The Precedential Effect of WTO Panel and Appellate Body Reports

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Abstract: The Dispute Settlement Understanding in the WTO Agreement represents a significant shift from a diplomatic model of dispute settlement to a rule-based model. The substitution of legal legitimacy for political legitimacy in the dispute settlement process makes the success or failure of the system largely dependent on the credibility of the jurisprudence produced by the panels and Appellate Body. One way which international tribunals have established credible jurisprudence, is by following their previous decisions unless there is good reason for deciding otherwise. This paper examines the precedential effect of previously adopted panel and Appellate Body reports, and policy reasons for and against a stronger form of precedent in WTO jurisprudence.

1. INTRODUCTION

The 1994 Agreement Establishing the World Trade Organization (WTO Agreement),[1] adopted by 132 states,[2] has been hailed as the most important worldwide agreement since the Charter of the United Nations of 1945.[3] Apart from setting out members' rights and obligations relating to international trade, the WTO Agreement establishes the World Trade Organization (WTO), which assumes its predecessor's role in providing a forum for negotiations among its members concerning their multilateral trade relations, and a framework for implementing the results of such negotiations.[4] The most far-reaching reforms in the WTO Agreement are in its Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[5] The DSU does not simply codify the dispute settlement procedures under the GATT regime, it represents

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1. 33 ILM 13 (1994).
2. On 19 September 1997.
3. E.U. Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement 45 (1997).
4. Art. III(2) GATT.
5. *See* WTO Agreement, *supra* note 1, Annex II.

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a significant shift to a rule-based juridical model of dispute settlement.[6] It establishes a quasi-right to be heard by an independently constituted dispute settlement panel, a standing Appellate Body to hear appeals from issues of law, and the quasi-automatic adoption and enforcement of panel and Appellate Body rulings as well as recommendations. Before this, any party, including the disputing parties, could obstruct the dispute settlement process at any stage because consensus was required for each decision.

The success or failure of the new dispute settlement mechanism, and ultimately the WTO itself, largely depends on the credibility of the jurisprudence produced by the panels and Appellate Body. By foregoing their right to veto, and providing for quasi-automatic adoption of reports as well as authorization of retaliatory measures for non-compliance, parties have substituted legal legitimacy for political legitimacy in the dispute settlement process. This represents the culmination of a gradual shift in attitudes towards a rule-based process. It is therefore critical to the success of the system that the panels and Appellate Body produce a jurisprudence that is legally credible and commands the respect of WTO members. This will ensure that decisions are respected not only by parties to a given dispute, but also by other states when considering similar measures. One way which international tribunals, such as the International Court of Justice, have developed a credible jurisprudence, is by following reasonings in their previous decisions unless there is good reason for deciding otherwise. Whilst not bound by a formal doctrine of precedent, the Court has largely adopted its substance. This not only provides certainty in the administration of justice, it avoids the appearance of any excess judicial discretion.[7] This paper examines the approach of the WTO dispute settlement panels and Appellate Body to the precedential effect of their prior decisions. It then considers whether the approach taken is desirable in the context of international trade where security and certainty are prerequisites for the expansion of trade and investment.

2. THE PRECEDENTIAL EFFECT OF ADOPTED REPORTS IN PANEL JURISPRUDENCE

Panel practice indicates that whilst legal reasonings of previously adopted panel reports are usually followed by subsequent panels,[8] they are not strictly

6. For a detailed description of the dispute settlement process, *see* N. Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, 12 Journal of International Arbitration 81 (1995); Petersmann, *supra* note 3; and D. Steger, *WTO Dispute Settlement. Revitalization of Multilateralism After the Uruguay Round*, 9 LJIL 319 (1996).
7. H. Lauterpacht, The Development of International Law by the International Court 14 (1958).
8. *See e.g.*, Panel Report Norway – Restrictions on Imports of Apples and Pears, adopted 22 June 1989, BISD 36S/306, para. 5.6; Panel Report Canada – Import Restrictions on Ice Cream and

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binding in the sense of the common law doctrine of precedent. This is illustrated by the panels' approach to two fundamental principles of non-discrimination in GATT[9]: the national treatment obligation and the 'most-favoured nation' principle.

2.1. The quasi-precedential effect of panel reports

The national treatment obligation, primarily expressed in Article III, requires the treatment of imported goods, once they have entered the country and cleared customs, to be no worse than that of domestically produced goods, especially in regard to internal taxes and regulations. Article III(2), one of the most frequently litigated GATT provisions, states:

> [t]he products of [...] any contracting party imported into [...] any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products.[10]

In *Brazil Internal Taxes*,[11] contracting parties noted that Article III(2) prohibited the imposition of taxes on imports in excess of those on like domestic products whether or not damage to trade was shown.[12] The national treatment obligation was interpreted as protecting competitive conditions rather than trade volumes. This was followed in *US – Section 337 of the Tariff Act of 1930*,[13] and *US – Measures Affecting Alcoholic and Malt Beverages*,[14] where the panels noted that "in accordance with" previous panel reports,[15] Article III(2) protects competitive conditions between imported and domestic products but not expectations on export volume. Thus, it is no defense for a party to show that the impugned measure had no or insignificant effects on trade volumes.[16] The Appellate Body adopted this approach in *Japan – Taxes on Alco-*

Yoghurt, adopted 4 December 1989, BISD 36S/68, para. 62; Panel Report United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil, adopted 19 June 1992, BISD 39S/128, paras. 6.13 and 6.15-6.17; Panel Report United States – Measure Affecting Alcoholic and Malt Beverages, adopted 19 June 1992, BISD 39S/206, para. 5.39; Appellate Report Japan – Taxes on Alcoholic Beverages, adopted 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 20, 22, and 25, respectively.

