

The Politics of Precedent in International Law: A Social Network Application*

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Abstract

There is no formal binding precedent in international law. Yet, as this article demonstrates, countries nonetheless expend considerable resources in seeking to shape legal precedent. Looking at the international trade regime, I show that while some disputes are initiated to gain market access in response to domestic interests, others are filed primarily to build favorable precedent for future cases of greater commercial value. I construct an original dataset consisting of the network of all rulings spanning the WTO period, and the cases they cite. I analyze this network to provide systematic evidence for the existence of “test cases” in international law: countries initiate commercially unimportant disputes to shape legal precedent to their advantage. And wealthy countries with high legal capacity are significantly better able to do so. While the existence of binding precedent in international law remains a point of continuous debate, countries observably behave in a manner consistent with its existence.

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1 Introduction

The notion of precedent amounts to a puzzling causal relationship. A past decision constrains a current one—not because the past action proved especially wise in hindsight, but simply because it was taken beforehand. And while the concept of precedent is fundamental to domestic law, especially in Anglo-American common law systems, it has no formal authority in international law. Legal scholars point to Article 59 of the International Court of Justice Statute in this respect, according to which international legal rulings are binding only on the parties in the dispute at hand, and have no bearing on matters outside of the particular case.

What this article seeks to demonstrate is that despite the total absence of an institutionalized function, and indeed, in spite of explicit refutations of its authority, both legal and political actors are inexorably drawn to precedent in international law. They act as though the constraint operated, even as formally, it does not. And this has important consequences for institutional change, and for who gains and loses from global rules, as state actors continue to shape the meaning of the rules through litigation, long after these rules have been formally agreed on.

The invocation of precedent, more broadly, is a fixture of the social world. Policymakers routinely invoke the risk of setting a “dangerous precedent” for the future to justify avoiding a path that would seem beneficial in the short run. Just as often, they look to the past, by claiming the need to “keep with established practice”. Even children instinctively draw on logics of precedent: breaking with past practice is invariably denounced as “unfair”. Yet political science, and international relations in particular, lack a good grasp of how precedent operates. The question is whether invoking precedent is merely a rhetorical move, or whether it actually shapes state behavior. The domain of international law represents an ideal laboratory to address this question. Its practitioners are trained to recognize and codify precedent, yet precedent holds no formal power over future decisions. It is thus a good setting in which to ask, what is the mechanism underlying precedent? And what are its implications for strategic state actors?

The methodological challenge in assessing the effect of precedent is the same as arises in the study of norms, to which the notion of precedent is often compared (Knight and Epstein, 1996). It is difficult to measure the degree to which precedent compels behavior, since in any given instance, there is little means of distinguishing sincere appeals to precedent from opportunistic ones. In the latter case, actions justified by reference to a precedent may well have taken place all the same without it. Theory suggests that the possibility of opportunistic invocation implies that some actors

must be genuinely swayed by this invocation—otherwise there would no room for opportunism.¹ Yet with precedent as with social norms, it remains difficult to assess whether on average, they affect behavior, or whether they are instead epiphenomenal.²

To get around this difficulty, this article looks for clues in the behavior of states, rather than judges. If precedent operates in international law, that is, if verdicts are driven by how similar legal questions were decided in the past, this should have an observable effect on countries' litigation strategies. Specifically, rational state actors would begin to value disputes not only in terms of how they resolved the matter at hand, but also in terms of how they reshaped the meaning of rules. We would then expect countries to strategically file (costly) disputes with a view to building precedent, rather than to simply challenge a specific violation. Such behavior would be consistent with the existence of binding precedent; in the alternative, it would make little sense for countries to invest in precedent that would hold no sway over the future.

I test these expectations in the realm of international trade law. The analytical benefit of trade law is that one can readily observe the commercial value of each dispute, by looking at the specific trade barriers being challenged. This allows me to separate the immediate value for the complainant of resolving the dispute from its long-term *precedential value*. Additionally, World Trade Organization (WTO) rules also explicitly deny the authority of precedent, further reinforcing the puzzle at the center of this article.³ Finally, the question of whether precedent is binding or not at the WTO has never been of greater consequence. With the Doha Round on ice, multilateral trade negotiations are at a standstill. What this means is that insofar as liberalization still occurs in the trade regime, it takes place through litigation (Steinberg, 2009; Goldstein and Steinberg, 2008). And if precedent holds authority in trade law, then countries could start litigating the questions they cannot legislate. In this respect, the present situation in the trade regime bears a strong resemblance to the EU in the 1970s, which was also characterized by a negotiating deadlock. There too, the courts, and the notion of precedent, emerged to to play a strong role in shaping the institution's evolution. I draw out this analogy in the conclusion.

I calculate the long-term precedential value of cases by relying on social network analysis. To do so, I construct an original dataset, consisting of the full network of all rulings adopted during the WTO period, and the cases they cite. The network approach allows me to observe how disputes relate to one another, and thus how a ruling impacts the legal regime's jurisprudence. A dispute's

¹Elster makes frequent use of this premise. See, for example, Elster (1989).

²See, for instance, Knight and Epstein (1996); Segal and Spaeth (1996).

³Article 3.2 of the DSU. See the discussion below, section 2.

precedential value is then proportional to (i) the number of times it is cited by other disputes initiated by the same complainant, and to (ii) the commercial significance of those citing disputes. In other words, precedential value denotes the exploitation of a dispute in subsequent high value cases filed by the same complainant.

The analysis presents two main findings, which together offer support for the article's theoretical expectations. First, there exists a category of WTO cases that countries file not for their immediate commercial value, but for their future precedential value. Such seminal cases, in accordance with domestic legal theory, tend to be commercially unimportant, and filed against smaller countries, yet they exert a disproportional effect on jurisprudence. And while countries set such precedents through low stakes cases, they then turn around and exploit them on high stakes disputes.

Secondly, the existence of such *de facto* binding precedent has observable distributional consequences: members such as the US and the EU are shown to be significantly more likely to file seminal cases which they subsequently exploit in commercially significant disputes. Insofar as litigation is a means of shaping the meaning of the rules, wealthy countries with high legal capacity appear to have a notable advantage in bending that meaning in their favor. In a twist that will be familiar to students of domestic law, when it comes to international rules, "the haves come out ahead".⁴

Precedent represents a causal relationship. One that political science should be well equipped to address, yet that it has largely ignored up to now. This is striking, given how frequently the concept of precedent is invoked in justifying social behavior. The question is whether such invocations have a real effect on behavior, or merely serve as rhetorical devices. This article addresses this question in a particular context, that of international trade law. Despite precedent having no formal authority in trade law, legal and political actors are inexorably drawn to it, and behave as if precedent were truly constraining. The remainder of this paper proceeds in four parts. Section 2 establishes what we already know about precedent, specifically in the context of trade law. Section 3 presents the theory, and an illustration of the argument using a series of cases filed by the EU. Section 4 tests these theoretical expectations, and section 5 concludes with a discussion of the findings' implications.

⁴See Galanter (1974).

2 Precedent in International Law: What Do We Know?

The doctrine of *stare decisis* states that “past decisions must stand”. The idea that similar cases must be decided in similar ways may be the fundamental belief underlying common law systems. By contrast, the ICJ Statute’s Article 59 states that “a decision of the ICJ has no binding force except between the parties and in respect of the particular case.” And although it applies technically only to the ICJ, the Statute is widely seen as embodying principles applicable to international law broadly held, and representing the fullest statement we have about the sources of international law (Ginsburg, 2005).

That there would be such reticence to allow for any measure of formal binding precedent in international law is hardly surprising. Countries are commonly resistant to making enforceable international commitments in the first place; binding precedent represents an important step in the direction of further delegation. Under binding precedent, the meaning of a home country’s obligations can be affected overnight as a result of an interpretation by foreign judges in a case involving foreign parties, and into which the home country may have had no input. And while on average, binding precedent constrains judicial activism, it also increases its reach in new areas of law where there is scarce jurisprudence to rely on.

This is not to say that international courts do not engage in the legal practice of citing past decisions. As Ginsburg (2005, 8) notes, even in the ICJ itself, 26% of cases decided between 1948 and 2002 cited past rulings. But as he goes on to concede, this does not mean that precedent had any influence on these verdicts.

Indeed, this same debate occurs in settings, such as the US Supreme Court, where the role of precedent is far more established than in international law, as attested to by an ambitious literature.⁵ Both Knight and Epstein (1996) and Segal and Spaeth (1996), for instance, agree that there exists a norm of *stare decisis* at the US Supreme Court; yet while Knight and Epstein (1996) argue that it constrains judicial positions, Segal and Spaeth (1996) disagree, claiming that it serves mostly as an *ex post* legitimation of legal opinions.

