Dispute Settlement in the World Trade Organisation: Moving Towards an Acknowledgement of Stare Decisis

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I. Introduction

The Dispute Settlement Body (DSB) has been hailed as a central pillar of the World Trade Organisation's (WTO) success.[1] It has compulsory jurisdiction over WTO members (hereinafter, "Members") and stands as the "core linchpin of the whole international trading system",[2] interpreting and upholding the WTO Agreement.[3] From its inception to 2014, the DSB's Appellate Body (AB) has dealt with no less than one-hundred and twenty-nine appeals; the DSB Dispute Panel (hereinafter, "Panel") has handled even more disputes.[4] Following an increasing stream of litigation, the DSB is steadily developing a substantial body of case law on the interpretation and application of the WTO Agreement.

As a result, the controversial issue of the legal status of Panel and AB reports which have been approved by the DSB (Reports) is gaining in prominence and importance by the year. It is still unclear what the position is of such Reports in WTO law: whether they are in themselves a source of legal authority, as part of

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1 Adrian TL Chua, 'Precedent and Principles of WTO Panel Jurisprudence' (1998) 16 Berkeley Journal of International Law 171.

2 John H Jackson, *The World Trading System* (2nd edn, MIT Press 1997) 124.

3 For the rest of this article, a broad understanding of the WTO Agreement will be adopted. Thus, any subsequent reference to the WTO Agreement includes the Marrakesh Agreement, its appendices and all related documents such as Accession Protocols. See Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (hereinafter, "the Marrakesh Agreement").

4 The World Trade Organisation, 'Dispute Settlement: Statistics' <https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm> accessed 26 December 2017.

the *corpus* of law, akin to the status of judicial decisions in common law; or whether they are merely of subsidiary status as part of the *acquis* of WTO law, per civil law.[5]

If Reports do not enjoy legal precedential status, then the consolidated Panel and AB jurisprudence becomes of diminished value. All the hundreds of pages of effort gone into the writing and editing of each Report is limited to the facts at hand and have no value thereafter; the much vaunted transparency of the DSB is thus rendered of limited use. This is a conclusion that instinctively does not sit well with efficiency considerations. Hence, this article will endeavour to give a reasoned legal analysis as to why the Reports should enjoy precedential effect under a doctrine of *stare decisis*.

II. The Concept Of Stare Decisis

The doctrine of *stare decisis* (SD) is a common law concept that, in brief, means "to abide by, or adhere to, decided cases".[6] Accordingly, if courts in prior judgments have laid down a "principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same, regardless of whether the parties and property are the same".[7] Its purpose is to give the law a "tensile toughness",[8] imbuing the law with a level of consistency and predictability so as to allow its subjects legitimate expectations on the operation of the law, and to be consistent with the rule of law.

However, the doctrine of SD today is no longer strictly binding in the UK and the US, as archetypes of the world's common law jurisdictions. The common law values consistency, but ultimately, the judge's higher obligation is to "his mistress, the law".[9] This is reflected in the development of vertical and horizontal SD over time. The former is the obedience of a lower court to a higher court in the judicial hierarchy, while the latter describes how a judge is bound by or must respect earlier decisions by another court of the same coordinate level. While vertical SD is still strictly followed, the parameters of horizontal SD have been relaxed, particularly with regard to apex courts. In the UK, a House of Lords Practice Statement recognised that "too rigid adherence to precedent may lead to injustice in a particular case", and as such, "while treating former decisions of this House

5 Wooraboon Luanratana and Alessandro Romano, '*Stare Decisis* in the WTO: Myth, Dream or a Siren's Song?' (2014) 48 Journal of World Trade 773, 777 ff.

6 Bryan A Garner, *Black's Law Dictionary* (10th edn, West Group 2014) 1406.

7 ibid.

8 Neil McCormick and Robert Summers, *Interpreting Precedents: A Comparative Study* (Routledge 1997) 355, 396–397.

9 Carleton Allen, *Law in the Making* (6th edn, OUP 1958) 280.

as *normally binding*, [the House would] depart from a previous decision when it appears right to do so".[10] Similarly, in the US, appellate judges "expressly overrule precedents at least two or three times a year in almost every state".[11]

The chief implication of this change is that the highest court is now able to depart from prior precedent. Hence, the greatest weakness of a strict doctrine of SD has been diminished, as a court will not uphold a legal principle simply "because it was laid down in the time of Henry IV".[12] However, this newfound flexibility is as much a two-edged sword as strict SD; it brings heightened fears of unfettered judicial law-making, as it leaves more power and discretion in the hands of appellate judges.

In this article, where SD is mentioned, it refers to the newer, less strict understanding of the doctrine of precedent. This is the modern incarnation of the doctrine after years of progress: the UK and the US, as originators and champions of the SD doctrine, now abide by this less binding variant of the doctrine.

