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Dispute Resolution as Institutionalization in International Trade and Infromation Technology

Cover Page Footnote

Director, Institute of Comparative Law; Associate Professor, Faculty of Law, McGill University. I wish to thank Marie-Christine Levasseur and Michael Wong for their research and Rod Macdonald for his insights. All mistakes are mine.

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PANEL III: INFORMATION TECHNOLOGY AND INTERNATIONAL TRADE

DISPUTE RESOLUTION AS INSTITUTIONALIZATION IN INTERNATIONAL TRADE AND INFORMATION TECHNOLOGY

*Fabien Gélinas**

INTRODUCTION

The history of the World Trade Organization ("WTO") is one of a quest for the maximization of economic benefits at the least possible cost in terms of international institutionalization and the loss of sovereignty by Member States. Obvious considerations of instrument choice by sovereign states serve to explain state avoidance of international institutionalization. Such considerations were apparent in the negotiations surrounding the International Trade Organization ("ITO"), and were clearly central to its ultimate failure.[1] These considerations also help explain the relative success of the non-institution that was the General Agreement on Tariffs and Trade of 1947 ("GATT 1947"). Overcoming the tragedy of the commons through normative coordination in trade rules is all very well as long as sovereignty and the attendant dynamics of treaty-making are preserved. This implies a logical rejection by states of any institutionalization of trade regimes that could make the subsequent exit by a state, or a reversal of position, overly difficult.

When thinking of institutionalization, a decision-making organ of the executive or legislative type most often comes to mind. One naturally thinks of international organizations entrusted with powers similar to the powers exercised by the political branches of domestic systems, namely the legislative branch and the executive branch. In this sense, the Member States of the WTO were extremely successful in maximizing economic benefits at the least possible cost (calculated in terms of

* Director, Institute of Comparative Law; Associate Professor, Faculty of Law, McGill University. I wish to thank Marie-Christine Levasseur and Michael Wong for their research and Rod Macdonald for his insights. All mistakes are mine.

1. Robert E. Hudec, The GATT Legal System and World Trade Diplomacy 23-24 (2d ed. 1990).

institutionalization), making the well-known "member-driven organization" description a mantra.[2]

However, in making the WTO the success it is today, something had to give which would not overtly involve a loss of sovereignty. This had to be the power of what is often referred to as "the least dangerous branch."[3] Dispute settlement was made one of the key functions of the WTO.[4] It was the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), with the fundamental provision of the reverse consensus rule for adoption of panel and Appellate Body reports,[5] that made the WTO a true institution.

The reason why the DSU was a turning point in terms of institutionalization is that rulemaking and standard setting by courts, panels, and other tribunals have become more prevalent on an international scale than ever before. The American model of judicial involvement in high-level law making is spreading fast, as is an overall sense of acceptability of judicial or adjudicative bodies effectively reviewing political decisions.[6] Judicial involvement is a significant part of institutional decision making in any contemporary normative context.

It should be clear that the fear of institutionalization, mentioned in the context of treaty making, is a fear of giving rise to alternative sources of legitimacy. Alternative sources of legitimacy indirectly challenge the claims of sovereignty put forth by nation-states and supported by domestic political and legal institutions. There should be no doubt that the fear of institutionalization is as justified with respect to the "judicial" or adjudicative function today as it is with regard of the executive and legislative functions.

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2. The very first piece of information given on the *The WTO Gateway*—the official website of the World Trade Organization ("WTO")—is that "The WTO is a rules-based, member-driven organization—all decisions are made by the member governments, and the rules are the outcome of negotiations among members." The WTO Gateway http://www.wto.org/english/thewto_e/thewto_e.htm (last visited Oct. 20, 2005).

3. *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1 (2d ed. 1986); The Federalist No. 78, at 424-25 (Alexander Hamilton) (E.H. Scott ed., 1898) (referring to the judiciary as the department "least dangerous to the political rights of the Constitution").

4. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, art. 3.2 (1994) [hereinafter WTO Agreement].

5. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, arts. 16.4, 17.14 (1994) [hereinafter DSU].

6. Before World War II, there were only a handful of countries where a court had the power to throw out national legislation. *See* Carlo Guarnieri & Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy 135 (C. A. Thomas ed., 2002). Today, there are more than eighty countries where the judiciary enjoys this power. *See* Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism 1 (2004).

