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Extending Trade Law Precedent

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ABSTRACT

Precedent is celebrated as a fundamental feature of dense legal systems as it creates predictability, builds coherence, and enhances the authority of courts and tribunals. But, in international adjudication, precedent can also affect interstate cooperation and ultimately the legitimacy of international organizations. Wary of clashing with state interests, most international dispute settlement systems are designed so that rulings do not set obligatory precedent.

This Article describes the role of precedent in the Appellate Body (AB) of the World Trade Organization (WTO) to explain how precedent can affect compliance with the decisions of international courts and tribunals (ICs). This Article makes two main contributions. First, it shows that there can be precedent without a formal stare decisis *rule. In theory the AB has a rule against binding precedent. Based on empirical evidence, however, this Article shows that the AB has in fact a strong norm of relying on prior decisions. Second, it shows that over time, the*

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widening of legal commitments can result from extending precedent to new situations and this has an impact on the ability or willingness of states to comply. These findings have implications for the WTO and beyond. For the WTO, efforts to better define the value of precedent are unlikely to resolve the general mistrust of the AB and, therefore, this Article proposes other solutions to control the drift resulting from precedent. Beyond the WTO, international scholars should account for the intertemporal dimension of legal commitments in analyzing and explaining compliance with international law.

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I. INTRODUCTION

The World Trade Organization's (WTO) Appellate Body (AB) recently went from the trade regime's "Crown Jewel" to its "Crown of Thorns."[1] After years of mounting political controversy, the AB lost its quorum in December of 2019—the result of the United States blocking the (re)appointment of AB members.[2] Now, the United States has stated that since a decision was completed without the issuance by a properly constituted AB, the decision cannot be considered for adoption—effectively signaling that it will not comply with WTO decisions.[3] Why has the United States undermined the AB? And what do their actions illustrate about the issues facing international adjudication more generally?

This Article argues that despite a formal rule against the application of precedent, the AB leaned heavily on prior decisions. In applying precedent, the AB often gave an expansive treatment to its prior rulings, eventually leading to a backlash. While recent commentary about the demise of the AB has looked at the role of precedent, this Article's analysis is the first to systematically describe that unwritten norm and its effect on compliance.[4] The AB is important as it is the sole international, multilateral, and appellate court or tribunal (IC) with general jurisdiction over an entire area of United States policy, routinely interpreting a discrete number of treaties.[5]

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1. Cosette D. Creamer, *From the WTO's Crown Jewel to its Crown of Thorns,* 113 AIJL UNBOUND 51, 51 (2019); *see also* Gregory C. Shaffer, *A Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations*, 43 YALE J. INT'L L. 37, 38 (2019); Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma,* 111 AM J. INT'L L. 225, 226 (2017); Jennifer A. Hillman, *Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?*, 111 AJIL UNBOUND 364, 364 (2017); *see generally* Marrakesh Agreement Establishing The World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

2 Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?*, INST. INT'L ECON. L. 1, 2 (2018), https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf [https://perma.cc/DK9G-CN8Y] (archived Feb. 22, 2021).

3. *See* Communication from the United States, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/12 (adopted Apr. 17, 2020).

4. For other articles that discuss the role of precedent in the demise of the AB, see generally James Bacchu & Simon Lester, *The Rule of Precedent and the Role of the Appellate Body,* 54 J. WORLD TRADE 183 (2020); Mariana Clara de Andrade, *Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism,* J. INT'L DISP. SETTLEMENT 262 (2020), https://doi.org/10.1093/jnlids/idaa006 [https://perma.cc/9NQC-7DQE] (archived Feb. 22, 2021).

5. *See* Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary,* 27 EUR. J. INT'L L. 9, 31 (2016) ("[T]he WTO's Appellate Body is a formidable engine of global economic governance, probably the most active and productive of all international courts not only in the number and range of its decisions but also in the number of disputes that its jurisprudential guidance has helped to settle, often out of the courtroom."); *see also* John Jackson, *The Evolution of the World Trading*

Specifically, this Article uses data to explore the relationship between the extension of precedent or decisions that expand the meaning in the application of a previous decision and the determination to comply with decisions. This analysis shows a relationship between extension and compliance and notes that extensions can add cost for states because it makes politically unworkable interpretations of the law hard to reverse by the traditional mechanisms of control. As put simply by a commentator, "[W]hen you make the rules unrealistically tight, you also provoke a backlash."[6]

This Article's analysis is anchored in public choice theory.[7] As will be explained, very often in ICs there can be precedent without a formal *stare decisis* rule. This may lead to a troubling path—creating a dilemma—for ICs because of the domestic political consequences of their decisions. While ICs increase their authority by using precedent to build up a record of legal coherence, efforts to bolster authority backfire because states may respond adversely to decisions. From the standpoint of political officials, international trade agreements need to result in net political gains relative to their costs.[8] Given the uncertainty about the future, strategic ambiguity in treaties can help tailor the degree of commitments as new information comes to light.[9]

System—The Legal and Institutional Context, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 31, 31 (Daniel Bethlehem, Isabelle Van Damme, Donald McRae & Rodney Neufeld eds., 2009); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763, 811 (2000).

6. Nathan Gardels, Opinion, *Let's Roll Back the Hyper-globalization Rules of the WTO*, WASH. POST (Aug. 20, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/08/20/wto/ [https://perma.cc/3SQE-E6RL] (archived Feb. 22, 2021).

7. *See* Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 647 (2005); *see also* Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism* 5 (Univ. of Chicago Pub. Law & Legal Theory, Working Paper No. 55, 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=495571 [https://perma.cc/9L97-SED5] (archived Feb. 22, 2021); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System* 2 (John M. Olin Program in Law & Econ., Working Paper No. 143, 2002), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1507&context=law_and_economics [https://perma.cc/2SPM-48UV] (archived Feb. 22, 2021).

8. *See* Alan O. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. ECON. L. 523, 525 (2004); *see also* Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis,* 32 HOFSTRA L. REV. 1, 16 (2003); JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 3–4 (2008).

9. *See* Katerina Linos & Tom Pegram, *The Language of Compromise in International Agreements*, 70 INT'L ORG. 587, 587 (2016) Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 414–15 (2000); Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L.

As shown in Part II, the AB, through a strong norm of precedent, may have contributed to the strengthening of legal commitments and with that a marked decrease in compliance by its once main supporter.

This analysis focuses on the WTO. However, the findings have implications beyond the peculiar confines of trade law. First, for institutional design, it is unlikely that efforts to better define the value of precedent can resolve the general problem without impacting ICs, as some have suggested in the context of the WTO crisis.[10] Instead, this Article notes that the use of sunset clauses in treaties could be one way to maintain strong delegation (including systems with appeal processes) without the risk of dramatic challenges to the authority of ICs, which inevitably need consistency and predictability in decisions. These controversial clauses, which require parties to a treaty to affirmatively confirm a desire to continue the agreement, are recent developments in United States practice[11] as evidenced by the United States–Mexico–Canada Agreement (USMCA).[12] More broadly, this analysis suggests the WTO, which was once an example of strong functional delegation, will remain as a cautionary tale of relying on ICs without an effective and functional mechanisms for clarifying treaty terms by political means when real economic and political power is at stake.[13]

Second, this Article poses that scholars theorizing compliance should account for the intertemporal dimension of legal commitments in explaining state behavior. Recent scholarship on international relations has begun to emphasize different aspects of the design of international agreements for cooperation.[14] Among other elements, the

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& POL'Y REV. 245, 253 (2010). *But see* Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 1, 10 (2018).

10. *See* Dennis Shea, Ambassador, World Trade Org., WTO General Council Meeting (Dec. 9, 2019).

11. Sunset clauses appear most often in international investment agreements. They have been less common in international trade agreements. *See* Tania Voon, Andrew Mitchell & James Munro, *Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties*, 29 ICSID REV. 451, 466 (2014).

12. *See* Agreement between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., Nov. 30, 2018, Off. of the U.S. Trade Representative [hereinafter USMCA].

13. Former Appellate Body member Thomas Graham stated that the Body "[i]s not coming back any time soon or in the form it had before". *See* Thomas R. Graham, Appellate Body Member, The Rise (and Demise?) of the WTO Appellate Body, John D. Greenwald Memorial Lecture, Georgetown Law International Trade Update (Mar. 5 2020).

14. *See generally* Mark S. Copelovitch & Tonya L. Putnam, *Design in Context: Existing International Agreements and New Cooperation*, 68 INT'L ORG. 471 (2014); LEONARDO BACCINI, ANDREAS DÜR & MANFRED ELSIG, THE POLITICS OF TRADE AGREEMENT DESIGN: DEPTH, SCOPE, AND FLEXIBILITY (2012); *see also* Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 579 (2005); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*,

literature highlights the problem of "time inconsistency" in states' preferences for international cooperation.[15] However, compliance theory needs a fuller account of how agreements evolve over time from the inside, including the role played by ICs and other interpretative mechanisms. This process can affect the nature of the legal commitment, potentially widening the distance between the rules in practice and the original design over time. This Article shows that the slow erosion of rules that results from ICs' rulings must be accounted for by compliance theory no matter what competing vision (international law as "contract" or international law as "governance") one embraces.[16]

This Article proceeds as follows. Part II first examines how precedent is treated under international law. Part III discusses how precedent is used at the WTO and how it became a source of political contention. Part IV focuses on the United States and antidumping, which is by far the most widely used trade remedy. Before concluding, Part V develops the argument and explains the implications of these findings for the WTO and beyond.

