Precedential Power: The Role of the United States in Shaping International Law at the WTO

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Abstract

Where does precedent in international law come from? Because the efficacy of international courts depends on the efficiency with which they can deal with disputes, they must be able to deter future disputes. Deterrence rests on the availability of precedent (a public good), but because it is costly to generate precedent, powerful states must take on the cost of leadership. In this paper, I investigate the relationship between power and precedent by analyzing dispute settlement at the World Trade Organization (WTO). Borrowing insights from hegemonic stability theory, I argue that it is precisely the strategic nature of WTO dispute settlement that makes powerful states–namely, the United States (US)–willing to supply precedent. This theory accounts for three empirical insights regarding WTO dispute settlement: (1) the US, counterintuitively, tends to file low-stakes cases, (2) cases filed by the US yield a greater precedential value for the broader WTO membership than their counterparts, and (3) the US tends to shape the precedent that it does create in its favor. Statistical analysis using Bayesian estimation provides evidence in favor of the hypotheses. My results suggest that power undergirds the politics of WTO law.

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1 Introduction

Legalization of world politics should bring the international system out of anarchy–where power politics abounds–and into a world of equals (Abbott et al., 2000). At the heart of legalization lies the proliferation of international courts such as the International Court of Justice (ICJ), the European Court of Justice (ECJ), and the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) just to name a few. These international courts are enshrined with the power to decide matters related to peace, human rights, international commerce, and much more.

For international law to impose order in world politics, the law itself must be able to deter transgressions against codified principles. Moreover in a world of equals, an international court system cannot be reduced to adjudicating a deluge of individual disputes (Hudec, 1993). Such a system of courts would be wildly inefficient and perhaps damaging to international relations. Thus, a well-functioning court system must rely on generating deterrent value–that is, adjudication of one case should help to stave off similar cases across time and place (Kim and Sikkink, 2010; Pelc, 2014; Kucik and Pelc, 2014). In the language of law, deterrent value hinges on the doctrine of *stare decisis* (precedent).

But precedent does not come cheap. Cases that might help deter future transgressions against international law could be politically controversial, domestically impalpable, or materially inconsequential making the costs of litigation potentially quite high. Yet, the value of precedent for deterrence lies in its public good nature. For deterrence to operate in international law, cases adjudicated in the past must be able to permeate across time and place making precedent akin to a global public good. Herein lies the puzzle. If the value of international law to efficiently deal with contemporary and future disputes rests on the authority of precedent and states have incentive to undersupply it, which state (if any) picks up the tab?

Using Hegemonic Stability theory as an analytical lens, I argue that the public good nature of precedent requires the system leader to take on the individual cost of litigating precedential cases in order to maintain the efficacy of the international legal system. To test my argument, I

investigate the nature of the dispute settlement process at the WTO. The WTO offers an ideal setting to test the relationship between precedent and power politics because Pelc (2014) shows that precedent meaningfully shapes the litigation strategy of WTO member states. Moreover, the empirical advantage is that the costs and benefits of dispute settlement are easily observable relative to other international courts. In particular, I argue that the hegemon–the United States (US)–should take on the cost of filing cases for the sake of their power to generate precedent in order to maintain a free-trade equilibrium within the WTO system. If the US does act, as I argue, as-if it is tasked with providing public goods at the WTO, then we should readily observe this in both the nature and impact of its litigation strategy. This generates three main empirical implications. First, the US should file, counterintuitively, less commercially valuable cases than its counterparts. Second, the cases that the US does file should carry more precedential value for the broader WTO membership than cases filed by other member states. Third and finally, the US should disproportionately benefit from the precedent that it does help generate.

The intuition is that the future benefits of free trade within the system must outweigh the collective costs of taking on cases with low commercial stakes, but high precedential value. Under this condition, the US should be more willing to file low-stakes/high-precedential value cases. Given this selection process, I also predict that the cases that the US does file should be associated with higher levels of precedential value than their counterparts and that the cases that the US does invest in should disproportionately benefit the US. Statistical analysis of WTO disputes using Bayesian estimation to overcome problems of statistical and asymptotic inference with WTO disputes provides evidence in favor of my hypotheses. My results remain robust to alternative explanations such as overall US involvement in the DSB, economic size, political sensitivity, and European Union (EU), Japanese, and Canadian filing behavior.

Returning to this paper's puzzle, I provide evidence that the US does indeed pick up the tab when generating precedent. The evidence suggests that other WTO member states do not systematically take on this task. At least in the realm of WTO law, the evidence suggests that the USA behaves at least *as-if* it is tasked with efficiently enforcing each member's obligations

by creating precedent at this institution.

My results indicate that power lies at the heart of international (trade) law. Rather than bringing power politics out of international law, this paper suggests that power is precisely what undergirds the viability of this system. In work similar to Rosendorff (2005), this view posits that the durability of this system might actually depend on the efficiency of enforcement. The efficiency of enforcement depends on the willingness of powerful states to take on the burden of deterrence. The cost of enforcement, however, means that great powers disproportionately benefit from the systems of international law that they help prop up.

My argument proceeds in several steps. First, Section 2 shows the importance of precedent in making international law work. Section 3 provides a theory of international public goods provision and applies it to the WTO. Next, Section 4 tests the empirical implications of the theory using statistical analysis. Finally, Section 5 concludes by discussing the implications of this study for understanding the WTO and international law writ large.

2 The Strategy of International Cooperation

How does international law work? Legal theorists point to two main types of international law: law derived from formal treaties and law rooted in custom. Though customary international law–law based on the presence of a generally accepted norm–is an important source of international law, I primarily focus on the way in which law codified through conventions shapes the international system. A few examples of these sources of law include the Convention against Torture (CAT), the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO), and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Clearly, treaties span a diverse set of functional areas. For a treaty to come alive, states must voluntary bind themselves to the obligations contained therein. Moreover, the words inscribed in these treaties are specifically designed to encourage certain types of behavior and proscribe others. Governments should not torture their citizens. States shall uphold reciprocal market ac-

cess. Nations will not pursue nuclear weapons. In short, international law carries international obligations.