It is this fear of adjudicative institutionalization that prompted the adoption of some of the most interesting provisions of the DSU:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB (Dispute Settlement Body) cannot add to or diminish the rights and obligations provided in the covered agreements.[7]

The DSU goes on to state that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."[8]

These provisions may be given several meanings. First, they can be taken as a word of caution against judicial activism addressed to panels and the Appellate Body. Second, they can be taken as a statement of legal protectionism meant to isolate the covered agreements from the broader influence of international law. Third, they can be taken as a declaration that reports have no legal effect or status in later disputes.

The first reading would make the last sentence of article 3.2 a means of qualifying the role of the dispute settlement system mentioned in the preceding sentence, which is to "clarify the existing provisions" of the covered agreements.[9] Panel and Appellate Body members are told, under this reading, that "clarifying" does not mean "changing." Any person with experience in legal interpretation in virtually any context, however, can readily see that such formal warnings or directives can have but very limited practical impact.[10]

The Appellate Body quickly excluded the second, "isolationist" reading in its very first report.[11] The notion that the covered agreements should be read in clinical isolation from the rest of international law (with the exception of customary rules of interpretation) was interesting from the point of view of theories of interpretation, but was rightly rejected. Even if

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7. DSU, *supra* note 5, art. 3.2.

8. *Id.* art. 19.2.

9. *Id.* art. 3.2.

10. A good indication of this is the fact that interpretation acts found in the statute books of many jurisdictions are often ignored by lawyers and judges. *See, e.g.*, Attorney-Gen.'s Dep't, Commonwealth of Austl., Review of the Commonwealth Acts Interpretation Act 1901, ¶ 1.10-1.11 (1998) (suggesting, in a discussion paper, that a note could be included at the beginning of every new act drawing attention to the legislative guidance on interpretation).

11. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 17, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *Conventional Gasoline*].

that reading had clearly been intended by the parties to the agreement, it would quite likely have had the same fate. Put succinctly, the reason is that international law is the normative environment in which WTO law has legal meaning. Adopting the "isolationist" reading would amount to pulling oneself up by one's own bootstraps.

We are left with the third reading, which speaks to the notion of case law in a dispute resolution context still formally subordinated to political will.[12] In order to assess that reading, I propose to look at precedent as a form of institutionalization.

I. DISTINGUISHING PRECEDENT FROM PRECEDENT

To raise the issue of case law in the context of the DSU is to ask about the relative value of panel and Appellate Body reports as precedents. The impact of a report on the deliberations of future panels in other cases is, in fact, considered limited because no finding in the DSU system is meant to be binding beyond the dispute in which it was made. The value of panel and Appellate body reports is explained as follows by the Legal Affairs Division and the Appellate Body Secretariat in a handbook on the WTO dispute settlement system:

> A dispute relates to a specific matter and takes place between two or more specific Members of the WTO. The report of a panel or the Appellate Body also relates to that specific matter in the dispute between these Members. Even if adopted, the reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise. As in other areas of international law, there is no rule of *stare decisis* in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases. This means that a panel is not obliged to follow previous Appellate Body reports even if they have developed a certain interpretation of exactly the provisions which are now at issue before the panel. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases.[13]

It is clear then that there is no such thing as a doctrine of stare decisis governing the relationship between past and present in the normative context of the WTO.

But stare decisis should not be mistaken for the general principle it was meant to formalize. It is easy to lose sight of the fact that the doctrine of stare decisis is a relatively recent phenomenon peculiar to common law systems. The conditions necessary for such doctrine to function in English

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12. This is because the formal adoption of panel and Appellate Body reports lies with the Dispute Settlement Body ("DSB"), a political organ, even if consensus is needed for the report to be rejected.

