

The Rule of Precedent and the Role of the Appellate Body

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The crisis over appointments to the WTO's Appellate Body has been one of the most challenging conflicts the GATT/WTO system has ever seen, threatening to destroy a core institution of the world trading system. The Appellate Body has played a valuable role in dispute settlement, by providing a coherent set of jurisprudence to guide WTO Members as to the meaning of WTO law. The Appellate Body does not create formal 'precedent', but nevertheless its reasoning in past cases serves informally to create expectations as to the meaning of the WTO agreements. The United States has objected to the Appellate Body's treatment of past rulings, arguing that the Appellate Body has elevated these rulings to 'binding precedent'. However, a careful reading of the language used by the Appellate Body to describe its views indicates that the Appellate Body has not done so. The US objections are one part of its series of concerns justifying its blocking of appointments. Losing the Appellate Body over this dispute would be devastating to the WTO, and engagement on these issues must continue in good faith in order to find a resolution.

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In many domestic legal systems, including especially those of the United States and other countries that follow the Anglo-American common law tradition, the highest court in the land has a special role in interpreting the constitutional or other foundational documents of the society. The 'precedents' it sets through its interpretations do more than simply resolve a dispute. They also create a body of law for lower courts to apply and for the high court itself to follow in the future. This reliance on precedent provides certainty and foreseeability to individuals, businesses, and other domestic actors within the society. They can have confidence that they know what the law is and how it will be applied.

In the arena of international law, there is no single high court. There are, however, various international tribunals and other judicial and quasi-judicial bodies

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that play a similar role with respect to specific international jurisdictions. The judicial decisions of these international tribunals are among the sources of international law.¹ Yet these decisions have no binding force except between the parties and in respect of that particular case.² Thus, there is no rule of *stare decisis* – no rule of precedent – in international law.

Why this difference between domestic and international law on the matter of precedent? Countries that rightly see the rule of law as essential to their freedom and that, therefore, strive to uphold the rule of law within their own jurisdictions, are willing to accept and apply the judgments of their own national jurists. For the same reason, in upholding the rule of law domestically, such countries are also generally inclined to accept a domestic judicial practice of relying on previous judgments as precedents in the interpretation of the law. The parties to the current domestic dispute may not have been parties to the past dispute that is used as precedent, but the precedent is a ruling from within the national jurisdiction and those who rendered that ruling are as well.

But, in contrast, since the emergence of international institutions and international tribunals in the late nineteenth and early twentieth centuries, and since the simultaneous emergence of more concerted global efforts to establish and uphold the international rule of law, all countries have been suspicious of international judgments that rely for their legal conclusions on international precedents. In the eyes of ‘our’ country (wherever our country may be), a previous international judgment that may be used as a precedent by the jurists in our case may have been made in a case in which our country was not a participant and in which our country may have had no standing and therefore no say. And yet, because this previous judgment has been used as a precedent, it may help determine the outcome of our case, which, if the judgment is binding and enforceable, may have a significant impact on us domestically. On this reasoning, there has long been a firm international consensus that there is no rule of precedent in international law.

At the same time, the rule of law requires certainty in the meaning of the law and foreseeability in the application of the law, internationally as well as domestically. As a former president of the International Court of Justice, Judge Gilbert Guillaume, expressed it, ‘Any system of law requires a minimum of certainty, and any dispute settlement system a minimum of foreseeability. Furthermore, these systems assume that persons in comparable situations are treated as comparable. Precedent plays an irreplaceable role in this respect. For the parties it is the guarantor of certainty and equality of treatment’.³

¹ Statute of the International Court of Justice, Art. 38.1(c).

² Statute of the International Court of Justice, Art. 59.

³ Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) J. Int’l Dispute Settlement 5–23, n. 6 (2011).