III. Status of Stare Decisis in the Wto

A. Denial of stare decisis

(i) Legislative instruments

Various WTO legal authorities, including the Dispute Settlement Understanding (DSU) itself,[13] have repeatedly emphasised that the common law doctrine of SD has no place in the DSB. The root of this statement can be traced back to Article IX(2) of the Marrakesh Agreement,[14] which confers upon the Ministerial Conference and the General Council the exclusive authority to adopt interpretations of the WTO Agreement. Given that such exclusive authority was explicitly granted to these bodies but not to the DSB or its AB, it is logical to assume that the adopted AB or Panel Reports do not constitute authoritative interpretations of the WTO Agreement.

There are also other indicators to the effect that the DSB's interpretations are not authoritative, such as Article 3(2) of the DSU. Article 3(2) prohibits the DSB from "add[ing] to or diminish[ing] the rights and obligations provided in the

[10] *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234, [1966] 3 All ER 77.

[11] Allen (n 9) 404.

[12] *Loschiavo v Port Authority* (1983) 58 NY.2d 1040, 1043.

[13] WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes', Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (hereinafter, "Dispute Settlement Understanding").

[14] Marrakesh Agreement (n 3) Article IX(2).

covered agreements" via its "recommendations and rulings". If the Reports were to have precedential effect, a decision today between two parties would impact the parameters of a third party member's rights or duties in future cases.[15]

Further, Articles 3(3) and 3(4), in explaining the function of the DSB, focus on how the DSB ensures the "prompt settlement of the situation" or the "satisfactory settlement of the matter", with no indication of any hope or intention to build a body of jurisprudence from the rulings and recommendations.

(I) Panel and ab pronouncements

The *inter partes* rule in the DSU has been repeatedly affirmed by personnel associated with the WTO. The WTO Legal Affairs Division and the Appellate Body Secretariat jointly affirmed that "the Reports… are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter… there is no rule of SD in WTO dispute settlement according to which previous rulings bind panels and the AB".[16]

This sentiment is echoed in several Panel and AB Reports, even under the former General Agreement on Tariffs and Trade of 1947 (GATT 1947). Two cases involving certain European measures on imports of apples from Chile show this point. In *EEC – Apples (1989)*,[17] Chile complained the European Economic Community (EEC) was fixing the prices of apples, and the EEC countered with the exception in Article XI(2)(c)(i) GATT 1947. The same issue, over the same subject and between the same parties, had been raised in an earlier case, *EEC – Apples (1980)*.[18] However, in *EEC – Apples (1989)* the Panel did not rely on such precedent, but re-examined the issue entirely following a different legal reasoning. Indeed,

[15] Raj Bhala, 'The Myth about *Stare Decisis* and International Trade Law (Part One of a Trilogy)' (1999) 14(4) American University International Law Review 845, 879.

[16] WTO, 'Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings' in WTO, *Dispute Settlement System Training Module: Chapter 7* <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm> accessed 26 December 2017. However, this is not conclusive as to the legal effect of precedents since this is merely a statement on the WTO website but is not incorporated into any legally binding agreement between the Members, nor is it a pronouncement from the two bodies which have been given explicit authority to interpret the WTO Agreement (including whether or not its DSB's judgments have precedential value).

[17] *EEC – Restrictions on Imports of Dessert Apples* (Complaint by Chile) (1989) GATT L/6491 36S/93.

[18] *EEC – Restrictions on Imports of Apples from Chile* (1980) GATT L/5047 27S/98.

the Panel noted that "did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report".[19]

Similar statements were made in other Reports, such as in *Japan – Taxes on Alcoholic Beverages*,[20] where the AB stated that Panel Reports are "not binding [to subsequent Panels], except with respect to resolving the particular dispute between the parties to that dispute".[21] In addition, the AB has been known to overturn its past decisions. *China – Raw Materials*[22] and *China – Rare Earths*[23] were independent cases decided less than two years apart, yet *China – Rare Earths* decisively rejected its predecessor. This is a notable deviation from the practice of courts under an SD regime, where precedents, if overturned, are generally done so only after a considerable length of time. While such a move is theoretically possible under the doctrine of SD, the low likelihood of its occurrence in a system abiding by the doctrine of SD makes it more probable than not that the Panel and AB do not consider themselves bound by precedents.

B. De facto practice of stare decisis

Despite the apparent inapplicability of the SD doctrine to the DSU's operations, some have observed that the Panel and AB have adopted a *de facto* practice of SD.[24]

(I) Persuasive authority: panel and ab practice

Panel and AB Reports invariably come attached with a table of cases, which list down past Reports cited by parties or panels as relevant to the case at hand. This shows that, in practice, disputes brought before the Panel and AB are not limited to an *inter partes* effect, as every Report may have precedential effect in future cases.