9. J. Jackson, The World Trading System: Law and Policy of International Economic Relations 133 (1989).
10. Art. III(2) GATT.
11. Panel Report, adopted 30 June 1949, BISD II/181.
12. *Id.*, para. 15.
13. Panel Report, adopted 7 November 1989, BISD 36S/345, para. 5.13.
14. *See* Panel Report, *supra* note 8, para. 5.6.
15. Similar language is found in Panel Report United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted 4 October 1994, DS44/R, paras. 99-100.
16. *See* Panel Report United States – Taxes on Petroleum and Certain Imported Substances, adopted 17 June 1987, BISD 34S/160, para. 5.1.9.

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holic Beverages.[17] It cited four previously adopted reports[18] as authority, that the prohibition on discriminatory taxes in Article III(2), is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard. That this principle is regarded as practically binding on subsequent panels, is evidenced by its consistent application to Article III,[19] and its extension to other provisions of the GATT.[20] Most recently, the Appellate Body in *Canada – Certain Measures Concerning Periodicals*,[21] accepted this principle as "well-established" in panel jurisprudence.

By contrast, the treatment of 'like product' in the context of the most-favoured nation principle demonstrates that interpretations in previously adopted reports are not always followed. The most-favoured nation principle in Article I(1), referred to as "the golden rule of the GATT",[22] requires parties to treat products of a particular party at least as favorably as it treats 'like products' of any other party.[23] 'Like product' is not defined in the GATT. Panels have wavered between a subjective and objective interpretation of the term in the context of Article I(1). In *Australian Subsidy on Ammonium Sulphate*,[24] the Working Party found that ammonium sulphate and sodium nitrate fertilizers were not like products under Article I(1), because the tariff regime of the importing country listed the two products as separate items and they were treated differently.[25] This is a subjective test giving weight to the importing country's

17. *See* Appellate Report, *supra* note 8, at 25.
18. *See* Panel Report Brazil Internal Taxes, *supra* note 11, para. 16; Panel Report United States – Taxes on Petroleum and Certain Imported Substances, *supra* note 16, para. 5.1.9. *Also see*, Panel Report Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, adopted 10 November 1987, BISD 34S/83, para. 5.18; and Panel Report United States – Measures Affecting Alcoholic and Malt Beverages, *supra* note 8, para. 16.
19. Panel Report Italian Discrimination Against Imported Agricultural Machinery, adopted 23 October 1958, BISD 7S/60, para. 12; Panel Report Canada – Administration of the Foreign Investment Review Act, adopted 7 February 1984, BISD 30S/140, para. 6.6; Panel Report Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, *supra* note 18, para. 5.11; Panel Report United States – Section 337 of the Tariff Act of 1930, *supra* note 13, para. 5.13; Panel Report Canada – Import Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Authorities, adopted 18 February 1992, BISD 39S/27, para. 5.6; Panel Report United States – Measures Affecting Alcohol and Malt Beverages, *supra* note 8, para. 5.31; and Panel Report United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco, *supra* note 15, para. 99.
20. Panel Report on Japanese Measures on Imports of Leather, adopted 15/16 May 1984, BISD 31S/94, para. 55; Panel Report United States – Taxes on Petroleum and Certain Imported Substances, *supra* note 16, para. 5.2.2; and Panel Report EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, adopted 25 January 1990, BISD 37S/86, para. 151.
21. Appellate Report, adopted 30 June 1997, WT/DS31/AB/R, at 19.
22. A. Lowenfeld, Remedies Along With Rights: Institutional Reform in the New GATT, 88 AJIL 477, at 478 (1994).
23. *See* Jackson, *supra* note 9, at 136.
24. Panel Report, adopted 3 April 1950, BISD 7S/68.
25. *Id.*, para. 8.