II. INTERNATIONAL LAW AND PRECEDENT

Many of the institutions that adjudicate international legal disputes are designed so that there is no formal *stare decisis* (i.e., obligatory application of precedent). Yet, in practice, ICs frequently rely on past interpretations when making their decisions. This is because ICs, like any other court, or state, who invoke precedent have a systemic interest in predictability and coherence across decisions. However, there is a fundamental tension between the role of precedent in international law and state behavior. Among others, states may push back against the application of precedent through various mechanisms of control, including noncompliance.

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54 INT'L ORG. 401, 446 (2000).

15. *See generally* NIKOLAI ZIEGLER, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE NEGOTIATIONS (2009); Matthew O. Jackson & Leeat Yariv, *Collective Dynamic Choice: The Necessity of Time Inconsistency*, 7 AM. ECON. J. 150 (2015).

16. *See* Harlan Grant Cohen, *Theorizing Precedent in International Law* 1 (Univ. of Ga. Sch. of L. Rsch. Paper Series, Paper No. 2014-13, 2014), https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2286&context=fac_artchop. For a governance perspective, see Alec Stone Sweet, Michael Yunsuck Chung & Adam Saltzman, A*rbitral Lawmaking and State Power: An Empirical Analysis of Investment Arbitration,* 7 J. INT'L DISP. SETTLEMENT 1, 16–17 (2017).

A. *Precedent*

1. Judicial Technique

Judicial precedent is associated mainly with common law. However, globalization and the convergence of diverse legal traditions have made precedent relevant across different levels of systems, including international law.[17]

In its simplest terms, binding precedent requires that adjudicators follow past rulings.[18] Courts may not necessarily explain or evaluate the authority of past decisions. *Following* precedent generally involves applying the best reading of a prior decision as it is, strengthening its binding authority. In practice, legal bodies try to follow their own precedents, and they rarely abandon the force of prior decisions. This is because courts wish to maintain coherence in their readings for reasons of practicality and, importantly, increased authority of the decision and the court.[19] Precedent can also act as a constraint for future judges. For example, in a recent controversial case before the US Supreme Court, Chief Justice John Roberts atypically joined the Court's four liberal justices, citing the adherence to precedent, to invalidate a law that would have curtailed access to abortions in the state of Louisiana.[20]

While precedent typically means following prior readings, it may also take on other forms. For example, judges can utilize the plasticity often encountered in legal discourse to *distinguish* prior readings.[21] Barry Friedman argues that "distinctions drawn by a subsequent court must be germane to the purpose or justification for the rule itself."[22] Where that is not the case, courts may clarify precisely why a prior ruling does not apply.

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17. Civil law jurisdictions attach some kind of value to prior decisions—hence the term "jurisprudence constante." For a cultural perspective to stare decisis, see generally Samuel C. Damren, *Stare Decisis: The Maker of Customs*, 35 NEW ENG. L. REV. 1 (2000). For a general history, see generally NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT (2008).

18. In its broadest sense, it commands judges to apply the law as it has been set out in a prior case. *See* Duxbury, *supra* note 17, at 14.

19. *See* Robert von Moschzisker, *Stare Decisis in Courts of Last Resort,* 37 HARV. L. REV. 409, 410 (1924); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 823–25 (1994).

20. *See* June Med. Servs., LLC v. Russo, 140 S. Ct. 2103, 2133–35 (2020), (Roberts, J., concurring).

21. *See* Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 376 (2010) ("Justices must decide for themselves . . . how broadly or narrowly to read cases with which they disagree.").

22. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 10 (2010).

Both following and distinguishing precedent can increase the authority of the court, as they bolster the importance of previous readings and generate greater coherence in legal interpretations over time. Importantly, scholars also recognize at least two ways judges adapt prior decisions.[23] The first is *narrowing* precedent, which occurs in instances where the best prior reading applies but where the court decides to shrink the scope of that reading to have a more limited bearing on the decision at hand. Narrowing precedent can be done slowly over time[24] or by abruptly interpreting a precedent less broadly than it might have been construed otherwise.[25] According to Stephen Sachs, "Courts often amend past doctrines by distinguishing prior cases on narrow, sometimes formal, grounds. That's how doctrine usually changes over time; not by wholesale overruling, but by slow evolution and reassessment of the law." [26] In this sense, narrowing precedent means that the court effectively shrinks the *ratio decidendi* of the precedent, trimming back its reach.

Courts may also adapt precedent where the best prior reading does *not* apply clearly to the case at hand. In these instances, judges may read and apply a precedent more broadly, effectively *extending* precedent. Extending precedent involves the widening of a prior reading's *ratio decidendi*.[27] This can occur when the court adopts a justificatory approach to a precedent that extends the application to domains not previously covered by the prior decision. By contrast, distinguishing or not extending preserves the precedent as it was.[28]

Thus, at a high level of generality and with many caveats, the use of precedent can refer to four possible outcomes. When a prior reading clearly applies, a court may follow that precedent through a simple, direct application of a previous decision. Or it may narrow precedent

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23. *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1869 (2014).

24. *See* Stephen E. Sachs, *The Uneasy Case for the Affordable Care Act*, 75 L. & CONTEMP. PROBS. 17, 26–27 (2012) (The link between distinguishing and narrowing is: "Courts often amend past doctrines by distinguishing prior cases on narrow, sometimes formal, grounds. That's how doctrine usually changes over time; not by wholesale overruling, but by slow evolution and reassessment of the law").

25. *See* Re, *supra* note 23, at 1869, n.27; *see also* Kevin C. Walsh, *Expanding Our Understanding of Narrowing Precedent*, JOTWELL (Feb. 11, 2015), https://courtslaw.jotwell.com/expanding-our-understanding-of-narrowing-precedent/ (reviewing Re's Narrowing Precedent) [https://perma.cc/DQ8A-LAMD] (archived Feb. 22, 2021).

26. *See* Sachs, *supra* note 24, at 26–27.

27. For a discussion of the nuances of expanding precedent, see generally Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. LA. L. REV. 77 (2012). Expanding precedent is a form of following precedent broadly.

28. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 739 (1987) (a judge has the option to "distinguish a precedent he believes to be controlling when he is unable or unwilling to overrule it").

through a refinement of those past readings. When a precedent may not necessarily apply, the court can distinguish the current reading from the previous one by explaining why invoking a prior decision is inappropriate. Or it may extend precedent by applying that past reading to a new circumstance, effectively expanding the scope of previous rulings.

Table 1. Types of Applications of Precedent

	Best Reading Does Apply	**Best Reading Does Not Apply**
Apply Precedent	Follow	Extend
Don't Apply Precedent	Narrow	Distinguish

2. The International Judicial Technique of Precedent

In theory, past decisions of international tribunals have no binding effect on future cases.[29] Article 38 of the International Court of Justice Statute (regarded as customary international law) provides that the court "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . subject to the provisions of Article 59, judicial decisions . . . as subsidiary means for the determination of rules of law."[30] Article 59 in turn provides that "[t]he decision[s] of the Court [have] no binding force except between the parties and in respect of that particular case."[31] However, although the statute suggests that the court resolves cases without yielding to past precedent, the ICJ tends "to follow the reasoning and conclusions of earlier cases."[32]

29. *See* Cohen, *supra* note 16, at 2. Of course, states can always agree otherwise. *See, e.g.*, Rome Statute of the International Criminal Court art. 21.2, July 17, 1998, 2187 U.N.T.S. 38544 ('The Court may apply principles and rules of law as interpreted in its previous decisions.").

30. Statute of the International Court of Justice art. 38.1(d), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

31. *Id.*

32. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objection, 1998 I.C.J. 275, ¶¶ 28, 31 (June 11) (concluding that the solution adopted in Right of Passage over Indian Territory corresponded to the rule reflected in the Vienna Convention on the Law of Treaties, and thus by analogy applied to this case). *See* Legality of the Use of Force (Serb. & Montenegro v. Port.), Preliminary Objection Judgment, 2004 I.C.J. 1160, 1208, ¶3 (Dec. 15) (joint declaration of seven judges) (stating that the Court must "ensure consistency with its own past case law").

The ICJ is just one example, but similar behavior is found in a variety of international settings, including regional systems like the European Court of Justice and Inter-American Court of Human Rights. The European Court of Human Rights has gone so far as to state that it "usually follows and applies its own precedent."[33] The International Criminal Tribunal for the Former Yugoslavia developed an extensive internal precedent system upon which the Trial Chamber relied directly to render its judgments.[34] Even investment tribunals, which decide disputes based on different agreements and on an *ad hoc* basis, routinely make use of past decisions as a source of "comparison and . . . of inspiration."[35] Other examples exist as revealed by studies analyzing different ICs.[36]

As a result, the treatment of precedent by international law mirrors, in some respects, that of domestic legal orders—precedent is applied even if it is not explicitly or formally built into the system. While international law "falls somewhere between the common law and civil law systems in terms of its explicit acknowledgment of precedent,"[37] past decisions regularly take on precedential effect with some level of authority.[38] ICs also engage with precedent as a judicial technique—this is, by narrowing, distinguishing, or extending—to

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33. Cossey v. United Kingdom, App. No. 10843/84, 13 Eur. H.R. Rep. 622, 629 (1990) (finding that even though the Court was not bound by its previous decisions, the Court would likely not stray from past decisions absent "cogent reasons for doing so").

34. *See, e.g.*, Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment, ¶ 336–38 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (citing past Trial Chamber and Appellate decisions as guidance in defining what torture is and what elements to apply).

35. AES Corp. v. Argentina, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 Apr. 2005, ¶ 31, ¶ 95 (relying on past precedent to hold that the clauses in the License do not bar jurisdiction by an ICSID tribunal).