International law (and law in general) is fundamentally an interpretive exercise. States have to make decisions about when another state has or has not upheld its obligations under a treaty. For example under the NPT regime, it is up to individual states to decide when another state has violated the agreement to not pursue nuclear weapons. But such examples of decentralized interpretation of international law have become increasingly rare. With the rise of legalization–a term used to describe the increasing obligation, precision, and delegation of international law–states have increasingly ceded the authority to interpret international law up to international courts (Abbott et al., 2000; Keohane, Moravcsik, and Slaughter, 2000). Most notably, this aspect of legalization has taken hold in international economic affairs such as the WTO, Bilateral Investment Treaties (BITs), and an increasing number of Free Trade Agreements (FTAs) (Goldstein and Martin, 2000; Elkins, Guzman, and Simmons, 2006; Dür, Baccini, and Elsig, 2014) as well as political and human rights affairs through the ICJ and the ICC.

For international court rulings to actually change state behavior, their decisions must carry non-negligible costs for the violator and they must be able to deal with future potential treaty violations. Particularly on the second point, the costly nature of litigation–in terms of time, money, and the potential for ill-will–suggests that courts have to somehow handle the potential for future violations in an efficient manner less they be deemed as mere forums for rhetoric. In essence, the efficacy of international courts depends on the degree to which they can deter states from reneging on their commitments (Schelling, 1981; Hudec, 1993; Wippman, 1999; Kucik and Pelc, 2014).

The tension between enforcement and voluntary accession begs the question: How does deterrence work in international law when both accession to and compliance with treaties is voluntary? This is precisely where the literature diverges. Pessimists argue that international courts, as a physical manifestation of international law, are hopeless in changing state behavior because of the non-random nature in which states select into treaties. This selection effect im-

plies that states only enter into commitments that they intend to carry out regardless of having signed a piece of paper (Downs, Rocke, and Barsoom, 1996). In the case of the WTO, one scholar notes that, "the WTO has no jailhouse, no bondsmen, no blue helmets, no truncheons or tear gas" (Bello, 1996, pg. 417). The scope for real deterrence, then, seems small.

Scholars have gone great lengths to understand this selection problem. Looking at ratification patterns, many scholars point to how domestic politics is the primary impetus behind the decision to partially relinquish sovereignty to international institutions (Broz and Hawes, 2006; Vreeland, 2008; Hollyer and Rosendorff, 2011; Chapman and Chaudoin, 2013).[1] When taking these selection effects into account, international institutions have either no observable effect or perhaps even perverse effects on state behavior (Rose, 2004; Neumayer, 2005; von Stein, 2005; Hafner-Burton and Tsutsui, 2007; Hollyer and Rosendorff, 2011).

Other scholars remain cautiously optimistic. Simmons and Danner (2010) argue that states both least and most vulnerable to ICC prosecution have ratified the Rome Statute in order to credibly commit to reducing wartime atrocities. Moreover, Gilligan (2006) shows that the ICC can deter atrocities at the margin because foreign states may not have an interest in giving a violator asylum. When considering the problem of compliance, Chaudoin (2015) shows that the ICC can create compliance when there would not have been otherwise as long as the pro and anti-compliance groups are relatively equal in strength. Using a spatial model of treaty selection, Lupu (2013) provides evidence that treaties can change state behavior even when accounting for selection effects.

While scholars studying the ICC point to a domestic fire-alarm mechanism to understand how international courts can create costs, those studying other institutions point to the way in which courts can generate useful information. Particularly, court decisions can create reputational costs that encourage states to maintain a pro-compliance equilibrium (Axelrod and Keohane, 1986; Kono, 2007). Others, mainly from the rational design literature, argue that adjudication helps to legitimize retaliatory strategies under de-centralized enforcement as is with

[1] there's probably plenty of other shit I could cite here

the WTO (Rosendorff and Milner, 2001; Rosendorff, 2005; Kono, 2007). Even if states do violate their obligations and states turn to litigation to resolve the dispute at hand, Busch and Reinhardt (2000) show that courts can at least help to settle disputes swiftly under the shadow of the law. Finally, Kucik and Pelc (2014) provide evidence that financial markets also punish firms that are outside of the immediate scope of a case, but are likely to be in violation of WTO obligations.

Even before considering the merits of whether international courts can actually impose costs on violators, I argue that the authority of precedent is a necessary condition for international courts to generate any deterrent value at all. To see why, consider a world without precedent. The decision made in one case would have absolutely no bearing on future cases that have factual similarities. Governments in this world would have a relatively large incentive to violate treaty commitments when pressured to do so because the *ex ante* probability of an adverse ruling against the violator would be relatively low. Turning to a world where precedent matters, rulings in one case would then help clarify the direction of rulings in subsequent, factually similar cases. As a result, potential violators in this world (assuming some degree of foresight) would have less of an incentive to renege on their treaty commitments because the *ex ante* probability of an adverse ruling would be relatively high.[2] Even if international courts can impose costs on treaty violators, the only way for those costs to permeate across time and space is if courts operate under the doctrine of *stare decisis*. Thus, precedent is necessary to a well-functioning court system–a point that has been largely overlooked by most scholars.

Does precedent actually exist in international law? Many of the world's foremost international judiciaries such as the ICJ, ECJ, ECtHR, and the Dispute Settlement Body (DSB) of the WTO all ostensibly deny the authority of precedent. Article 59 of the ICJ Statute states, "the decision of the Court has no binding force except between the parties and in respect of *that particular case*."[3] Moreover, Article 3.2 of the WTO's Dispute Settlement Understanding empha-

[2]This is assuming that courts deliver rulings that are consistent with the obligations and spirit of the treaties that they are tasked to interpret.

[3]Emphasis added

sizes that rulings "cannot add to or diminish" the obligations of contracting states. In reality, though, international judiciaries frequently reference prior rulings in order to justify current ones. This phenomenon has been documented across a wide range of international judiciaries (Bhala, 1999; Shahabuddeen, 2007; Guillame, 2011; Lupu and Voeten, 2011; Pelc, 2014).

