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# How to Treat the WTO's Problem with Precedent

Timothy Meyer\*

## ABSTRACT

*This Article argues that the World Trade Organization's Appellate Body (AB), or a successor body, must become more transparent in justifying its decision to rely (or not) on prior decisions. The AB's practice of precedent—which the United States cited as a cause of its decision to paralyze the AB by blocking new appointments—is similar to how it has approached “likeness” in nondiscrimination cases. It placed a lot of weight on whether two cases (or products) are sufficiently similar to be compared, and it spent relatively less time substantively justifying its treatment of prior cases. Because the WTO does not have a system of stare decisis, the AB and WTO panels generally must explain why they find prior decisions persuasive, rather than simply relying on similarity to justify carrying prior interpretations forward.*

*The Article begins by examining and evaluating the results of a new study from Jeffrey Kucik and Sergio Puig, the first study to use a large dataset to study the AB's use of precedent. The Article then advances a framework for how WTO dispute panels should evaluate the relevance of prior cases in future disputes. The proposed approach would treat the comparison of cases as merely a threshold inquiry. If two cases are sufficiently alike and one party contests the applicability of the prior decision, then a tribunal must substantively justify its treatment of the prior decision in light of a variety of factors. In some instances, the result may be that the AB or a panel acknowledges that a prior interpretation was wrong and should not be followed. Openly analyzing the persuasive value of prior cases, and acknowledging when those cases should not be followed, would better promote the goals of relying on prior decisions—promoting predictability, transparency, and coherence in the law's application—as compared to deference to prior decisions based only on the similarity of two disputes.*

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## I. INTRODUCTION

In retrospect, it should hardly be a surprise that the use of “precedent” became such a problem for the World Trade Organization’s Appellate Body (WTO AB). As any trade lawyer, commentator, or student knows, the question of “likeness” has bewitched trade law for years. One might think that “likeness” should serve merely as a check to make sure that two products compete with each other before doing the hard work of evaluating whether imports have been treated “less favorably” on account of their national origin. Instead, likeness is, in the view of many people, “the core element” of nondiscrimination jurisprudence under the General Agreement on Tariffs and Trade (GATT).<sup>1</sup> “The obsession with ‘likeness’ in the GATT/WTO is unheard of in any other legal arena.”<sup>2</sup>

And what is the practice of precedent, if not the practice of treating like cases alike?<sup>3</sup> Precedential reasoning requires an account of when two cases are sufficiently similar that they should be subject to the same rule or, on the other hand, why and how they are different and thus can permissibly be treated differently. This comparison also requires a general justification for why like cases should be treated alike. That justification is intuitive to most lawyers. Precedent serves values of predictability, transparency, and coherence. In so doing, it might also promote the legitimacy of the tribunal in the eyes of stakeholders, thereby boosting the tribunal’s effectiveness at resolving disputes and compliance with its rulings.

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1. Joost Pauwelyn, *The Unbearable Lightness of Likeness, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES* 358, 359 (Marion Panizzon, Nicole Pohl, & Pierre Sauvé eds., 2008).

2. *Id.* at 360.

3. H. L. A. HART, *THE CONCEPT OF LAW* 155 (1961) (discussing the principle of treating like cases alike).

But most tribunals also justify the use of prior decisions in individual cases. At the case-specific level, the practice of justifying reliance on prior decisions—in other words, the practice of precedent—tends to rely on a different set of factors: the correctness of the prior decision, its administrability, reliance by the governed on the rule from the prior decision, and changes to relevant law or facts. Legal systems may often face a tension between the goals of relying on precedent generally and the goals served by relying on precedent in specific—often difficult—cases. And this tension may be particularly acute in legal systems, like the WTO and international law generally, where no express authorization for following precedent exists.

In *Extending Trade Law Precedent*, Jeffrey Kucik and Sergio Puig conduct a large-scale empirical study that suggests that the WTO AB fell victim to this exact tension—adhering to its own prior decisions in the name of the systemic values of precedent while failing to justify reliance on precedent in difficult cases.<sup>4</sup> Kucik and Puig’s article does an admirable job of unpacking how the WTO AB used precedent, despite the formal absence of authorization to do so.<sup>5</sup> While others have discussed how precedent contributed to the AB’s decline,<sup>6</sup> Kucik and Puig document with data both the AB’s construction of a system of precedent and how that precedential system has operated. They have, in other words, given us a map of how the AB analyzed whether cases were “like” and whether “like” cases should be subject to the same rule. Their main empirical finding is that the AB relied on precedent overwhelmingly to follow or extend the reach of its prior decisions, as a means of “strengthening [of] legal commitments.”<sup>7</sup> Because the WTO’s negotiation mechanism ceased functioning, political oversight of the AB became difficult and the extension of precedent ultimately alienated the United States. Kucik and Puig thus endorse the greater use of mechanisms, such as sunset clauses, that promote political accountability for international tribunals. They also argue that in the international system, extending precedent can ultimately reduce compliance with the tribunal’s decisions, at a cost to the system as a whole.<sup>8</sup>

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4. As of the time of writing, the AB still technically exists but has lacked a quorum to conduct business for over a year, and hence is moribund. For that reason, I often refer to the AB in the past tense. When speaking of the future, especially in Part III, I use the term “AB” to refer either to a revitalized AB or a new body that might take the AB’s place.

5. Jeffrey Kucik & Sergio Puig, *Extending Trade Law Precedent*, 54 VAND. J. TRANSNAT’L L. 539 (2021).

6. See generally James Bacchus and Simon Lester, *The Rule of Precedent and the Role of the Appellate Body*, 54 J. WORLD TRADE 183 (2020); Mariana Clara de Andrade, *Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism*, 11 J. INT’L DISP. SETTLEMENT 262 (2020).

7. Kucik & Puig, *supra* note 5, at 543.

8. *Id.*

This Article offers a complementary way to think about the AB's problems with precedent. It argues that the AB's difficulties were similar to the problems with its treatment of "likeness" in nondiscrimination. In short, the AB focused too much on whether two cases (or products in the nondiscrimination context) were "like," while minimizing substantive justifications for treating two cases or products in the same fashion. If two cases were "like," all that remained was to check to make sure no "cogent reasons" counseled departing from the previously established rule.<sup>9</sup> But the "likeness" of two cases, similarly to the "likeness" of two products or services, is best treated as the prelude to evaluating the substantive reasons for treating the specific like things alike—be they cases, products, or services. The failure to inquire into substantive reasons is similar in both the context of precedent and the context of goods and services and creates similar problems.

