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# Chronicle of a crisis foretold: how the WTO Appellate Body drove itself into a corner

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## ABSTRACT

With 146 decisions delivered since 1995, the Appellate Body of the World Trade Organization (WTO) stands as one of the world's most prolific and accomplished international courts. However, the Appellate Body finds itself currently embroiled in a crisis that has crippled it. This article delves into the reasons that may account for this state of affairs. We examine a sample of Appellate Body decisions, that, on the one hand, had significant policy and systemic implications for WTO dispute settlement, but on the other hand, are beset with notable flaws. While it is human to err, and there is no reason why this old adage should not be applicable to international tribunals, by developing an overly dogmatic jurisprudential tradition that has the potential to perpetuate even the most deficient rationale, the Appellate Body invited at least some of the criticism that escalated into political maneuvering that rendered it inoperative. Our aspiration is that this crisis can serve as a source of valuable lessons regarding how to mitigate the risks that international adjudicators must inevitably bear when interpreting international treaties. In an effort to trigger a scholarly discussion on how to make the work of the Appellate Body more sustainable, we outline a possible blueprint to resolve the current deadlock.

## INTRODUCTION

The much-lauded dispute settlement system of the World Trade Organization (WTO) has now regressed towards a mirror image of the much-less-celebrated dispute settlement mechanism of the General Agreement on Tariffs and Trade (GATT). In particular, due to the fact that over the last few years, the USA refused to agree to the appointment of replacements for the Members of the WTO Appellate Body (AB) whose terms expired, from December 2019 onwards the AB has lacked the quorum of three Members required to discharge the appeal of a panel report. As

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long as the AB remains nonoperational, a panel report could be sent into legal limbo simply by appealing it, which would then frustrate recourse to WTO litigation by the complainant since the WTO Dispute Settlement Body (DSB) cannot issue recommendations absent an AB report on an appealed panel report. This is reminiscent of the GATT dispute settlement system, where the adoption of a panel report was voluntary because panel reports had to be adopted by the GATT Contracting Parties, including the party complained against.

WTO rulings and recommendations will continue to be binding on WTO Members ('Members') that refrain from appealing panel reports or that, alternatively, channel appeals through an interim arbitration process pursuant to Article 25 of the WTO Dispute Settlement Understanding (DSU).[1]

Whether the Members that do not pursue either approach will be given a 'time-out' from WTO dispute settlement while the AB remains dysfunctional is uncertain. An interesting development in this respect is the proposed regulation that would result in the application of countermeasures by the European Union against Members that appeal (and send into legal limbo) panel reports upholding its claims.[2]

So, how did we get here? A popular view holds that the USA resorted to hardball tactics in order to punish the AB—and effectively put it out-of-business—for a series of rulings that banned the US practice of 'zeroing' (ie the setting of negative dumping margins to zero) in antidumping (AD) investigations.[3] We contend that this view is not only simplistic but also misinformed. Over the years, the AB has made a number of findings regarding interpretative issues, mostly related to trade remedies, that are objectively deficient. By objectively deficient, we mean findings that address issues that had not been raised by complainants, do not conform with the customary rules of interpretation of public international law, misapply a legal standard developed by the AB itself, or are inconsistent with the reasoning followed by the AB in similar situations.

A certain degree of controversy or error is inherent in the judicial function. Thus, isolated instances of judicial deficiency as such should not surprise anyone. However, judicial deficiency emerges as a source of concern when it can be categorized as egregious and cannot be corrected subsequently. As we explain later, the AB has become a slave to its own words by developing a doctrine of binding precedent that is far more rigid than even the *stare decisis* doctrine applied in some national jurisdictions.[4] This 'super-hardline' approach to case law makes it nearly impossible to amend, not to mention abandon, an AB-created legal standard that is flawed.

To be clear, we are not arguing that many AB decisions are in error. What we are arguing is that, when interpretative errors by the AB are grievous, which happens ocassionally, as illustrated in the case studies presented in the section 'The case studies' of this paper,[5] such errors cannot be

[1] On 27 March 2020, there was an agreement by 16 Members to leverage DSU art 25 to establish a Multi-Party Interim Appeal Arbitration Arrangement ('MPIA'). Those Members are Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Mexico; New Zealand; Norway; Singapore; Switzerland; and Uruguay. See 'EU and 15 World Trade Organization Members Establish Contingency Appeal Arrangement for Trade Disputes', press release by the European Commission available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2127> accessed 4 June 2020. As of the time of writing, additional countries have joined the MPIA, including Ecuador, Nicaragua, and Benin.

[2] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules' COM(2019) 623 final. The draft legislation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019PC0623&from=EN> accessed 4 June 2020.

[3] See, for instance, 'WTO's Dispute-Settlement Mechanism Collapses' (*The Economist Intelligence Unit*, 11 December 2019) <http://country.eiu.com/article.aspx?articleid=1798800563>.

[4] We use the terms 'binding precedent' and 'case law' interchangeably.

[5] To be sure, we are not alone in arguing that the AB does err and that its errors can be nontrivial. For instance, Bradly Condon has observed that the AB has interpreted language in GATT art XX and the Agreement on Technical Barriers to Trade expansively, creating new obligations nowhere present in the legal texts. See Bradly J. Condon, 'Captain America and the Tarnishing of the Crown: The Feud between the WTO Appellate Body and the USA' (2018) 52 Journal of World Trade, 535–556 <https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/52.4/TRAD2018023>.

rectified 'within the system' because the modality of case law that the AB has adopted does not allow for open backtracking.

Finally, we wish to underscore what this paper is not. This paper is not a survey of proposals about how to improve the DSU in light of the experience gained over the past 25 years of WTO litigation. There already is an extensive literature in this regard.[6] Our contribution to the debate as to the causes of the crisis affecting the AB has a different, more nuanced approach, explaining and providing evidence that the AB's actions do not always comport with what is enshrined in the DSU.

The paper is organized into four chapters.[7] The section 'The case studies' discusses the analytics as well as the legal aspects of five crucial AB rulings in the area of trade remedies.[8] The section 'Precedent in international, municipal, and WTO law' examines the role of case law or binding precedent in international, municipal, and WTO law, emphasizing the distinction between a ruling having the force of binding precedent and a ruling having precedential value only as a 'source of reason'. The section 'Summary and conclusions' closes the paper by setting out a number of conclusions and presenting various proposals that might bring the AB out of its enforced hibernation.

## THE CASE STUDIES

### The pronouncement in EC—Fasteners regarding whether the surrogate country methodology as applied to China in AD investigations has an expiration date

One of the issues addressed by the AB in *EC—Fasteners* was whether nonmarket economy (NME) status in AD investigations has implications for the determination of AD duty rates as such.[9] In particular, the European Union alleged that Paragraph 15 of China's WTO Protocol of Accession allows setting countrywide AD duty rates, notwithstanding the restrictions imposed by Article 6.10 of the AD Agreement on AD duty rates that are not exporter specific.[10] The AB ruled that Paragraph 15 foresaw no such dispensation.[11]

However, the AB went on to make a pronouncement regarding when the ability of Members to use the surrogate country methodology for determining the 'normal value' of Chinese exports came to an end. The AB concluded that such special rules would expire in 2016.[12]

Article 3.4 of the DSU provides that '[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter.' Furthermore, as stipulated in Article 17.6 of the DSU, the jurisdiction of the AB is 'limited to issues of law covered in the panel report and legal interpretations developed by the panel'.

By making a pronouncement in respect of whether the surrogate country methodology as applied to China (in effect, China's NME's status) had an expiration date, the AB articulated an opinion that was not aimed 'at achieving a satisfactory settlement of the matter' or that would

[6] The latest manifestation of this literature is the collection of papers assembled by Chang-fa Lo, Junji Nakagawa and Tsai-Fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer Singapore 2020).

[7] A short summary of parts of an early version of this paper was published as three posts in Kluwer's *Regulating for Globalization* Blog. See 'The Way the AB Has Approached WTO Case Law Is Not Helping', Part I (5 November 2019), Part II (7 November 2019), and Part III (8 November 2019). A subsequent version of this paper was presented at the conference 'OMC: 25 Anos' held at the University of Lisbon on 28–29 November 2019.

[8] Trade remedies are the most common subject matter before WTO tribunals. From 1995 to 2018, over half of all WTO disputes involved trade remedies. Specifically, 23% of all disputes involved the Agreement on the Implementation of art VI of the GATT (the 'AD Agreement'), 23% involved the Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement'), and 10% involved the Agreement on Safeguards, as reported by Worldtradelaw.net (accessed 27 January 2023). It is therefore evident that the interpretation of these agreements has had significant systemic implications for the use of the WTO dispute settlement mechanism.

[9] It is undisputed that, in AD investigations, NME conditions in the exporting Member allow importing Members to calculate the 'normal value' using data from a surrogate market economy country.

[10] *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* ('*EC—Fasteners*'), Report of the Appellate Body, WT/DS397/AB/R, adopted 28 July 2011, paras 283 and 310.

[11] ibid, para 290.

[12] ibid, para 289.

address a legal issue covered in the panel report. The AB seemed to admit that the statement concerned constituted *dicta* rather than a legal finding.[13] However, volunteering such acknowledgement did not make these particular *dicta* any less troubling as it should have been obvious to the AB that the WTO consistency of the surrogate country methodology as applied to China post-December 2016 was a highly contentious issue,[14] which would inevitably be the subject of future WTO litigation.[15] It is puzzling how in such circumstances the AB chose to go on record stating something it did not need to state, and which seemingly prejudiced its impartiality in future disputes regarding the issue involved in its *dicta*. Regrettably, this is a clear example of the AB exceeding its mandate (as set forth in Articles 3.4 and 17.6 of the DSU).

## The interpretation of the term 'public body' within the meaning of the Subsidies and Countervailing Measures Agreement

Article 1.1(a)(1) of the WTO Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement') conceptualizes subsidies as a transfer of economic resources, not in market terms, that results from either a 'financial contribution by a government or any public body' or 'income or price support' (within the meaning of Article XVI of the GATT). Neither 'government' nor 'public body' is defined in Article 1.1(a)(1) or in the remainder of the SCM Agreement. However, the drafters must have recognized an important distinction between the terms 'government' and 'public body'; otherwise, they would have dispensed with the latter concept.

In the context of countervailing duty (CVD) investigations, 'public bodies' have traditionally been identified as commercial enterprises where the government holds majority ownership that translates into effective control (allowing the government to hold a majority of the seats in the managing board and appoint key managers). In *US—Anti-Dumping and Countervailing Duties (China)*, China challenged this approach as applied by the USA in a series of CVD investigations involving imports of Chinese origin. In particular, China argued before the AB that 'the defining characteristic of a public body is that it exercises authority vested in it by the government for the purpose of performing functions of a governmental character'.[16]

The AB sided with China, reversing the panel. The AB defined 'public body' as analogous to 'government' in terms of certain 'core commonalities'.[17] As the first step in its search for such 'core commonalities', the AB formulated a generic characterization of 'government', applicable in all WTO agreements. In particular, citing its finding in *Canada-Dairy*, a dispute under the Agreement on Agriculture, the AB observed that 'the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority'.[18] In the view of the AB, because a government

[13] ibid, para 291.

[14] By way of illustration, Suse cites to 19 academic articles addressing this issue published during 2011–2017. See Andrei Suse, 'Old Wine in a New Bottle: The EU's Response to the Expiry of Section 15(a)(ii) of China's WTO Protocol of Accession' (2017) 20 Journal of International Economic Law 953, fn 7.

