of EU rules, there is no evidence to suggest that such power differentials remain important in the post-agreement phase.

The effectiveness of the EU's supranational dispute settlement system results in sharp decreases in non-compliance cases from one stage of the enforcement procedures to the next. Many cases are resolved through pre-proceeding settlements even before initiation of the formal non-compliance procedure. As in other systems of dispute resolution, cases that do not involve formal complaints are relatively less well documented. Yet in recent years, the Commission has begun to report aggregate annual figures on 'suspected infringements,' of which there are approximately 2000 to 2500 a year. When these figures are compared to the yearly number of formally initiated infringement proceedings, we find that approximately half of all suspected infringements are resolved at the informal stage.

With regard to the formal *initiation* of non-compliance proceedings, the Commission each year launches a staggering number of 1000 to 1500 infringement suits against the relatively small number of EU member states. This caseload suggests that the EU system of enforcement, while very effective at detecting and settling cases, is not particularly good at deterring violations in the first place. A majority of the cases initiated by the Commission target late or faulty adoption of EU directives in national law (59.5% in 2009), while the remainder target inappropriate application of EU directives, regulations, and treaties in particular circumstances (40.5% in 2009) (European Commission, 2010: annex I, 15). The policy areas that generate the most compliance conflicts are the internal market and environmental issues, which combine extensive legislation and often costly adjustment requirements.

Studies of compliance and enforcement in the EU find no evidence that the Commission systematically discriminates among member states in initiating infringement proceedings (Börzel et al., 2010; Mendrinou, 1996; Tallberg 2003). Data on the initiation of infringement proceedings for the period 1978–2009, reported in Table 5, demonstrate that Denmark has been least often targeted by the Commission, followed by the Netherlands, Luxembourg, Ireland, Sweden, the UK, and Germany. Above the EU average are Belgium, Spain, Austria, Finland, France, Portugal, Greece, and Italy. (This list excludes member states that joined in 2004 and 2007, for which the data are not fully comparable.) A robust finding of research on EU infringement proceedings is the absence of any correlation with traditional measures of power, such as market size and voting weight in the Council of Ministers. Germany, France, and the UK are not less likely to be targeted by the Commission just because they wield considerable power in pre-agreement negotiations.

Interaction between the Commission and member states during the infringement procedure makes *early settlement* the most common method of dispute resolution in the EU. Among infringement cases initiated by the Commission between 1978 and 2009, only 36.6% reached the second stage of the procedure, and only 11.5% were referred to the ECJ for a decision (Table 5). In its own words, the European Commission (1996: 9) 'endeavours to make the fullest use of the pre-litigation stage of the infringement proceedings to persuade the offending Member State to remedy its deficiency or to

Table 5. Cases per EU member state by stage in the infringement procedure, 1978–2009

State	Formal notice (FN)		Reasoned opinion (RO)		Referral (REF)	
	Total	Yearly average	Total	RO/FN (%)	Total	REF/FN (%)
Austria	1064	70.9	391	36.7	124	11.7
Belgium	2080	65.0	941	45.2	350	16.2
Bulgaria	154	51.3	13	8.4	0	0.0
Czech Republic	450	75.0	81	18.0	21	4.7
Cyprus	352	58.7	55	15.6	6	1.7
Denmark	1142	35.7	179	15.7	33	2.9
Estonia	289	48.2	56	19.4	9	3.1
Germany	1992	62.3	785	39.4	248	12.4
Greece	2409	83.1	1106	45.9	369	15.3
Hungary	297	49.5	40	13.5	6	2.0
Finland	1066	71.1	199	18.7	45	4.2
France	2478	77.4	1067	43.1	384	15.5
Ireland	1702	53.2	630	37.0	209	12.3
Italy	2960	92.5	1514	51.1	595	20.1
Latvia	161	26.8	43	26.7	0	0.0
Lithuania	353	58.8	30	8.5	2	0.6
Luxembourg	1613	50.4	690	42.7	271	16.8
Malta	376	62.7	67	17.8	14	3.7
Netherlands	1490	46.6	467	31.3	140	9.4
Poland	364	60.7	106	29.1	30	8.2
Portugal	1972	82.2	846	42.9	168	8.5
Romania	261	87.0	20	7.7	1	0.4
Slovakia	310	51.7	43	13.9	5	1.6
Slovenia	273	45.5	34	12.5	2	0.7
Spain	1695	70.6	632	37.3	213	12.6
Sweden	810	54.0	185	22.8	50	6.2
UK	1750	54.7	536	30.6	134	7.7
EU 27	30,839	64.8	11,293	36.6	3554	11.5

Source: European Commission annual monitoring reports.

negotiate a settlement.’ As evidenced by the data, this strategy has proven remarkably effective in solving non-compliance cases.

