Silence is Golden? Revisiting Third Party Participation in World Trade Organization Litigation

Lauren Konken*

September 2018

12,669 words

Abstract

State membership in international organizations confers obvious benefits, but the ability of states to act on their preferences and realize those gains is the subject of much debate in IR scholarship. In the context of the international trade regime, concern has mounted that developing countries have not realized the benefits of participating in the World Trade Organization (WTO) dispute settlement mechanism (DSM). Scholars have highlighted the alternative accessibility of third party status for member states with low levels of legal capacity to engage in litigation. Yet contrary to these theories, 22% of all third parties in disputes with a ruling are silent, in that such countries do not submit any oral or written testimony. Existing theories of institutional engagement highlight the importance of material factors. In this paper I counter these mechanisms with a theory of systemic interest. I argue that a state's level of engagement in the WTO DSM is better predicted by whether a state possesses a preference to influence the rules and norms of an international regime. Using large-N statistical analyses and a case study of DS267, *United States – Upland Cotton*, I show that the capacity of governments to navigate the friction of operating bureaucracies at home and in Geneva severely impacts a state's ability to act on their systemic interests by as much as 34%. The preliminary findings of this paper underline the importance of engaging with the details of institutional participation, and for reconsidering what weak states get out of institutional membership.

*Department of Politics, Princeton University. Email: lkonken@princeton.edu. Thank you to Manuel Balán, Leonardo Baccini, Cameron Ballard-Rosa, Eric Bélanger, Matthew Castle, Brendan Cooley, Christina Davis, Amanda Kennard, Nicole Kliewer, Dela Kpo, James Lee, Helen Milner, Krzysztof Pelc, Sven-Oliver Proksch, Keren Yarhi-Milo and Alexandra Zeitz for excellent comments on preliminary drafts. Special thanks to Matthew Castle for excellent research assistance.

Introduction

Let rules handle an outcome, not power.

– A Handbook on the WTO Dispute Settlement System[1]

With over 200,000 international agreements in force to date, the number of international organizations (IOs) with near universal membership continues to increase (Koremenos, 2013, 1). The question as to why countries join and exit IOs has long been debated by scholars. Implicit in arguments over why states join are claims about state preferences, foreign policy decisions and strategic thinking. In conventional explanations, the self interested state seeks membership for their own private gains, to avoid losing out on the benefits of otherwise club goods (Gowa and Kim, 2005), to free-ride on the provision of public goods by other members (Johns and Pelc, 2018), or to seek status by adopting memberships that confer countries the role of a state (Finnemore, 1993). Much ink has been spilled assessing whether these benefits are truly had and what disrupts them from being achieved. Power politics in the realm of IOs, particularly concerning global economic affairs, are viewed as significantly limiting the ability of non-hegemonic states to realize their preferences.

The struggle to realize the gains of organizational membership is perhaps most evident in the World Trade Organization (WTO). In 1995, the WTO was born out of the success of the General Agreement on Tariffs and Trade (GATT), yet as of the end of 2017 the institution is struggling to achieve progress of the same kind. To date, the WTO has failed to adopt another binding set of tariff concessions and treaty terms despite opening its ninth series of trade talks, the Doha Round, in 2001. As a result of this stalling, litigation has become the primary means by which the institution moves forward.[2] This turn to litigation, however, leaves countries vying for influence or WTO jurisprudence. For developing countries with limited resources and legal

[1] See (WTO, 2004, 1)

[2] States can alternatively sign bilateral or multilateral preferential trade agreements external to the organization to establish new commitments. These PTAs have indeed increased 10 fold in number since the early 1990s. For more details on the rise of these commitments, see the WTO World Trade Report on PTAs from 2011 at https://www.wto.org/english/res_e/publications_e/wtr11_e.htm.

capacity, scholars have consistently noted that the institution and the dispute settlement mechanism within it remains beyond reach. Instead scholars have stressed the value such countries can bring to a case by playing the role of a third party.

Being a third party allows countries to free ride on the power of other countries to identify and advance disputes, while also giving them the ability to introduce original written and oral testimony to a case, and learn the details of an ongoing dispute that would otherwise be confidential. Studies have evaluated the factors that drive countries to file disputes in the WTO dispute settlement mechanism (DSM), as well as what leads countries to seek third party status. To date, however, there has been no evaluation of third party activity in the WTO DSM beyond counting the number of third parties, or treating third part status as a dichotomous variable. As of January 1st 2018, the top fifteen participating third parties accounted for 70% of all instances of third party participation. Of the top ten, five are considered the world's leading economies: the European Union, Japan, the United States, Canada and Australia. The list is telling in one respect: if third party participation is an available alternative and effective means of participation in the WTO, the countries considered to need it most don't appear to be using it.

For those that do request third party status, one in five third parties fail to make or submit a statement to a panel in a given case at all, representing 258 cases of what I call silent third party participation. This phenomenon also appears to be increasing over time, with upwards of 50% of third parties on a given dispute not submitting testimony in cases starting in 2015. Overwhelmingly these silent third parties also happen to be developing countries, the most frequent of which happen to be newly industrialized countries.[3] These facts generate two puzzles: what can account for this phenomenon of silent third parties? Moreover, is third party status as accessible to developing countries as some scholars suggest? In unpacking the nature of institutional participation in the context of the WTO, I introduce the concept of systemic interest to explain participation. In turn, I show that when combined with traditional measures

[3] Calculations by author using data provided on the WTO DSU's chronological list of dispute cases as of January 1st 2018. Accessible online: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. Note these calculations differ from the WTO's count of third party participations as it includes only the 170 unique disputes that have reached a final ruling.

of bureaucratic capacity, economic interest, legal capacity, overcrowding and previous experience, we can better predict third party activity than conventional models deploying material measures of state capacity.

Systemic interest stems from the international implications of developments in an international organization. In the context of the WTO, member states possess a systemic interest when they are concerned about the impact of a panel ruling or interpretation of a multilateral trade agreement on future disputes or negotiations. In justifying their participation in a dispute, particularly as a third party, delegations will state whether they possess a strong systemic or commercial interest when requesting to be added to disputes, and in the opening lines of their statements. Yet states expressing interest in the downstream effects of a ruling in the context of the WTO is counterintuitive. On paper, the WTO DSM does not have *de jure stare decisis*; that is to say, a ruling in one case have no authority over others. As a result, for example, a decision against a subsidy program in Canada should have no implications for a similar program in India. In practice, however, scholars have found consistent evidence that WTO DSM panelists apply *de facto* precedent, consistently referencing previous decisions to justify their interpretation of trade rules (Bhala, 1998; Pelc, 2014). Indeed, research has shown that private markets respond to rulings in states beyond the country found in violation by the WTO DSM (Kucik and Pelc, 2016*a*). Moreover, the stalling of formal negotiations makes interpretation in the WTO DSM all the more salient (Steinberg, 2009).

Those states with a substantial interest in seeing the WTO treaty text interpreted or defined in a particular way have a vested interest in voicing their opinion, and are thus more likely to be active third parties. Shaping law requires actively presenting arguments for how it should be interpreted. Preliminary work on the ability of states to shape the meaning of vague terms in GATT/WTO law suggests states have successfully harnessed this capacity (Busch and Reinhardt, 2006; Daku and Pelc, 2017). Yet acting on systemic interests requires more than simply possessing a preference for a rule to be crafted a certain way. Securing approval to express these preferences at the WTO in Geneva also requires concerted efforts by delegations to the

institution via approval from their domestic counterparts. States lacking a cohesive bureaucratic structure may fail to act on their preference to influence the interpretation as a result. Inaction may then emerge out of a lack of coordination, at which point a lack of engagement with the institution is not so much a function of power politics, but bolstering capacity. Silence, in this instance is constrained.

This argument comes up against two alternatives. First, silence may instead stem from the fact that another country has already provided the interpretation and arguments another states wishes to provide. When voicing preferences isn't necessary, then silence is golden. By being in the room, states accomplish their desired interpretation and gain information about the nature of the dispute and preferences of other states that would otherwise be confidential. Previous research has highlighted the power of overcrowding, with disputes drawing more third parties after the first decade of the WTO's existence and this exerting audience costs on disputants (Busch and Reinhardt, 2000). Secondly, commercial interests and power politics on the part of countries with larger markets clearly play a role in determining participation. Fearing the repercussions of providing evidence against the interests of a larger market, it may also be the case that countries are formally silenced by more powerful countries. The historical record within the WTO is ripe with this kind of realpolitik, with concerted efforts to develop legal agreements that favour the interests of the United States, European Union, Japan and now China. Statements may also be unnecessary to signal intentions. The presence of a delegate alone may be more than enough for other countries in the room to know their state's preferences. In all of these instances, silence may be strategic. Reconciling the problem of inactivity in this instance is more daunting.

Despite conventional wisdom highlighting the problem of power politics, I find evidence that systemic interest and bureaucratic effectiveness are better predictors of third party activity than traditional indicators of overcrowding, commercial interest or the presence of more powerful states in disputes. A democratic country with systemic interest, average experience in the WTO DSM, average wealth and an average number of third parties has a predicted probabil-

ity of speaking of 88%. Conversely, an autocratic country with the same traits has a predicted probability of speaking of 77%. Bureaucratic capacity clearly matters. For states with a systemic interest but the lowest level of bureaucratic effectiveness, the predicted probability of speaking is just 58%, whereas those with the most effective the predicted probability is almost guaranteed at 92%! I also show that conventional theories of participation in the WTO DSM cannot account for the phenomenon of silent third parties. Models evaluating economic interest, experience, legal capacity, overcrowding, domestic bureaucratic capacity, and intimidation cannot explain more than 22% (57 of 257) of silent third parties.

This paper contributes to our understanding of engagement with international organizations by unpacking the politics of participation. My theory departs from existing explanations by developing the concept of systemic interest, and investigating it in a context where states should be less concerned about the downstream consequences of actions made against their interests. In doing so, I incorporate insights well understood by legal scholars into the study of international relations, while highlighting the importance of bureaucratic capacity to act on those preferences. For developing countries, power politics are not the only barrier to effective participation. They can be overcome in instances where countries have invested in their bureaucratic effectiveness, and synchronicity between domestic offices and delegations in Geneva. The evidence I provide is corroborated by existing interview based studies. By focusing on the impact of power politics and overcrowding, our insights into the barriers to effective institutional membership seem more dire. Relying on material interests and strategic concerns to explain patterns of behaviour cannot explain broader patterns of behaviour amongst all WTO member states.

In what follows, I develop the concept of systemic interest and contrast it with existing literature predicting membership and activity within the WTO. Using an original dataset alongside existing interview based studies of WTO member states and a short case study of DS267, *United States–Cotton*, I provide preliminary evidence that both systemic interest and bureaucratic effectiveness affect institutional participation, while other conventional theories of participation

can only account for active third parties, not silence. I conclude with a discussion of the policy implications for participation within the WTO and how this study informs broader IR theories of institutional membership.

Systemic Interest and Silent Third Parties

Krasner (1982) defined an international regime as "implicit or explicit principles, norms, rules and decision-making procedures around which actors? expectations converge in a given area of international relations." In the context of international law, it is these formal rules and definitions that exert the greatest impact. But who defines those rules is contentious, with states vying for influence in all forms of global governance (Barnett and Finnemore, 2004). In the context of the international trade regime, states have developed one of the most formalized and legalized bodies of international law but it is the product of seven decades of negotiations. Systemic interests differ from traditional material based explanations of regime creation and development. Instead of highlighting the commercial or power based motivations for joining an organization like the WTO, systemic interests underline the interests of states for actors to converge on particular definitions of legal behaviour, and to do so through negotiated understandings. Systemic interests therefore stem from a state's preference to influence the rules and norms of an international regime by fostering explicit principles and shared understandings. In the context of the international trade regime today, this can be done through the signing of preferential trade agreements with one's preferred terms, the negotiation of multilateral agreements through the WTO or through interpretations in the WTO dispute settlement mechanism.