13. World Trade Org., A Handbook on the WTO Dispute Settlement System 90-91 (2004) [hereinafter WTO Handbook].

law, the original common law system and, for many, the ideal type of precedent-based systems, took a long time to materialize. Rules governing strict binding authority in case law can only emerge in a context where a system of clear judicial hierarchy exists together with effective arrangements for case reporting. This state of affairs only came about in the United Kingdom in the second part of the nineteenth century.[14] It was simply not possible for a strict rule of stare decisis to take hold before then.[15] And yet, the common law tradition had managed to evolve over centuries relying upon a softer, more flexible understanding of precedent.[16]

This older doctrine of precedent can be said to have been part of English law since at least the twelfth century.[17] It is also possible to argue that the idea of treating a decision as strictly binding is foreign to the common law tradition seen from a broader historical perspective.[18] In contrast to the rule of stare decisis, the much older doctrine of precedent simply expresses the rule of law desideratum that like cases should be treated alike, which is in some form or another recognized by all advanced legal systems. It expresses a concern for formal justice—the kind of justice obtained through predictability and coherence—without implying binding authority in the formal sense, which dictates that a ruling must be followed even if it is found to be wrong, or even appalling.

The fact then that there is no stare decisis does not mean that reports have no precedential value. The concern for formal justice behind the older doctrine of precedent is, after all, the very concern expressed in the DSU: that the dispute settlement system should provide "security and predictability."[19] Panel and Appellate Body reports are therefore said to

14. Mirehouse v. Rennell, (1833) 1 Cl. & F. 527 (H.L.) (U.K.), is occasionally referred to as establishing the strict rule of precedent expressed by stare decisis. The reasons of Justice Parke do mention the need to follow rules derived from precedents for the sake of certainty and consistency, even where they are "not as convenient and reasonable as we ourselves could have devised." *Id.* at 546. But the reasons only stand for the statement that precedents are to be followed "where they are not plainly unreasonable and inconvenient," a formulation closer to the general idea that like cases should be treated alike, one that has no implication of strictly binding precedent. *Id.*

15. The thorough reorganization of the judiciary that gave the doctrine its current shape in England was introduced by the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.) and Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77 (Eng.). It was the initiative of the Council on Law Reporting in 1865 which established a reasonably systematic reporting of cases. Note that it took almost another century before the English Court of Appeal established itself as strictly bound by its own decisions. *See* Wynne-Finch v. Chaytor, [1903] 2 Ch. 475 (K.B.); *In re* Shoesmith, (1938) 2 K.B. 637, 644 (dictum). The rule is now known as the rule in Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718.

16. *See* J. H. Baker, An Introduction to English Legal History 133 (2d ed., Butterworth 1979).

17. R.W.M. Dias, Jurisprudence 56 (4th ed., Butterworth 1976).

18. *See* H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law 250 (2d ed. 2004) ("Stare decisis appears now, with hindsight, as a quick fix, the starch necessary to make the new substantive common law take hold.").

19. DSU, *supra* note 5, art. 3.2.

have persuasive authority. The WTO Legal Affairs Division and the Appellate Body Secretariat explain this idea by stating,

> If the reasoning developed in the previous report in support of the interpretation given to a WTO rule is persuasive from the perspective of the panel or the Appellate Body in the subsequent case, it is very likely that the panel or the Appellate Body will repeat and follow it.[20]

But the notion of persuasive authority can be confusing. The Appellate Body has stated that panel reports, as well as Appellate Body reports,[21] "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[22] Also, even though reports that have not been adopted by the DSU have no status in the system, they can provide useful guidance to a panel or the Appellate Body in subsequent cases involving the same questions.[23]

II. DEFINING PERSUASIVE AUTHORITY

Two distinctive strands of persuasive authority can be disentangled in the WTO context. The first strand focuses on persuasion in the ordinary sense and has to do with substantive justice rather than formal justice. Good reasons are and should be persuasive, in the ordinary sense of the word, irrespective of the formal status of the documents in which they are expressed or of the person or persons who have authored them. This idea is about the intrinsic persuasiveness of particular reasons rather than the status or even the reputation of its author.[24] In the WTO context, a report, whether formally adopted by the Dispute Settlement Body ("DSB") or not—or, for that matter, any other sources found to be relevant—can be persuasive irrespective of their relative formal pedigree.

The second strand focuses on authority. The idea entangled in the notion of persuasive authority is expressed in terms of legitimate expectations and relates strictly to formal justice: Like cases should be treated alike, if only to ensure legal security and predictability in terms of economic efficiency.[25] Formal justice focuses on authority as derived from legal forms. Treating like cases alike implies a measure of constraint on the decision maker which

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20. WTO Handbook, *supra* note 13, at 91.

21. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 109, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp Products*].

22. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 14, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Alcoholic Beverages II*].

23. *See id.* at 13; Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.10, WT/DS8/R (July 11, 1996).

24. In practice, persuasiveness is always corrupted by such factors as the reputation and status of the author. These factors, being intimately related to expectations, probably reflect a concern for formal justice.

25. The situation is more complex when the legal subjects are individuals rather than states. Where individuals are concerned, formal justice relates directly to human dignity as a function of the space they need for self-determination.

curtails the freedom to decide a legal issue afresh based on the substantive rights and obligations of the parties as assessed in the circumstances of each case. Such constraint is presented as absolute under a strict doctrine of stare decisis: Where the conditions are met, the precedent must be followed.[26]

Under the older, more flexible doctrine of precedent, the constraint would translate, in WTO terms, into a more or less stringent duty imposed on the Appellate Body as well as on panels to consider an adopted report in a case involving the same legal issues. The second idea, that like cases should be treated alike, focuses on formal authority because it is the pedigree of a report that makes it persuasive: The only reports that must be considered by the panels and the Appellate Body are those that have been formally adopted by the DSB. Accordingly, opinions expressed in other panel or Appellate Body reports or elsewhere can only be persuasive in the first, substantive sense identified above. What we have, in short, is substantively persuasive authority and formally persuasive authority.

Formally persuasive authority calls for further clarification, however. By all accounts, it imposes a "duty to consider."[27] A closer look at the scope of this duty is needed if one is to grasp the constraints imposed by persuasive authority and the degree of institutionalization involved in the DSU.

It should be helpful to start from the common law system which introduced the formal distinction between binding and persuasive authority in the context of case law. The duty to consider reports should be similar to that imposed on a common law judge who in a particular case is not bound by any ruling under stare decisis. In the English context, Rupert Cross put it as follows:

> The obligation of the common law judge to consider case-law entails not only a duty to follow the *rationes decidendi* that are binding on him according to the rules of precedent, but also the duty of considering, though not necessarily of following, rules and principles mentioned in dicta or constituting the *rationes decidendi* of merely persuasive precedents.[28]

The "duty to consider" may vary in intensity depending on context.[29] In most cases, however, it appears to be highly constraining. Given the setup of the WTO dispute resolution system, which does not have multiple layers of judicial hierarchy, a look at the examples provided by the top courts in common law systems should be helpful.

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26. Of course there are numerous exceptions to the doctrine and the determination of the *ratio decidendi* upon which it depends is known to leave much leeway to the judge who is expected to abide by it.

27. *See* Rupert Cross, Precedent in English Law 156 (3d ed. 1977). For further possible distinctions, see Richard Bronaugh, *Persuasive Precedent, in* Precedent in Law 217 (Laurence Goldstein ed., 1987). *See generally* Gerald L. Gall, The Canadian Legal System (2d ed. 1983).

28. *See* Cross, *supra* note 27, at 217.

29. *See generally* Gall, *supra* note 27.

In 1966, the House of Lords announced in a practice statement that it would be willing to depart from its own decisions where necessary:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.[30]

Previous decisions of the House are therefore "normally binding," which means that the practice of departure must be used "sparingly."[31] Indeed, the House of Lords has indicated on many occasions that the mere conclusion by a panel that an earlier decision was "wrong" is not in and of itself sufficient to support a decision to depart from it.[32] This seems similar to the situation of the Judicial Committee of the Privy Council, which has historically served, and in some cases continues to serve, as the top appellate court for British colonies and the Commonwealth.[33] As its decisions were formally given in advice to the Crown, the Committee was "not absolutely bound by previous decisions," but nevertheless made it clear that, at least on constitutional questions, "it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects."[34]

Other appellate courts in common law jurisdictions take a similar position. The High Court of Australia has never considered itself strictly bound by its own decisions,[35] but will depart from such decisions "only after the most careful and respectful consideration of the earlier decisions, and after giving

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30. The Statement was read before judgments were delivered on July 26, 1966. Practice Statement (Judicial Precedent), (1966) 1 W.L.R. 1234 (H.L). The former position that the House of Lords was bound by its own decisions had been established in *London Tramways v. London City Council.* [1898] A.C. 375, 380.