All member states display the same preference for backing down or finding amicable solutions in early stages of the infringement procedure. Yet, as illustrated by Table 5, member states vary as to when they tend to settle cases. Some — in particular Denmark, Finland, and Sweden, but also the UK and the Netherlands — go to great lengths to close cases as early as possible. Others — notably Italy, but also Belgium, Greece, France, Portugal, and Luxembourg — tend to resist settlement and end up having a higher share of cases referred to the ECJ. Germany, Austria, and Ireland represent the

Table 6. EU infringement cases closed in 2009 by stage in the procedures

Stage	Number	Share
Before formal notice	786	38.0%
Before reasoned opinion	786	38.0%
Before ECJ referral	278	13.5%
Before ECJ judgment	104	5.0%
Before second formal notice	72	3.5%
Before second reasoned opinion	21	1.0%
Before second ECJ referral	16	0.8%
Before ECJ sanctioning judgment	1	0.1%
After ECJ sanctioning judgment	3	0.1%
Total	2067	100.0%

Source: European Commission (2010).

average EU profile. These settlement patterns do not conform to variation in power capabilities. Whether one expects member states with greater power resources to be relatively less likely to have their cases referred to the later stages of the procedure (because of Commission leniency), or relatively more likely to resist Commission pressure (because of their capacity to sustain sanctions), the data do not support expectations that power matters.

Once a case has been referred to the ECJ, the room for bargaining is significantly reduced. Still, member states occasionally get cold feet when faced with the prospect of an adverse judgment. That possibility is very real: about 90% of rulings in infringement cases favor the Commission (Audretsch, 1986; European Commission, 1996).

Moving to *post-ruling outcomes*, there is evidence that sanctioning proceedings are highly effective in resolving cases against states that persist in violations after adverse ECJ rulings. Moreover, the initiation of such proceedings remains unbiased with respect to differences in state power. After gaining the power to propose economic sanctions against states in 1993, the Commission first made use of this tool in 1997. From 1997 to 2005, it proposed penalties in 39 cases, with amounts ranging from €3600 to €316,500 per day (European Commission, 2006: annex, 7). Irrespective of relative power capabilities, member states have been quick to back down in the face of threatened sanctions. In only three cases during this period, involving Greece, Spain, and France, were the Commission and the ECJ actually forced to impose the proposed penalties in order to achieve compliance. A breakdown of the 39 cases by defendant shows that France, Italy, and Germany have been subject to sanctions proposals most frequently, demonstrating the Commission's lack of acquiescence to great power interests.

For a snapshot of the effects of compliance bargaining in the EU, Table 6 shows the percentage of all cases closed in 2009 that were solved at each stage in the enforcement procedures. Of 2067 cases closed, 38% were solved through pre-proceeding settlements, 56.5% through pre-ruling settlements, and 5.5% through post-ruling settlements.

To summarize the comparison, the contrast between the interstate WTO and supranational EU is stark at each stage of compliance bargaining. In terms of initiation, the Commission files far more complaints than do WTO member states — at least 25 times as many annually. Pre-ruling settlements are common in both systems, but more common in the EU: the Commission refers only about 12% of its cases to the ECJ, while roughly 40% of WTO disputes lead to a panel ruling. Crucially, there is no evidence that the Commission initiates or settles cases based on the political or economic heft of the defendant among EU members. In the WTO, by contrast, market size and institutional capacity influence both the initiation of suits (with powerful states filing more cases against a broader array of defendants) and the distribution of gains in negotiated settlements (with powerful states obtaining greater concessions). Finally, in post-ruling bargaining, the Commission's ability to threaten fines since 1993 has ensured compliance even in difficult cases, again without respect to the defendant's relative size. Yet in the WTO, defendants — in particular, powerful members such as the US and EU — have delayed compliance in a number of disputes, some of which remained unresolved even after complainants threatened or imposed retaliatory sanctions.

