The welfare implications of precedent in international law

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Introduction

There is no formally binding precedent in international law. The rest is in dispute. Legal scholars have long suspected that despite the widely agreed-upon fact that international law denies the formal authority of precedent, something akin to de facto stare decisis or effectively binding precedent operates nonetheless. International trade law is no exception: legal texts and judicial opinions explicitly deny that past decisions have precedential authority, yet there is a growing sense that the significance of precedent has steadily risen with the trade regime’s increased legalization, as marked by the passage from the General Agreement on Tariffs and Trade (GATT) to the World Trade Organization (WTO), and the introduction of the Appellate Body.

After reviewing this debate, this chapter proposes some empirical strategies to assess the claim that precedent in international law is effectively binding. The common premise behind these approaches is that if precedent is binding on courts, then this should be reflected in other actors’ behaviour. I show how recent findings that use the entire universe of WTO disputes and the legal citations between them suggest that WTO member governments systematically invest in precedent. Countries thus behave as if precedent were binding; specifically, they appear to file some disputes for precedential rather than for commercial gains. Such “test cases”, which tend to involve small stakes, then become highly likely to be cited, especially by the country who initiated the first dispute.1 In other words, governments strategically bet that courts will be swayed by past precedent, even as the formal rules explicitly deny their

authority. One can perform a similar exercise by looking at financial markets to assess whether or not markets make links between disputes: specifically, do financial markets update their beliefs about the likely outcome of one dispute when another dispute produces an unexpected ruling? The answer appears to be yes: firms that benefit from measures shown to be in violation in another country see their market valuation negatively affected. This occurs even as there is no formal legal link between the ruling and the foreign firms under observation. From this review of recent findings, the chapter’s first section concludes that although binding precedent may be, legally speaking, a fiction, it is a fiction that countries allow themselves to be bound by.

The second section of the chapter interrogates this first conclusion. Namely why would countries tolerate the informal rise in authority of precedent? After all, there is good reason for the widespread denial of the binding force of precedent in international law. To put it bluntly, countries fear judicial activism. Domestic audiences are skittish at the notion of countries delegating enforcement power to unelected international institutions, let alone delegating rule-making power to those institutions. Allowing for binding precedent constitutes a politically untenable concession to institutions “taking on a life of their own”. A foreign judge who rules on a dispute that a country may not even be party to can suddenly modify the meaning of the rules that its government has committed to. Moreover, binding precedent falls prey to condemnations of undemocratic decision-making, since unelected individuals can potential changing the system’s balance of rights and obligations.

Given the expected political reticence to delegate such power to international courts, why do we observe a tacit acceptance of the rising authority of precedent among governments? I suggest that allowing for de facto binding precedent may constitute a strategic response by states to the weakness of international courts. Allowing judges to invoke the authority of past decisions limits the otherwise significant risk that international courts will yield to political pressure. Countries that join international institutions make binding commitments to one another and to their domestic audiences; they appoint third-party enforcement mechanisms to ensure that they and their partners keep these commitments. The problem that inevitably arises is that international courts

have even less power than their domestic counterparts. We know from anecdotal evidence from courts as varied as the European Court of Justice (ECJ) and the North American Free Trade Agreement (NAFTA) that judges are often wary of rendering rulings that are unfavourable to governments, especially to those states who are at the origin of the institution. Paradoxically, this judicial deference to political power may come at the expense of governments themselves, if their international commitments lack credibility as a result. Indeed, if courts can be pushed around, then the commitments that countries make, and which rely on those same courts for enforcement, lose much of their meaning.

This view also explains an otherwise puzzling fact. It may account for how major powers traditionally appear most wary of binding precedent. Indeed, scholars have remarked that the reticence of major powers like the United States towards legal precedent is puzzling, given that they are also the ones best able to manipulate precedent to suit their interests. In this line of reasoning, major powers should view binding precedent as an opportunity to use litigation to obtain what they were unable to get through negotiation. There are numerous examples of the United States and the European Union doing just that in the WTO context. Why, then, should these members be associated with the hardest stance against *stare decisis*? One implication of the argument presented here is that in the short-term perspective major powers stand to lose the most political influence within the litigation process from binding precedent. Although binding precedent likely serves these members in the long term by imbuing the litigation process with greater credibility, in the short term it reduces their unique political influence over the judicial process. The empowerment of judges that binding precedent allows for is likely to be especially felt by great powers.

