

Negotiating the Democratization of the WTO's Dispute Settlement Process

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INTRODUCTION

International organizations (IOs) have been increasingly criticized because of their apparent 'democratic deficit.' In response to this criticism, some scholars and policy-makers suggest that greater participation of non-state actors may improve the democratic legitimacy of IOs. Indeed, international organization of all varieties have opened their doors and granted non-state actors greater access to participate. Despite the apparent democratizing benefits, opening doors to non-state actors is often controversial. The WTO is an institution where non-state actor participation has been highly controversial. From protests in Seattle to negotiating reform of the dispute settlement process, the WTO has had to face the question of how open its doors should be. At the core of this question lies disagreement among member states as to what types of access should be granted to non-states actors. This disagreement has been especially prominent as member states have negotiated modifications to the WTO's dispute settlement mechanism. Among other things, states have disputed proposals to allow amicus curiae submissions to the dispute settlement mechanism (herein DSM). Looking at the WTO's negotiations to reform the DSM contributes to our understanding of what drives states to permit non-state actors to participate in international organizations. More specifically, this paper evaluates the DSM review process to explore what factors shape states' preferences on the participation of non-state actors.

Scholarly work that has explored non-state actors' access to international organizations has made great strides in mapping the participation of non-state actors and considering the consequences of such participation for global governance. In contrast, this paper contributes to the literature on non-state actors' participation in global governance by exploring the preferences of states regarding the participation of non-state actors. That is, what factors shape states' preferences on allowing non-state actors access to and participation in international organizations? Equally important to the contributions for non-state actor literature, this paper contributes to literature on the design of international institutions by looking through the lens of state preferences. While some scholars have given attention to the design of IOs and features which provide for non-state actors' access more specifically, this literature tends to focus on functionalist accounts that neglect the role of states in the decision-making on design of institutions. This paper posits an account that complements such accounts. More specifically, I argue that state preferences are shaped not only by the ability to manage costs associated with amicus submissions, but also socialization mechanisms. In addition to normative commitments, imitation of existing international organizations play an important role in informing the preferences of states.

This paper proceeds in four sections. First, I provide an overview of the theoretical expectations guiding this analysis. I highlight three potential explanations—management of costs, normative commitments and imitation of other international organizations. Second, I will introduce the WTO's dispute settlement process and the negotiations to reform the WTO before proceeding to the empirical analysis. I then turn to the empirical analysis in the third section. Here I illustrate that neither management of costs nor normative commitments offer full explanations of state preferences. Rather, state preferences are also informed by mimicking regional trade organization to which they are members. Last, I will discuss the implications of these findings and conclude.

EXPLAINING STATE PREFERENCES ON PUBLIC PARTICIPATION

Traditional understandings of international politics and international organizations have been challenged by scholars who have shown that non-state actors are key players in global governance. A wide range of literature explores the role of non-state actors in global governance.¹ First, authors have illustrated how non-state actors facilitate the diffusion of international norms.² Second, others have looked at how through information and socialization processes non-state actors shape IO's agendas, decisions and their monitoring of states.³ Third, scholars have devoted attention to mapping the involvement of non-state actors in international organizations.⁴ But why would states support such inclusion in an IO?

Largely absent from this literature is scholarship which address why IOs give access to non-state actors. A few scholars however have begun to explore the question of why IOs are designed to include non-state actor access.⁵ Those scholars who have asked this question tend to focus on functionalist accounts for IOs grant non-state actors access.⁶ While such explanations have merit, there is a tendency for the state to be neglected. As member states are often the actual decision-makers on granting non-state actors access, there is good reason to consider the role of the state in making such design choices.⁷ I aim to 'bring the state back in' by focusing on state preferences. Also, in contrast to the functionalist accounts, I claim socialization processes contribute to the formation of state preferences. Using the case of the WTO dispute settlement mechanism and *amicus curiae* submissions, I show that state preferences on the participation of non-state actors are a result of mimicking devices and imitation of existing international organization to which the state is party.

¹ For a review of this literature, see Risse 2002.

² Keck and Sikkink 1998; Boli and Thomas 1999; Florini 2000; Risse, Ropp and Sikkink 1999; Price 1998.

³ Raustiala 1997; Haas 1992; Finnemore 1999; Finnemore 1996; Finnemore and Sikkink 1998; Raustiala 2003.

⁴ Boli and Thomas 1999; Clark, Friedman and Hochstetler 1998; Steffek, Kissling and Nanz 2008.

⁵ Alter *ibid.*; Koremenos 2008; Raustiala 1997; Raustiala 2003; Tallberg forthcoming.

⁶ Alter 2006; Raustiala 2003.