36. *See generally* Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413 (2011); Stewart Manley, *Referencing Patterns at the International Criminal Court*, 27 EUR. J. INT'L L. 191 (2016); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L REV. 1832 (2002) (describing the European Court of Human Rights precedent's migration to other bodies).

37. Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 637 (2005).

38. Of course, this varies by court. But precedent has been shown to matter across a wide variety of international public policy issues. For courts, see Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 L. & CONTEMP. PROBS. 1, 11–12 (2016). For precedent outside of court-like settings, see Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations,* 38 YALE J. INT'L L. 289, 291 (2013) (arguing that "[t]hrough the interpretation of the formal terms of their constituent instruments, these constituted judicial bodies have proven capable of transforming the material constitutions"). *See also* KATERINA LINOS, THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES 4, 14–15 (2013).

"walk back," maintain, or to expand prior precedents. ICs rarely openly overturn a prior judgment.[39] Occasionally, however, international adjudicators refer to a precedent as constraining despite a preference for a different outcome.

There are different explanations for why ICs rely on precedent, one being that precedent has value as a source of reason to be relied upon to resolve particular legal issues.[40] Chiefly, however, scholars remark that ICs lack coercive force and therefore need to convert the formal legal authority into *de facto* authority.[41] Consistent with a rich literature, ICs gain authority by relying on precedent "through the iterative process of issuing logically consistent and legally persuasive decisions."[42] For sure, divergent preferences of various IC constituencies may persist even if IC rulings are consistent and persuasive. But, according to Alter, Helfer, and Madsen, ICs acquire authority when users rely on the jurisprudence that connects with the court's interlocutors.[43] Therefore, ICs have clear incentives to rely on previous readings. The trouble is that this effort to prioritize coherence and fidelity to the law can create tensions between ICs and the states that delegate power to these bodies.[44]

B. *The Tension between International Precedent and States*

International adjudication bodies are often designed so that precedent is given limited, if any, formal mandatory weight. This is done for various political reasons. Not least, governments—especially powerful states who can more often dictate treaty terms—fear that precedent under international law could make it difficult to reform rules to better reflect future conditions.[45] Precedent can, essentially, tie the hands of states to particular readings of the law over time. As

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39. *See generally* Laurence R. Helfer & Erik Voeten, *Walking Back Human Rights in Europe?*, 31 EUR. J. INT'L L. 787 (2020).

40. *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach,* 106 AM. J. INT'L L. 225, 266 (2012); Dinah L. Shelton, *Form, Function, and the Powers of International Courts,* 9 CHI. J. INT'L L. 537, 557 (2009).

41. *See generally* Alter, Helfer & Madsen, *supra* note 38. *See also* Thomas M. Franck, *Legitimacy in the International System,* 82 AM. J. INT'L L. 705, 726 (1998).

42. Joseph Weiler discusses the benefits of an incremental iterative process of building IC authority. *See* Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2447–48 (1991).

43. *See* Alter, Helfer & Madesen, *supra* note 38, at 22.

44. This pattern exists in the Andean Community legal system. *See, e.g.*, Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutor: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U. J. INT'L L. & POL. 871, 888 (2009).

45. *See* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 INT'L DISP. SETTLEMENT 5, 13, 23 (2011); Irene M Ten-Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418, 421 (2013) (arguing against precedent in investment treaty arbitration).

such, a strong norm of precedent on states' treaty obligations (as opposed to exceptions) can be tantamount to placing additional constraints on states' policy behaviors. As explained below, precedent can be especially constraining if states lack mechanisms to control or modify the drift in such interpretations.

Precedent can be problematic because ICs' decisions are made outside of the traditional interstate bargaining process. The terms of international agreements are bargained over carefully to reflect a compromise among states. States are notoriously wary of delegating authority to international legal bodies. That is exactly why many ICs are designed without formal precedential power. The concern, from the point of view of states, is that in applying precedent in an effort to clarify legal commitments, this action may affect the formal meaning of the commitment. Relying on previous readings of legal precedent may lock states into more stringent rules.[46] Simply put, when past rulings have binding force of law, states are concerned that judges, rather than state representatives, decide the extent and nature of international commitments.[47] Understood in this way, precedent introduces a traditional principal-agent problem. Rulings by agents (this is, ICs) may cause the law to drift from the principals' (this is, states') preferences, especially as principals' interests shift over time.

Precedent can create an additional problem for states. Without proper controls, precedent can increase the costs of compliance by reducing the policy space within which states can operate under the law.[48] Consider the issue of coherence within bodies of law. Coherence is not just the convergence of opinion but a "certain degree of connection and engagement" between decisions.[49] Each decision becomes part of a greater functional order, providing certainty and

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46. A "negative consensus rule" means that in the absence of an objection by every party to the agreement, including the winning/moving party that is not likely to object, the rule stands. The WTO adapted the GATT to allow dispute settlement panel or appellate body reports to become binding international obligations between the parties, and to have countermeasures authorized in the absence of negative consensus. *See* John H. Jackson, *The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?*, *in* THE WORLD ECON. 11–31, 20 (1995);*see also* Kendall W. Stiles, *The New WTO Regime: The Victory of Pragmatism*, 4 J. INT'L L. & PRAC. 3, 34 (1995) (detailing history of WTO creation).

47. *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals,* 93 CAL. L. REV. 1, 13–14 (2005). *But see* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo,* 93 CALIF. L. REV. 899, 931 (2005).

48. *See generally* Helfer & Voeten, *supra* note 39.

49. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 482 (2003) (discussing "structural issues" of coherence, compliance, expertise, and legitimacy); *see also* Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7–8 (2011) (noting the following criteria: compliance, coherence, determinacy of rule and epistemic quality (expertise), and sustainability (or legitimacy)).

predictability to litigants.[50] This process includes clarifying the meaning of treaty text and its application to a variety of diverse, complex situations. The IC may have an interest in clarifying the text. However, efforts to increase coherence may become a problem over time as legal decisions remove useful ambiguity in the text.[51]

Ambiguity in international law is usually deliberate. As above, it is the result of careful drafting of treaties, often born from difficult political negotiations. Those negotiations are shaped by states' shared uncertainty over the future. That is why, in international economic law in particular, states negotiate what some scholars refer to as "incomplete contracts," which are broadly drafted treaties to encourage future bargaining in the shadow of their commitments.[52] States cannot hope to draft complete rules to address every possible contingency. Instead, they leave vague terms, opening some room for different interpretations. While states understand that rules will be clarified, ambiguous terms allow for deniability or contestation of particular interpretations. This ambiguity has implications for interstate cooperation. Ambiguous, flexible rules make the actual implementation of—and compliance with—such commitments easier than highly rigid deals. There is more policy leeway available to states under less complete contracts. However, in the effort to achieve systemic coherence, ICs may effectively erode the deliberate flexibility that treaties offer to states.

Precedent, therefore, can pit important interests of ICs against those of member states. This is particularly true when there is a strong norm to apply precedent—namely, when precedent is regularly

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50. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 319 (1997) ("In a social or legal culture that venerates tradition for its own sake, consistency with earlier decisions provides an autonomous bulwark of legitimacy."); *see generally* Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2012); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008).

51. *See* Linos & Pegram, *supra* note 9, at 617; Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504, 516 (2008). *But see* Erik Voeten, *Does a Professional Judiciary Induce More Compliance?: Evidence from the European Court of Human Rights*, GEO. UNIV. 1, 22 (Mar. 20, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029786 (last visited Feb. 19, 2021) [https://perma.cc/7EKX-RKVB] (archived Feb. 19, 2021) (arguing that consistent application of rules enhances compliance).

52. *See* Robert W. Staiger & Alan O. Sykes, *How Important Can the Non-violation Clause Be for the GATT/WTO*?, 9 AM. ECON. J. 149, 151 (2017); Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158, 160 (2000) (arguing that "the success of the WTO system hangs on its ability to encourage bargaining in the shadow of weak law"); William W. Burke-White & Andreas von Standen, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283–84 (2010) (arguing that the international investment arbitrations now look far beyond traditional issues of nationalization and expropriation to a "much broader variety of regulatory and public goods").

followed and *extended* through IC decisions. Certainly, states may always resist adverse rulings from ICs that deem a state's policy to be in violation of the law. However, a strong norm of precedent can *amplify* political resistance to the decisions—and to the authority—of the legal body.

Aware of this problem, states design dispute settlement institutions with mechanisms to exercise control over ICs.[53] As delegation to international adjudicatory bodies expands, there is a need to maintain control over the outputs of ICs, especially when these outputs can generate costs before different audiences. As defined by Cogan, "control" means checks on the powers of an IC that ensure that the organization acts within its assigned mandate.[54] Such mechanisms can be justified as follows: without some mechanisms of control, states would be reluctant to voluntarily delegate powers to the IC in the first place.[55] These mechanisms try to ensure that the decision-making authority delegated to the ICs is not abused. Helfer and Slaughter rightly add to this point that because states are keenly aware of the effect of international court's outputs, they "fine-tune their influence over the tribunal and its jurisprudential output using a diverse array of structural, political, and discursive controls."[56]

The optimal level of state influence over IC outputs is a complex task of institutional design, which is considered in greater length elsewhere. Suffice to say, it requires understanding different features of ICs and how they interact, in practice and over time. The existence (or the lack thereof) of an appellate proceeding, the role and influence of an IC secretariat, the embeddedness (or not) of the court in a particular regime or legal community, and the *ex-ante* or *ex-post* control mechanisms imposed by states that create the court (jurisdictional mandate, applicable rules, staffing, budget, etc.) can all affect how courts decide cases and how these are applied prospectively.[57] For

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53. *See* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 2–3 (1992).