The Article proceeds in three parts. Part II describes and evaluates Kucik and Puig's descriptive results and their conclusions about the implications of the AB's use of precedent. To preview, their article often equates the use and extension of precedent with decisions that narrow the freedom member states have under the WTO agreements. But tribunals can follow and even extend their prior decisions without necessarily constricting a state's scope of permitted action. Precedent, after all, can narrow the scope of legal commitments just as it can broaden this scope.

Part III argues that international tribunals evaluating whether to treat two cases alike should engage in a full-throated, two-part analysis. The first step asks the threshold question of whether earlier decisions are sufficiently similar to the current case that they might have persuasive value. If the answer to that first question is yes, the second step requires tribunals to grapple with the justification for relying on the reasoning in prior cases. This Article suggests that inquiry should be grounded in the tribunal's key task—treaty interpretation—and should therefore focus explicitly on whether states collectively have embraced prior decisions and the limits of their endorsement.

## II. THE APPELLATE BODY AND PRECEDENT

In the 2000s and early 2010s, the United States became disenchanted with the WTO AB—the centerpiece in the WTO's "crown jewel" of a dispute settlement system.<sup>10</sup> While originally conceived of

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9. Appellate Body Report, *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 51, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008).

10. See, e.g., Jennifer Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL ON FOREIGN RELS. (Jan. 14, 2020),

as a standing body to correct legal errors in panel decisions in WTO disputes, the AB quickly became the chief component of the most functional element of the WTO. In part, that stemmed from divisions among an expanding membership that limited the possibility for successful negotiations. In part, it also stemmed from a difference in rules. WTO members automatically adopt AB and unappealed panel rulings unless they agree by consensus not to, while negotiated outcomes require affirmative consensus to conclude the negotiations. In other words, holdouts can block negotiations, but not decisions from panels and the AB interpreting the WTO agreements.

The United States had multiple grievances, but, at bottom, most of the grievances stemmed from a belief that the AB was not reading the WTO agreements as they were written. With respect to substantive commitments, the United States believed that AB decisions imposed new trade liberalization commitments to which the members had not agreed, especially with regard to disciplines on trade remedies. But the United States also believed that the AB was ignoring textual limits on its own authority, such as time limits on AB proceedings. Straddling these issues, the United States attacked the AB's decision to follow its own previous decisions, a practice of precedent. The Dispute Settlement Understanding (DSU) does not explicitly authorize a system of precedent in any form and certainly does not countenance a firm rule of *stare decisis*. Evidence that professional staff at the WTO Secretariat exert disproportionate influence over WTO dispute reports further fueled US concerns.<sup>11</sup> The United States worried about a transfer of decision-making from appointed (and thus at least somewhat accountable) panels and AB members to unaccountable and entrenched bureaucrats who might be wedded too strongly to prior decisions on which they had worked.<sup>12</sup> While the objection to the use of precedent goes to the AB's mode of deciding cases, the US objection to the use of precedent focused, of course, on the use of precedent in substantive decisions with which the United States disagreed, which are primarily in the trade remedies area.

Because the United States ultimately paralyzed the AB by blocking the reappointment of members, addressing the United States' concerns is essential to reanimating the AB or constructing a successor organization. To that end, Kucik and Puig have conducted what is to my knowledge the first comprehensive study of how the AB uses its prior decisions to decide disputes. Their study provides a critical

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<https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>  
[<https://perma.cc/R72D-7VYL>] (archived on February 21, 2021).

11. See Joost Pauwelyn & Krzysztof J. Pelc, *Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement*, SOC. SCI. RSCH. NETWORK, Oct. 6, 2019, at 2, <https://ssrn.com/abstract=3458872> [<https://perma.cc/HR4Z-6HTR>] (archived on February 21, 2021).

12. Hillman, *supra* note 10.

starting point for any conversation about how to reform the AB. This Part describes Kucik and Puig's study and discusses some limitations as to what one can infer from their results.

### A. *How the AB Used Precedent*

Kucik and Puig begin by coding the AB's use of its prior decisions. Their framework for coding AB precedent begins by asking, with respect to each citation the AB makes to its own prior cases, whether the AB applied its own prior decision or failed to apply its own prior decision.<sup>13</sup> Each of those two categories can then be broken down into two further categories. Applications of past precedent can either "follow" or "extend" past precedent.<sup>14</sup> Failures to apply past precedent can either "distinguish" prior decisions or "narrow" them.<sup>15</sup>

The distinctions between "following" and "extending" precedent, on the one hand, and "distinguishing" and "narrowing" precedent, on the other hand, is more than semantic. Extensions, in their view, "reflect a stronger application of precedent because extensions arguably use inapposite case law to resolve open questions."<sup>16</sup> Some of the examples Kucik and Puig give are intuitive. They involve, for instance, applying decisions about one provision of law to another similarly worded provision, such as using GATT provisions to interpret similar General Agreement on Trade in Services (GATS) provisions.<sup>17</sup> Kucik and Puig also consider applications of precedent involving one provision of an agreement to another provision of the same agreement to be an extension. This is clearest in the antidumping cases, in which the AB applied its early decisions finding zeroing impermissible under Article 2.4.2 of the Anti-Dumping Agreement to later cases challenging zeroing under other provisions of the Anti-Dumping Agreement that did not contain the language—"all comparable export transactions"—on which the early case had turned.<sup>18</sup>

With respect to failure to apply precedent, Kucik and Puig make a distinction between "distinguishing" a prior decision and "narrowing" it. The former refers to "explain[ing] specifically why the rationale of a prior case *does not* apply to the case at hand."<sup>19</sup> The latter refers to decisions that "shrink the scope of the [best prior] reading to have a

13. Kucik & Puig, *supra* note 5, at 558–59.

14. *Id.* at 558.

15. *Id.*

16. *Id.* at 562 (internal quotations and citations omitted).

17. See, e.g., Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 159, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005); Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, ¶¶ 6.24, 6.25 WTO Doc. WT/DS453/AB/R (adopted May 9, 2016).

18. Kucik & Puig, *supra* note 5, at 571 (discussing *United States-Zeroing's* extension of the AB's decision in *EU-Bed Linen*).

19. *Id.* at 561.

more limited bearing on the decision at hand.”<sup>20</sup> The AB availed itself of these two options with less frequency than their opposites. Overall, Kucik and Puig find that the AB followed its precedents 77 percent of the time, extended its precedents 10 percent of the time, narrowed its precedents 7 percent of the time, and distinguished its precedents 6 percent of the time.<sup>21</sup>

It is a bit difficult to know what to make of these numbers. On the one hand, the fact that the AB overwhelmingly cited its prior decisions in order to follow them seems on the surface to support the US complaint that the AB has adopted an unauthorized system of precedent. On the other hand, though, not even the United States argues that prior decisions are irrelevant. Rather, the United States argues that prior decisions are useful for their persuasive value.<sup>22</sup> Since many applications of previous decisions involve uncontroversial topics, it therefore makes sense that “following” precedent is the most significant category. At the same time, it may not tell us much about the use of precedent in cases that are difficult or controversial.