Thus, there is an inherent tension in international law on the question of precedent. It is universally agreed that previous international legal judgments are not binding; but it is also widely believed that previous international legal judgments can be useful in reaching the right outcomes in current international legal disputes where identical or similar legal issues are involved. This is an ever-present tension for every international jurist on every international tribunal. Individual cases must be judged on their own facts and their own merits case-by-case; and yet, to uphold the international rule of law, the law must mean the same for everyone, everywhere, all the time. If the same legal obligation is interpreted differently in different international disputes, then where are the certainty and foreseeability that are needed by all those who are bound by a legal system? But, as Judge Guillaume went on to say, 'to constantly follow precedent also freezes the law, and prevents it from progressing according to new demands of society. A balance must be found for the judge and arbitrator between the necessary certainty and the necessary evolution of the law'.⁴

In practice, this tension is resolved in different international tribunals on a case-by-case basis as international jurists ritually adhere to the international rule that there is no law of precedent while often also relying on the legal reasoning in previous international cases where the legal issues are the same or similar and where the same or similar reasoning seems appropriate. Previous legal rulings do not serve as formal and binding precedents, but they routinely provide guidance to participants in the various international legal systems as to what the legal obligations in the wide-ranging and ever-growing collection of international agreements mean.

The inherent tension on the question of precedent appears to be one of the main causes of the current crisis involving the Appellate Body of the World Trade Organization, the final tribunal of appeal in the WTO's rules-based and multi-lateral dispute settlement system for international trade. The United States is blocking appointments of new judges to fill vacancies on the Appellate Body, which has undermined the continued functioning of the WTO dispute settlement system. As of this writing, the Appellate Body is no longer hearing new appeals, and WTO Members are considering alternatives that will try to preserve the binding nature of WTO dispute settlement.

One of the reasons the United States cites as a justification for its stonewalling of new judicial appointments is the Appellate Body's alleged treatment of its past rulings as 'binding precedent'. In the view of the United States, the approach taken by the Appellate Body in dealing with this inherent tension strays from the

⁴ *Ibid.*

mandate of WTO dispute settlement rules and is not appropriate for the world trading system.

In this article, we examine the US objections to the use of previous legal judgments in new disputes, and we offer some suggestions for how best to move forward on this issue. In doing so, we consider several underlying questions: What is the value of having an appeals court in international trade disputes? What is the proper role of previous legal interpretations in resolving new disputes? What standard has the Appellate Body created in this regard? How would the alternative approach proposed by the United States differ? And how, if adopted, would the approach favoured by the United States impact the WTO trading system?

1 THE CREATION OF THE APPELLATE BODY

The Uruguay Round of GATT negotiations was transformative in numerous ways, not least in the establishment of the World Trade Organization in 1995. The creation of an appeals court as part of this institutional transformation was not thought at the time to be the most significant change. Appeals from the verdicts of ad hoc panels in trade dispute settlement were expected to be somewhat narrow in scope and frequency, and thus the role of the seven-member standing Appellate Body, appointed by consensus of all the members of the WTO, was expected to be limited. The reality turned out to be very different. About 70% of the panel decisions in an ever-growing number of international trade disputes in the WTO have been appealed, and the number, variety, and complexity of the legal issues appealed has been much greater than originally anticipated.

Contrary to the expectations of the drafters at the outset of the WTO, the Appellate Body's value to the multilateral trading system soon became clear and has remained so ever since. Before the advent of the WTO, when GATT panels operated without an appeals mechanism, panel reports often diverged on core principles. One GATT panel might interpret the fundamental national treatment principle of non-discrimination between like foreign and domestic products one way, while another would interpret it another way.⁵ That made understanding and applying GATT legal obligations exceedingly difficult for governments. Thus, it undermined certainty and foreseeability in the rules-based trading system. How could a non-discrimination obligation be enforced fairly and appropriately when

⁵ For example, cf. the reasoning on 'like products' in Article III:2, first sentence of the GATT in the panel reports on *Japan – Alcoholic Beverages I* (para. 5.7) and *US – Auto Taxes* (para. 5.15). GATT Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216 (adopted 10 Nov. 1987); GATT Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11 Oct. 1994, unadopted.

governments, businesses, and other actors in world trade did not even know what it meant?