[15] In *EU—Price Comparison Methodologies*, China claimed that, subsequently to 11 December 2016, 'the WTO rules that govern the determination by WTO Members of all elements of price comparability now apply to imports from China'. See Panel Request, *European Union—Measures Related to Price Comparison Methodologies*, WT/DS516/9, circulated 10 March 2017, para 6. Bloomberg reported that the panel's interim report was highly unfavourable to China. See <https://www.bloomberg.com/news/articles/2019-04-18/china-is-said-to-lose-market-economy-trade-case-in-eu-u-s-win?leadSource=uverify%20wall> accessed 24 June 2020. In any event, China effectively withdrew the case subsequently by requesting that the proceeding be suspended and then letting the authority for the panel lapse. See, respectively, *European Union—Measures Related to Price Comparison Methodologies*, Communication from the Panel, WT/DS516/13, circulated on 17 June 2019; *European Union—Measures Related to Price Comparison Methodologies*, Note by the Secretariat, WT/DS516/14, circulated on 15 June 2020.

[16] *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ('*US—Anti-Dumping and Countervailing Duties (China)*'), Report of the Appellate Body, WT/DS379/AB/R, adopted 25 March 2011, para 279.

[17] The AB failed to similarly inquire into what were the characteristics of a 'public body' that made a 'public body' different from the 'government'. Evidently, if 'public body' is defined only in terms of its 'core commonalities' with the 'government', but not in terms of what distinguishes it from the 'government', then 'public body' effectively folds into 'government'.

[18] Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)* (n 16) para 290.

performs its functions as a consequence of exercising legal authority,[19] 'the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body'.[20] It then concluded that 'being vested with, and exercising, authority to perform governmental functions is a core feature of a "public body" in the sense of Article 1.1(a)(1)'[21] and found accordingly that '[a] public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority.'[22]

Oddly, the AB bypassed the possibility to define 'public body' by reference to the remainder of Article 1.1(a)(1) which lists the governmental functions of interest from the perspective of the SCM Agreement. Crucially, as explained later, nearly all of these governmental functions are purely commercial, for which obviously no authority (regulatory or otherwise) is needed. Thus, if the AB had characterized the 'government' in terms of Article 1.1(a)(1) itself, the 'core commonalities' drawn between 'government' and 'public body' would have leaned, for the most part, towards commercial activities, and against this backdrop adopting the 'vested with governmental authority' standard as reflective of the essence of a 'public body' would have made little sense.

In particular, Article 1.1(a)(1) of the SCM Agreement, in Subparagraph (iv), addresses the situation where 'private bodies' are 'entrusted or directed' by the government to undertake the functions, listed in Subparagraphs (i)–(iii) of the same provision, 'which normally would be vested in the government'. Therefore, Subparagraph (iv) identifies by implication the functions that, for purposes of the SCM Agreement, the government would normally perform. Such functions are the provision of 'financial contributions' through direct transfers of funds,[23] tax concessions,[24] and the sale of goods and services (other than general infrastructure) or the purchase of goods.[25]

The provision of 'financial contributions' via tax concessions does require being endowed with authority, as tax concessions can be granted only by an entity that holds the *regulatory power to tax*. Conversely, the provision of 'financial contributions' via direct transfers of funds (grants, loans, or equity infusions, for instance), the sale of goods and services (eg electricity), or the purchase of goods (agricultural products, eg) does not require being endowed with any authority. In fact, the entities capable of issuing loans/investing capital, selling electricity, or purchasing agricultural products naturally are commercial enterprises that obviously would not be vested with regulatory, controlling, or supervisory authority *because they would have no use for any such authority in conducting their activities*.[26]

In its report in *Japan—Alcoholic Beverages II*, the AB stated that, pursuant to Article 31 of the Vienna Convention, '[t]he provisions of the treaty are to be given their ordinary meaning in their context.'[27] This is the context in which the terms exist.[28] Thus, the AB's definition of 'public

[19] ibid, para 290.
[20] ibid, para 290.
[21] ibid, para 310.
[22] ibid, para 317.
[23] art 1.1(a)(1), subpara (i).
[24] art 1.1(a)(1), subpara (ii).
[25] art 1.1(a)(1), subpara (iii).
[26] It is inconceivable that a national legislature would be willing to confer regulatory, controlling, or supervisory authority to a commercial enterprise irrespective of whether such authority is needed.
[27] See *Japan—Taxes on Alcoholic Beverages* ('*Japan—Alcoholic Beverages II*'), Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, adopted 1 November 1996, 12 (emphasis added). As aptly put by Waincymer, ordinary meaning is coloured by the surroundings. See Jeff Waincymer, *WTO Litigation*, Cameron May 2002, 221. Perhaps the best illustration of this principle is that the term 'like product' appears in multiple WTO provisions but means different things depending upon the specific context in which it is used: in GATT art I, 'like product' stands for imported products; in GATT art III and art 4.1 of the AD Agreement, it means a domestic product that competes against imported products; in art 5.8 of the AD Agreement, it means imported products including both investigated and uninvestigated imports; etc.
[28] Appellate Body Report, *Japan—Alcoholic Beverages II*, ibid, fn 19 citing to the ICJ in *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admissions Case)* (1950), ICJ Reports, 4 at 8.

body' is not in harmony with Article 31 of the Vienna Convention because it is not based on Article 1.1(a)(1) which, as the sole provision in the SMC Agreement where this term appears, is the appropriate context for the interpretation of this term.

The implications of the AB's definition of 'public body' are especially troubling. By conceptualizing government functions in a manner that does not correlate with Article 1.1(a)(1), the AB shut the door on the possibility of addressing subsidies made available by 'public bodies' operating as commercial enterprises because 'possessing, exercising or being vested with government authority' is not an attribute of commercial enterprises.[29]

Subsequent rulings suggest that the AB is not happy with how it narrowly the term 'public body' in *US—Antidumping and Countervailing Duties (China)*. In particular, in *US—Carbon Steel (India)* the AB appeared to be publicly sticking to its authority-centric definition of 'public body' while reinstating surreptitiously a 'control test' *at the stage of application* of such legal standard:

> [A] government's exercise of 'meaningful control' over an entity and its conduct, including control such that the government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body.[30]

According to the AB, evidence of such control 'may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions'.[31]

Unfortunately, this attempt at quietly fixing matters resulted in coupling 'public body' with 'benefit'. The AB found that the panel had failed to evaluate whether the investigating authority had properly considered the extent to which the government (of the complainant Member) *exercised meaningful control over the exporter concerned and over its conduct*.[32] More specifically, the AB found fault with the panel not addressing the relevance of the investigating authority's disregard of evidence purportedly showing that government policies had not influenced *the terms of the transactions, or the pricing of the products sold, by the exporter at issue*.[33] Such evidence was supposedly indicative that the exporter concerned conducted its operations following 'commercial principles' instead of government mandates.[34] However, because the existence of a 'benefit', within the meaning of the SCM Agreement, is identified by a comparison against market terms,[35] the AB's reasoning suggests that evidence put forward to meet the legal standard for 'benefit' can also be acceptable for purposes of meeting the legal standard for 'public body'. Thus, the AB's tacit reinstatement of a 'control test' for 'public body', inasmuch as

[29] In all fairness, the 'ownership and control' test that the AB rejected in *US—Anti-Dumping and Countervailing Duties (China)* (n 16) does not work properly in respect of 'public bodies' with taxation responsibilities, since these entities do need to be endowed with the authority to tax. Hence, in *US—Anti-Dumping and Countervailing Duties (China)* (n 16) the AB went overboard. It should have broadened the definition of 'public body' to require being vested with government authority if need be, ie to undertake the government function of raising tax revenue enunciated in subpara (ii) of art 1.1(a)(1). Instead, the AB required every 'public body' to be endowed with government authority, irrespective of whether this was relevant for undertaking the government functions of a commercial nature described in art 1.1(a)(1).

[30] *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* ('*US—Carbon Steel (India)*'), Report of the Appellate Body, WT/DS436/AB/R, adopted 19 December 2014, para 4.20.

[31] ibid, para 4.10.

[32] ibid, para 4.43.

[33] ibid, para 4.40.

[34] ibid, para 4.40.

[35] *Canada—Measures Affecting the Export of Civilian Aircraft* ('*Canada—Aircraft*'), Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, para 157 ('… the trade distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favorable than those available to the recipient on the market').

that test incorporates business conduct as an element, is as flawed as the AB's definition of this term.

## The finding that Article 19.3 of the SCM Agreement addresses the concurrent application of CVDs and NME AD duties

### *Analytical background*

Article VI:5 of the GATT provides that '[n]o product … of any contracting party imported into … any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or *export subsidization*' (emphasis added).

Theoretically, this situation would arise, for instance, where there is a 'price support' programme in the exporting country that forces consumers to buy domestic production at prices above world prices, boosting domestic production to the point of generating an exportable surplus which then has to be sold in world markets at the lower world prices. In such circumstances, domestic producers would necessarily engage in price discrimination when exporting. However, selling abroad at the lower world prices would neutralize at least in part the effects of the 'price support' programme in terms of raising the profitability of domestic producers. An *export subsidy*, covering the difference between domestic prices and export prices, would take care of this problem.[36] Importantly, in this case, the subsidy rate fully overlaps with the dumping margin because export subsidization essentially finances the practice of dumping. According to Article VI:5, where AD duties and countervailing duties (CVDs) counteract 'the same situation of dumping or export subsidization', both measures should not be imposed concurrently (in view of the fact that AD duties, in isolation, or export subsidy–based CVDs, in isolation, would offset dumping as well as export subsidization).

In *US—Anti-Dumping and Countervailing Duties (China)*, China alleged that WTO rules also ban the combination of NME AD duties (where the 'normal value' is calculated according to the surrogate country methodology) *with CVDs offsetting production subsidies*. A tall order indeed, due to the absence of textual support in WTO provisions for anything resembling China's elaborate claim. Nevertheless, as explained later, China succeeded in its endeavour.

As a preamble to its finding that the SCM Agreement bans the concurrent application of NME AD duties and CVDs offsetting production subsidies, the AB borrowed the panel's conceptualization of why 'double remedies' are likely to occur in the event of such a combination:

> … the dumping margin calculated under an NME methodology 'reflects not only price discrimination by the investigated producer between the domestic and export markets (dumping)', but also 'economic distortions that affect the producer's costs of production', including specific subsidies to the investigated producer of the relevant product in respect of that product.[37]

In other words, the AB and the panel were of the view that a dumping margin, when calculated according to the surrogate country methodology, measures not only price discrimination in an NME context but also the price effects of production subsidies in the same situation.[38] Why this would be so is not self-evident, and the AB's account of the point involved did not go beyond a series of similar conclusory statements.

[36] By contrast, domestic subsidies either raise domestic producers' marginal revenue or lower domestic producers' marginal cost. Domestic subsidies that lower producers' marginal cost (by means of subsidized raw material and financial costs) are characterized as 'production subsidies'. Subsidies that raise producers' marginal revenue generally consist of cash transfers.

[37] Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)* (n 16) para 544 (paraphrasing para 14.69 of the panel report).

[38] As is well known, in the case of NMEs domestic prices are not be a proper basis for the 'normal value' because they are affected by the economic distortions arising from the NME regime.