⁷ Member states are not always the actors to make such decisions. Sometimes a body of the IO can make such a decision. For example, *amicus curiae* were granted access to the DSM by Appellate Body.

Moreover, in contrast to existing literature that explores the WTO dispute settlement system, I focus on design choice. To date, scholars have been largely focused on examining the consequences of greater legalization of the WTO compared to the GATT. Scholars have sought to explain state usage of the WTO's DSM, especially in comparison to the dispute process under the GATT.⁸ In addition, some scholars have explored whether the design of the WTO system contributes to compliance and how so. (Zangl 2008, 825-854; Rosendorff 2005, 389-400) Given this literature's findings on the consequences of legalization, this paper's contribution is to explain why states would opt to further legalize the WTO dispute settlement process.

The central question of what shapes state preferences is explored through three theoretical accounts. First, state preferences may be shaped by the expected costs and benefits of amicus submissions and the state's ability to manage costs to reap benefits. Second, state preferences may be shaped by a commitment to a democratic norm of participation. Third, state preferences may be shaped by mimicking devices and thus construct preferences based on imitating design features of other international organizations to which the state is a member. I will consider each of these below.

Cost Management to Reap Benefits

State preferences may be a product of the expected costs and benefits associated with amicus curiae submissions. Institutional design features provide expected benefits to states. Decisions to include features such as delegation to a supranational entity, legalization, and access for private actors accordingly can be explained by looking at the expected benefits provided by these features. Some of the general benefits for allowing for non-state actors to participate within an IOs governing processes include greater technical expertise for problem

⁸ Busch, Reinhardt and Shaffer 2009; Kim 2008

¹⁰ Raustiala 1997.

solving,¹⁰ and ‘fire alarms’ which disincentivize opportunism and improve compliance.¹¹ In addition, amicus curiae submissions increase legalization, which enhances the certainty of outcomes and decreases information costs by providing legal arguments, legal facts and general expertise. Scholarship has demonstrated these benefits of amicus submission in the context of various international legal systems.¹²

While amicus curiae submissions and other design feature have anticipated benefits for states, increased costs can arise. For example, increasing the number of actors to a WTO dispute, such as third parties, causes dispute settlement to be more burdensome for disputants and less likely to result in settlement.¹³ Similarly, amicus submissions necessitate that states put additional time, money and expertise into responding to arguments and facts provided by amicus curiae. Thus, amicus curiae can incur higher procedural costs for states.

The costs and benefits associated with amicus curiae submission may have divergent effects on states based on their capacities to manage these additional costs and thus reap the benefits. Scholars have shown that differences in state use of the WTO dispute settlement can be explained by states’ capacity to manage costs. Kim argues that the state usage of the DSM can be explained by the material capacity of the state to manage the costs of increased legalization found in the WTO system compared to the GATT.¹⁴ Developed states are more inclined than developing states to use the WTO dispute settlement mechanism because developed states are more able to manage the costs of legalization. At the same time, the legal capacity of a state contributes to its level of participation in WTO dispute settlement.¹⁵ In all, states that use the WTO’s DSM more are more capable of managing the costs. We would therefore expect that the more a state uses the DSM, the more it will be able to manage

¹¹ Raustiala 2003; McCall Smith 2000.

¹² Williams and Woolaver 2006

¹³ Busch and Reinhardt 2006

¹⁴ Kim 2008

¹⁵ Busch, Reinhardt and Shaffer 2009

the costs and reap the benefits of amicus curiae submissions. Thus, states that more frequently use the DSM will be more willing to prefer the inclusion of amicus submissions.

Hypothesis 1: The more that a state uses the DSM, the more likely it will be to prefer non-state actors' access to an international organization.

Commitment to democratic norms

Rationalist approaches are not necessarily the only way to explain the design of international organizations.¹⁶ Rather, we might be able to derive an explanation drawing from our knowledge of norms and socialization in world politics. An extensive body of literature on international norms has developed. More importantly, this literature has shown that norms affect states' behavior.¹⁷ States' views on the design features of international organizations are also likely to be shaped by norms. Accordingly, state preferences on institutional design may be constructed by norms on what is believed to be an appropriate form of governance.

State preferences for amicus curiae submission may be shaped by a commitment to democratic norms and out of concern for the 'democratic deficit.' Citizens, scholars and politicians alike have debated whether IOs lack democratic legitimacy.¹⁸ This debate has revolved around questions of whether IOs adequately provide for democratic accountability, transparency and participation. In general, public participation in the WTO is limited. Scholars have mapped the involvement of non-state actors in the WTO and for the most part have found that the WTO in this regard is a relatively closed IO.¹⁹ For example, NGOs do not have direct access to the WTO's committees.