In fact, the dramatic discrepancy between applying precedent and failing to do so might stem from the AB’s decisions *not* to use precedential reasoning in many instances. As Kucik and Puig acknowledge, this discrepancy could be in part because the AB did not mention precedents found inapplicable. Kucik and Puig are, after all, only examining the use of citations by the AB; they cannot observe the decision not to cite. The AB might, in other words, have tried to bolster its legitimacy by citing cases it intends to follow or extend, thus creating the appearance of a coherent and predictable body of law. At the same, though, the AB yielded to pressures to be less coherent by simply omitting citations to disregarded cases. If true, the AB fell into a trap of its own making. By not being transparent about its decisions *not* to follow precedent, the AB may have created the appearance of following precedent more than it does—thereby opening itself to the US complaint.

While this is a limitation of their findings (one that is imposed on them by the nature of citation), it does not meaningfully reduce the impact of their descriptive results. The AB overwhelmingly uses past decisions as a justification for adopting a decision in the case before it. As Part III argues, Kucik and Puig have shown that the AB has an expansive definition of what constitutes “like” cases.

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20. *Id.* at 546.

21. *Id.* at 559–61.

22. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, ¶ 36 (Dec. 18, 2018) [hereinafter US Statements] [https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB\\_Stmt\\_.as-deliv.fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_Stmt_.as-deliv.fin_public.pdf) [<https://perma.cc/48PE-DS2V>] (archived on February 21, 2021).



### B. *The Implications of the AB's Use of Precedent*

Having mapped the AB's use of precedent, Kucik and Puig go on to consider the implications of that use. They argue that "[i]n recent years, the United States has complied less frequently with rulings" and they posit that "the application of precedent is a major contributing factor."<sup>23</sup> They show that overall compliance with WTO Dispute Settlement Body ("DSB") decisions hovers consistently around 60 percent, while US compliance drops from 66 percent before 2009 to 39 percent afterwards.<sup>24</sup> They argue that "the change in US behavior is traceable more directly to the aforementioned decision in *United States—Continued Zeroing* as well as *United States—Stainless Steel (Mexico)*, introducing the 'absent cogent reasons' approach"—essentially a presumption in favor of following precedent.<sup>25</sup>

Kucik and Puig are properly circumspect about the causal connection between the AB's use of precedent and the decline in US compliance. They note, for instance, that "many other things happened around this time"<sup>26</sup> and underscore that "precedent is not the only issue that influences whether states abide by their trade-liberalizing commitments."<sup>27</sup> Nevertheless, they argue that the AB's use of precedent "clearly influences the behavior of one of the WTO's most powerful members."<sup>28</sup>

I am not so sure. The AB's use of precedent did prompt a backlash from the United States. The United States complained about the AB's use of precedent. It cited the use of precedent as a concern with the AB's approach in support of its decision to block consensus on the appointment of new AB members.<sup>29</sup> But the claim that the AB's use of precedent, as such, led to a decline in US compliance is more specific and requires more substantiation.

To begin, Kucik and Puig are right that other things were happening in 2009 that might explain the subsequent change in US behavior. Most obviously, the financial crisis of 2008–2010 imposed a substantial burden on the entire global economy. If dispute settlement decisions do not take account of the political pressure brought to bear

23. Kucik & Puig, *supra* note 5, at 574.

24. *Id.* at 576–78.

25. *Id.* at 577. James Bacchus and Simon Lester argue that the "absent cogent reasons" standard and the United States' preferred "persuasive" value standard are likely to produce similar results in practice. Bacchus & Lester, *supra* note 6, at 193–94. That may be true in practice, but a reasonable lawyer (or member of a subsequent dispute panel) might reasonably conclude that the "absent cogent reasons" standard places the burden on the party attempting to avoid the application of precedent.

26. Kucik & Puig, *supra* note 5, at 577.

27. *Id.* at 579.

28. *Id.*

29. See US Statements, *supra* note 22.

on governments due to an economic crisis, it can hardly be a surprise that compliance with those decisions falls after the crisis.<sup>30</sup>

To be sure, Kucik and Puig do not find a change in overall compliance with DSB decisions, though the Great Recession had global effects.<sup>31</sup> This fact does suggest something unique to the United States.<sup>32</sup> But, two other trends might well have played a unique role in the United States. The first is the entrenchment of textualism and its constitutional cousin, originalism, in US legal practice.<sup>33</sup> Common law jurisdictions have always been more wary of using extrinsic evidence to vary or supplement the meaning of legal texts than have civil law jurisdictions and international tribunals. However, in the United States, statutory textualism and constitutional originalism have spread that reluctance to public law as well. Indeed, textualism's exclusion or minimization of non-textual sources sits in some tension with rules of treaty interpretation in the Vienna Convention on the Law of Treaties.<sup>34</sup>

Nor would it be a surprise that textualism/originalism would take a while to percolate into US trade law. Justice Antonin Scalia, the US Supreme Court Justice that deserves the most credit for spreading the approach, didn't even join the Supreme Court until 1986. Over the ensuing decades, the approach became more prevalent in US courts and increasingly taught in law schools. Perhaps by coincidence, in her 2010 Supreme Court confirmation, US Supreme Court Justice Elena Kagan declared that "we are all originalists" now.<sup>35</sup> Her 2015 Scalia Lecture at Harvard Law School made the same argument about textualism more broadly.<sup>36</sup> The decline in US compliance thus also

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30. This claim does not require that overall protectionism increase as a result of the financial crisis. Rather, it only requires that governments, or in this case the US government, became less willing to accommodate claims of WTO inconsistency for those measures that they did adopt to protect their domestic economies.

31. Kucik & Puig, *supra* note 5, at 576–78. One might also wonder whether Kucik and Puig should look at whether AB practices with to precedent have changed over time. If the AB's use of precedent accelerated in the years before the U.S. decline in compliance, that would offer further evidence in support of their claim. If it has remained fairly constant, though, that might suggest other factors were more important.

32. Kucik and Puig do not have a theory about what makes the U.S. complaint about precedent at the WTO unique, simply taken the strength of the U.S. complaint about precedent at face value. One possibility stems from the renewed U.S. interest in fidelity to text in statutory and constitutional interpretation.

33. Textualism is a theory of interpretation under which the ordinary meaning of a legal text is given primacy, and non-textual sources such as the intention of the law's drafters are discounted. *See generally* KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW* (2001).