Other practices of the Panel and AB further evince an awareness that their reasoning and decisions are of value beyond the case at hand: in several cases, such as *EEC – Parts and Components*[25] and *Japan – Restrictions on Imports of Certain Agricultural*

[19] *EEC – Apples* (1989) (n 17) [12.1].

[20] *Japan – Taxes on Alcoholic Beverages* (1996) WTO WT/DS8/AB/R.

[21] ibid 14.

[22] *China – Measures Related to the Exportation of Various Raw Materials* (2012) WTO WT/DS394/AB/R.

[23] *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (2014) WTO WT/DS431/AB/R.

[24] For example, see Bhala (n 15) and Anne Scully-Hill and Hans Mahncke, 'The Emergence of the Doctrine of *Stare Decisis* in the WTO Dispute Settlement System' (2009) 36(2) Legal Issues of Economic Integration 133.

[25] *EEC – Regulations on Imports of Parts and Components* (1990) GATT L/6657 - 37S/132.

Products,[26] the Panel and AB pre-emptively reminded parties that their reasoning would, given the circumstances at hand, only be applicable to the specific matter, which implies that the Panel or AB is aware that it may be used *beyond* the specific matter.

In addition, the Panel and AB have on various occasions been asked to, and agreed to, rule on expired measures which no longer fuel live issues. For example, in the famous *US—Woven Wool* case,[27] part of the dispute centred on the validity of US transitional safeguard measures against Indian wool imports. The measures were withdrawn before the Panel reached a decision, yet, India specifically requested that the Panel continue to finalise and release its Report.[28] The only reason for India to do so would be if it believed that the reasoning and decisions could be of use in the *future*, instead of being limited only to the specific situation and parties at hand.

Therefore, it is not only the adjudicatory bodies which assume that their Reports have precedential value; the Members under their jurisdiction have—via their actions—also indicated that they too share a similar belief.[29] However, these examples only go towards showing that the old Reports are referred to in new judgments and thus enjoy persuasive precedential value, but fall short of evidencing a practice of *de facto* SD. It ought to be recalled at this juncture that SD refers to a practice of *normally binding* vertical and horizontal precedent; not quite invariably binding but also not merely persuasive authority.

(II) Specific Cases

Stronger evidence for the *normally* binding nature of precedent can be found elsewhere in the DSB's operations. In particular, the language of SD recurs in Reports: in *Canada – Periodicals,*[30] the AB distinguished a prior Report on the grounds that the part of the Report cited by the USA constituted only "*obiter dicta*" and was, therefore, not binding.[31] The term "*obiter dicta*" and the related idea of the binding "*ratio decidendi*" are singular to the concept of SD as it is known in common law.

The case that is now frequently cited as establishing de facto SD in the DSB is *US—Stainless Steel*.[32] In that case, the AB pronounced that future Panels are not

[26] *Japan – Restrictions on Imports of Certain Agricultural Products* (1988) GATT L/6253 35S/163 [5.4.1.4].
[27] US – *Measures Affecting the Imports of Woven Wool Shirts and Blouses from India* (1997) WTO WT/DS33/AB/R.
[28] ibid 2.
[29] Chua (n 1) 177–178.
[30] *Canada – Certain Measures Concerning Periodicals* (1997) WT/DS31/AB/R.
[31] ibid 33.
[32] *US – Final Anti-Dumping Measures on Stainless Steel from Mexico* (2008) WT/DS344/AB/R.

permitted to "disregard the legal interpretations and the *ratio decidendi* contained in previous [adopted] Appellate Body Reports".[33] The Report acknowledged that "WTO Members attach significance to reasoning provided in previous Panel and Appellate Body reports… [which are] often cited by parties in support of legal arguments…in subsequent disputes".[34] Hence, "[t]he legal interpretation… becomes part and parcel of the acquis of the WTO settlement system".[35]

Importantly, the AB reasoned that apart from the practice of using cases as persuasive precedent, "[WTO] Members recognised the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements… [which in turn] is essential to promote 'security and predictability' in the dispute settlement system…"[36] As such, to protect Members' legitimate expectations, and to "[ensure] 'security and predictability' in the dispute settlement system, as contemplated by Article 3(2) of the DSU… absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[37] The language of "cogent reasons" echoes the "normally binding precedent" stand in common law jurisdictions—precedents would by default be followed, save certain exceptions. The case concluded that "the Panel's decision to depart from well-established Appellate Body jurisprudence… has serious implications for the proper functioning of the WTO dispute settlement system".[38]

The "cogent reasons" standard was accepted and a further test was adopted in *US – Countervailing and Antidumping Measures*.[39] The case provided four non-exhaustive situations which would justify departure from an otherwise applicable precedent:[40]

> A multilateral interpretation of a provision of the covered agreements under Article IX(2) of the WTO Agreement that departs from a prior Appellate Body interpretation;
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> A demonstration that a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue;
>
> A demonstration that the Appellate Body's prior interpretation leads

[33] ibid [158].
[34] ibid [160].
[35] ibid [160].
[36] ibid [161].
[37] ibid [160].
[38] ibid [162].
[39] *US – Countervailing and Antidumping Measures* (2014) WTO/DS449/R.
[40] ibid [7.317].