Alternative explanations

The WTO–EU comparison provides empirical support for our argument that interstate and supranational dispute resolution systems generate varying patterns of compliance bargaining with distinct implications for outcomes. Yet we recognize that there are differences between the two organizations other than institutional variation in access rules. Accordingly, we address three prominent alternative explanations and explain why none fundamentally undermines our account.

The first alternative explanation, informed by constructivism, emphasizes the distinct character of the EU as a norm community with shared values and a collective identity, as compared to other international organizations (Börzel, 2003: 201–202; Checkel, 2005). According to this argument, it is not the delegation of prosecutorial powers to the Commission that mediates the influence of power differentials and generates high levels of compliance, but institutionalized norms of appropriate behavior in the EU. The absence of a power-related pattern in the EU would thus be best explained by norms proscribing power-wielding in the legal process, whereas the high level of rule adherence would constitute the product of an unusually strong compliance pull (Franck, 1990).

We do not rule out the influence of norms in compliance bargaining. Yet we have reason to believe that such factors play a secondary role in explaining the observed outcomes. The existence of an exclusively *interstate* enforcement system for the EU's economic and monetary union (EMU) enables a controlled comparison, offering a unique chance to assess this alternative explanation. In the stability pact of the EMU, it is the member governments in the Council that decide on warnings and sanctions. The Commission's role is restricted to monitoring economic performance and issuing recommendations to the Council. While we would expect compliance bargaining under the EMU's interstate regime to be relatively less effective at achieving rule adherence and relatively more influenced by power asymmetries than the EU's supranational system,

constructivists would expect governments socialized through compliance norms to behave similarly in both settings.

Evidence on the operation of the stability pact since its establishment in 1997 reveals markedly different patterns of compliance bargaining, lending support to our argument (Calmfors, 2005; *Financial Times*, 2010). Unlike the Commission in the supranational system, the Council has been very reluctant to use formal measures to address non-compliance, not imposing sanctions once in the years since the stability pact's establishment, despite many violations of its rules. Moreover, relative power differentials have influenced the pact's operation and effects. The member states have been particularly hesitant to use formal enforcement weapons against France and Germany. In fact, successful moves by these two major powers to obtain special treatment eventually led the Commission to sue the Council before the ECJ for violations of the EU treaties. In the end, the stability pact was watered down in 2005 to accommodate the Council's lenient approach to France and Germany, and following the financial crisis beginning in 2008, changes to its rules are being considered.

The second alternative explanation, informed by realism, emphasizes that power differentials in the WTO are relatively greater than in the EU. According to this explanation, it is unsurprising that power differentials appear not to influence compliance bargaining in the EU, given its relatively homogeneous industrialized members. In the more heterogeneous WTO, by contrast, there is extensive variation in power capabilities between wealthy states with large markets and small developing countries. According to this realist account, it is this difference between the WTO and the EU, rather than variation in dispute settlement design, that explains the observed patterns in compliance bargaining.

Recognizing that power differentials in the WTO exceed those in the EU, we do not believe that this difference in scale weakens our account. First, power differentials in Europe historically have been sufficient to shape pre-decisional bargaining. In both treaty negotiations and legislative politics, France, Germany, and the UK have tended to exercise greater influence on distributive outcomes than small-or medium-sized EU powers. There is no a priori reason to believe that power differentials would not also affect compliance bargaining.

Moreover, by considering a sub-sample of WTO compliance disputes involving industrialized countries, we can attempt to control for the greater differences in power capabilities among WTO members overall. Even in this subset of industrialized WTO members, more analogous to the EU, differentials in power resources influence initiation and settlement patterns. Compared to other industrialized states, the US and EU file considerably more complaints; target each other, smaller industrialized states, and developing countries in more equal proportions; and participate more frequently in disputes as third parties (Bown, 2005a: Table 2; Garrett and Smith, 2003; Horn and Mavroidis, 2008b: Table 2a). In terms of outcomes, the US and EU have generally enjoyed success in cases against smaller industrialized countries, requesting sanctions only twice, and have encountered obstacles primarily in certain high-profile cases against each other. As defendants, they have been relatively less eager to enter into settlements, and therefore the target of several sanctions requests by other industrialized countries (Horn and Mavroidis, 2008a).