tariff classification. By contrast, *Spain – Tariff Treatment of Unroasted Coffee*,[26] took an objective approach to the 'like product' concept. Prior to 1979, imports of unroasted coffee into Spain were classified under a single designation under Spain's tariff regime. However in 1979, Spanish authorities subdivided unroasted coffee imports into five tariff lines subject to different treatment. In ruling that the five categories of unroasted coffee were 'like products' under Article I(1), the panel noted that no other contracting party applied its tariff regime in such a way that different types of coffee were subject to different tariff rates.[27] The panel took into account objectively ascertainable characteristics such as the product's end use and consumers' tastes and habits.[28] Subsequently, in *Japan – Tariffs on Imports of Spruce-Pine-Fir Dimension Lumber*,[29] the panel returned to the subjective analysis of the *Australian Ammonium Sulphate* case.[30] The panel stated that, "a claim of likeness [...] should be based on the classification of [...] the importing country's tariff",[31] even though it had earlier noted that Japan's tariff classification was established autonomously, without negotiation.[32] This subjective approach was criticized by the complainant, Canada, in the Council discussion adopting this report, as giving too much weight to the importing country's tariff classification when determining 'like products'.[33] Such an approach could preclude other contracting parties from exercising their rights under Article I(1). The panels' divergent approaches to previous interpretations of the two key substantive provisions of the GATT, indicate that though legal reasonings of previously adopted panel reports are influential, they are not binding.

There are also several cases where applications of legal rules to identical facts have not been followed. The leading example[34] is *EEC – Restrictions on Imports of Dessert Apples – Complaint by Chile*.[35] It concerned an EEC market intervention scheme intended to fix the prices of apples. The scheme's operation and targets were essentially price related. The issue was whether the scheme was justified under Article XI(2.c.i), which provides an exception for import restrictions on agricultural products and where necessary to enforce

26. Panel Report, adopted 11 June 1981, BISD 28S/102.
27. *Id.*, para. 4.8.
28. *Id.*, para. 4.7.
29. Panel Report, adopted 19 July 1989, BISD 36S/176.
30. *See* Panel Report, *supra* note 24.
31. *Id.*, para. 5.13.
32. *See* Panel Report, *supra* note 29, para. 5.5.
33. Analytical Index: Guide to GATT Law and Practice 38 (1995).
34. *See also* Panel Report United States – Section 337 of the Tariff Act of 1930, *supra* note 13, where the panel found that Section 337 could not be justified as a 'necessary' measure under Art. XX(d) to secure compliance with US patent laws. An earlier panel report, United States – Imports of Certain Automotive Spring Assemblies, adopted 26 May 1983, BISD 30S/107, came to the opposite conclusion.
35. Panel Report, adopted 22 June 1989, BISD 36S/93.

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governmental measures restricting the quantities of the like domestic product permitted to be marketed or produced. The same parties litigated the same measure in relation to the same product nine years earlier in *EEC – Restrictions on Imports of Apples From Chile*.[36] The earlier panel held that the scheme fell into the Article XI(2.c.i) exception. However, the subsequent panel "did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report",[37] hence it was not relieved of the responsibility to carry out its own examination of the issue.[38] It departed from the earlier panel's decision by holding that the scheme did not fall under the exception.[39]

Despite the absence of a formal doctrine of precedent, panel practice reveals awareness that, in reality, their legal reasonings may be used by subsequent panels as precedents. This is exemplified when they expressly limit the applicability of their reasonings to the measures in question. Thus, in *US – Section 337 of the Tariff Act of 1930*,[40] the panel emphasized that whilst its observations relating to the application of Section 337 may be applicable to cases outside the field of intellectual property, its findings and conclusions are limited to patent-based cases.[41] In *EEC – Regulation on Imports of Parts and Components*,[42] the panel examined whether anti-circumvention duties imposed by the EEC fell under the Article XX(d) exception, which provides that nothing in the GATT shall prevent adoption of measures "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement". The panel construed its terms of reference so narrowly as to prevent itself from considering whether the laws in question were 'not inconsistent' with the GATT. Its analysis of Article XX(d) proceeded on the assumption that the laws sought to be enforced by the anti-circumvention duties were not inconsistent with the GATT. The panel emphasized that this assumption was limited to that case and "without prejudice to any examination of these regulations in any other dispute settlement proceeding".[43]

Similarly, the panel in *Japan – Restrictions on Imports of Certain Agricultural Products*,[44] in applying the term 'enforcement of governmental measures' in Article XI(2.c.i), took into account the practice of 'administrative guidance' which is a traditional Japanese government policy tool based on consensus and

36. Panel Report, adopted 10 November 1980, BISD 27S/98. An earlier panel in the EEC – Program of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, adopted 10 October 1978, BISD 25S/68 decided that a similar scheme in relation to fresh tomatoes did not fall within the Art. XI(2.c.i) exception.
37. *See* Panel Report, *supra* note 35, para. 12.1.
38. *Id.*, para. 12.10.
39. *See* Panel Report, *supra* note 35, para. 12.17.
40. *See* Panel Report, *supra* note 13.
41. *Id.*, para. 5.4.
42. *See* Panel Report, adopted 16 May 1990, BISD 37S/132.
43. *Id.*, para. 5.13.
44. Panel Report, adopted 22 March 1988, BISD 35S/165.

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peer pressure. In view of this special characteristic of Japanese society, the panel stressed that "its approach in this particular case *should not be interpreted as a precedent* in other cases where societies are not adapted to this form of enforcing government policies".[45] Thus by expressly limiting the applicability of their decisions to subsequent cases, panels implicitly acknowledge that, despite the absence of the doctrine of precedent in panel jurisprudence, their reasonings and findings may have precedential effect in practice.