Other international and supranational courts exhibit similar ambiguity, at once denying the formal authority of precedent, while promoting the desirability of judicial consistency. The European Court of Justice, the EU’s constitutional court, also does not recognize precedent to be formally binding. But ECJ judges do “pay considerable attention to their earlier case-law” (Rosas, 2006,

⁵See, among others, Fowler and Jeon (2008); Fowler et al. (2007); Clark and Lauderdale (2012, 2010).

488).⁶ Attempting to strike this balance can result in convoluted language, as when ICJ Judge Shahabuddeen wrote that “the Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions” (Shahabuddeen, 2007, 132). The picture looks much the same in the European Court of Human Rights (ECHR), where, in its own words, “It is true that ... the Court is not bound by its previous judgments ... However, it usually follows and applies its own precedents”.⁷ This would seem a relatively low bar for precedential reasoning. In short, ambiguity remains as to the exact hold of past case law over current decisions, given how formally speaking, judges are not beholden to earlier rulings.

Despite continuing ambiguity over its role in practice, what binding precedent entails in principle, at least, is clear. If *stare decisis* holds, then there must be cases that would have been decided differently were it not for the existence of a past verdict. Specifically, a judge who would rule one way in isolation of past verdicts would rule another way because of those past decisions. This counterfactual is a difficult one to test, but given a sufficiently large caseload, a standing body of judges, and signed dissenting opinions, it could be tested for specific series of cases.⁸ Yet these conditions are met nowhere in international law.

It is equally clear what precedent is not. Precedent represents a causal relationship. If the underlying causality is spurious, then we are dealing with something other than binding precedent in the sense of this article. Two possible functions of past decisions, in particular, should not be conflated with the doctrine of *stare decisis*. First, precedent cannot amount to information-gathering about judges’ positions. In other words, continuity in rulings could simply be the result of consistent judicial preferences across time. In this way, precedents could simply serve as previews of the likely outcome of a subsequent verdict, without there needing to be any causal relation between verdicts. Secondly, precedential logic cannot be reduced to learning; indeed, it largely corresponds to its opposite. It may be that the consequences of decisions become clearer in hindsight. But precedent cannot simply be a means by which the good decisions of the past are selectively invoked, and repeated. Rather, the notion of precedent takes on its full meaning precisely when past

⁶ECJ scholars appear comfortable discussing the precedential implications of rulings, in a way that WTO scholars are less likely to do (see, for instance, Garrett, Kelemen and Schulz (1998)).

⁷European Court of Human Rights, Cossey Judgement, Sept. 27th, 1990. Series A, vol. 184, para 35.

⁸Given those requirements, such tests can for now only be performed in the context of domestic courts. In one such famous instance, US Supreme Court Justice Potter Stewart dissented from the majority in *Griswold v. Connecticut*, in 1965. The same issue of law, about a woman’s right to privacy, then came up in *Roe v. Wade*, eight years later, in 1973. And although Stewart presumably had not changed his own mind about the constitution’s treatment of the principle of privacy, this time he ruled with the majority (Schauer, 2008). Such natural tests are hard to come by in international law.

decisions are demonstrably deficient: it is then that the causal relation faces its hardest test.⁹

2.1 Precedent in the Trade Regime

As in the rest of international law, there is broad consensus over the absence of formal binding precedent at the WTO. The panel in *US—Zeroing* says as much in a recent ruling: “In our view, there is not a system of precedent within the WTO dispute settlement system and panels are not bound by Appellate Body reasoning.”¹⁰ Even insofar as international law could allow for a recognition of binding precedent, the Appellate Body, the WTO’s higher court, has explicitly ruled out these options. In this way, the panel in *Japan—Alcoholic Beverages II* attempted to argue that past rulings comprised “subsequent practice” within the meaning of the Vienna Convention on the Law of Treaties—to which the WTO Agreement is subject—in which case past rulings would become a source of law. The AB forcefully disagreed, arguing that the contracting parties did not intend for panels’ rulings to become definite interpretations of the rules.¹¹ Similar denials of binding precedent are also found elsewhere in WTO law. Presciently, Article 3.2 of the Dispute Settlement Understanding (DSU) reads: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” The intent could not be less ambiguous: judicial rulings should not change the meaning of countries’ commitments under the agreement.¹²

Yet these same judges appear able to tolerate some disparity between legal status and practice. When the aforementioned panel in *US—Zeroing* declared that there was no system of precedent in the WTO, it went on in the same breath to cite the AB in what may be the clearest encapsulation of the status of precedent in the institution:

“...we agree with Korea that adopted reports create legitimate expectations among

⁹In the UK’s House of Lords, for instance, “a mere doubt about the correctness of a previous decision does not justify departure [from precedent].” *Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)*, 1977. cited in: Third Party Submission by the European Communities, 2007, DS344.

¹⁰*US—Zeroing*, WT/DS402/R, 7.31.

¹¹The AB pointed to the exclusionary formulation of Article IX:2 of the WTO Agreement, according to which “[t]he Ministerial Conference and the General Council shall have the *exclusive authority* to adopt interpretations”. (emphasis added).

¹²The WTO texts themselves create another opening for formal *stare decisis*, which the AB also closed off. The GATT 1994 Agreement views “decisions of the Contracting Parties” as forming part of the Agreement (Article 1(b)(iv)). And since all panel reports need to be adopted by members, one could claim this adoption constitutes such a decision. In this way, the panel in *Japan—Alcoholic Beverages II* reasoned that members’ “decision” in adopting a panel report meant that adopted reports became part of the Agreement. Here too, the AB balked, stating that while rulings *are* an important part of the *acquis*, they are not decisions in the sense of Article 1(b)(iv). Interestingly, Palmeter and Mavroidis (2004, 53), an authoritative voice on the subject, concede that the effective difference between the panel’s interpretation and the AB’s harried denial of it is “difficult to detect”, and that the disagreement is largely semantic.

WTO Members¹³ and that ‘following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same’¹⁴

Along these same lines, a former AB judge has commented: “...the basis by which panels and the Appellate Body decide cases is substantially formulated on precedents. Indeed, the ‘common law’ approach has become the predominant feature of WTO law *although there is no formal* ‘stare decisis’ *doctrine.*”¹⁵

What the combination of views on precedent’s role in practice and the consistent denials of its formal authority actually result in remains unclear. It is this gap between principle and practice that this article seeks to explore empirically. If precedent changes state expectations, then it will have an effect on behavior, no matter what its formal status may be.

Yet the literature considering the implications of this far-reaching fact for country behavior is limited. While many legal scholars have followed in the footsteps of Bhala (1998) in distinguishing between *de jure* and *de facto* stare decisis, and suggesting that the WTO features the latter, few studies have considered the implications of such a *de facto* constraint. Among these, Busch (2007) claims that the incentive to set a precedent multilaterally leads NAFTA members to file at the WTO instead of NAFTA, even as NAFTA law may offer a more favorable verdict on a case’s merits. More recently, Davis (2012) considers the spillover effects flowing from precedent, asking whether countries internalize rulings sufficiently in disputes to which they are not party to modify their own domestic legislation accordingly.

And some anecdotal evidence hints at countries employing the kind of strategy this article seeks to identify. As Simmons and Guzman (2005, 567) mention in passing, powerful countries are more likely to initiate WTO cases with “long term precedential value”, without going further into how we would know this were happening. Closest to this article’s line of argument, Porges (2003) claims that a “government may have as its objective the establishment of a legal precedent rather than any particular commercial outcome.” Here, I use a novel empirical approach, applied for the first time to the WTO setting, to evaluate whether these claims can be verified.

¹³The phrase “legitimate expectation” comes up frequently: see Appellate Body Reports, *Japan–Alcoholic Beverages II*, p. 14; *US–Shrimp (Article 21.5 Malaysia)*, paras. 108-109; and *US–Softwood Lumber V*, paras. 109-112.

¹⁴Panel’s own citation: Appellate Body Report, *US–Oil Country Tubular Goods Sunset Reviews*, para. 188.” in *US–Zeroing*, WT/DS402/R, 7.31.

¹⁵Cited in: Palmeter and Mavroidis (2004, 56), emphasis added.

3 Argument

The defining features of WTO law is that it is decentralized, and that it allows no private standing. In other words, the institution has no central prosecutorial function: a case only arises if a country initiates it. And only states can be parties to a dispute; private industry has no formal role in the process, even as it is the one affected by the policies being challenged. The premise behind the argument is that the way to get at the effect of precedent on state behavior is to examine the filing decision: which disputes get filed, and why?