Through its clarifications in WTO dispute settlement, the Appellate Body has brought more consistency, and thus certainty and foreseeability, to the meaning of WTO law. This is not to say the Appellate Body has achieved perfection in fulfilling its responsibilities to the members of the WTO. No human institution is perfect, including international (and domestic) legal tribunals. Like all other institutions, the WTO Appellate Body is comprised of fallible human beings who simply do their best. Yet there is no lack of scholarly and other observers who see the WTO Appellate Body as having attained, in a short time, a level of accomplishment unmatched by any other international tribunal.⁶ Likewise, with the sole exception of the United States, the members of the WTO seem all to agree that the Appellate Body has served the rules-based trading system well and is essential to hopes for preserving the system. Furthermore, and again with the sole exception of the United States, no member of the WTO questions that the binding dispute settlement system with the Appellate Body at its apex is an enormous improvement over the non-binding dispute settlement system under the GATT. Some may have forgotten the inadequacies and frustrations of the GATT system that inspired the members of the trading system – led at the time by a quite differently-minded United States – to transform it, in part by creating the Appellate Body as a means of ensuring the end of consistency in the interpretation and application of trade rules. If the Appellate Body is lost due to the current crisis, there will be a quick and harsh reminder of why the Appellate Body was created in the first place.

⁶ As Shaffer, Elsig and Puig put it: ‘the authority of the Appellate Body (AB) of the World Trade Organization (WTO) rapidly and almost immediately became extensive ... Particularly remarkable is how the AB almost immediately established not merely narrow (litigant-specific) authority and intermediate (membership-level) authority, but extensive field-level authority. Such rapid development of extensive field authority is arguably a unique case in international politics at the multilateral level’. See Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, Legal Studies Research Paper Series No. 2014–54, School of Law, University of California, Irvine; and as WTO law expert Gabrielle Marceau recently explained: ‘There is no other international tribunal or quasi-judicial body, however you label them, that are cited as often as the AB is cited. In 2012, it [reached] 150 times, so, there’s something there that we cannot deny: the world is looking and considering what the AB does and writes’. WTO Appellate Review: Reform Proposals and Alternatives, Proceedings of the 24 May 2019 World Trade Institute Workshop held at the World Trade Organization, Geneva, p. 44; see also Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27(1) Eur. J. Int’l L. 9–77 (2016) (‘The WTO’s Appellate Body is a formidable engine of global economic governance, probably the most active and productive of all international courts not only in the number and range of its decisions but also in the number of disputes that its jurisprudential guidance has helped to settle, often out of the courtroom.’).

2 STARE DECISIS/PRECEDENT AND SECURITY/PREDICTABILITY

In domestic legal systems, we talk about the ‘precedents’ that high courts create, with ‘stare decisis’ as its strongest expression. Lower courts follow the precedents of the higher courts. Smart lawyers either cite precedents or distinguish precedents if they want to win their cases. Most people in most countries are comfortable with high courts having this role domestically, although, of course, they often complain about specific rulings and argue for overturning precedents they do not like. The high courts themselves generally rely on precedent and feel compelled to offer some justification when they do not.

In international law, because there is no formal system of precedent, courts are not bound by their past reasoning. They are free to change their minds without offering any justification for doing so. At the same time, if a court reasoned in a particular way on the meaning of a legal obligations one time, it would be surprising to see it reason in a different way on the meaning of that same legal obligation in the future. If the judges are the same, it is even more likely. But just as with domestic legal systems, as time goes on and as judges change, the likelihood of divergent reasoning increases.

On this, WTO jurists have been given some specific instructions by WTO members in the Dispute Settlement Understanding (DSU). Article 3.2 states: ‘The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system’.⁷ ‘Security and predictability’ is just another way of referring to the certainty and the foreseeability that traders need to engage in trade. Consistent reasoning over time in the clarification of WTO obligations through dispute settlement is a key element of ensuring this ‘security and predictability’. If legal reasoning about the meaning of an obligation were to change from one case to the next, the multilateral trading system would have neither ‘security’ nor ‘predictability’. The global flow of trade would be disrupted and diminished, and the inevitable result would be fewer global gains from trade.