> to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; and
>
> A demonstration that the Appellate Body's interpretation was based on a factually incorrect premise.

The case confirms the *US – Stainless Steel* ruling that precedent is not merely persuasive, but is—to a certain extent—binding (particularly in the sense of vertical SD). Even if a future adjudicatory board find themselves persuaded by legal arguments that reach a different conclusion, they are unable to stray from prior AB rulings. Hence, Panels and the AB are instructed to render their decisions with strong deference to prior cases, which is in practice adherence to SD.

C. Controversy over stare decisis

Given the wealth of sources insistently reassuring members that the doctrine of SD does not apply in the context of the DSB, the mixed signals sent by Panels and the AB are confusing and unjust to members, particularly if the DSB is in truth prohibited from adopting the doctrine of SD. Until this fundamental issue is settled, it is highly likely that parties to a dispute, when faced with undesirable precedent, will attempt to argue that: (a) the AB's prior decisions do not even have high precedential value; and (b) even if they do, the exact standard for the AB or Panels to stray from precedent (the "cogent reasons" test) is too high.

In both situations, the central issue is that whatever the adjudicator pronounces will not be satisfactorily regarded as final. One of the parties will accuse the adjudicator of spinning both the doctrine of SD and the "cogent reason" test (for the doctrine's application) from thin air. Any decision or guidelines on precedent, however, will not be conclusive because the unhappy Member—and any unhappy future litigants—will simply argue that these requirements are not binding in the context of future rulings because AB or Panel rulings do not have precedential value in the first place. If that is the case, the same issue will arise repeatedly as part of an endless cycle, wasting WTO and DSB resources. Hence, for the dispute resolution mechanism to continue functioning efficiently, a conclusive answer must be reached on this matter.

IV. Arguments on the Existence of Stare Decisis per the WTO Agreement

To end the stalemate, it is crucial to identify whether the WTO Agreement envisions a doctrine of SD. In the absence of a clear statement, the next best

option is to identify whether the WTO Agreement *excludes* the operation of the doctrine. It would be unrealistic to hope to find an explicit, conclusive statement in the Agreement on whether the doctrine of SD is applicable, given that scholars and Members have been arguing over this issue for a decade, and would have already reached a unanimous resolution if the answer could so easily be found. Hence, the focus shall be on proving that the WTO Agreement does not in fact forbid the operation of SD.

The subsequent analysis of the WTO Agreement's relevant provisions will, as far as possible, not involve interpretations or applications found in Reports. This is a logical concession as the question under discussion is whether Reports findings have value beyond their specific factual scenario; in particular, whether Reports have precedential value. Hence, it would be circular reasoning to use Report findings to substantiate the argument.

A. WTO agreement does not forbid stare decisis

Earlier, Article IX(2) of the WTO Agreement was identified as the backbone of the argument that the doctrine of SD has no place in the DSB. This is supported by clauses in the DSU agreement itself, which ostensibly lend to the conclusion that the doctrine of SD cannot apply. However, a closer reading of the relevant provisions shows that the WTO Agreement does not reject the doctrine's operation.

(i) Article 3(2) of the DSU

As noted earlier, Article 3(2) states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements", which has been read to exclude the operation of the SD doctrine. The argument goes that if Reports had precedential effect, the rulings of the DSB would affect the rights and obligations of WTO Members in future disputes.[41]

There is, however, an alternative way to understanding Article 3(2) that does not necessitate the conclusion that SD cannot operate in the DSB. Article 3(2) explains that the WTO's dispute settlement mechanism seeks to provide "security and predictability" regarding the operation of the rules in the WTO Agreement, which is achieved when the DSB clarifies the provisions of the WTO Agreement.[42] Subsequently, when enforcing WTO members' rights and obligations—the

[41] Bhala (n 15) 879.

[42] John H Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?' (2004) 98(1) American Journal of International Law 109, 116.

parameters of which are interpreted by the DSB in the Panel or AB reports—the system preserves members' existing rights and obligations. The goal of providing predictability to WTO members is further achieved when a body of jurisprudence is developed, taking precedential effects that can be relied on by both immediate disputants and other WTO members in future disputes.[43] Thus, on a purposive reading of Article 3(2), in the context of dispute resolution proceedings, the DSB does not alter the rights of parties, but merely *explains* existing rights and obligations under the WTO Agreement. That should be the preferred understanding of the DSB's role.