The third alternative explanation, informed by institutionalism, suggests that differences in compliance bargaining between the WTO and the EU may reflect other institutional variation. First, although both dispute settlement systems provide for sanctions against non-complying states, sanctions in the EU consist of punitive economic fines, whereas sanctions in the WTO are merely compensatory and require complainants to bear the costs of raising trade barriers. The deterrent design of sanctions in the EU could thus present an additional explanation for the greater capacity of its dispute settlement system to induce compliance and mediate power differentials. Second, alongside its supranational enforcement system, the EU operates a transnational legal system through which individuals may defend their rights under EU law in domestic courts (Alter, 2000; Burley and Mattli, 1993). The existence of this parallel system could increase the incentives of states to settle allegations of non-compliance by the Commission, since infringements otherwise may become subject to legal action in national courts.

We recognize that these additional institutional differences contribute to making the EU dispute settlement system stronger than the WTO system, and thus may help shape the observed patterns in compliance bargaining. However, for several reasons, we consider these differences to be marginal factors reinforcing the basic pattern, rather than the primary sources of this pattern. The EU introduced its system of punitive fines in 1993 and began to use it only in 1997. Beforehand, the Commission could not threaten economic sanctions in any form and thus possessed less deterrent authority than disputing parties in the WTO. Still, the evidence demonstrates that the Commission, even before the mid-1990s, was effective and even-handed in raising cases, settling disputes, and achieving compliance (Audretsch, 1986; Mendrinou, 1996; Snyder, 1993). The introduction of sanctions mainly contributed to reducing the time-lag in member state adjustment to adverse ECJ rulings at the final stage (Tallberg, 2003). It is more difficult to assess the impact on supranational dispute settlement of individuals' enforcement options in domestic courts. That said, the two systems are more parallel than interlinked. For instance, negotiated settlements between the Commission and member governments do not restrict the possibilities for individuals to pursue outstanding complaints through domestic courts. Finally, as we discuss below, other dispute settlement systems with supranational prosecutors display similar patterns to those observed in the EU, but do not possess deterrent sanctions or parallel enforcement through national courts.

Dispute settlement in other international organizations

The WTO–EU comparison testifies to the differences between supranational and interstate dispute settlement. Yet to what extent have the dynamics observed in the WTO and the EU been reproduced elsewhere? Among international organizations, there are multiple other examples of interstate and supranational dispute settlement (Table 1; see also Alter, 2011). Beyond the WTO, we find interstate dispute settlement in at least eight other international organizations, most of them regional trade arrangements: MERCOSUR, NAFTA, ASEAN, BENELUX, CARICOM, CIS, ITLOS, and ICIJ. Similarly, there are at least seven other international organizations with commissions or secretariats empowered to pursue infringement cases against states, all of them in

trade or human rights: EFTA, AC, ECOWAS, EAC, COMESA, IACHR, and ECHR until 1998.

Before we briefly review experiences from this broader universe of cases, two caveats are in order. First, both categories feature a relatively heterogeneous group of cases, with extensive institutional and contextual differences. On the institutional side, not all dispute settlement systems involve full compulsory jurisdiction (ICJ, IACHR), and some include access also for private parties either in general (AC, ECHR) or for specific provisions such as investments (NAFTA) or the seizing of vessels (ITLOS). On the contextual side, these dispute settlement systems exhibit variation in terms of dates of establishment, policy scope, number of members, and level of economic and cultural homogeneity. Second, the activities of these dispute settlement systems have been unequally documented, with more extensive attention devoted to some systems (NAFTA, ECHR) than to others (CIS, ECOWAS), which hampers effective comparison.

While comparative data thus must be interpreted carefully, experiences from other dispute settlement systems generate important preliminary observations consistent with the WTO and EU cases. To limit the problems identified above, we concentrate on NAFTA, MERCOSUR, EFTA and AC, which present a relatively higher degree of institutional and contextual resemblance to the WTO and EU, and where we have access to relatively more comprehensive and reliable data. Two patterns stand out. First, supranational systems have raised more cases against states suspected of non-compliance than interstate systems. Second, supranational systems have been less susceptible to the influence of power asymmetries on the initiation and settlement of cases.