The conventional wisdom is that countries file a case to challenge and bring down discriminatory trade measures that hurt domestic exporters. This is largely seen as a demand-side story, as exporters facing noncompliant barriers abroad mobilize and lobby their government to enforce their rights under the agreement. The government then decides which disputes to pursue. Given how disputes are costly, they are seen as credible signals to the industry that the government is upholding their interests Davis (2011). For this exercise to be worthwhile, the underlying trade at stake needs to be significant. As Horn, Mavroidis and Nordström (1999) put it, for a discriminatory measure to be a potential candidate for a WTO dispute, bilateral trade flows in the underlying product must exceed some significant “threshold”.¹⁶

The puzzling fact is that many disputes do not reach this threshold. Some disputes concern ostensibly minor discriminatory barriers, affecting a seemingly trivial amount of trade. This suggests that considerations other than immediate commercial interest may be motivating the filing of disputes. If past rulings are perceived as exerting a constraint on future rulings, one such consideration would be a case’s precedential value, or the extent to which a ruling can shape the WTO *acquis* in the complainant’s favor with regards to future potential cases.

All disputes are filed by a limited number of countries. By way of illustration, the two superpowers, together with Canada and Brazil, account for over half of all complaints in the caseload of an organization that now counts 157 members. In other words, the system features a number of “repeat players” (Galanter, 1974). These are countries with sufficient legal capacity to file a dispute not primarily as a means of bringing down the contested barrier, but rather as a means of setting a precedent which could be subsequently exploited. As Davis (2012) puts it, “[a]s the strength of the legal case against a measure improves on the basis of past precedent, governments on the complainant side will be more likely to go forward with the case.” The point is that countries themselves can build up this strength through prior filings. Even within an active trade round,

¹⁶The authors experiment with setting this threshold at US\$1M and US\$10M.

litigation may be an easier means of affecting country behavior than negotiations—the European setting provides examples of such situations.¹⁷ In the absence of any progress under the current trade round, it becomes the *main* formal means of influencing behavior.

How can we tell whether countries sufficiently believe in the binding nature of precedent to invest in legal strategies to build it? The legal literature offers some clues of what “test cases” should look like (Porges, 2003; Galanter, 1974; Alter and Vargas, 2000).¹⁸ Disputes that are initiated primarily with an eye to setting precedents to exploit in subsequent higher profile cases are unlikely to target a policy that happens to be of utter importance to the defendant. Similarly, these disputes should not represent too significant of a domestic industry, lest that industry capture the litigation process and influence the legal arguments the governments wants to put forth (Porges, 2003). Finally, these are, by construction, cases where the complainant is willing to take a tangible loss in exchange of a rule gain. The objective must not to be “win” the dispute *per se*, but to obtain the sought-out interpretation of the rules.

For all these reasons, “test cases” are likely to target commercially unimportant markets, leaving the complainant greater latitude to push for its desired legal interpretation. When the commercial stakes are low, defendants grow less likely to dedicate many resources to contesting the complainant’s claims; the complainant faces less domestic pressure to target its arguments in a given way; and it can allow itself to lose the case, as long as it obtains its sought-out language.¹⁹ This reasoning leads to the following theoretical expectation:

H1: *All else equal, cases with lower commercial value should go on to acquire greater precedential value, from the point of view of the complainant.*

This is an analytically convenient hypothesis. Absent the effect posited in H1, we would expect that commercially important cases would lead to relatively higher, rather than lower, precedential value. Indeed, commercially important cases attract more attention. They are more likely to be

¹⁷Bouwen and McCown (2007) suggest that IP regulations in the EU were such a sector: given the level of political disagreement, political parties had an easier time affecting policy through litigation than by pushing for legislative change. The ECJ itself conceded how its role increased as a result of political deadlock: “In view of the modest scale of legislative activity in relation to trade marks and to intellectual property in general, the task of reconciling the competing interests [...] of the Treaty has fallen mainly to the Court” ECJ C-10/89, IV:11.

¹⁸The literature on test cases has looked especially at rights litigation, and the legal strategies pursued by rights organizations such as the NAACP in the US, and labor unions in the EU, who pushed for rule change by seeking optimal test cases.

¹⁹Moreover, if the intuition behind Horn, Mavroidis and Nordström (1999)’s threshold is correct, if a case does not represent significant market opening, it must have been filed for another reason. Given a random distribution of legal merit across high commercial value and high precedential value cases, we might thus expect an analogous negative relationship between the commercial and precedential value of cases because of the selection process involved: from the government’s standpoint, both objectives—immediate market access and precedential value—are substitutable.

trumpeted by the media. They tend to draw more third party countries, who are non-litigant countries that can be present in the room during both consultations and litigation (Busch and Reinhardt, 2006; Johns and Pelc, 2011). Such third parties are then better informed of the details of the dispute, and become more likely to build subsequent litigation on the basis of that ruling. Foreign industries are more likely to be aware of how commercially significant cases have affected their odds of successfully challenging a similar barrier, and would thus be more likely to lobby their government to do so. Resulting filings would entail a boost to the initial case's precedential value. For these reasons, if the observed relationship between commercial value and precedential value is nonetheless negative, we can conclude that countries' strategic shaping of the WTO *acquis* through commercially unimportant cases is significant enough to trump what one might call the publicizing effect of commercially significant cases.

Before describing how precedential value is calculated, it is worth addressing one possible observation: if precedent were perfectly binding, then it would rarely need to be invoked. Indeed, past cases could dictate the likely outcome of disputes. And these would either never need to be initiated, or they would be settled before ever making it to litigation, which is always an inefficient outcome. Two responses are in order. The first is that applying precedent is always the result of some degree of interpretation, and outcomes are thus uncertain. Even under *stare decisis*, favorable precedent could tip the scales towards one party, but the exact outcome could remain uncertain. Much as with armed interstate conflicts, such uncertainty would be enough to result in a breakdown of bargaining. The second point is that formal models of dispute settlement teach us that we need to take a general equilibrium view of litigation (Gilligan, Johns and Rosendorff, 2010; Johns and Pelc, 2011). And the other parameter that changes when a complainant has a strong case is the demand it makes of the defendant. Higher legal merit means higher demands, and these are necessarily *less* likely to be accepted. Otherwise, weak complainants could pretend to be strong simply by making high demands: there would be no separation (Gilligan, Johns and Rosendorff, 2010). The point is that even under binding precedent, litigation could result from complainants raising the demands they make of defendants when their case rests on favorable case law.

4 Empirics: Mapping Precedential Value Through Network Analysis

The jurisprudence of courts can be usefully conceived of as a network, where each ruling is a vertice, or node, and each citation to another ruling is a uni-directional link. The network approach is especially apt for the task of representing complex relationships between entities. These can be between individuals, websites, academic articles, industry patents, or in this case, legal rulings. Much as is the case with scientific articles, rulings have a cumulative aspect: ruling A that cites ruling B may also be indebted to the reasoning of the disputes that ruling B has itself cited in arriving at its own conclusions. What a network approach allows one to do is to measure the level of such indebtedness for every dispute in the system vis-à-vis every other dispute.

Collecting the data required for constructing the WTO’s citation network is relatively straightforward: all citations are found in footnotes in publicly available panel rulings, and use a consistent coding format,²⁰ allowing for quick retrieval of all a dispute’s citations. The only difficulty consists in ensuring that the citations come from the panel or the AB itself, rather than from the litigants or third parties to the dispute presenting their arguments. The citations relevant to the network analysis are those of judges. Of course, if a litigant rests an argument on a past dispute, as is often the case, it is highly likely that judges will address this argument by citing the dispute, but only then does it enter the dataset as an additional link.²¹

I restrict my attention to panel reports as *citing* cases, and leave out AB rulings—that is, I am interested in the higher court only as a *cited* entity. This is because the function of the AB is fundamentally different from that of panels: it has no fact-finding ability, and has to limit itself to examining the panel ruling being appealed. Conversely, I allow *cited* cases to be either panel or AB reports. The jurisprudential impact of a panel ruling is best thought of as “net of appeal”.²²

Some additional characteristics of the data are worth mentioning. As with all citations, academic or legal, the links between vertices make no distinction as to how the citation is employed. It could be that the panel is being critical of a past ruling, and cites it for this reason, though this rarely occurs in WTO panel rulings. Moreover, a link conveys that the case being cited has

²⁰All WTO disputes are similarly designated: “WT/DS”, followed by the dispute number, followed by the type of document: a panel report (“R”), an AB report (“AB/R”), a 21.5 compliance panel report (“RW”), etc.

²¹This distinction is made easier for cases from about DS120 onwards, when all panel and AB reports begin to include a “Table of Cases Cited in this Report” at the beginning of each report. The inclusion of this table, in itself, serves as further evidence of the recognition of past cases’ importance in current legal reasoning.

²²Note that there are never any duplicate links in the network: from the data’s standpoint, there is no difference between a panel citing only the panel ruling of *Canada—Periodicals*, or only the AB report, or both.

relevance to the current dispute, which is sufficient for the purposes of the analysis.