Moreover, courts and states act as if precedent does matter. Busch (2007) and Pelc (2014) both find that states litigate so as to shape precedent at the WTO. International judiciaries are politically savvy as well. Particularly, Busch and Pelc (2010) find that panels at the WTO moderate the scope of their opinions when the effects of a precedent are ambiguous to the broader WTO membership. In the European setting, Lupu and Voeten (2011) provide evidence that the ECtHR relies on precedent with a view to convince lower courts of the legitimacy of the decision.

Even though precedent seems to meaningly guide both states and courts, precedent is costly to generate. For there to be any precedent at all, states must supply courts with cases to be adjudicated. Litigation, however, entails financial, political, and/or diplomatic costs. What complicates this even further is precisely the value of precedent. Precedent influences cases across borders thus making precedent a public good. Any precedent generated in one case not only benefits the litigant, but also the broader population of potential litigators. As a result, states then have an incentive to shirk on the costs of litigating and free-ride on the efforts of others. Like all public goods provision stories, we are left with the age-old collective action problem in the supply of precedent (Olson, 1971).

So if precedent is a necessary condition for legal deterrence and there exists a tendency for states to undersupply precedent, who steps up to fill the gap? In the next section, I draw upon the insights from Hegemonic Stability Theory to show how powerful states attempt to fill in the delta between the private supply of stability and the socially optimal one.

3 A Return to Hegemonic Theory

If precedent is, as I argue, an international public good, then why would states have an incentive to supply it when they could free-ride off of the effort of others? More broadly speaking, where do international public goods come from? Scholars of international institutions and cooperation suggest three sets of explanations: (1) the role that power plays in encouraging the creation of institutions, (2) the way in which transaction costs necessitate the design of international institutions, and (3) the ability of domestic political factors to induce or dissuade institutionalized cooperation. Though Hegemonic Stability Theory, which privileges the study of power in the creation and persistence of institutions, has fallen out of fashion relative to the contracting and domestic politics theories of international cooperation, I argue that this lens helps us to understand why the GATT/WTO system is one of the most successful international institutions. Furthermore, the insights from Hegemonic Stability Theory can help us to understand the US's litigating behavior in the WTO dispute settlement system.

Hegemonic Stability Theory, in its most simple form, argues that powerful states that have an interest in facilitating cooperation will do so by creating institutions that help to provide international public goods (Krasner, 1976; Webb and Krasner, 1989; Gilpin, 1981; Ikenberry, 2009; Kindleberger, 2013). These public goods, in the form of international institutions enable states participating in the regime to make mutually beneficial policy adjustments that would have been too costly to unilaterally implement without the presence of the international institution. But as previously argued, the efficacy of international institutions depends on their ability to deter violations–in other words, there has to be a mechanism to encourage compliance and punish violators. According to Hegemonic Stability Theory, powerful states take on the individual cost of punishing violators in order to maintain a liberal world order (Gilpin, 1981; Ikenberry, 2009; Kindleberger, 2013).

Scholars point to how the United States, following World War II, exercised its power as the global hegemon to help set up many of the institutions that characterize the contemporary international political economy (Ikenberry, 1992, 1993; Woods, 2003). These include interna-

tional financial institutions such as the International Monetary Fund (IMF) and the World Bank as well as sources of international law such as GATT. A number of scholars argue that the US was instrumental to the creation and persistence of the GATT/WTO system (Goldstein and Gowa, 2002; Kim, 2006; Irwin, Mavroidis, and Sykes, 2009; Kim, 2010; Davis, 2012; Gowa, 2015; Davis and Wilf, 2015). Moreover, Davis (2012) argues that the US is a leader in litigation at the WTO. Though Davis (2012) argues that part of this is because of the relationship between the US Congress and the Executive, I argue that a power-based explanation also helps to understand the US's involvement with WTO dispute settlement.

While Hegemonic Stability Theory is a reasonable explanation for why these institutions were created in the first place, there are still a number of obstacles to address for this theory to have explanatory power for contemporary international relations. I examine each of these potential objections one by one as they relate to the US.

First, does the US actually have a preference toward maintaining the vitality of the Bretton Woods institutions (IMF & World Bank) as well as the GATT/WTO regime? Besides providing the US with economic benefits resultant from a more stable international economic system, these institutions also help to further US foreign policy goals. Research by Vreeland and Dreher (2014) demonstrate that the IMF and the World Bank provide avenues for the US to pursue its foreign policy objectives by buying the votes of temporary United Nations Security Council (UNSC) members. One potential objection by those who study the relationship between domestic politics and international institutions might be that such preferences should be rooted in domestic political behavior and not just elite preferences. Milner and Tingley (2011) as well as Fordham (2008) provide evidence that the US domestic public does indeed support global economic engagement. Analyzing US Congressional voting records, Broz (2008, 2011) as well as Broz and Hawes (2006) provide evidence that US legislators generally tend to support engagement with the IMF and World Bank for both ideological and material interests. Finally, Malik and Stone (2014) find evidence that US-based Multinational Corporations benefit from World Bank projects. The evidence suggests that the US should and does have an interest in

continuing support for the institutions that it helped establish following World War II.

Second if international economic law is supposed to be self-enforcing as the rational design literature argues, then does that not eliminate the need for powerful states to invest in enforcement? This is indeed the critique levied by functional institutionalists in the likes of Koremenos, Lipson, and Snidal (2001); Keohane (2005); Koremenos (2005). If the international trade system is an infinitely repeated Prisoner's Dilemma game, then cooperation can emerge in the absence of a hegemonic enforcer.[4] Indeed, Rosendorff (2005) provides a game theoretic model that shows how the WTO dispute settlement system can create a stable self-enforcing equilibrium without the need of a central enforcer such as the US. Going back to the argument made earlier in this paper, dispute settlement is costly and precedent generates public goods. Though Rosendorff (2005)'s model of the WTO system yields insight into the benefits of the WTO for maintaining free trade in light of protectionist pressures, it does not model the costs of litigation nor the spillover effects (precedent) ensconced in the content of panel reports. When taking account these factors presented in the previous section, central enforcement through a hegemon becomes increasingly important.