In 1947, the General Agreement on Tariffs and Trade (GATT) was born out of failure. The inability and unwillingness of the United States to accept the terms laid out in the International Trade Organization (ITO) saw the institution fail before it was created. What remained was a set of general concessions that would lead to 8 rounds of multilateral talks by member states to reduce tariffs and non-tariff barriers across 48 years. In 1995, WTO was born out of the GATT's

success, yet as of the middle of 2018, the institution is struggling to achieve progress of the same kind. To date, the WTO has failed to adopt another binding set of tariff concessions and treaty terms despite opening its ninth series of trade talks, the Doha Round, in 2001. As a result of this stalling, litigation is the primary means by which the institution moves forward.[4]

The WTO can issue protocols or plurilateral agreements, but these treaties are voluntary and non–binding to non–signatories. They also tend to be tailored and subject–specific. As the institution is premised on binding multilateral agreements, interpretations of existing commitments have become central to diffusing new commitments to all member states. Litigation accomplishes this function by allowing panelists – the quasi-judicial body that oversees the dispute process and issues formal rulings on complaints – and disputants to clarify and interpret the institution's many constructively ambiguous agreements (Steinberg, 2009). Through interpretation, the institution is able to qualify previous commitments and creatively define new ones within the context of disputes. While formally the institution does not acknowledge binding precedent, in practice scholars have found evidence of *de facto stare decisis* in judicial reasoning (Bhala, 1998). At the same time, states have filed test-cases to build legal precedent for subsequent disputes (Pelc, 2014). Markets have also been shown to punish publicly traded firms benefiting from policies found in violation, even when the countries executing them were not party to the dispute (Kucik and Pelc, 2016*a*).

As a result of this turn to litigation, the value of engaging in the dispute settlement process has grown immensely since the late 1990s: it remains the only way for states to create and enforce WTO commitments that are in practice binding to all member states. Central to this litigation process are the complainant and defendant, who launch and receive disputes respectively. Intervening in cases, however, are third parties: WTO member states that have an interest in a dispute but not enough so to act as co-complainants. Serving a dual purpose for the institution, third parties are both key observers preventing discriminatory settlements and the providers

[4] States can alternatively sign bilateral or multilateral preferential trade agreements external to the organization to establish new commitments. These PTAs have indeed increased 10 fold in number since the early 1990s. For more details on the rise of these commitments, see the WTO World Trade Report on PTAs from 2011 at https://www.wto.org/english/res_e/publications_e/wtr11_e.htm.

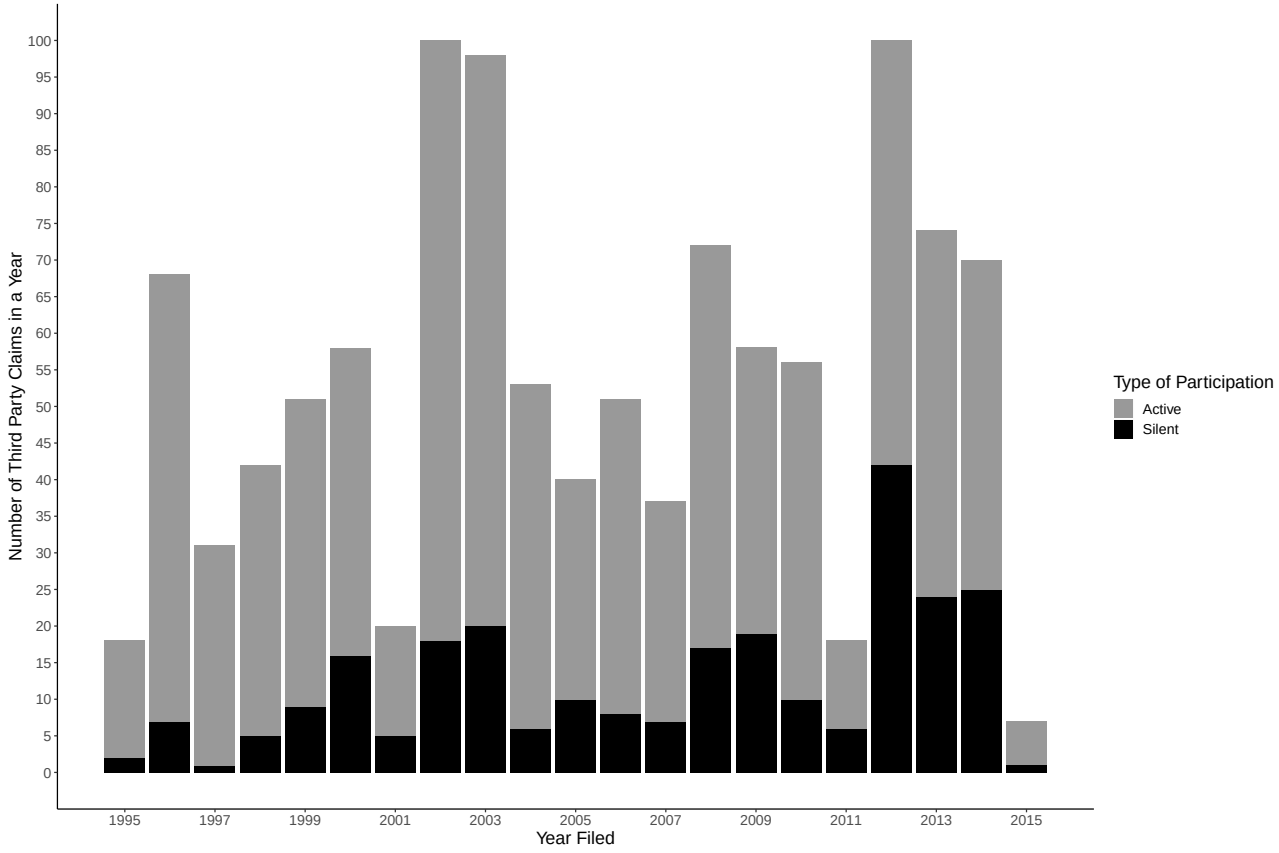
of additional evidence to panels (Busch and Reinhardt, 2006). In return, participation serves to expand dispute settlement issues beyond litigating parties, allowing all interested member states to participate in a dispute at little to no cost relative to those faced by the complainants.[5]

The cheapness of participation makes it an invaluable opportunity for states to gain priceless experience within the institution or simply to free ride on the litigation efforts of others (Bown and Hoekman, 2005; Davis and Bermeo, 2009; Conti, 2010). Engaging in dispute settlement as either a litigant or third party also presents one of the most effective ways to influence WTO jurisprudence, and therefore interpretation of existing rules. As a result, systemic interests are most likely to be expressed in the WTO DSM, and they may guide state behaviour to engage with the institution even when lacking formal commercial interests in a dispute. Given the stalling of negotiations since 2001, the number of third parties to WTO disputes has steadily increased over time.

Descriptive studies highlight the frequency of developing countries using third party status and non-litigious behaviour, but such statements belie important underlying realities. While these studies have undoubtedly contributed to wider understandings about the nature of third party participation in WTO disputes, the degree of participation has been under-assessed. Simply requesting third party status says nothing of the degree a given country is involved in a given dispute or why, despite ample reason to believe that different countries have different utilities for participating in litigation. In previous research, participation in GATT/WTO litigation is theorized to allow states to capitalize on the likelihood that a disproportionate number of cases settle, from which participants gain additional trade flows both as complainants and third parties (Busch and Reinhardt, 2000; Bechtel and Sattler, 2015; Chaudoin, Kucik and Pelc, 2016). It also avails states of the actual enforcement capacity of the institution, allowing developing countries to hold their larger, more developed peers accountable (Horn and Mavroidis, 2006; Moon, 2006). Yet a body of literature has challenged these views, arguing that the institution and its dispute settlement process is relatively inaccessible to its poorest members (Abbott,

[5] WTO disputes are estimated to run over several million dollars in fees on average, particularly with the turn to employing private law firms as legal council (Davis and Shirato, 2007; Conti, 2008).

Figure 1: Third party participation over time (1995-2015)

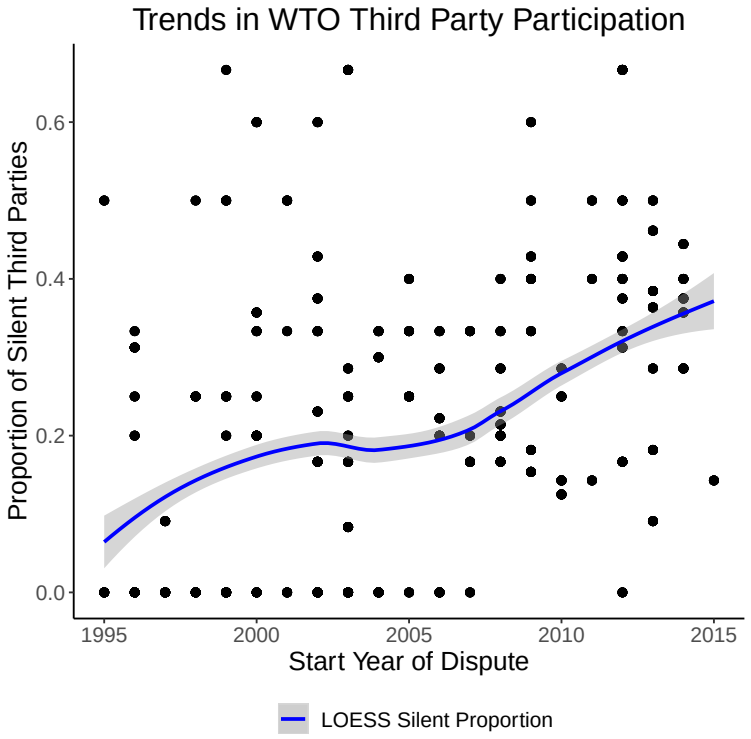


2007; Bown, 2010*b*). Well known capacity constraints, and concerns surrounding intimidation have led many political scientists to suggest that if developing countries are unable to actively launch and litigate their own disputes, they can still participate through the institution's third party mechanism (Horn et al., 1999; Guzman and Simmons, 2005; Shaffer, 2006; Kim, 2008; Busch, Reinhardt and Shaffer, 2009).

As of August 30th 2018, 566 requests for consultations have been filed with the WTO DSM. Looking at third party participants in completed disputes at the panel level and adjusting for duplicate cases yields 1140 instances of states acting as third parties across 170 disputes filed and concluded between 1995 and 2017. When evaluating the number of *unique* complaints that have concluded in a ruling (that is, the parties to the dispute did not settle), the number of cases reduces to just 170.[6] As of January 1st 2018, the top fifteen participating third parties

[6] The choice to evaluate disputes that concluded in a ruling is due to the fact that documentation for settled

Figure 2: Proportion of silent third parties over time (1995-2015)



accounted for 799 instances of all third party activity in WTO panel level disputes, collectively amounting to 70% of all instances of third party participation. Of the top ten, five are considered the world's leading economies: the European Union, Japan, the United States, Canada and Australia. The remaining five are newly industrialized countries: India, China, Brazil, Mexico and Taiwan. Table 1 lists the top fifteen third parties.

Importantly, for those that do participate, one in five third parties fail to make or submit a statement to a panel in a given case at all, representing 258 cases of silent third party participation. This phenomenon also appears to be increasing over time, though fluctuating around global economic crisis periods in 2001, 2008 and 2010. Figure 1 depicts this increasing rate of participation. Figure 2 highlights the increasing proportion of silent third parties on disputes over time, with upwards of 50% of third parties to disputes not submitting testimony in disputes starting in 2015. Overwhelmingly these silent third parties also happen to be developing coun-

disputes remains confidential. It is only possible to "observe" third parties acting in completed disputes. Completed disputes are systematically different from those that settle, but they provide circumstances where third party activity should be most likely.