The data contain only WTO cases; extra-WTO citations are omitted. Not surprisingly, early WTO cases tended to cite GATT cases and reference external agreements (such as the Vienna Convention on the Law of Treaties) to a greater degree than more recent cases, likely in a bid for legitimacy, yet this is not reflected in the data. This point touches on the importance of time. Because of the relatively short WTO history, especially when compared against other courts that have been studied through network analysis, such as the US Supreme Court or the European Court of Human Rights, one needs to be especially conscious of the effect of time. Present cases can only cite past cases.²³ In such graphs, nodes representing more recent cases are less likely of having a high in-degree, that is, of being cited by many cases. I account for this by including a time variable in all the estimations.

4.1 The Case of European Safeguards Disputes

To illustrate both the theory and the approach taken to test it, I examine a series of disputes fought over the same legal issue: safeguards. Safeguards constitute the quintessential escape clause of the trade regime: they allow members to temporarily escape their obligations when confronted with difficult domestic circumstances. Together with antidumping and countervailing duties, they form one of the regime's three trade remedies. Up to 1995, the exercise of safeguards fell under the GATT's Article XIX, which was then superseded by the Agreement on Safeguards with the inception of the WTO.

With the creation of the WTO, safeguards became considerably easier to use. This reflected an effort to turn countries away from resorting to alternative policy instruments, which were usually considered to be more economically distortionary.²⁴ Compensation, for instance, was no longer required of members using the safeguard. As Bown (2002, 58) put it at the time, it is difficult to imagine by what means the WTO's new Agreement on Safeguards could have made the escape clause any more attractive to WTO members, short of *paying* members to exercise it.

The EU has long stood out among WTO members by how little it relies on safeguards. By 2001, which was, as this discussion goes on to show, a turning point in the use of safeguards, the EU had not filed a single safeguard investigation on behalf of its industries. The US, by comparison, had initiated ten important investigations for large industries. Emerging economies like India, which

²³This means that there is no possibility for a case to cite another case that cites it too. The resulting network is known as a directed acyclic graph.

²⁴These included voluntary export restraints, which were barred under the WTO, but remained difficult to police, and antidumping duties, by far the most relied on trade remedy in the trade regime.

counted as many investigations as the US in 2001, as well as Argentina, were already heavy users by this point, on their way to becoming the most frequent users of trade remedies in the system.

Faced with what was from its standpoint a costly rise in the use of safeguards by trade partners, Europe took on the issue in dispute settlement. Given its own low use, any legal constraints on the exercise of safeguards represented a net gain from Europe's standpoint. Such constraints would come at little cost to its own policy space, and would decrease the extent to which its trade partners could erect barriers against European exports.

Yet Europe did not take on the issue of safeguards by challenging large markets, or countries that had a high vested interest in the issue. It began by challenging a small barrier in a tiny market, over Korean safeguards on skimmed powdered milk, in 1997. In this first dispute, the EU made a bold legal claim: despite the WTO's Agreement on Safeguards no longer making any mention of it, the EU invoked a clause from GATT Article XIX which required that the WTO Member exercising a safeguard action find itself faced with developments it had not "foreseen" or "expected". This clause had gone unenforced even under the GATT, and the WTO's Agreement on Safeguards made no reference to it.

Before the panel had ruled in the dispute against Korea, the EU filed another safeguards dispute, this time against Argentina, over footwear. The commercial value of this case for Europe, measured in bilateral trade flows, was even lower than Korea's powder milk market had been. Here too, Europe made its legal claim about "unforeseen developments". Europe's approach did not go unnoticed. As Porges (2003) put it at the time, speaking of the two concurrent cases, "the disputes concerned export markets of little or no commercial concern to European exporters [...]; the very lack of stakeholder interest left Commission litigators with a free hand to target their arguments."

The panel rulings in both disputes were reached at nearly the same time: the panel in *Korea–Dairy* circulated its findings four days before the panel in *Argentina–Footwear*. As a result, the latter does not cite the former. Both panels dismissed Europe's "unforeseen developments" claim. Yet both rulings were appealed, and in both cases, the AB overturned the panel's findings, and affirmed the authority of the "unforeseen developments" clause. In the second of its rulings, the AB underlined the continuity of its reasoning: "[w]e have recently confirmed this principle in our Report in [*Korea–Dairy*]"²⁵

Europe obtained the language it was seeking, and with it, the precedent was set. Every single subsequent safeguards case has cited these two rulings, net of appeal, to justify the continued

²⁵*Argentina Safeguard Measures on Imports of Footwear*. WT/DS121/AB/R, fn. 72.

Figure 1: Europe's Seminal Safeguards Cases

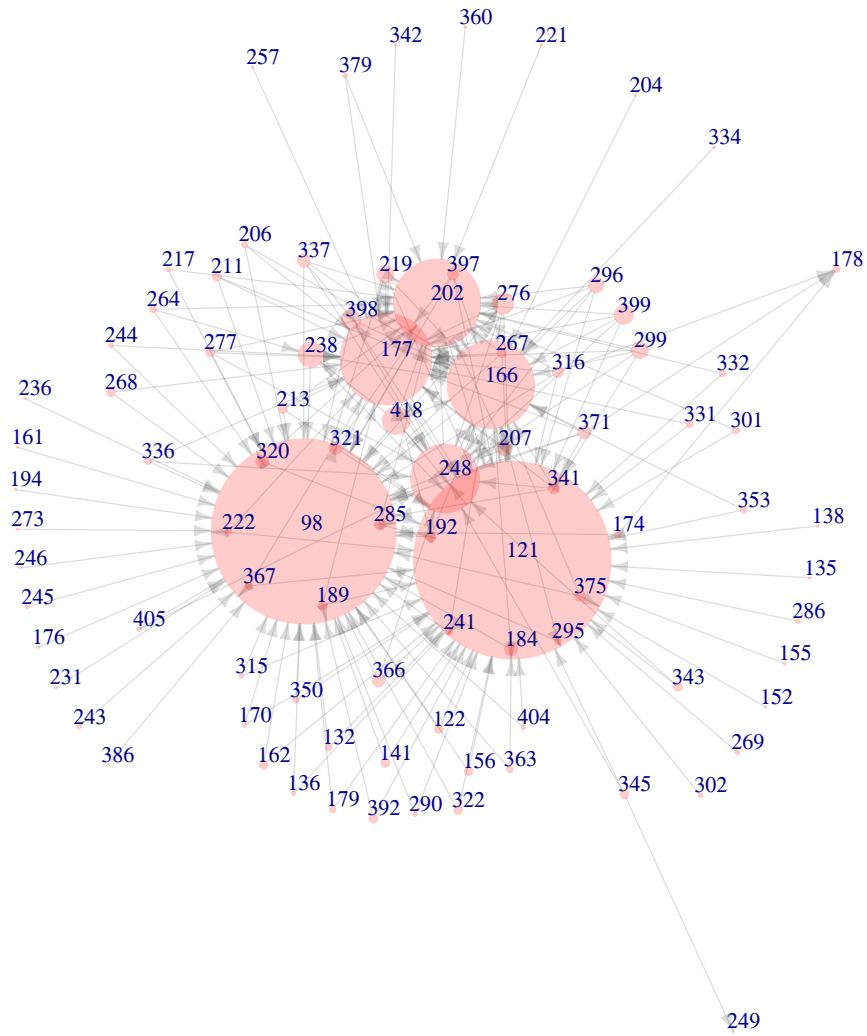
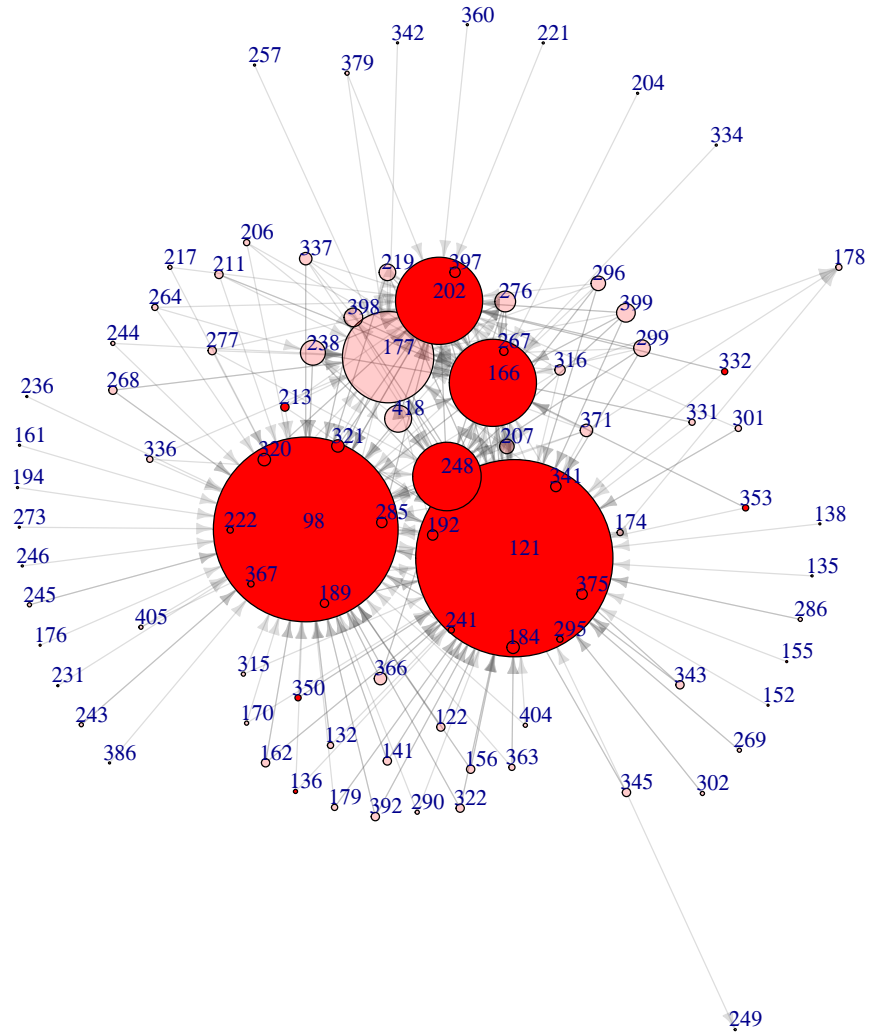