34. *See* Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

35. Kagan: 'We Are All Originalists,' *LEGAL TIMES: BLT* (June 29, 2010, 9:22 AM), <https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html> [<https://perma.cc/V42F-WKMC>] (archived on February 21, 2021).

36. Justice Elena Kagan, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 15, 2015).

coincides with the emergence of the hegemony of text in US law. US trade lawyers educated in a textualist legal tradition are more likely to be hostile to applying precedent involving one treaty provision to a different provision that uses different words.<sup>37</sup>

US-style textualism happened to coincide with another important trend: an increased focus on communities within the United States that have been harmed by trade liberalization. David Autor, David Dorn, and Gordon Hanson have documented how local labor markets in regions of the United States with import-competing manufacturing industries had not recovered years after China's accession to the WTO.<sup>38</sup> The pressure from Chinese imports, combined with the Great Recession, led to increasing skepticism about trade liberalization, and associated calls for more protection, among influential constituencies within the United States. This political pressure ultimately forced President Obama to abandon his attempts to ratify the Trans-Pacific Partnership before he left office and drove President Trump's trade policies. While the EU did face some of the same pressures, most European nations have social safety nets that are considerably wider and more generous than US social safety nets. By absorbing the brunt of the economic dislocation that can result from trade liberalization, social welfare programs tend to bleed off the pressure for protection.<sup>39</sup> In so doing, social welfare programs support trade liberalization.

The small government ethos that has characterized US politics since the 1980s has, so far, taken a dramatic expansion of the social safety net off the table. That leaves protection as the primary politically feasible vehicle to address the dislocations caused by trade liberalization in the United States. Protection redistributes economic gains from consumers to producers and their employees, just as direct fiscal programs redistribute from taxpayers to import-competing businesses and workers; but, it does so in a less transparent and less efficient fashion than redistribution through direct government spending. While voters understand direct fiscal programs as

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37. Harlan Cohen has argued that precedent in international tribunals emerges in part through the practice and norms of the legal community. *See generally* Harlan Grant Cohen, *Lawyers and Precedent*, 46 VAND. J. TRANSNAT'L L. 1025 (2014). But when interpretive norms became fractured among the community of lawyers, norms about following precedent will also come under strain. *See also* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 6–8 (2017) (demonstrating how the diverse influences on international lawyers cause them to approach international law differently).

38. David H. Autor, David Dorn, & David H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2155–59 (2013).

39. *See, e.g.*, Sung Eun Kim & Krzysztof Pelc, *The Politics of Trade Adjustment vs. Trade Protection*, COMPAR. POL. STUD. Sept. 24, 2020, at 5–6, <https://journals.sagepub.com/doi/10.1177/0010414020957687> [<https://perma.cc/NT37-XSRD>] (archived on February 21, 2021); Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 1016–17 (2017).

redistribution (a term that has a negative connotation in significant quarters of the United States), they do not understand protection in the same way. Unlike taxes that fund direct redistribution, the costs of protection are diffuse and hard to see for the average consumer. To the extent they do understand that protection imposes costs, politicians in the United States have encouraged voters to see those costs as imposed on foreign producers, rather than American consumers.<sup>40</sup>

Not surprisingly, given these pressures, Congress enacted changes to US trade remedies law during the Obama administration that made the imposition of trade remedies easier.<sup>41</sup> In other words, just as the AB was extending its precedents to cabin member state discretion to impose trade remedies, the United States was legislating changes in the opposite direction within its own domestic law. Given these opposing trends, it should not come as a shock that US compliance with WTO DSB decisions declined.

This raises another important question about Kucik and Puig's claims that the extension of precedent contributed to the decline in US compliance: Was the United States responding to the application of precedent as such, or was the United States objecting to the content of specific decisions regarding trade remedies? The distinction matters for Kucik and Puig's larger thesis about the role of precedent. The claim that the United States disliked the content of the decisions in cases like *United States—Continued Zeroing* and *United States—Stainless Steel (Mexico)* seems uncontroversial.<sup>42</sup> But it is not clear that the United States would have objected (at least as strenuously) if the extension of precedent had worked to its advantage, rather than its disadvantage.<sup>43</sup> To put the counterfactual in concrete terms, if, for instance, *European Communities—Bed Linen* had upheld zeroing under Article 2.4.2 of the Anti-Dumping Agreement, would the United States have objected to the extension of that precedent to challenges to zeroing under other provisions of the Anti-Dumping Agreement?<sup>44</sup> I

40. President Trump, for instance, insisted that tariffs on Chinese imports would be paid by China. See, e.g., Brooks Jackson, *Does China Pay Tariffs?*, FACTCHECK.ORG (Feb. 28, 2019), <https://www.factcheck.org/2019/02/does-china-pay-tariffs/> [<https://perma.cc/5QQC-QACB>] (archived on February 21, 2021).

41. See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362.

42. See Kucik & Puig, *supra* note 5, at 578–79.

43. The United States has had three confirmation hearings for Supreme Court Justices in the past four years. Precedent has played a major role in these hearings, with Senators on both sides of the aisle demanding that the nominee agree that certain precedents should not be overruled, but other precedents are obviously wrong and therefore should be overruled. These Senators, it seems to me, are not concerned with precedent as such, but rather with the content of particular decisions.

44. Zeroing is a controversial technique for calculating whether dumping—the introduction of products of one country into the commerce of another country at less than the normal value of the products, see General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 55 U.N.T.S. 187—has occurred. In essence, instead of averaging the deviation of prices from normal value to decide whether dumping has occurred, an

don't think so. Nor does the United States appear to object to reliance on uncontroversial prior decisions.

Put differently, Kucik and Puig often seem to assume that the application of precedent will result in limiting the freedom states enjoy under international law.<sup>45</sup> This assumption is implicit in their focus on the relationship between precedent and compliance. But precedent will usually only raise a question of compliance when precedent is applied so that the respondent loses. Where precedent is applied against the complainant, and the respondent therefore wins, the question of compliance never arises.<sup>46</sup> A study that looks at compliance decisions in response to precedent will thus be very likely to find that precedent reduces compliance. This result will occur because the study is not looking at the situations in which precedent is used to increase the flexibility afforded to states (i.e., situations in which the respondent wins).<sup>47</sup>

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Kucik and Puig conclude by examining how states exert control over an international tribunal in the absence of a functioning political system. This discussion does not depend on whether the United States' decline in compliance is caused by precedent as such or not. They are quite right to note, as others have noted in the international law context more generally,<sup>48</sup> that noncompliance is a key tool states have to control the reach of tribunal decisions. Reappointment, the tool that the United States has used most aggressively in response to its complaints about the AB, and strategic litigation are also effective tools.<sup>49</sup> The most intriguing idea that Kucik and Puig embrace, though, is the use of sunset clauses. The United States has deployed this idea

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investigating authority "zeroes" all prices that do not show dumping, thus cause the dumping margin to increase.