¹⁶ Wendt 2001.

¹⁷ Klotz 1995; Risse, Ropp and Sikkink 1999; Keck and Sikkink 1998; Finnemore and Sikkink 1998; Price 1998; Checkel 1999.

¹⁸ Dahl 1999; Scharpf 1999; Moravcsik 2004; Follesdal and Hix 2006; Held and Koenig-Archibugi 2005.

¹⁹ For example see O'Brien, Goetz, Scholte and Williams 2000; Steffek and Ehling 2008; Charnovitz 2000.

Legal processes may be one particular avenue for facilitating the participation of non-state actors and thus minimizing the democratic deficit.²⁰ For example, some dispute resolution processes in IOs allow for direct private access. Another possibility is to allow non-state actors to submit amicus curiae briefs, which has been considered by WTO members. A state's preference regarding amicus curiae briefs may be shaped not by the costs and benefits, but rather out of a commitment to democratic norms, of which participation is paramount. Out of concern for the democratic deficit that exists within the WTO, states who do have a commitment to democratic norms are likely to prefer greater participation of non-state actors in the WTO.

Accordingly, the source of the normative commitment of states to democratic participation derives from domestic norms. As Joppke argues, international norms begin as domestic norms, which can diffuse to become international.²¹ States that embrace the norms of democratic participation in domestic politics will be more likely to be committed to democratic norms at the international level. Thus, democratic states are thus more likely to be proponents of democratic processes in international organizations, such as the supporting the allowing amicus curiae submissions and other forms of public participation in the WTO.

Hypothesis 2: The more democratic a state is, the more likely it will be to prefer non-state actors' access to an international organization.

Imitation of existing international organizations

Normative suasion is not the only socialization mechanism to affect state preferences. In fact, various socialization mechanisms can affect the behavior and preferences of states and state agents.²² State preferences with regards to the participation of non-state actors may not be a matter of normative commitment to democratic norms derived from domestic norms, but rather a result of imitation. States face a high degree of uncertainty when deciding whether to

²⁰ Cichowski 2006

²¹ Joppke 2001

²² Checkel 2005

allow access to non-state actors. For example, amicus curiae submissions will have different costs and benefits on a case-by-case basis. The cumulative effects for each individual state are beyond the state's capacity to rationally predict. Left with such uncertainty, states will tend to rely on mimicking devices to construct their preferences.²³

States will look to existing institutions for models to imitate. Specifically, state preferences will be influenced by existing IOs that they perceive to be successful, appropriate and legitimate. Scholars have shown that international organizations can serve as forums of socialization.²⁴ International organizations' socialization effects can affect state behavior and practices domestically.²⁵ It is also likely that socialization effects can extend to state preferences on international cooperation. State participation in international organizations teaches states what institutional design features work and familiarizes them with the costs and benefits as well as what is viewed as appropriate and legitimate. In other terms, state preferences are a result of Bayesian updating that occurs from prior experience in international organizations and a degree of bounded rationality leads states to rely on socialization mechanisms of imitation. Rather than expressly being a result of a normative commitment or careful assessment of cost benefit calculations, states are likely to determine their preferences according to what has been done and tried with success. Moreover, states are likely to imitate organizations which they have been engaged as members. Thus, state preferences may be shaped by mimicking devices, such that states seek to imitate other international organization to which there are members. Accordingly, we would expect states preferences on amicus curiae submissions to be derived from their experiences with other international organizations.

Hypothesis 3: States who are members to international organizations with higher degrees of legalization and access to private parties will be more likely to prefer non-state actors' access to an international organization.

²³ DiMaggio and Powell 1983

²⁴ Checkel 2005

²⁵ Risse, Ropp and Sikkink 1999; Gheciu 2005; Greenhill 2010

PUBLIC PARTICIPATION AND THE WTO DISPUTE SETTLEMENT PROCESS

One of the key differences between GATT and the WTO is the Dispute Settlement Mechanism (DSM), which was formalized through the Dispute Settlement Understanding (DSU) of the Uruguay Rounds. Unlike GATT, the WTO's dispute process is more structured, has fixed timetables for dispute resolution, and rulings are automatically adopted (unless all WTO members agree to block the ruling). Any member state can make a complaint against another member state for supposedly violating a WTO rule. The DSM includes four general phases. The first phase is consultation, during which disputing states engage in talks to try to resolve the dispute. If consultation does not resolve the dispute, the second phase is panel review. The DSB appoints a panel of three experts to adjudicate the dispute by evaluating and hearing each side's arguments. The panel then issues its findings as a report. The Dispute Settlement Body (DSB), which is comprised of all member states, either approves or rejects the panel's report. The third phase is an appeal. If one of the state parties is dissatisfied with the panels' decision, it can appeal to the Appellate Body (AB), which then issues another report which can be approved or rejected by the DSB. The fourth phase is implementation of the DSM findings—which when compliance does not occur, states negotiate compensation, and if states cannot agree on compensations, the DSM can impose sanctions.²⁶