Secondly, panels have been asked on several occasions to rule on measures that have expired or been withdrawn.[46] Panels have justified their decisions to grant such rulings on various grounds, including the fact that the case involved "questions of great practical interest", as well as the risk that the party in question may impose similar import restrictions in the future.[47] The Appellate Body has continued this practice in *US – Measures Affecting the Imports of Woven Wool Shirts and Blouses From India*,[48] where US transitional safeguard measures challenged by India were withdrawn prior to the completion of the panel process. India requested the panel to continue its work and, upon the release of the report, India notified the Dispute Settlement Body of its decision to appeal certain issues of law in the report. Parties request and panels grant rulings on withdrawn measures in the belief that these rulings have practical value for future implementation of the GATT.[49] These reports can only be of such practical value if parties believe that the reports' reasonings have precedential effect and are likely to be followed in subsequent disputes.

2.2. The Japan – Taxes on Alcohol Beverages Appellate Body Report

The precedential value of previously adopted reports was raised formally for the first time since the WTO Agreement, in *Japan – Taxes on Alcoholic Beverages*.[50] The panel held that reports adopted by the GATT Council and Dispute Settlement Body are an integral part of GATT 1994 on two grounds.

Firstly, adopted reports constituted[51] 'subsequent practice' under Article 31(3.b) of the 1969 Vienna Convention on the Law of Treaties,[52] which states

45. *Id.*, para. 5.4.1.4 (emphasis added).
46. *See*, e.g., Panel Report EEC – Measures on Animal Feed Proteins, *supra* note 20; Panel Report US – Prohibition of Imports of Tuna and Tuna Products from Canada, adopted 22 February 1982, BISD 29S/91; Panel Report EEC – Restrictions on Imports of Apples from Chile, *supra* note 36; and Panel Report EEC – Restrictions on Imports of Dessert Apples – Complaint by Chile, *supra* note 35.
47. *See* Panel Report EEC – Restrictions on Imports of Dessert Apples – Complaint by Chile, *supra* note 35.
48. Appellate Report, adopted 25 April 1997, WT/DS33/AB/R.
49. R. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System 262 (1993).
50. *See* Appellate Report, *supra* note 8.
51. *Id.*, para. 6.10.

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that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[53] shall be taken into account when interpreting the treaty. The panel accepted Article 31(3.b) as part of the "customary rules of interpretation of public international law" which it was bound to use, under Article III(2) of the DSU, in interpreting the GATT. Construing past reports as 'subsequent practice' requires panels to interpret the GATT in light of any previously adopted reports on the provision in question.

Secondly, adopted reports constituted 'other decisions of the Contracting Parties to GATT 1947' under Paragraph 1(b.iv) of Annex 1A incorporating GATT 1994[54] into the WTO Agreement.[55] This incorporates all panel reports adopted prior to the WTO Agreement into GATT 1994, together with GATT 1947, and other Understandings on the interpretation of the GATT. These two findings render past panel reports as binding on future panels as provisions of GATT 1947 itself. The US appealed, claiming that the panel erred in incorrectly characterizing adopted panel reports as 'subsequent practice' under the Vienna Convention and 'decisions of the Contracting Parties' under paragraph 1(b.iv) of the language incorporating GATT 1994 into the WTO Agreement. The EEC, as intervening third party to the dispute, supported the US position.

The Appellate Body rejected the panel's finding on this issue.[56] It found that 'subsequent practice' within the meaning of Article 31(3.b) of the Vienna Convention, requires a "'concordant, common and consistent' sequence of acts or pronouncements sufficient to establish a discernible pattern implying the parties' agreement regarding its interpretation".[57] Hence, an isolated act, such as the adoption of a panel report, is generally not sufficient to establish subsequent practice. The Appellate Body held that the character and legal status of panel reports has not changed since the WTO Agreement came into force:

> [a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[58]

52. Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).
53. Art. 31(3.b) Vienna Convention on the Law of Treaties.
54. GATT 1994 is incorporated into the WTO Agreement through its inclusion in Annex 1A of the Agreement. GATT 1994 is defined in Annex 1A as including the provisions of GATT 1947 as well as legal instruments falling in categories listed in para. 1(b) of Annex 1A. One such category is "other decisions of the Contracting Parties to GATT 1947".
55. *See* Appellate Report, *supra* note 8, para. 6.10.
56. *Id.*, at 13-15.
57. *Id.*, at 13.
58. *Id.*

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Hence, panel and Appellate Body jurisprudence indicates that, whilst legal reasonings of previously adopted panel reports are usually followed by subsequent panels, they are not strictly binding in the sense of the common law concept of precedent. Such an approach is similar to the practice of the International Court of Justice.[59] However, the question arises as to whether such an approach is desirable in the context of international trade law, and workable in light of the move from a diplomatic model of dispute settlement to the rule-based model of the DSU. The following section examines policy reasons for and against a stronger form of precedent in GATT/WTO jurisprudence.