45. See, e.g., Kucik & Puig, *supra* note 5, at 554 ("Precedent can make the rules sufficiently stringent that the domestic 'constituencies of compliance' cannot mobilize effectively.").

46. Since many WTO decisions find for both parties on at least some issues, rather than delivering a clear victory for either the complainant or respondent, it might be more accurate to say that compliance costs are low when the respondent is, as a practical matter, the winner.

47. Scholars have worried more generally that compliance, which measures state behavior against a legal standard, is not the best way to assess international law's impact. See, e.g., Lisa L. Martin, *Against Compliance*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 591, 591 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012). Effectiveness, which measures changes in state behavior against the status quo, might yield a more accurate picture of how international law impacts state decision-making.

48. E.g., Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 *YALE J. INT'L L.* 189, 189–92 (2006); Timothy Meyer, *Noncompliance as Lawmaking*, in *LEGITIMACY AND LAW-MAKING IN INTERNATIONAL HUMANITARIAN LAW* (Heike Kreiger ed., forthcoming 2021).

49. Kucik & Puig, *supra* note 5, at 574.

in the revised NAFTA (the so-called United States-Mexico-Canada Agreement, or USMCA). Sunset clauses in trade agreements can be an effective way to encourage trade liberalization's proponents to remain engaged in negotiating measures to address the dislocations that trade agreements can cause.<sup>50</sup> The AB's decisions limiting member state flexibility in the trade remedy area raise the same issue regarding the appropriate balance between trade liberalization and support for import-competing industries and labor. An appropriately designed sunset clause, one with safeguards similar to the ones in the USMCA, seems a reasonable solution to encourage ongoing negotiations on a range of issues that might arise under an agreement, including the scope of an international tribunal's mandate and the content of its decisions. If nothing else, a sunset clause would make transparent the ability of objectors to shut down or withdraw from an agreement and/or its dispute settlement system at particular times. That transparency would be an improvement over using the appointment of dispute body members to create leverage for negotiations.

### III. JUSTIFYING ADHERENCE TO DECISIONS IN SIMILAR CASES

Kucik and Puig's study tees up the question of how the AB, or a reconstituted body, can rely on its prior decisions in a way that creates the predictability to which legal systems aspire while respecting the limits states have imposed on AB decision making. This Part offers a tentative two-step framework that seeks to accommodate both of these concerns. In short, this Article suggests that the AB first determine whether a prior decision is sufficiently similar to the current dispute to be persuasive. That inquiry, however, should merely be a threshold inquiry. If two cases are sufficiently similar, the AB should then evaluate the substantive reasons for relying on its prior decisions. This justification need not apply to every citation in a report. Instead, the degree of justification (as opposed to the factors justifying reliance, discussed below) required at the second stage would depend on the extent to which the parties contest the correctness of prior decisions, the importance of the issue to resolving the dispute, and the degree of similarity between the current case and a prior case found sufficiently like to have persuasive value.

This Article does not claim that this approach will produce dramatically different results across the range of appellate cases. Rather, in the difficult cases in which following prior decisions, or failing to do so, is controversial, the framework will force the AB to justify its decision more fulsomely than it has in the past. That justification, in turn, will boost the AB's legitimacy. It will also make it easier for the AB to justify a decision *not* to follow a prior decision.

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50. Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 210 (2020).

In so doing, it will reintroduce the flexibility into dispute settlement that members contemplated when they declined to impose a firm rule of *stare decisis* while preserving the benefits of predictability and increasing transparency about how and when prior decisions will be followed. Most importantly, reflexive adherence to prior decisions elevates the role of the AB at the expense of member state arguments in individual disputes. Forcing the AB to evaluate and justify its decision to rely on prior reports will force the AB to engage thoughtfully with member state arguments as to why prior decisions were wrong, thereby giving member states a greater ongoing role in the interpretation of the WTO agreements.

#### A. *How to Evaluate Prior Decisions in Contemporary Disputes*

Systems of precedent can operate in two ways. First, precedent can operate vertically, as when a lower tribunal follows a higher tribunal's prior cases. Second, precedent can operate horizontally, as when a tribunal follows its own prior decisions (which often will be decisions of other members of the tribunal, rather than the same members) or the decisions of another similarly situated tribunal. Both types of precedent are potentially in play at the WTO, although Kucik and Puig are primarily concerned with the second, horizontal type.

With vertical precedent, tribunals are bound to follow the decisions of courts that outrank them. A trial court must follow the prior decisions of an appellate court, and all lower courts must obey a court of last resort, a supreme court. In legal systems with a doctrine of *stare decisis*, this form of precedent is typically the strongest. Lower tribunals ask only the first question in our two-step precedential inquiry: Is the present case "like" a prior case decided by a higher tribunal?<sup>51</sup> If so, the lower tribunal must follow the higher tribunal's decision. While a formal rule of *stare decisis* makes this adherence mandatory, lower tribunals also have an institutional interest in following the decisions of higher tribunals. Because the higher tribunal can overrule the lower one, the lower one may wish to stay within the boundaries established by their "bosses."

The Dispute Settlement Understanding ("DSU"), of course, establishes two levels of dispute settlement, panels and the AB. At the same time, the DSU does not establish a rule of *stare decisis* for panels with regard to prior AB decisions. This makes sense because, in an important way, panel and AB reports are equivalent. Neither has any force on its own. Each only has force to the extent it is adopted by the

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51. See, e.g., *Am. Inst. for Int'l Steel v. United States*, 809 Fed. App'x 982, 988 (Fed. Cir. 2020) ("On appeal, AIIS urges that *Algonquin* does not control this case . . . Agreeing with the Court of International Trade that *Algonquin* controls, we affirm without deciding what ruling on the constitutional challenge would be proper in the absence of *Algonquin*.").

Dispute Settlement Body (“DSB”)—that is, by the member states themselves. An unappealed adopted panel report is thus a decision of the DSB just as an adopted AB report is. This suggests that WTO dispute settlement should not have a strong norm of vertical precedent. At the same time, though, in individual cases in which a panel report is appealed, the AB has the power to reverse panel interpretations of WTO agreements. The AB has inferred a strong norm of vertical precedent from this fact.<sup>52</sup>

Horizontal precedent—which applies to the AB’s treatment of its own prior reports and, for the reasons just discussed, arguably applies to panel considerations of prior reports as well—operates differently. Most obviously, the institutional incentive to follow prior decisions—the fear of being overruled—is absent. Second, even in systems of formal *stare decisis*, the “like” cases question is not the end of the inquiry. After deciding that two cases are sufficiently similar, tribunals can then still evaluate whether following prior “like” cases is justified. They ask, in essence, whether following prior similar decisions is justified in the current context.