“Amicus curiae” is the Latin term for “friends of the court.” An amicus submission presents a non-dispute with the opportunity to offer information and advice on a legal dispute to the convening authority (e.g., judge, panel, mediator, etc.). An amicus submission can include both factual information and legal arguments. Amicus curiae submissions can be filed during the second and third phase of the DSM (that is, during the panel and appeal process). Amicus are not engage in the consultation process, during which the majority of

²⁶ World Trade Organization .

disputes are resolved.²⁷ My data collection reveals that amicus submissions are filed in only a small number of disputes and rarely are taken into consideration by the panel or AB.²⁸

Similar to Busch's data which included disputes through 2002, my data shows that disputes through 2009 that the majority of disputes are resolved or settled during consultation. Out of 369 disputes that have been initiated through the DSM, 156 have reached the panel phase. Moreover, amicus curiae submissions are made in a small percentage of these disputes (21%). Out of the 156 disputes that reach the review phase, only 32 disputes have elicited amicus submission directly to the panel or appeal body. Moreover, the panel has declined to take amicus curiae submissions into consideration in all disputes in which they have been submitted. A range of actors have submitted amicus briefs to the WTO's DSM, including NGOs, scholars and industry associations.

Despite the limited use of the amicus curiae submissions, amicus curiae submissions have been a controversial aspect of the DSM. In part the controversy arose from the fact that the DSU does not explicitly provide for the inclusion of amicus curiae. Rather it was the AB itself which decided that amicus curiae could be introduced. The AB found that both panels and the AB itself had the authority to accept submissions. In the 1998 *US-Shrimp Appellate Report*, the AB found that Article 13 of the DSU gave panels the authority to receive, review and ignore information, including from non-state actors, regardless of whether such information was solicited.²⁹ The AB went further, and in the 2000 *British Steel Appellate Report* the AB ruled that it also has authority to accept and consider amicus submissions.³⁰ In

²⁷ Busch and Reinhardt 2006

²⁸ I have constructed a database of WTO disputes that were initiated through the DSM between 1994 to 2009. This database records core facts of the disputes, including dates, parties and disputed agreements, as well as whether amicus curiae were filed, by whom and how the panel or AB responded to the submission. The data represented here are collected using the WTO's website on the disputes. I use this database for this discussion.

²⁹ WTO Appellate Body Report, U.S. – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, para 105-108. (October 12, 1998). Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (Accessed March 9, 2010).

³⁰ WTO Appellate Body Report, U.S. - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (May 10, 2000). Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds138_e.htm (Accessed March 9, 2010).

anticipation of numerous amicus submissions in the *Asbestos* dispute, the AB established a procedure for receiving submissions. Following the *Asbestos* dispute, the WTO General Council held a special session on November 22, 2000 to discuss the amicus procedure adopted by the AB. During this session, states overwhelmingly expressed disapproval with the DSM's acceptance of amicus curiae submissions. The session concluded that the AB "should exercise extreme caution in future cases until Members had considered what rules were needed."³¹

When the states agreed on the DSU in 1994, they also agreed that in five years time they would complete a review of the DSU. The debate over the amicus submission continued during the review, which began in 1999 and failed to conclude. The Doha Ministerial Declaration then mandated negotiations on the improvement of the DSU would be extended and completed by 2003. After the new 2003 deadline passed without conclusion of the negotiations, the deadline was not extended and now has an undefined deadline. It is the negotiations which are the focus of the empirical case. Looking at the various proposals submitted by states and minutes from the negotiation meetings, I evaluate states' preferences on amicus curiae submissions.³² The following section summarizes the preferences of states that were expressed during the negotiation process. I then apply the theoretical hypotheses to the negotiations on the WTO's Dispute Settlement Understanding.

State's Preferences on Amicus Curiae

States' preferences on amicus curiae submissions take three forms. First, some states prefer the status quo, where the panel and/or Appellate Body determine themselves whether to accept amicus submissions on a case by case basis. Second, some states reject the status quo

³¹ WTO General Council, Minutes of the WTO General Council Meeting, WT/GC/M60, para. 121 (Nov 22, 2002). Available at http://www.wto.org/english/thewto_e/gcouncil_e/gcouncil_e.htm (Accessed March 9, 2010). For an overview on the WTO's history with amicus curiae submissions see, Umbricht 2001.