**Does precedent change minds, and how might we know?**

The difficulty of assessing the impact of a norm is well established. We know for a fact that courts invoke precedent; we can count their citations, and indeed these are a constant feature of both panel and Appellate Body reports at the WTO (e.g., the average case now cites...
nearly twenty other disputes). This does not necessarily mean that judges are swayed by past cases. In this way, Ginsburg (2005) notes that while a quarter of International Court of Justice (ICJ) cases cite past ICJ rulings, this does not mean that ICJ judges are truly constrained by these past rulings, nor does it mean that past rulings serve as focal points for current cases. Courts may invoke precedent for *ex post* legitimation or for rhetorical flourish. They may simply choose among precedents that bolster their position after the fact, and ignore those precedents that invalidate their position.\(^6\) If this is the case, then precedent may have no real effect on either the reasoning or the content of rulings.\(^7\) In Chapter 5, Pauwelyn demonstrates the tightness of the WTO citation network, highlighting the degree to which WTO judges rely on past cases to inform their reasoning. Yet this still leaves open the question of whether these citations have an effect, or whether they are epiphenomena, occurring after a decision has already been made.

The test for precedent-as-constraint can be stated succinctly: does the existence of precedent change minds? Specifically, are there instances where international courts would rule differently due to a past ruling than they would have in its absence? Whether or not precedent matters must be judged by whether or not it is counterfactually valid; courts must have behaved differently as a result of it. This is not to say that breaking with precedent invalidates its authority. As opposed to physical phenomena, violations of norms need not nullify their existence.\(^8\) Norms are not deterministic; they acquire importance through their ability to help actors discern right from wrong. We might instead expect, for instance, that for those instances where past precedent *was* broken, judges expended considerable resources attempting to justify the decision to do so. Failure to pass the counterfactual test as worded here would thus not be sufficient to claim that precedent does not matter; yet it would be enough to question whether it affects behaviour in a meaningful way.

One thing is certain. Precedent lacks formal authority in international law. Legal scholars habitually point to Article 59 of the ICJ Statute to support the view that an international legal ruling has no implications

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\(^6\) Even here, precedent would serve a limiting function, if those rulings that would find no precedent for rhetorical flourish were less likely to be arrived at.


past the confines of the case and the parties at hand. The WTO is faithful to this perspective. 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.” Though scholars have remarked on the odd nature of this provision, its intent is relatively unambiguous: judicial decisions should not affect the meaning of countries’ obligations beyond the ratification of an agreement. More creative interpretations by panels that aim to institutionalize a de facto form of *stare decisis* have also been forcefully rejected by the Appellate Body (AB). The panel in *Japan – Alcoholic Beverages II* famously claimed that past rulings comprised “subsequent practice” within the meaning of the Vienna Convention on the Law of Treaties (VCLT), thus past rulings should become a source of law. The AB disagreed. Hewing to the formal consensus, it countered that the treaty’s designers did not intend for panels’ rulings to become definite interpretations of the rules.

In spite of this, students of trade law have long argued that for all intents and purposes, the WTO has gradually developed a form of *de facto stare decisis*. This view is supported by such developments as the GATT and WTO Analytical Indexes which the institution itself provides to trace the lineage of decisions through time, and by anecdotal evidence. The judicial views themselves express some ambiguity. As one example, the same AB that forcefully denied that WTO rulings were “subsequent practice” under the VCLT also noted in *US–Zeroing* that “adopted reports create legitimate expectations among WTO Members and . . . ‘following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels’ ”. Yet even when judges admit to the importance of precedent, they are quick to qualify their claims. “The basis by which panels and the Appellate Body decide cases is substantially formulated on precedents […] although there is no formal ‘stare decisis’ doctrine.” What remains is an ambiguous overall picture.

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How are we to know, then? How might one determine the weight of past disputes on subsequent disputes when the text claims this influence to be nil, yet practice suggests otherwise? One method is to ask whether actors whose interests depend on the answer to this question behave in accordance with one view over the other. Do the actors affected by precedent act as if precedent were binding, or does their behaviour instead concord with a view of legal disputes as independent events? Regardless of its legal status, if actors are observably vested in one stance over the other, this may be reason enough to elect it as the valid stance for the purpose of analysis. One can observe the behaviour of two sets of actors in this regard: governments and financial markets. The question is, does the behaviour of these actors conform to one view of precedent over the other? Strategic governments would care little for rhetorical flourish unless it also affected their subsequent interests, for example by empowering some domestic groups over others, or adding legal merit to some claims while subtracting merit from others. Similarly, since trade disputes ultimately impact real firms, we can look to financial markets to see whether firms affected by a precedent in a case against a foreign country see a corresponding dip in their market valuation. In other words, do markets bet that disputes will have spillover effects across borders?