This is akin to the difference between a *discovery* of a legal principle, which is within the purview of common law judges' duties and powers, as opposed to *creating* law, which judges are technically not supposed to do.[44] The taboo against judicial activism is prevalent even in common law jurisdictions. As such, it would be more palatable to any party or Member of the WTO if the DSB's pronouncements on the WTO Agreement, communicated via Panel and AB Reports, are regarded as mere interpretations of existing law. If that is the meaning of Article 3(2), then Panels and the AB when interpreting the WTO Agreement are merely (legitimately) explaining existing rights and obligations, and these interpretations are, therefore, not precluded from holding precedential value.

This is further supported by the logical inference that Article 3(2) cannot possibly be referring to Panels and AB affecting the rights and obligations of Members simply through ordinary interpretation of the WTO Agreement. If a pertinent question of interpretation arises in a dispute, the Panel or AB must necessarily reach an answer on the matter. Such a pronouncement, because of the litigious nature of the dispute, would in all likelihood be favourable to one party but not to the other. If that were, by itself, to constitute illegitimate interpretation, then the DSB would be wholly powerless because it would not be able to settle disputes at all. Thus, according to Article 31 of the VCLT, which requires that a treaty be interpreted in good faith in light of its object and purpose, Article 3(2) should be interpreted in this suggested manner, which avoids the rendering the DSB's dispute-settlement process ineffectual.

If it is accepted that Panels and the AB take on an explanatory role when interpreting and applying provisions, then these pronouncements are automatically capable of having precedential value. The concept of *discovering* the law means that there is necessarily only one pre-existing, objectively correct understanding of the

[43] ibid.

[44] Zecheriah Chafee Jr, 'Do Judges Make or Discover Law?' (1947) 91(5) Proceedings of the American Philosophical Society 405.

law.[45] Panels, and subsequently the AB acting as a check on the Panel, are stating a truth that will be equally valid in future cases as it is in the case at issue.

The only reason against such interpretations having precedential value would be to argue that the DSB is not the appropriate body to make such a pronouncement. This may be justified under the earlier analysis of Article IX(2) of the WTO Agreement,[46] which confers such binding authority—apparently exclusively—on the Ministerial Conference, the General Council and none other.

However, it is difficult to reconcile a strict reading of Article IX(2) of the WTO Agreement with Article 3(2) of the DSU. If Article IX(2) is interpreted to mean that only the Ministerial Conference and the General Council can adopt authoritative interpretations, then the DSU's panel and AB reports are not authoritative interpretations. Thus, the current practice wherein the DSB announces interpretations—apparently not authoritatively, per Article IX(2)—and subsequently enforces judgment[47] causes parties in a dispute to have their rights re-defined and altered by the DSB, violating Article 3(2) of the DSU. This is because if the DSB is not authoritative, its interpretations could be mistaken and enforcing a mistaken judgment would then constitute derogating from members' rights and obligations under the WTO Agreement, which members should be protected from under Article 3(2).

To avoid such derogation from existing rights and obligations, it appears that the only logical solution left is to demand that either the Ministerial Committee or the entire General Council decisively entertain all questions of interpretation by divining one right understanding of the law. This is, however, an unfeasible proposal given the difficulty of obtaining consensus or at minimum a three-quarter majority and the inefficiency of bothering the MC for individual cases.[48] In addition, such a move would render the valued DSU mechanism obsolete and inefficient. As a result, Members must reconsider the implications of reading Article IX(2) as authority against *stare decisis*.

It would not be inconceivable for the DSB to have that authority. Whereas Article IX(2) indeed neglects to explicitly grant exclusive authority to the DSB, the reason could well be that the composition of the General Council and the DSB are identical. Article IV(3) of the WTO Agreement explains that "[t]he General Council shall convene as appropriate to discharge the responsibilities of the

[45] ibid.

[46] See Part III.A.(i) above.

[47] The pronouncement of decisions by the DSB and its binding effect on parties to the dispute is provided for in Article 17(14) of the Dispute Settlement Understanding (n 13).

[48] Marrakesh Agreement (n 3) Articles IX(1) and IX(2).

Dispute Settlement Body provided for in the Dispute Settlement Understanding". Indeed, the equivalence of the General Council and the DSB is implied in Note 3 to the Marrakesh Agreement that speaks of "[d]ecisions by the General Council when convened as the Dispute Settlement Body…" Hence, although these are two distinct legal bodies, they are in practice composed of the same members and might be regarded as *alter egos* of each other, so that the General Council *is* sometimes the DSB. As such, in agreeing to grant exclusive interpretive authority of the WTO Agreement to the General Council in Article IX(2), it can be extrapolated that Members have also granted authority to the General Council's *alter ego*, the DSB.