Third and finally, why would weaker states actually participate in these institutions if the powerful hegemon has incentives to exploit weaker states? Drawing from contract theory, Lake (1996) argues that hegemons face commitment problems when encouraging weaker states to join an institution. When an institution makes a weak state significantly dependent on the hegemon, it may actually be less willing to relinquish sovereignty to that institution despite the benefits of participation fearing that the hegemon will exploit that dependent relationship. Hegemons have two ways to solve this commitment problem. The first way, as Baccini, Poast, and Urpelainen (2011) point out, is through domestic political institutions that enable credible commitments. Using a formal model and data on PTA formation, they show that regional

[4]When investigating the legal regime for international investment, Allee and Peinhardt (2014) find that power and preferences actually carry greater explanatory power than hypotheses derived from the rational design literature. Moreover, even some of the initial proponents of rational design theories of institutions concede that it is often times the case that powerful states are some of the strongest proponents of legalization (Kahler, 2000; Koremenos, Lipson, and Snidal, 2001).

hegemons are able to generate regional cooperation when the hegemon has democratic political institutions. But there is also another way in which hegemons can solve commitment problems. By delegating dispute settlement to international courts, powerful states can reassure weaker states that punishment will not be arbitrary and will instead be in line with the core mission of the institution rather than a hegemon's own political goals. Delegation of arbitration, then, helps to legitimize the system as well as the great power's role in it (Grynaviski and Hsieh, Forthcoming).

If Hegemonic Stability Theory is indeed a useful analytical lens for explaining regularities in WTO dispute settlement and the development of precedent broad speaking, we should readily observe its empirical implications in the US's litigation behavior. There are several empirical implications that one can test against the data.

Part of the utility of Hegemonic Stability Theory in explaining the persistence of international cooperation and the supply of global public goods rests on the assumption that the hegemon is willing to take on a significant portion of the enforcement costs. As Pelc (2014) argues, cases that are useful for generating precedent and subsequent deterrent value are generally cases where the trade stakes are low so that governments have enhanced flexibility to shape the content and meaning of the decision. This, of course, is costly to the US not only because of the direct litigation costs, but also because of the opportunity cost of not taking on another more politically powerful interest group's case. If it is indeed the case that the US litigates in a manner consistent with Hegemonic Stability Theory, then the US should disproportionately invest in these low-stakes cases that have the potential to generate significant precedent at the WTO. This leads me to the following hypothesis:

H1 (Investment Hypothesis): Cases where the US files as a complainant should tend to have a lower amount of trade at stake than cases where the US is not a complainant.

The second prediction of Hegemonic Stability Theory is an obvious one. Hegemons should actually be able to provide global public goods. If it were the case that powerful states systematically failed in delivering global public goods, then this would call into question the function

of the hegemon in an international institution. Cooperation would then best be explained by something akin to the rational design literature where institutions are viewed as a self-enforcing equilibrium. This leads me to the following hypothesis:

H2 (Public Goods Hypothesis): Cases where the US files as a complainant should tend to have greater precedential value for the wider WTO membership than cases where the US is not a complainant.

A third and final prediction of Hegemonic Stability Theory for explaining WTO dispute settlement patterns lies in the ability of hegemons to manipulate the system to reap private benefits. Vreeland and Dreher (2014) demonstrate that the US takes advantage of its position of power at the Bretton Woods institutions to pursue its private geopolitical goals. Thus, we might expect similar behavior at the WTO. While the geopolitical benefits of precedent at the WTO are scarce, the US can reap sizable commercial benefits from the precedent that it does create. Pelc (2014) argues that WTO member states tend to exploit the precedents that they are able to create in later cases that are more commercially valuable. This leads me to the following hypothesis:

H3 (Manipulation Hypothesis): Cases where the US files as a complainant should tend to have greater precedential value for the US itself than cases where the US is not a complainant.

Whether the US actually litigates in a way consistent with these hypotheses only the data can tell. In the following section, I use data on all WTO disputes with a panel ruling between 1995-2011 to empirically test my hypotheses. Importantly, estimation using Bayesian methods provides support for all three hypotheses and discounts potential alternative explanations.

4 From Theory to Empirics

My theory suggests three main empirical predictions. First, the US should be more willing to take on commercially invaluable cases than other WTO member states so as to shape precedent (investment hypothesis). Second, cases where the US is a complainant should have precedential value for the wider WTO membership (public goods hypothesis). Third and finally, the

US should disproportionately benefit from the precedent that it does help generate (manipulation hypothesis). I test all three of these predictions using a Bayesian estimator to overcome problems of small-sample inference with WTO cases.

4.1 Data & Models

For the empirical analysis, my main unit of analysis is each WTO dispute between 1995 and 2010 that received a panel ruling. By focusing on disputes that received a panel ruling, I eliminate any disputes that were settled or withdrawn before a panel ruling because these cases cannot be incorporated into the WTO's body of precedent. This leaves me with 171 observations in the final dataset.

The dependent variable for the investment hypothesis is the natural logarithm of the value of the dispute d for the complainant i at hand ($Log(Stakes)_{i,d}$). This variable is taken from Pelc (2014). There exists plenty of variation in the amount of trade at stake for each complainant for each dispute. On average, each dispute is worth approximately 1.7 Million USD for each complainant with some disputes being worth almost no money and some disputes approaching billions of dollars of trade at stake. What is particularly puzzling is the fact that most of these disputes involve quite low stakes with many of them seemingly missing the supposed threshold of commercial value needed to make them a suitable candidate for a WTO dispute (Horn, Mavroidis, and Nordstrom, 2005; Pelc, 2014). I argue that because low-stakes cases are particularly fertile grounds for generating precedent, we should see that the US is disproportionately involved in these low-stakes cases.