The US Supreme Court, for instance, has held that following past precedents “is not an inexorable command.”<sup>53</sup> Instead, if the Court determines that one of its precedents is applicable to a case, it still uses a variety of factors to decide whether to continue to apply the precedent or to depart from it. Those factors include whether: the rule has proven to be intolerable simply in defying practical workability; the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>54</sup>

International tribunals employ a similar framework for reevaluating their precedents. The Advocate General of the Court of Justice of the European Union (CJEU), for instance, said the following of the CJEU’s attitude toward precedents:

[It] has also recognised the importance of adapting its case-law in order to take account of changes that have taken place in other areas of the legal system or in the social context in which the rules apply. It has also accepted that the

52. Appellate Body Report, *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 161–62, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008) (“The Panel’s failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements as contemplated under the DSU. . . . We are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.”).

53. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

54. *Id.* at 854–55.



appearance of new factors may justify adaptation or even review of its case-law.<sup>55</sup>

The CJEU has a history of modifying its precedents, including explicitly deciding that reconsideration of its prior decisions is necessary.<sup>56</sup> The European Court of Human Rights (ECHR) has indicated that it will depart from its precedents in order to “reflect[] societal changes and remain[] in line with present-day conditions.”<sup>57</sup> The ECHR has on that basis departed from its prior decisions in a number of cases.<sup>58</sup> Similarly, the International Court of Justice (ICJ) has revised its prior decisions when circumstances have warranted, such as in its decisions regarding the demarcation of maritime boundaries.<sup>59</sup>

The AB has, of course, embraced some flexibility in the application of its decisions to future cases. It has said it will depart from its prior decisions in the presence of “cogent reasons.”<sup>60</sup> Those cogent reasons might well include similar kinds of factors to those identified by the US Supreme Court and various international courts. Nor can the AB be accused of failing to update its case law. Although the departures may not necessarily show up in citation studies like Kucik and Puig’s (which is a limitation of the methodology, not of their study specifically), the AB has revisited its case law in some areas over the years.

This has been particularly true with respect to Article XX of the GATT, where the AB’s jurisprudence has slowly become more accommodating of member states’ public policies that burden trade. The famous *Shrimp—Turtle* decision is the best example. There, the AB essentially abandoned the approach a GATT panel had adopted in the original *Tuna—Dolphin* dispute and ultimately upheld the United States’ right to insist that imports meet standards comparable in effectiveness to the standards applicable to domestic products.<sup>61</sup> Criticism that the AB was always slavishly adherent to precedent is

55. Joined cases C-94 & 202/04, *Cipolla v. Rosaria Fazari (nee Portolese)*, 2006 E.C.R. I-11421, ¶ 29 (Dec. 5, 2006).

56. See generally Tamas Szabados, *‘Precedents’ in EU Law—The Problem of Overruling*, 2015 ELTE L.J. 125 (2015).

57. *Cossey v. United Kingdom*, App. No. 10843/84, 184 Eur. Comm’n H.R. Dec. & Rep. (ser. A) at 11 (1990); see also *Stafford v. United Kingdom*, App. No. 46295, 35 Eur. Ct. H.R. 32, 39 (2002) (“A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.”).

58. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETTLEMENT 5, 13 (2011).

59. *Id.* at 11.

60. Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008).

61. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 119, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998); Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Art. 21.5 of the DSU by Malaysia*, ¶ 144, WT/DS58/AB/RW (adopted Nov. 21, 2001).

thus misplaced.<sup>62</sup> Another example involves the AB's decision in *Dominican Republic—Cigarettes*. There, the AB appeared to say that a non-protectionist explanation for a regulation creating a disparate impact on imports could be sufficient to avoid a finding that the regulation treated imports "less favorably" and was thus discriminatory.<sup>63</sup> Subsequent decisions, however, abandoned this suggestion in favor of a test that equated "less favorable" treatment with actions to the detriment of the equality of competitive opportunity.<sup>64</sup>

The AB, though, can still be rightly criticized for insufficiently justifying its decisions both to follow and depart from its precedents. The goal of precedent—whether traveling under the banner of *stare decisis*, *jurisprudence constante*, or simply state expectations—is to ensure predictability, transparency, and coherence. A tribunal that fails to justify its decisions to follow or depart from precedent does not achieve these goals. How can member states predict whether a prior decision will inform a future case regarding a similar issue if the tribunal has not developed and discussed a comprehensive framework for making such determinations?

In this sense, adhering to precedent in the name of coherence elevates form over substance. While it creates coherence among the decisions of a tribunal, it may destroy the more important coherence between the objectives of states in entering into a treaty and the conditions they face in implementing the treaty. It may increase predictability and transparency with respect to how the tribunal is likely to rule, but without providing an explanation for changes in doctrine over time that occur in any legal system. Most importantly, it may increase the difficulty of departing from prior decisions that member states feel to be erroneous or untenable. In so doing, it reduces the legitimate role of member states in interpreting their own agreements.

That lack of explanation for the changes in doctrine, in turn, can undermine the ultimate justification for precedent: sociological legitimacy. The international trade bar today is much more

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62. In the absence of a functioning AB, a panel also recently applied the "cogent reasons" test to depart from prior AB decisions on trade remedies. Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, ¶ 7.107, WTO Doc. WT/DS534/R (circulated Apr. 9, 2019).

63. Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WTO Doc. WT/DS302/AB/R (adopted May 19, 2005).

64. See, e.g., Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 179 n. 372, WTO Doc. WT/DS406/AB/R (adopted April 24, 2012); Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.101, WTO Doc. WT/DS400/AB/R (adopted June 18, 2014).

sophisticated than it was in 1995.<sup>65</sup> A pattern of decisions from a tribunal that proudly trumpets consistencies while papering over and hiding discrepancies is sure to ruffle feathers in any sophisticated legal community. Those concerns will only be compounded when the adherence to precedent sits uncomfortably with both the challenges the legal system as a whole faces and an influential community (US trade lawyers) with a different interpretive approach, one that suggests that important precedents that the tribunal adheres to were incorrect in the first place.

