Free Trade Bulletin
HERBERT A. STIEFEL CENTER FOR TRADE POLICY STUDIES
CATO INSTITUTE
September 12, 2019 | Number 74

Of Precedent and Persuasion

The Crucial Role of an Appeals Court in WTO Disputes

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In many domestic legal systems, the highest court 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 that play a similar role with respect to specific international jurisdictions. Yet these decisions have no binding force except between the parties and in respect to that particular case. Thus, there is no rule of stare decisis—no rule of precedent—in international law.

Nonetheless, in practice, international legal rulings do provide guidance to participants as to what the legal obligations mean. While there is no formal system of precedent, there is an informal practice of taking into account past rulings to help ensure certainty and foreseeability for those who are affected by the rulings.

The precise role for precedent appears to be one of the main causes of the current crisis involving the Appellate Body of the World Trade Organization (WTO). The United States is blocking appointments of new judges to fill vacancies on the Appellate Body, which could prevent the tribunal from hearing new appeals and thus threatens to undermine the continued functioning of the WTO dispute settlement system. 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 strays from the mandates of WTO dispute settlement rules and is not appropriate for the world trading system.

In this brief commentary, we examine the U.S. 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 favored by the United States impact the world trading system?

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THE CREATION OF THE APPELLATE BODY

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations was transformative in numerous ways, not least in the establishment of the World Trade Organization in 1995. However, the creation of an appeals court for disputes was not thought at the time to be the most significant change. Appeals were expected to be somewhat narrow in scope and frequency, and thus the role of the Appellate Body would be limited. The reality turned out to be very different: about 70 percent of WTO cases were appealed, and the number and depth of the issues appealed were much greater than anticipated.

Despite the restrained expectations of the drafters, however, the Appellate Body's value has become clear. Before the WTO, when GATT panels operated without an appeals mechanism, panel reports often diverged on core principles. One GATT panel might interpret the national treatment principle of nondiscrimination one way, while another would interpret it another way. That made understanding and applying GATT legal obligations very difficult, and it undermined certainty and foreseeability in the rules-based trading system. How could a nondiscrimination obligation be enforced fairly and appropriately when governments, businesses, and other actors 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. Like every other institution of human making, the Appellate Body is not perfect. But it has significantly improved upon the sometimes confused situation that existed under the GATT. Some people may have forgotten those past difficulties, but if the Appellate Body is lost because of the current crisis, there will be a quick and harsh reminder of why it was established in the first place.

PRECEDENT AND PREDICTABILITY

In domestic legal systems, we talk about the precedents that high courts create, with stare decisis as its strongest expression. In international law, by contrast, because there is no formal system of precedent, courts are not bound by their past reasoning. At the same time, if a court reasoned in a particular way on the meaning of a particular legal obligation 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 that the reasoning will be consistent. But just as with domestic legal systems, as time goes on and as judges change, the likelihood of the occurrence of divergent reasoning increases.

The WTO Dispute Settlement Understanding provides some guidance on this point. 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." Consistent reasoning over time in the clarification of WTO obligations is a key element of ensuring 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.

That provision also states: "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 WTO Agreement. Thus, the job of members of the Appellate Body and panels 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 APPELLATE BODY'S APPROACH

The Appellate Body has been aware of the potential controversies since it was founded. In its first appeal, *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."[1] Then, in its second case, *Japan—Alcohol*, the Appellate Body addressed the role of previous cases. It noted that adopted GATT panel reports "are an important part of the GATT acquis" and "are often considered by subsequent panels."[2] The previous reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[3] 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."[4] The Appellate Body was trying at the outset of the WTO dispute settlement system to establish boundaries that allow for recourse to past interpretations of WTO legal obligations where the same obligations must be clarified in a current dispute, while also respecting its mandate in the Dispute Settlement Understanding.

In 2008, the Appellate Body was confronted with this issue again in the appeal in *US—Stainless Steel (Mexico)*. This time it 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."[5] 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.[6]

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.[7]

All the factual descriptions provided by 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 Body was, however, new, and that phrase does not appear in the WTO Agreement. It is not treaty language; it is interpretive language used to clarify the treaty. And any language that is new will inevitably provoke questions as to its significance. In particular, new language will inspire questions as to whether it is truly different and therefore adds something new to the line of judicial interpretation, or whether it is only an alternative way of restating the same legal perspective.

In our view, the use of the phrase "absent cogent reasons" was essentially a restatement of the position 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 legal issues are subject to appeal, which means that the panel's legal judgments can be overturned by the Appellate Body. So, practically speaking, 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 in order to prevent a quick reversal on appeal.

The Appellate Body itself is free to depart in subsequent appeals from its reasoning and rulings in previous appeals. 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 then are the implications for the security and predictability of the multilateral trading system? What if 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 a different appeal says that it means another? What if there is no longer any consistency in the legal rulings in WTO appeals? Reversals of past reasoning are allowed, but they should be undertaken with caution.