This leads me to estimate the following equation:

$$log(stakes)_{i,d} = \beta * US + \gamma * \mathbf{X}_{i,d} + \epsilon_{i,d} \tag{1}$$

The investment hypothesis predicts that β should be < 0. γ represents a vector of alternative explanations. There are several alternative explanations that I would need to control for in

order to be confident in my results. First, I control for cases where the EU was a complainant since the EU is also a major participant in WTO dispute settlement. It may be the case that the most active litigants are more likely to take invest in precedent rather than solely the US taking on that effort. Second, I control for Japanese involvement as a complainant since (Davis and Shirato, 2007) finds evidence that Japan litigates with an eye toward creating favorable precedent. Third and finally, I account for the US's general involvement with dispute settlement at the WTO by creating an indicator variable that takes on the value of 1 if a case features the US as either a complainant or a defendant and 0 otherwise. If it were the case that general involvement of the US in a dispute were associated with lower trade stakes, this would undermine the hypothesis that the US *actively* invests in cases that would help it create precedent.

Additionally, I make sure to account for several other alternative explanations that may account for my findings. First, I control for $Log(\text{Complainant's GDP})_{i,d}$ in order to make sure that I am capturing the actual effect of the US instead of some broader tendency of larger markets to file more disputes because of greater legal capacity. Second, I account for the number of third parties on a dispute because Busch and Reinhardt (2006) provide evidence that greater third party involvement increases the probability that a dispute actually goes to panel. Third, I control for both the total number of claims made by the complainant and the percent of claims won by the complainant since these both influence the scope of the case law generated by a ruling. Fourth, I control for whether the defendant or the complainant appealed the decision because precedent created in a panel report only exists net of appeal. Finally, I control for the panel year in order to absorb any trends that might also be correlated with the US filing a dispute.

To test both the public goods and the manipulation hypotheses, I rely on a network analysis of WTO case citations. For the public goods hypothesis, I adapt the procedure described in Pelc (2014) to measure the precedential value for the broader WTO membership instead of the precedential value for the specific complainant. Following Pelc (2014), I use a weighted Katz centrality measure to measure precedential value to the wider WTO membership. The

advantage of the Katz centrality score is that it takes into account both direct and indirect ties when calculating the centrality of each node (panel ruling). Specifically, the weighted Katz centrality score is calculated using the following formula:

$$\mathbf{C} = \mathbf{W}((\mathbf{I} - \alpha * \mathbf{A})^{-1} - \mathbf{I}) \tag{2}$$

Unpacking the notation, the matrix **C** represents the precedential value to the broader WTO membership for each dispute d. The matrix **W** contains a matrix of weights for each dispute where each weight is the $Log(1 + \text{Mean Commercial Value})$ of each dispute d.[5] I use data from Bown and Reynolds (2015) to generate the weights used in **W**. Next, the matrix **A** is the adjacency matrix, which describes the directed acyclic network of WTO case citations. The term α represents a tuning parameter that characterizes the relative importance between direct and indirect ties. I set the parameter at 0.35. My results are robust to reasonable changes in the tuning parameter. Finally, the matrix **I** is the identity matrix.

As a sanity check for my measure of precedential value for the broader WTO membership, I check that the top 10th percentile of my measure includes seminal cases in the WTO liturgy. My measure of precedential value for the broader WTO membership correctly identifies these seminal cases, which include Japan–Taxes on Alcoholic Beverages, EC–Hormones, EC–Bananas, and Canada–Periodicals. This suggests that my measure does accurately capture precedential value for the broader WTO membership.

In order to examine the validity of the public goods hypothesis, I estimate the following model using the centrality measure calculated from Equation 2 as the dependent variable:

$$\text{Precedential Value (Wider Membership)}_{i,d} = \beta * US + \gamma * \mathbf{X}_{i,d} + \epsilon_{i,d} \tag{3}$$

Given the model, the public goods hypothesis implies that β should be > 0. Moreover, I capture several alternative explanations suggested by the literature in the matrix γ. First and

[5]My results do not change if I replace the mean commercial value with the total commercial value for the broader WTO membership.

foremost, I make sure to control for *Log*(Complainant's Stakes) since Pelc (2014) finds that commercial stakes are inversely related to precedential value to the complainant. Second, I control for cases where the EU was a complainant to ensure that my results are picking up any effects specific to the US's role in supplying precedent rather than the effects of major players in the WTO system. Similarly, I control for other middle powers (Canada and Japan) involvement as a complainant as well. Third, I assess whether my results are driven by general interaction with the dispute settlement system by including a variable that captures whether the US was either a complainant or respondent in a case. Finally, I control for *Log*(Complainant's GDP) in order to isolate the effect of market size from the US's efforts to supply precedent to the WTO.

To test the manipulation hypothesis, I use the same measure of precedential value that Pelc (2014) uses since it captures how valuable (in terms of precedent) a particular dispute is to the complainant rather than the wider WTO membership. This amounts to setting the matrix **W** in Equation 2 to the complainant's commercial stakes for each subsequent dispute that cites dispute d. Thus, I estimate the following statistical model:

$$\text{Precedential Value (Complainant)}_{i,d} = \beta * US + \gamma * \mathbf{X}_{i,d} + \epsilon_{i,d} \tag{4}$$

Similarly to Equation 3, which tests the public goods hypothesis, I predict that the coefficient β should be positive. The vector γ controls for the same alternative explanations used to test the public goods hypothesis. Summary statistics for all of the dependent and independent variables can be found in the Appendix.

4.2 Estimation Strategy

Asymptotic inference via Ordinary Least Squares (OLS) methods poses a theoretical tension in examining WTO disputes. Particularly, the intuition that estimates of population parameters should converge to their true values as the number of units in the sample increases is diffi-

cult to apply to WTO disputes. This is because it is unrealistic to think about the number of WTO disputes increasing asymptotically. As Davis (2009) notes, the domestic political selection mechanism that lays behind the decision to file a dispute helps to filter out a large number of cases. From the institution's standpoint, Busch and Reinhardt (2000, 2003) argue that the WTO has incentive to dissuade myriad litigation for efficiency reasons. As a result, I argue that it unreasonable to think asymptotically about WTO disputes when both domestic selection and institutional incentives dissuade n from tending toward ∞.