That there is an overlap between the price effects of an NME regime and the price effects of production subsidies in that same setting is incorrect as a general proposition. Consider China's production subsidies and NME 'interventions' including in the form of industrial policy. China grants production subsidies consisting, generally speaking, of tax concessions, 'soft' loans, and raw material prices below market levels.[39] Additionally, it runs a comprehensive industrial policy which, in respect of the targeted sectors, typically involves controls on entry, scale of production, technologies, and production efficiencies and may even feature forced mergers.[40]

Both production subsidies and the 'interventions' concerned lower the marginal cost of Chinese producers. However, as the reductions in marginal cost generated by these two sets of policies are independent of each other, offsetting such cost distortions cumulatively requires distinct remedies.[41] Thus, contrary to what the AB assumed, conceptually there is no necessary equivalence between the effects of production subsidies and those of NME 'interventions'.

At footnote 515 of its report, the AB stated that '[t]he use of surrogate, market economy values presumptively puts the producer in the position of having *unsubsidized* costs of production' (emphasis added). In other words, the AB seems to have reasoned that, as the surrogate country methodology uses 'normal value' price or cost data from a surrogate market economy country, such price or cost data are 'market-based' not only in the sense of having been taken from a market economy country but also in the sense of reflecting subsidy-free prices and costs in the NME itself.

Unfortunately, this conclusion is plain wrong. Prices and costs from a surrogate market economy with no subsidization are not the same as prices and costs from an NME where subsidization has been offset. This is so for the simple reason that, as a general rule, subsidies are granted to bring the costs of an uncompetitive industry (in a subsidizing country) down to the level of the costs of a competitive industry (in a nonsubsidizing country). Accordingly, an upward adjustment in costs to infer subsidy-free levels would be null for a country that does not subsidize, whereas it would be much greater than zero for a country that subsidizes, such as China. Hence, by holding that, once NME AD duties are in place, there is no need to impose additionally a CVD on imports of Chinese origin to adjust Chinese costs upwards to their subsidy-free level, the AB simply assumed the effects of subsidization in China away.[42]

To say that the AB's articulation of the theory of 'double remedies' is marred by analytical confusion would be an understatement.

### *Legal assessment*

Overturning the panel, the AB found that the concurrent application of CVDs offsetting production subsidies and NME AD duties is inconsistent with Article 19.3 of the SCM Agreement. Article 19.3 does not speak to this issue, but the AB reached this finding by interpreting expansively the term 'appropriate' in the phrase 'appropriate amounts' in that provision.

[39] See THINK! DESK China Research & Consulting, *Assessment of the Normative and Policy Framework Governing the Chinese Economy and Its Impact on International Competition*, 25 June 2015, 46. China also grants subsidies in the form of grants, although these are comparatively less common.

[40] For an overview of China's NME regime, see Jorge Miranda, 'How China Did Not Transform into a Market Economy' in James J Nedumpara and Weihuan Zhou (eds), *Non-market Economies in the Global Trading System: The Special Case of China* (Springer 2018) 65–97. See, in addition, Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 Harvard International Law Journa, 1001–1063.

[41] Importantly, as explained in Miranda, ibid, the economic distortions brought about by China's NME interventions cannot be legally treated as subsidies because they do not fall under the definition of this term in the SCM Agreement, as they involve government-enabled cross-subsidies funded by private parties (upstream producers, bank depositors, migrant workers lacking the local residency permit known as *Hukou*, etc.) instead of 'financial contributions' disbursed by the Chinese Government itself.

[42] We do not contend that 'double remedies' is an impossibility. Our point is that the theories espoused by the AB in *US—Anti-Dumping and Countervailing Duties (China)* (n 16) do not raise an appropriate factual scenario for 'double remedies' to emerge.

Article 19 of the SCM Agreement addresses the levying or collection of CVDs, as opposed to the calculation of subsidy rates, in respect of which Article 14 of that Agreement is controlling. In particular, according to Article 19.3:

> *When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case*, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced the subsidies in question or from which undertakings under the terms of this Agreement have been accepted. (Emphasis added)

Article 19.3 starts out with a conditional proposition: 'When a countervailing duty is imposed in respect of any product'. Once this condition is fulfilled, two subsidiary propositions come into play, the first one of which is that CVDs shall be levied in the appropriate amounts in each case. Thus, Article 19.3 distinguishes between the act of imposing (definitive) CVDs, which takes place upon the publication of the final determination reflecting the results of the investigation (including in respect of the calculation of the subsidy rate) and the later-in-time collection of such CVD, upon the subsequent importation of the subject product. Article 14 of the SCM Agreement requires calculating subsidy rates on a recipient-specific basis. Logically, CVDs also have to be levied in the same manner; if not, calculating subsidy rates individually for each subsidy recipient would be pointless. Accordingly, a plain reading of Article 19.3 implies that the purpose of the clause 'such countervailing duty shall be levied … in the appropriate amounts in each case' is simply to require that, once a product becomes subject to CVDs, the CVD collected from each exporter must correspond to the particular subsidy rate set for that exporter.

Importantly, this reading of Article 19.3 is compatible with the fact that the remainder of this provision prohibits foregoing collection of CVDs from exporters in respect of whom affirmative findings of subsidization and injury have been made, except where undertakings have been agreed upon, which is also a collection-related issue.

The AB did not follow this straightforward approach to interpreting 'appropriate amounts' in Article 19.3. Instead, as explained later, the AB turned to interpreting the term 'appropriate' instead of the phrase 'appropriate amounts'. In doing so, it focused on a few dictionary definitions of this term (disregarding others). The AB concluded that the selected definitions were not self-explanatory and went on to find that, to be 'appropriate' within the meaning of Article 19.3, CVDs would have to be consistent with *the purported spirit of other provisions in the SCM Agreement as well*.

In particular, the AB began its interpretative analysis by observing that in the *Shorter Oxford English Dictionary* the '*relevant* dictionary definitions of the term "appropriate" included "proper", "fitting" and "specially suitable ( *for, to*)"'.[43] The alternative definitions of this term in the *Oxford English Dictionary* were '[a]ttached or belonging (*to*) as an attribute, quality or right'; peculiar (*to*); and 'inherent, characteristic'. The AB did not explain why in its view these alternative definitions were irrelevant. Crucially, if the AB had interpreted 'appropriate' as meaning 'attached or belonging to as an attribute, quality or right', it would have been near impossible to escape the conclusion that 'appropriate' in Article 19.3 was shorthand for CVDs that were attached, or belonged as an attribute, to each recipient (because they reflected recipient-specific subsidy rates).

[43] Appellate Body Report, *US-Anti-Dumping and Countervailing Duties (China)*, ibid, para 553 (emphasis added).

Having chosen selectively the dictionary definitions of the term 'appropriate', the AB surmised that the meaning of this term as used in Article 19.3 was not clear and could only be established by reference to 'something else':

> These definitions suggest that what is "appropriate" *is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else*. They suggest some core norm—"proper", "fitting", "suitable"—and at the same time adaptation to particular circumstances.[44]

The AB then turned to using as 'context' six provisions of the SCM Agreement other than Article 19.3 (namely, Articles 10, 19.1, 19.2, 19.4, 21.1, and 32.1). Following this approach, the AB concluded that 'appropriate' in Article 19.3 meant consistent with obligations set forth *in provisions of the SCM Agreement other than Article 19.3*.[45] Against this backdrop, the AB found:

> Under Article 19.3 of the *SCM Agreement*, the appropriateness of the amount of countervailing duties cannot be determined without having regard to anti-dumping duties imposed on the same product to offset the same subsidization. The amount of a countervailing duty cannot be "appropriate" in situations where that duty represents the full amount of the subsidy and where anti-dumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry.[46] (emphasis in original)

Apart from being contrary to Article 31 of the Vienna Convention, by skipping the immediate context of the term involved (Article 19.3 of the SCM Agreement), the AB's interpretation of 'appropriate' in this provision is implausible. If the drafters had intended to institute a requirement that CVDs be 'appropriate' in respect of all of the disciplines set forth in the SCM Agreement, such a requirement would have been embedded in a provision that has far greater prominence than Article 19.3, which, as discussed earlier, addresses collection issues. More importantly, the AB's reading of 'appropriate' in Article 19.3 implies that, even if the substantive requirements under Articles 14 and 15 regarding, respectively, the calculation of subsidy rates and the injury determination are fully complied with, the resulting CVDs may still be found not to be 'appropriate', and this would be so in spite of the absence in Article 19.3 of any language that would provide textual guidance regarding the specific circumstances that would give rise to an infringement of the broad obligation regarding 'appropriateness'.

In summary, in *US—Anti-Dumping and Countervailing Duties (China)*, the AB concluded (based upon flawed reasoning) that the concurrent imposition of NME AD duties and CVDs offsetting production subsidies on imports of Chinese origin was wrong, stumbled upon a term ('appropriate') on the basis of which this action could be banned, and proceeded to interpret this term using as context virtually all of the SCM Agreement except the relevant provision itself.

### The finding regarding the conditions under which Article 14(d) of the SCM Agreement allows relying on ex-country benchmarks in making a benefit determination

Article 14 of the SCM Agreement provides guidance for quantifying subsidies. Since quantifying subsidies requires making a determination as to whether the provision of a financial contribution involved a benefit and this, in turn, requires identifying an appropriate market

[44] ibid, para 552 (emphasis added).
[45] ibid, para 564.
[46] ibid, para 583.

'benchmark', Article 14 provides 'guidelines' in this respect and considers four specific scenarios, one of which concerns identifying a market benchmark in the event of the sale of goods and services, or the purchase of goods, by the government.

Article 14(d) of the SCM Agreement states that, as regards the sale of goods and services, or the purchase of goods, by the government, the market benchmark shall be reflective of 'adequate remuneration' which must be determined 'in relation to prevailing market conditions for the good or service in question in the country of provision or purchase', including prices in the country of provision or purchase ('in-country' prices).

In *US—Softwood Lumber IV*, the AB found that Article 14(d) did not exclude the possibility of using 'ex-country' prices (ie 'something other than private prices in the market of the country of provision') as a market benchmark.[47] The AB further found that a specific situation warranting rejecting in-country prices as a market benchmark would be the government being the sole supplier of the product concerned.[48] A closely related situation would be the government being the predominant supplier such that 'it can affect through its own pricing strategy the prices of private providers … inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices'.[49] Both situations would result in the same 'market distortion and effect on prices'.[50]

In the compliance proceeding in *US—Countervailing Measures (China)*, the AB reiterated that what is required to reject in-country prices as a market benchmark under Article 14(d) is evidence that such prices are distorted, irrespective of whether this situation is attributable to the weight the government has in the market as a supplier: '[W]hile the government's predominant role as the provider of goods may make distortion of in-country prices likely, *it is a finding of "price distortion" that allows an investigating authority to reject those prices*.'[51] This confirmed the earlier finding by the AB in *US—Antidumping and Countervailing Duties (China)* to the effect that '[i]t is, therefore, price distortion that would allow an investigating authority to reject in-country private prices, not the fact that the government is the predominant supplier, *per se*.'[52] We have no quarrel with this legal standard.

Quoting in part from its report in *US—Carbon Steel (India)*, in the compliance proceeding in *US—Countervailing Measures (China)*, the AB also recapitulated its guidance in respect of *the application* of the 'price distortion' legal standard for rejecting in-country prices as a market benchmark under Article 14(d). As explained later, this guidance is not only analytically flawed but is also much narrower than the legal standard involved, which has led to the AB rejecting administrative findings that should have been upheld had such a standard been properly applied. In particular, in the compliance proceeding in *US—Countervailing Measures (China)*, the AB concluded that:

> [P]roposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price as a result of governmental intervention in the market. (Footnote omitted) The required examination may, on the basis of information supplied by petitioners and respondents, or collected by the authority in a countervailing duty investigation, involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as

[47] *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* ('*US—Softwood Lumber IV*'), Report of the Appellate Body, WT/DS257/AB/R, adopted 17 February 2004, para 89. By 'private prices', the AB meant prices in transactions between private parties.