31. Reg. v. Nat'l Ins. Comm'r, [1972] A.C. 944, 966. For a discussion of the statement from a legal theory standpoint, see Anthony Blackshield, *'Practical Reason' and 'Conventional Wisdom': The House of Lords and Precedent, in* Precedent in Law, *supra* note 27, at 107.

32. *See, e.g.*, Knuller Ltd. v. DPP, [1973] A.C. 435, 445; Fitzleet Estates Ltd. v. Cherry, (1977) 1 W.L.R. 1345, 1349; Wilson (Paal) & Co. A/S v. Partenreederei Hannah Blumenthal, [1983] 1 A.C. 854, 911-13.

33. Note that the Privy Council acted on appeal from jurisdictions where systems other than the common law were in place.

34. A. G. Ont. v. Canada Temperance Fed'n., [1946] A.C. 193, 206 (P.C.).

35. *See* Australian Agric. Co. v. Federated Engine Drivers and Firemen's Assoc. of Australasia (1913) 17 C.L.R. 261. For a Privy Council decision following the abolition of appeals, see Viro v. The Queen (1978) 141 C.L.R. 88.

due weight to all circumstances."[36] The Supreme Court of Canada indicated its willingness to depart from its own decisions in 1967, with the warning that a departure from a previous decision "should be made only for compelling reasons."[37] The United States Supreme Court takes a comparable position. It has never considered stare decisis an "inexorable command,"[38] but nevertheless requires compelling reasons to depart from its earlier decisions.[39]

In all of these cases the precedents are not strictly binding on the appellate courts, but may be described as having persuasive authority. The appellate court precedents may have substantively persuasive authority to the extent that they are supported by good reasons. The appellate court precedents certainly have formally persuasive authority because they express the opinion of the highest judicial organ in a system. As such, like adopted reports under the DSU, they "create legitimate expectations . . . and, therefore, should be taken into account where they are relevant."[40] By analogy from our brief survey of the practice of appellate common law courts, the "duty to consider" which is emerging in WTO law may provisionally be taken to mean that the Appellate Body or a panel cannot depart from relevant previous reports without justification, that is, without providing reasons for its departure.[41]

III. SITUATING PERSUASION AND AUTHORITY

An assessment of the degree of institutionalization involved in the WTO dispute settlement system can be informed by Max Weber's typology of the basic forms of legal thought, which may be applied to adjudication. The typology can best be presented as a table of the combinations of four characteristics:[42]

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36. Queensland v. The Commonwealth (1977) 139 C.L.R 585, 599.

37. Binus v. The Queen, [1967] S.C.R. 594, 601. The Court openly reversed itself for the first time in *Brant Dairy v. Milk Commission of Ontario*, [1973] S.C.R. 131, 152-53.

38. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

39. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 576-77 (2003).

40. *Alcoholic Beverages II, supra* note 22, at 14.

41. Thus far, the treatment of persuasive authority in the WTO system has put panel reports on the same footing as those of the Appellate Body. This might not be sustainable in the future given the growing caseload. The DSU has been applied to 324 complaints in its first ten years, which represents more cases than had been handled under the General Agreement on Tariffs and Trade of 1947 ("GATT 1947") system in some forty-eight years. Thomas A. Zimmermann, *WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation*, 60 Aussenwirtschaft 27, 27 (2005).

42. The categories making up the typology are used throughout Weber's work on the sociology of law. The terminology, however, is known to be somewhat inconsistent. *See* Anthony T. Kronman, Max Weber 75-76 (1983). The diagram is inspired by Kronman, *supra*, at 76, and David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 Wis. L. Rev. 720, 729 (1972).

	rational	**irrational**
formal	*formal rationality*	*formal irrationality*
substantive	*substantive rationality*	*substantive irrationality*

Starting from the top on the right-hand side, our first combination is *formal irrationality*, which is illustrated by primitive procedures for deciding disputes by oracular pronouncements. Adjudication of the oracular type is irrational because it is ad hoc by definition. It has recourse to means that cannot be controlled by intellect and results in pronouncements that can only concern the instant case as presented. Oracles give no reasons which could be relied upon in the future. At the same time, oracular mechanisms usually involve a rigorous ritual imposing strict forms in the formulation of the question put to the oracle: "[U]nless the relevant question has been stated in the formally correct manner, the magical technique cannot provide the right answer."[43] In this limited sense, it is formal.