As an alternative, I follow recent work in the WTO literature that uses Bayesian estimators to estimate parameters of interest as they relate to WTO disputes (Brutger and Morse, 2015; Pelc, 2014). One particular advantage of Bayesian estimation is that it better allows the researcher to generate credible confidence intervals for small samples. This is because it estimates parameter by repeatedly sampling a large number of times from a posterior distribution rather than directly computing confidence intervals from only the data itself. Thus, I rely on a Normal Bayes estimator using Zelig that implements a Gibbs sampler on a Gaussian weak prior to estimate the coefficients on β and γ across Equations 1, 3, and 4 (Imai, King, and Lau, 2008). Since some disputes are aggregated into one common panel report, I cluster my errors by the combined dispute number. Finally, I report the mean and 95% interval for the posterior distribution of the coefficients.

In the following sections, I test each hypothesis finding evidence in support for each one.

4.3 Testing the Investment Hypothesis

Do disputes initiated by the US tend to have lower commercial stakes? Evidence across Models 1-5 of Table 1 provides evidence in support of the investment hypothesis. Across all Models, the coefficient on the US as a complainant is negative. Moreover, the values in the 95% interval of the posterior distribution of the coefficient on the US as a complainant are all negative as well indicating that this finding is unlikely to be resultant of pure chance. Using the estimates from Model 3 of Table 1, the lower bound on the substantive effect of the US being a complainant

Table 1: Testing the Investment Hypothesis

	Log(Stakes)				
	(1)	(2)	(3)	(4)	(5)
US Complainant	−2.329**	−2.705**	−2.432**	−3.621***	−4.273***
	(-4.449,-0.181)	(-5.007,-0.448)	(-4.613,-0.258)	(-5.847,-1.407)	(-6.872,-1.637)
EU Complainant		−0.930			−1.256
		(-3.258,1.438			(-3.776,1.251)
Japan Complainant			−0.451		−0.830
			(-4.,81,3.448)		(4.697,3.098)
Canada Complainant			−0.671		−0.826
			(-3.667,2.323)		(3.895,2.286)
Overall US Involvement				2.595***	2.561***
				(0.765,4.459)	(0.679,4.429)
Non-Merchandise Dispute	−10.562***	−10.216***	−10.591***	−11.332***	−10.934***
	(-12.626,-8.457)	(-12.487,-7.970)	(-13.439,-9.232)	(-13.185,-8.673)	(-13.171,-8.694)
Log(Complainant GDP)	0.602***	0.711***	0.617***	0.592***	0.756***
	(0.154,1.054)	(0.184,1.237)	(0.160,1.074)	(0.150,1.035)	(0.205,1.309)
Num. 3rd Parties	0.233***	0.229***	0.227***	0.215***	0.208**
	(0.071,0.399)	(0.065,0.394)	(0.062,0.393)	(0.054,0.375)	(0.044,0.368)
Number of Legal Claims	−0.041	−0.044	−0.037	−0.051	−0.051
	(-0.147,0.067)	(-0.151,0.063)	(-0.147,0.076)	(-0.155,0.054)	(-0.156,0.055)
Percent Claims Accepted	0.674	0.798	0.620	0.720	0.794
	(-2.008,3.482)	(-1.992,3.652)	(-2.213,3.506)	(-1.980,3.515)	(-1.958,3.534)
Systemic	−1.286	−1.272	−1.233	−1.492	−1.374
	(-3.198,0.639)	(-3.172,0.614)	(-3.123,0.649)	(-3.357,0.367)	(-3.262,0.510)
Defendant Appeal	1.304	1.414	1.295	1.159	1.303
	(-0.376,3.042)	(-0.345,3.144)	(-0.440,3.002)	(-0.538,2.835)	(-0.450,3.069)
Complainant Appeal	−0.284	−0.358	−0.257	−0.643	−0.659
	(-2.463,1.877)	(-2.607,1.860)	(-2.497,1.982)	(-2.833,1.544)	(-2.861,1.498)
Panel Year	−0.712***	−0.721***	−0.724***	−0.686***	−0.717***
	(-0.938,-0.493)	(-0.945,-0.501)	(-0.956,-0.496)	(-0.905,-0.471)	(-0.947,-0.487)
CONSTANT	1,425.879***	1,440.327***	1,449.750***	1,373.379***	1,430.733***
	(985.484,1,874.213)	(1002.087,1886.535)	(994.950,1,909.883)	(944.998,1,809.548)	(975.549,1,890.044)
Observations	171	171	171	171	171

Notes: ***p < .01; **p < .05; *p < .1

95% posterior intervals reported in parentheses.

Robust standard errors clustered by combined DS number.

Models estimated using Normal Bayes as implemented in Zelig.

suggests that the commercial stakes tend to be about 240% lower than cases with a different complainant. When estimating the upper bound on the effect of the US being a complainant using the results from Model 5 of Table 1, this effect jumps to about a 430% decrease in commercial stakes. This effect, it seems, is both statistically and substantively significant.

Importantly, my results survive even when accounting for several key alternative explanations. First, estimates across Models 1-5 of Table 1 indicate little support for the argument that major WTO members also invest in cases that are useful for generating precedent. The coefficient on the EU as a complainant has the correct sign, but the 95% interval contains 0. Turning to the role of other middle powers in WTO dispute settlement, the results of Models 3 and 5 of Table 1 indicate little support for the argument that Japan or Canada also invests in creating precedent. Again, the coefficients on both Japan and Canada complainant status have the correct signs, but the 95% interval of the posterior distributions for both variables contain 0. The next major alternative explanation is that it is simply the case that all disputes in which the US is involved in tend to have lower trade stakes. Results from Models 4 and 5 of Table 1 indicate the opposite. Overall US involvement in a dispute as either a complainant or a defendant is actually associated with *higher* commercial stakes. This is in line with the intuition that WTO member states filing disputes against the US tend to have larger trade stakes since the US has an enormous trade market. In fact when controlling for overall US involvement in a dispute, the effect size on the US as a complainant actually increases as shown in Models 4 and 5 of Table 1.