The DSU also instructs, in that same article: ‘Recommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements’ of the Marrakesh Agreement that established the WTO.⁸ Thus, Judge Guillaume’s point about not relying so much on precedent in judicial reasoning as to leave no room for the evolution of law does not apply to the process of reaching legal judgments in WTO dispute settlement. WTO law is not supposed to evolve judicially. It is supposed to remain

⁷ Dispute Settlement Understanding, Art. 3.2.

⁸ *Ibid.*

always the same in WTO dispute settlement. The job of members of the Appellate Body and other WTO jurists is to clarify the meaning of the WTO legal obligations that already exist. It is not to invent new obligations, and it is not to erase existing obligations. The WTO members themselves are entrusted exclusively with the task of the evolution of WTO law through the process of continued international trade negotiations.

3 THE APPELLATE BODY'S APPROACH

The Appellate Body has been aware of the tension that can arise between adherence to past reasoning and allowance for new persuasion since it was founded. In its first appeal in 1996, the new international trade tribunal of last resort placed that tension squarely within the context of overall international law when it surprised some traditional GATT scholars by emphasizing that the WTO system is not a separate and self-contained legal system but is a part of international law. At that time, in *United States – Gasoline*, the Appellate Body made its frequently-quoted statement that the GATT 'is not to be read in clinical isolation from public international law'.⁹

In its second case, *Japan – Alcohol*, that same year, the Appellate Body went further toward exploring this tension when it noted that adopted GATT panel reports 'are an important part of the GATT acquis' and 'are often considered by subsequent panels'.¹⁰ The previous reports 'create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute'.¹¹ But, importantly, the Appellate Body also made clear in that appeal that such reports 'are not binding, except with respect to resolving the particular dispute between the parties to that dispute'.¹²

In the appeal in *Japan – Alcohol*, the Appellate Body was trying at the outset of the WTO dispute settlement system to establish boundaries that allow for recourse to the past interpretations of WTO legal obligations where the same obligations must be clarified in a current dispute, while also respecting the instructions it has been given in the DSU, as well as the legitimate desire of governments within the multilateral trading system to have each trade dispute judged on its own merits, case-by-case.

⁹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R 17 (adopted 20 May 1996); James Bacchus, *Not in Clinical Isolation*, in *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* 507–516 (Gabrielle Marceau ed., Cambridge University Press 2015).

¹⁰ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 14 (adopted 1 Nov. 1996).

¹¹ *Japan – Taxes on Alcoholic Beverages*.

¹² *Japan – Taxes on Alcoholic Beverages*.

Consistent with these boundaries, in the decade that followed, the Appellate Body elaborated on several occasions on the importance of relying on its previous reasoning in new disputes. In 2001, in *United States – Shrimp (Article 21.5 – Malaysia)*, the appellate jurists observed that the panel in that Article 21.5 compliance proceeding was right to use the Appellate Body's reasoning in the previous proceeding in the same dispute, adding that '[i]ndeed we would have expected the Panel to do so. The Panel had necessarily to consider our views, as we had overruled certain aspects of the findings of the original panel on this issue, and, more important, had provided interpretative guidance for future panels, such as the Panel in this case'.¹³ However, in that same case in 2001, when stating that its rulings could provide 'interpretative guidance for future panels', the Appellate Body did not state that future panels were to be 'bound' by previous Appellate Body rulings.

When, then, should dispute settlement panels be expected to follow previous Appellate Body reasoning and rulings? In 2004, in *United States – Softwood Lumber V*, the Appellate Body stressed that, as provided in DSU Article 3.2, 'the dispute settlement system is a central element in providing security and predictability to the multilateral trading system', and explained that, in that appeal, it had taken into account the reasoning and the findings in a previous Appellate Body report 'as appropriate' in considering the facts of this case and the arguments raised by the parties.¹⁴ The underlying implication here was that, assuming the requisite legal arguments have been made, and unless the facts differ in a way that justifies making a legal distinction, the same legal obligations should be clarified in the same way in all WTO disputes so as to ensure 'security and predictability' to the system.