Moving down in the table, the second combination, *substantive irrationality*, refers to forms of adjudication where questions are decided on a case-by-case basis, without following any identifiable set of rules. Any type of consideration, emotional, ethical, or political, may bear on the result.[44] This kind of justice recognizes no firm distinction between ethics and law. It is therefore substantive in the sense that it imposes no constraints on the decision maker which could prevent a free, concrete balancing of all interests and possible reasons in each and every case.[45] It is irrational in the sense that it is purely ad hoc; it steers clear of rules and principles and has no time for precedents or for similar cases that may arise in the future.[46]

Moving to the left, the third combination, *substantive rationality*, is associated with adjudication in a "patriarchal system of justice" or under a "priestly" approach to law.[47] "[It] is presented in its purest form in the legal teaching in seminaries for the priesthood or in law schools connected with such seminaries."[48] This kind of adjudication also does not recognize a firm distinction between ethics and law and is in this sense substantive, but

43. Max Weber, Weber on Law and Economy in Society 77 (Max Rheinstein ed., Edward Shils trans. 1954).

44. *Id.* at 229.

45. *Id.* at 317.

46. Arbitral justice is in some cases similar, for example, where the arbitrator is given the power to decide *ex aequo et bono* in a context where the process and the award will remain confidential.

47. Weber, *supra* note 43, at 205-06.

48. *Id.*

it is fundamentally different from irrational adjudication in its strict adherence to principles.[49]

The last combination, *formal rationality*, corresponds to adjudication under "the legal science of the Pandectists' Civil Law,"[50] which, among other characteristics,[51] clearly separates legal considerations, which are relevant, from extralegal considerations, which are not. This kind of adjudication is rational because it is rule based.

As these combinations are ideal types for adjudication, they may be presented on a two-dimensional sliding scale, as shown here.[52]

	rule based	↔	**ad hoc**
artificial reasoning	*formal rationality*		*formal irrationality*
↕			
open-ended reasoning	*substantive rationality*		*substantive irrationality*

A particular system of adjudication may thus lie anywhere between the extremes of strictly rule-based and purely ad hoc systems. At the same time, the decisions may be based on anything between constrained, artificial legal reasoning and open-ended, unrestricted reasoning. As adjudication moves closer to pure formal rationality, the more institutionalized the system becomes. Artificial forms of reasoning and rule-based adjudication are the opposite of open-ended political reasoning and decisions based on expediency.

Going back to our notion of persuasive authority, one thing should be readily apparent. An adjudicative system which does not recognize strict binding authority in case law may be further from extreme formal rationality than a system which does,[53] but that does not make it a system of substantive irrationality. The notion of persuasive authority draws the system a long way toward formal rationality. On one plane, it increases the artificial character of the reasoning by giving certain sources, and not

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49. *Id.*

50. *Id.* at 64.

51. *Id.* (explaining that another feature that Weber found important was "the collection and rationalization by logical means of all the several rules recognized as legally valid into an internally consistent complex of abstract legal propositions"). Note that here the ideal type refers to legal thought in general and not adjudication in particular.

52. This diagram is inspired by Trubek, *supra* note 42, at 729, who applies Weber's typology to legal norms (as opposed to adjudicative systems), using a gradation of generality on one plane and differentiation from nonlegal norms on the other.

53. The move of the common law from the soft doctrine of precedent to the strict doctrine of stare decisis was a move in the direction of rule-based adjudication and a move toward artificial reasoning.

others, a legal quality which constrains even though it does not bind.[54] On the other plane, it increases reliance on rules by forcing the relative "likeness" of cases to be reasoned out in a transparent way.[55]

Persuasive authority, as compared to binding authority, fosters a greater degree of competition between panels and other international tribunals. As long as the justificatory framework is more constraining than open-ended reasoning, competition for sway in legal interpretation and approaches increases the system's chances of making the right decisions and getting closer to the elusive right answer. In such a system, a report is followed not only because of the authority formally granted to the DSB but also by virtue of the authority wielded by the reasoning.

The general principle that like cases should be treated alike is very much alive in WTO dispute resolution. Persuasive authority can hardly be prevented from doing its justificatory work, and from fostering a balance between the right answer in terms of substantive justice on one side, and predictability and coherence of the system on the other.