The AB thus needs to become better at transparently justifying how it uses—or does not use—precedent. In particular, this requires an explanation when the AB decides *not* to follow prior decisions. The AB has historically resisted acknowledging these departures. And one might worry that openly acknowledging differences in interpretation over time will itself undermine the AB's legitimacy. But this concern is overstated for two reasons. First, as already discussed, a lack of transparency about the reasons for deviating from prior decisions is itself costly to a tribunal's legitimacy. Second, though, the costs of openly acknowledging deviation need not be as high as some might worry. As the next subpart explains, the role of a treaty interpreter should be a humble one, recognizing the primacy of states as authors of their own legal obligations. In that context, there should not be anything wrong with openly admitting that interpretations adopted in the past are not appropriate to the current dispute. What's needed, though, is a framework to justify that decision.

### B. A Tentative Framework

So what, then, is the appropriate way to take into account prior decisions at the WTO? As already suggested, WTO dispute panels (in whatever form they may be constituted in the future) would be wise to introduce an explicit element that requires consideration of whether applying a prior decision is justified. Panels should give that element more importance than the threshold question of whether there are prior decisions on the same or similar subjects. Its approach would thus first ask whether a prior decision is sufficiently similar to the current dispute to have any persuasive value at all. Second, the tribunal would then explicitly consider a variety of factors to determine whether according a prior decision any persuasive authority is justified. The AB, of course, did engage in justification, but its decisions and the commentary thereon focused heavily on the first prong—"likeness." A rebalanced approach must devote more time and effort to the second prong than the AB has historically done.

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65. See, e.g., GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* (forthcoming May 2021); Cohen, *supra* note 37, at 1038–40.

Again, this task need not consume significant resources in every case. If the parties do not contest the correctness of prior decisions, a justification for relying on the prior decision may be unnecessary or limited to briefly noting the parties' agreement. Even if the parties disagree, the degree of justification may be limited to the importance of the issue to the dispute, as well as the similarity between the prior dispute and the current one. The closer the issue and the more central it is to the current dispute, the greater the need to justify the reliance—or the decision not to rely—on prior decisions.

Space does not permit an exhaustive inquiry into the factors that a WTO dispute panel or the AB (or a future body) should evaluate in considering the weight to give prior decisions at the second stage of this inquiry. But, those factors must begin with the appropriate role of tribunals in treaty interpretation. While the Statute of the ICJ makes judicial decisions a “subsidiary means for the determination of rules of law” for that court, the ICJ Statute does not apply to the AB.<sup>66</sup> The DSU says nothing explicit authorizing reliance on prior decisions.<sup>67</sup> The starting point for justifying the use of a particular prior decision thus must be the Vienna Convention on the Law of Treaties (VCLT).

Article 31 of the VCLT provides three sources of interpretation: (1) ordinary meaning of the text; (2) in light of the context and object and purpose, including instruments made in connection with the treaty; and (3) any subsequent agreement or practice evidencing an agreement between the parties with regard to the treaty, or any relevant rules of international law.

Technically, WTO panel and AB reports both receive legal significance when they are adopted by the DSB. The relevant legal act with respect to a report is thus the decision of the DSB adopting the report. These DSB decisions are plainly not part of the text of the agreement, nor, since they are not contemporaneous with the adoption of the WTO Agreement, are they context for its interpretation under VCLT Article 31.2.

DSB decisions are also not really subsequent agreements under VCLT Article 31.3. Under the DSU, unappealed panel reports and AB

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66. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993. WTO member states have also been careful not to label the AB a “court,” raising the question of whether a WTO body could properly consider AB decisions count as “judicial decisions,” even if the ICJ did pursuant to its own statute.

67. Some scholars have argued that DSU art. 3.2, which provides that “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system,” permits reliance on prior decisions. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; see Bacchus & Lester, *supra* note 6, at 188. As I have suggested above, though, security and predictability can be promoted through an explicit framework that guides panels in evaluating whether to follow prior decisions, rather than simply a presumption in favor of following those decisions.

reports are adopted unless a consensus exists against the adoption of the report.<sup>68</sup> Moreover, “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>69</sup> Instead, they “shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.”<sup>70</sup> Most importantly, DSB decisions have no binding force apart from the particular dispute at issue. The WTO members can thus not be said to have agreed to be bound by any legal requirements through the DSB’s adoption of reports.<sup>71</sup>

The act of adopting reports thus is not relevant to treaty interpretation as a subsequent agreement. In some circumstances, though, the adoption of a report might amount to a practice that constitutes an agreement under VCLT Article 31.3(b). The DSU makes clear that the adoption of a report is “without prejudice to the right of Members to express their views” on the report’s content.<sup>72</sup> DSB meetings often involve robust discussions of panel and AB reports. Indeed, the United States raised its concerns about the AB’s use of precedent in these very meetings.<sup>73</sup>

Meetings in which states do not raise any concerns with a panel or AB interpretation thus might constitute practice evincing an agreement among states. A subsequent tribunal might thus reasonably conclude that a prior decision of the DSB taken without objection is relevant to treaty interpretation under Article 31.3(b). It is the practice of member states accepting earlier decisions by the AB that give the AB’s decision its weight, not the fact of the AB’s decision itself.<sup>74</sup> A state’s later objection during litigation thus might be overcome by its prior acquiescence to the adoption of an interpretation in a sufficiently similar case.

Inferring acceptance from the absence of objection in DSB meetings is consistent with broader international legal norms regarding the primacy of state consent to treaty interpretation.

68. DSU, *supra* note 67, arts. 16.4, 17.14.

69. *Id.* art. 3.2.

70. *Id.* art. 3.4.

71. See VCLT, *supra* note 34, art. 11 (“The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”)

72. DSU, *supra* note 67, arts. 16.4, 17.14.

73. See, e.g., US Statements, *supra* note 22, at ¶ 36.

74. This approach bears similarities to how the AB described the role of prior decisions *Japan-Alcohol*. There, the AB said that previous reports “create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute.” Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 14, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996). The key question, under my framework, is *whether* the AB decision created expectations among states. If it did not, or if those expectations are fractured among member states, the relevance of the prior decision is diminished or non-existent.

Understood properly, using subsequent practice in treaty interpretation rests on state consent.<sup>75</sup> The AB must be transparent about where it will look for evidence of subsequent practice evincing state consent. DSB meetings that precede a straightforward decision from the AB analyzing the relevance of DSB meetings should therefore be given less weight. Prior to such an announcement, states were not on notice of the need to object in order to avoid the possibility of acquiescing. But after it is clear that DSB meetings are events at which states can evince an agreement through subsequent practice, then states are on notice of the need to object if they do not wish to acquiesce.

Where state views on an AB interpretation do not coalesce into acceptance, the AB should not rely on DSB meetings. In these situations, there is no basis for inferring a practice that amounts to an agreement, and thus no basis for inferring state consent. In this sense, subsequent practice is similar to the formation of rules of customary international law. States can avoid being bound by a customary rule by objecting, thus evincing an absence of consent.<sup>76</sup> So too can objection in DSB meetings serve to make clear that there is no practice evincing an agreement among states, and thus that a particular DSB meeting results in the adoption of a report (which will virtually always be the case, given the need for consensus to block a report's adoption).