In 2005, in *United States – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body seemed to suggest more emphatically that previous Appellate Body reasoning and rulings should be followed, stating that 'to rely on 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'.¹⁵ There is no law of precedent *de jure* in WTO dispute settlement; but, for the purposes of providing 'security and predictability' to the multilateral trading

¹³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Art. 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, paras 107–109 (adopted 21 Nov. 2001).

¹⁴ Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, para. 112 (adopted 31 Aug. 2004).

¹⁵ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Art. 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, para. 188 (adopted 17 Dec. 2004).

system, these Appellate Body statements suggest that there may be a law of precedent *de facto*.¹⁶

In 2008, the Appellate Body was confronted with this issue again in the appeal in *US – Stainless Steel (Mexico)*. This time the appellate jurists employed a phrase that has since caused increasing consternation, mainly for the United States. At the panel level in that case, the European Communities argued that in order for a panel ‘to depart from previous Appellate Body findings’, the panel ‘would have to identify cogent reasons for why it proposes to take a different direction’.¹⁷ In its own submissions in that case, the United States at one point also used the term ‘cogent reasons’, although it did not assert that this should necessarily be the relevant legal standard.¹⁸

On appeal, the Appellate Body adopted this ‘cogent reasons’ standard, stating:

Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring “security and predictability” in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, *absent cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.¹⁹

All the factual statements of the Appellate Body in this paragraph are accurate. Governments *do* attach significance to reasoning provided in previous panel and Appellate Body reports; adopted panel and Appellate Body reports *are* cited by parties in support of legal arguments in dispute settlement proceedings; and those reports *are* relied upon by panels and the Appellate Body in subsequent disputes. The use of the phrase ‘absent cogent reasons’ by the appellate jurists was, however, new, and that phrase does not appear in the WTO Agreement. It is not treaty

¹⁶ See generally, Raj Bhala, *The Myth About Stare Decisis and International Trade Law* (Part One of a Trilogy), 14 Am. U. Int'l L. Rev. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication* (Part Two of a Trilogy), 9 Fla. St. U.J. Transnat'l L. & Pol'y 1 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication* (Part Three of a Trilogy), 33 Geo. Wash. Int'l L. Rev. 873 (2001).

¹⁷ *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, DS344, Third Party Submission by the European Communities, para. 174 (11 Apr. 2007).

¹⁸ *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, DS344, Opening Statement of the United States of America at the First Substantive Meeting of the Panel, para. 4 (22 May 2007); for a detailed overview of the origins of the ‘cogent reasons’ standard in the *Stainless Steel* case, see: Simon Lester, *The Origins of the ‘Cogent Reasons’ Approach to the Precedential Value of Appellate Body Reports*, Int'l Econ. L. & Pol'y Blog (24 June 2019).

¹⁹ Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, para. 160 (adopted 20 May 2008) (emphasis added).

language; it is interpretive language used to clarify the treaty. And any language that is new in a line of judicial interpretation will inevitably provoke questions as to its significance. In particular, it will inspire questions as to whether it is truly new and therefore adds something to the line of judicial interpretation or is only a way of restating the same legal perspective.

In our view, the use of the phrase ‘absent cogent reasons’ was essentially a restatement of the view previously expressed by the Appellate Body that, where the legal issues are the same, it is ‘appropriate’ and to be ‘expected’ that panels will rely on Appellate Body reasoning and rulings in previous disputes. Panels are free not to do so. There is, to be sure, no rule of *stare decisis* in the WTO. And yet ‘issues of law covered in the panel report and legal interpretations developed by the panel’ are subject to the automatic right of appeal to the WTO Appellate Body.²⁰ The panel’s legal judgments can be overturned on appeal. So, it is only to be expected that, when panels choose to depart from previous Appellate Body reasoning and rulings, they will try their best to explain their reasons why. Should those reasons suffice if they are *not* ‘cogent’ – if they are not ‘persuasive, expounded clearly and logically, convincing’ (as the Shorter Oxford English Dictionary defines the word and as the panel in the *China – Rare Earths* dispute has construed it)?²¹