Table 1: Top 15 third parties overall

	Country	Disputes as Third Party
1.	European Union	93
2.	Japan	89
3.	India	68
4.	China	65
5.	United States	64
6.	Brazil	57
7.	Australia	54
8.	Canada	53
9.	Korea, Rep.	52
10.	Taiwan, China	41
11.	Mexico	37
12.	Norway	36
13.	Turkey	33
14.	Thailand	32
15.	Argentina	25
	Others	341
	Total	1140

Table 2: Top 15 silent third parties

	Country	No. Cases Silent 3rd Party
1.	India	32
2.	China	19
3.	Taiwan, China	19
4.	Thailand	14
5.	Korea, Rep.	12
6.	Vietnam	10
7.	Australia	10
8.	Ecuador	9
9.	Guatemala	9
10.	Honduras	8
11.	Russia	8
12.	Turkey	8
13.	Canada	7
14.	Mexico	7
15.	Brazil	6
	Others	69
	Total	258

tries, the most frequent of which happen to be newly industrialized countries. Table 2 provides a list of the top 15 silent third parties. Oddly, a number of highly developed countries also feature on this list, namely South Korea, Canada and Australia.

Systemic interests remain salient in the context of the international trade regime, yet silent third parties highlight that acting on such preferences may be complicated by the realities of engaging with other countries in an international organization. Conventional explanations for third party participation in the WTO highlight the importance of material capacity, commercial interest, previous experience, overcrowding and bureaucratic effectiveness. I turn to evaluating these now.

A theory of obstructed participation

State behaviour within the WTO's dispute settlement mechanism is often presented as a puzzle of engagement (e.g. when and why do countries litigate) or as a question of the impact of actors on disputes and vice versa (e.g. do third parties increase the odds of a ruling). How and why developing countries have participated in the institution has received significant attention. Research has largely focused on the WTO as a unique venue as opposed to how state engagement with the institution might be part of broader patterns of behaviour across IOs. Yet participation in the WTO, and by extension the DSM, proceeds in series of conscious choices to both join and then engage with the institution, a pattern no different from state behaviour in the United Nations or European Union.

A series of decisions land a state in a position to litigate at the WTO. First they must select into membership by joining the institution. Second, they must decide to litigate a violation by another member state. Absent litigation, or when faced with another state's request for consultations, countries can alternatively decide to be a third party. After requesting third party status, states proceed to engage in the WTO dispute settlement process. If the dispute proceeds to the point of accepting testimony, then third parties will be granted the write to submit

oral or written comments to the panel. It is this final sequence of decisions that is of primary interest here, though the preceding actions no doubt condition which states, and which disputes, end up proceeding to a ruling and providing opportunities for states to shape WTO law. The formal process by which a country can become a third party to a dispute is detailed in the accompanying appendix.

Following the decision to become a third party, countries decide to be active or silent in the dispute settlement process, a choice that is still constrained by earlier factors, and the additional element as to their ultimate intentions regarding the dispute: are they there as strictly observers, or are they there to actively pursue a particular interpretation or ruling? While this intent is a factor when countries decide to become a third party, it is only visible in their actions after the fact: after joining, did they engage with the dispute process or only observe? A consideration of this sequential decision making process lends evidence towards explanations to the two puzzles of interest: why don't developing countries participate more as third parties, and why as third parties are they not more active? First, I develop a theory of systemic interest and bureaucratic effectiveness. I then develop alternative explanations from conventional wisdom in the IR literature, focusing on commercial interest, experience, overcrowding and intimidation. Summarizing all of these theorized effects is Table 3.

Systemic interest and bureaucratic effectiveness

While the WTO is an international organization focused on trade policy, many of its disputes are legal with no identifiable traded products at issue. With cases concerning the way in which countries calculate antidumping duties, to how state subsidies for agricultural or airline industries are constructed, some of the most intense disputes have been reduced to a legal interpretation of words and intent. The importance of legalism, and the additional fact that the WTO has primarily progressed since 1995 by interpreting existing agreements through disputes, highlights the relevance of systemic interests. At the same time, the salience of a case's precedential value is far from new, with existing research highlighting that countries with a significant interest

in how the text of WTO agreements will be interpreted are more likely to participate as third parties (Busch and Reinhardt, 2006). The established efforts of states to manipulate precedents and the market responses to precedents further highlight its importance (Pelc, 2014; Kucik and Pelc, 2016*a*).

Systemic interests vary given the position of states both in global value chains. At the same time, priorities are not only a function of a country's economic make-up but their political priorities. For a country like the United States for example, the protection of intellectual property and patent rights is a high priority. For the European Union, and its many geographically contingent industries, issues such as geographical labels (e.g. the right to use the word "champagne" to describe one's product) are especially salient. For developing countries, subsidies on agricultural products remain a significant barrier to their ability to compete in foreign markets. Systemic interests extend beyond topics as well, given the different orientations of countries toward the uses of international law and how legal commitments should be constructed. Overall, there is reason to believe that systemic interests vary, but do so systematically. What key things influence a state's systemic interests, when they are activated and their willingness to act on them is less understood.

A significant systemic interest in a dispute leaves a state with a high stake in how a legal clause is defined or implemented. Naturally, the only way to ensure the outcome comes as close to their preferred interpretation is to influence the panelists overseeing the dispute. In the context of being a third party, the only way to directly influence panelists is to present testimony, thus leading states with high systemic interests to be more likely to be active third parties if they are not already litigants. For those with low systemic interests in a dispute, the options are less clear. Their lack of systemic interests leaves them less concerned about a definitive interpretation or outcome. Yet, the possession of some systemic interest in a given legal issue may leave them interested enough to follow proceedings. Being in the room allows states to confer their assent towards the dispute and its outcome, while also gaining valuable information: if a country is not a third party to a dispute, proceedings are otherwise confidential until a ruling is

issued. By being present, states are also able to signal their intolerance for a discriminatory settlement, should the complainant or defendant attempt to buy one another off. Signalling in this context – be it to gather information, or to act as an audience to proceedings – merely requires being present, not acting. As such, we might expect states with lower systemic interests to be more likely to be a silent third party. That a dispute has a high salience for a country like the United States may draw an audience and that audience may be ambivalent towards whether the United States wins that dispute or not. If this is the case, states may fall into "types" – active third parties may seek to influence when they have more systemic interests at stake; those seeking to benefit from settlements and are otherwise ambiguous about precedents may be more likely to be silent.

Whether or not states are capable of following through on this strategy, however, is likely a function of many things. Most relevant is a state's bureaucratic capacity. Existing interview based studies indicate the importance of synchronicity between delegations in Geneva and their respective home governments. Often possessing strict mandates not to speak or act without the approval of their respective ministers, delegates have complained that bureaucratic red tape has left their hands tied when it comes to submitting testimony as a third party (Horn et al., 1999; Busch, Reinhardt and Shaffer, 2009; Elsig and Stucki, 2012). At the same time, there exist sharp differences in the design of bureaucratic institutions and delegations abroad that may condition their effectiveness. Overall the degree of centralization with regards to economic policy and foreign affairs decisions appears to be an important variable. Whether countries primarily employ lawyers to represent them at the WTO, as opposed to career diplomats, varies highly – with states increasingly deploying the former over the latter. Whether representatives have an office in Geneva also varies, with smaller developing countries typically abstaining from maintaining a permanent mission to the WTO.

There is also room for bureaucratic mismatches in skills, and within the institution. Previous studies have shown that the institution frequently cannot accommodate linguistic differences for participating delegates, with the DSU primarily operating in the institution's three official

languages: English, French and Spanish (Horn et al., 1999). These arrangements strongly impact how effectively a government can represent itself at the institution. I define bureaucratic synchronicity here as the capacity of a state to harmonize the activities of its domestic and foreign economic policy making apparatuses. The capacity of states to overcome the challenges posed by formulating policy at home, and then having it executed at broad is not unique to managing relations at the WTO: this skill may impact a state's capacity to represent itself in any international organization. It is in part a function of the skillsets of a country's diplomatic core, while also a function of the ease with which policies can be translated from home to permanent missions abroad. There may be slippage between principals and agents in this context, but not due to shirking or slack by agents.

Bureaucratic synchronicity in this context acts as a moderating variable by affecting the capacity of states to implement the strategies that realize their preferences. States with a high systemic interest require effective governments and diplomatic cores to achieve their preferred ends. This can be spoiled by miscommunications or bureaucratic red tape that hinders states from meeting deadlines for approval within the institution. At the same time, a state with a low systemic interest may have an extremely effective government that is more than content to convey their position – even if that position is one that has little stake in the outcome. Low systemic interest and fragmented governments may also incapacitate their foreign officers from acting effectively. Figure 3 graphically depicts how systemic interest and bureaucratic synchronicity come together to affect whether or not a state is an active or silent third party.

The failure of developing countries to initiate more disputes was first illuminated by a number of descriptive studies released on the WTO DSM in the late 1990s. Horn et al. (1999) provided the first comprehensive study on developing country WTO legal capacity. They raised the question of whether use of the WTO DSM was inherently biased against the participation of developing countries, particularly in light of the initial view that the legalization of the WTO DSM had "levelled the playing field." Constructing a model of capacity based on the number of delegates a given country had listed in the WTO phone directory and their respective gross

domestic product (GDP) per capita, Horn et. al. concluded that the disparity in human and legal resources between member states fundamentally impacted their use of the institution. The size and capacity of domestic bureaucratic administrations were assumed correlated to the number of personnel in Geneva (Horn et al., 1999). The study was closely followed by a study by Hoekman and Mavroidis (2000), assessing developing member state bureaucratic constraints more closely, with a particular focus on the role of poor information gathering and monitoring capacities imposing limits a country's ability to identify valid cases. Studies remained general in their construction, making little effort to analyze particular cases or to speak to how these phenomena may be more widespread than the GATT/WTO.

Later reflections on the WTO's "institutional bias" added to concerns about disparities in legal capacity. A great divergence in participation trends between developing and developing countries became apparent as the WTO aged (Kim, 2008). Scholars rapidly concluded that the inability to retaliate, absorb legal costs, foreign aid dependence, and trade dependence hindered developing country participation substantially (Bown, 2005; Bown and Hoekman, 2005; Guzman and Simmons, 2005; Abbott, 2007; Bown and McCulloch, 2010). Overall this generated a growing sense that developing countries were failing to actively litigate cases despite clear violations of WTO commitments by fellow member states (Busch and Reinhardt, 2003; Bown and Hoekman, 2005; Conti, 2010; Elsig and Stucki, 2012). Paired with these studies were a number of cultural explanations to explain the non-litigious behaviour of Southeast Asian countries, though in recent years they have largely been dismissed due in part to China's substantial increase in participation, both as a litigant and third party (Harpaz, 2010; Chow, Goh and Patil, 2013; Moon, 2013).

Statistical studies of third party participation have been bolstered by interview and survey based studies. Busch, Reinhardt and Shaffer (2009) found that legal capacity constraints facing developing countries were so severe that they often prevented officials from acting as effective third party participants:

> Interviewees cited the difficulty of participating as a third party in WTO complaints because

> of lack of support from the home capital. A Latin American country cited one occasion on which it could not file a third party submission in time because the approval from capital took too long. This same Latin American representative noted that even when they "get third party submissions from capital", "they are not in the proper form" and do not make a "proper argument" for panels [...] Yet another Latin American representative stated that, even when it received approval to be a third party, the lack of clear guidance constrained its ability to participate effectively. [...] Sometimes the Geneva mission can only obtain a general approval to participate as a third party, but cannot obtain approval of a written position within the time delay set by the panel. As a result, when faced with an important case involving systemic issues, this country only put forward a vague general position, and did so orally, rather than submit a written position regarding the appropriate legal interpretation of the relevant WTO provisions. In a legalized dispute settlement system, this representative noted, vague third party general policy declamations are meaningless.[7]

Busch, Reinhardt and Shaffer's study proved to be one of a handful wherein developing country participation in the WTO DSM was assessed at all levels (complainant, defendant and third parties). Their striking anecdotes highlighted that even when developing countries had a minimum of five representatives tasked with handling WTO affairs, they were often personnel conducting diplomatic rotations with no clear legal experience. The net result, in their view, has been a recurring cycle of bureaucratic incapacity crippling developing countries in their efforts to participate within the institution more effectively.

