



The Binding Force of Precedent under the Shadow of the Legal Reasoning of the WTO Dispute Settlement Understanding (DSU) Mechanism

Chan Bibi¹, Qurat-ul-Ain Ashfaq², Ghulam Ayesha³

Abstract

The Dispute Settlement Understanding mechanism works as a legal instrument to the WTO Agreement which works as a pivotal pillar in the process of the multilateral trading system. The legal credibility of the WTO Jurisprudence which has been dependent on the GATT interpretations underlying the Panels and Appellate Body reports remains controversial. The Panel and Appellate Body report following the previous decisions unless there is a good decision for deciding otherwise. This article will investigate the Panels and Appellate Body reports interpretations from a constitutional, political, and practical perspective and their impact to build a precedent under the shadow of legal reasoning.

Keywords: Legal reasoning, precedent, Panel Jurisprudence, GATT, WTO, Dispute Settlement Understanding

1. Introduction

The establishment of the World Trade Organization (1994) is the most significant and most important worldwide agreement adopted by 132 states since the UNO Charter, in 1945.⁴ The fundamental part of WTO is to offer predictability and security of the multilateral trading system to the members in the "Dispute Settlement Understanding" framework⁵ to the WTO signatory states. This has contained the procedures and rules for an understanding of the governing Settlement of Disputes (DSU).⁶ The General Agreement on Tariffs and Trade (GATT) regime's dispute settlement processes are only one aspect of the DSU's goal to be codified, this rule provides a better interpretation of the dispute settlement model.⁷ Under the DSU mechanism, an independent DS panel establishes a right to be heard⁸ and the next stage is to hear appeals on issues of law by a standing Appellate Body⁹ and the programmed adoption¹⁰ and implementation of panel verdicts.¹¹ The mandatory jurisdiction of the DSU panels is the most significant component of the "dispute settlement procedure". Under the WTO DSU mechanism, the Panels have to function to make an impartial determination of the evidence and the enforcement of the WTO Agreement.¹² However, after the establishment of GATT/WTO, the DSU Mechanism depends on the credibility of the jurisprudence produced by the "Panels and Appellate Body".¹³ The WTO system tries to function upon these issues by extracting legal principles from panel jurisprudence and their impact on future cases, and the past GATT panel reports underlying interpretations must have some legal effect.¹⁴ The member states have alternative legal legitimacy for the political legitimacy in the DSU procedure for the adoption of the reports and in case of non-compliance, a central authority for retaliatory measures. According to the Preamble of the WTO Agreement, one of the main objectives of The WTO Agreement is to raise standards of living, guarantee full employment, and raise real per capita

¹ Ph.D Scholar, Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan

² Ph.D Scholar, Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan

³ Ph.D Scholar, Visiting Lecturer, Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan

⁴ Chua, Adrian. "The Precedential Effect of WTO Panel and Appellate Body Reports." *LJIL* 11 (1998): 45.

⁵ Albren, Brett A. "The Continued Need for a Narrowly-Tailored, Rule-Based Dispute Resolution Mechanism in Future Free Trade Agreements." *Suffolk Transnat'l L. Rev.* 20 (1996): 85.

⁶ Porges, Amelia. "General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations." *International Legal Materials* 33, no. 1 (1994): 1-12.

⁷ Abbott, Kenneth W. "The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice." *Colum. Bus. L. Rev.* (1992): 111.

⁸ Waincymer, Jeffrey M. "GATT Dispute Settlement: An Agenda for Evaluation and Reform." *NCJ Int'l L. & Com. Reg.* 14 (1989): 81.

⁹ DSU art. 17.

¹⁰ DSU art. 16

¹¹ DSU art. 22

¹² DSU art. 11.1.

¹³ Chua, Adrian. "The Precedential Effect of WTO Panel and Appellate Body Reports." *LJIL* 11 (1998): 45.