The first approach examines the cases countries choose to file. As it turns out, there exists a puzzling class of trade disputes that concern markets of little or no commercial value. Conventional wisdom states that disputes are costly to file, and governments would primarily file these disputes to enforce their WTO rights to open unfairly restricted markets for their exporters,\(^\text{13}\) thus all disputes would be expected to cross some threshold commercial value, as filing would otherwise be a losing proposition.\(^\text{14}\) Indeed, even if most disputes do not make it to litigation, complainants have to be willing to go to litigation in case negotiations during consultations break down.\(^\text{15}\) Yet many disputes concern trivial markets. Why are these cases filed?


\(^{15}\) The cost of all disputes is not the same. Disputes that are settled early naturally cost less than disputes that proceed to litigation and appeal. Yet since filing and backing off would negatively affect both a country’s reputation for resolve and its odds of obtaining concessions during consultations in subsequent disputes, the relevant cost in such calculations should allow for the possibility of escalation. Indeed, as with all instances of bargaining, the threat to escalate has to be credible for states to get what they want.
One component of the answer to this question can be gleaned from the data on the entire network of citations between WTO cases. As Pauwelyn points out, not all cases are cited with the same frequency. To try and account for this variation, one can regress citation rates on the dispute characteristics we might expect to play a role. Strikingly, controlling for such factors, low commercial value disputes – the very disputes that fall short of the expected “filing threshold” – get cited disproportionately more often.16 Moreover, the complainant who files the initial low-stakes case is most likely to be the one reaping the precedential benefits, citing this precedent to its advantage in subsequent cases. These often have far higher commercial stakes. This results in chains of cases filed by the same complainant that begin with low-stakes and proceed to high-stakes cases.

The reasoning underlying this strategic behaviour is that that low commercial stakes leave complainants with more latitude to tailor their legal arguments and obtain the language they seek from a ruling. Defendants commit fewer resources to defending the case, and the complainant’s affected domestic groups are less insistent on dictating specific arguments. In sum, low commercial stakes cases allow complainants to take a tangible loss in exchange of a rule gain.17

The series of safeguard disputes filed in rapid order by the European Union over a period of four years serves as an apt illustration. The disputes began in 1997 with Korea – Dairy and Argentina – Footwear, two nearly value-less commercial markets, where the European Union obtained AB rulings that made safeguards more difficult to use. The European Union then went on to file against the United States in two high-stakes steel cases, US – Steel Safeguards and US – Line Pipe, in a way that rested heavily on the initial safeguards cases against Korea and Argentina. The striking finding, however, is that this relationship appears to hold on average: lower commercial stakes cases have disproportional subsequent influence, especially from the point of view of the initial complainant.18 The final related finding is that some countries appear better able to file these series of cases of increasing commercial importance than other nations. This may not seem surprising. To use Galanter’s term, the United States and European Union are “repeat players” in the trade

16 Pelc, “Politics of Precedent”.
18 Pelc, “Politics of Precedent”.
system. This comes across in econometric findings, where these two members are significantly better able than other countries to set precedents that they then build upon in subsequent litigation.

A similar exercise can be performed by looking at financial markets. This approach proceeds from the same premise as above; much like countries, markets have an interest in knowing whether precedent is a true constraint on judicial behaviour, insofar as it allows them to anticipate the likely outcome of subsequent cases. One can then examine whether rulings have spillover effects beyond a given case. When a ruling strikes down a measure that benefits other countries, do financial markets update their beliefs about the viability of these foreign measures and the ability of the relevant firms to continue benefiting from them?

In a recent case, the European Union filed against Canada to challenge Ontario’s feed-in-tariff, a subsidy program for a nascent solar energy industry. India happens to have a nearly identical program that features similar domestic content requirements. Both Canada and India have long defended the WTO legality of their policies. The AB ruled against Ontario’s program, making it possible to measure whether financial markets reacted by updating their beliefs about Indian firms. The analysis relied on an event study of the stock market valuation of all publicly traded Indian solar firms. The findings suggest that markets take precedent to heart. Indian firms’ stock prices, normalised against the stock index, registered significant negative abnormal returns in the week following the AB announcement. This effect is observed even though, as Davis puts it, “WTO members are not obligated to change policies in light of new information from a ruling against another country.”