54. *See* Jacob K. Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 420 (2008) (providing a taxonomy for controlling international courts (internal and external) and five categories of external controls over courts: 1) mandates; 2) rules it can apply; 3) staffing; 4) budget; and 5) ability to make and apply decisions).

55. *See id.* at 415.

56. Helfer & Slaughter, *supra* note 50, at 942 (contending that because states are keenly aware of the effects of the outcomes they "fine-tune their influence over the tribunal and its jurisprudential output using a diverse array of structural, political, and discursive controls"). According to Cogan, one way of controlling is by granting or curtailing the ability to apply prior decisions. *See* Cogan, *supra* note 54, at 416 (describing mechanisms of state control over international adjudicatory bodies).

57. Cogan, *supra note* 54, at 416; *see also* Ginsburg, *supra* note 37, at 635; Laurence R. Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence*, *in* INTERNATIONAL CONFLICT RESOLUTION 253, 268–72 (Stefan Voigt, Max Albert & Dieter Schmidtchen eds., 2006); Joost Pauwelyn, *The Rule of Law Without the*

instance, two features of the WTO, the lack of private standing and the availability (until recently) of an appeals mechanism, suggest that states hope to exercise at least moderate control over the outputs.[58]

In short, the process of formation—and reliance on—precedent may give rise to a difficult tension. Clearer rules can enhance future litigation and increase the authority of decisions as well as the authority of the issuing ICs. However, clearer rules may also result in lower levels of IC effectiveness as it relates to state behavior. As legal commitments calcify or drift via precedent, states may be unable to amend such commitments by political means. Eventually, states, especially those with the power to dictate terms and conditions, may face pressures not to comply as a result of the strengthening of, or the increase of the precision in, legal obligations.[59] Thus, although necessary to enhance systemic coherence and authority, relying on precedent may create troubles in promoting the main systemic goal of ICs: compliance with international law.

C. *International Precedent and State Responses*

International adjudicators can, to some degree, shape the meaning of law when applying precedent. In response, states tend to have different strategies against this reality: to influence the process of precedent formation by choosing carefully the cases they bring and the arguments they make; to control the process via the (re)appointment of judges; and more importantly, to discount the authority of the court by criticizing or failing to comply with its rulings.

First, states select cases carefully, paying attention to those that can influence case law—even if the current economic or political value of the cases may not justify the decision to bring that claim. This can involve deciding between different competing cases. States may also tailor legal arguments so that current rulings affect the meaning of the rules in future cases. Litigation is known to generate "audience costs," which are the costs states may incur for publicly ventilating possible violations of international commitments.[60] States litigate purposefully to shape these costs.

Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus, 109 AM. J. INT'L L. 761, 787–88 (2015).

58. Conversely, investor-state dispute settlement—a system available to investors, who enjoy a private right of standing and with no appeal process—suggests a different role for precedent in international investment law. *See generally* Ten-Cate, *supra* note 45.

59. *See* Abbott, Keohane, Moravcsik, Slaughter & Snidal, *supra* note 9, at 402.

60. *See* Emilie M. Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 YALE J. INT'L L. 279, 295–96 (2017); Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 42 (2003); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 417 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281,

Second, states may try to manage the nomination, selection, and reappointment processes of IC judges—referred to as (re)appointments. If the political process (i.e., diplomatic negotiations) cannot correct what courts decide, states may try to transform the composition of the adjudicatory body to shape the law by appealing to the views of adjudicators. In particular, powerful states that see unwarranted interpretations may become disaffected and appoint less independent or more predictable adjudicators. In fact, one reason why international arbitration tribunals are typically composed of members appointed by each party in the litigation unilaterally, and a chair often appointed by agreement of the parties, is specifically to control the outputs. Some have defended these systems in light of the role played by ICs and their relationships to states.[61] The two leading competing theories of international judicial politics, the principle-agent theory[62] and the trustee theory,[63] both argue that international judges operate in an environment of relative judicial independence. While the extent of such independence is debated, it is clear that, in practice, states exercise some level of control via their powers of judicial nomination.[64]

Finally, because precedent could risk freezing the law in place, applications of precedent may not reflect the systemic preference of states, a particular scientific consensus, or the political compromise embedded in the legal text. In certain instances, the disconnect may be so profound that it can erode states' ability to comply—regardless of their political will to do so. Or it can potentially erode that political will. Precedent can make the rules sufficiently stringent that the domestic "constituencies of compliance" cannot mobilize effectively.[65] This does not mean that precedent necessarily makes it less likely that

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1297 (1976).

61. *See* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded,* 29 ARB. INT'L 7, 14–15 (2013); *cf.* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. FOREIGN INV. L.J. 339, 355 (2010) ("[M]y proposal [is] that we turn our backs on the practice of unilateral appointments" and experiment with blind appointments).

62. Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization,* 20 EUR. J. INT'L RELS. 391–92 (2014); Karen J. Alter, *Agents or Trustees: International Courts in their Political Context,* 14 EUR. J. INT'L RELS. 33–34 (2008).

63. Alec Stone Sweet & Thomas Brunell, *The European Court of Justice, State Noncompliance, and the Politics of Override*, 106 AM. POL. SCI. REV. 204, 204 (2012); Olof Larsson & Daniel Naurin, *Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU*, 70 INT'L ORG. 377–78 (2016).

64. *See* Dunoff & Pollack, *supra* note 1, at 251.

65. We have in mind interest groups with potentially competing preferences over whether their governments should abide by international rules, including the decisions of ICs. These domestic obstacles can be quite difficult to overcome. *See generally* William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1976); Sykes, *supra* note 7.

the parties agree to be bound by a particular decision. However, decisions that pass judgment on generalized practices, including the substantive content or the production of laws, can make states unable or unwilling to follow the rule(s) as interpreted.[66]

States can criticize decisions to appease different constituencies. Yet, in its most consequential aspect, a judgment in a system of rigid precedent may trigger a decision of a state to ignore the judgment completely, to withdraw from the proceedings, or, ultimately, to exit the IC. The United States' unwinding of the ICJ's compulsory jurisdiction during the Nicaragua case serves as an example of this point. The case involved the support of a rebel group by the United States in violation of international law. In that case, the United States claimed that the ICJ decided the preliminary jurisdictional question erroneously "as a matter of law and . . . based on a misreading and distortion of the evidence and precedent" leading to the US withdrawal of the participation in the merits stage of the case and, eventually, the United States' withdrawal of the court's compulsory jurisdiction.[67]

To be sure, governments may resist decisions by ICs that are internally inconsistent and arbitrary. However, a political problem can still arise when the application of precedent is consistent and objective. This Article explores those instances by looking at the WTO AB's use of precedent and the effect on one of the most important aspects of international dispute settlement: *compliance*.

III. TRADE LAW AND PRECEDENT

The AB has become a focal point of controversy. One accusation the United States levied against the AB is that it applies—that is, follows and often extends—its own precedent in spite of the institution's design, which the United States interprets as rejecting the notion of binding precedent. This Part describes and assesses the use of precedent by the AB. It then uses the analysis to provide an explanation of the role of precedent in the current crisis of the AB in Part IV.

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66. This is especially the case at the WTO. For examples, see Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 237, 254 (2016) ("The AB has also exercised agency to enhance its authority by directing its decisions toward administrative bodies instead of legislatures.").

67. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction, 1984 I.C.J. 392 (Nov. 26); *Text of U.S. Statement on Withdrawal from Case Before the World Court*, N.Y. TIMES (Jan. 19, 1985), https://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html (last visited Feb. 20, 2021) [https://perma.cc/PZD3-ZGKP] (archived Feb. 20, 2021).

A. Stare Decisis *at the WTO*

The WTO's dispute settlement system is composed of four main stages: consultation, panel, appeal, and compliance. Until recently, the appeals process was the pinnacle of the system, representing a significant advancement over the reliance of the General Agreement on Tariffs and Trade (GATT) on positive consensus for the adoption of decisions.[68]

The appeals process deals with questions of law (as opposed to fact) that result from panel decisions. Members have relied heavily on the appeals system since its inception. There were 243 panel rulings in the first five hundred disputes, and two-thirds of those decisions were appealed.[69] These appeals address important and controversial issues, ranging from complex technical regulations to more traditional trade questions like the imposition of tariffs against dumping.[70]

One interesting feature of the dispute system is that, despite the judicial nature of the appeals process, the members of the WTO do not consider the AB a court *per se*. The Dispute Settlement Understanding refers to AB adjudicators as "persons" who broadly represent "membership in the WTO."[71] Related, and more importantly for the purpose of this work, WTO dispute settlement is designed such that there is no formal *stare decisis* application in AB reports.[72] Cases are supposed to be objectively assessed, judged on their own merit, and decided irrespective of prior rulings. Article IX:2 of the WTO Agreement[73] and Dispute Settlement Understanding Article III:2[74] are

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68. *See* Graham *supra* note 13, at 10–11.

69. Only about half of WTO disputes end up reaching a formal panel ruling. The other half are either settled prior to panel ruling through mutually agreeable solutions or they are simply dropped as a result of changing preferences.

70. From DS1 to DS450, the AB ruled on 420 separate legal claims in 130 rulings. This included 52 individual decisions on antidumping, 52 on subsidies, and 50 on safeguards. Each of these are highly contentious areas of the law. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 259–60 (2004).

71. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17(3), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

72. The text states that "[rulings] cannot add to or diminish the rights and obligations provided in the covered agreements." *Id.* at art. 3(2). This means legal decisions do not shape members' commitments or the agreement itself. Any revisions to the law must be decided through agreed upon channels, which is made explicit in Article IX:2 of the WTO Agreement.