¹⁴ In this Article, "a reference to panels or panel reports includes a reference to the Appellate Body and Appellate Body reports respectively".

income with the help of expansion in production and trade of services and goods.¹⁵ To achieve these objectives, certainty, and predictability are the main elements that permit investors to make efficient decisions about market development and investment.¹⁶ The far-reaching success results of the dispute settlement mechanism are depended on principles i.e. predictability, security, and certainty in the process “multilateral trading system” to WTO member nations.¹⁷ The rationale for a tribunal following its previous decisions has been long recognized that it makes for certainty and stability, which are of the essence of the orderly administration of justice. In this regard, the decisions are respected not only by state parties in dispute but also by other states when considering similar measures. The International Criminal Court has also developed a credible jurisprudence by following the legal reasonings of its previous decisions unless there is a good cause for determining otherwise. By adopting this practice, the administration of justice will prevail with certainty and avoids the appearance of any excess judicial discretion, and uncertainty will develop as to whether government policies conflict with the “WTO Agreement” if this agreement is interpreted arbitrarily without taking into account prior judgments.¹⁸ In that way, panel reports will lose their practical value as desired by parties in dispute and also impair the attainment of GATT/ WTO objectives.¹⁹ The formation of a thorough body of law, on the other hand, will lead to the building of a comprehensive body of law which may be used not only as direct proof of specific rules of law but also as indicative of the method and spirit in which future cases might be settled.²⁰ Henceforth, the objectives under the Preamble of the GATT/ WTO multilateral trading system need that subsequent decisions of the panel body has been followed unless there is good reason to do otherwise. If this statement is taken as correct then the substitution of legal legitimacy for political legitimacy in the DSU process can be supported. The credibility of the jurisprudence produced by the panels and the appellate Body in the DSU settlement system is based on such a rule-based system which also commands the respect of WTO state parties.²¹ Globally in most legal systems, It is also an essential principle of the administration of justice that like cases be decided consistently.²² If the judicial decisions are inconsistent in like cases then legal credibility can hardly be achieved.

This paper examines the precedential effect of their prior decisions by the Panels and Appellate body under the mechanism of WTO DSU. It also observes whether the mechanism is desirable for a multilateral trading system where security and certainty are prerequisites.

2. The role of precedents on adopted reports in Panel Jurisprudence

Legal reasoning reflects a fundamental principle on earlier adopted panel reports which are usually practiced by subsequent panels as indicated through panel practice.²³ But the doctrine of precedent is not strictly binding in the sense as binding in Common Law. This approach can be illustrated by two fundamental principles of non-discrimination in GATT/WTO, the national treatment obligation and ‘the most favored nation’ principle.²⁴ Under Art. IX.2 of the WTO Agreement, the Ministerial Conference and the General Council hold the exclusive authority to adopt interpretations of GATT and the Dispute Settlement Understanding Art.3.9 does not prejudice the rights of the parties to seek authoritative interpretations of the GATT through Art.IX.2. From that time, an exclusive authority has been specifically established so that the interpretation is that such authority does not exist by inference or inadvertence elsewhere.²⁵ Article III primarily expressed the national treatment obligations on imported

¹⁵ Preamble to the WTO Agreement, Dec. 15, 1993, 33 I.L.M. 13 (1994).

¹⁶ Lowenfeld, Andreas F. "Enforcing International Trade Law: The Evolution of the Modern GATT Legal System. By Robert E. Hudec. Salem, NH: Butterworths, 1993. Pp. 630. Index. \$125. "American Journal of International Law" 89, no. 3 (1995): 663-666.

¹⁷ DSU art. 3.2.

¹⁸ Lauterpacht, Hersch. *The development of international law by the International Court*. Cambridge University Press, 1982, 14.

¹⁹ Statements of delegates.

²⁰ Lauterpacht, *supra* note 16, at 18.

²¹ Chua, *supra* note 11, at 46.

²² Shahabuddeen, Muhammad. *Precedent in the world court*. Vol. 13. Cambridge Univ Pr, 2007, 40.

²³ Norway - Restrictions on Imports of Apples and Pears, Report of the Panel adopted on 22 June 1989, L/6474 - 36S/306, para.5-6.

²⁴ Jackson, John Howard. *The world trading system: law and policy of international economic relations*. MIT press, 1997, 133.

²⁵ Panel Report on Japan - Measures on Imports of Leather, May 15/16, 1984, GATT B.I.S.D. (31st Supp.) at 94,

goods as when the imported goods entered any country and cleared customs, then no internal tax over domestically produced goods directly or indirectly be imposed. Under the GATT Art.III:2, one of the most frequent provisions, states:

“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind over those applied, directly or indirectly, to like domestic products”.²⁶