3. THE DESIRABILITY OF PRECEDENT IN GATT/WTO JURISPRUDENCE

3.1. Policy reasons against a stronger form of precedent

Several reasons have been cited against panels and the Appellate Body being bound by the doctrine of precedent as a principle or rule.[60] Firstly, the Appellate Body in the *Japan Alcohol* case found support for its rejection of the doctrine of precedent in Article IX(2) of the WTO Agreement. Article IX(2) states that the "Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements",[61] and such decisions "shall be taken by a three-fourths majority of the members".[62] Furthermore, under Article III(9) of the DSU, nothing in the DSU prejudices the rights of parties to seek authoritative interpretations of the WTO Agreement through Article IX(2). Since such an exclusive authority has been established so specifically, the argument is that such authority does not exist by implication or inadvertence elsewhere.[63] The fact that the power to adopt authoritative interpretations has indeed been exercised on several occasions supports this. A leading example in this regard is the codification of the *prima facie* breach principle. Recourse to dispute settlement procedures under Article XXIII(1) depends upon proof that some benefit accruing to the party under the GATT has been 'nullified or impaired'. In *Uru-*

59. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion of 18 July 1950, 1950 ICJ Rep. 233 (Judge Read, Dissenting Opinion); President Winiarski in an address delivered on the fortieth anniversary of the Permanent Court of Justice, (1961-1962) Yearbook of the International Court of Justice 1, at 2; G. Fitzmaurice, The Law and Procedure of the International Court of Justice 583 (1986); Lauterpacht, *supra* note 7, at 13-14; and S. Rosenne, The Law and Practice of the International Court 612 (1985).
60. *See, generally,* Appellate Report, *supra* note 8, at 12-15.
61. Art. IX(2) of the WTO Agreement.
62. *Id.*
63. *See* Appellate Report, *supra* note 8, at 13-14.

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guayan Recourse to Article XXIII,[64] the first panel to consider the issue noted that where a GATT provision has been breached, that breach *prima facie* constitutes a nullification or impairment under Article XXIII(1).[65] Subsequent panels have consistently applied the *prima facie* breach principle to Article XXIII(1).[66] Thus in *US Tax Legislation (DISC)* and the other three *DISC* cases, panels treated the statement in *Uruguayan Recourse* as 'precedent'.[67] In 1979, the GATT Council adopted the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.[68] Paragraph 5 of the Understanding's Annex, codified the *prima facie* breach principle as developed by the panels. The concept was also included in Article III(8) of the DSU, which states that "where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification and impairment".

Does Article IX(2) exclude the development of authoritative interpretations of the GATT through the panel process? The argument in favor of exclusion is that since the GATT Council has exercised its Article IX(2) power to codify certain panel reasonings such as the *prima facie* breach principle, unless such authority is exercised, panel reasonings cannot be regarded as having precedential effect. To construe Article IX(2) otherwise would deprive it of any effect. However Olivier Long, a former Director-General of GATT, argues that although competence to give authoritative interpretations lies with the GATT Council, panels make recommendations in carrying out tasks delegated to them. By adopting their reports, contracting parties "endorse these recommendations".[69] Thus, instead of viewing Article IX(2) as excluding the development of authoritative interpretations through adoption of panel reports, one can regard such adoption by contracting parties as an exercise of their power to make authoritative interpretations of the GATT. This is supported by the *EEC Oilseeds Follow-Up Report,* which recognized that conclusions and recom-

64. Panel Report, adopted 16 November 1962, BISD 11S/95.
65. *Id.*, para. 15.
66. *E.g.*, Panel Report EEC – Program of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, *supra* note 36, para. 4.20; Panel Report Norway – Restrictions on Imports of Certain Textile Products, adopted 18 June 1980, BISD 27S/119, para. 17; Panel Report EEC – Restrictions on Imports of Apples from Chile, *supra* note 36, para. 4.24; Panel Report EEC – Imports of Beef from Canada, adopted 10 March 1981, BISD 28S/92, para. 4.9; and Panel Report Spain – Tariff Treatment of Unroasted Coffee, *supra* note 26, para. 4.11.
67. Panel Report US Tax Legislation (DISC), adopted 12 November 1976, BISD 23S/98, para. 80; Panel Report Income Tax Practices Maintained by France, adopted 12 November 1976, BISD 23S/114, para. 58; Panel Report Income Tax Practices Maintained by Belgium, adopted 12 November 1976, BISD 23S/127, para. 45, and Panel Report Income Tax Practices Maintained by The Netherlands, adopted 12 November 1976, para. 45.
68. BISD 26S/210.
69. O. Long, Law and Its Limitations in the GATT Multilateral Trade System 46 (1985).

mendations of a panel "cannot be severed from the reasoning underlying those Conclusions".[70]