Strong evidence that legal and financial capacity constraints hinder the ability of developing countries to participate led to a number of scholars proscribing ways in which states could overcome their weaknesses. For Davis and Bermeo (2009), the best way to surmount capacity constraints was to learn by doing: countries that participated once as a litigant were found to be more likely to participate again, distributing the costs of capacity building over time. Given the costs associated with formal disputes, scholars have also viewed third party participation as a virtually costless way to gain experience (Busch and Reinhardt, 2003; Bown and Hoekman, 2005; Conti, 2010; Elsig and Stucki, 2012). This view was bolstered by China's accession to the WTO in 2001, where after it immediately and heavily made use of its third party rights (Nakagawa, 2007; Bown, 2010*a*; Manjiao, 2012; Chow, Goh and Patil, 2013). Scholars further encouraged the development of legal assistance to less capable countries that needed it, and have

[7] Quote from (Busch, Reinhardt and Shaffer, 2009, 573).

since supported the creation and use of the Advisory Centre on WTO Law (ACWL) established in 2004, an institution designed to provide free and discounted legal services to countries that sign onto it (Bown and McCulloch, 2010).

The effect of a country's bureaucracy on whether or not they participate as a third party should only deter them at the absolute extreme. That is, only those countries with the least effective domestic bureaucracies should fail to participate as third parties. This coincides with the finding that inefficient or slow to respond home governments can easily approve the request to participate by delegates within permanent missions in Geneva (Busch, Reinhardt and Shaffer, 2009). The capacity of a given country's domestic bureaucracy will loom heavier on whether or not a country can actively participate as a third party. If a domestic bureaucracy is slow and disconnected from its permanent mission in Geneva, delegates may not receive an approved testimony in time for the hearing. Even then, while a statement may be issued it may not be properly formatted, making it irrelevant to the dispute at hand. The result, in this context, is that an ineffective or poorly structured domestic bureaucracy tasked with handling WTO affairs may lead to more silent third parties. As theorized by Davis and Bermeo (2009), democracies are more likely to have stronger domestic institutions, and potential capacity in litigating disputes. As a result, measuring domestic bureaucratic capacity as well as level of democracy will be important.

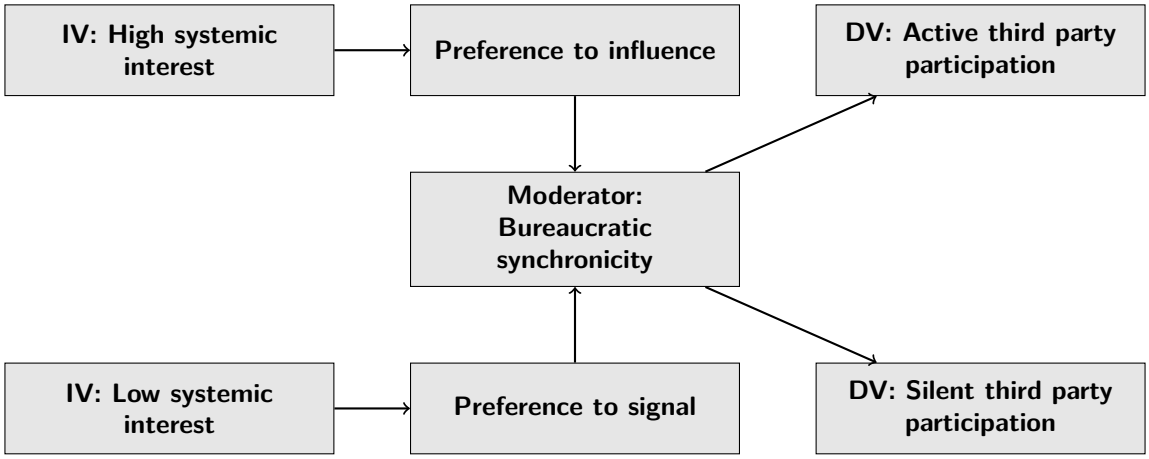
This generates a pair of hypotheses related to systemic interest and bureaucratic effectiveness. Countries with a significant interest in how the text of WTO agreements will be interpreted are more likely to participate as third parties, but that capacity is only realized when a state has an effective bureaucratic apparatus domestically and in Geneva.

Alternative explanations

Trade and commercial Interest

Commercial interests have long been viewed as the single most important predictor of participation in the WTO DSM. If a country has a large stake in the industry involved in a dispute,

Figure 3: Impact of systemic interest and bureaucratic synchronicity on third party participation.



they are more likely to face domestic political pressure from such actors to engage in the dispute and ensure their interests are adequately represented. As a result, countries with a large economic stake in a product directly affected by litigation are more likely to participate as a third party Weiss (1998); Conti (2008); Bown and Reynolds (2015). Not participating means ignoring a dispute that could potentially harm an important source of revenue to a nonparticipant (Bown and Hoekman, 2005; Bohl, 2009). Traditionally, these interests have been reflected by measures of trade flows in identifiable products at issue in a dispute between the responding country (defendant) and litigants or third parties. All else equal, countries with larger bilateral trade flows in the products at issue in a dispute should be more likely to fully participate in a dispute; that is, they should be more likely to be a third party, and more likely to actively participate in the dispute process in turn in order to represent their interests.

Notably, a pure commercial interest in a dispute is distinguishable from a systemic one. The source of a states preference fundamentally differs. For a country with a large industry affected by a law at issue in the WTO DSM, what motivates a country to influence the terms of a ruling are purely economic: in order to limit harm to domestic trade, a state is compelled to argue for specific interpretations that benefit its commercial interests. For states with a systemic interest, the compelling factor that drives their engagement is the law itself, and a normative preference for rules to be constructed in a certain way. A systemic interest is inherently broader, and the

implications of a systemic interest extend beyond one particular industry or sector.

Experience

Conventional wisdom claims that those with less experience may be more inclined to participate as a third party in order to gain knowledge of the WTO dispute settlement process (Bown and McCulloch, 2010; Davis and Bermeo, 2009; Conti, 2010; Davis, 2012). Yet, those who pursue third party participation as a means to educate themselves and build legal capacity have two options. Countries can also learn by watching a dispute unfold, saying nothing as they learn the logistics of participating in litigation. Alternatively they can learn by doing, effectively engaging in a trial run at litigation without the costs of a potential loss bearing over them. For those with more experience, the effect is also unclear. Countries may have enough experience and thus participate less as a third party because they are able to litigate or don't feel the need to participate in order to learn. Yet, the opposite may be true. Precisely because they have experience, third party participation may be an effective means to participate in litigation simply because it's easy, states know how to do it, and they know it is cheaper than initiating a dispute. This may be even more the case if the country is poor but experienced.

China's behaviour as a third party since joining the institution in 2001 depicts this mixed effect well. Despite being lauded as the exemplary case of using third party status to learn how the WTO DSM works, increasingly China has increasingly failed to submit testimony as a third party after 2005. Of the 51 cases it was a participant in as a third party after and including 2005, representatives did not submit testimony in 20 cases. Since 2010 in particular, China has only submitted testimony in 7 of its 24 disputes as a third party. The role of cumulative experience, as a result, is important. It may be that after a certain number of disputes, experience no longer pays off or, as (Busch, Reinhardt and Shaffer, 2009) argue, resets with the incoming of a new diplomatic rotation.

Overcrowding

For the few studies that have assessed third party behaviour specifically, the question has been one of their impact on the likelihood of settlement, or the decision to request third party status more bluntly. Busch and Reinhardt conducted a pair of quantitative studies on the impact of third parties in the consultations process, noting that the more third parties involved in a dispute, the less likely a case was to settle (Busch and Reinhardt, 2000, 2006). They noted this was likely due to posturing induced by by the audience of third parties, though their role remained important in preventing discriminatory settlements. Shaffer (2006) turned to the question of why cases failed to accumulate more third parties given significant economic interests, explaining such behaviour as due to overcrowding and an inability of developing countries to collect sufficient information on important disputes of interest. Building on such findings, additional studies have analyzed third party participation as a strategic choice. Johns and Pelc (2016) found diminishing marginal benefits to joining a dispute with each additional participant.

Third parties are expected to be less likely to join a dispute as a third party when there are a large number of other countries participating (Busch and Reinhardt, 2000). This coincides with the expectation developed by previous studies that overcrowding limits the utility of third party participation given that countries may feel that what they have to say will already be said by another participant (Johns and Pelc, 2016). Overcrowding can continue to affect country behaviour after countries have joined in a similar way. The larger the number of third parties participating, the less a third party may be inclined to speak. This follows the logic that if a country feels other participants will voice the arguments it wishes to make, it may be more inclined to sit back and watch the proceedings occur. As a result, overcrowding is more likely to generate silent third parties.

Intimidation

Lastly, countries may be deterred from participating in a dispute if they fear provoking a powerful country put in the hot seat of defending itself. Countries may fear repercussions if they

participate and exacerbate a dispute concerning great powers who in turn may face particularly harsh consequences if they are found in violation of WTO rules. The effect here, however, may be a weak one as merely requesting third party status does not imply that a country is required to speak out against a great power, or denounce their policy. Intimidation is a significant source of concern for media outlets, however, and may be relevant for those countries who are scared to provoke great powers, or are intimidated of the process in general (Bohl, 2009). As such, an intimidated country may be less likely to be a litigant, and as a result seek third party status with the view that it offers states a more neutral position (Elsig and Stucki, 2012). In the context of the *US – Cotton* dispute, the Cotton-4 countries, Burkina Faso, Benin, Chad and Mali strongly considered participating as co-complainants with Brazil. Ultimately, Benin and Chad would join as third parties, while Burkina Faso and Mali would abstain (Elsig and Stucki, 2012, 309-10).

Intimidation matters more once a country has decided to participate as a third party. Being active might mean being vocal against a great power's trade policy, or actions regarding a particular trade partner. The primary bullies of concern in the GATT/WTO remain the United States and European Union (EU), as both maintain the capacity to retaliate on issues such as the generalized system of preferences or issues external to the organization (Özden and Reinhardt, 2005). Developing countries may perceive that criticism of the EU or United States at a time when they're vulnerable may lead to external repercussions (withdrawn foreign aid, for example) (Guzman and Simmons, 2005; Abbott, 2007). As a result, they may participate as a third party because they hold a significant interest in the dispute, yet restrain their activity as a means to ensure self-preservation. In essence, the more dependent a country is on the US or EU as a trade partner or for foreign assistance, the more likely they may be intimidated. As a result, they are more likely to be silent.