[48] ibid, para 100.

[49] ibid, para 100.

[50] ibid, para 100.

[51] *United States—Countervailing Duty Measures on Certain Products from China, Recourse to Article 21.5 of the DSU by China* ('*US—Countervailing Measures (Article 21.5—China)*'), Report of the Appellate Body, WT/DS437/AB/RW, adopted 15 August 2019, para 5.138 (emphasis added).

[52] Appellate Body Report, *US—Antidumping and Countervailing Duties (China)* (n 16) para 446.

> any entry barriers. It could also require assessing the behaviour of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power resulting in distortion of in-country prices.[53] (Footnote omitted)

There are two fatal problems with this guidance for the application of the legal standard for rejecting in-country prices as a market benchmark under Article 14(d). First, it is plain illogical because it assumes that somehow there can be in-country market-determined prices even where there is pervasive government intervention in the market affecting all in-country prices. Evidently, market-determined prices will not be available where the government intervenes heavily in respect of supply conditions (as happens in certain industrial sectors in China). Second, the guidance involved conceptualizes price distortions as resulting exclusively from the exercise of 'market power' by dominant government suppliers.[54] This is evident in the admonition that establishing the existence of price distortions requires the assessment of entry barriers, the structure of the relevant market, the market share of incumbents, and whether government entities exert market power. However, limiting the test for rejecting in-country prices as a market benchmark to whether government suppliers are dominant and exercise market power is inconsistent with the legal standard concerned which, as noted earlier, is broader and consists of whether in-country private prices are distorted by government intervention, regardless of the form of intervention.

As is all too obvious, the dominant supplier/market power test does not capture the price-distortive effects of industrial planning, although this is the preferred modality of market intervention by China, the complainant in *US—Countervailing Measures.*

In the compliance proceeding in *US—Countervailing Measures (China)*, the panel and the AB examined the benefit redeterminations by the Commerce Department concerning the US CVD investigations on *Oil Country Tubular Goods, Line Pipe*, and *Pressure Pipe*.[55] These products use as their main input, respectively, steel rounds and billets, hot-rolled steel, and stainless steel coil.[56] The Chinese Government intervenes in the Chinese steel industry, which includes the manufacture of the three above-mentioned steel inputs, mainly by means of two legal instruments: the *Steel Policy* (formally known as *Policies for Development of the Iron and Steel Industry*) and the sectoral nationwide development plan (including in recent years the *13th Five-Year Development Plan for the Steel Industry*).

Both instruments require actions by producers that have a direct and significant impact on *supply conditions* in the Chinese steel market. For example, employing equipment with appropriate economies of scale (eg the minimum capacity of blast furnaces should be 1000 cubic metres),[57] achieving minimum technical efficiencies (eg by 2020 no more than 6 tons of water shall be consumed per ton of steel),[58] consolidating production capacity and output (eg by 2020 the market share in the domestic market of the top 10 steel groups should be of at least 70%),[59] and improving the capacity utilization rate (eg up to at least 80% by 2020).[60] All of

[53] Appellate Body Report, *US—Countervailing Measures (Article 21.5—China)* (n 51) para 5.139.

[54] 'Market power' is commonly defined as the ability to affect or influence market prices. See, for example, John Black, Nigar Hashimzade and Gareth Miles, *Oxford Dictionary of Economics* (OUP 2009) 294 ('The ability of an economic agent (firm or consumer) to affect the equilibrium price in a market'); Donald Rutherford, *Routledge Dictionary of Economics* (3rd edn, Routledge 2013) 371 ('A buyer's or seller's ability to influence a market price').

[55] Appellate Body Report, *US—Countervailing Measures (Article 21.5—China)* (n 51) para 5.127.

[56] ibid, para 5.169.

[57] See art 12 of the *Steel Policy* (an English version of the *Steel Policy* is available at <http://www.asianlii.org/cn/legis/cen/laws/pfdoiasi501/> accessed 19 January 2023).

[58] See art 5 of the *Steel Policy*.

[59] See art 3 of the *Steel Policy*.

[60] See Government of China, available at Government of China, Ministry of Industry and Information Technology, Iron and Steel Industry Adjustment and Upgrade Plan (2016–2020), 13. <http://www.miit.gov.cn/n1146295/n1652858/n1652930/n3757016/c5353943/part/5353954.doc> accessed 22 June 2023.

these actions should have reduced production costs. It is well established in economic theory that '[a]s a firm's cost falls, it is usually willing to supply more, holding price and other factors constant'; '[t]hus, factors that affect cost also affect supply.'[61] Accordingly, the reduction in production costs brought about by industrial planning should have expanded domestic supply, making domestic prices lower than they would otherwise have been. It is hard to see how the combination of the facts described earlier (as to how industrial planning governs the conduct of the Chinese steel industry at large) with basic microeconomic theory would not amount to *prima facie* evidence that the Chinese domestic prices of the above-mentioned three steel inputs are distorted because of heavy government intervention on supply conditions.

Although in its redeterminations Commerce relied on similar arguments,[62] the AB upheld the panel's decision that, in the three investigations concerned, Commerce 'failed to explain … how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price'.[63] The AB insisted on the utility of comparisons against market-based prices,[64] although this approach is impracticable where, as in the Chinese steel industry, all in-country prices are distorted because of heavy government intervention on supply conditions. The AB also chastised Commerce for not having addressed 'how government involvement influenced *pricing decisions* regarding the inputs at issue and actually resulted in price distortion',[65] in spite of the fact that proof of government involvement in actual pricing decisions is unnecessary when heavy government intervention on supply conditions affects prices directly.[66] Crucially, the AB also made clear that, in its view, the government distorts prices through the exercise of market power by dominant government suppliers,[67] although a test along these lines is inconsistent with its own declaration that the legal standard for rejecting in-country private prices as a market benchmark under Article 14(d) is whether such prices are affected by government intervention in the market, whatever the modality of that intervention is.

## The finding in respect of whether GATT Article XIX:1(a) and Article 2.1 of the Safeguards Agreement apply cumulatively

Both GATT Article XIX:1(a) and Article 2.1 of the Safeguards Agreement set out requirements for the application of safeguard measures. However, the requirements under GATT Article XIX:1(a) are far more stringent than those under Article 2.1 of the Safeguards Agreement. In particular, under GATT Article XIX:1(a), the application of safeguard measures is contingent upon demonstrating the existence of two 'chains' of causation. First, there must be an 'import surge' causing (or threatening to cause) 'serious injury' to the domestic industry (that produces

[61] James A Brander and Jeffrey M Perloff, *Managerial Economics and Strategy* (2nd edn, Global Edition, Pearson 2019) 39.

[62] Appellate Body Report, *US—Countervailing Measures (Article 21.5—China)* (n 51) para 5.182 ('[t]he USDOC drew an overall inference that prices in all specific input markets are distorted from its conclusions that … the steel sector as a whole was distorted by government intervention').

[63] Appellate Body Report, *US—Countervailing Duties (Article 21.5—China)*, para 5.203.

[64] Appellate Body Report, *US—Countervailing Measures (Article 21.5—China)* (n 51), para 5.154.

[65] ibid, para 5.172 (emphasis added).

[66] Another reason for concern is the AB's insistence that evidence of government intervention in the Chinese steel market in general is insufficient as evidence of government intervention in the specific markets for the inputs concerned, although all three inputs are steel products subject to the *Steel Policy* and the *Steel Development Plan*. For instance, in para 5.169 of its 21.5 report, the AB referred approvingly to the panel's observation that 'the information collected and summarized in the Benchmark Memorandum focuses on *government intervention* in … the steel sector generally, *rather than on the specific input markets* at issue' (emphasis in original). However, as neither the *Steel Policy* nor the *Steel Development Plan* excludes the three steel inputs concerned, there was no basis to think that the three products could have been unaffected by the controls posed by both instruments on supply conditions.

[67] Appellate Body Report, *US—Countervailing Measures (Article 21.5—China)* (n 51), para 5.180 ('[Commerce] focused on establishing price distortion based on the pervasiveness of government intervention in China's steel sector, rather on the exercise of market power by the [Government of China] and therefore on the question of whether the government could effectively determine prices in the input markets in question').

a product that is 'like' or 'directly competitive' with the imported good).[68] Second, this 'import surge' should be the result of both 'unforeseen developments' and 'the effect of the obligations incurred … under [GATT], including tariff concessions'.[69] By contrast, under Article 2.1 of the Safeguards Agreement, the application of safeguard measures simply requires that there be an 'import surge' causing (or threatening to cause) 'serious injury' to the domestic industry. Thus, textually, Article 2.1 of the Safeguards Agreement does not make safeguard measures conditional upon tracing back the 'import surge' to 'unforeseen developments' and having complied with obligations under the GATT.

The panel in *Argentina—Footwear* addressed whether the 'unforeseen developments' requirement in GATT Article XIX:1(a) was applicable under WTO rules. The panel found that Member obligations in respect of the application of safeguard measures were self-contained in the Agreement on Safeguards.[70] That the requirement relating to 'unforeseen developments' was absent from Article 2.1 of the latter indicated that it had been 'deliberatively' excluded from this provision by the Uruguay Round negotiators.[71] The panel added that, while it took no position as to whether there was a conflict between Article XIX:1(a) and Article 2.1 of the Safeguards Agreement, if there were one, Article 2.1 would override Article XIX:1(a), pursuant to the General Interpretative Note to Annex 1A of the WTO Agreement containing the multilateral agreements on trade in goods ('the General Interpretative Note').[72]

The panel's decision was overturned on appeal. The AB found that the requirements under GATT Article XIX:1(a) and those under Article 2.1 of the Safeguards Agreement applied cumulatively because there was no conflict between these two provisions.[73] The AB remarked that if the Uruguay Round negotiators had intended to 'expressly omit' the requirement of 'unforeseen developments', they 'would and could have said so' in the text of the Safeguards Agreement.[74] This remark is perplexing because 'omissions', by their very nature, are not verbalized.

The question is whether there were any prior cases where the AB found that two WTO provisions did *not* apply cumulatively in circumstances that were analogous to those involved in *Argentina—Footwear*. The AB's decision in *Japan—Alcoholic Beverages II*, in respect of GATT Article III:1 not coming into play, by implication, in the context of a claim under the first sentence of GATT Article III:2, is one such case.

GATT Article III:1 requires 'national treatment' by providing that internal measures (including 'internal taxes and other internal charges', 'laws, regulations and requirements', and 'internal quantitative regulations') 'should not be applied to imported or domestic products so as to afford protection to domestic production'. GATT Articles III:2, III:4, and III:5 elaborate upon this general principle. GATT Article III:2 discusses the case of internal taxes and other internal charges.

[68] The 'import surge' involved is formally characterized as a product 'being imported in such increased quantities and under such conditions as to cause serious injury to the domestic industry'.

[69] 'Unforeseen developments' would be developments that could have not been anticipated at the time the relevant WTO tariff concession was granted.

[70] *Argentina—Safeguard Measures on Imports of Footwear* ('*Argentina—Footwear*'), Report of the Panel, WT/DS121/R, adopted 12 January 2000, para 8.67.

[71] ibid, para 8.67. This is plausible, because the drafters may have intended to soften the requirements for the application of safeguard measures in exchange for Members' renunciation of voluntary export restraints ('VERs'), which were quite common at the time the Uruguay Round negotiations took place. In fact, art 11.1(b) of the Safeguards Agreement expressly bans VERs and similar measures.