Figure 2: Europe's Seminal Safeguards Cases, EC filings vs. ROW

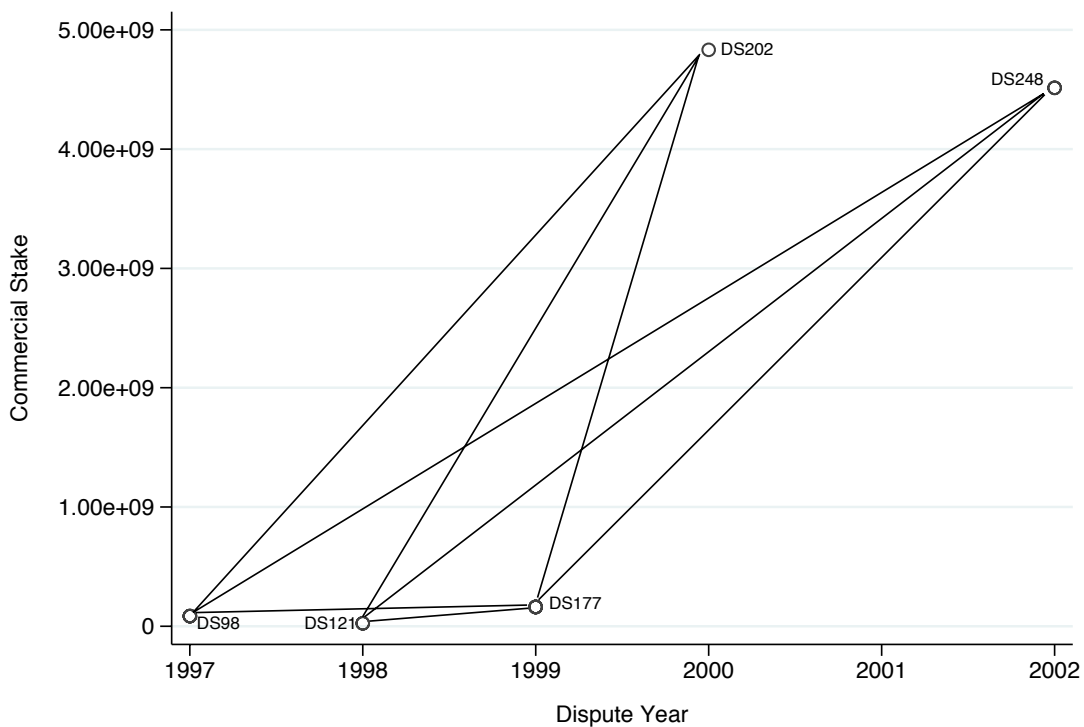


relevance of the “unforeseen developments” clause, despite its absence in the Agreement on Safeguards. What some have described as judicial activism on the part of the AB was, by 1999, a *fait accompli*: since then, there exists a shared, WTO-wide understanding that safeguards flout the rules unless the domestic circumstances leading to their use are “unforeseen” (Pelc, 2009; Goldstein and Steinberg, 2008). Despite the lack of formal binding precedent, for all intents and purposes, Europe obtained a rule change through litigation that it could never have obtained through negotiation. The centrality of these two disputes of negligible commercial importance to jurisprudence over safeguards comes across clearly in Figure 1. In this figure, which shows the universe of safeguards disputes, that is, all disputes that either cite or were cited by a ruling on safeguards, the size of the nodes is proportional to their in-degree, that is, to the number of other rulings that cite them. What is evident is that despite their commercial insignificance, *Korea—Dairy* (DS98) and *Argentina—Footwear* (DS121), have disproportional jurisprudential impact. Figure 2 shows the same graph, this time shading in all EU-initiated disputes, making light of another fact: *all* seminal safeguards cases have been filed by the EU.

Indeed, after the rulings in *Korea—Dairy* and *Argentina—Footwear*, the EU filed two more safeguards disputes in short order; these were no longer over small markets. In both *US—Line Pipe* and *US—Steel Safeguards*, the amount of trade at issue was more than 55 times greater than had been at stake in the disputes against Korea and Argentina. Both *US—Line Pipe* and *US—Steel Safeguards* belong in the top 5% of all WTO disputes according to trade value. In both cases, the industries in question were politically powerful, and frequently petitioned for safeguards. The second of these cases remains one of the most notorious disputes in the WTO. When the US raised safeguards on steel in 2001, it was widely condemned across the membership, and the legal proceedings pit the US against much of the rest of the world. The panel ruled against the US on all claims, and did so by invoking the rulings in the two cases the EU had filed three years prior. When the US appealed, the AB upheld all the panel’s findings, including the “unforeseen developments” claim, by pointing to the precedent it had set in *Korea—Dairy* and *Argentina—Footwear*. The steel safeguards dispute marked something of a turning point. The United States ceased relying on safeguards almost entirely (Pelc, 2009). By 2010, it had not filed a single other investigation.

Europe thus successfully suppressed the use of safeguards through litigation. It led to an interpretation of the rules which likely could never have been achieved through negotiation within a trade round Goldstein and Steinberg (2008). And it did so in a specific way, by setting the precedent through a series of low commercial value disputes, and then relying on this precedent

Figure 3: Charting the Commercial Value of a Precedent Chain Across Time



Note: All links are unidirectional, and go backwards in time. All disputes, save for DS177, were filed by the EC.

in subsequent high value cases. The resulting pattern is shown in Figure 3, which illustrates the relevant citations network across time and commercial value. Because of the acyclic nature of citation network graphs, all unidirectional citation links go back in time—a case cannot cite a future ruling to justify its reasoning. What Figure 3 makes evident is the increase in commercial value over the life of this citation path. Europe shapes the WTO *acquis* in low commercial value cases, and later exploits that precedent in higher value cases.

Comparing Figures 1 and 2 to Figure 3, it becomes evident that for the safeguards issue area, the result of Europe’s legal strategy is that some cases with low commercial value go on to acquire high precedential value. In other words, commercial and precedential value are negatively correlated across this subset of disputes. The question is, to what extent does this pattern apply to the universe of WTO disputes? Do other countries systematically behave in a way similar to the EU over safeguards, by using low salience disputes to shape jurisprudence in a way that subsequently favors them in commercially significant cases?

4.2 Network Analysis

Most recent legal network studies aim to measure how “legally central” (Fowler et al., 2007), or how “strongly embedded in case law” (Lupu and Voeten, 2010) a case is. Fowler et al. (2007) do so to show that reliance on precedent in the USSC has risen through time; that reversed Supreme Court decisions are more “important”, or legally central, than others; and that judges are more likely to ground such reversals in case law. Lupu and Voeten (2010), in turn, find that ECtHR cases where the value of persuading judges in domestic courts is higher tend to be more embedded in case law.

The aim of this article is different. I am interested in the extent to which a given country files disputes that it then relies on—directly or indirectly—in subsequently initiated, *commercially important* disputes. The main departure from the above studies is that the level of analysis is at the complainant level: the analysis is concerned with the strategic behavior of countries pursuing their own interest through litigation. The second distinction is that I am concerned with an additional dimension, that of commercial value.