China also presents a significant concern with regards to intimidation. As an authoritarian country, it maintains the right to withdraw permits and other domestic benefits to foreign multinational companies (MNCs) operating in its territory if frustrated by the efforts of other states to deter it from pursuing its agenda in the institution. With no legal recourse, MNCs are left in

Table 3: Expected Direction of Effects

Variable	Effect on Third Party Activity
Experience	$+/-$
GATT/WTO Legal Capacity	$+$
Domestic Bureaucratic Capacity	$+$
Systemic Interest	$+$
Economic Interest	$+$
Intimidation	$-/+$
Overcrowding	$-$

the middle. As such, evaluating the impact of China as a major market with its own means of retaliation outside of foreign aid will be important. No matter the level at which China is participating, they may be inclined to impose external pressure on other participants in order to push a dispute in their favour.[8]

Case Selection, Data Sources and Measures

Assessing third party participation within the WTO DSM requires constructing a dataset of all instances of state participation in the dispute settlement process, as well as developing a list of nonparticipants who were members of the institution but opted not to join a dispute. Developing a complete list of potential disputes not filed goes beyond the scope of the project undertaken here in large part due to the difficulty of constructing observable windows around the periods before a request for consultations is filed, and again when litigants request the formation of a panel. Given the interest in active participation once a country has decided to become a third party, only completed disputes (those that did not settle) are included in the data set. Third party activity and speeches are not released to the general public unless a dispute is ruled on, and a panel report is issued as well, which leaves the silent third party

[8] Thank you to Christina Davis for noting this important reality. Documentation from Inside U.S. Trade highlights the fear many states face that China will retaliate against their participation in disputes by revoking local permits and other facilitating laws given to their MNCs operating in its jurisdiction. For Japan, this has led them to pursue being a third party instead of a co-complainant against China in a few cases. In those instances they have still faced repercussions, demonstrating that China may not view the third party mechanism as entirely neutral.

phenomenon only observed in completed cases.

Understandably, this creates a selection effect. As discussed, there is reason to believe that particular kinds of disputes are more likely to be ruled on than others (Busch and Reinhardt, 2000). Such disputes tend, on average, to be more politicized in terms of the economic trade stake or systemic implications of the WTO law being applied. They also tend to attract more third parties (Johns and Pelc, 2014, 2016). However, this subset of cases makes for an easy test of conventional wisdom. If the WTO disputes that go to a ruling are more likely to demonstrate the characteristics that draw more third parties, those same characteristics should predict engagement well. Summary statistics for each measure are summarized in Table 4.

Dependent Variable: Third Party Activity

To date, 566 disputes have been initiated in the WTO DSM since 1995. Collapsing cases wherein there were multiple complainants on the same issue generates a universe of 170 completed disputes at the panel level between January 1st 1995 and January 1st 2018. Of the potential participants, 227 were complainants, and 1140 were third parties. In line with the number of disputes, 170 participants are respondents, of which 23 were unique countries. Since early 2000, statements made by delegations have been included in appendices to final panel reports in their original form. Prior to that, statements were integrated into the main body of the panel report. In order to compile a dataset of third party activity, I collected a list of reported third party requests as indicated in the introductory summary of the panel report and cross-referenced that with published third party statements included in the circulated panel report. In order to measure my key outcome of interest, third party activity is then a dichotomous variable, coded 1 if the third party submitted oral and/or written testimony to the panel and 0 otherwise.

Independent Variables: Systemic Interest and Bureaucratic Effectiveness

States justify their participation as third parties when they submit a request for third party status. Unfortunately, the WTO does not make these petitions publicly available.[9] Instead, what remains are justifications in the statements submitted – either as written or oral testimony. In a novel approach, I hand code country-level **systemic interest** from the explicit statements made by countries in their reported testimony. States are coded as 1, possessing systemic interest, if they explicitly state they have such an interest or issue statements that they are concerned with the legal precedent that will be generated by the case. Those that do not say so are coded 0.

In practice, these statements are often made explicitly in introductory remarks justifying their participation in a dispute. Consider the opening lines of the third party statement made by the Canadian delegation in DS267, *United States – Upland Cotton*:

> Mr. Chairman, members of the Panel, on behalf of my Government, I thank you for your consideration of Canada's views in this dispute. Canada's statement today conveys our *systemic interest* in the interpretation of certain provisions of the Agriculture Agreement and the SCM Agreement regarding certain aspects of Brazil's claims. The first two points we address relate to US domestic support measures and the applicability of the Peace Clause.

An implicit reference to systemic interest is exemplified by statements by the European Union delegate as a third party in the same dispute:

> This dispute raises a large number of issues. In our interventions, we have concentrated on those issues of principle which we consider are of *systemic* concern. Today, we will largely address issues which were not addressed in our written submission. At the same time, we also consider it necessary to revisit some issues which we have already addressed in order to rebut some of the arguments raised by other parties.

Problematically, this only allows for a coding of systemic interest for active third parties since it relies on a collection of statements made, defeating the point of evaluating the impact of systemic interest on silent third parties. For now, in order to generate a measure with better

[9] Efforts to collect these original petitions were denied by the institution due to a limited policy on data availability. In the future, it may be possible to get ahold of these original petitions by visiting the institution's archive and meeting with the WTO librarian directly.

coverage, silent third parties are coded as possessing systemic interest if any other third party in the dispute has systemic interest. The result is a dichotomous, country level measure of systemic interest that proxies for the 258 cases that are unobserved.

In order to evaluate how bureaucratic effectiveness may hinder the capacity of states to act on their systemic interests, I deploy a number of measures that capture different aspects of the same phenomenon. **Domestic bureaucratic capacity** is proxied by the World Bank's government effectiveness indicator, obtained from the World Governance Indicators database. Ranging from -2.5 (highly ineffective) to +2.5 (highly effective) the measure captures "perceptions of the quality of public services, the quality of the civil services and the degree of its independent from political pressures, the quality of policy formulation and implementation and the credibility of the government's commitment to such policies" (World Bank, 2014). Measured from 1996 to 2016, the variable offers coverage of all but those disputes initiated in 1995.[10]

I also include a measure of **democracy** measured by the raw Polity2 score from the Polity IV dataset. I then create a dummy measure for whether a country is a democracy if it scores a 7 or higher. Notably Polity2 has several missing values, namely for the aggregated European Union and a number of small island nations that fail to meet the population threshold required to be considered a country in their dataset. I run models employing the raw measure with missing values, and a version where all missing values are coded as democracies, and the results do not change. I present the results here using the complete dataset. The effect of strong political institutions on bureaucratic capacity is of greater importance than free and fair elections. As such, it appears a fair assumption that those countries missing from the Polity IV dataset possess the baseline institutions to be considered democratic for the purposes of this research. It is my expectation that the bureaucratic capacity and democracy measures will be the best proxy of capacity to realize systemic interests in a dispute, and act on them.

Given their importance in the literature, I also include measures of **legal capacity** and **mission size**. Legal capacity is proxied by a logged measure of GDP per capita in constant 2010

[10] Notably, this will limit the number of observations in the models in which the measure is deployed. Unfortunately the degree of missingness is too severe for multiple imputation.

US dollars, obtained from the World Bank's World Development Index database. As the WDI database does not include estimations for Taiwan, I code missing values with GDP per capita in constant 2010 US dollars calculated by the IMF. I also include a variable for diplomatic mission size in Geneva, as measured by (Elsig, 2011). The variable is a simple count of the number of diplomats reported as state representatives for their respective missions in Geneva in the WTO Blue Book between 1995 and 2009. Understandably this measure does not capture those countries anecdotally known to stand out as having lower levels of GDP/capita yet maintaining highly capable personnel such as Brazil (Busch, Reinhardt and Shaffer, 2009). Moreover, countries can and do mitigate their legal capacity issues by making use of the ACWL (Bown and McCulloch, 2010). Data on when countries have made use of the ACWL within particular disputes is limited, however, and only available after the institution was formed in 2001. As such I employ the two measures available, but with the expectation of noisier results.

Control variables

In order to measure **trade interest**, a large volume of bilateral trade flow data is required. Two measures of trade stake are developed using dyadic data developed by Bown and Reynolds through the World Bank Development Research Group (Bown and Reynolds, 2015). The first measure consists of the real value of imports of products at the 6 digit HS code associated with the dispute, by the respondent country from the third party, adjusted by the International Monetary Fund's import price deflator. The second is a volume of imports of the respondent country from the third party partner country of products associated with the dispute. Both measures are taken for the year in which the dispute was initiated. Unfortunately the coverage of the Bown and Reynolds dataset only includes disputes concluded between 1995 and 2011. Data provided by Kucik and Pelc (2016*b*) as part of the WTO Dispute Data database offers similar coverage of the volume trade flows at the identifiable six-digit product code level.[11] In order to generate a measure of trade flows between participants and dispute respondents with better

[11] This dataset is available at http://www.wtodisputedata.com/data.

coverage, I deploy the Kucik and Pelc data. I sum the total volume of traded goods across all identifiable product codes involved in a dispute and average the flow over the 10 year period available for each dyad of countries involved in a dispute. Given the high volume of these flows, I then take the log of this measure for estimation purposes. This measures only covers 521 third party participants of the 1140 observations. This reality also highlights that the majority of disputes that result in a ruling do not have identifiable traded products, but the measure enables for sub-group analysis amongst disputes concerning material goods.

Like Davis and Bermeo (2009), I deploy a rolling wall count of **experience** as a third party. This measure is calculated at the dispute-participant level, summing the prior instances a country has participated as a third party up to but not including the dispute of a particular observation. If a country requests third party status in a given year 10 times, their experience accumulates with each dispute. This means that those countries that file ten cases in a year are treated the same as those that file 10 cases over the 20 year period under observation, but this allows for testing the presence threshold effects of the total number of cases a country has participated in as opposed to the length of time a country has been a member. Summing the number of third parties participating in a given dispute also provides a measure of **overcrowding.**

Intimidation is first measured by a factor indicating whether the United States or European Union or another country was a defendant in the dispute, with all other defendants coded "other" serving as the baseline. This is adopted in lieu of a measure of general trade dependence on the US or EU due to the fact that when the US or EU is a defendant, the measures of economic interest in a dispute will also capture a country's dependence on the US or EU market for the particular products involved (if and when they are identifiable). The impact of intimidation, and power politics by extension, should be most salient when either the US or EU are most vulnerable. An additional dummy variable is included to account for whether China is the complainant or defendant in a dispute, given anecdotal evidence of their independent willingness to manipulate the position of foreign firms domestically when other states oppose their position on a dispute in the WTO.

Table 4: Summary Statistics

Statistic	N	Mean	St. Dev.	Min	Max
Dispute start year	1,367	2005	5.7	1995	2015
Polity IV score	1,367	7.1	5.2	−10	10
Democracy dummy	1,367	0.8	0.4	0	1
Speak	1,140	0.8	0.4	0	1
Dispute level systemic interest	1,367	0.8	0.4	0	1
State level systemic interest	877	0.7	0.4	0	1
Combined systemic interest	1,367	0.7	0.4	0	1
Number of third parties	1,367	9.2	5.1	1	23
Geneva delegation size	981	10.7	5.4	1	24
Experience	1,367	19.4	21.1	0	93
Logged GDP per capita	1,367	259.1	141.0	1	515
WDI government effectiveness score	1,100	0.6	0.9	−1.2	2.4
Mean import flow of disputed products	521	198,319	847,116	0.01	11,696,844
China respondent/defendant dummy	1,367	0.1	0.3	0	1

Results of Initial Investigation

In order to estimate the predicted probability of being an active third party, I estimate a logistic multiple regression model in order to evaluate the effect of systemic interest under five specifications. Results are reported in Table 5. Each model specification clusters standard errors by dispute due to the panel nature of the data. The first model is a simple estimation of the effect of systemic interest on third party activity absent controls and fixed effects. The result is negative and statistically significant, indicating that for countries with a systemic interest, their predicted probability of being an active third party decreases by close to 7.5%. Yet countries with systemic interest are likely to be active third parties overall, as this shift marks a decrease in predicted probability from 82.9% to 75.5%. Models 2 through 5 gradually introduce additional variables, and include year-fixed effects to control for year-specific trends in cases filed. While systemic interest is not uniformly significant across all model specifications, the coefficient is consistently negative and of similar magnitudes.