In *Brazil Internal Taxes*,²⁷ the Contracting Parties quoted Art.III:2 which prohibits no internal tax over domestically produced goods whether or not damage to trade was shown.²⁸ The term ‘national treatment obligation’ can be interpreted as protective competitive conditions rather than trade volumes. This had also been stated in US-section 337 of the Tariff Act of 1930,²⁹ and *US-Measures Affecting alcoholic and Mall Beverages*³⁰ the panels cited that under previous panel reports, Article III (2) protects competitive conditions between imported and domestic products but not expectations on export volumes. In this way, a party in a dispute has no defense on impugned measures as they had had no or insignificant effects on trade volumes. This version had also been adopted by The Appellate Body in *Japan-Taxes on Alcoholic Beverages*³¹ and four previously adopted reports were cited as an authority which has been stated as the prohibition on discriminatory taxes in Art.III:2 is not conditional on a ‘trade effects test’ nor is it qualified by a *de minimis* standard. This principle is evidenced by its consistent application under Art. III and is regarded as practically binding on subsequent panels and its extension to other provisions of the GATT.³² In *Canada-Certain Measures Concerning Periodicals*,³³ the Appellate Body accepted this principle as well established in panel jurisprudence. Where several examples highlight that the application of legal procedures to similar evidence has not been followed in several previous interpretations as exemplified in *EEC-Restrictions on imports of Dessert Apples-Complaint by Chile*.³⁴ The contention is that an intervention scheme was introduced to fix the prices of apples. It was a deep concern about this scheme whether it is justified under the provision in XI (2. c.i) that provides an exception for import limits on agricultural products and, when required, to enforce governmental measures restricting the amounts of the comparable local products permitted to be marketed or produced. In *EEC-Restrictions on imports of Apples from Chile*,³⁵ the litigating parties are the same with the same product and the same measures nine years ago. The earlier panel decided that the intervention scheme was according to the provisions of Art. XI (2. c.i) exception. Hence, the future panel holds that the particulars and legal reasoning of the 1980 panel report were not legally bound.³⁶ However, the subsequent panel cannot be relieved to carry out its scrutiny of the issue.³⁷ Therefore, the subsequent panel while deciding the case departed from the earlier panel’s decision and held that the scheme did not fall under the exception.³⁸ Previous penal practice reveals the absence of a formal doctrine of precedent but these panel’s legal reasonings may be used as precedent by subsequent panels.

para. 55.

²⁶ GATT, Art. III (2).

²⁷ Working Party Report, Brazilian Internal Taxes, GATT/CP.3/42 (First Report), adopted 30 June 1949, BISD II/181; GATT/CP.5/37 (Second Report), adopted 13 December 1950, BISD II/186.

²⁸ *Id*, para. 15.

²⁹ GATT Panel Report, United States Section 337 of the Tariff Act of 1930, L/6439, adopted 7 November 1989, BISD 36S/345.

³⁰ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/GG/DS/44R.PDF&Open=True> (Last Accessed November 22, 2022).

³¹ GATT Panel Report, Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, L/6216, adopted 10 November 1987, BISD 34S/83

³² GATT Panel Report, United States–Taxes on Petroleum and Certain Imported Substances, L/6175, adopted 17 June 1987, BISD 34S/136

³³ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds31_e.htm (last accessed November 26, 2022).

³⁴ European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile Report of the Panel adopted on 22 June 1989 (L/6491 - 36S/93).

³⁵ EEC Restrictions on Imports of Apples from Chile Report of the Panel adopted on 10 November 1980 (L/5047 - 27S/98)

³⁶ European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile, Report of the Panel adopted on 22 June 1989 (L/6491 - 36S/93).

³⁷ *Id*, para. 12.10.

³⁸ *Id*, para. 12.17.

The panel's legal reasoning for the "measures" in query can be exemplified in *US section 337 of the Tariff Act of 1930*³⁹ where the panel states that its observations relating to the application of Section 337 may apply to circumstances outside the sphere of intellectual property, its findings and conclusions are limited to patent based cases, they are referring to cases where the law is applied to patents.⁴⁰ In another case *EEC-Regulation on Imports of Parts and Components*⁴¹ anti-circumvention duties imposed by the EEC under Art. XX (d) exception examined by the panel and this article explains that nothing in the GATT shall prevent the adoption of measures "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement. Indeed, the panel held very narrowly by referring to the exception of this article and limited itself from considering whether the laws in question were 'not inconsistent' with the GATT. The panel construed its analysis of Art. XX (d) on the presumption that the enforcement of the laws by the anti-circumvention duties was not inconsistent with the GATT. The panel also stressed that the impact of this assumption is only limited to this case and without prejudice to any examination of these regulations in any other dispute settlement proceeding.⁴² The panel in *Japan – Restrictions on Imports of Certain Agricultural Products*⁴³ article XI:2(c) to "enforcing governmental measures" considers administrative guidance, which is a customary Japanese government policy tool based on consensus and peer pressure. The panel emphasized that its approach in this particular issue should not be taken as a precedent in other cases where societies are not acclimated to this type of implementing government regulations in light of this unique feature of Japanese society.⁴⁴ However, the panels limited the applicability of their verdicts to the subsequent cases and acknowledged implicitly in panel jurisprudence that, despite the absence of the doctrine of precedent, their legal reasoning and findings have a precedential effect on the subsequent panel's practice.