There are several other points to note. First, Non-Merchandise disputes–disputes that involve laws and regulations such as the US's Section 301 law–tend to have lower trade stakes. The 95% interval of the posterior distribution of the coefficient on Non-Merchandise disputes does not contain 0 indicating that the effect is statistically significant. Even though Non-Merchandise disputes tend to concern politically sensitive issues, my results survive suggesting that the effect of the US as a complainant is not a product of the US disproportionately filing politically sensitive cases (Pelc, 2010, 2013). Next, the complainant's market size as measured

by *log*(complainant GDP) is positively correlated with trade stakes. This is consistent with the intuition that larger markets tend to file disputes with larger trade stakes. Importantly, my results survive even when including this variable suggesting that my results cannot be explained by market size. Moving on, third party interest, as measured by the number of third parties on a case, is positively related to the trade stakes of a dispute. This is unsurprising given that Third Parties tend to exhibit greater interest in cases that can affect the broader WTO membership (Busch and Reinhardt, 2006; Busch and Pelc, 2010; Johns and Pelc, 2014; Kucik and Pelc, 2015). Finally, the coefficient on Panel Year is negative, which suggests that trade stakes have gotten progressively lower over time.

4.4 Testing the Public Goods Hypothesis

Do cases filed by the US tend to have greater precedential value for the broader WTO membership? Estimates across all Models of Table 2 suggests that this is indeed the case. The coefficient on US Complainant status has the expected direction and the 95% posterior interval indicates that it is unlikely that the effect is due to pure chance. Substantively, the effect is equivalent to approximately a one-half standard deviation increase in the precedential value of a case for the wider WTO membership. Comparing this effect to the effect of panel year, this effect is comparable to case existing approximately 10 years in the WTO liturgy. Thus, this effect is both statistically and substantively significant.

Importantly, several alternative explanations fail to explain away my findings. Models 1-5 of Table 2 demonstrate that neither EU, Japanese, nor Canadian Complainant status explain away my findings. In fact, none of these variables have a statistically significant effect on average precedential value suggesting that the US uniquely supplies precedent to the WTO. These findings are consistent with the results presented in Table 1 where I found that the US seems to be the only one to invest in commercially insubstantial cases. Again, my results cannot be explained by overall US involvement in WTO dispute settlement either. The coefficient on this variable is slightly positive, but the 95% posterior interval contains 0. Several other alter-

Table 2: Testing the Public Goods Hypothesis

	Avg. Precedential Value				
	(1)	(2)	(3)	(4)	(5)
US Complainant	2,781.461**	3,516.232***	2,589.388**	2,671.973**	3,306.218***
	(729.862,4,804.259)	(1,251.933,5,765.450)	(434.891,4,696.950)	(363.368,4,965.638)	(575.819,5,990.603)
EU Complainant		1,718.339			1,630.328
		(-580.710,4,020.072)			(-827.406,4,095.026)
Japan Complainant			−1020.495		−307.629
			(-4,753.578,2,631.589)		(-4,208.469,3,633.427)
Canada Complainant			−807.343		−250.431
			(-3,748.035,2,148.042)		(-3,380.226,2,786.244)
Overall US Involvement				216.093	169.787
				(-1,658.573,2,099.031)	(-1,716.524,2,057.472)
Log(Stakes)	−42.478	−36.232	−43.682	−47.234	−40.399
	(-194.204,114.522)	(-187.751,117.081)	(-196.892,109.005)	(-204.240,110.941)	(-198.671,114.923)
Non-Merchandise Dispute	−1,256.588	−1,808.439	−1,354.512	−1,352.791	−1,905.529
	(-3,812.651,1,310.323)	(-4,541.750,849.910)	(-3,946.399,1,213.674)	(-4,186.430,1,374.691)	(-4,747.394,931.757)
Log(Complainant GDP)	199.873	−1.311	227.204	200.843	19.881
	(-251.481,648.559)	(-511.859,511.227)	(-242.990,693.441)	(-241.103,640.256)	(-543.717,578.973)
Panel Year	−387.981***	−367.274***	−407.175***	−390.510***	−373.740***
	(-629.786,-149.568)	(-614.000,-124.922)	(-656.886,-161.894)	(-636.784,-147.230)	(-628.528,-120.604)
CONSTANT	771,427.446***	635,153.714***	809,229.343***	776,479.772***	747,554.706***
	(295,879.491,1,255,621.480)	(251,454.451,1,224,525.887)	(323,107.012,1,305,379.570)	(292,237.395,1,266,401.429)	(244,457.981,1,256,251.000)
Case-Level Controls	*YES*	*YES*	*YES*	*YES*	*YES*
Observations	171	171	171	171	171

Notes: ***p < .01; **p < .05; *p < .1; 95% posterior intervals reported in parentheses; Robust standard errors clustered by combined DS number.
Models estimated using Normal Bayes as implemented in Zelig.

native explanations such as political sensitivity (proxied by Non-Merchandise Disputes) and complainant market size (*Log*(Complainant GDP)) do not explain away my findings either. The panel year, as expected, has a negative effect on average precedential value. Cases that have had more time to accumulate precedent do indeed have greater precedential value for the wider WTO membership. My results suggest that the US plays a unique role in contributing to WTO case law.

4.5 Testing the Manipulation Hypothesis

Lastly, does the US disproportionately benefit from the precedent that it does generate? Again, estimates across all Models of Table 3 provide evidence in favor of the manipulation hypothesis. The coefficient on US Complainant status is positive and the 95% posterior interval indicates that the effect is statistically significant. In substantive terms, estimates from Model 5 of Table 3 suggest that the effect is approximately the same as if a precedent existed in WTO case law since the inception of the WTO in 1995–a sizable effect. While the US seems to provide a public good to the WTO, it seems that the meaning of the precedent that it does set for the rest of the membership disproportionately benefits the US's own commercial interests. This manipulation of international rules is consistent with what other scholars find in other institutions such as the United Nations Security Council, the IMF, and the World Bank (Kuziemko and Werker, 2006; Stone, 2011; Vreeland and Dreher, 2014).