For these reasons, I depart from the prevalent method employed in the legal networks literature, which calculates centrality measures by relying on a recent advance in web search theory, called Kleinberg scores (Kleinberg, 1999). Kleinberg scores measure the degree to which nodes serve as *hubs* and *authorities*. Hubs are those cases that cite many rulings; authorities are those cases that

are cited by many rulings. Both have a mutually reinforcing effect: a case’s authority score grows when it is cited by many good hubs. Conversely, a case’s hub score grows as it cites many good authorities.

Yet the emphasis that Kleinberg scores put on hubs is a premise that travels poorly to the WTO context. Because of the relatively small size of the WTO network and the considerable expertise of judges, we obtain relatively little information about the “quality” of a ruling from its ability to cite good authorities. In this case, identifying and citing good authorities is neither costly, nor is it especially difficult, in a way that might tell us something about the quality of panelists’ rulings.²⁶

Instead, the starting point of the approach used here goes back to an earlier, and simpler network measure, by Katz (1953). Katz centrality measures the influence of a given node in a directed acyclic network by measuring all the paths leading to it, but discounting indirect citations in proportion to how far on the path they are. In other words, a ruling C adds more to the centrality of A when it cites it directly, rather than when it cites a ruling B which in turn cites A. This discount rate, or what Katz called the attenuation factor, is a tunable parameter β that is set, within certain bounds, by the user. Setting β to 1 would mean no attenuation, so that indirect citations would be just as valuable as direct citations. Setting β to 0 would mean that only direct citations mattered. The analysis here employs an α of 0.35, though varying this measure from 0.2 to 0.5 has no discernible effect on the analysis.

Using the adjacency matrix A_{ji} , the centrality measure of node i , determined by whether node j links to it, in a network of $(n + 1)$ nodes, is expressed as:

$$c_i = \sum_{j=1}^n (\beta A + \beta^2 A^2 + \beta^3 A^3 + \dots)_{ji} \quad (1)$$

To adapt the Katz centrality measure to the present context, it is possible to add a weight W_j to each dispute j , corresponding to the bilateral trade at stake in that dispute, such that a citation from a highly commercially significant dispute will add more to dispute i ’s precedential value than a citation from a commercially trivial dispute:

$$c_i = \sum_{j=1}^n (\beta A + \beta^2 A^2 + \beta^3 A^3 + \dots)_{ji} W_j \quad (2)$$

This can be expressed in matrix format, using a $1 \times n$ row vector w for the weights:

²⁶This is in contrast to the world wide web, the network of interest in Kleinberg’s original study, where the ability to identify and link up to pages that constitute good authorities is more difficult, and thus informative.

$$c = w((I - \beta A)^{-1} - I) \quad (3)$$

Finally, to formulate this at the country-level, in a network containing m countries, one can imagine an $m \times n$ matrix such that W_{gh} is the logged commercial value of dispute h for country g . This produces C , an $m \times n$ matrix such that C_{gh} becomes the precedential value of dispute h for country g :

$$C = W((I - \beta A)^1 - I) \quad (4)$$

What the measure C amounts to is picking all the citation paths for which the initial authority and the final hub are both cases initiated by the same WTO member, and weighting each node on this path that was initiated by that same member by its commercial weight, while discounting it in accordance to its distance from the initial authority, to arrive at the precedential value of that initial authority.

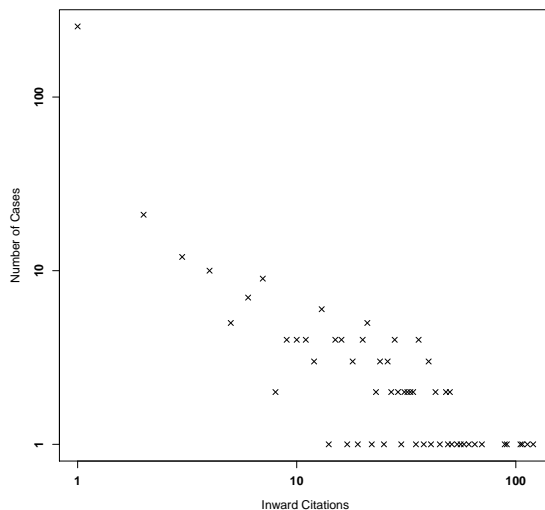
4.3 Precedential Value vs. Inward Citations

The measure of interest, precedential value, is thus quite distinct from a case's in-degree, or the number of disputes that cite it directly. The key distinction is that precedential value considers indirect citations, the commercial value of citing cases, and is measured strictly from complainant's point of view. Across all WTO cases, the dispute with the highest in-degree is *US–Wool Shirts and Blouses*. This dispute, filed by India and ruled on in 1996, set a number of important precedents.²⁷ Yet in terms of precedential value to the complainant, India, it ranks only 27th among the disputes in the system. A even starker example of this contrast is *US–Gasoline*, which was initiated by Venezuela. While it ranks as the 4th most cited dispute across the system, its precedential value is nil. What this means is that no subsequent dispute of positive commercial value initiated by Venezuela either cites *US–Gasoline*, or cites another dispute (initiated by whomever) that in turn cites *US–Gasoline*. In other words, there exists no commercially significant hub filed by Venezuela that is on a citation path that counts *US–Gasoline* as an authority. If Venezuela set any useful precedent in the dispute, it did not exploit it subsequently.

It is nonetheless useful to consider the in-degree of disputes across the network, both as a

²⁷Among these, *US–Wool Shirts and Blouses* formalized the WTO's treatment of judicial economy, a practice which itself has bearing on the shape of the WTO *acquis*, since it allows judges to skip rulings which may have unpredictable effects on future jurisprudence. The way in which judges employ judicial economy in the WTO is itself another sign of the importance of precedent in the institution (Busch and Pelc, 2010).

Figure 4: Distribution of Inward Citations Across WTO Disputes



description of the network, and as a test of the data. This distribution is graphed in Figure 4, where both the number of citations, on the horizontal axis, and frequency, on the vertical axis, are logged. It shows the power law tail that we expect from scale-free networks, or networks where nodes join in accordance with preferential attachment. In this case, there are a few cases in the network that are subsequently cited a great number of times.

Considering instead precedential value as defined in (4), the dispute that ranks highest in the system is *Japan–Alcoholic Beverages II*, initiated by the EU, and ruled on in 1996. What this means is that Europe went on to file a number of commercially important disputes that relied on the precedents set in *Japan–Alcoholic Beverages II*, either directly or indirectly, by citing cases that cited this seminal dispute.

4.4 Tests

Do countries strategically shape precedent? Do they file low commercial value cases to build up valuable precedent that they subsequently exploit? To answer this question, I calculate the precedential value, in the manner outlined above, of all 182 cases since 1995 where a ruling was adopted in the WTO, which correspond to the all the nodes in the WTO network. This measure of precedential value makes up my main dependent variable throughout the analysis. I also re-estimate the same model using the in-degree as the dependant variable instead, and compare the results. The level of analysis is the complainant-dispute, since I am interested in whether individual

complainants observably invest in precedent. And because disputes often include more than one complainant, this results in a sample of 274 observations.

Both to code my main independent variable of interest, the *Logged Commercial Value* of every dispute, and to arrive at the weight w used in the calculation of the centrality measure above, I first identify the traded products at issue in every case. These are coded in the Harmonized System (HS) at the six-digit level, and are taken from the Horn and Mavroidis database of WTO disputes, hosted by the World Bank,²⁸ which I complete and extend using WTO documents. I then rely on trade flows data from the World Integrated Trade Service (WITS), also hosted by the World Bank, to calculate the bilateral trade flows of the products at issue in the dispute in the year preceding its initiation.²⁹

Additionally, I control for a range of other possible determinants of precedential value. Chief among these is each complainant's market size. This is in part to account for Simmons and Guzman (2005)'s concern that powerful countries are more likely to file disputes with long term precedential value. If richer countries have a greater ability to act strategically in this way, we should expect this coefficient to be positive. The corresponding *Logged Complainant GDP* variable is coded using *World Development Indicators* data.

It is important to account for whether a case has been appealed. Appealed cases contain more material apt to be subsequently cited. I disaggregate this measure into two variables: an *Indicator of Complainant Appeal*, and an *Indicator of Defendant Appeal*, both relating to appeals of the panel findings. These are useful ways of also getting at the satisfaction of each party with the initial findings, which may indicate how close to the desired precedent the panel's findings were.