The Appellate Body itself is, of course, free to depart in subsequent appeals from its reasoning and rulings in previous appeals when clarifying WTO legal obligations. Again, there is no rule of *stare decisis* in the WTO. Like any other international tribunal, the Appellate Body should feel free to revisit its previous reasoning and rulings. But if it does, what are the implications for the ‘security and predictability’ of the multilateral trading system? What if (when once more there is a full complement of seven appellate judges) a division of three Appellate Body Members in one appeal says that ‘national treatment’ means one thing and another division of three Appellate Body Members in another appeal says that it means another? What if there is no longer any consistency in the legal rulings in WTO appeals? It may be that an appreciation for the broad benefits of legal consistency to the trading system has made the Appellate Body hesitant to overrule some of its previous rulings. But it may also be that, even with the turnover in its membership over time, the Appellate Body has not yet seen any compelling reason to overrule any of its previous rulings.

²⁰ Dispute Settlement Understanding, Art. 17.6.

²¹ The WTO panel in *China – Rare Earths* noted that: ‘The word “cogent” means “[a]ble to compel assent or belief; esp. (of an argument, explanation, etc.) persuasive, expounded clearly and logically, convincing.”’ Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R/WT/DS432/R/WT/DS433/R/and Add.1, para. 7.61 (adopted 29 Aug. 2014).

4 THE US OBJECTIONS TO THE ‘ABSENT COGENT REASONS’ STANDARD

As part of the efforts by the United States to block appointments of new judges to the Appellate Body, it has cited what it sees as the Appellate Body’s establishment of a role for its past interpretations as ‘precedent’. On this allegation, in December of 2018, the United States made the following argument to the Dispute Settlement Body: ‘The United States requested this agenda item to draw Members’ attention to an important systemic issue, the concern that the Appellate Body has sought to change the nature of WTO dispute settlement reports from ones that assist in resolving a dispute, and may be considered for persuasive value in the future, to ones that carry precedential weight, as if WTO Members had agreed in the DSU to a common law-like system of precedent’.²² The United States also said that ‘the Appellate Body’s statement concerning “cogent reasons” in US – Stainless Steel (Mexico) is profoundly flawed’.²³ The United States argued instead that the use of past Appellate Body interpretations by panels and the Appellate Body should be based on their persuasiveness. On its proposed standard of persuasiveness, the United States explained, ‘This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. For example, to the extent that a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter’.²⁴

In our view, the concerns voiced by the United States about the Appellate Body’s ‘cogent reasons’ standard and its alleged illegitimate adherence to legal ‘precedent’ are vastly overstated. Although the ‘cogent reasons’ language is new, it is not clear that an interpretative approach stating that a panel should have ‘cogent reasons’ for departing from previous appellate reasoning and rulings differs from a reliance, as the United States recommends, on a standard of persuasiveness. It could be argued that there are subtle differences in the two approaches, based on who has the burden to show that a previous ruling should not be followed.²⁵ It seems likely, though, that the Appellate Body would have been explicit if it had intended to announce such a distinction. Legal scholars sometimes have a tendency to read far-reaching rulings between the lines of judicial statements when they are

²² *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, para. 10 (18 Dec. 2018).

²³ *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, at 21.

²⁴ *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, para. 36.

²⁵ Canadian trade official Rob McDougall has put this argument as follows: “‘Absent cogent reasons’ implies “follow it unless there is a reason not to”; “persuasive value” implies “follow it if there is reason to”. This reverse onus could be significant in many ways.’ See Robert McDougall, Twitter post (19 Dec. 2018, 8:10 a.m.).

not there. Indeed, at a recent conference, one of the Appellate Body Members serving on the Division in that appeal, Giorgio Sacerdoti, publicly explained that, in his view, the ‘absent cogent reasons’ language had not done what the United States claimed. In this regard, Sacerdoti noted that ‘the AB [Appellate Body] has not laid down “precedent” as a principle of WTO law in the sense of US common law, on the contrary’, and that ‘the AB has rejected any doctrine of precedent, while restating the importance of the principles of predictability and stability which underpins the conclusion that panels are expected to follow the previous interpretations of the AB, absent cogent reasons not to do so’.²⁶