73. "The Ministerial Conference and the General Counsel shall have the 'exclusive authority' to adopt interpretations of the *WTO Agreement* and of the Multilateral Trade Agreements." Marrakesh Agreement, *supra* note 1, art. IX:2.

74. "Recommendations and rules of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." DSU, *supra* note 71, art. 3(2). The Vienna Convention on the Law of Treaties serves as guiding principles for panels' and AB's interpretation per art. 3(2). *See* Vienna Convention on the Law of Treaties art.

seen, especially by the United States, to reject any strong notion of binding precedent.[75]

Yet, panel and AB reports both regularly cite past decisions, as do litigants in their submissions and legal arguments.[76] Importantly, the AB regularly treats previous readings as authoritative. The WTO states that "it is very likely that the panel or the Appellate Body will repeat and follow" a persuasive interpretation of a decision.[77] The WTO's view of dispute settlement means previous decisions are instructive and that there is a high level of consistency in rulings across disputes.[78] As a result, interpretations of specific WTO provisions usually become part of the *acquis* and, therefore, become authoritative.[79] Most telling is the fact that, in twenty-five years, the AB has never entirely overruled a previous interpretation.[80] Only specific panel decisions are reversed on occasion.[81]

The WTO's reliance on past rulings—and its extension of those rulings—raises several questions. How widespread and consistent is the application of precedent? And how may the use of precedent be

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31(3)(c), opened for signature May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

75. *See* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 878 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 50–51 (1999); Raj Bhala, *The Power of the Past: Towards De Jure* Stare Decisis *in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 876 (2001). According to Jackson, the WTO did not adopt *stare decisis* because "[m]ost nations in the world do not have stare decisis as part of their legal systems, and the international law also does not." *Testimony Prepared for the U.S. Senate Committee on Foreign Relations Hearing on the World Trade Organization and U.S. Sovereignty*, 6 World Trade & Arb. Materials 127, 132–33 (1994) (statement of John H. Jackson).

76. *See* Shaffer, Elsig & Puig, *supra* note 66, at 271; Joost Pauwelyn, *Minority Rules: Precedent and Participation Before the WTO Appellate Body*, *in* JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW 141 (Joanna Jemielnaik, Laura Nielsen & Henrik Palmer Olsen eds., 2016).

77. *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings Available*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm (last visited May 19, 2020) [https://perma.cc/9WK9-594Z] (archived Feb. 20, 2021).

78. *See* Graham Cook, *Humpty Dumpty and the Illusion of 'Evolutionary Interpretation' in WTO Dispute Settlement*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW (2019).

79. *See* Shaffer, Elsig & Puig, *supra* note 66, at 261.

80. The closest the Appellate Body has come to overruling precedent is with regard to pre-WTO panel reports. For example, the rejection of the processes and production methods analysis in the first Tuna-Dolphin case - although even then the AB did it carefully and not explicitly citing the precedent. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/RW/USA (adopted Dec. 14, 2018). We especially thank Tomer Broude for his suggestion on this point (and many others).

81. Out of the 420 legal claims ruled on the AB in DS1-450, the AB differed from the panel report on only 113 occasions—i.e., twenty-seven percent of the time.

implicated in the current AB crisis? Answering these questions requires a close, systematic assessment of how the AB's use of precedent evolved over time and how WTO members responded to this evolution.

B. *An Empirical Assessment of Trade Law Precedent*

1. Coding

The first contribution of this work is to identify the ways in which the AB uses precedent. A database of precedent was created including each citation an AB report makes to past AB decisions as well as the way a prior decision is applied (*followed* or *extended*) or failed to be applied (*distinguished* or *narrowed*) to that particular case. The data focus on the AB—a rare body in the grand scheme of international law with jurisdiction over powerful members. The AB is in charge of interpreting a discrete number of treaties and engages with its case law when deciding issues of treaty interpretation (or the legal consequences from a particular characterization of the facts) on appeal.

The coding process started by identifying the network of references that AB reports made to previous AB decisions.[82] The sample spans twenty years, from the start of WTO operations in 1995 to the end of 2015, which effectively covers appeals made in the first 450 disputes.[83] As of the end of 2015, the AB had circulated 138 reports.[84]

Each citation is also associated with a specific subject matter—such as import quotas, or national treatment-taxation (GATT Article III:2)—and the WTO agreements involved. There are over 1,400 case references in AB reports for almost 5,600 individual applications of

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82. For a full list of references, we relied on the Trade Law Guide online jurisprudence citator. The Trade Law Guide jurisprudence citators identify all reports (both Appellate and Panel) that have cited a past decision as well as paragraphs in which they were cited. It does not show cases that were cited in parties' submissions. Rather it shows cases used actively or passively by the Appellate Body as support, authority, or context in its analysis or ruling. *See* TRADE L. GUIDE, https://www.tradelawguide.com/ (last visited June 23, 2021) [https://perma.cc/2BXR-U2D4] (archived Feb. 20, 2021).

83. One exception is Article 21.5 proceedings. Appellate Body and Arbitration compliance proceedings under Articles 21 and 22 are excluded from this work and their precedential values are not assessed. Neither are they examined for references to other Appellate Body reports. Only substantive Appellate Body decisions form the subject of this endeavor. In the coding, we also distinguished between cited provisions that establish obligations as opposed to exceptions or more hortatory language. This can help to analyze if our hypothesis that following or expanding precedent tends to diminish the members' policy space.

84. WORLD TRADE ORGANIZATION [WTO] SECRETARIAT, WTO ANNUAL REPORT 112 (2016), https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf (last visited Feb. 20, 2021) [https://perma.cc/U9BT-JXBR] (archived Feb. 20, 2021).

precedent.[85] Each reference was coding using the categories described in section II.1: follow, expand, distinguish, or narrow.[86]

This was not an insignificant task. Coding precedent requires careful attention. In many cases, deviations from precedent can be nuanced, leading to confusion as to how exactly a prior interpretation is being applied. Decisions that follow prior rulings are generally apparent on the surface in part because the application of precedent is often accompanied by a presentation, such as "We emphasized in that Report […] that," and shelved summarily. However, the narrowing and extending of past decisions often involves a longer discussion by the AB and deeper engagement with prior decisions. In such cases, the coding requires a good understanding of the implication of the finding. To ensure the quality of the coding, each citation was scrutinized at least twice for meaning by trained coders and substantial discussions trailed complicated cases.

2. Following and Distinguishing Precedent

Naturally, precedent usage increases over time. As the number of disputes grows, the AB encounters more situations to which a prior decision could apply. Since *Australia—Measures Affecting Importation of Salmon*, the first case citing a previous ruling, more than 70 percent of AB reports affirm (i.e., follow) particular precedents.[87]

The data show that the AB follows a prior reference roughly 77 percent of the time (Table 2). Areas of consistency include the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS), two relatively new areas of trade law where clarifications of the rules are especially important. The data do not contain any instance of the AB openly following a precedent despite considering such prior case wrongly decided (this is, following as a constrain on authority). Yet, in *United States—Final Anti-Dumping Measures on Stainless Steel from*

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85. The average number of prior cases referenced per dispute is 15. *See also* Pauwelyn, *supra* note 57, at 800.

86. The coding was conducted by two research assistants with international trade law backgrounds. To ensure reliability, each of them mapped all citations independently. The two coding sheets were then compared, and outstanding gaps were resolved. Most references to prior decisions are made to cases under the same covered agreement. However, there are two special circumstances. In some instances, the AB applies the rationale from one agreement to disputes over another, a technique that, while different, we also considered as expansion. For example, AB reports in several disputes about WTO flexibility provisions, including DS295 *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, cite the Agreement Establishing the World Trade Organization. In other cases, the AB mentions a prior decision without openly adopting any of the described behaviors, hence we exclude this from the analysis.

87. *See generally* Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/AB/R (adopted Nov. 6, 1998).

Mexico the AB did not take kindly the panel's refusal to follow an AB report concluding the following:

> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system.[88]

One notable example in this analysis is the consistency in the application of the two-tiered analysis of Article XX of GATT, which establishes the conditions for invoking exceptions to that agreement. The two-tiered analysis involves first an examination of the challenged measure under one of the paragraphs of Article XX establishing the conditions of application of the exception (e.g., necessary to protect public morals).[89] And, where the measure is shown to fall under any of those paragraphs, a further examination of the measure under the microscope of the *chapeau*—the introductory paragraph—of Article XX.[90] This analysis was established early in *United States—Standards for Reformulated and Conventional Gasoline*,[91] but reechoed and cited in many other disputes including in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*. In this later case, the AB rejected the Panel's suggestion "that following the indicated sequence of steps, or the inverse thereof, does not make any difference."[92] In doing so, the AB explained in greater depth why the sequence matters

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88. Appellate Body Report, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, ¶ 162, WTO Doc. WT/DS344/AB/R (adopted Apr. 30, 2008).

89. *See* General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (the introductory paragraph reads as follows: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . . ").

90. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 58, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *US—Gasoline*]. A measure must therefore fall within one of the exceptions listed in Article XX, and afterwards pass the "arbitrary and unjustifiable discrimination" test of the chapeau (to Article XX); *see also* Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 758 (2001).

91. *US – Gasoline*, *supra* note 90, at ¶ 17; James Bacchus, *Not in Clinical Isolation*, *in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 507–16 (Gabrielle Marceau ed., 2015).

92. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 119, WTO Docs. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *US – Shrimp*]; *see also id*. at ¶ 157, n.151 (citing the GATT decision of *United States – Section 337 of the United States Tariff Act of 1930* to reaffirm that "the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau").

and made clear that the panel's analysis in *United States—Gasoline* was inappropriate.[93]

Table 2. Distribution of Applications of Precedent

Form of Precedent	Number of Applications	Percent of Total Applications
Follow	4246	77
Extend	575	10
Narrow	374	7
Distinguish	323	6

By contrast, AB members formally distinguish an invoked precedent only 6 percent of the time. Distinguishing occurs when the AB explains specifically why the rationale of a prior case *does not* apply to the case at hand.[94] These decisions occur most often with respect to GATT (1994) and to the Agreements on Subsidies and Technical Barriers to Trade. For example, in the case *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*,[95] Argentina sought to rely on a prior AB's ruling in its challenge of Chile's Price Band System (PBS), by which tariff rates for certain products were assessed based on whether the price fell below a lower price band or rose beyond an upper price band. Argentina brought a claim under the first sentence of Article II:1(b) challenging the PBS as "ordinary customs duties" in excess of Chile's bound rates. The panel found against Chile and ruled that the duties imposed under the PBS are "other duties or charges" that are prohibited under Article II:1(b)'s second sentence. Before the AB, Argentina argued that the structure of Article II:1(b) (dealing with nondiscrimination with respect to charges that can be levied on imports) is similar to that of Article III:2 of the GATT 1994 (dealing with nondiscrimination with respect to taxation). As a result, Argentina claimed that the decision in *Canada—Periodicals* was relevant. In that previous case, the AB determined that the relationship between the first and second sentences of Article III:2

93. *Id.* ¶ 119.

94. It may also be the case that while a precedent already exists, the AB omits to reference it.

95. *See generally* Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WTO Doc. WT/DS207/AB/R (adopted Oct. 23, 2002) [hereinafter *Chile – Price Band System*].

of the GATT 1994 was systemic.[96] One could move from an examination of the first sentence of that article to the examination of the second sentence as the two sentences are "part of a logical continuum."[97] However, rejecting Argentina's position, the AB distinguished the application of such decision in *Canada—Periodicals*.[98] Ruling on *Chile—Price Band System*, the AB decided that the first and second sentences of Article II:1(b) prescribed distinct obligations with respect to the disputed measures.[99]

Instances of distinguishing, like that in *Canada—Periodicals*, are relatively rare. The AB is ten times more likely to follow precedent than to distinguish it (see Table 2). This supports the idea that, like many ICs, the AB has an interest in legal coherence and upholding its previous analysis. More importantly, in terms of the political arguments around the WTO, the AB often extends—and only occasionally narrows—precedent as well.

3. Extending and Narrowing Precedent

It is not surprising the AB follows most of its prior decisions given that ICs have an interest in consistency and given that the AB uses precedent to justify its decisions. More interesting is the fact that the AB has sometimes extended, and other times narrowed, its own precedent, as we discuss below. Extensions, in particular, reflect a stronger application of precedent because extensions arguably "[use] inapposite case law to resolve open questions."[100] The result, in the view of some WTO members, is a gap between the best reading of a precedent and its application. Extensions may also inflate the power of the court, for it tends to enlarge constraints on government action. Narrowing, conversely, tends to dilute the force of prior readings.

The AB extends its own precedent 10 percent of the time—and, with that, expands the scope of those prior decisions beyond their initial contextual confinements. Precedent is extended most frequently with respect to the GATT of 1994, principally because the vast majority of disputes cite some portion of that agreement, most commonly

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96. *See generally* Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R (adopted July 30, 1997) [hereinafter *Canada – Periodicals*].

97. *See id.* ¶ 3.111.

98. *See generally id*. In the Dispute Settlement Body meeting of July 30, 1997 Canada and Switzerland had voiced vociferous concern about the Appellate Body's decision to make findings (in the *Canada – Periodicals* case) on Article III:2's second sentence when Canada had not been permitted to submit arguments in respect of that provision. The Appellate Body had completed the legal analysis in that case using the available arguments and had not allowed Canada to furnish fresh arguments, on the reasoning that both sentences of Article III:2 formed a logical continuum.

99. *See Chile – Price Band System*, *supra* note 95, at ¶ 168, n.150.

100. Re, *supra* note 23, at 1870.

Articles II and III (dealing with nondiscrimination obligations). Other areas of WTO law extended with some regularity include the Agreements on Agriculture, Subsidies, and Anti-Dumping.[101] These areas are extended at essentially the same rate. There were 822 applications of GATT between 1995 and 2015, and 104 of them were extensions—or, 12 percent.[102]

Table 3. Extensions of Precedent by Issue Area

Issue Area	**Number of Extensions**	**Share of Applications Resulting in Extension**
GATT 1994	104	12%
Subsidies and Countervailing Measures	30	13%
Agriculture	29	13%
Antidumping (Article VI of GATT 1994)	24	13%
Safeguards	22	17%
Agreement Establishing the WTO	17	11%
Import Licensing	11	20%
Technical Barriers to Trade (TBT)	10	9%
Services (GATS)	7	18%
Sanitary and Phytosanitary Measures (SPS)	6	5%

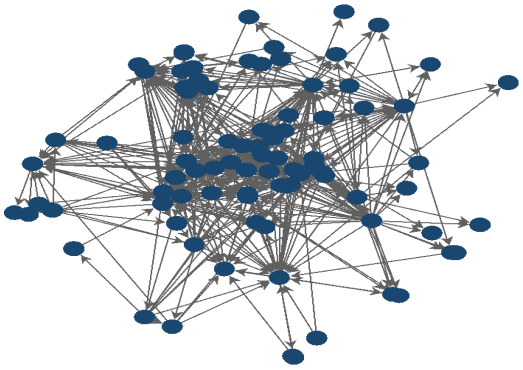
One pertinent example is the long line of antidumping cases, where the AB has steadily expounded its prohibition of a specific practice known as "zeroing" (i.e., the setting of negative dumping

101. *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1869 U.N.T.S. 229 [hereinafter SCM]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 145 [hereinafter Anti-Dumping Agreement]; Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 43 [hereinafter Agriculture Agreement].

102. The application *followed* past readings 612 times—or, 75 percent of the time.

margins to zero) in antidumping investigations.[103] Part IV explores the cases of zeroing as a visible and consequential extension of precedent, but many other examples exist—see below for some illustration. First, however, Figure 1 depicts the interconnectedness of WTO disputes relating to antidumping.

Figure 1. Interconnectedness of Antidumping Cases



Note: This figure depicts the connections between antidumping disputes' application of precedent. Each node is a dispute that was either cited in—or was cited by—the AB in a decision on disputed antidumping measures. The high density of the network illustrates the frequent application (follow or extension) of precedent in antidumping disputes.

The question of extension of precedent—and its appropriate application—runs through several high-profile disputes. For example, in *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, the body indicated that prior reasoning and rulings should be followed, stating that "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."[104] Following that decision, in *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, the AB relied on past reports to come to the conclusion that AB reports

103. *See* Edwin Vermulst & Daniel Ikenson, *Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?*, 2 GLOB. TRADE & CUSTOMS J. 231, 231 (2007).

104. Appellate Body Report, *United States–Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina,* ¶ 188, WTO Doc. WT/DS268/AB/R (adopted Dec. 17, 2004).

serve as precedent "absent cogent reasons."[105] However, it is difficult to see how the AB came to this conclusion based on the cited reports. In particular, the AB cited *Japan—Taxes on Alcoholic Beverages II* and honed in on the statement that adopted reports are "an important part of the GATT *acquis*."[106]

In *United States—Lamb*, the AB expanded the scope of review of trade remedies investigations by WTO panels relying on a prior decision in *European Communities—Hormones*. The AB indicated that on safeguards, a panel's objective assessment involves both a formal aspect (whether the competent authorities have evaluated all relevant factors) and a substantive aspect (whether the competent authorities have given a reasoned and adequate explanation for all their determination).[107] By transposing the *European Communities—Hormones* analysis to trade remedies, *United States—Lamb* expanded the authority of panels to review in a more invasive manner the determinations by domestic authorities.[108]

In *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the AB was tasked with interpreting the GATS and its application to the United States' ban on internet gambling.[109] Significantly, referring to prior decisions dealing with GATT, the AB found the ban of the United States was a quantitative restriction rather than a qualitative restriction; essentially that it acted as a "prohibited market access restriction simply because they

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105. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008) [hereinafter *US – Stainless Steel (Mexico)*]. *But see* Meredith Crowley & Robert Howse, *US – Stainless Steel (Mexico)*, 9 WORLD TRADE REV. 117, 145, 147 (2010) (considering stare decisis a valuable development at the WTO).

106. *US—Stainless Steel (Mexico)*, *supra* note 105, ¶ 158 (citing Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 14, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter *Japan – Alcoholic Beverages II*]). In that case the E.U. argued "[w]hether as a matter of doctrine or practice, a high value is placed on consistency, certainty and predictability of the jurisprudence, particularly as regards decisions rendered by the highest courts".

107. The AB concluded "the panel's obligation to make an 'objective assessment of the matter' under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU7, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim." Appellate Body Report, *US – Lamb*, ¶ 105, WTO Doc. WT/DS177/AB/R (adopted May 16, 2001).

108. WTO, Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*1 26, WTO Doc No WT/DS26/AB/R, WT/DS48/AB/R (Jan 16, 1998) (*European Communities - Hormones). See* Henrik Horn & Petros P. Mavroidis, *US – Lamb: United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What Should be Required of a Safeguard Investigation?* 2 WORLD TRADE REV. 395, 395–97.