The last necessary control is for time. The variable *Panel Year* is coded as the year in which the panel report was issued. We would expect this measure to be strongly negative: more recent cases are likely to have shorter citation paths, and lower precedential value. To show this simple bivariate relationship, I graph both the in-degree and out-degree of WTO disputes, according to the date of the panel ruling, in Tables 5 and 6, respectively. In both cases, the expected bivariate relationship is apparent. I also make sure that the results are robust to an inclusion of a more flexible time indicator, using cubic splines, as shown in Model 3.

The variables above make up my base estimation, shown in the first column of Table 1. Here, as in models 2 and 3, I rely on a standard OLS estimation. Importantly, robust standard errors are

²⁸Permanent URL: <http://go.worldbank.org/X5EZPHXJY0> Last accessed on Sept. 16th, 2012.

²⁹Importantly, although trade flows are found on both sides of the equation, they never correspond to the trade flows of the same disputes: the dependent variable, precedential value, is weighted with the commercial values of subsequent disputes, while the main explanatory variable is the commercial value of the dispute under observation.

clustered on the dispute combined throughout. Indeed, some disputes have multiple complainants in the same dispute (under the same DS number), while others count as two separate disputes (with separate DS numbers) that result in common litigation and a single panel and AB report. To account for this, I code all such disputes as belonging to a single *Dispute Combined* number, and cluster errors on that identifier.

In the second column, I control for a number of additional possibly confounding variables. The *Number of Third Parties*, which is a count variable coded as the number of countries that joined the dispute as third parties. This is a proxy for how many other WTO members have a stake in the dispute. A related variable, *Systemic*, is a dummy coded as 1 if any of the third parties in the dispute joined by invoking “systemic”, rather than “material” interests, and 0 otherwise. The invocation of systemic interests tends to be indicative of issues of law that have a far-reaching impact on WTO jurisprudence.

I also control for some additional characteristics of the litigation process. *Number of Panel Claims* is a count of how many legal claims the complainant made when filing the dispute. There is some anecdotal evidence suggesting that employing a “trash can approach” is a sign of low legal merit of the dispute. Additionally, I include *Percentage of Panel Claims Won*, a measure of how many of the claims made were decided in favor of the complainant. The last control variable is a *Non-Merchandise Dispute Indicator*, which is coded as 1 if a dispute challenged no specific product, but rather an issue of domestic legislation, or intellectual property. These tend to concern more opaque barriers, be politically sensitive, since they often concern domestic statutes, and hold systemic implications. By definition, these dispute do not have a measurable stake, that is, the *Logged Commercial Value* is zero. As such, including the variable on the right hand side is a way of verifying whether any effect of *Logged Commercial Value* might not be reducible to this category of non-merchandise disputes.

Model 2 also changes the way time is included, by replacing the simple *Panel Year* variable with a cubic spline with four knots (not shown to save space). The spline is graphically represented in Figure ??, where the non-linearity of the relationship between time and citations is evident. Though less efficient, the inclusion of the cubic spline serves as a better control of this non-linearity.

Model 3 in Table 1 includes the same right-hand side variables as model 2, this time going back to the simple *Panel Year* time measure. The difference here is the dependent variable, which is now a simple measure of in-degree, that is, the number of direct citations to the dispute under evaluation. I include this third model as a means of comparing the weighted, complainant specific

measure of *Precedential Value* to a simpler, unweighted, system-wide measure of direct citations.

Finally, the last model 4 features the results of a Bayesian analysis. Including network measures into regression equations generates a number of potential challenges that political scientists are only starting to recognize. Luckily, the application in this article—which amounts to placing a centrality measure on the left-hand side of the equation—is simple enough that there is little concern about bias. However, it is worth running an additional test of the relationship using an equivalent Bayesian model, which is more flexible in terms of its underlying assumptions, and which also fares better with small samples. The mean of random draws from the posterior distribution is shown in the 4th column, and columns 5 and six show bottom and top quintiles. I take the opportunity of the Bayesian model to add two more control variables: *US Complainant* and *EU Complainant*, which are indicators of whether the complainant in the dispute under examination is one of the superpowers. This is meant to check for the possible greater ability of the superpowers to file series of precedent-building disputes.

The findings are consistent across all estimations. In all four models, disputes' commercial value is negatively related to their subsequent precedential value, offering support for the paper's main hypothesis: countries appear to strategically file low commercial value disputes which go on to build favorable precedent for subsequent cases. And the effect is substantively significant: looking at Model 2, increasing the commercial value of the average dispute by one standard deviation reduces the subsequent precedential value of that case by over 30%.³⁰

The effect of wealth is consistently positive, indicating some support for the view expressed in passing in Simmons and Guzman (2005) that powerful countries may be better able to invest in precedential value with a view to the future. However, the coefficient for wealth is only significant in the full estimation in Model 2 at the 10% level, and is just short of significance in the two OLS estimations, suggesting that the link is tenuous. It is worthwhile pointing out, however that the reference point here is not the entire membership, but the set of 43 countries who have initiated a WTO dispute that has ended with a ruling. These countries constitute a subset of members with significant legal capacity. A better test of a legal capacity advantage, then, may be found in the two superpower indicators in the Bayesian estimation, in Model 4. Both variables show a highly significant positive relationship with precedential value, suggesting they are better able to file and exploit precedent-setting cases.

In terms of dispute-specific variables, the number of third parties shows no significant effect.

³⁰Simulation using *Clarify*, (Tomz, Wittenberg and King, 2003).

The number of panel claims and the percentage of those claims ruled in favor of the complainant are all negatively signed, but only the percentage of claims won in Model 2 is significant. As expected, the year of the panel ruling is statistically and substantively significant. The earlier a case is filed, the more time it has to acquire precedential value by being cited by other commercially significant cases.

There are interesting comparisons to be drawn between models 1 and 2, which use the precedential value dependent variable, and model 3, which uses the in-degree as the dependant variable. Recall that one of the main differences between the two dependent variables is that the precedential value specifically concerns the complainant, and how a case fuels subsequent citations. By contrast, the in-degree treats invocations of a dispute by all countries alike. This distinction is reflected in the results. While disputes where third parties join by invoking systemic interest show no significant effect for precedential value, they show a highly significant, positive effect for the in-degree. The fact that a dispute is of great systemic interest for the membership as a whole is likely to increase its overall citation rate, as other countries cite that dispute in their own filings. Yet systemic interest will have at best an indirect effect on precedential value from the complainant's point of view.

The *Appeal* variables also behave accordingly. Defendant appeals have a significant positive effect on precedential value, while complainant appeals exhibit an even stronger and more significant *negative* relationship. This too is expected: complainant appeals, on average, indicate a complainant's dissatisfaction with the ruling, suggesting the dispute may be of limited value in setting the ground for subsequent filings. By contrast, appeals of any sort increase the amount of legal reasoning to be drawn on by the membership as a whole. As a result, both defendant and complainant appeals show a positive relationship to a country's in-degree.

4.5 *Cui Bono?*

The empirical findings above suggest that precedent is perceived as holding sufficient authority for countries to file trade disputes accordingly. Countries' behavior, in this sense, is consistent with a system where precedent is constraining. It is worth thinking through the distributional consequences of such a system. Who gains, and who does not? Along these lines, how do countries not favored by precedent in a particular case behave?

The question of distributional consequences is especially interesting given how the judicialization of international politics, as a broad phenomenon, is usually taken as a gain for small countries.

The added “stability and predictability”, an explicit goal of the WTO’s legal system,³¹ that comes with the delegation of decision-making to courts is usually thought to benefit poor countries. Legalization is by construction a move away from power politics, and thus a reduction in the returns to power.

And binding precedent is undoubtedly a move in the direction of further legalization. The prospect of past judicial decisions exerting a constraining effect on current decisions favors rule of law. There is good reason to believe that when judges have clear jurisprudence to fall back on, they are less likely to give into political pressure. Courts may well want to avoid displeasing states by ruling against them, but clear case law will limit the extent to which they are willing to tailor their rulings to countries’ preferences—a phenomenon that has been most clearly established in the case of the European Court of Justice (ECJ) (Garrett, Kelemen and Schulz, 1998).