The sharpest results stem from whether a third party has a democratic government and an effective bureaucracy. For states with a systemic interest, moving from the lowest reported

polity score amongst third party participants, -10, to the highest, 10, reduces the predicted probability of being active from 58% to 80%. Conversely, shifting from the minimum government effectiveness score, -1.17 to the maximum, a 2.43, increases the predicted probability of activity by 34.13%. As expected, the more experience a country has the more likely they are to be active. Legal capacity as proxied for by GDP per capita is positive in all estimations but only significant in the final model specification. Mission size is also positive, but not significant.

Model 5 evaluates disputes with identifiable traded products and systemic interest is not a significant predictor of third party activity. Unlike all other model specifications, the intimidation coefficient for the European Union is significant but positive. This indicates that relative to other countries, when the EU is a respondent third parties are more likely to be active. Additionally, the coefficient for when china is the complainant or defendant in a dispute is also positive and significant, indicating that in such cases, third parties are also more likely to be active. When a dispute has clear commercial gains involved, it appears that countries are more likely to be vocal, even in the fact of intimidating respondents. At the same time, GDP per capita is significant and negative, meaning countries with more wealth are less likely to speak, and democratic countries are positive and significant, meaning they are more likely to be active. This contradictory result may be a function of the small sample size.

The classification capacity of the models in Table 5 are depicted in Table 6. Notably, while all 5 model specifications on average predict close to 80% of all cases third party participation, this largely stems from successfully classifying when third parties are active, not when they are silent. Classification of silent third parties never surpasses 20% of observations, maxing out at 57 of the 257 observed instances of silence. This inability to predict silent third parties is in turn reflected in the substantive significance of the results in Table 5 shown in Figures 4. The effects plots demonstrate the shift in predicted probability of being active and silent for the variable of interest, with the parallel y-axis noting the frequency distribution of the independent variable for those classified as 0 (bottom) and 1 (top). The predicted probability of being active with 1 third party and 23 third parties is the same: close to 80%. While the evidence presented can

Table 5: Predicting Whether A Third Party Speaks

	Active Third Party (Speak = 1, Silent = 0)				
	(1)	(2)	(3)	(4)	(5)
Systemic interest	−0.455*	−0.369	−0.363	−0.665**	−0.042
	(0.265)	(0.265)	(0.263)	(0.285)	(0.529)
Number of third parties		0.0003	−0.0003	0.025	−0.044
		(0.023)	(0.024)	(0.024)	(0.038)
Experience		0.027***	0.024***	0.012**	0.035
		(0.004)	(0.005)	(0.005)	(0.024)
Intimidation: European Union		0.500	0.528	0.589	2.464***
		(0.348)	(0.360)	(0.385)	(0.739)
Intimidation: United States		0.006	0.015	0.089	−0.202
		(0.205)	(0.207)	(0.224)	(0.351)
China		0.342	0.307	0.317	2.154*
		(0.290)	(0.287)	(0.302)	(1.106)
Log GDP per capita		0.080	0.090	0.013	−0.457**
		(0.075)	(0.075)	(0.084)	(0.202)
Polity IV score		0.037***			
		(0.014)			
Democracy dummy			0.761***	0.441*	1.362***
			(0.216)	(0.230)	(0.360)
Government effectiveness				0.597***	−0.047
				(0.123)	(0.253)
Log flow of disputed products					0.048
					(0.049)
Geneva mission size					0.0005
					(0.052)
Year FE	No	Yes	Yes	Yes	Yes
N	1,140	1,140	1,140	941	361
Log Likelihood	−606	−546	−542	−466	−113
AIC	1,216	1,151	1,142	985	271
Pseudo-R^2	0.0058	0.1037	0.1110	0.1181	0.1999

Note: *p < .1; **p < .05; ***p < .01. Models presented are binary logistic multiple regression estimations with standard errors clustered by dispute. Models 2 through 5 include year-specific fixed effects (1995-2015). Estimates for Model 4 are reduced from the total 1140 due to data limitations for the WDI government effectiveness indicator; observations from 1995 and 2016-17 are dropped. Model 5 presents the most limited results due to data availability for economic measures, as well as a country's delegation size.

Figure 4: Predicted probability of being an active third party by coefficient

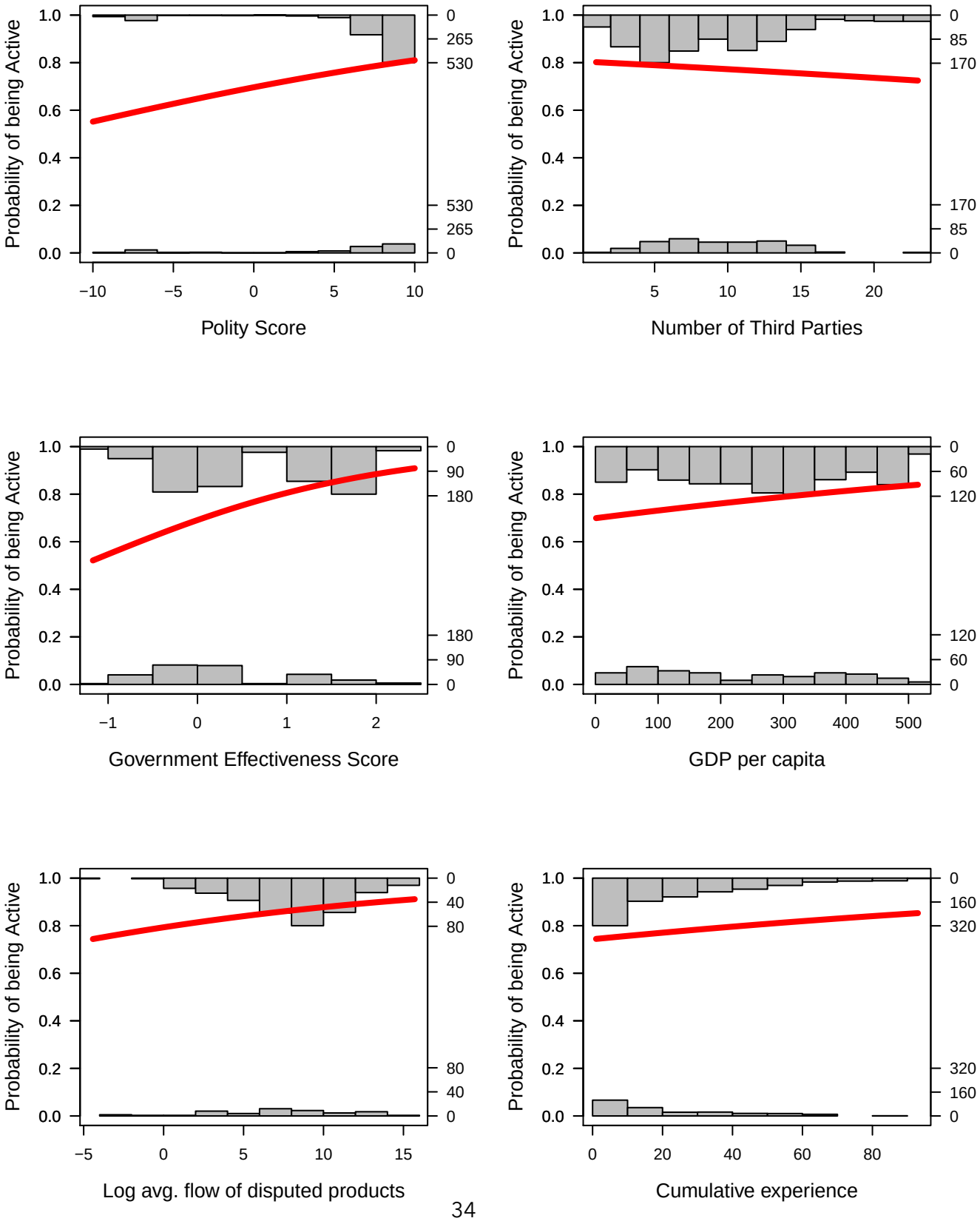


Table 6: Classification Capacity of Each Model on Active Third Party as an Outcome

Observed	**Predicted**	Model 1	Model 2	Model 3	Model 4	Model 5
0	0	0	38	43	57	13
1	0	0	25	215	182	37
0	1	258	220	26	31	2
1	1	882	857	856	671	309
N		1140	1140	1140	941	361
% Correct		77.4%	78.5%	77.3%	78.9%	89.2%

predict activity, it cannot do the same for silent third parties. As a result, while conventional wisdom appears to, on average, predict whether a third party engages, there does not appear to be much evidence that conventional wisdom can explain the rising prominence of silent third parties in the WTO dispute settlement mechanism from the statistical models produced here. Systemic interest and bureaucratic effectiveness, however, best explain variation in activity.

Mapping results onto a sample case: DS267 US–Upland Cotton

A good example of systemic interest, and the moderating effect of bureaucratic synchronicity is DS267 *United States – Upland Cotton*. The dispute was filed by Brazil against the United States in 2002, arguing that subsidies contained in the Farm Security and Rural Investment Act of 2002 (FSRIA), as well as additional subsidies established by the Farm Bill of the same year, violated agreed upon definitions of legal subsidies in the institution's Agreement on Subsidies and Countervailing Measures (SCM). The dispute drew the immediate attention of Burkina Faso, Benin, Chad and Mali, commonly referred to as the Cotton 4, due to their significant market share in exported cotton, and the harsh impact American subsidies had on their respective domestic industries. The case also garnered the attention of countries concerned about the implications of a change in what constituted a legal agricultural subsidy. In particular, the European Union's delegation was extremely attentive to the dispute given their Common Agricultural Policy (CAP), and stressed this in the context of its written submission as a third party to

the dispute.

Brazil took up the dispute at the insistence of Pedro de Camargo Neto, then deputy agriculture minister of Brazil in 2001. Having rallied domestic political support to initiate the dispute, Camargo levied Brazil's resources to hire White & Case, an American law firm. At the same time, they appealed to the Cotton 4 countries to launch a parallel dispute by directly appealing to the Ambassador of Benin, Samuel Amehou and by launching informal appeals through Oxfam to all four states. Brazil also petitioned the Advisory Centre on WTO Law (ACWL) to offer assistance to the C4, which was indeed granted but ultimately only taken up by Benin and Chad. Mali and Burkina Faso would state that bureaucratic mishaps had them miss the deadlines to request third party status (Elsig and Stucki, 2012, 301-303). Benin and Chad bolstered their position by enlisting White & Case on a pro bono basis. For Chad, this was essential, as the country did not maintain a permanent mission in Geneva prior to the dispute. Despite significant demands from local industries to be proactive against American subsidies, only Benin and Chad succeeded with the former playing an important role early in the dispute, and the latter working more effectively when the dispute escalated to an appeal and later noncompliance hearings (Elsig and Stucki, 2012).

While this case presents evidence of the proposed mechanism at play, the initial empirical evidence contradicts this theory as it stands. In the models run, states with explicitly systemic interests were less likely to be active third parties. This may be due in part to the moderating effect of bureaucratic synchronicity, as well as other factors. While the measure does not necessarily account for whether states place a high value on a definitive outcome, and at present it employs a dispute level proxy of systemic interest for silent third parties, it presents the possibility that states may claim they have systemic interests as a means to justify their participation when something else may be driving down their willingness to speak.

Agenda for Future Research

The measures employed to evaluate the theories presented here are national level aggregates, and as a result are quite blunt operationalizations. Taken together, measures may not be adequately capturing the differences between silent and active third parties in part because they do not reflect institutional practices, or adequately capture the underlying mechanisms. Early survey and interview studies highlight the idiosyncrasies of every day activity at the WTO and in litigation: linguistic barriers and bureaucratic hurdles systematically impact the capacity of states to engage with the WTO DSM (Busch, Reinhardt and Shaffer, 2009; Elsig and Stucki, 2012). At the same time, certain states like Brazil defy expectations, "punching above their weight" by investing considerable resources in their legal capacity and presence in Geneva (Devereaux, Lawrence and Watkins, 2006). A number of measures in this study are incredibly blunt and heavily aggregated metrics of their underlying concepts. Proxying legal capacity with a measure of GDP per capita, for example, is perhaps the worst offender of this.