Furthermore, it is not at all clear how the use of one interpretative approach instead of the other would lead in practice to different outcomes. Rather, it seems most likely that the two different interpretative approaches would reach the same result. In addition, casting some doubt on the credibility of the US contention that the use of the phrase ‘absent cogent reasons’ imports *stare decisis* inappropriately into WTO dispute settlement is the fact that a recent WTO panel applied the ‘absent cogent reasons’ approach in a way that allowed it to depart from past Appellate Body reasoning.²⁷ The difference between the ‘absent cogent reasons’ approach of the Appellate Body and the standard of persuasiveness endorsed by the United States seems to be one mainly of semantics. This perceived distinction by the United States does not warrant the emphasis the United States has given it.

Of course, underlying this semantic debate is the true US concern. The United States has long hoped that new members of the Appellate Body would overrule the judgments of previous members of the Appellate Body on an assortment of legal issues of political significance to the United States, particularly on anti-dumping, countervailing duties, and safeguards. The United States seeks more legal elbow room in employing these trade remedies than it is allowed by WTO rules as the Appellate Body has clarified them. Failing this, the United States wants WTO panels to disregard these previous Appellate Body rulings on trade remedies and rule differently in new disputes. (What is more, with its stonewalling of appointments of new Appellate Body members, it seems the US view is that, if there no longer is an Appellate Body to hear new appeals that could end with the appellate jurists overruling panels that do not follow previous appellate rulings, then so much the better.)

²⁶ WTO Appellate Review: Reform Proposals and Alternatives, Proceedings of the 24 May 2019 World Trade Institute Workshop held at the World Trade Organization, Geneva, at 36.

²⁷ Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R, para. 7.107 (circulated 9 Apr. 2019).

5 IMPLICATIONS FOR THE WORLD TRADING SYSTEM OF THE US CHALLENGE TO THE ROLE OF PREVIOUS APPELLATE BODY REASONING

Whatever their merit and practical impact, the United States continues to press hard for changes to the system on this point. There is no guarantee that a resolution to this and several other professed concerns raised by the United States would convince the United States to back off on blocking new Appellate Body appointments. But it is worth trying to reach a resolution if one can be achieved without undermining the integrity and the independence of the Appellate Body and the dispute settlement system. For, without an end to the stalemate on new appointments caused by US intransigence, the Appellate Body will cease to function. As of this writing, the Appellate Body's budget has been slashed, and its only current role is to finish several pending appeals. There is the possibility of restoring the Appellate Body at some point, but in the short-term WTO Members are looking for alternative approaches that preserve the overall operation of the dispute settlement system.

The disappearance of the Appellate Body would be a significant loss for the world trading system. The 'security and predictability' provided by an Appellate Body independent of political pressures and intimidation is necessary to the continued success of the WTO dispute settlement system. An impartial dispute settlement system that upholds the rule of law in trade is essential to the continued existence of the multilateral trading system.

In hopes of reaching some resolution, several other WTO members have tried to engage on the issue of precedent v. persuasion by offering reform proposals of their own. Australia and Japan have proposed a 'draft decision' stating that: 'Members confirm that an interpretation by the Appellate Body of any WTO provision does not constitute a precedent for posterior interpretations', and that 'Members confirm that panels may adopt an interpretation of a WTO provision that is different from the one developed by the Appellate Body'.²⁸ And Honduras put forward a number of underlying questions in order to stimulate thinking in this area.²⁹ In the latest version of the 'Walker Principles',³⁰ an effort to resolve the Appellate Body crisis that is being led by New Zealand Ambassador David Walker, the various proposals were taken into account with the following draft language:

²⁸ World Trade Organization, *Informal Process on Matters Related to the Functioning of the Appellate Body: Communication from Japan and Australia*, WT/GC/W/768, paras 7 and 8 (18 Apr. 2019).

²⁹ World Trade Organization, General Council, *Fostering a Discussion on the Functioning of the Appellate Body, Addressing the Issue of Precedent: Communication from Honduras*, WT/GC/W/761 (4 Feb. 2019).