In sum, binding precedent may be, legally speaking, a fiction, yet it is one that both governments and financial markets are willing to bet on.

In sum, far from blocking the rise in authority of binding precedent, for example by protesting against invocations of past rulings by panelists, governments appear to have tacitly accepted it. What is more, countries appear to have internalized the weight of precedent in their litigation strategies, investing in low-stakes cases to build favourable

21 Kucik and Pelc, “Can International Legal Rulings Deter”.
precedent for subsequent, higher-stakes cases. This leads to a theoretical puzzle, which I examine next.

Why do states tolerate the rising authority of precedent?

Both governments and their domestic audiences are traditionally wary of delegating power to international institutions. The danger of a “democratic deficit” is frequently invoked, alleging that the negotiations that form international rules are insufficiently responsive to the public’s demands. In this context, the possibility of binding precedent represents a considerable additional threat. If the mere act of committing to shared rules comes at a political cost, then the notion that the meaning of those rules, and the precise balance of rights and obligations they represent, might be further affected through litigation would seem politically unpalatable. The prospect of judicial activism and rule-making by international courts is invariably discussed in negative terms. If this is the case, then why have WTO members tacitly accepted the rise of de facto binding precedent?

Different scholarly perspectives offer different answers. A common explanation among legal scholars is that judges value continuity in reasoning, no matter whether it is formally prescribed or not. Respecting precedent is also viewed as respecting the rule of law; to follow past decisions is to steer clear of judicial bias. It increases predictability and legal certainty, which are stated goals of the WTO dispute settlement system. Scholars have also claimed that binding precedent increases adjudicatory harmonization and fairness.

On the other hand, an interpretivist view has claimed that the norm of arguing by precedent is intrinsic to the legal setting. From this perspective, the very question of why precedent would operate in international law may appear ill conceived. Precedential reasoning is not an institution to be accepted or rejected; it is inseparable from the practice of lawyers

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23 Observers already complain that the DSB might adopt judicial activism and abuse its binding nature to create WTO “common law”, to which the members never agreed (Ragosta et al., “WTO Dispute Settlement”)
24 Ibid.
25 Felix David (2009), Knight and Epstein, “Stare Decisis”: “To the extent that the members of a community base their future expectations on the belief that others in that community will follow existing laws, the Court has an interest in minimizing the disruptive effects of overturning existing rules of behaviour.”
26 Article 3.5 speaks of “stability and predictability”. Bhala, “Stare Decisis”.
27 Kratochwil, Rules, Norms, and Decisions.
arguing over the validity of a measure. Law is seen as the act of reasoning and arguing by seeking support from past decisions to buttress one’s own case. Precedent is not a causal factor whose force can be isolated and measured, but instead it is an intrinsic part of the legal environment that limits what constitutes an acceptable argument.

The notion that reasoning through precedent is an inherent part of law is especially true of common law systems, but less so of civil law systems. Some have claimed that it is precisely the existence of both systems, and their difference in this respect, that keeps *stare decisis* from operating in international law.\(^\text{29}\) Reasoning by precedent nonetheless remains a pervasive norm in the legal sphere. Yet the same can be said of the norm against judicial activism. Since the latter is backed by the strong political interests described above, the interpretivist perspective offers little means of deciding in which cases the practice of reasoning by precedent should trump the norm against judicial activism. In fact, even as states themselves may have internalized precedential reasoning in their legal arguments, we also observe states openly challenging the invocation of precedent. In other words, the practice of citing precedent is not so internalized that states are unable to distinguish it as such. In cases where the practice disadvantages them, they appear able to contest it. In the salient example of *US – Civil Aircraft*, the United States made the following demand:

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.\(^\text{30}\)

Yet such challenges are remarkably rare, which leads to the puzzle that this chapter attempts to elucidate. The final challenge to explanations of *de facto stare decisis* in international trade law that hinge on the pervasiveness of the juristic practice of reasoning by precedent is that these explanations merely defer the question. The question becomes, why is law so inherently tied up with precedential reasoning? And why do countries not avail themselves more often of formal rules that would trump such a legal practice, no matter how long its tradition?

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\(^{29}\) Steinberg, "Judicial Lawmaking": "*stare decisis* is not followed formally by international tribunals, partly because many civil law systems do not adhere to this principle."