109. *See generally* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

have the effect of a prohibition on certain cross-border supplies on gambling services."[110] Perhaps the result of arguments raised by the parties, a shortcoming of this analysis is the failure to articulate a dividing line between market access and domestic regulation. Such distinction is crucial to the distinction between the goals of the GATT and the goals of the GATS—importing the application of prior interpretations of GATT.

Finally, in *Argentina—Measures Relating to Trade in Goods and Services*, the AB dipped into its GATT jurisprudence to interpret the "likeness" of services and service suppliers.[111] Specifically, it relied on *European Communities—Asbestos* to analogize how "likeness" is interpreted consistently between GATT and GATS,[112] and that the "criteria for assessing 'likeness' traditionally employed as analytical tools in the context of trade in goods are relevant for assessing the competitive relationship of services and service suppliers."[113] Therefore, the AB utilized the interpretations and reasoning set out in GATT decisions as a heuristic and to reason by analogy to decide this GATS dispute.

Conversely, the AB has narrowed its precedent less frequently—only 7 percent of the time. Some of these decisions may be attributed to pressures of members to change course over the interpretation. For example, the scope of a finding in *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*[114] was whittled down by the subsequent decision in *United States—Tax Treatment for "Foreign Sales Corporations."*[115] In the former ruling, grants or payouts could constitute subsidies under the Agreement on Agriculture. In the latter case, the AB ruled as follows:

> We held, in *Canada–Milk*, that "export subsidies" under the *Agreement on Agriculture* may involve, not only direct payments, but also "revenue foregone."

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110. BRYAN C. MERCURIO & MARKUS KRAJEWSKI, 3 THE REGULATION OF SERVICES AND INTELLECTUAL PROPERTY 147 (2013).

111. *See* Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, ¶¶ 6.24 – .25, WTO Doc. WT/DS453/AB/R (adopted May 9, 2016).

112. *Id.* ¶ 6.25.

113. *Id.* ¶ 6.31.

114. *See generally* Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/AB/R, WT/DS113/AB/R (adopted Oct. 27, 1999).

115. *See generally* Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WTO Doc. WT/DS108/AB/R (adopted Mar. 20, 2000) [hereinafter *US – FSC*]. Notice that the initial interpretation of the word "payments" in *Canada – Dairy*, in the specific context of Article 9.1(c) was an expansive one, imputing into its meaning, "payment in kind" which may be read to include foregone revenue. In *US - FSC*, the AB effectively shrinks the meaning of subsidy for the entire agreement to mean only foregone revenue in a move that all but destroys the young and fragile precedent set in *Canada – Dairy*, and creates expansive implications for the entire AA, with that limited interpretation.

> We believe, however, that in disputes brought under the *Agreement on Agriculture*, just as in cases under Article 1.1(a)(1)(ii) of the *SCM Agreement*, it is only where a government foregoes revenues that are "*otherwise due*" that a "subsidy" may arise.[116]

This ruling modifies the decision in *Canada—Dairy* because it limits prohibited subsidies under the Agreement on Agriculture to revenues foregone.[117]

As the United States and other members, like Japan, Canada, and the European Union (EU), turned away from the WTO for purposes of trade negotiations (as witnessed in the proliferation of regional and bilateral trade agreements), it was not obvious what the effects could be on the WTO dispute settlement mechanism, especially the AB.[118] At the beginning, WTO rules—and dispute settlement—remained dominant because the multilateral system could more effectively induce compliance.[119] However, as AB precedent accumulated, and problems and discrepancies over the validity of certain practices increased (in particular, practices by China), the role of the AB became subject to debate. Without a functioning organ within the international organization to correct what states see as undesirable AB interpretations, states can become disaffected, appoint fewer independent AB members, and stop participating in WTO disputes or complying with certain decisions.

IV: TRADE LAW PRECEDENT AND US COMPLIANCE

There are strong reasons to think that the practice of expanding precedent contributed to the AB's demise. This is because distaste of precedent among certain governments may cause them to exert control over the IC, including by resisting compliance with decisions. In this Part, we explore with more detail the potential relationship between the conduct of the United States and the practice of expanding precedent at the AB.

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116. *Id.* ¶ 138.

117. The U.S. was outraged at the overall outcome of this dispute and refused to support its adoption at the Dispute Settlement Body meeting of March 20, 2000. However, it did not specifically attack the Appellate Body's departure from its previous decision, choosing instead to, in its words, "leave that to scholars." Minutes of the Dispute Settlement Body Meeting, ¶ 55, WTO Doc. WT/DSB/M/77 (Apr. 17, 2000). The EC, Canada and Australia, on the other hand, all praised the ruling. *Id.* ¶¶ 54, 59 – 60.

118. *See* WTO, THE FUTURE OF TRADE: THE CHALLENGES OF CONVERGENCE 23–25 (2013). For an excellent analysis of how global multilateralism is changing as a result of the new tools use to liberalize markets, see generally CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT (2014).

119. *See* Giovanni Maggi & Robert Staiger, *The Role of Dispute Settlement Procedures in International Trade Agreements*, 126 Q. J. ECON. 475, 484 (2011).

A. *The United States and Precedent*

1. General

It is well accepted that the United States is a key member of the WTO.[120] For years, along with the EU, the United States was committed to ensuring that the dispute system worked. To that end, the United States was the most active participant in the system, bringing a number of high-profile cases. Currently, the United States still remains the leading filer of complaints.[121] And the United States has won more cases than any other member of the WTO, including against China.[122]

However, the United States is also the most frequent target of dispute filings. It was the respondent in 123 of the WTO's first five hundred cases.[123] Of those 123 disputes, panel reports were issued in seventy-seven cases and the United States lost decisions in sixty-nine of them. That loss rate (about 90 percent) is the basis for some arguments alleging that the United States is targeted unfairly by trade litigation.[124] However, there are two important things to point out. First, losing 90 percent of rulings is consistent with the overall loss rate for respondents, including other large markets like the EU and China.[125]

Second, losing a case cannot be the principal explanation for the United States' recent frustrations with the AB. The United States' loss rate at the WTO has been relatively constant over time—never

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120. As one the predominant market economies, the U.S. played an important role in shaping the WTO's design. *See generally* JOCK FINLAYSON & MARK W. ZACHER, MANAGING INTERNATIONAL MARKETS. DEVELOPING COUNTRIES AND COMMODITY TRADE REGIMES (1988). There is also evidence that the material benefits of membership are focused heavily in the largest markets. *See* Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94*, 57 WORLD POL. 453, 476–77 (2005).

121. *See Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [https://perma.cc/LA76-FYDZ] (archived Mar. 4, 2021)

(listing cases of the United States as of January of 2021: 124 as Complainant, 156 Respondent, and 162 as Third Party).

122. *Id.*

123. The US faced 46 more requests for consultations than the second-most targeted member, which was the European Union (77 disputes). *Id.*

124. *E.g.*, President Trump stated that the United States was "losing all [its] cases at the World Trade Organization." President Donald J. Trump, Remarks on American Energy and Manufacturing at Shell Pennsylvania Petrochemical Complex (Aug. 13, 2019) (transcript available at https://web.archive.org/web/20190814011508/https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-energy-manufacturing-monaco-pa/).

125. In fact, respondents almost always lose. We measure "losing" as having at least one panel finding in favor of the complainant. From DS1 to DS450, the overall loss rate was about 92 percent.

dropping below 85 percent. The same is true for all WTO respondents. As a result, states have a reasonable expectation of losing a case.

These near constants—being targeted and losing disputes—cannot fully explain the sharp change in US behavior. US opposition to the AB escalated mainly over the last decade. There are two potential explanations. One is "fatigue" with the system. That is to say, US frustrations with the AB may have accumulated over time, and we are just now seeing the effects. However, if losing disputes were solely to blame, US resistance to the system should have built up momentum more evenly over time. That is not what we see. Instead of a gradual accumulation of political resistance, US behavior changed markedly a decade ago. Therefore, a second explanation is more compelling: that there was a significant shift in AB behavior that amplified US grievances with the system and led to the current crisis.[126]

Losing a dispute is only part of the story. An equally serious concern arises over the *content* of those decisions.[127] The data shows that the AB keeps a strong norm of precedent. It does not just follow past rulings but often expands upon them. That is true, generally, across the WTO's case load, and it is especially consequential for the United States. The AB applied precedent in 70 percent of its rulings against the United States. Almost 90 percent of those rulings *extended precedent* in at least one application.[128] In other words, when the AB cites prior decisions, it almost always results in an extension of precedent on at least one application. And often these are in highly contested, politically controversial areas of the law.

Those numbers help explain why the US questions the role of the AB in adjudicating disputes. In fact, the US delegation to the WTO stated in 2018 that it had "sounded the alarm about the Appellate Body exceeding its authority" for many years precisely because of the AB's

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126. For discussion, see Bernard M. Hoekman & Petros C. Mavroidis, *Burning Down the House? The Appellate Body in the Centre of the WTO Crisis* 11 (Eur. Univ. Inst., Robert Schuman Ctr. for Advanced Stud., Glob. Governance Programme, Working Paper No. RSCAS 2019/56, 2019) ("Another dimension of US skepticism concerns the precedential value of AB reports. Since mistakes can occur, why repeat them, so the thinking goes. Consistency is not a value in and of itself, since one can be consistently wrong. Two remarks are in order one this question.").

127. This is an argument that other scholars have made, including in the WTO context. *See generally* Marc L. Busch & Krzysztof J. Pelc, *Words Matter: How WTO Rulings Handle Controversy,* 63 INT'L STUD. Q. 464 (2019); Mark Daku & Krzysztof J. Pelc, *Who Holds Influence Over WTO Jurisprudence?,* 20 J. INT'L ECON. L. 233 (2017); Samantha Besson, *The* Erga Omnes *Effect of Judgments of the European Court of Human Rights* – What's in a Name?, *in* THE EUROPEAN COURT OF HUMAN RIGHTS AFTER PROTOCOL 14: PRELIMINARY ASSESSMENT AND PERSPECTIVES (Samantha Besson ed., 2011).