Empowered to pursue violations and capable of drawing on specialized legal expertise, the EFTA Surveillance Authority and the AC General Secretariat have detected, investigated, initiated, and settled significant numbers of non-compliance cases. This supranational litigation activity has had the knock-on effect of helping the EFTA and AC courts build dockets of cases to establish legal precedent. While power asymmetries between members of these two organizations are limited, there is little in the data to suggest that the asymmetries that exist influence dispute settlement patterns.

The EFTA Surveillance Authority, explicitly modeled on the European Commission, has recently investigated about 400 cases of suspected non-compliance annually, detected either through complaints or in-house inquiries (EFTA Surveillance Authority, 2009). During the period 1994 to 2008, these investigations resulted in a yearly average of about 80 infringement proceedings against the three member states (EFTA Court, 2009). During the same time span, not a single case was brought by one member state against another.

The dispute settlement system of the AC, also heavily inspired by the European legal order, reveals a similar pattern (Alter and Helfer, 2010). While AC member states have not brought a single case against each other, the AC General Secretariat initiated 223 non-compliance cases between 1989 and 2008 (Andean Community, 2011). A large majority of these cases were settled in compliance bargaining, as only 90 cases resulted in a judgment by the Andean Court of Justice.

By contrast, the parties to NAFTA and MERCOSUR have been very reluctant to sue each other for non-compliance, and interstate power differentials appear to have influenced both the initiation and settlement of non-compliance cases.

In NAFTA, fewer than 15 cases have been initiated under the general interstate dispute settlement procedure (Chapter 20) from the entry into force of the agreement in 1994 until February 2010 (Gantz, 2009: 388; NAFTA, 2009). The last case was initiated in 2001, after which the procedure fell into disuse, because of the parties' inability to agree on panelists, general skepticism about the process, and preference to address some issues in the WTO instead. Throughout this period, not a single interstate arbitration has occurred under the specific dispute settlement mechanisms for environmental and labor cooperation, in part because two of three signatories must agree to proceed (Gantz, 2009: 357). By contrast, NAFTA's decentralized dispute settlement procedure (Chapter 19), through which firms may request panel review of anti-dumping and countervailing duty cases, generated more than 130 cases by February 2010.

In MERCOSUR, roughly 20 interstate disputes were referred to the ad hoc arbitration system from 1993 to 2005, 10 of which developed into formal proceedings. Overall, MERCOSUR states shunned the dispute resolution system, resolving issues instead through direct negotiations or unilateral actions outside the treaty. The case record reveals that 'only minor differences have been taken to arbitration in comparison with the impressive agenda of potential controversies that were permanently an important part of Mercosur's recent negotiating history' (Vinuesa, 2005: 432). The replacement of the ad hoc arbitration system by the Permanent Review Tribunal in 2005 has not produced any fundamental change. So far, only five decisions have been handed down by the tribunal, all pertaining to various aspects of the same dispute between Uruguay and Argentina (MERCOSUR Permanent Review Tribunal, 2009). The tribunal is typically regarded as ineffective or dysfunctional, and in October 2007 one of the judges resigned to protest member states' lack of political will to see the tribunal operate effectively (IPS, 2008).

While the limited number of cases in NAFTA and MERCOSUR reduces our ability to draw reliable conclusions, the operation of these interstate systems points to the influence of power differentials. In NAFTA, the US was the defendant in two of the three cases decided through panel arbitration: in both, the US delayed or resisted compliance, in conformance with our expectation that more powerful parties have less vulnerability to sanctions (Gantz, 2009: 389–390). In the *Brooms* case, the panel found unanimously in favor of Mexico, but the US declined to comply immediately, maintaining safeguards for nine months after the decision, despite Mexican sanctions. In the *Trucks* case, too, the panel agreed with the complainant Mexico. But in March 2009, eight years after the decision, Congress still had not enacted the legislation required for Mexican trucking firms to operate in the US, prompting Mexico to impose retaliatory tariffs. In addition, there are indications that US reluctance to participate as defendant helps to explain the limited usage of the dispute settlement procedure. A case brought by Mexico in 2000 against the US because of restricted market access for Mexican sugar remained pending for at least four years, and no tribunal was ever established, following US refusal to appoint panelists. In MERCOSUR, Argentina and Brazil featured more often than the smaller parties as both complainants and defendants in the 10 cases decided prior to 2005, mirroring the pattern in the WTO (Vinuesa, 2005: 432–433). In two cases, compliance has been unsatisfactory — and both involve Brazil, which has refrained from adopting the requisite legislation, despite countermeasures by the aggrieved parties.