One rationalist response might argue that a tacit acceptance of binding precedent is what one would expect of far-sighted strategic states. This vein of argument is based on the premise that courts fill in the optimal ambiguity produced by the legislative process when consensus over sensitive questions is difficult to obtain. In this reading, legislators are aware of and knowingly defer to the way in which the functionalist domain of the law is removed from politics, knowing that a court decision will sufficiently defuse political conflict to achieve the very outcome that would have been difficult to obtain through legislative means. In the case of international trade law, however, such cross-purpose use of courts may strain credulity. While states may tolerate some gap-filling by courts when it happens to suit their interests, it may be a step too far to argue that countries weave in such judicial gap-filling into the design of the institution. I suggest that a simpler explanation is that binding precedent is a means of empowering otherwise weak international courts. In other words, the value of de facto binding precedent from the point of view of countries lies not in the interstitial legislating it allows courts, but in the way it empowers courts to rule against actual violations by states, in accordance with their institutional design.

**Binding precedent empowers weak international courts**

This chapter argues that despite the political costs associated with the perception that they have delegated decision-making power to courts, states may nonetheless gain by doing so. Binding precedent serves as an antidote against the incentives courts have to defer to political power. This, in turn, favours governments themselves in the long run. Indeed, countries create international institutions because they are better off by committing to a set of shared rules. In the case of the trade regime, countries’ commitments lower the risk that trade partners will erect unfair barriers, and it provides governments with a potent bargaining tool vis-à-vis import-competing groups who demand distortionary protection. Yet sovereign states have difficulty making credible promises, as there is nothing to prevent them from simply breaking their commitments. To address this problem, states create third-party

32 Mansfield, Milner and Rosendorff (2002); Pelc (2013).
enforcement bodies such as courts that are set up to provide an unambiguous condemnation of policies that flout agreed-upon rules.\textsuperscript{33}

Here, too, the power of states gets the better of them. Courts themselves are inevitably prone to political pressure. The European context is instructive in this respect. A large part of the political science literature that studies the ECJ suggests that the court must be politically savvy: “the judges of the ECJ realize that their power is ultimately contingent on the acquiescence of member states and hence are reticent to make decisions of which governments disapprove.”\textsuperscript{34} The interests of member states like France and Germany are perceived to weigh particularly heavily in the calculations of judges. Moreover, political pressure need not be actualized to have a strong impact. As long as judges anticipate the likely reactions of governments (e.g., defiance of rulings, wilful noncompliance, renegotiation of the rules themselves), they may let those expectations colour the content of their rulings. Others have pointed out that the ECJ must walk a fine line in this respect, as its power not only relies on not provoking the ire of member governments, but also relies on not appearing overly motivated by political concerns.\textsuperscript{35} In sum, the court’s power relies on walking the fine line between awareness of political constraints and excessive deference to political interests.\textsuperscript{36} Similar concerns exist for the North American Free Trade Agreement (NAFTA) and its investor-state mechanism. Analysts point to instances such as the Loewen case, where NAFTA arbitrators are believed to have caved to anti-NAFTA sentiment in the US Congress out of fear that a finding against the United States might lead Congress to do away with Chapter 11 altogether.

Power undermines promises. The power that states hold over courts impedes their ability to tie their own hands through institutions. In this respect, states face a similar dilemma to that of dictators who are unable to bind themselves through a central bank – which would never be viewed as truly independent – and whose monetary policy suffers as a result.\textsuperscript{37} Governments have a short-term incentive to exert pressure over courts to rule in their favour, but this works against their long-term

\textsuperscript{33} Mansfield, Milner and Rosendorff (2002).
\textsuperscript{35} Burley and Mattli, “Europe before the Court”. \textsuperscript{36} Steinberg, “Judicial Lawmaking”.
incentive to have unbiased courts that will render politically unbiased, predictable verdicts.

The same literature on political bias in the ECJ yields another claim. When judges have precedents to rely on, this decreases the likelihood of bias, as “the greater the clarity of ECJ case law precedent, the lesser the likelihood that the Court will tailor its decisions to the anticipated reactions of member governments”.\(^{38}\) In other words, the more legal discretion judges have in a given case, the more likely they cede to political pressure, and vice versa.

Binding precedent may thus serve a blame-shifting function. The underlying mechanism is the same as when governments motion to international institutions when denying demands for trade protection from import-competing interest groups. In this case, however, it is judges who use this means against governments, by claiming that prior verdicts dictate their opinion in a given instance. By limiting judges’ apparent agency, clear precedent thus limits political backlash. The reduced fear of backlash means that judges may be less vulnerable to pressure when they can rely on a past ruling.