Yet what this article argues is that case law in a decentralized legal regime such as the WTO does not emerge in a random fashion. It results from countries strategically initiating cases. And insofar as some countries are better able to initiate multiple disputes than others, then they will also have a greater say over the meaning of the rules, as seen through the prism of case law. The final irony, then, as highlighted by Ginsburg (2005), is that those powerful countries most likely to benefit from binding precedent are usually those that oppose it most fervently, usually over concrete cases. The US, specifically, stands out as contesting the authority of precedent more than any other WTO member, even as the analysis suggests that it been uniquely able to exploit the precedents it sets.³²

Of course, this is no zero-sum game. Even if countries with high legal capacity have the greatest ability to initiate cases and thus shape case law, in so doing they also clarify the rules to everyone’s benefit. Political actors will often delegate decision-making to courts in areas that are too politically sensitive. Any solution may be better than no solution, but sometimes no common solution is politically ratifiable by all parties. This, after all, is the case made by many students of European integration (Burley and Mattli, 1993). The result of deadlock is often optimal legislative ambiguity of one form or another. One way to subsequently fill those gaps is through the courts. As in Judge Holmes’ famous dissenting opinion, judges legislate, but they do so “interstitially”. The result of such clarifying rulings, especially if through some precedential logic they carry forward to

³¹Article 3.2 of the DSU reads “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”

³²See US statements on precedent in the context *US—Zeroing*, or *US—Civil Aircraft*: “The United States requests that the first sentence of paragraph 7.248 of the Interim Report be modified to remove any suggestion that reports of the Appellate Body are binding except with respect to resolving the particular dispute between the parties to that dispute.” The EU took the opposite view.

subsequent cases, is a convergence of expectations that benefits all members.

Precedent thus serves a clarifying function that benefits the average member. As is often the case, this public benefit conceals a distributional conflict: some gain more than others. This is a familiar story, and in some ways a retelling of the very genesis of international rules. The existence of rules favors everyone, and the weak most of all. Yet in exchange for binding themselves, powerful states often seek to extract rents. They influence the shape of the rules to their advantage. Precedent in international law is one more instance of such travel along the Pareto frontier (Krasner, 1991).

5 Conclusion

International law explicitly disavows the constraining effect of precedent. Yet international courts routinely invoke past rulings in their reasoning. In this respect, international law may offer a unique insight into the role of precedent in social life more broadly. Indeed, the concept of precedent permeates our language and our reasoning. Policymakers frequently invoke precedents from the past to justify current actions, or warn of how a decision would set a “dangerous precedent” for the future. The question is whether such invocations have an actual effect on behavior, or whether they are merely *ex post* justifications.

Using tools borrowed from social network analysis, this article has shown that even as precedent in international law is a fiction, political and legal actors agree to be bound by its logic. Specifically, past legal decisions shape countries’ expectations over what the rules allow. I demonstrate that countries behave *as if* precedent were binding by observing the type of disputes they choose to file. States initiate disputes not to resolve a particular disagreement, but also as a means of setting a precedent that changes the interpretation of rules in their favor. Such seminal cases tend to target smaller markets, allowing complainants greater latitude to target their legal arguments. Once a precedent is set, countries turn around and apply it on high commercial value cases.

In sum, despite the singular degree of delegation involved in recognizing binding precedent, instead of obstructing it, countries invest in precedent as a means of bending the meaning of the rules in their favor. But not all countries are equally able to engage in this exercise. WTO members such as the US and the EU appear significantly more likely to invest in precedent, and build on it in subsequent filings. Such distributional consequences should be of concern to those who view legalization as an unambiguous step away from power politics.

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Figure 5: In-Degree of WTO Disputes Through Time

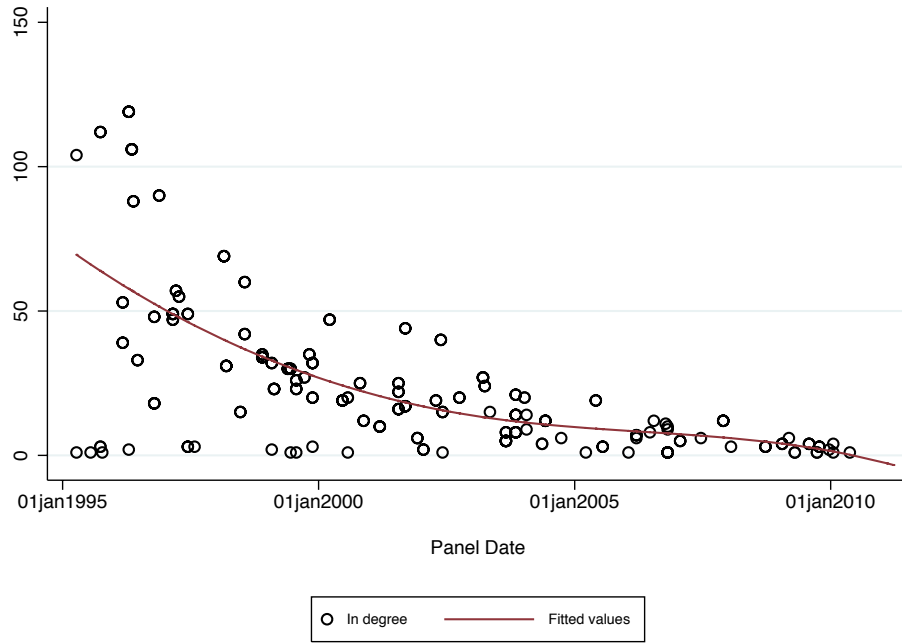


Figure 6: Out-Degree of WTO Disputes Through Time

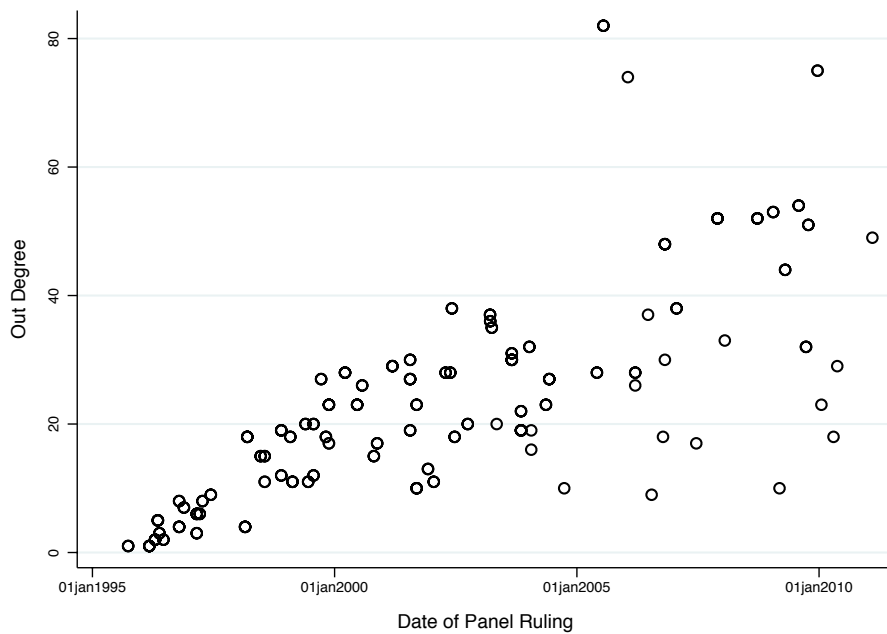


Table 1: Do Countries Strategically Shape WTO Precedent?

	Model 1 Precedential Value	Model 2 Precedential Value	Model 3 In-degree	Model 4 Precedential Value	2.5%	97.5%
Dispute's Commercial Value	-337.89** (146.26)	-468.05*** (135.80)	-1.38** (0.63)	-105.50	-202.24	-8.47
Logged Complainant GDP	661.03 (675.15)	967.29+ (562.21)	1.07 (0.89)	-135.05	-476.15	210.20
Defendant Appeal	2647.80 (1756.53)	5227.39** (1959.56)	6.59 (4.80)	818.22	-120.50	1751.66
Complainant Appeal	-3148.14** (1308.19)	-3612.91** (1400.08)	10.92+ (6.14)	-886.52	-1989.00	227.80
Number of Third Parties		166.11 (136.24)	1.11 (0.95)	12.41	-77.20	100.08
Systemic Interest Indicator		669.60 (1971.60)	5.13 (3.87)	590.31	-305.94	1503.02
Number of Panel Claims		9.05 (84.20)	-0.26 (0.25)	-22.51	-78.54	33.46
Percentage of Claims Won		-6430.01** (2288.92)	-6.69 (6.96)	-1308.69	-2548.72	-57.40
Non-Merchandise Dispute		1593.52 (2069.94)	-1.25 (4.24)	604.71	-2996.65	4246.34
Panel Year	-1008.77*** (267.47)		-4.09*** (0.75)	-347.70	-454.63	-241.57
US Complainant				2621.34	1461.17	3761.58
EU Complainant				1960.81	826.15	3111.74
Constant	2.01e+06*** (529169.32)	-23627.69 (15387.70)	8197.91*** (1501.14)	699476.21	486429.87	914099.15
N	274	274	274	274		
R-squared	0.16	0.25	0.44			

OLS estimations in models 1-3. Robust standard errors clustered on *Dispute Combined* in parentheses. + p<0.10, ** p<0.05, *** p<0.001. Model 4 shows Bayesian estimates of draws from the posterior distribution, and top and bottom quantiles of marginal posterior distribution, implemented through Zelig using a Gibbs sampler.