[72] Panel Report, *Argentina—Footwear*, ibid, para 8.68. The General Interpretative Note provides that '[i]n the event of conflict between a provision of [GATT 1994] and a provision of another agreement in Annex 1A to the [WTO Agreement], the provision of the other agreement shall prevail to the extent of conflict.'

[73] *Argentina—Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, adopted 12 January 2000, para 89. For the record, the panel in *Korea—Diary* reached the same conclusion but a completely different result. In particular, it found that the language concerning 'unforeseen developments' in GATT art XIX only stood for 'context' as to why safeguard actions would not erode the value of tariff and other GATT concessions. Since the phrase 'unforeseen developments' did 'not specify anything additional as to the conditions under which measures pursuant to Article XIX may be applied', there was no conflict between GATT art XIX and art 2.1 of the Safeguards Agreement. See *Korea—Definitive Safeguard Measure on Imports of Certain Diary Products*, Report of the Panel, WT/DS98/R, adopted 12 January 2000, para 7.45.

[74] Appellate Body Report, *Argentina—Footwear* (n 70) para 88.

In particular, according to the first sentence of GATT Article III:2, imports 'shall not be subject … to internal taxes or other internal charges … in excess of those applied … to like domestic products'.

In the appeal in *Japan—Alcoholic Beverages II*, Japan claimed that complying with the first sentence of GATT Article III:2 required examining not only whether the imported products at issue were subject to internal taxes higher than those levied on like domestic products but also whether the challenged tax measure afforded protection to domestic production.[75] In other words, that the first sentence of GATT Article III:2 (requiring that imports are not subject to internal taxes higher than those collected on like products of domestic origin), by implication, incorporated the general obligation set forth in GATT Article III:1 (banning applying domestic measures, including internal taxes, so as to provide protection to local production). While the AB acknowledged that the general obligation in GATT Article III:1 informed the rest of GATT Article III, it rejected Japan's claim on the grounds that in the first sentence of Article III:2:

> There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures "so as to afford protection". *This omission must have some meaning.*[76]

Thus, in *Japan—Alcoholic Beverages II* the AB ruled that, because the language in GATT Article III:1 was neither transcribed nor invoked in the first sentence of GATT Article III:2, the general obligation in GATT Article III:1 did not apply in the context of a claim under the first sentence of GATT Article III:2, *notwithstanding that the two provisions were not in conflict with each other and could be read cumulatively*. Consistent with such reasoning, in *Argentina—Footwear* the AB should have ruled that the requirements in GATT Article XIX:1(a) were not operative under WTO rules. Moreover, it is anybody's guess why in *Japan—Alcoholic Beverages II* the AB did not hesitate to rely on the 'omissions must have some meaning' formula irrespective of the fact that the omission involved had not been verbalized (the test on the basis of which it rejected applying that same formula in *Argentina—Footwear*). Regrettably, the AB also failed to provide an explanation as to how *Argentina—Footwear* could be distinguished from *Japan—Alcoholic Beverages II*).

## PRECEDENT IN INTERNATIONAL, MUNICIPAL, AND WTO LAW

### Introduction

Scholarly debates about the role of precedent in judicial adjudication traditionally revolve around two main doctrines. *Stare decisis* or binding precedent is the harder doctrine of precedent. Consistent with this doctrine, which prizes above all continuity and stability, 'later courts are bound to follow precedents irrespective of whether they think the earlier court made the right decision'.[77] According to commentators of the common law world, *stare decisis* implies that precedents equate to statutory norms and should be conceptualized, therefore, as a means for courts to make rule-based decisions.[78] Other common law scholars, who endorse the second, softer doctrine, consider that the doctrine of precedent merely 'requir[es] later courts to treat earlier cases as correctly decided'.[79] In other words, under the harder *stare decisis* doctrine, a

[75] Appellate Body Report, *Japan—Alcoholic Beverages II* (n 27) 3 and 8.
[76] ibid 18 (emphasis added).
[77] Grant Lamond, 'Precedent' (2007) 2 Philosophy Compass 699.
[78] See, for example, Sir Rupert Cross and JW Harris, *Precedent in English Law* (4th edn, OUP 1991); Neil MacCormick, 'Why Cases Have Rationes and What These Are' in (), *Precedent in Law* (Clarendon Press 1987) 170; John Bell, 'Sources of Law' (2018) 77 The Cambridge Law Journal 40; Larry Alexander, 'Constrained by Precedent' (1989) 63 Southern California Law Review 1–64; Fred Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life, 181–187* (1991) Oxford University Press, <https://academic.oup.com/book/4020>.
[79] Grant Lamond, 'Do Precedents Create Rules?' (2005) 11 Legal Theory, 1–26.

precedent is enforceable as a statutory norm would be, whereas the softer doctrine posits that a precedent is influential to future findings not because it was properly adjudicated, but because it has the force of a statutory norm.

The approach taken depends on how a particular legal system values earlier cases jurisprudentially: as either a 'source of law' or a 'source of reason'. In the *stare decisis* approach, previous findings, however questionable, constitute a source of law in and of themselves, with the only requirement that the case at hand must be similar to the earlier decision. Conversely, the alternative approach ascribes precedential value solely to the logic underpinning prior findings. In this case, if a decision was rightly decided, then it should be adhered to unless the new judge presents a legal reasoning that is at least as compelling as the one contained in the earlier decision.[80] In practice, international courts have shown a marked preference for this 'source of reason' approach over the stricter *stare decisis* doctrine.

The flawed legal reasoning deployed by the AB in the cases discussed in the previous section would not pose a systemic risk for the WTO dispute settlement system were it not for the predominant role that, in practice, the AB has attributed to its own decisions and legal interpretations. As will be discussed in this section, while in its early decisions the AB expressly dismissed the existence of a doctrine of *stare decisis*, its more contemporary practice evidences that its judicial reasoning carries a binding force that surpasses even the one afforded to case law in municipal systems where jurisprudence is a source of law. This raises the question of whether an excessively strict jurisprudential tradition has contributed to the current AB crisis.[81]

Before proceeding further, it is worth highlighting Pellet's commentary on Article 38 of the International Court of Justice (ICJ) Statute, where it is noted that 'the role of jurisprudence in the development of international law would merit a comprehensive analysis, rather than the brief examination it will necessarily receive here'.[82] The same applies here. It is not the objective of this article to theorize in depth about the role of precedent in international law, but simply to provide a framework for the discussion of precedent in this article and, as such, situate the WTO's jurisprudential practice in the right context.

## Precedent in international law

The theory of binding precedent does not align well with international law.[83] Two provisions in the Statute of the ICJ ('ICJ Statute'), the most representative international court, expressly decline the doctrine of *stare decisis*. According to Article 38(d) of the ICJ Statute, judicial decisions are not a source of law but 'subsidiary means for the determination of rules of law'. In other words, as Pellet has noted, judicial decisions 'are not sources of law … [but] documentary "sources" indicating where the Court can find evidence of the existence of the rules it is bound to'.[84] Article 59 of the ICJ Statute further provides that '[t]he decision of the Court has

[80] ibid. Importantly, the 'source of reason' approach is not exclusive to civil law systems. In common law systems, earlier cases decided by lower courts are not binding on higher courts and hence their utility, from the perspective of a higher court, is limited to 'persuasive authority'.

[81] Jeffrey Kucik, Lauren Peritz and Sergio Puig, 'Legalization and Compliance: How Judicial Activity Undercuts the Global Trade Regime' (2023) 53 British Journal of Political Science 221.

[82] Allain Pellet, 'Article 38' in Andreas Zimmerman, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford 2006) 784.

[83] GI Tunkin and Edited and translated by William E Butler, *Theory of International Law* (Harvard UP 1974) 182; G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 Journal of International Dispute Settlement 5.

[84] Pellet (n 82) 784. It is worth noting that, with respect to the question of whether jurisprudence or judicial decisions constitute a source of law (if only a 'secondary' or 'subsidiary' one) remains a lively debate. In addition to Pellet, see, for example, George Abi-Saab, *De la jurisprudence: quelques réflexions sur son rôle dans le développement du droit international*, in Marcelo G Kohen and Magnus Jesko Langer, *Le développement du droit international: Réflexions d'un demi-siècle* (Graduate Institute Publications, Presses Universitaires de France 2013) 97–106; Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019). Harlan Grant Cohen, 'Theorizing Precedent in International Law (2 April 2014)' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP, forthcoming) SSRN: <https://ssrn.com/abstract=2419706>.

no binding force except between the parties and in respect of that particular case.' In other words, at least in paper, the doctrine of *stare decisis* is inapplicable before the ICJ.[85]

Judicial decisions in the context of ICJ procedures do, however, carry a general jurisprudential weigh.[86] As Judge Jessup stated in his separate opinion in the *Barcelona Traction* case, 'the influence of the Court's decisions is wider than their binding force'.[87]

Data show that not only has the frequency with which the ICJ cites itself or the PCIJ has increased overtime—to the point that it has become a generalized practice—but the frequency with which it cites other courts' decisions to strengthen its own argumentation is also on the rise. According to Alschner and Charlotin, between 1948 and 2013 the ICJ relied on precedents in at least 80% of its decisions.[88] Although it took some years for the ICJ to adopt a generalized practice of citing precedents, the ICJ now references prior ICJ or Permanent Court of International Justice decisions in every case it hears. Furthermore, during recent years, the ICJ has increasingly used external case law as material support to its reasoning.

According to de Brabandere, the practice of expressly citing other courts' decisions blossomed since the ICJ's *Israeli Wall* advisory opinion of 2004.[89] The ICJ has since then cited decisions rendered by arbitral tribunals, the WTO AB, the International Tribunal on the Law of the Sea, the International Criminal Tribunal for the former Yugoslavia, the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the European Court of Human Rights (ECtHR), among others.[90]

Arguing on precedent is also a rooted practice in litigation before the Court of Justice of the European Court, the ECtHR, the International Criminal Court, and international trade adjudicative bodies. In fact, a growing community of empirical legal researchers is exploring this phenomenon through the analysis of citation networks within and between international adjudicative systems.[91] Jurisprudence is an inescapable by-product of virtually any dispute settlement system, and this serves to explain why the citation of precedents has become a deeply ingrained practice in international adjudication.

The fact that international adjudicative bodies have the authority to clarify the law through interpretation, however, does not imply that *stare decisis* applies. As Shahabuddeen has rightly noted, 'the existence of *stare decisis* is not a precondition to the creation of judge-made law'.[92] It is very much possible for a court to clarify a rule, ultimately leading to a deeper understanding

[85] See also M Shahabuddeen, 'Stare decisis' in *Precedent in the World Court*, Hersch Lauterpacht Memorial Lectures (CUP 1996) 97–109, Cambridge University Press. doi:10.1017/CBO9780511720840.010. See Guillaume (n 83) <https://www.cambridge.org/core/books/precedent-in-the-world-court/95D0F9AB026791E7C26669E9BD4BDC9A#fndtn-contents>.

[86] For example, the ICJ in *Land and Maritime Boundary between Cameroon and Nigeria* acknowledged that, 'It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.' See *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports 1998, 275, para 28.

[87] *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, 3 (Sep Op Judge Jessup).

[88] The proportion involved could be even higher; however, in the ICJ's early years, which account for the remaining 20% of decisions, there was no practice of memorializing in writing reliance on past rulings. See Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29 European Journal of International Law 83.

[89] Eric De Brabandere, 'The Use of Precedent and External Case-Law by the International Court of Justice and the International Tribunal for the Law of the Sea' (2016) 15 The Law and Practice of International Courts and Tribunals 24–55.