Secondly, it has been argued that development of a stronger form of precedent in the WTO system is difficult to justify in light of the unstated assumption of contracting parties that "neither the manner [panel reports] were made nor the manner they were adopted [...] entitle the precise legal rulings in such decisions to binding effect on future controversies".[71] The decision to adopt a panel report does not mean that legal reasonings in that report are adopted as the definitive interpretation by parties.[72] Proponents of this argument have cited statements of the contracting parties to support this. There are two problems with this argument. In the first place, it relies on the proposition that contracting parties can adopt conclusions and rulings of panels but not the legal reasoning behind the rulings. This distinction is highly artificial. The *EEC Oilseeds Follow-Up Report* recognized that the conclusions of a panel cannot be severed from their underlying reasoning.[73] Secondly, most of the statements by contracting parties cited in support of this argument were made by EEC delegates who view GATT dispute settlement as a non-adjudicative, diplomatic process rather than a rule-based model.[74] Thus during the Uruguay Round, EEC delegates stated that results of the panel process should not have precedential effect.[75] Similar statements were made by the EEC representative in discussion on the adoption of *Japan – Restrictions on Imports of Certain Agricultural Products*,[76] where the panel's findings were stated to be "limited to the specific measures under examination".[77] This view does not enjoy the consensus of the contracting parties. In discussion on the adoption of *Spain – Measures Concerning Domestic Sale of Soyabean Oil*,[78] the US representative stated that:

> [t]here was [...] an aspect to any panel report that was perhaps more important than the resolution of a particular dispute: panel reports, explicitly and of necessity, interpret Articles of the General Agreement [...] when the Council adopted a report, those interpretations became GATT law.[79]

70. Panel Report, not adopted, BISD 39S/91, para. 77.
71. *See* Hudec, *supra* note 49, at 263; *see also,* Steger, *supra* note 6, at 320.
72. *See* Appellate Report, *supra* note 8, at 13-15.
73. *See* Panel Report, *supra* note 70.
74. M.M. Mora, A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes, 31 Columbia Journal of Transnational Law 103, at 131 (1993).
75. T.P. Stewart (Ed.), The GATT Uruguay Round: A Negotiating History 1986-1992, at 2727 (1993).
76. *See* Panel Report, *supra* note 44.
77. Minutes of the GATT Council, C/M/217, at 20.
78. This panel report was not adopted.
79. Minutes of the GATT Council, C/M/152, at 8.

In discussion on the adoption of *Canada – Administration of the Foreign Investment Review Act*,[80] the Indian representative, supported by the delegations of Brazil, Chile, Pakistan, Colombia, Nicaragua, and Peru implicitly, acknowledged the precedential effect of panel reports by stating that the dispute concerned two developed parties and adoption of the report could not contribute to the evolution of case law applying to less developed parties.[81] Similarly, the Korean representative stated that panel reports were not limited to the particular regime in question but "once adopted, constitute a precedent".[82] Furthermore, the EEC representative in its request for consultations on *Chile – Internal Taxes on Spirits*, stated that a previous panel on Japanese customs duties on alcoholic drinks "has made very clear findings and constitutes a precedent applicable in the present instance to Chilean taxation of spirits".[83]

The third argument against a stronger form of precedent in GATT jurisprudence, is that no doctrine of precedent exists in international law and, in the absence of a provision in the GATT providing for such a doctrine, panels should not be bound by the doctrine. In this regard, it should be noted that the GATT does not even provide for the panel process, so not much can be inferred from the absence of a provision similar to that in Article 59 of the Statute of the International Court of Justice.[84] On the contrary, the following section argues that the nature of the GATT supports a stronger form of precedent in panel jurisprudence.

3.2. Policy reasons in favour of a stronger form of precedent

The primary argument in favor of a stronger form of precedent in panel jurisprudence, is the nature and object of the GATT/WTO system and dispute settlement process. The WTO Agreement is essentially commercial in nature. Its preamble indicates that it aims to raise standards of living, ensure full employment, and increase real incomes through expansion of production and trade in goods and services. This requires security and predictability for entrepreneurs to make appropriate efficient investment and market development decisions.[85]

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80. *See* Panel Report, *supra* note 19.
81. Minutes of the GATT Council, C/M/174, at 16.
82. Minutes of the GATT Council, C/M/236.
83. Communication from the EC representative, cited *in* WTO, Analytical Index: Guide to GATT Law and Practice 759 (1995).
84. Statute of the International Court of Justice, 1976 YBUN 1052. Art. 59 states that a decision of the Court "has no binding force except between the parties and in respect of that particular case".
85. Panel Report US Manufacturing Clause, adopted 15/16 May 1984, BISD 31S/74, para. 39; Panel Report Japan – Measures on Imports of Leather, *supra* note 20, para. 55; Panel Report Norway – Restrictions on Imports of Apples and Pears, *supra* note 8, para. 5.6; Appellate Report Japan – Taxes on Alcoholic Beverages, *supra* note 8, at 34; Hudec, *supra* note 49, at 261; J. Jackson, *The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections*, *in* N.