³² All negotiation documents publicly accessible through the WTO's website were included in this analysis. See World Trade Organization.

and support more restrictive rules on submissions, where non-state actors could only give information which is solicited by a body of the DSM. Third, there are states that prefer to develop a procedure that would allow for submissions in any case, or less restrictive rules on amicus curiae. Less restrictive preferences includes states who express a desire to have consensus-formed rules, as opposed to a DSM developed rules. I include these latter preferences as less restrictive because having a consensus formed procedures implies an acceptance of amicus curiae briefs. Table 1 below summarizes the preferences of states on both amicus curiae submissions. As Table 1 shows, the most obvious trend in states' preferences is a global North-South divide.

Table 1: Views of States on Public Participation*

States (or groups of states)	
<u>Amicus Submissions</u>	
Status Quo	<i>Taiwan, Costa Rica, Mexico, Switzerland</i>
More Restrictive	<i>Africa Group**, Brazil, Chile, China, Colombia, Cuba, Ecuador, Egypt, Hong Kong, Honduras, India, Indonesia, Jamaica, Malaysia, Pakistan, Peru, Singapore, Sri Lanka, Tanzania, Turkey, Uruguay, Zimbabwe</i>
Less Restrictive	<i>Canada, EC***, US, Bulgaria, Hungary, Japan, Jordan, Norway</i>

* States are only listed if their view is expressed in the negotiations. Other states did participate in the negotiations.

**Africa Group includes: Angola, Benin, Botswana, Burkina Faso, Burundi, Côte d'Ivoire, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Djibouti, Egypt, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

*** During most of the negotiations, the EC consists of the EU15: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and United Kingdom.

Note: States in bold-face type are more expressive of the relevant view.

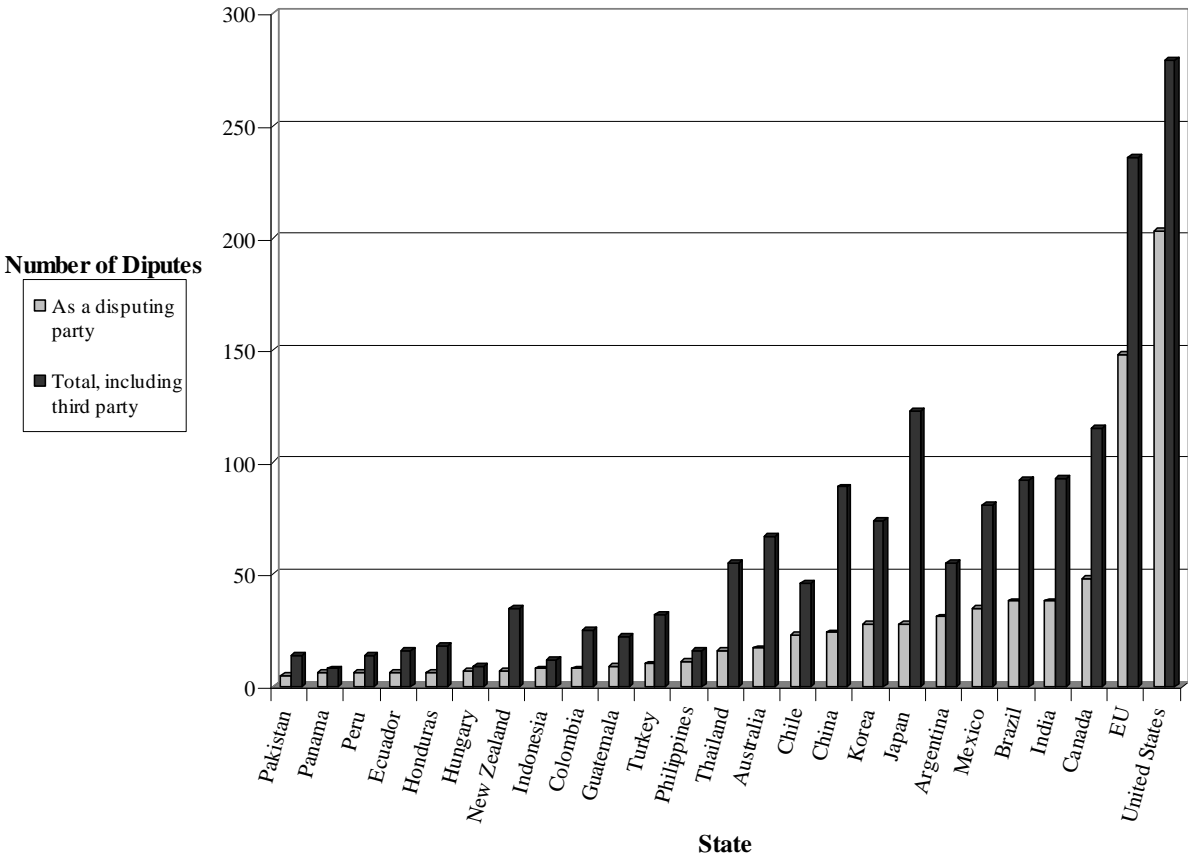
The most expressive opponents of amicus curiae submissions are India and Indonesia, yet other opponents are Asian and Latin American states and the Africa Group. On the other hand, the states most supportive of amicus curiae submissions were the EC (or the European