Only the DSB may make rulings under the DSU, echoing the authority of the General Council. It has the authority to decide whether to adopt a Panel or AB Report, which are merely recommendations and not binding upon the parties to the dispute.[49] When the DSB approves of a Report, it accepts the interpretations of the WTO Agreement contained therein. By virtue of the DSB's status as the *alter ego* of General Council, the General Council can by extension be seen to have accepted the same interpretations. Given that the General Council's interpretations are authoritative, they become timeless interpretations of the WTO Agreement and are, therefore, normally binding precedent on future cases in which the same interpretative issue arises.

Although, it may be unpersuasive to consider the DSB and General Council to be legal *alter egos*,[50] the identical composition of the two bodies does make it less objectionable for the DSB to hold similarly conclusive interpretive authority. Hence, the simplest way to resolve the glaring inconsistency between Article IX(2) WTO and Article 3(2) DSU, would be to openly acknowledge that the DSB does possess interpretive authority.

(II) Other DSU articles

It was earlier noted that other provisions in Article 3 of the DSU appear to imply that the Panel and AB judgments should be limited *only* to the factual scenario at issue. Articles 3(3) and 3(4) in explaining the duties of the DSB repeatedly focus only on "the matter" at hand, without any reference to the DSB contributing to the creation of a body of jurisprudence. It might therefore reasonably be inferred from

[49] Dispute Settlement Understanding (n 13). See in particular Articles 16 and 17(14) which entrusts the right to adopt a report to the DSB, and Article 11, which terms Panel and AB reports as "recommendations".

[50] The author acknowledges that this is likely to be a controversial argument because of the fundamental principle of separate legal entities.

the silence that the latter is not part of the DSU's mandate. There are, however, two reasons that demonstrate that Articles 3(3) and 3(4) are inconclusive on the matter.

Firstly, it is overthinking to infer that it was not intended that the DSU's Reports lack any precedential value simply from the provisions' silence. Article 3 of the DSU is titled "General Provisions" and deals with the day-to-day functions of the DSU, which are indeed primarily to resolve disputes. This should be contrasted with the preamble of the WTO Agreement, which in its recitals comprehensively list the goals and visions of the WTO as a body facilitating international trade.[51] If there were a similar preamble in the DSU, then it would be more reasonable to expect that the DSU's goals and functions be comprehensively stated, including any long-term goals to build a body of precedent. Hence, in the absence of such an overarching statement on the DSU's goals, it does not mean anything that Article 3 does not specifically indicate that the Panel and AB Reports should have precedential effect. In any case, an equally persuasive argument can be made that Article 3 did not specify that the Reports should *not* have precedential effect.

Secondly, the language of Articles 3(3) and 3(4) supports the contrary argument; namely, that the DSU's reports should contribute to the formation of a stable body of precedents for Members' reference and edification. In particular, Article 3(3) regards "the [*prompt*] settlement of [disputes]…" as "essential to the functioning of the WTO…" The "prompt" settlement of disputes is certainly furthered by the application of a doctrine of SD, which enables judicial economy by promoting consistency and stability in the interpretation of Members' rights before Panels and the AB.[52]

Following a related train of thought, in the *US – Stainless Steel* case mentioned earlier, the AB stated that "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".[53] Indeed, it would be useful for "security and

[51] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, Preamble.

[52] Simon Lester, 'International Decisions: WTO-Anti-dumping Agreement – "zeroing" – role of precedent – standard of review' (2008) 102(4) American Journal of International Law 834, 839.

[53] *US – Stainless Steel* (n 32) [160].

predictability" if the doctrine of SD is applicable,[54] giving voice to Members' legitimate expectations that like cases should be treated alike.

It must be acknowledged, however, that although these are good reasons for the application of SD, they do not yet lead to the *necessary* conclusion that the doctrine of SD must apply in the DSU. As such, further guidance must be sought elsewhere.

B. Doctrine of SD is implied in the DSU

The interpretation of the WTO Agreement and the DSU are both guided by "customary rules of interpretation of public international law",[55] which has been codified in the form of the Vienna Convention on the Law of Treaties (VCLT).[56] In particular, Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties.

The VCLT in its "General Rule of Interpretation" does not expressly mention the doctrine of SD nor does it describe anything similar to the doctrine. However, a few VCLT provisions appear to tacitly permit the doctrine of SD in the WTO dispute settlement context.

(I) Article 31(3)(b)

Article 31(3)(b) of the VCLT states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account when interpreting the treaty (i.e. the mechanism encapsulated in the DSU). In *Japan – Taxes on Alcoholic Beverages*, it was argued that adopted Reports constitute "subsequent practice", and these Reports' findings are therefore part of the "subsequent practice" of the WTO Agreement.[57] As a result, per Article 31(3)(b), Panels and ABs must take into

[54] The "cogent reasons" test introduced in *US – Stainless Steel* is one of the methods by which the doctrine of SD could be realised and applied.