Article III(2) of the DSU, states that the dispute settlement system "is a central element in providing security and predictability to the multilateral trading system".[86] It has been recognized that the rationale for a tribunal following its previous decisions, is that it "makes for certainty and stability, which are of the essence of the orderly administration of justice".[87] Hence the objectives of the GATT/WTO multilateral trading system require panels, though not bound by the doctrine of precedent, to follow their previous decisions unless there is good reason to do otherwise. If the WTO Agreement is interpreted in an *ad hoc* manner, without regard to previous decisions, there will be uncertainty as to whether government regulations will be found to be contrary to the WTO Agreement. Such uncertainty will deprive panel reports of the practical value desired by contracting parties,[88] and impair the achievement GATT/WTO objectives. On the other hand, a general recognition of the persuasive force of previously adopted panel reports will result in:

> the development of a comprehensive body of law which [...] can be used not only as direct evidence of specific rules of law [...] but also as indicative of the method and the spirit in which future cases might be resolved.[89]

This policy reason is supported by Article XVI(1) of the WTO Agreement, which states that the WTO "shall be guided by the decisions, procedures and customary practices followed by the contracting parties to the GATT 1947".[90]

This argument is further supported by the move from a diplomatic model of dispute settlement to a rule-based model. Through the DSU reforms, parties have substituted legal legitimacy for political legitimacy in the dispute settlement process. It is therefore critical to the success of the system that the panels and Appellate Body, produce a jurisprudence that is legally credible and commands the respect of WTO members. Following its previously adopted reports, unless there is good reason to do otherwise, contributes to this credibility by avoiding the appearance of any excess judicial discretion, which may be perceived as an *ex post* rationalization for a conclusion reached by other means.

Blokker & S. Muller (Eds.), Towards More Effective Supervision by International Organizations 152 (1994).

86. Art. III(2) of the DSU.
87. *See* Lauterpacht, *supra* note 7, at 14.
88. *See* statements of delegates in notes 78-82 *supra*.
89. *See*, in relation to the practice of the International Court of Justice, Lauterpacht, *supra* note 7, at 18.
90. Art. XVI(1) of the WTO Agreement, *supra* note 1.

4. The Principle of Subsequent Practice: A Basis for the Precedential Effect of Reports

Given the desirability of certainty, predictability, and the absence of a strict doctrine of precedent, on what legal basis can past panel reasonings have precedential effect? It is important to establish clear grounds for the precedential effect of panel reasonings, to provide parties with a criterion for predicting which reasonings will be applied in future disputes. This section argues that despite the decision of the Appellate Body in the *Japan Alcohol* case, the principle of subsequent practice constitutes a basis for the precedential effect of previously adopted reports.

Article III(2) of the DSU requires panels to interpret the WTO Agreement in accordance with "customary rules of interpretation of public international law". Kuyper notes there is:

> little doubt that the drafters of this provision intended it to be an indirect reference to the principles of Articles 31 and 32 of the Vienna Convention, but that the Convention as such could not be referred to because several WTO Members are not party to it.[91]

Indeed, like other international tribunals,[92] the Appellate Body has recognized that Article 31 has attained the status of customary international law.[93]

Article 31(3.b) of the Vienna Convention states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation",[94] shall be taken into account when interpreting the treaty. The International Court of Justice has applied this rule as a principle of international law in several cases.[95] Two issues arise as to its applicability to the adoption of panel reports by the GATT Council, and now the Dispute Settlement Body. Firstly, the preliminary question arises as to whether the acts of an organ established by a treaty can constitute subsequent practice of the par-

91. *See* P. Kuyper, *The Law of GATT as a Special Field of International Law*, XXV Netherlands Yearbook of International Law 227, at 232 (1994).
92. Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151, at 158; Territorial Dispute (Libyan Arab Jamahiriya *v.* Chad), Judgment of 3 February 1994, 1994 ICJ Rep. 6; Golder *v.* United Kingdom, 18 ECHR (1995); and Inter-American Court of Human Rights: Advisory Opinion on Restrictions to the Death Penalty, 70 ILR 449, at 466 (1983).
93. *See* Appellate Report United States – Standards for Reformulated and Conventional Gasoline, adopted 29 April 1996, WT/DS2/AB/R, at 17. *See also*, Appellate Report, *supra* note 8, at 10.
94. Art. 31(3.b) Vienna Convention on the Law of Treaties
95. International Status of South-West Africa, Advisory Opinion of 11 July 1950, 1950 ICJ Rep. 135; Temple of Preah Vihear (Cambodia *v.* Thailand), Merits, Judgment of 15 June 1962, 1962 ICJ Rep. 6, at 34; Certain Expenses of the United Nations, *supra* 92, at 160, especially the Separate Opinion of Judge Sir Percy Spender at 189; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 ICJ Rep. 392, at 408-411.

ties to that treaty. Judges Lauterpacht and Spender have noted the artificiality of arguing that the practice of an organ established under a treaty can constitute 'subsequent practice of the parties' under this principle.[96] In relation to the Charter of the United Nations,[97] Judge Spender stated that the practice of an organ such as the General Assembly cannot be equated with the practice of the parties to the Charter under this principle. He based his objection on the fact that in such organs, majority rule prevails and so determines the practice.[98]

This objection, if valid, does not apply to the practice of the GATT Council prior to the WTO Agreement, since the adoption of panel reports could only occur by the consensus of the contracting parties. However, since the establishment of the Dispute Settlement Body, panel reports are automatically adopted in the absence of a consensus against adoption.[99] This casts doubt on the applicability of the subsequent practice principle to reports adopted under the new system.