Yet, the empirical results presented in this paper offer preliminary evidence of the importance of systemic interest and bureaucratic capacity, as do existing case-based evaluations of state behaviour in the institution. Anecdotal evidence on the role of intimidation, coalition building and the politics of settlement also cannot be understated. At this stage, the next logical step is to pursue interviews with current and former individuals who have been involved with the WTO DSM since its inception. At the same time, minimal archival work may potential yield documents from which better metrics of state interests, both systemic and commercial can be more adequately coded. Most importantly, it may be possible to obtain copies of petitions by states to be third parties by accessing WTO archives. At the same time, interview based evidence would allow for more informed model building before returning to the large–N data, and evaluation of DS267 in greater detail.

Future empirical work would do well to seek better measures of economic interests, alongside petitions for third party status. Introducing ACWL membership, and its potential use in a dispute by a certain country would also allow for a more nuanced measure of legal capacity

that takes into consideration how states can bolster their effectiveness independently of bureaucratic effectiveness. Introducing estimation techniques that can account for moderating variables, and potentially a Heckman Selection Model in order to address the selection into through party status would also allow for novel estimations of participation that take into account the sequencing of participation. Selection would then estimate the "hurdle" of states requesting third party status to begin with, and then estimate what predicts their activity. It is possible in the context of the organization to account for this selection by estimating which countries were WTO members within the 30 day window that states can request third party status. From there, one can create a pool of all "potential" third parties, from which states select into disputes. However, what is missing is a more nuanced sense of which forcing variables would not predict overall selection into disputes, but will predict third party activity.

Implications for the WTO and IR Theory

The alarming lack of third party activity on behalf of developing countries, in addition to limited engagement with the WTO DSM as litigants, may be less concerning that initial statistics suggest. The empirical pattern of silent third parties in the WTO dispute settlement mechanism appears, at face value, quite concerning and irrational. Given the high salience of WTO panel rulings in the face of stalled negotiations, it is in the express interest of countries to petition for third party status if they cannot litigate, and then to submit testimony to effect the interpretation of existing trade rules. For countries to request third party status, and then effectively not use it, is puzzling. This paper demonstrates that what may appear to be irrational behaviour on behalf of states is perfectly in line with their realized strategies, but that state actions may reflect constrained preferences due to structural conditions such as poor ties between domestic governments and diplomatic branches. Despite having clear systemic interests, a lack of bureaucratic effectiveness can limit the ability of states to express them. Moreover, this theory speaks to a broader phenomenon of states fighting for observer status in international organizations, and

considers what countries gain from being "in the room." When capacity is bolstered, states can overcome these limitations. Moreover, they can do so even in the face of intimidating foreign markets like the United States, the European Union and Japan. The view that the WTO and its dispute settlement process remains beyond the reach of developing countries is true, but the reason for limited engagement is not only a function of power politics.

Conventional wisdom on third party participation in the WTO dispute settlement mechanism offers some degree of explanation for third party activity once a country has decided to join a dispute, however the models employed here demonstrate the need for a more thorough understanding of the sequential decision making process associated with third party participation, and the utility of being a silent third party. Overall, measures of economic interest, experience with third party status, GATT/WTO legal capacity, overcrowding, and intimidation cannot predict more than 57 cases of third party silence amongst 257. Yet, anecdotal evidence does suggest that factors such as legal and bureaucratic capacity remain important barriers to particularly poor countries. A novel measure of systemic interest also yields promising results.

Future research would do well to replicate studies by Horn et al. (1999) and Busch, Reinhardt and Shaffer (2009). Both employed detailed surveys and interviews of WTO bureaucrats and country representatives in order to garner a better understanding of how the institution functions. As both studies age, and the institution enters its third decade of life, it is important to consider how earlier trends might have changed or, perhaps, remained the same. The GATT began as an institution that first and foremost prioritized commercial substance over legalities, with early diplomats noting how much John Maynard Keynes sought to prevent it from becoming a "lawyer-ridden land" (Azevêdo and Marceau, 2015). Today it stands the reverse, with the WTO DSM increasingly drawing in private-practice lawyers to litigate on behalf of states, and state-hired lawyers forming most member states' diplomatic cores (Shaffer, 2003).

Diving into the idiosyncrasies of how the litigation process works serves to reveal one omitted factor not explicitly tested here: whether third parties actually show up to disputes, and whether their absence is why they otherwise fail to submit testimony. A myriad of factors could

explain their inability to show up to a dispute when convened, but statistics would not serve well to predict how and when representatives are actually in the room. At the same time, one must step back and consider what this form of participation means and how it might be widespread across other IOs. For developing countries, and least developed countries in particular, the inaccessibility of the WTO DSM is likely part of a broader structural phenomenon of countries gaining membership in large institutions and yet underutilizing it thereafter. While the WTO, and the DSM in particular, confer specific benefits on its member states, there is reason to believe that formal institutional engagement, and use of membership benefits by extension, remains limited to an exclusive few. Such a structural phenomenon is certainly not limited to the WTO, and accessing parallel trends in engagement across other institutions would further bolster a this theory of silent engagement.

Evidence to this affect of systemic interest lends credence to the view that the United States and other powerful, developed democracies continue to directly shape global governance while others are along for the ride. Alternatively, institutions may be taking on lives of their own. Both possibilities, however, leave some of the weakest, poorest states as free-riders; whether this is a voluntary position remains up for debate and whether free-riding is necessarily in their best interest is unclear, though media pundits would wholeheartedly say so. Reporters have labeled the idea of a fair, level playing field in the GATT/WTO a fairy tale. Some have even gone so far as to say that the acclaimed the WTO's "rising tide" to lift all boats is a myth, stating that, "liberal trade across all borders only benefits the industrialized nations, [while] developing countries don't stand a chance against the states of the northern hemisphere in no-holds-barred competition.The yachts are rising with the tide, while the rowboats are shipwrecked" (Wenkel, 2014).

What a country has to gain from joining a dispute is the key question worth answering. Such questions are inherently linked to broader theories of institutional membership. Can states achieve the benefits of institutional engagement? What determines when states seek to join an IO and then use that membership as a point of leverage? Systemic interests remain salient in

a world with fewer wars and material disputes over the rules that guide international relations. With a shifting balance of power comes contention over the rules that guide foreign policy, particularly amongst globalized economies. After twenty years of existence, the WTO DSM may still be beyond the reach of countries that need it most. Countries may choose to be silent simply because observing proceedings is all they need and want to accomplish, not because they are incapable or disorganized. In this case, silence may truly be golden.

References

Abbott, Roderick. 2007. "Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the Years 1995–2005." *ECIPE Working Paper No. 1*. 1.

Azevêdo, Roberto and Gabrielle Marceau. 2015. *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*. Cambridge University Press.

Barnett, Michael and Martha Finnemore. 2004. *Rules for the world: International organizations in global politics*. Cornell University Press.

Bechtel, Michael M and Thomas Sattler. 2015. "What is litigation in the world trade organization worth?" *International Organization* 69(02):375–403.

Bhala, Raj. 1998. "The myth about stare decisis and international trade law (part one of a trilogy)." *American University International Law Review* 14(4):845–956.

Bohl, Kristin. 2009. "Problems of developing country access to WTO dispute settlement." *Chicago-Kent Journal of International and Comparative Law* 9:130–197.

Bown, Chad P. 2005. "Participation in WTO dispute settlement: Complainants, interested parties, and free riders." *The World Bank Economic Review* 19(2):287–310.

Bown, Chad P. 2010*a*. China's WTO entry: antidumping, safeguards, and dispute settlement. In *China's Growing Role in World Trade*. University of Chicago Press pp. 281–337.

Bown, Chad P. 2010*b*. *Self-enforcing trade: developing countries and WTO dispute settlement*. Brookings Institution Press.

Bown, Chad P and Bernard M Hoekman. 2005. "WTO dispute settlement and the missing developing country cases: engaging the private sector." *Journal of International Economic Law* 8(4):861–890.

Bown, Chad P and Kara M Reynolds. 2015. "Trade flows and trade disputes." *The Review of International Organizations* 10(2):145–177.

Bown, Chad P and Rachel McCulloch. 2010. "Developing countries, dispute settlement, and the Advisory Centre on WTO Law." *The Journal of International Trade & Economic Development* 19(1):33–63.

Busch, Marc L and Eric Reinhardt. 2000. "Bargaining in the shadow of the law: early settlement in GATT/WTO disputes." *Fordham International Law Journal* 24(1):158–172.

Busch, Marc L and Eric Reinhardt. 2003. "Developing countries and general agreement on tariffs and trade/world trade organization dispute settlement." *Journal of World Trade* 37(4):719.

Busch, Marc L and Eric Reinhardt. 2006. "Three's a crowd: third parties and WTO dispute settlement." *World Politics* 58(03):446–477.

Busch, Marc L, Eric Reinhardt and Gregory Shaffer. 2009. "Does legal capacity matter? A survey of WTO Members." *World Trade Review* 8(04):559–577.

Chaudoin, Stephen, Jeffrey Kucik and Krzysztof Pelc. 2016. "Do WTO Disputes Actually Increase Trade?" *International Studies Quarterly* 60(2):294–306.

Chow, Michael Ewing, Alex WS Goh and Akshay Kolse Patil. 2013. "Are Asian WTO Members Using the WTO DSU 'Effectively'?" *Journal of International Economic Law* p. jgt023.

Conti, Joseph A. 2008. "The good case: decisions to litigate at the World Trade Organization." *Law & Society Review* 42(1):145–182.

Conti, Joseph A. 2010. "Learning to dispute: repeat participation, expertise, and reputation at the World Trade Organization." *Law & Social Inquiry* 35(3):625–662.

Daku, Mark and Krzysztof J. Pelc. 2017. "Who holds influence over WTO jurisprudence?" *SSRN Working Paper* .
URL: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2945027*

Davis, Christina L. 2012. *Why adjudicate?: enforcing trade rules in the WTO*. Princeton University Press.

Davis, Christina L and Sarah Blodgett Bermeo. 2009. "Who files? Developing country participation in GATT/WTO adjudication." *The Journal of Politics* 71(3):1033–1049.

Davis, Christina L and Yuki Shirato. 2007. "Firms, governments, and WTO adjudication: Japan's selection of WTO disputes." *World Politics* 59(02):274–313.

Devereaux, Charan, Robert Z. Lawrence and Michael D. Watkins. 2006. *Brazil's WTO Cotton Case: Negotiation through Litigation*. Washington, DC: Peterson Institute for International Economics chapter 5, pp. 235–282.

Elsig, Manfred. 2011. "Principal–agent theory and the World Trade Organization: Complex agency and 'missing delegation'." *European Journal of International Relations* 17(3):495–517.

Elsig, Manfred and Philipp Stucki. 2012. "Low-income developing countries and WTO litigation: Why wake up the sleeping dog?" *Review of International Political Economy* 19(2):292–316.

Finnemore, Martha. 1993. "International organizations as teachers of norms: the United Nations Educational, Scientific, and Cutural Organization and science policy." *International organization* 47(4):565–597.

Gowa, Joanne and Soo Yeon Kim. 2005. "An exclusive country club: the effects of the GATT on trade, 1950–94." *World Politics* 57(4):453–478.

Guzman, Andrew T and Beth A Simmons. 2005. "Power plays and capacity constraints: The selection of defendants in world trade organization disputes." *The Journal of Legal Studies* 34(2):557–598.

Harpaz, Marcia Don. 2010. "Sense and sensibilities of China and WTO dispute settlement." *J. World Trade* 44:1155.