THE U.S. OBJECTIONS TO THE 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 past interpretations as precedent. In December 2018, the United States made the following argument to the WTO's 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 [Dispute Settlement Understanding] to a common law-like system of precedent."[8] The United States also said that "the Appellate Body's statement concerning 'cogent reasons' in *US—Stainless Steel (Mexico)* is profoundly flawed."[9] The United States argued instead that the use of past Appellate Body interpretations 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."[10]

In our view, the concerns voiced by the United States about the Appellate Body's cogent reasons standard and its alleged illegitimate adherence to precedent are vastly overstated. Although the cogent reasons language is new, it is not clear to us that an interpretative approach stating that a panel should have cogent reasons for departing from previous appellate reasoning and rulings differs from a reliance on 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.[11] It seems likely, though, that the Appellate Body would have been explicit if it had intended to announce such a distinction. The Appellate Body has not been known for pronouncing major points of departure in its jurisprudence by implication.

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 use of the two different interpretative approaches will each reach the same result. In fact, a recent WTO panel applied the absent cogent reasons approach in a way that allowed it to depart from past Appellate Body reasoning.[12] The difference between the absent cogent reasons approach and the standard of persuasiveness endorsed by the United States seems to us to be one mainly of semantics. This perceived legal 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 U.S. concern. The United States has long hoped that, in deciding new appeals, 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 antidumping, subsidies, 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 in previous appeals in WTO dispute settlement. Failing this, the United States wants WTO panels to disregard these previous Appellate Body rulings on trade remedies and rule differently in new disputes.

IMPLICATIONS OF THE U.S. CHALLENGE FOR THE WORLD TRADING SYSTEM

Whatever their merit and practical impact, the United States continues to press hard for changes to the system regarding the role of previous Appellate Body reasoning. Without a resolution to this and several other issues, the Appellate Body may soon cease to function. That 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 crucial to the continued success of the WTO dispute settlement system.

In hopes of reaching some resolution, several other WTO members have tried to engage on this issue 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."[13] And Honduras put forward a number of underlying questions in order to stimulate thinking in this area.[14]

Unfortunately, the United States has not offered a response to this engagement, and a great deal of uncertainty remains about the U.S. criticism in this area. In the U.S. 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 the United States 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 compares to the existing system.

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 the United States' current arguments, it tries to distinguish the current case from the past cases, just as all other WTO members do. Perhaps, then, this is just a question of finding language that sets a tone that all parties can accept. For example, adding a sentence to Article 3.2 along these lines could help: "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."[15] The explicit reference to persuasive value could assuage the United States' concerns by adopting its terminology without changing the rules or functioning of the Appellate Body in a way that could cause concern for other members.

An overarching consideration, however, is that, whatever resolution may be reached, security and predictability through judicial consistency and coherence must be maintained. A court system, including an appellate court, that offers interpretations to guide future cases is crucial in this regard. Nobody thinks the Appellate Body is set in stone, unchangeable for all time. All institutions must adapt and learn from experience. But the value of an appellate court for WTO disputes is indisputable, and all necessary efforts must be made to maintain the Appellate Body. The issue of the role of past cases has been vexing for some, but the differences in viewpoint, between cogent reasons and persuasiveness, are not actually all that large, and a compromise should be possible through a good-faith discussion of the issues by all the members of the WTO.

NOTES

1. World Trade Organization, Appellate Body Report, "United States—Standards for Reformulated and Conventional Gasoline," WT/DS2/AB/R, adopted May 20, 1996, p. 17; 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*, ed. Gabrielle Marceau (Cambridge: Cambridge University Press, 2015), 507–16, doi:10.1017/CBO9781316048160.038.

2. World Trade Organization, Appellate Body Report, "Japan—Taxes on Alcoholic Beverages," WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted November 1, 1996, p. 14.

3. WTO, "Japan—Taxes on Alcoholic Beverages."

4. WTO, "Japan—Taxes on Alcoholic Beverages."

5. "United States—Final Anti-Dumping Measures on Stainless Steel from Mexico," (DS344), Third Party Submission by the European Communities, April 11, 2007, para. 174, http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137716.pdf.

6. "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, May 22, 2007, para. 4, https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/dispute_settlement/ds344/asset_upload_file352_11098.pdf. 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," *International Economic Law and Policy Blog*, June 24, 2019.

7. "United States—Final Anti-Dumping Measures on Stainless Steel from Mexico," WT/DS344/AB/R, adopted May 20, 2008, para. 160 [emphasis added].

8. "Statements by the United States at the Meeting of the WTO Dispute Settlement Body," December 18, 2018, para. 10, https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf.

9. "Statements by the United States," p. 21.

10. "Statements by the United States," para. 36.

11. 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, December 19, 2018, 8:10 a.m., https://twitter.com/rdmcdougall/status/1075377837706788866.

12. World Trade Organization, Panel Report, "United States—Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada," WT/DS534/R, April 9, 2019, para. 7.107.

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

14. 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, February 4, 2019.

15. See Simon Lester, "Persuasive Value vs. Precedent in Appellate Body Reasoning," *International Economic Law and Policy Blog*, December 19, 2018.

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