[55] *US – Stainless Steel* (n 32) [39], [76], [136] and [161]. See also: WTO, 'WTO Analytical Index: Marrakesh Agreement' [279] <https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#articleXVI> accessed 26 December 2017.

[56] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[57] Chua (n 1) 182.

account these past findings in interpreting the WTO Agreement. This essentially transplants the doctrine of SD into the Panel and AB's decision-making process.

However, this argument was rejected in the *Japan – Alcoholic Beverages*[58] case on the grounds that "the essence of subsequent practice in interpreting a treaty has been recognised 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".[59] As such, it was determined that a single precedent would be insufficient to establish "subsequent practice"[60] such that parties' agreement to the interpretation could be inferred.

Although this appears to be a rejection of the doctrine of SD, the AB did not unequivocally decline to establish its own power to set precedents. It merely stated that isolated incidents would be insufficient "practice" to convincingly establish "agreement" as to the interpretation. Hence, where there is a sufficient sequence of cases agreeing on the same interpretation for a given clause in the WTO Agreement, the AB would likely accept the particular interpretation as conclusive since the interpretation would be taken to enjoy the acceptance of all parties, per Article 31(3)(b). In such a situation, the doctrine of SD would operate by virtue of Article 31(3)(b) VCLT read with Article 3(2) DSU, as the string of past decisions would take on precedential effect and become normally binding.

In such a situation, the doctrine of SD applies but with a caveat. An interpretation becomes "normally binding" only when there is a sufficiently long and consistent line of prior decisions concurring with the interpretation. Exactly how many Reports would be required to constitute sufficient "subsequent practice" is open to further debate. It would seem then that a persuasive argument has been made to the effect that a limited but satisfactory doctrine of SD applies, per the relevant provisions in the VCLT and the DSU.

Unfortunately, one further problem arises: what of the situation where a string of cases is built upon each other in an illegitimate practice of *de facto* SD, reaching the same interpretation of a given clause in the WTO Agreement? The line of precedents could then be traced back to a *single* case, which would run contrary to the *spirit* of a "sequence of acts" sufficient to establish "subsequent practice". Hence, it would appear that the doctrine of SD would be further circumscribed in its application to situations where each of the Panels or ABs issuing the Reports cumulatively constituting "subsequent practice" independently reach the interpretation of the relevant clause of the WTO Agreement. At the very least, the

[58] *Japan – Taxes on Alcoholic Beverages* (1996) WT/DS8/AB/R.
[59] ibid 13.
[60] Chua (n 1) 183.

Panels and ABs should not have cited prior cases as dispositive reasons in reaching their interpretations of the WTO clauses in question.

Although this argument based on Article 31(3)(b) of the VCLT leads to the conclusion that the doctrine of SD is applicable to the dispute resolution process, it leaves us with a diminished version of the doctrine of SD. Hence, the next logical step would be to ascertain if there are any other provisions capable of incorporating the full doctrine of SD into the Panel's and AB's dispute resolution process.

(II) Article 31(3)(a)

Under the same Article, the VCLT also states that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" should be taken into account during interpretation. Similar to Article 31(3)(b), this sub-paragraph also focuses on the "agreement" of the parties, but does not require that this "agreement" be proved via the *frequency* of prior Reports reaching the same interpretation of a given clause in the treaty.

In this section, "agreement" will not be assessed with regard to agreement as to any particular interpretation of any particular clause in the WTO Agreement, as was the case when analysing the implications of Article 31(3)(b). Instead, the central question which needs to be answered is whether Members have agreed, generally, to a doctrine of SD in the WTO Agreement.

It is not contested that in Article 4(2) of the WTO Agreement, signatory states unanimously agreed to the creation of the DSB and its compulsory jurisdiction. By extension, the Members also consented to the DSU annexed to the Marrakesh Agreement, from which the DSB derives its functions and powers. Under Articles 3(1) and 17(14) of the DSU, Members agree that where they are parties to a case, they will accept the Panel's and AB's interpretations and abide by the DSB's final ruling. The problem with this is that this agreement and acceptance of the interpretation is limited to the parties in a case. Hence, the precedential value of such a case would be limited to future cases where the parties again appear as litigants.