The status of the soft doctrine of precedent in the WTO system may be said to depend on the formal recognition of dispute settlement as "a central element in providing security and predictability to the multilateral trading system."[56] But it also depends on less visible elements such as an assumption that reports are published, or, with respect to persuasive authority, that a distinction is warranted between formal jurisprudential sources (relevant adopted DSB reports and, perhaps, decisions of the International Court of Justice) on one hand, and other informal sources (unadopted DSB reports and other materials) on the other, or that legal training is a highly relevant aspect of the expertise required of actors.[57] The doctrine clearly relies on implicit assumptions about law and legal processes.

It would seem that the soft doctrine of precedent is so central to the idea of law and the process of legal reasoning that no act of legislative authority could ever displace it entirely. As I explained at the outset, article 3.2 of the DSU could be read as such an attempt.[58] Yet, the Appellate Body's first report decided that the trade rules found in the covered agreements were not

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54. This is a form of reliance on authority, which promotes efficiency by constraining the scope of legal debate.

55. Weber's ideal type for formal rationality in law was a civilian system, which does not have a concept of stare decisis but certainly has a tradition of persuasive authority. On the relationship between the development of state law and binding authority on one hand and persuasive authority on the other, see H. Patrick Glenn, *Persuasive Authority*, 32 McGill L.J. 261 (1987).

56. DSU, *supra* note 5, art. 3.2.

57. It is very significant that the Appellate Body decided to allow representation of governments by law firms where this had not been the practice under the GATT 1947 system. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 11, WT/DS27/AB/R (Sept. 9, 1997).

58. *See supra* note 9 and accompanying text.

to be read in clinical isolation from public international law.[59] This was an implicit, but important, acknowledgement that context matters in defining rights and obligations. If international law provides the relevant context, then this must comprise adjudicatory decisions expounding international law, which necessarily include WTO panel and Appellate Body reports.[60] The urge to seek coherence and to fashion law as a concern broader than that which is raised by any particular case cannot be contained by writ. Neither can the tendency of legal processes to foster, at least to an extent, their own institutionalization.

IV. INSTITUTIONALIZATION AND LEGITIMACY

The phenomenon of institutionalization is not always deliberate or even self-conscious. But even if not entirely self-conscious, institutionalization serves clear purposes—legal certainty and efficiency.[61] Most would agree, however, that institutionalization without legitimacy is best avoided. The phenomenon of adjudicative institutionalization has a dark side which should not be overlooked. The proposal by a WTO commentator that dispute settlement panels should act strategically provides a glimpse of this dark side:

> [I]nternational tribunals should move cautiously in their early years, striking a delicate balance between independence and deference that permits states to develop a level of comfort with international review and to become habituated to complying with unfavorable outcomes in specific cases. Only later will a more assertive approach be feasible.[62]

Of concern here is the self-interest of the human beings involved in this process. Adjudicative institutionalization entrenches the economic and social value of the specialized knowledge created and possessed by a community of experts whose interests clearly lie in further entrenchment. In the context of WTO law, one may well be justified in fearing a dictatorship of the experts. Of course, the legitimacy derived from political institutions in Member States supports the rules contained in the WTO Agreement and the covered agreements. What is at stake is the fate of those rules and the regime they put in place once the main decision-making mechanism not based on positive consensus—the only realistic mechanism for evolution—is adjudication. The area where concerns as to legitimacy have been voiced most convincingly lies upstream of the actual decisions, where well-informed, civil society input could influence outcomes in pending cases and ultimately help shape case law. This is where the public interest argument about a legitimacy deficit is most effective.

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59. *Conventional Gasoline*, *supra* note 11, at 17.

60. *See id.*

61. *See supra* note 54.

62. Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 Harv. Int'l L.J. 357, 410 (1998).

WTO cases always have a public dimension. That is not in doubt. It will become even more obvious as the scope of the General Agreement on Trade in Services ("GATS") is gradually extended to cover national treatment in the trade of services.[63] What is controversial in this respect is how that public dimension should influence the rules regulating information flows in the dispute settlement system. The questions revolve around the information that needs to be made public and the possibility for third parties to provide input to panels and the Appellate Body.