In conclusion, this brief survey of other interstate and supranational systems speaks to the generalizability of the central findings from our WTO–EU comparison. Even beyond these two organizations, supranational systems tend to be more effective at raising non-compliance cases, and less susceptible to the influence of power differences, than interstate systems.

Conclusion

In this article, we have developed a distinction between interstate and supranational dispute settlement and advanced an argument about the effects of institutional design on treaty compliance. Specifically, we hypothesized that systems relying on supranational prosecution of cases are more effective at addressing non-compliance, and more likely to mediate the impact of power asymmetries on outcomes, than systems relying only on state-initiated complaints. We explored these hypotheses through a comparison between the WTO and EU, which allowed us to assess the impact of variation in access rules while holding other dimensions of institutional design broadly constant.

This comparison underscores fundamental differences between interstate and supranational dispute settlement. First, evidence on the initiation and termination of cases in the WTO and EU suggests that interstate dispute settlement is less effective at promoting compliance than supranational dispute settlement (see also Zürn and Joerges, 2005). Dispute resolution is less effective in the WTO, partly because states are more reluctant to raise cases, and partly because states have greater difficulty reaching amicable solutions among themselves. WTO member states have to think twice about initiating cases, because of both litigation costs and the risk of retaliatory action by the defendant. By contrast, the EU Commission has a mandate to pursue infringements and the resources to do so effectively. Likewise, once cases are under way, the Commission is relatively more effective at achieving settlements than WTO member states. Moreover, while some WTO settlements tolerate violations of regime rules, we are aware of no case in which an EU member state has challenged the Commission for reaching a settlement in violation of EU law.

Second, the evidence from the WTO and EU suggests that interstate dispute resolution leaves greater scope for power asymmetries to influence outcomes than supranational dispute settlement. Whereas the market size and institutional capacity of disputants markedly shape the process and outcomes of WTO dispute settlement, in the EU power differentials are mediated or even neutralized through delegation of prosecutorial authority to the Commission. In the WTO, states of greater relative power are more likely to initiate complaints, to achieve favorable outcomes in settlements before panel rulings, and as defendants to resist making concessions after adverse rulings. In the EU, by contrast, patterns of initiation and settlement cut across traditional power dimensions. States of greater relative power are neither more nor less likely to be targeted by the Commission or to settle their cases.

Our brief survey of other dispute settlement systems suggests that the patterns observed in the WTO and EU extend beyond these organizations. Supranational systems appear relatively more effective at raising and settling non-compliance cases, and less susceptible to the influence of power differentials, than interstate dispute settlement.

These results, however, do not indicate that supranational dispute settlement is likely to become more prominent in world politics. Indeed, perhaps anticipating the patterns we have examined, GATT signatories in the 1960s flatly rejected a proposal by certain developing countries to establish an expert prosecutor for the international trade regime (Dam, 1970: 372–373). Moreover, cases such as IACHR and COMESA demonstrate that states, even when they decide in favor of supranational prosecutors, sometimes link the delegation of powers to political control mechanisms (Alter, 2011). Accordingly, we expect states in general, and relatively more powerful states in particular, to think twice before adopting this design, precisely because of the constraints typically imposed by supranational prosecutors, whose even-handed and often aggressive promotion of state compliance reduces the impact of power differentials on distributive outcomes.

Notes

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- 1 Since our purpose is to contrast supranational and interstate dispute settlement, we focus on the EU's centralized enforcement system, rather than its decentralized system of enforcement through private litigants, national courts, and the European Court of Justice (ECJ).

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