[90] ibid.

[91] See, for example, Alschner and Charlotin (n 88); Chanya Punyakumpol, 'The Evolution and Current Status of De Facto Stare Decisis in International Trade and Investment Tribunals' (2019) <http://repository.graduateinstitute.ch/record/297451>; Jeffrey Kucik and Sergio Puig, 'Extending Trade Law Precedent' (2021) 54 Vanderbilt Journal of Transnational Law 539; see Kucik, Peritz and Puig (n 81); Joost Pauwelyn, 'Minority Rules: Precedent and Participation Before the WTO Appellate Body' in Henrik Palmer Olsen, Joanna Jemielniak and Laura Nielsen (eds), *Establishing Judicial Authority in International Economic Law* (2016) (Cambridge: Cambridge University Press, 2016) 141–172; Niccolò Ridi, 'The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 Journal of International Dispute Settlement 200; Atieh Mirshahvalad and others, 'Significant Communities in Large Sparse Networks' (2012) 7 PLoS One e33721; Jorge C Leitão, Sune Lehmann and Henrik Palmer Olsen, 'Quantifying Long-Term Impact of Court Decisions' (2019) 4 Applied Network Science 3; Stewart Manley, 'Referencing Patterns at the International Criminal Court' (2016) 27 European Journal of International Law 191.

[92] Shahabuddeen (n 85).

of such rule, without an interpretation becoming binding in subsequent cases. In the words of Shahabuddeen, 'it is possible to hold that a decision creates law without necessarily implying that stare decisis applies'.[93] The notions of judicial law-making and *stare decisis* should not be mixed up.

## Precedent in municipal law

Reliance on precedent is also a widespread practice in national legal doctrines, albeit there exist significant variations as to whether precedents carry binding or merely persuasive force. There is no doubt that precedent plays a predominant role in the common law tradition, where prior cases serve as a primary source of law and provide a formal legal basis to make judicial decisions in subsequent cases. In civil law countries, judges typically follow a jurisprudential tradition whereby precedents, while not legally binding, are nonetheless considered and do carry persuasive force. The longer a precedent has been in place consistently, the more persuasive that precedent becomes. This is what the French call '*jurisprudence constante*'. Similarly, the role of precedent in both Islamic[94] and socialist countries[95] is also fundamental. Precedents play therefore an essential role in virtually any national legal system, and they are unavoidable.

In this section, we focus our analysis on two countries: the USA (a common law country) and Mexico (a civil law country). Both of these countries maintain the tradition of *stare decisis* (ie in both of them, jurisprudence is binding and a formal source of law). Our focus on these two countries serves the purpose of illustrating two distinct models of binding precedent, one more rigid than the other, and then utilizing these two models as a benchmark to expound how far the AB has reached out in developing its own jurisprudential tradition.[96]

### *The USA*

*Stare decisis* is a fundamental principle of the US legal system. According to commentators who have written about the origins of this doctrine, precedents embody 'a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments'.[97] Even in the common law tradition, however, the *stare decisis* doctrine is not absolute as it allows judges to refrain from applying precedents 'when the former decision is manifestly absurd or unjust' or 'has been erroneously determined'.[98]

Under US law, specifically, *stare decisis* applies to rulings by both the Supreme Court and appeal courts. Nevertheless, a US court may overrule another court or even its own precedent

[93] ibid.

[94] Abdul Karim Aldohni, *The Legal and Regulatory Aspects of Islamic Banking: A Comparative Look at the United Kingdom and Malaysia* (Routledge 2011).

[95] Shucheng Wang, 'Guiding Cases and Bureaucratization of Judicial Precedents in China' (2019) 14 University of Pennsylvania Asian Law Review 96–135.

[96] Japan and France follow two other models of *stare decisis*. Japan endorses the doctrine of *stare decisis* but only in certain narrow contexts, whereas in France *stare decisis* applies but only on a *de facto* basis. Iimura, Takabayashi, and Rademacher report that Japan has a civil law system where technically *stare decisis* only applies to decisions by the Supreme Court. However, as a practical matter decisions by lower courts are routinely relied upon in adjudication and thus 'play a vital role in understanding and interpreting codified statutes'. See T Iimura, R Takabayashi and C Rademacher, 'The Binding Nature of Court Decisions in Japan's Civil Law System' (*Stanford Law School China Guiding Cases Project*, 30 June 2015) 2, 4, and 8 <http://web.archive.org/web/20170518183001/http://cgc.law.stanford.edu/commentaries/14-iimura-takabayashi-rademacher> accessed 22 June 2023. In turn, according to Cohen-Tanugi, the French version of jurisprudence results fundamentally from the duty on the part of courts to state clearly the reasons supporting a judgment ('devoir de motivation'). Thus, 'French judges never expressly base their decisions upon earlier judgements, but instead follow prior interpretations and arguments and any resulting legal principles'. In view that jurisprudence operates only on a *de facto* basis, 'French judges can always reverse prior *jurisprudence*, even decisions by higher courts'. See Laurent Cohen-Tanugi, 'Case Law in a Legal System without Binding Precedent: The French Example' (*Stanford Law School China Guiding Cases Project*, 29 February 2016) 2–12. <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/02/CGCP-English-Commentary-17-Partner-Cohen-Tanugi.pdf> accessed 22 November 2020.

[97] William Blackstone, *Commentaries on the Laws of England*, vol 1 (Clarendon Press, 1765, facsimile version Legal Classics Library, 1983).

[98] ibid.

provided there is a 'special justification' that warrants doing so.[99] Factors that are relevant in assessing whether such 'special justification' exists include 'workability', which involves assessing whether the precedent concerned has 'tended to generate inconsistent applications, fostered unclarity and uncertainty, or proven difficult to manage in any kind of principled way'[100] or led to 'nebulous, vague … standards not well-rooted in legal texts….'[101] Other factors justifying departing from precedent include the quality of the reasoning behind a decision,[102] and a precedent having become an outlier compared to other decisions.[103] Additionally, less precedential power is assigned to cases that are 'decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of decisions'.[104]

In summary, while the USA adheres to the practice of *stare decisis*, its legal system contemplates a safety valve mechanism in the form of well-defined criteria to remedy situations in which a precedent, or line of precedents, is flawed (because it is vague or not anchored clearly in the law) or is way out of line with related decisions. In other words, even in common law systems, the *stare decisis* policy has its limits.

### *Mexico*

*Stare decisis* is not exclusive to common law countries. Mexico, a civil law country, maintains a sophisticated legal framework governing the creation and treatment of binding precedent. Binding precedent in Mexico results from the interpretation of constitutional norms by the Supreme Court (and in certain cases, by the Collegiate Circuit Courts), and of federal laws by the Collegiate Circuit Courts.[105]

In Mexico, there are three tracks to create binding jurisprudence. The first one is known as 'jurisprudence by reiteration of criteria' ('*jurisprudencia por reiteración de criterios*').[106] Through this method, binding jurisprudence is created when five consecutive rationales or interpretations are rendered uninterruptedly by either the Collegiate Circuit Courts or a simple majority at the Supreme Court. The second method is known as 'jurisprudence by resolution of a contradiction' ('*jurisprudencia por contradicción de tesis*') and accrues from the power that the Supreme Court has to resolve opposite rationales or interpretations rendered by separate Collegiate Circuit Courts. The resulting rationale or interpretation becomes jurisprudence. The third method is known as 'jurisprudence by compulsory precedents' ('*jurisprudencia por precedentes obligatorios*'). Under this method, the reasons that justify the decisions issued by the Supreme Court constitute binding precedent for all judicial authorities in the country (but not the Supreme

[99] John M Walker, Jr, 'The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effects' (*Stanford Law School China Guiding Cases Project*, 29 February 2016) 4 <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/02/CGCP-English-Commentary-15-Judge-Walker.pdf> accessed 4 June 2020.

[100] ibid 5 citing Michael S Paulsen, 'Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?' (2008) 86 North Carolina Law Review 1175.

[101] Walker, ibid, 5 citing Paulsen, ibid 1173.

[102] See, for example, *W. Va. State Bd. of Educ. v Barnette* (1943) 319 US 624, 636–42, in which the Supreme Court overruled the 3-year-old decision in *Minersville School District v Gobitis* (1940) 310 US 586.

[103] See, for example, *Adarand Constructors, Inc. v Peña* (1995) 515 US 200, 233–34 (overruling *Metro Broad., Inc. v FCC* (1990) 497 US 547). 'Stare Decisis Factors', *LII/Legal Information Institute* <https://www.law.cornell.edu/constitution-conan/article-3/section-1/stare-decisis-factors> accessed 23 November 2022.

[104] Walker (n 99) 4 citing to *Payne v Tennessee* (1991) 501 US 808, 828–29.

[105] The Mexican model contrasts with the French model, where precedents are applied but are only *de facto* binding and not *de jure* binding. Indeed, in France, for a precedent to become *de facto* binding, jurisprudence *constante* must be attained in the form of a consistent series of decisions rendered in the same sense. A single interpretation, even from the highest court, is not binding in and of itself. The longer the line of decisions, and the more consistent these decisions are, the more jurisprudential value precedents will carry.

[106] In a communication to the WTO General Council, Honduras characterized the approach of creating binding jurisprudence contingent upon reaching several repetitive findings as a 'rule of reiteration' and observed that this approach reflects the Roman law principle *of rerum perpetuo similiter iudicatarum auctoritas vim legis obtinere debet* (which loosely translates as 'the authority of court decisions in cases that are always solved in the same way must have the force of law'). Honduras also observed that this 'rule of reiteration' is common in civil law countries. See *Fostering a Discussion on the Functioning of the Appellate Body—Addressing the Issue of Precedent: Communication from Honduras*, WT/GC/W/761, circulated on 4 February 2019, para 2.3b.

Court itself) when taken by a 'super' majority.[107] Crucially, Mexican law expressly dictates that *obiter dicta* shall not become jurisprudence.[108]

The Mexican approach to binding precedent allows judges to render dissenting and separate opinions whenever discrepancies with a majority decision or legal reasoning arise. Unlike the USA' system, Mexico's lacks a mechanism to amend or abandon a binding precedent where the underlying rationale is deficient or has proven to be unworkable. This problem, however, is alleviated by the fact that binding precedent is not typically established through a single ruling, and in instances where it is (at the Supreme Court level), a 'super' majority is required for it to be binding. Furthermore, the Mexican system explicitly excludes *obiter dicta* from being considered as binding precedent.

## Precedent in WTO law

The WTO adjudicative bodies have the power to interpret WTO norms. This authority originates from Article 3.2 of the DSU, according to which WTO tribunals have the power to 'clarify [WTO provisions] in accordance with customary rules of interpretation of public international law'. This authority is subject to the proviso that '[r]ecommendations and rulings by the DSB cannot add or diminish the rights and obligations provided in the covered agreements.' Furthermore, DSU Article 3.2 characterizes the WTO dispute settlement system as 'a central element in providing security and predictability to the multilateral trading system'.

Compared to its early years, the position of the AB on precedent has radically hardened. Originally, the AB treated precedents as a 'source of reason' (and not as a source of law), but in later practice, AB precedents gained the status of source of law, indicating a fundamental shift in the way the AB conceptualizes its interpretative powers. This evolution can be best illustrated by looking into two polar cases: *Japan—Alcoholic Beverages II* and *US—Stainless Steel (Mexico)*.