³⁰ World Trade Organization, *Draft Decision, Functioning of the Appellate Body*, WT/GC/W/791 (28 Nov. 2019).

15. Precedent is not created through WTO dispute settlement proceedings
16. Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.
17. Panels and the Appellate Body should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them.

But these and other changes suggested in the Walker Principles were not enough to satisfy the United States.

As noted above, WTO law is a part of public international law and there is no rule of precedent in public international law. Thus, any consensus statement by the members of the WTO that there is no rule of precedent in WTO law is redundant. As a matter of law, it is duplicative and therefore not necessary. Legally, it will not change anything. At the same time, as a matter of law, such a consensus statement by the members of the WTO would cause no harm. Moreover, as a matter of politics within the WTO, it could prove helpful in resolving one of the concerns expressed by the United States and thus in defusing the crisis that has been provoked by the United States – if indeed the United States is interested in resolving the crisis.

Instead of a consensus statement, the members of the WTO could also consider approval of a formal legal interpretation of the DSU. Under Article IX:2 of the WTO Agreement, the Ministerial Conference of the General Council of the WTO has ‘the exclusive authority to adopt interpretations of the WTO Agreement and the multi-lateral trade agreements that together comprise the WTO treaty, including the DSU.’³¹ This approach would not require a consensus. It would require only a three-fourths vote of the WTO members. To be sure, WTO Members, with their devotion to consensus, have never resorted to voting on anything, even where it is clearly permitted by the WTO treaty. Accordingly, WTO Members have never adopted a formal legal interpretation (which, among other things, suggests that the Members have not seen the need to correct any dispute settlement decisions with their own interpretation and that the concerns the United States has voiced about Appellate Body rulings are not, to say the least, widely shared).

Unfortunately, the United States has not offered a constructive response to any initiatives by other Members on the issue of ‘precedent’. It rejects their approach, but has not offered one of its own. Also, much doubt remains about the clarity of the US criticism on this issue. In the US view, when exactly should the Appellate Body depart from the reasoning in past appeals? Where and how does the United States draw the line about following previous reasoning in its alternative approach that focuses on ‘persuasiveness’? And – importantly – what will be the result for the trading system if the United States gets what it wants? If

³¹ World Trade Organization (WTO) Agreement, Article IX:2.

the United States truly wants to convince other governments that a change from current practice is needed, it should set out its vision and explain what its alternative system looks like and how it would work.

The ‘absent cogent reasons’ language is one articulation of a standard that can be used for guidance here; the ‘persuasiveness’ of past reports is another. In our view, the two standards are not all that different. The United States certainly continues to cite past cases when it litigates at the WTO, just as all other WTO Members do. And, when past decisions do not support their current arguments, the United States tries to distinguish the current case from the past case, just as all other WTO Members do. Perhaps, then, it is just a question of finding language that sets a tone that all parties can accept. For example, Article 3.2 could be amended to add a sentence (in bold) as follows:

2. 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. **Clarifications provided by panels and the Appellate Body can have persuasive value, but are of less authority than the interpretations adopted under Article IX:2 of the WTO Agreement.** Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.³²

This amendment would not change the meaning of the provision, but it could reassure those with concerns about the role of the Appellate Body in relation to reliance on past cases.

An overarching consideration, however, is that, whatever resolution may be reached, ‘security and predictability’ through judicial consistency and coherence must be maintained in fulfilment of the mandate in the Dispute Settlement Understanding. This mandate has the effect of requiring panels and the Appellate Body to render legal judgments providing certainty and foreseeability. This includes providing guidance for resolving future international trade disputes. Just how much guidance, and in just what circumstances, are appropriate subjects for negotiation. The distinctions between the Appellate Body’s approach of ‘absent cogent reasons’ and the United States’ preferred approach of persuasiveness are distinctions without much, if any, real difference apart from the choice of nomenclature. Negotiations in good faith can find a positive solution.

³² See Simon Lester, *Persuasive Value v. Precedent in Appellate Body Reasoning*, Int’l Econ. L. & Pol’y Blog (19 Dec. 2018).