Hoekman, Bernard M and Petros C Mavroidis. 2000. "WTO dispute settlement, transparency and surveillance." *The World Economy* 23(4):527–542.

Horn, Henrik, Louise Johannesson and Petros C Mavroidis. 2011. "WTO Dispute Settlement System 1995-2010: Some Descriptive Statistics, The." *J. World Trade* 45:1107.

Horn, Henrik and Petros C Mavroidis. 2006. "A survey of the literature on the WTO dispute settlement system." *IFN Working Paper No. 684*. .

Horn, Henrik, Petros C Mavroidis, Håkan Nordström et al. 1999. *Is the use of the WTO dispute settlement system biased?* Vol. 2340 Centre for Economic Policy Research London.

Johns, Leslie and Krzysztof J Pelc. 2014. "Who gets to be in the room? Manipulating participation in WTO disputes." *International Organization* 68(03):663–699.

Johns, Leslie and Krzysztof J. Pelc. 2016. "Fear of Crowds in WTO Disputes: Why Don't More Countries Participate?" *Journal of Politics* 78(1):88–104.

Johns, Leslie and Krzysztof J. Pelc. 2018. "Free Riding on Enforcement in the World Trade Organization." *The Journal of Politics* 80(3):873–889.
URL: *https://doi.org/10.1086/697463*

Kim, Moonhawk. 2008. "Costly procedures: divergent effects of legalization in the GATT/WTO dispute settlement procedures." *International Studies Quarterly* 52(3):657–686.

Koremenos, Barbara. 2013. "The continent of international law." *Journal of Conflict Resolution* 57(4):653–681.

Krasner, Stephen D. 1982. "Structural causes and regime consequences: regimes as intervening variables." *International organization* 36(2):185–205.

Kucik, Jeffrey and Krzysztof J Pelc. 2016*a*. "Do International Rulings Have Spillover Effects?: The View from Financial Markets." *World Politics* 68(4):713–751.

Kucik, Jeffrey and Krzysztof J Pelc. 2016*b*. "Measuring the cost of privacy: A look at the distributional effects of private bargaining." *British Journal of Political Science* 46(4):861–889.

Manjiao, Chi. 2012. "China's participation in WTO dispute settlement over the past decade: Experiences and impacts." *Journal of International Economic Law* p. jgs002.

Moon, Don. 2006. "Equality and inequality in the WTO dispute settlement (DS) system: Analysis of the GATT/WTO dispute data." *International Interactions* 32(3):201–228.

Moon, Don. 2013. "Neither Reluctant nor Aggressive Legalism: East Asian Countries under the World Trade Organization Dispute Settlement Mechanism." *Pacific Focus* 28(1):62–98.

Nakagawa, Junji. 2007. "No More Negotiated Deals?: Settlement of Trade and Investment Disputes in East Asia." *Journal of International Economic Law* 10(4):837–867.

Oatley, Thomas. 2010. *International political economy*. 2nd edition ed. Pearson Longman.

Özden, Çaglar and Eric Reinhardt. 2005. "The perversity of preferences: GSP and developing country trade policies, 1976–2000." *Journal of Development Economics* 78(1):1–21.

Pelc, Krzysztof J. 2014. "The politics of precedent in international law: A social network application." *American Political Science Review* 108(3):547–564.

Shaffer, Gregory. 2006. "The challenges of WTO law: strategies for developing country adaptation." *World Trade Review* 5(02):177–198.

Shaffer, Gregory C. 2003. *Defending interests: Public-private partnerships in WTO litigation*. Brookings Institution Press.

Steinberg, Richard. 2009. "Future of the WTO." *Chicago Law School Faculty Blog* .
URL: *http://uchicagolaw.typepad.com/faculty/2009/02/future-of-the-wto.html*

Weiss, Friedl. 1998. Third Parties in GATT/WTO Dispute Settlement Proceedings. In *Reflections on International Law from the Low Countries: In Honor of Paul de Waart*, ed. Paul J.I.M. De Waart, Erik M. G. Denters and Nico Schrijver. New York: Martinus Nijhoff Publishers.

Wenkel, Rolf. 2014. "Not Much Life Left in the WTO." *Deustche Welle* Published Online April 12th 2014.
URL: *http://www.dw.de/not-much-life-left-in-the-wto/a-17562977*

WTO. 2004. "A handbook on the WTO dispute settlement system: a WTO secretariat publication." *Secretariat and World Trade Organization Legal Affairs Division* .

Appendix

Primer on Third Party Participation in the WTO DSM

With the adoption of the Marrakesh Agreement and the creation of the World Trade Organization on January 1st 1995, states adopted the WTO dispute settlement understanding (DSU) as the new treaty detailing procedures for disputes concerning the WTO's various agreements and treaty texts. Unlike other IOs with centralized enforcement bodies, the WTO DSU remains an institution based on self-enforcement. WTO members initiate the litigation process by formally requesting consultations through the institution's dispute settlement body (DSB) (Bown, 2010*b*). In requesting the consultations process under the GATT/WTO DSU Article 4, that country becomes a complainant; the country on the receiving end of the complaint in turn becomes the respondent, commonly referred to as the defendant. In the event two countries request consultations separately with the same respondent, related to the same trade measure, disputes are combined to conserve resources. Confidential consultations are then set to run for at least sixty days, during which parties are encouraged to settle. It is during this phase that interested third parties are first able to join a dispute, but this is contingent on the procedures under which a complainant requests consultations. Countries can also file under GATT article XXII:1, or XXIII:1, with the latter allowing the litigants to potentially exclude third parties from the consultations phase (Busch and Reinhardt, 2006, 453).

Article 4.11 of the WTO DSU then allows a "member other than the consulting members" with a "substantial trade interest" to request to join consultations as a third party within ten days of the initial request.[12] Participation remains subject to the approval of the defendant who retains the right to question whether or not the requesting country truly has a "substantial" trade interest at play. Once approved, third party participants are then able to participate during the consultation period. If the consultations process expires, the complainant(s) are then entitled to request the formation of a panel. In theory, the institution stipulates that a panel should be formed within thirty days. Often this process is drawn out due to limited resources. In practice, when requesting third party status states often justify their participation as rooted in economic or systemic interests, or occasionally both.

With the transition from consultations to a panel, member states retain a second opportunity to request third party status under Article 10.2 of the DSU.[13] Such a request does not require the approval of the defendant, but again must be made within ten days of the establishment of a panel. As before, third parties may cite that they have a substantial trade interest, or that they have a larger systemic interest. Citing systemic interest references that a state's interest in the dispute stems from a concern for the larger legal implications of a given panel. In practice, few third party requests at the panel stage have ever been revoked (WTO, 2004; Busch and Reinhardt, 2006).

Once a panel has been convened, the complainant(s) and defendant exchange written submissions. The first substantive meeting then proceeds as an oral hearing within the WTO head-

[12] The full text of the World Trade Organization Dispute Settlement Understanding can be found at https://tinyurl.com/WTODSU4-11.

[13] The loose definition surrounding third parties within the WTO has notably led to the development of a procedure by which non-governmental organizations can participate in disputes at the panel level as well. By filing an amicus curiae with the WTO DSB, NGOs can submit a statement to a given dispute.

quarters in Geneva, Switzerland. The meeting is confidential: under normal circumstances only the litigating parties and secretariat staff running the panel are present. The complainant and defendant present their views orally. A special presentation then follows in which third parties are invited to present their testimony based on written statements subject to their respective home government's approval. Requests can and have been made for third parties to be granted additional rights, and in those instances they often have the opportunity to view other, otherwise confidential, hearings and obtain more than the first submissions drafted by the litigating states. Following the first hearing, third parties are invited to answer questions from the panel, after which they are able to submit a written copy of their statements. Barring the granting of additional rights, third party participation is relatively limited thereafter and the panel proceeds with a second round of submissions and testimony, followed by closing remarks (WTO, 2004).

If a given panel follows a normal timeline, a ruling and panel report should be issued within six months of it being convened, though these deadlines, and others, are often not followed if parties decide to extend negotiations, or the litigation itself becomes protracted (Bown, 2010*b*; Horn, Johannesson and Mavroidis, 2011). Within three months, the ruling is then established in the dispute settlement body, at which point the complainant(s) or defendant may appeal the result, further extending the process another nine to twelve months (if not more so). When an appellate body ruling is made, states involved in the dispute are given a "reasonable period of time" to implement the results.

Further mechanisms are available in the event of non-implementation, namely the complainant may request the right to a compliance panel to rule on whether a state has complied with a ruling after appeal, or the establishment of an arbitration panel to discuss retaliatory measures (Horn and Mavroidis, 2006; Oatley, 2010). Given that member states must initiate disputes independently, they also pay for the associated costs of litigation, estimated to run over several million dollars in fees on average (Davis and Shirato, 2007; Conti, 2008). The increased use of private law firms as opposed to government bureaucrats and lawyers has also led to increased costs in recent years. Knowing that litigation, particularly on an international scale, is expensive, scholars have paid great attention to the inherent barriers facing developing and least developed countries in particular.

Table 7: Complete List of Silent Third Parties

Country	Disputes Silent
India	32
China	19
Taiwan, China	19
Thailand	14
Korea, Rep.	12
Vietnam	10
Australia	10
Ecuador	9
Guatemala	9
Honduras	8
Russia	8
Turkey	8
Canada	7
Mexico	7
Brazil	6
Colombia	6
Japan	5
Costa Rica	4
El Salvador	4
Pakistan	4
Singapore	4
Venezuela	4
Argentina	3
Chile	3
European Union	3
Malaysia	3
Oman	3
Paraguay	3
Bangladesh	2
Cuba	2
Hong Kong, China	2
Israel	2
Nicaragua	2
Saudi Arabia	2
Sri Lanka	2
Uruguay	2
Bahrain	1
Chad	1
Dominican Republic	1
Egypt, Arab Rep.	1
Iceland	1
Indonesia	1
Kuwait	1
Moldova	1
Norway	1
Peru	1
Senegal	1
South Africa	1
Switzerland	1
Ukraine	1
United States	1
Total	258

Table 8: Complete List of Third Party Participants

Country	Disputes as Third Party
European Union	93
Japan	89
India	68
China	65
United States	64
Brazil	57
Australia	54
Canada	53
Korea, Rep.	52
Taiwan, China	41
Mexico	37
Norway	36
Turkey	33
Thailand	32
Argentina	25
Colombia	25
Chile	21
Guatemala	20
Ecuador	18
New Zealand	16
Saudi Arabia	16
Honduras	14
Vietnam	14
Paraguay	11
Russia	11
El Salvador	10
Hong Kong, China	9
Venezuela	9
Cuba	8
Costa Rica	7
Nicaragua	7
Singapore	7
Jamaica	6
Pakistan	6
Philippines	6
Peru	5
Israel	4
Mauritius	4
Barbados	3
Belize	3
Dominica	3
Dominican Republic	3
Egypt, Arab Rep.	3
Indonesia	3
Ivory Coast	3
Malaysia	3
Oman	3
Sri Lanka	3
St. Lucia	3
Switzerland	3
Ukraine	3
Uruguay	3
Bangladesh	2
Fiji	2
Guyana	2
Hungary	2
Iceland	2
Kenya	2
Madagascar	2
Malawi	2
Panama	2
Senegal	2
St. Kitts and Nevis	2
Swaziland	2
Tanzania	2
Trinidad and Tobago	2
Bahrain	1
Benin	1
Bolivia	1
Cameroon	1
Chad	1
Ghana	1
Grenada	1
Kuwait	1
Moldova	1
Namibia	1
Nigeria	1
Poland	1
South Africa	1
St. Vincent and the Grenadines	1
Suriname	1
United Arab Emirates	1
Zimbabwe	1
Total	1140