Given that the subsequent practice principle can be applied to decisions of the GATT Council (at least prior to the DSU reforms which removed the requirement for consensus-based decision making), the question arises as to whether the adoption of panel reports by consensus can constitute 'subsequent practice' establishing the agreement of the parties regarding the interpretation of the GATT. In this regard, the Appellate Body's statement in the *Japan Alcohol* case is critical. It stated:

> the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.[100]

It concluded that a decision to adopt a panel report, is an isolated act which cannot constitute subsequent practice, and cannot be recognized as constituting a definitive interpretation of the relevant GATT provisions.

On the face of it, this statement appears to reject the view that the subsequent practice principle can be applied to the adoption of panel reports.[101] However, a careful analysis of the Appellate Body's statement, indicates that it does not deny the applicability of the principle *per se*. Rather it noted that the

96. *See* the Separate Opinion of Judge Spender in Certain Expenses of the United Nations, *supra* note 92, at 189.
97. Charter of the United Nations, 1976 YBUN 1043.
98. *See* the Separate Opinion of Judge Spender in Certain Expenses of the United Nations, *supra* note 92, at 192.
99. Art. 16(4) of the DSU.
100. *See* Appellate Report, *supra* note 8, at 13.
101. *See* Jackson, *supra* note 85, at 157. *See also* Petersmann, *supra* note 3, at 75-76.

principle did not apply generally to a decision to adopt a panel report, because such an isolated decision would not amount to a "'concordant, common and consistent' sequence of acts sufficient to establish a discernible pattern implying the agreement of the parties"[102] on the legal reasoning contained in that panel report. The statement does not exclude the adoption of several panel reports which contain the same *ratio decidendi*, or legal reasoning crucial to the findings in each case, from constituting the requisite 'concordant, common, and consistent' sequence of acts establishing a discernible pattern implying the agreement of the parties to that interpretation of the provision.

Indeed, a leading example of the implicit application of this approach is the adoption of the principle, referred to at the beginning of this paper, that the national treatment obligation protects competitive conditions rather than trade volumes. Although this principle is not expressed in the GATT, it is regarded as well-established,[103] and practically binding on subsequent panels, because it constitutes the *ratio decidendi* of a long line of panel reports[104] adopted by the consensus of the contracting parties. Another example of the implicit operation of the subsequent practice principle, is the rule that legislation mandating action inconsistent with the GATT is a violation *per se*, whilst legislation conferring a discretion on the executive to take action inconsistent with the GATT, can only be challenged if the legislation has been so inconsistently applied. Again, this principle is regarded as practically binding on subsequent panels, because it constitutes the *ratio decidendi* of several panel reports adopted by the contracting parties.[105]

These examples indicate that subsequent practice constitutes a basis for the precedential effect of previously adopted panel reports. For the subsequent practice principle to apply to a particular line of legal reasoning, that reasoning must form the *ratio decidendi* of a sufficient number of consensually-adopted panel reports so as to constitute a 'concordant, common, and consistent' sequence of acts sufficient to establish the agreement of the parties to the reasoning in question.

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102. *See* Appellate Report, *supra* note 8, at 13.
103. *See* Appellate Report Canada – Certain Measures Concerning Periodicals, *supra* note 21, at 19.
104. *See* Panel Reports, *supra* notes 19 and 20.
105. Panel Report United States – Taxes on Petroleum and Certain Imported Substances, *supra* note 16, para. 5.2.2; Panel Report EEC – Regulations on Imports of Parts and Components, *supra* note 42, para. 5.25; Panel Report Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, adopted 7 November 1990, BISD 37S/200, para. 84; Panel Report United States – Measures Affecting Alcoholic and Malt Beverages, *supra* note 8, para. 5.59; Panel Report United States – Denial of Most-Favoured-Nation Treatment as to Non-rubber Footwear from Brazil, *supra* note 8, para. 6.13; and Panel Report US – Measures Affecting the Importation, Internal Sale and Use of Tobacco, *supra* note 15, para. 118.

5. CONCLUSION

Prior to the DSU reforms, disputes were decided by panels composed of trade policy experts, chosen on an *ad hoc* basis rather than a permanent tribunal, with members appointed for fixed terms such as the International Court of Justice. This may have inhibited the development of a coherent jurisprudence by panels. This paper has argued that, whilst panels and the Appellate Body are not bound by a strict doctrine of precedent, the security and predictability necessary to achieve the objectives of the WTO multilateral trading system, require that reasonings in previously adopted reports be followed unless there are compelling reasons to the contrary. In the absence of a doctrine of precedent, the principle of subsequent practice provides a legal basis for this to be achieved. Such an approach will provide the foundation for the development of a sound and credible jurisprudence that not only commands the respect of parties to a given dispute, but also the respect of all WTO members.

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