### *The early era: precedents as 'source of reason'*

In *Japan—Alcoholic Beverages II*, the AB summarized the views of the *GATT Contracting Parties* in respect of the legal implications of *adopted (GATT) panel reports*:

> The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.[109]

In that same dispute, as regards what *Members* could make of *adopted GATT panel reports*, the AB stated the following:

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They *create legitimate expectations among WTO Members*, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute.[110]

[107] Eight Supreme Court Justices out of 11 need to vote favourably. See art 94, para 12, of Mexico's Constitution; art 222, Law on Amparo.
[108] art 222, Law on Amparo.
[109] Appellate Body Report, *Japan—Alcoholic Beverages II* (n 27) 13.
[110] ibid 14 (emphasis added).

In the compliance proceeding in *US-Shrimp (Malaysia)*, the AB observed that its finding in *Japan—Alcoholic Beverages II* as regards the implications of adopted GATT panel reports was applicable to both *adopted WTO panel reports* and *adopted AB reports*.[111]

In *Japan—Alcoholic Beverages II*, the AB also discussed whether *adopted WTO panel reports* provided definitive interpretations of the WTO agreements. The AB declared emphatically that this was *not* the case because the power to produce such interpretations rested with Members. In particular, the AB observed that:

> Article IX:2 of the WTO Agreement provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.' Article IX:2 provides further that such decisions 'shall be taken by a three-fourths majority of the Members'. The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that *such authority does not exist by implication or by inadvertence elsewhere*.[112]

Thus, the AB was originally of the view that adopted GATT panel reports, WTO panel reports, and AB reports were not binding other than for purposes of resolving the dispute at hand and that, as regards subsequent disputes, the function of adopted dispute settlement reports was simply to 'create legitimate expectations *among Members*' as to how their rights and obligations would be interpreted.[113] The AB also expressly acknowledged that only Members could produce definitive interpretations of the WTO Agreements.

Such views about the role of precedent in WTO law were fully consistent with Article 3.2 of the DSU and Article IX:2 of the WTO Agreement. The practice, at that point, was also in line with the legal framework of other international courts, including the ICJ. Paraphrasing the language of Article 38 of the ICJ Statute, adopted dispute settlement reports were regarded as a subsidiary means for the determination of rules of law rather than as a source of law in and of themselves. This approach also aligned with the proposition that prior judicial decisions must only be considered as a 'source of reason' and not as a source of law.

### *The new era: hardline binding precedent*

The AB began to alter its approach towards jurisprudential value in the cases that followed and, by implication, to gradually introduce the doctrine of *stare decisis* into WTO dispute settlement (in a process that, paradoxically, appears to have been heavily influenced by the participation of US law firms in WTO litigation).[114]

In *US—Oil Country Tubular Goods Sunset Review*, the AB tweaked the 'legitimate expectations' requirement to make it applicable *to panels instead of Members*. In particular, the AB

[111] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, Report of the Appellate Body, WT/DS58/AB/RW, adopted 21 November 2001, paras 108 and 109.

[112] Appellate Body Report, *Japan—Alcoholic Beverages II* (n 27) 13 (emphasis added).

[113] The position that the findings in panel and AB reports are binding but only for the Members involved in the dispute at issue is logical since generalizing the applicability of findings through the adoption of case law makes all other Members liable for errors that the defendant may have incurred as regards litigation strategy, legal argumentation, and the submission of evidence. This problem is not fully cured by participation in WTO disputes as a 'third party', even under the modality of 'extended third party' rights, because in such circumstances the defendant remains in control of the process in terms of legal argumentation, etc. Another problem in respect of generalizing the applicability of findings is that frequently findings are driven by specificities in the defendant's practices, and yet WTO adjudicative bodies rarely address how findings remain applicable irrespective of context. A good example of the latter problem are the above-described WTO findings in respect of 'double remedies' which are affected by specificities in US practices as regards the determination of 'normal value' under the surrogate country methodology and the identification of ex-country benchmarks for determining benefit.

[114] Bhala has observed in this connection that the AB 'increasingly functions not simply like a court, as distinct from an arbitral tribunal, but like an *American* court'. See Raj Bhala, 'The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)' (1998) 14 American University International Law Review 848.

stated: 'following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same' (emphasis added).[115]

In *US—Stainless Steel (Mexico)*, the AB went much further by declaring that panels were not free to disregard the legal interpretations and the *ratio decidendi* in previous AB reports.[116] In the AB's view, ensuring security and predictability in the WTO dispute settlement system as mandated by DSU Article 3.2 implied that, 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'.[117] With this restriction in place, panels would be prevented from 'undermin[ing] the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU'.[118]

In making such a statement, the AB failed to explain how the adoption of what effectively constitutes the establishment of a doctrine of binding precedent could be reconciled with having previously recognized, in *Japan—Alcoholic Beverages II*, that, under Article IX:2 of the WTO Agreement, 'the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements' belongs to Members, and this authority 'does not exist by implication or by inadvertence elsewhere'. In fact, the AB's interpretation of the 'security' and 'predictability' language in DSU Article 3.2 as providing a legal basis for binding precedent renders Article IX:2 of the WTO Agreement a nullity, contrary to one of the most basic principles of treaty interpretation.[119]

Even assuming for the sake of argument that the AB is legitimately entitled to render binding interpretations, the version of binding precedent currently upheld by the AB is excessively rigid compared to common law and civil law systems. It confers binding status to any first finding, akin to the US interpretation of the *stare decisis* doctrine does, albeit lacking US-style 'safeguards' (ie unlike the US version, the AB's version of *stare decisis* lacks specific criteria to fine-tune or abandon flawed rationale). The AB's jurisprudential practice is also disproportionately rigid compared to civil law systems such as those in Mexico or France. In these systems, an interpretation by the highest court does not normally become binding.[120] Instead, *jurisprudence constante* or a series of consistent and uninterrupted decisions with the same interpretation must be rendered for it to become binding. In summary, the AB's approach to precedent is not only at odds with Article IX:2 of the WTO Agreement, but it is also stricter than how domestic courts treat precedent in countries where precedents constitute a formal source of law.

[115] *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ('*US—Oil Country Tubular Goods Sunset Review*'), Report of the Appellate Body, WT/DS268/AB/R, adopted 17 December 2004, para 188.

[116] *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico,* Report of the Appellate Body, WT/DS344/AB/R, adopted 20 May 2008 ('*US—Stainless Steel (Mexico) AB Report*'), para 158.

[117] ibid, para 160.

[118] ibid, para 161.

[119] Even though some authors have described the approach currently followed by the AB as the adoption of '*de facto*' binding precedent (see, for instance, James Bacchus and Simon Lester, 'The Rule of Precedent and the Role of the Appellate Body' (2020) 54 Journal of World Trade 191), we believe that AB's current approach can be best characterized as *de jure*, in view that the AB justified it by expressly citing to the 'security' and 'predictability' language in DSU art 3.2. Raj Bhala argues that *de facto stare decisis* has long operated in WTO adjudication (nearly *ab initio*) under the 'legitimate expectations' standard in respect of adopted reports combined with the AB simultaneously upholding the proposition (in its report in *Japan—Alcoholic Beverages II* (n 27) 15) that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'. Bhala is of the view that, as the distinction between the persuasive force of a finding and the obligation to adhere to binding precedent is tenuous, formally WTO tribunals could pretend they were aligning with a persuasive finding when in practice they were complying with binding precedent in all but name, notwithstanding what is provided for under DSU art 3.2 and art IX:2 of the WTO Agreement (see Bhala (n 114) 854, 878, 884 and 885). This might have been so, and the fact remains that, as in a *de facto* system, prior to *US—Oil Country Tubular Goods Sunset Review* (n 115) and *US—Stainless Steel (Mexico)* (n 116), there was no consequence to a panel deviating from AB guidance. Thus, the transition from AB reports as a 'source of reason' to AB reports as a source of law can plausibly be equated to a transition from *de facto stare decisis* to *de jure stare decisis*.

[120] As explained earlier, in the Mexican system reasoning adopted by the Supreme Court becomes jurisprudence only if the decision that rests on such reasoning is adopted by a 'super' majority.

Recent empirical legal research by Kucik and Puig, the first one to use a large dataset to study the AB's use of precedent, provides an important perspective on our evaluation of the AB's hard-line jurisprudential tradition. Their study confirms, as argued in this article, that the AB indeed applies 'a strong yet unwritten norm of the stare decisis doctrine'.[121] Crucially, their dataset demonstrates that, from the totality of times that the AB has applied precedent, in 77% of the times the AB has followed precedent and in 10% it has extended it; conversely, in only 13% of the times has the AB narrowed or distinguished from precedents.[122] In our view, these findings support our proposition that the AB applies precedent in a manner that is overwhelmingly more likely to strengthen precedent than depart from it and, in other words, that the AB's overly strict jurisprudential tradition has played a major role in driving the AB into a corner.

Two additional aspects of the AB's jurisprudential practice are worth criticizing, as discussed in turn.

**The notion of 'cogent reasons' remains undefined**

According to the jurisprudence of the AB, departing from precedent is only permitted when there are 'cogent reasons' to do so. The AB, however, has failed to elaborate on what this term means. This is systemically problematic because, in the absence of an AB-sanctioned definition, statements as in *India—Solar Cells*, where the AB confirmed that 'a panel … can depart for "cogent reasons" from previous Appellate Body findings on the same issue of legal interpretation', are futile.[123] Understanding what scenarios would amount to 'cogent reasons' would help clarify the conditions or principles that, in the AB's view, must be fulfilled to depart from precedent.

In *US—Countervailing and Anti-Dumping Measures (China)*, the panel addressed an argument by the USA that it should disregard the AB's reading of Article 19.3 of the SCM Agreement (banning the imposition of 'double remedies', see the section 'The case studies' of this article) because such reading 'was not persuasive and not in keeping with the covered agreements' which, according to the USA, met the 'cogent reasons' standard for departing from AB findings.[124] The panel came up with its own definition of the term 'cogent reasons' ('reasons that could in appropriate cases justify a panel in adopting a different interpretation')[125] and linked it to four particular scenarios:

> To our minds, "cogent" reasons, i.e. reasons that could in appropriate cases justify a panel in adopting a different interpretation, would encompass, inter alia: (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a factually incorrect premise.[126]

These are all useful scenarios, but none of them contemplated the one scenario specifically raised by the USA; that is, an AB interpretation lacking a clear connection with the relevant

[121] See Kucik and Puig (n 91).
[122] ibid. For a complementary opinion on this study, see Timothy Meyer, 'How to Treat the WTO's Problem with Precedent' (2021) 54 Vanderbilt Journal of Transnational Law 587.
[123] *India—Certain Measures Relating to Solar Cells and Solar Modules*, Report of the Appellate Body, WT/DS456/AB/R, adopted 14 October 2016, para 5.39 (emphasis added).
[124] *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, Report of the Panel, WT/DS449/R, adopted 22 July 2014 ('*US—Countervailing and Anti-Dumping Measures (China) Panel Report*'), para 7.311.
[125] ibid, para 7.317.
[126] ibid, para 7.317.

legal text or, put another way, an error in legal interpretation by the AB. As the panel did not find that there were any 'cogent reasons' to disregard the AB's reading of Article 19.3 of the SCM Agreement,[127] the panel report was not appealed in this respect, and the AB did not review the panel's illustrations of 'cogent reasons'. To date, the meaning of the term 'cogent reasons' remains unclear.