Again, my results survive in the light of several other alternative explanations. While Model 5 of Table 3 shows some evidence that the EU is also successful in manipulating precedent to its own benefit, this effect is small compared to the US and not consistent between Models 2 and 5 of Table 3. Middle powers do not seem to be successful at manipulating precedent to their own advantage. My estimates in Models 3 and 5 indicate paltry support for the contention that prominent middle powers in the WTO dispute system such as Japan and Canada are also able to successfully manipulate precedent. Additionally, overall US involvement does not have a significant effect on the amount of precedent that the US is able to exploit itself.

Table 3: Testing the Manipulation Hypothesis

	Precedential Value Self				
	(1)	(2)	(3)	(4)	(5)
US Complainant	10,712.76***	12,361.85***	10,697.69***	10,615.44***	14,867.96***
	(6,417.254,14,947.96)	(7,626.11,17,066.05)	(6,180.24,15,116.74)	(5,781.16,15,418.42)	(7,047.12,18,365.08)
EU Complainant		3,8626.67			4,302.67*
		(-945.75,8,676.71)			(-834.47,9,454.37)
Japan Complainant			200.82		2,059.76
			(-7,626.54,7,858.36)		(-6,093.76,10,297.34)
Canada Complainant			−801.24		655.90
			(-6,967.16,5,395.48)		(-5,885.98,7,003.15)
Overall US Involvement				207.94	154.91
				(-3,717.65,4,150.86)	(-3,787.85,4,100.54)
Log(Stakes)	−39.99	−25.83	−39.66	−45.54	−24.86
	(-357.66,288.73)	(-342.72,294.82)	(-360.91,280.48)	(-374.32,285.68)	(-355.67,299.80)
Non-Merchandise Dispute	−2,081.48	−3,323.72	−2,101.05	−2,163.83	−3,410.52
	(-7,433.20,329.30)	(-9,040.39,2,236.17)	(-7,535.61,3,283.81)	(-8,097.53,3,547.59)	(-9,350.58,2,519.95)
Log(Complainant GDP)	−779.96*	−1,163.50**	−797.30*	−779.32*	−1,347.49**
	(-1,724.98,159.47)	(-2,299.82,-160.06)	(-1,783.19,180.28)	(-1,704.76,140.83)	(-2,525.52,-178.88)
Panel Year	−801.15***	−754.33***	−813.48***	−805.69***	−724.77***
	(-1,307.42,-301.97)	(-1,270.36,-247.46)	(-1,337.07,-299.19)	(-1,321.40,-296.26)	(-1,257.32,-195.66)
CONSTANT	1,625,205.00***	1,543,130.00***	1,650,442.00***	1,634,327.00***	1,486,796.00***
	(629,533.73,2,638,980.00)	(531,482.19,2,566,643.00)	(631,162.44,2,690,749.00)	(620,312.15,2,660,234.00)	(435,225.00,2,550,070.00)
Case-Level Controls	*YES*	*YES*	*YES*	*YES*	*YES*
Observations	171	171	171	171	171

Notes: ***p < .01; **p < .05; *p < .1; 95% posterior intervals reported in parentheses; Robust standard errors clustered by combined DS number.
Models estimated using Normal Bayes as implemented in Zelig.

This is consistent with the intuition that states have a greater ability to shape precedent when they litigate on the offense (Pelc, 2014). In contrast to Pelc (2014), I do not find statistically significant evidence that the commercial stakes of a dispute are related to the precedential value of a dispute for the complainant though the sign is in the expected direction. This may because this type of strategic litigation behavior may be driven by the US as shown in Table 1. Politically sensitive disputes do not seem to have a significant effect on the precedential value of a dispute to a complainant. Surprisingly when accounting for the US as a complainant, the coefficient on market size is actually negative and statistically significant. This is consistent with my results shown in Table 1 where larger markets tend to file more commercially valuable disputes, which, in turn, are less valuable for generating precedent.

When testing all three empirical implications of my theory against the data, I find evidence across the board that the US litigates in a way consistent with Hegemonic theory. This suggests that the US plays a unique role in the stability and efficacy of the WTO system. Power, then, seems to lie at the heart of international trade law.

5 Power and International Law

Though precedent is crucial to the deterrent function of international law, states have incentives to undersupply it. Given the public good nature of precedent, which states end up actually supplying it? Using the WTO as a case-study, I show that powerful states help bring the system closer to the socially optimal amount of precedent. Insights from Hegemonic Stability theory suggest that the US has a unique role to play in ensuring that WTO law is well-functioning.

In this paper, I showed that the US invests in and generates precedent that benefits the wider WTO membership. I also showed, however, that the precedent that the US does generate tends to disproportionately benefit the US. This evidence is consistent with the predictions of a Hegemonic theory of international law at the WTO.

This paper has two overarching implications for international relations scholars. First, my

results speak to the debate on whether international law can actually change state behavior. While the locus of this debate has centered around the degree to which selection bias poses a problem to this research agenda, I argue that scholars should take a step back. To understand how international law can change state behavior through deterrence, we must understand the sources of precedent in international law because precedent is vital for "deterrence across borders" (Kim and Sikkink, 2010). If an international court cannot rely on precedent, then the scope for deterrence may be quite small.

This paper also speaks to the distributional consequences of international institutions. While international institutions can be welfare improving from a global standpoint, the distribution of benefits are certainly not evenly distributed. In this paper, I show that while a hegemon can help maintain an efficacious institution, the benefits of that institution may disproportionately go to powerful states. Adjudication is an exercise in rhetorical jousting. The playing field, however, is not equal. Because participation in this game is costly, the meaning of the law may bend toward those powerful states with the greatest ability and interest in adjudication.

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