Union), US, and Canada. In general, we can say that the preferences of states have a strong regional affinity.

Cost Management to Reap Benefits

A state’s capacity to manage costs to reap the benefits of amicus submissions, as measured by the extent to which a state uses the DSM, correlates with the preferences of many states. As expected by hypothesis 1, the most ardent supporters of amicus curiae submissions are states that are among the most active users of the DSM. Figure 1 below illustrates what states have used the dispute settlement process the most.

Figure 1: State usage of dispute settlement process—number of disputes by country*



*Includes only those states which were a direct party to at least 5 disputes.
 Source: Data collected and summarized by researcher using member state information available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Accessed February 2009).

As the figure illustrates, state involvement can be assessed by whether a state is a direct party to a dispute, as either a complainant or a respondent. States can also be third parties to a dispute as an interested party. In Figure 1, the darker bars depict the cumulative number of disputes in which the given state is a party, including either as a direct or third party. The lighter bars depict the number of disputes in which the state is a direct party. The US, the EU and Canada are the most active users of the DSM and they were also proponents of amicus curiae submissions. In addition, states that rarely use the DSM (not depicted in the figure because they have not used the DSM) prefer more restrictive measure on amicus submissions. For example, the Africa Groups member states have only very minimally used the DSM and as expected prefer that amicus not be allowed.

Cost management however does not correlate with the preferences for all states, including India and Brazil. Both India and Brazil are active users of the DSM, and yet they do not support the inclusion of amicus curiae submissions. In fact, India has been one of the most outspoken opponents of amicus submissions and at the same time it is the fourth most frequent disputant.

Commitment to Democratic Norms

A commitment to democratic norms can help to explain in part why states may or may not support amicus curiae submissions. According to the expectation stated in hypothesis 2, the more democratic a state is, the more likely it will be to prefer amicus curiae submissions. At the same time, non-democracies or weaker democracies should be supportive of more restrictive rules on amicus curiae submissions. Using POLITY scores as a measure of how democratic a state is, this correlation is only partially supported by data. Table 2 below records the POLITY score for member states grouped by their preferences on amicus curiae submissions.

Table 2: Regime type of states grouped by preference on amicus submissions

	<u>POLITY SCORE (+10 to -10)</u>
Less Restrictive	
Canada	10
EC	9.9 (average)
US	10
Bulgaria	9
Hungary	10
Japan	10
Jordan	-2
Norway	10
Status Quo	
Taiwan	9
Costa Rica	10
Mexico	8
Switzerland	10
More restrictive	
Africa Group	2.3 (average)
Brazil	8
Chile	9
China	-7
Colombia	7
Cuba	-7
Ecuador	6
Egypt	-6
Hong Kong	No score
Honduras	7
India	9
Indonesia	6
Jamaica	9
Malaysia	3
Pakistan	-5
Peru	9
Singapore	-2
Sri Lanka	6
Tanzania	-1
Turkey	7
Uruguay	10
Zimbabwe	-4

* States are only listed if their view is expressed in the negotiations.

**Africa Group includes: Angola, Benin, Botswana, Burkina Faso, Burundi, Côte d'Ivoire, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Djibouti, Egypt, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

*** During most of the negotiations, the EC was the EU15: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and UK.

Source: POLITY IV. <http://www.systemicpeace.org/inscr/p4v2009.xls> (Accessed August 2010).

The POLITY score measures democracy on balance along a scale from +10 to -10, where +10 is democracy and -10 is autocracy. As we can see from Table 2, those states that support the inclusion of amicus curiae (less restrictive) tend to have high democracy scores. In fact, states that prefer less restrictive rules on amicus submissions have POLITY scores of 10 with the exception of Jordan. Conversely, those states that prefer more restrictions on amicus curiae submission have lower scores. On average, states that prefer more restrictions on amicus submissions average a POLITY score of 3.2. Thus, as expected by hypothesis proponents tend to be more democratic than those that object to amicus submissions.