3. Precedential value Report adopted by Appellate Body

In *Japan-Taxes on Alcoholic Beverages*, the first precedential value report was formally adopted by the Appellate body for the first time since the WTO Agreement.⁴⁵ The Appellate Body specified two grounds for the adoption of the reports by the GATT Council and Dispute Settlement Body which are an integral part of GATT 1994. First, adopted reports qualified⁴⁶ as "subsequent practice" under "The Vienna Convention on the Law of Treaties Article 31(3)(b)"⁴⁷, which states that any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into consideration when interpreting the treaty.⁴⁸ The panel acknowledged that Article 31(3)(b) fell under the category of customary principles of interpretation of public international law and that it was required to apply to interpret the GATT as per Article 3.2 of the DSU. By interpreting earlier reports as "subsequent practice, panels are forced to interpret the GATT in light of any reports that have already been approved on the relevant provision."⁴⁹

Second, the Appellate Body also emphasizes that these adopted reports constituted other decisions of the Contracting Parties to GATT 1947, under Paragraph 1(b. iv) of Annex 1A incorporating GATT 1994⁵⁰ into the WTO Agreement.⁵¹ All adopted reports of GATT 1947 and other Understandings on

³⁹ United States - Section 337 of The Tariff Act of 1930 Report by the Panel adopted on 7 November 1989(L/6439 - 36S/345)

⁴⁰ *Id.*, para. 5.4.

⁴¹ GATT Panel Report, European Economic Community – Regulation on Imports of Parts and Components, L/6657, adopted 16 May 1990, BISD 37S/132

⁴² *Id.*, para. 5.13

⁴³ https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_gatt47.pdf (last accessed October 20, 2022).

⁴⁴ *Id.*, para. 5.4.1.4.

⁴⁵ Appellate Report Japan-Taxes on Alcoholic Beverages, adopted October, 1996, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/8ABR.pdf&Open=True> (Accessed November 8, 2022).

⁴⁶ *Id.* para. 6.10.

⁴⁷ https://oas.org/dil/Vienna_Convention_on_the_Law_of_Treaties.pdf (Accessed November 8, 2022).

⁴⁸ Art. 31 (3.b) Vienna Convention on the Law of Treaties.

⁴⁹ DSU, Art. 3.2.

⁵⁰ https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf (Accessed November 8, 2022).

⁵¹ *Id.* supra note, 45, para. 6.10.

the interpretation of the GATT are incorporated into GATT 1994 before the WTO Agreement. Thus, the previous panel reports are binding on subsequent panels under GATT 1947 provisions. Similarly, The US also filed an appeal and argued that the Appellate Body erred in its assumption that the adopted panel reports are treated as 'past practice, under the Vienna Convention and paragraph 1(b.iv) decisions of the Contracting Parties incorporating GATT 1994 into the WTO Agreement. As a part of the third party to the dispute, the EEC supported the US position. The Appellate body overruled the panel's verdict on this issue and held that subsequent practice' under the Art. 31(3.b) of the Vienna Convention requires a concordant, common, and consistent sequence of acts or pronouncements sufficient to establish a discernible pattern implying the parties' agreement regarding its interpretation.⁵² However, the WTO appellate Body has ruled that there is no change in the character and legal status of panel reports since the commencement of the WTO Agreements. However, the adoption of a panel report is generally an isolated act that is insufficient to establish 'subsequent practice'.