Pressure to define what cogent reason means will emerge from the panel stage once panels apply the 'cogent reasons' rationale to depart from standing precedent, as in such circumstances the AB would be forced to decide whether any such departure was justified. For example, the panel in *US—Differential Pricing Methodology* dismissed the AB's interpretation of the second sentence of Article 2.4.2 of the AD Agreement as banning 'zeroing' even when the dumping margin is calculated pursuant to this provision, and did so on the basis that its reading of the second sentence of Article 2.4.2 was different from the AB's,[128] without actually stating that in its view the AB's interpretation was in error. While the panel acknowledged the 'cogent reasons' standard to depart from precedent, it limited its justification of how it had met this standard to a conclusory statement.[129] Unsurprisingly, Canada appealed this aspect of the panel's findings.[130] The appeal has not been discharged because of the stalemate at the AB. If the AB resumes its duties, this will be the first case where the AB will address whether a panel correctly departed from an interpretation reviewed and endorsed by the AB.

In any case, as long as the AB remains wedded to the notion that it is infallible in matters of legal interpretation, it does not seem likely that it will agree to include its own errors as a 'cogent reason' to depart from previous findings. In a legal system where a single precedent amounts to jurisprudence, and the concept of 'cogent reasons' is the only tool to depart from it, it is only evident how important it is that this concept is defined.[131]

It is worth noting that Roessler has identified a number of instances where the AB has changed its case law while failing to acknowledge having done so.[132] Roessler's assessment is evidence that the AB has not come to terms with the need to explain the reasons for having introduced such changes. This is not helpful from a systemic standpoint. Requiring WTO tribunals, including the AB, to acknowledge when they are departing from previous jurisprudence would help stakeholders infer what 'cogent reasons' means.

**Dissenting and separate opinions**

The AB has generally avoided issuing dissenting and separate (or concurrent) opinions (both of which have been bundled in the WTO context under the term 'separate opinions'), although it

[127] ibid, para 7.326.

[128] *United States—Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, Panel Report, WT/DS534/R, circulated on 9 April 2019, para 7.106.

[129] ibid, para 7.107 ('[w]e have carefully considered these reports of … the Appellate Body, and found convincing or cogent reasons to arrive at conclusions different from those of the Appellate Body …').

[130] Notice of Appeal, *United States—Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS543/R, circulated on 9 April 2019, 2 ('[w]hile the Panel acknowledged the existence of the 'cogent reasons' standard … it failed to provide any such reason that would justify departing from adopted Appellate Body legal interpretations and reasoning').

[131] The ICJ equivalent of the WTO's 'cogent reasons' rationale can be found in *Land and Maritime Boundary between Cameroon and Nigeria*. Here, the ICJ considered that, while there was no question of holding Nigeria to decisions reached in previous cases, '[t]he real question [was] whether, in this case, there [was] cause not to follow the reasoning and conclusions of earlier cases.' Despite the language used by the ICJ in this decision, it is worth noting that, in casu, the holding was supported by a series of earlier decisions where the matter at hand had been consistently resolved in the same sense (much like *jurisprudence constante*). Literally, the Court recalled that the case at hand was not 'an isolated one'. See *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports 1998, 275, paras 27 and 28.

[132] Frieder Roessler, 'Changes in the jurisprudence of the WTO Appellate Body during the Past Twenty Years' (2015) 14 Journal of International Trade Law and Policy, 129'146. Another example of furtive backtracking is the AB's attempt in *US—Carbon Steel (India)* (n 30), described in the section 'The case studies' of this article, to relax the authority-centric definition of 'public body' at the stage of application of this definition.

is worth noting that all such opinions have occurred in recent years, hinting at what in our view is a positive trend vis-à-vis the need to make the work of the AB more sustainable.[133]

In particular, in the compliance proceeding in *US—Countervailing Measures (China)*, a Division Member differed from the majority findings involving the issues of 'public body', 'benefit', and 'specificity'. Interestingly, the views presented by that Member in respect of the AB's interpretation of 'public body' echo the concerns raised in the section 'The case studies' of this article:

> The original mistake was the attempt, in *US – Anti-Dumping and Countervailing Duties (China)*, to define the term 'public body' as an entity that 'possesses, exercises or is vested with governmental authority'. (Footnote omitted) In each subsequent appeal where the issue has been presented, the Appellate Body has treated the phrase 'possesses, exercises or is vested with governmental authority' as a necessary element for determining whether an entity is a public body – albeit while adding criteria that seemed to undermine the role of that element. (Footnote omitted) That has sown confusion as participants and the Appellate Body have struggled to show how situational criteria fit with a rigid and limiting phrase.[134]

In *US—Washing Machines*, a Division Member also parted company with the majority finding in respect of whether 'zeroing' was consistent with the second sentence of Article 2.4.2 of the AD Agreement.[135]

The AB has yet to express its views as to whether 'separate opinions' carry any jurisprudential value (and what such value may be relative to the decision of the majority). While this remains an open question, the legal WTO community must be aware of the benefits and challenges that dissenting and separate opinions have had in other dispute settlement mechanisms.[136] Separate opinions could provide invaluable benefits to the WTO dispute settlement mechanism by presenting alternative viewpoints on contentious issues, especially those that warrant further deliberation by both the adjudicators and the legal community, which could in turn encourage the evolution of the system. Moreover, the presence of separate perspectives could also serve as a testament to the thoroughness of the deliberation process and the diligence that the majority made in tackling any potential objections. In short, they could contribute to the legitimacy of the WTO tribunals.[137]

## SUMMARY AND CONCLUSIONS

This article advances that a number of key AB findings concerning trade remedies are flawed because they address issues that were not raised by the complainants, deliver arbitrary legal interpretations that do not conform with the customary rules of interpretation of public international law, misapply a legal standard that developed by the AB itself, or depart from the reasoning that the AB followed in similar situations. In particular, in *EC—Fasteners* the AB declared the surrogate country methodology for determining the 'normal value' of Chinese exports in AD

[133] For a survey of minority opinions in GATT panel reports, WTO panel reports, and AB reports, see Meredith Kolsky Lewis's paper 'Dissent' (<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141411> accessed 19 January 2023).

[134] Appellate Body Report, *US—Countervailing Measures (Article 21.5—China)* (n 51), para 5.245.

[135] *United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Report of the Appellate Body, WT/DS464/AB/R, adopted 26 September 2016, paras 5.191–5.203.

[136] AD Sarmiento Lamus, 'The Proliferation of Dissenting Opinions in International Law: A Comparative Analysis of the Exercise of the Right to Dissent at the ICJ and IACtHR' (Leiden University 2020); RP Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 International & Comparative Law Quarterly 788.

[137] David Yuratich, 'Towards Separate Opinions at the Court of Justice of the European Union: Lessons in Deliberative Democracy from the International Court of Justice and Elsewhere' in Avidan Kent, Nikos Skoutaris and Jamie Trinidad (eds), *The Future of International Courts* (Routledge 2019). <https://www.taylorfrancis.com/books/edit/10.4324/9780429463280/future-international-courts-avidan-kent-nikos-skoutaris-jamie-trinidad?refId=b8db5862-d46e-428a-b7e2-a76f99b736c1&context=ubx>.

investigations dead by year-end 2016 even though this issue was not in the terms of reference of this dispute. In *US—Anti-Dumping and Countervailing Duties (China)*, the AB interpreted the term 'public body' in a manner that is inconsistent with the immediate context of this term in the SCM Agreement. Similarly, it interpreted the term 'appropriate' in the SCM Agreement by using virtually all of this Agreement as context except for the provision where such term actually appears. In *US—Countervailing Measures (China)*, the AB reduced the test for rejecting in-country private prices as a market benchmark under the SCM Agreement to whether government suppliers are dominant and exercise market power, although the legal standard concerned is broader and consists of whether in-country private prices are distorted by government intervention, no matter the form of intervention. Finally, in *Argentina—Footwear* the AB interpreted Article 2.1 of the Safeguards Agreement in a manner that is inconsistent with the reasoning followed previously by the AB in an analogous situation.

If the AB had not considered such findings as binding, they would not represent a systemic problem.

Moreover, not only binding precedent does not apply elsewhere in international law but the version of binding precedent adopted by the AB is overtly strict as compared to the version of binding precedent municipal systems where jurisprudence is a formal source of law. Over time, the AB abandoned the doctrine of 'legitimate expectations' (on the part of Members) that had characterized the role of precedent in WTO law in its initial years to later endorse the tradition of binding jurisprudence that ultimately led to the crisis the AB is currently undergoing.

At the epicentre of this problem lies the question of whether the AB has the power to create binding precedent. According to Article IX:2 of the WTO Agreement, the AB does not have such power, and Members have never delegated that power to the AB, something which the AB itself has recognized. In its later-day practice, however, the AB has argued that its power to create binding precedent derives from the practical need to ensure a 'coherent and predictable' body of WTO jurisprudence, which in the view of the AB aligns with the goal of WTO dispute settlement to provide 'security and predictability to the multilateral trading' system under Article 3.2 of the DSU.

Unfortunately, such an approach mixes up the legitimate goals set out in Article 3.2 of the DSU with the doctrine of *stare decisis* and would in any event reduce Article IX:2 of the WTO Agreement to inutility. Besides, justifying WTO binding precedent on the grounds that WTO dispute settlement should provide 'security and predictability to the multilateral trading system' is completely discredited by AB findings that are discretionary and capricious, if not downright arbitrary, such as those surveyed in this article.

Bearing this background in mind, the question, therefore, is not why there is an AB crisis, but why this crisis did not happen sooner. Indeed, the story of the AB is not only a story of triumph but also a story of failure.

Where do we go from here?

One option would be to keep the AB in enforced hibernation, indefinitely. We do not subscribe to this option because it ignores the enormous costs (economic and other) of keeping WTO dispute settlement dormant. Another option would consist of carving out trade remedies from the scope of the DSU and GATT Article XXIII (to disable WTO litigation in this area) as *quid pro quo* for the USA agreeing to reinstate the AB. While this action would be eminently practical, we think Members can do better.

We believe that the most straightforward solution to the current stalemate lies in reconciling the interpretative authority granted to Members under Article IX:2 of the WTO Agreement and the interpretative power of WTO tribunals under Article 3.2 of the DSU. *Lex lata* gives both Members and WTO adjudicators the right to interpret WTO norms. Therefore, the distinguishing factor between these two provisions cannot be the nature of what Members or the WTO

adjudicators can do (ie interpret WTO norms), but how the result of that process is internalized from a WTO legal system standpoint (ie either as a source of law or as a 'source of reason'). Reconciling both of these provisions in a manner that is consistent with the principle of effective treaty interpretation would require a statement by Members reiterating that only the interpretations rendered under Article IX:2 of the WTO Agreement constitute a source of law, while acknowledging that legal interpretations by WTO adjudicators should be treated as a 'source of reason' (ie as non-binding precedents, either *de jure* or *de facto*).

Absent such a statement by Members, we make three concrete proposals to achieve a sustainable jurisprudential tradition. First, that the concept of 'cogent reasons' is adequately defined by either the AB or Members. Second, that where a panel or the AB departs from precedent, this is expressly mentioned and justified in the corresponding report so as to flesh out the underlying rationale. Third, that dissenting and separate opinions are embraced as a matter of judicial policy.

At the time of writing, the AB remains nonoperational, and any potential appeals rely on an *ad hoc* mechanism that offers no assurance of appellate court review in the foreseeable future. In fact, as this article underscores, some panel reports have already been appealed into the void and will only be reviewed if and once the AB resumes its functions, which may or may not happen. As the painful crisis of the AB continues, this article has aimed to shed light on one of the main reasons why the AB has found itself in such a crisis, in the hope that WTO adjudicators, including *ad hoc* arbitrators, as well as Members and the relevant legal community, can learn from this experience.