While this correlation holds in many instances, there are some notable exceptions. For instance, some democratic states do not support amicus submissions, including India, Chile, and Uruguay. In addition, there are some surprising omissions that we might expect if a commitment to democratic norms explained state preferences. For example, Australia and New Zealand remained silent during the negotiations, yet both of these states are strong democracies (both have POLITY scores of +10). If a commitment to democratic norms alone explained state preferences, it is likely that more democratic states would be expressively supportive of inclusive procedures in the WTO. In all, a commitment to democratic norms cannot be a full explanation for how state preferences are formed.

Imitation of existing international organizations

According to hypothesis 3, we expect that states that are members to international organizations with higher degrees of legalization and access for private parties will be more likely to prefer non-state actors' access to an international organization. Thus, states preferences will be formed by a desire to imitate existing IOs which they perceive to be successful and/or legitimate. To examine this hypothesis, I look at similar IOs, or trade-base IOs to see what institutional features exist to inform state preferences. More specifically, I

look at regional trade IOs. Regional trade IOs are likely to have a large socializing effect because interactions between states are most profound at the regional level. The regional trade organizations that I include are those that existed and operated prior to 2002. These organizations are: ANZCERTA, APEC, ASEAN, MERCUSOR, Andean Community, Central American Common Market, NAFTA, and European Union. I also refer briefly to African trade agreements.

As stated previously, there is an important regional dimension that appears when looking at the grouping of state preferences on amicus curiae submissions. Namely, Asian, Latin American and African states are opponents to greater inclusiveness while Europe and North America are supportive of amicus curiae submissions. At the same time, there are some important differences in how states have built regional institutions. The parallels between regional trade IOs and the states preferences on amicus curiae submissions show an important correlation. Member states of regional trade IOs which are more legalized and have procedures allowing private parties access were more likely to promote the inclusion of amicus curiae briefs.

Scholars have shown that the North-American-European model of regionalism and the Asian model of regionalism differ in significant ways. Using the secondary literature, we can begin to trace states' preferences on the DSM to these different models of regionalism. More specifically, legalism in regional IOs differs significantly. Legalistic processes that include non-state actors have been important to North American and European regional governance models. In contrast, Asian organizations have minimal legalization and participation for non-state actors in legal processes (if they exist). Asian regionalism entails dispute settlement processes that are less legalistic compared to US-European models.³³ For example, ASEAN

³³ Acharya 1997, Kahler 2000.

did not until 2008 have a dispute settlement process. Rather legalism in world politics is in many ways an American-European approach to multilateralism.

Table 3 below illustrates that there are important differences in regional experiences with legalization and the inclusion of non-state actors in legal processes.³⁴

Table 3: Degree of Legalism and Private Access in Regional Trade Agreements in 2002*

	Member States**	Degree of Legalism	Private Access
ANZCERTA	Australia, New Zealand	None	n/a
APEC	Australia, Brunei, Canada, Chile, People's Republic of China, Hong Kong, China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Taiwan, Thailand, US, Viet Nam	None	n/a
ASEAN Free Trade Area	Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Burma	Low	n/a
MERCOSUR	Argentina, Brazil, Paraguay, Uruguay (Chile and Bolivia are associate members)	Medium	
Andean Community	Bolivia, Columbia, Ecuador, Peru, Venezuela	Very High	X
Central American Common Market	El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica	Very High	X
NAFTA	US, Canada and Mexico	Medium	X
EC	Austria, Belgium Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, UK	Very High	X

Source: (Alter 2006, 22-49; McCall Smith 2000, 137-180)

* Only regional trade agreement in Asia, North American, the EU and Latin America are included. For others, see source.

**Listed member states include those that were members during the 2002 when most of the negotiation regarding the WTO's DSM transpired.

³⁴ McCall Smith 2000.

As illustrated by Table 3, there are important differences between European/American and Asian regional trade agreements. First, drawing from the work of James McCall Smith, we can see that European/American trade organizations are highly legalistic.

Conversely, the Asian organizations have low legalism, which helps to account for the opposition by Asian states to greater public participation in the WTO's DSM. This is because *amicus curiae* processes can make a dispute settlement process more legalistic by incorporating another formal legal process and enhancing adversarialism in the process. Moreover, legalism is increased by allowing for non-state actors to have access to the court, or to give them legal standing as a direct party. The inclusion of private actors differs by regional organizations' legal processes, which is also depicted in Table 2 and summarizes findings by Karen Alter.³⁵ Private access to international courts is fairly widespread among courts in Europe and North and South America.³⁶ Conversely, Asian states have not experienced highly legalized process in regional affairs that include the participation of non-state actors.