"[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except for resolving the particular dispute between the parties to that dispute".⁵³

Even though the legal reasoning of the Panel and Appellant Body Jurisprudence indicates that earlier adopted panel reports are usually followed by future panels which are not binding on future panels in the sense of the common law concept of precedent. A similar practice has been followed International Court of Justice.⁵⁴

4. Conclusions

Before the Commencement of the Dispute Settlement Understanding mechanism, panels were comprised of trade policy experts who worked as *ad hoc* tribunals rather than permanent tribunals, such as the members of "the International Court of Justice" appointed permanently. The selection of panel jurisprudence is inhibited by this practice. This article has explored that the panels and the Appellant Body jurisprudence are not strictly binding like the common law doctrine of precedent but the predictability and security necessary to attain the objectives of the WTO multilateral trading system. Therefore, the legal reasonings of the earlier adopted reports be practiced by future panels unless there are compelling reasons to the contrary. Despite the absence of a doctrine of precedent, the subsequent practice of the principle set the legal basis for this to be achieved. Such a strategy will lay the groundwork for the creation of good and reliable legal precedent that not only demands the respect of the disputing parties but also of all WTO members.

References

- Abbott, K. W. (1992). The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice. *Colum. Bus. L. Rev.*, 111.
- Albren, B. A. (1996). The Continued Need for a Narrowly-Tailored, Rule-Based Dispute Resolution Mechanism in Future Free Trade Agreements. *Suffolk Transnat'l L. Rev.*, 20, 85.
- Appellate Report Japan-Taxes on Alcoholic Beverages, adopted October, 1996.
- Art. 31 (3.b) Vienna Convention on the Law of Treaties.
- Barcelona Traction, Light and Power Company Limited (Belg. v. Spain), Second Phase, 1970 ICJ 3, 38 (Feb.5).
- Beverages, L/6216, adopted 10 November 1987, BISD 34S/83.
- BISD 36S/345.
- Chua, A. (1998). The Precedential Effect of WTO Panel and Appellate Body Reports. *LJIL*, 11, 45.
- DSU art. 11.1.
- DSU art. 16
- DSU art. 17.
- DSU art. 22

⁵² Japan - Taxes on Alcoholic Beverages, *supra* note 45, para. 13

⁵³ *Id.*, para. 13.

⁵⁴ Barcelona Traction, Light and Power Company Limited (Belg. v. Spain), Second Phase, 1970 ICJ 3, 38 (Feb. 5); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunis. v. Libya), 1985 ICJ 191, 207 (Dec. 10).

- DSU art. 3.2
- EEC Restrictions on Imports of Apples from Chile Report of the Panel adopted on 10 November 1980 (L/5047 - 27S/98)
- European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile Report of
- European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile, Report of
- GATT Panel Report, European Economic Community – Regulation on Imports of Parts and Components,
- GATT Panel Report, Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic
- GATT Panel Report, United States Section 337 of the Tariff Act of 1930, L/6439, adopted 7 November 1989,
- GATT Panel Report, United States–Taxes on Petroleum and Certain Imported Substances, L/6175, adopted 17
- GATT, Art. III (2)
- II/181; GATT/CP.5/37 (Second Report), adopted 13 December 1950, BISD II/186.
- Jackson, J. H. (1997). *The world trading system: law and policy of international economic relations*. MIT Press.
- June 1987, BISD 34S/136.
- L/6657, adopted 16 May 1990, BISD 37S/132.
- Lauterpacht, H. (1982). *The development of international law by the International Court*. Cambridge University Press.
- Lowenfeld, A. F. (1995). *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. By Robert E. Hudec. Salem, NH: Butterworths, 1993. Pp. 630. Index. \$125. *American Journal of International Law*, 89(3), 663-666.
- Norway - Restrictions on Imports of Apples and Pears, Report of the Panel adopted on 22 June 1989, L/6474 - 36S/306, para.5-6.
- Panel Report on Japan - Measures on Imports of Leather, May 15/16, 1984, GATT B.I.S.D. (31st Supp.) at 94, para. 55.
- Porges, A. (1994). General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations. *International Legal Materials*, 33(1), 1-12.
- Shahabuddeen, M. (2007). *Precedent in the world court* (Vol. 13). Cambridge Univ Pr.
- the Panel adopted on 22 June 1989 (L/6491 - 36S/93).
- the Panel adopted on 22 June 1989 (L/6491 - 36S/93).
- United States - Section 337 of The Tariff Act of 1930 Report by the Panel adopted on 7 November 1989(L/643- 36S/345).
- Waincymer, J. M. (1989). GATT Dispute Settlement: An Agenda for Evaluation and Reform. *NCJ Int'l L. & Com. Reg.*, 14, 81.
- Working Party Report, Brazilian Internal Taxes, GATT/CP.3/42 (First Report), adopted 30 June 1949, BISD.