Strategic governments who realize this may have an incentive to allow for such precedents to take hold. If precedential reasoning increases judicial independence and such independence strengthens the credibility of state commitments, then tacitly allowing precedent may be welfare enhancing. Of course, precedents may work against governments in particular instances. The same can be said of the rules themselves, yet countries continue to support these. The greater point is that a tacit acceptance of precedent increases judicial independence, because it allows countries to shift the blame in politically sensitive rulings. This, in turn, increases the credibility of enforcement, and with it, countries’ willingness to exchange reciprocal commitments in the first place.

Finally, why is the equilibrium outcome that of “tacit allowance” rather than outright, formal \textit{stare decisis}, as Bhala, among others, has called for?\(^{39}\) Despite its potential welfare-enhancing qualities, formal binding precedent remains a politically unpalatable solution. Domestic audiences in countries such as the United States are unlikely to accept it.\(^{40}\) Informal acceptance may be the best governments can do to empower international courts while assuaging the fears of their domestic audiences.

\(^{38}\) Kelemen et al., “Legal Integration”. \(^{39}\) Bhala, “Stare Decisis”. \(^{40}\) To wit, see the views of observers such as Ragosta et al., “WTO Dispute Settlement”.
Explaining US reticence

The account presented here may also help account for the heretofore puzzling stance of major countries on the question of binding precedent. Indeed, of all the WTO members, major powers such as the United States have been most vocal about resisting anything approaching *stare decisis*. The aforementioned demand of the United States in *US – Civil Aircraft* is a case in point. The United States is also said to screen AB judges by first asking about their view on precedent. This stance is puzzling insofar as we would expect major powers to be the ones best able to exploit the implications of binding precedent. Indeed, this is one of the concerns of scholars like Pauwelyn: precedent may reinsert power politics into the equation, insofar as major powers with high legal capacity are uniquely placed to take advantage of precedent. The empirical findings cited above provide some support for these concerns. Major powers who are able to file series of precedent-building disputes may then use precedent as a means of obtaining through litigation what they were unable to secure through negotiations. Why, then, have these members been the most reticent to accept anything approaching binding precedent? Ginsburg (2005) notes this apparent paradox:

> There is no small irony that many of the criticisms of international tribunals emanate from American scholars. Powerful states like the United States, and groups of less powerful states, retain means of controlling and cajoling international judges.

The argument presented here may account for this apparent irony. Insofar as binding precedent increases courts’ judicial independence, it achieves the greatest increase in independence from member states like the United States. These are the states whose political clout within the institution allows them to exert the most pressure over the court, much like France and Germany in the case of the ECJ. Although these members may still achieve long-term gains from the resulting increase of the system’s credibility, they are also the ones who stand to lose the most from a short-term loss of political influence over judges, since they have the most influence to lose.

Conclusion

In international trade law, the effective authority of precedent lies somewhere between its denial under formal rules and its standing in domestic

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41 See Pelc, “Politics of Precedent”.
common law systems. One way to approach the question is to ask whether or not actors such as governments and financial markets, who have a vested interest in the answer, behave in a manner consistent with a view of precedent as binding. I describe two findings that support an answer to the affirmative. The status of precedent in international trade law appears considerably closer to its authority in common law systems than what the formal rules would lead us to believe.

The second section of the chapter addressed the implications of these findings. There is good reason for the formal denial of precedent’s authority in international law, as domestic audiences are likely to be wary of the sheer delegation of power to international courts that is entailed by binding precedent. Yet if binding precedent is politically unpalatable yet also exists in practice, why have we not seen more attempts by states to block its rising authority?

After reviewing possible answers from the literature, I propose that the tacit acceptance of binding precedent empowers otherwise weak courts. Building on findings that describe how courts are less likely to cede to political pressure when they have precedent to rely upon when ruling against a powerful party, I claim that precedent plays a blame-shifting function. It reduces the apparent agency of courts and allows judges to rule against powerful governments in a way that avoids political backlash, thus increasing judicial independence. This, in turn, increases the credibility of the commitments that countries make to one another in the first place. Legally speaking, binding precedent in international trade law remains a fiction. Yet it is a fiction that countries may find welfare enhancing, insofar as it strengthens the courts that they have created to keep themselves and their partners in check.

42 Where considerable literature has nonetheless also thrown doubt on the actual effect of precedent. See e.g., Knight and Epstein, “Stare Decisis”.