However, it is possible to discern "subsequent agreement", not merely on the interpretation of a specific provision in a specific case, but a more general, lasting agreement as to the precedential value of Reports in general. Agreement need not be demonstrated in the form of a formal contract, and may also take the

form of unequivocal acts, for the substance is more important than the form of agreement.[61]

Recall that neither the DSU nor the WTO Agreement explicitly forbids the doctrine of SD. It is only that in Article 3(2) of the DSU, the DSB pledges not to vary the rights and obligations of Members. It has never been clear whether the DSB's interpretation of the WTO Agreement constitutes variation of these rights and obligations, or—as argued earlier—whether these are merely interpretations, clarifying the boundaries of existing rights and obligations. If it is the latter, the doctrine of SD is capable of applying, and *should* apply in order to prevent wastage of resources in litigating over the same question.

Hence, any Member should be taken to have acquiesced to the operation of a doctrine of SD if, in their own submissions to the Panel or AB, they cite past decisions in order to convince the Panel or AB to adopt the same reasoning and interpretations once again. In so doing, they have decisively waived the option to challenge that according to the DSU, past DSB rulings have no precedential effect. On the contrary, each party's great hope is that the current Panel or AB will recall their past decision and be so bound. This can thus be taken as agreement between parties that neither Article 3(2) DSU nor Article IX(2) WTO, or any other provision, prevents past Reports from taking on future precedential effect.

Nearly every member who has at some point—in any dispute, or as a third party—directed the Panel's or AB's attention to a past case's interpretation can be taken to have agreed that the treaty can be interpreted with reference to past cases. In any case, in almost every dispute, there would be consent to the doctrine of SD; thus far, there has been no party that would willingly neglect to raise past cases as authority supporting their reasoning. Every Report published by the DSB comes attached with cases cited by both parties. It would not be an exaggeration to say that most Members have acknowledged the precedential effect and value of DSB Reports by petitioning adjudicators to abide by past decisions.

Such tacit agreement that the doctrine of SD applies is further reinforced by representatives' statements outside the dispute resolution process. For example, in *Canada – Administration of the Foreign Investment Review Act*,[62] the Korean representative stated that panel reports were not limited to the specific fact scenario but "constituted a precedent"; India and other developing nations were quick to observe that the Report could only contribute to future cases where both parties were developed

[61] *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R [267].

[62] *Canada – Administration of the Foreign Investment Review Act* (1984) GATT BISD (30th Supp) 140.

parties, and could not affect future claims from developing nations.[63] In addition, it is common for representatives of winner states to refer to successful suits as setting "precedents".[64]

Consequently, over time, most Members will have in substance implicitly agreed to apply the doctrine of SD. Where a dispute is between Members who have agreed that the doctrine of SD should apply, per Article 31(3)(a), this should be an important factor in the Panel's or AB's preliminary analysis of whether under the DSU, the doctrine of SD applies. Such subsequent agreement would weigh heavily in favour of a finding that the doctrine applies.

V. Conclusion

The doctrine of SD as it now stands balances in a continuum, between unbreakable binding precedent and mere persuasive authority. While the term *stare decisis* is admittedly a common law concept, it has its counterparts in civil law. Article 5 of the French Civil Law Code famously repudiates the concept of precedence, stating that "a judge… [is not] to dispose of the case by reference… to prior decisions". Yet, *la jurisprudence* is the result of the accumulation of a body of judgments, and in practice, 90% of French judges follow the position of the *Cour de Cassation*, creating a line of similar decisions.[65] The universality of the doctrine of SD is such that it is inevitable that the DSB will ultimately adopt a *de facto* doctrine of SD.

One of the greatest fears regarding the doctrine of SD is that it will bind future adjudicators to abide by the mistakes made by the predecessors. However, the doctrine of SD has developed over the years to take a more flexible stance on horizontal SD, which allows the apex adjudicator to deviate from its past rulings, which are only "normally binding". In any case, Article IX(2) can be seen as empowering the General Council and Ministerial Council of the WTO to veto interpretations by the AB, serving as a check on judicial power, echoing the separation of powers in national systems.

Having put these pressing worries about the doctrine at ease, would it not be better adapting to reality, acknowledging the long practice of SD and accepting the approving clues scattered in the relevant parts of the WTO Agreement, and so give the doctrine of SD formal legitimacy instead of requiring that adjudicators

[63] Refer to the Minutes of the GATT Council: GATT Council 'Council – Minutes of Meeting – Held in the Centre William Rappard on 11 October 1989' (11 October 1989) C/M/236 <https://docs.wto.org/gattdocs/q/GG/C/M236.PDF> accessed 26 December 2017.

[64] Bhala (n 15) 871.

[65] Christian Dadomo and Susan Farran, *The French Legal System* (2nd edn, Thomson Professional Publishing Canada 1996) 42.

dance around the issue? As such, this article attempts to present possible routes by which the doctrine of SD can be formally and openly inducted into the operation of the DSB. It is only when the official position of the DSB matches its actions that it can more efficiently fulfil its central function—to justly and transparently bring resolution to multinational trade disputes.