Where private entities have an interest in a WTO issue, they are expected to make representations directly to their government, thus following the traditional channel of political legitimation for international matters. To facilitate this, several Member States have put frameworks in place under which private parties may ask their government to file a case with the WTO.[64] In principle, private entities, unlike third-party Members, have no direct access to the dispute settlement system.[65] In addition, the entire WTO dispute settlement procedure is, in principle, confidential.[66] Member States, however, widely make use of their right to disclose their own submissions to the public, and the reports of panels and the Appellate Body, which are published, describe the position taken by participants.[67] Also, the parties are free to open a procedure by agreement.[68]

Availability of information is therefore not an issue with respect to adopted reports. In and of itself, this information is important in piecing together the elements of legitimacy. Civil society must have access to information that institutionally informs and shapes public policy in a political system—and DSB reports clearly represent such information for Member States. The instrumental value of the information is even more important when considering the legitimacy of the process. The information has instrumental value in that it enables civil society to participate in the decision-making process; it enables civil society to provide valid, well-informed input to the process. The information, in other words, can only

63. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1167, art. 17 (1994).

64. *See, e.g.*, United States Trade Act of 1974 § 301, 19 U.S.C. § 2411 (2000); Council Trade Barriers Regulation 3286/94, art. 4, 1994 O.J. (L 349) 71-78 (EC) (laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the WTO).

65. DSU, *supra* note 5, art. 10.2 (panels); *id.* art. 17.4 (Appellate Body).

66. *Id.* art. 4.6 (consultations); *id.* arts. 14.1, 18.2, app. 3, ¶ 3 (panel); *id.* art. 17.10 (Appellate Body).

67. *Id.* art. 18.2, app. 3, ¶ 3.

68. The hearings of September 12-15, 2005, in the *Continued Suspension of Obligations in the EC—Hormones* case were thus open to the public. The Center for International Environmental Law, *CI EL Attends First Open Dispute Proceedings at the World Trade Organization*, Sept. 20, 2005, http://www.ciel.org/Tae/WTO_OpenDispute_20Sep05.html.

realize its full value if private parties are somehow allowed into the procedure.

Aside from the right of third-party Member States to participate, panels and the Appellate Body have considered receiving amicus curiae submissions, even unsolicited, from any source.[69] Given the expressed reluctance of a significant proportion of Member States, this has been done sparingly. It is considered a matter not of the right of nonmember third parties but as a matter of panel discretion.[70] Still, the overall result is one of greater transparency and broader-based deliberations informed by a larger constituency, a sense of public debate within the narrow meaning of public interest adjudication.

What are the repercussions of this development on the phenomenon of institutionalization? As already pointed out, the fear of institutionalization in treaty making is a fear of new sources of legitimacy being created. For civil society to gain access to information produced in proceedings is important; for civil society to provide input to WTO panels and the Appellate Body is another matter altogether. It is a matter of public participation in the decision-making process, which can be justified because the decisions involve public interests. It is a matter not only of providing valuable input—a perspective, for example, which the disputing parties might not bring—but also of generating direct and independent legitimacy for the decision, the process, and ultimately the institution. This legitimacy is independent from that generated by the political institutions of the countries involved. It is not channeled through the state that entered the WTO—it is self standing—and it contributes to entrenching the institutionalization of trade law.[71]

CONCLUSION

By all accounts, the success of the WTO is largely the success of its dispute settlement system. This success has come at the price of adjudicative institutionalization through a soft conception of precedent which is arguably inherent to legal reasoning. The law-making power involved in this conception has raised issues of legitimacy and prompted calls for civil society input to the system. Such input, however, provides a form of direct participatory legitimacy which further entrenches institutionalization.

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69. *See Shrimp Products*, *supra* note 21, ¶¶ 103-07.

70. *Id.*

71. The fear of institutionalization was felt particularly strongly when the Appellate Body adopted special procedures for the filing of amicus curiae briefs in the *EC—Asbestos* case. The General Council of the WTO held a special meeting to discuss this matter and a majority of the Members that spoke considered it unacceptable for the Appellate Body to accept and consider such submissions. *See* General Council, Minutes of the Meeting of November 22, 2000, WT/GC/M/60.

With the arrival of judge-made law under the GATS and the advances of negotiations on services and e-commerce, what we are witnessing is the gradual international institutionalization of trade governance's last frontier.