To be sure, this approach—treating the absence of objections as acquiescence to a panel or the AB's interpretation of an agreement—creates incentives for states to object in DSB meetings. This incentive is actually a positive, though. It means that where no state objects, a subsequent panel can be more confident that states do indeed accept the prior interpretation. And if states do begin objecting more frequently, little is lost. The panels and the AB cannot rely on DSB meetings, leaving them no worse off than before.<sup>77</sup> This narrow approach avoids the problem of expansive interpretations that break the connection between a tribunal's interpretations and the rule to which states actually consented—the very problem that got the AB into trouble with the United States.<sup>78</sup>

When dissensus existed among states at the time a prior interpretation was made and debated,<sup>79</sup> a tribunal may wish to

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75. Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289, 307 (2013) ("At bottom subsequent practice is a technique of interpretation based on state consent.").

76. See, e.g., Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 142–43 (2005).

77. Arato, *supra* note 75, at 294 (noting that the AB traditionally took a "strict" approach to subsequent state practice).

78. See *id.* at 291 (arguing that "judicially driven transformation [often grounded in state practice] can fray the threads of state consent binding [an] organization to its constituent member states.").

79. Even where states do not object to a prior interpretation, a tribunal should be sure that the proposed application of the prior interpretation is one states could have foreseen at the time. If states could not have foreseen the prior interpretations

examine the kinds of factors that other tribunals have looked at in evaluating whether to follow or depart from past practice. A tribunal might ask some of the following questions: Have states relied to their detriment on prior rulings, such as by putting in place policies that would be difficult to unwind? Has the interpretation proved unworkable in light of other provisions of the WTO agreements? Has the surrounding law changed in ways that call into question the validity of the earlier interpretation? Have relevant facts emerged or changed in ways that suggest that prior interpretations of the covered agreements are incorrect? In the context of making an “objective assessment” of the dispute before it, the answers to these questions could help a tribunal decide whether prior decisions that have failed to attract consensual support among member states have persuasive value.

These kinds of questions will, in many cases, lead to the same outcomes as the “cogent reasons” test the AB adopted in *United States—Stainless Steel (Mexico)* or the “persuasiveness” test that the United States advocated as the correct standard. Indeed, Simon Lester and former AB member James Bacchus have argued that the practical daylight between those standards is modest.<sup>80</sup> But having an explicit framework for evaluating precedent that is grounded in the task that a tribunal undertakes—namely, treaty interpretation—would bolster the legitimacy of the undertaking. It would also cabin the discretion tribunals sometimes feel in relying on prior decisions without explanation. Perhaps most importantly, the act of justifying their reliance on prior decisions might highlight for a tribunal, during the course of hearing a dispute and writing a report, those cases in which reliance on prior decisions cannot be justified.

In this sense, changes to how WTO dispute settlement panels evaluate the force of prior decisions should mirror needed changes to the WTO’s nondiscrimination case law. That case law follows a similar two-step approach as the one this Article suggests for precedent, asking first whether two products are “like” and then asking whether two like products have been treated meaningfully differently (most frequently in WTO case law, the relevant test is whether there has been “less favorable” treatment). Over the years, member states such as the United States, as well as a range of commentators, have urged the AB to consider regulatory purpose in applying this test. Although the “aim and effect” test that the United States urged in the early and mid-1990s would have assessed the likeness of products in light of the measure’s regulatory purpose, commentators such as Joost Pauwelyn

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application in the context of a new case, there would be no reason to object, and nothing can be inferred from consensus. In my view, the foreseeability of a subsequent application goes to whether two cases are sufficiently “like” to be comparable, although tribunals could deal with this concern as the second stage of the inquiry too.

80. Bacchus & Lester, *supra* note 6, at 191–92.

have argued that consideration of regulatory purpose fits more comfortably within the element that assesses whether like products have been treated less favorably.<sup>81</sup>

This approach is, in fact, the approach that the AB adopted in *United States—Clove Cigarettes*. There, it held that a panel should only find “less favorable” treatment under Article 2.1 of the TBT Agreement if it finds that the challenged measure operates to the detriment of the equality of competitive opportunities *and* that such detriment does not stem exclusively from a legitimate regulatory distinction.<sup>82</sup> Although the AB resisted finding this same element in its GATT jurisprudence, where Article XX was available to justify measures on the basis of a closed list of regulatory purposes, any reconstituted AB is likely to come under pressure to consider regulatory purpose as part of its nondiscrimination jurisprudence more broadly. This pressure stems both from a need to rebalance the role of sovereignty over domestic policy and from the fact that Article XX itself is a closed list of legitimate regulatory objectives.<sup>83</sup>

#### IV. CONCLUSION

Strong evidence exists that legal systems with public decision-making and reason-giving tend to apply their prior decisions in future cases. Kucik and Puig have made a significant contribution in understanding how the WTO AB engaged in this task. They show that the AB most often just follows its own precedents, although in a small but significant number of cases the AB extends its precedents to new situations. Perhaps most surprisingly, they find that the AB rarely distinguishes or narrows its decisions.

This finding—that the AB primarily uses its prior decisions in situations in which it decides to follow those decisions—suggests that the AB is not engaging in a robust exercise of justifying the significance it gives to its prior decisions. On the surface, such an approach seems appealing. It creates superficial coherence between AB decisions and, at least on one view, signals a principled commitment to the rule of law.

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81. Pauwelyn, *supra* note 1, at 360–62.

82. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 174, WTO Doc. WT/DS406/AB/R (adopted April 4, 2012).

83. A common objection to considering regulatory purpose within the GATT’s primary nondiscrimination obligations is that doing so would render GATT art. XX redundant. This is not true, though, for two reasons. First, a panel might still find discrimination that can be excused under Article XX, for instance if the detriment to equality of competitive opportunities stems partially, but not exclusively, from a legitimate regulatory objective. Second, Article XX is a closed list of legitimate regulatory objectives, while a consideration of regulatory purpose within Article I or III would allow consideration of *any* legitimate regulatory purpose.



In fact, though, the failure to have a requirement to justify reliance on prior reports, and a framework to do so, undermines both the predictability of dispute reports in difficult cases and aggrandizes dispute settlement panels at the expense of member state interpretations of their own agreements. With the Biden Administration taking office in 2021, it seems likely that WTO member states will renew their efforts to reinvigorate WTO dispute settlement. When they do so, panels would be well advised to consider changing how they rely on prior reports to avoid the problems that the WTO AB encountered in its first decades.