Moreover, as Table 3 shows private access to legal processes are not included in Asian regionalism. Some of the states of the Americas which object to greater participation similarly have less legalism in their experiences with regionalism, such as Mercusor members Uruguay and Brazil. In addition, Chile and India are not members to a regional trade IO, limiting their experience to formulate a positive view on legalization and access to private actors in legal proceedings. As such, Chile and India are inclined to stick with what they know—that is, less legalization. Moreover, despite being active participants in the negotiations Australia and New Zealand did not express an interest in extending *amicus curiae* submissions or opening hearings to public access, which seems to correlate with the regionalism between these two states through ANZCERTA.

³⁵ Alter 2006.

³⁶ *Ibid.*

Similarly, African states, as voiced by the Africa Group during the negotiations, were opposed to amicus curiae submissions and open panel hearings. These states also have weak experiences with high legalization at the regional level. Legalization of African regional organizations is extensive. However, most of these organizations are newer or their legal processes are newly adopted and operational. Even though many of the African regional courts permit private access and high legalism, their newness limits the degree of socialization that these states have with the legalization to see it as either successful or legitimate and thus are not as likely imitate.

In addition to rules on private access and general measures of legalization, state preferences of the supporters of amicus curiae submissions correspond with the practice of allowing amicus curiae at the regional level. For example, the EU's European Court of Justice allows amicus curiae submissions. Article 40 of the Statute of the Court of Justice of the European Union gives individuals the right to intervene in a case before the Court.³⁹ Likewise, NAFTA, which since 2001 allows amicus submissions in Chapter 11 proceedings, provides a model for the US and Canada (as well as Mexico) to imitate.⁴⁰

In all, we can see that there is an important relationship between states preferences as expressed during the negotiations to reform the WTO DSM and the regional trade organizations legal processes. The regional trade communities to which states are member offer models for mimicking. Given the inability to fully anticipate the costs and benefits of amicus curiae submissions, states turn to models they are familiar with and know has worked for them and thus form their preferences by imitation.

³⁹ The right to intervene is the same as a right to serve as an amicus curiae. Available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf (Accessed March 15, 2010).

⁴⁰ Dumberry 2001

The social process of imitation helps us to understand the states' preferences with regards to the inclusion of non-state actors in the WTO's dispute process through amicus curiae submissions. However, the above analysis shows that a commitment to democratic norms and management of costs can also help to account for some of variation in state preferences. Rather than one factor explaining all variation, the analysis suggests these accounts are complementary. Moreover, it illustrates that a rationalist approach itself cannot account for state preferences alone. In negotiation design features, states preferences are informed also by social mechanisms such as normative commitments and imitation.

CONCLUSION

The intention of this paper has been to question and explore decisions to opening access to non-state actors in international organizations. The WTO has been relatively closed, and yet states have debated provision for greater public participation. For this reason, the WTO's DSM provides a window for asking how and what shapes state preferences on non-state actors' participation and access to international organizations' governing processes.

Design features, including rules on the inclusion of non-state actors, are a result of two causal pathways. The first causal pathway, which I explore here, is that of state made decisions to incorporate design features that will allow for civil society participation. The second causal pathway that affects the inclusion of non-state actors and helps to explain design features of international organizations are supranational made decisions. Often times the international organizations institutions can use their own authority to alter the rules of the organization and ultimately transform certain design elements of an institution. This has been argued extensively with regards to the European Union. In the case of the WTO's DSM, this causal pathway may offer a more compelling account for why the DSM has allowed for some non-state actor access through the form of amicus curiae submissions and open panel

hearings. While this second pathway is often critical to the change in the design features of an IO, the first causal pathway via state made decisions is however equally important to understand as states have initial and final say over questions of non-state actor participation and other such aspect of an IOs design. Existing literature has often neglected this first pathway and lost sight of the state.

Taking states into account, I have shown that both the logic of consequences and the logic of appropriateness play a role in shaping state preferences. State preferences are in part explained by their ability to manage the costs and thus reap the benefits of allowing non-state actors the ability to submit *amicus curiae* submissions. Moreover, a normative commitment to democratic participation is likely to inform the preferences of states. Most importantly, state preferences are informed by existing international organizations and their legal processes. Unable to fully anticipate costs and benefits, states turn to prior experience and seek out models that they perceive as successful and legitimate. For most states, regional trade organizations serve as these models. Their preferences are thus shaped by imitating these models.

Last, this paper has important implications for further research. A more extensive cataloguing of *amicus curiae* submissions across regional trade organizations would further inform how important imitation is to shaping state preferences. In addition, a more systematic methodology of interviews would also further enhance this project. More importantly, this research has broader implications for research on institutional design. Further research is needed to understand why IOs open their doors to non-state actors. This paper suggests that we must not lose sight of the state in this process.

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