128. That is, precedent was extended with respect to at least one issue. Most AB reports cite a variety of past rulings, and some of these may simply follow previous readings.

use of precedent.[129] For one thing, the United States noted that it did "not assign precedential value to panel or Appellate Body reports adopted by the DSB or interpretations contained in those reports."[130] Summarizing its position, the United States asked, "whether the [AB] was now suggesting for the first time that *stare decisis* existed in WTO dispute settlement?"[131]

To explore the role of precedent, the analysis focuses on a particular area of WTO litigation: the imposition of antidumping duties or tariffs. There were over 1,500 uses of antidumping reported to the WTO since 2009 alone.[132] Antidumping's rules, laid out in Article VI of the GATT and Anti-Dumping Agreement, are highly legalized, but they also contain important ambiguities.[133] From the states' point of view, these ambiguities allow governments some leeway in their domestic applications of international rules. It is no coincidence that antidumping has been called the "new" protectionism, for it is used by members as, according to its critics, import tariffs under disguise.[134]

The United States is one of the world's heaviest users of antidumping measures, outpaced these days by only a few WTO members, including South Korea and India.[135] This is a major reason why the United States faces so many complaints. In fact, almost 10 percent of WTO disputes from 1995 to 2015—forty-eight of the first five

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129. Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel from Products from* Japan, 9, WT/DS184/15/ADD.190 (Dec. 18, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf [https://perma.cc/7PAU-5ZFZ] (archived Mar. 4, 2021) [hereinafter U.S. Geneva Statements].

130. *Id.* at 10; *see also Trade Policy Under Trump*, TRADE TALKS, at 29:40–30:39 (Nov. 25, 2019), https://www.tradetalkspodcast.com/podcast/111-trade-policy-under-trump/ [https://perma.cc/G8TQ-73QN] (archived Mar. 4, 2021).

131. Minutes of Dispute Settlement Body Meeting, ¶ 43, WTO Doc. WT/DSB/M/180 (Feb. 1, 2005). For a criticism on the U.S. view, see Yuka Fukunaga, *Interpretative Authority of the Appellate Body: Replies to the Criticism by the United States*, *in* THE APPELLATE BODY OF THE WTO AND ITS REFORM 167 (Chang-fa Lo, Junji Nakagawa & Tsai-fang Chen eds., 2019).

132. By contrast, there were fewer than 100 safeguards measures reported to the WTO over the same period.

133. Ambiguities in the agreements underpin many WTO disputes, including in the area of anti-dumping. The AB addressed the issue head-on in *US - Offset Act* by acknowledging that certain elements of the *Anti-Dumping Agreement* have only "implicit" meaning due to lack of specificity. Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 262, WTO Doc. WT/DS217/AB/R (adopted Jan. 27, 2003).

134. Chad P. Brown, *Protectionism is on the Rise: Antidumping Import Investigations*, BROOKINGS (Mar. 5, 2009), https://www.brookings.edu/opinions/protectionism-is-on-the-rise-antidumping-import-investigations/ [https://perma.cc/Q7ZD-5LGP] (archived Mar. 4, 2021).

135. *See Anti-dumping*, WTO, https://www.wto.org/english/tratop_e/adp_e/adp_e.htm [https://perma.cc/3J8U-PQ4M] (archived Mar. 4, 2021).

hundred cases—were against the United States and its antidumping measures. No other country gets sued so often on one particular issue.

From the United States' point of view, many of these cases are controversial because the rules allow for sufficient flexibilities to support affected industries by enacting antidumping tariffs against low-cost producers. The tools include the practice known as "zeroing."[136] Zeroing is a method for calculating damages done by dumped goods and, in turn, for determining the size of the antidumping duty imposed in response. Part of the problem is that many other members of the WTO, notably the EU, allege that this process allows the United States to impose larger duties than allowed under a strict reading of Article VI and the Anti-Dumping Agreement.[137] In other words, according to its critics, zeroing overstates how much dumping has occurred. For the United States, there is a more fundamental issue at stake, which is what the rules allow states to do—and whether precedent should help clarify these ambiguities. US frustrations are illustrated in the lineage of zeroing disputes.

2. Zeroing Methodology and Other Extensions

In *United States—Continued Existence and Application of Zeroing Methodology*, the EU challenged the methods used by the United States to calculate antidumping duties imposed against steel products—in particular, zeroing.[138] At that time, the case was the tenth WTO dispute about zeroing and the eighth to target the United States. In one prior case, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, the AB ruled that zeroing was incompatible with the fair comparison requirement of Article 2.4.2 of the Anti-Dumping Agreement, which refers to the margins of dumping for a product, for failing to apply consistently to "all comparable export transactions."[139] The body ruled that the "fair

136. Persistent disagreement over zeroing means the U.S. faced 48 antidumping filings. The U.S. lost 26 of the 30 disputes that went to panel. As mentioned, only about 50 of all disputes reach a panel, though the rate is higher in antidumping cases.

137. The EU opposed attempts to explicitly outlaw zeroing during the Uruguay round negotiations that led to the conclusion of the ADA, along with Canada, and the United States. However, after *EC – Bed Linen*, where the AB considered the consistency of zeroing applied by the EU authorities in "model zeroing," the EU changed course. For discussion, see generally Petros C. Mavroidis & Thomas J. Prusa, *Die Another Day: Zeroing in on Targeted Dumping – Did the AB Hit the Mark in* US–Washing Machines*?*, 17 WORLD TRADE REV. 239 (2018).

138. *See* Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶¶ 99–110, WT/DS350/AB/R (adopted Feb. 4, 2009) [hereinafter *US – Continued Zeroing*].

139. Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 86, WT/DS141/AB/R (adopted Mar. 12,

comparison" requirement in Article 2.4.2 meant that the EU should have established the dumping margin "for the *product*—cotton-type bed linen—and not for the various types or models of that product."[140] In particular, by "zeroing" the "negative dumping margins" of *comparable* products, the EC failed to take fully into account the entirety of the prices of some export transactions, including *all* transactions involving *all* models or types of cotton-type bed linen. In essence, the AB placed the emphasis of the treaty text and in particular in the word *all* (as opposed to *comparable*) to limit the practice of zeroing, a move criticized by some scholars.

In *United States—Continued Zeroing*, however, the AB determined that such rationale was relevant to proceedings governed by Article 9.3, dealing with administrative periodic reviews, and notably, where the text "all comparable export transactions" is absent.[141] Before the AB, the United States argued that Article 9.4(ii) of the Anti-Dumping Agreement lends support to the proposition that dumping may be interpreted in relation to individual export transactions—this is, the text supported that dumping margins may be determined at the level of individual transactions. For the United States, given the differences in texts between the two provisions, it would be "absurd to interpret Article 9" as disallowing zeroing and requiring the US to offset margins while capping the importer's liability based on individual transactions.[142]

To some extent, the main controversy was about which interpretive approach should prevail—more textual or more contextual/policy analysis. Notably, the EU originally engaged in zeroing but changed its position and has since supported the AB's contextual interpretation on zeroing controversies on comity grounds.[143] The EU cited previous zeroing rulings and argued plainly that "earlier decisions already made clear that the practice of zeroing . . . [was] WTO-incompatible."[144] Conversely, the United States argued that its antidumping practices were read into the Uruguay Round agreements and that nothing in the text limited US

2001); Roger Alford, *Reflections on* US – Zeroing*: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196–98 (2006).

140. Appellate Body Report, *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 53, WT/DS141/AB/R (adopted Mar. 12, 2001).

141. In the end, despite the concurrence of some panels - notably the *US – Stainless Steel (Mexico)* - with the US position, the US never won at the Appellate Body, and eventually had to comply with the rulings.

142. Appellee Submission of the United States of America, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, ¶ 104, AB-2008-1 (Feb. 25, 2008).

143. *See* Mavoidis & Prusa, *supra* note 137, at 244.

144. Dispute Settlement Body, *Minutes of Meeting*, ¶ 70, WTO Doc. WT/DSB/M/265 (Feb. 19, 2009).

practices in this case.[145] In the end, by reading into the text the notion that the same requirements applied because of the need for consistent treatment between different provisions of the Anti-Dumping Agreement, the AB seemed to be making a decision based on a policy analysis as opposed to plainly interpreting the treaty text.

Not surprisingly, the United States objected to the decision and especially the AB's inappropriate extension of precedent. At a subsequent meeting of the Dispute Settlement Body, the United States noted it was "deeply disappointed in the Appellate Body's findings, which both incorrectly expanded the scope of the proceedings and disregarded the careful bargain struck as part of the Uruguay Round Agreements."[146] It added that "the DSU did not establish a common-law system, in which AB findings on legal issues became binding precedents."[147]

To be sure, zeroing is not the sole reason for the United States' frustrations with the AB. In a related analysis by a leading WTO practitioner, Jorge Miranda and Manuel Sánchez Miranda identified five additional instances of arguably problematic application of precedent also within the area of trade remedies:

1. the pronouncement in *EC—Fasteners* regarding whether the surrogate country methodology as applied to China in [antidumping] investigations has an expiry date
2. the interpretation of the term "public body" within the meaning of the subsidies agreement [in *US—Anti-Dumping and Countervailing Duties*]
3. the finding that Article 19.3 of the Subsidies Agreement addresses the concurrent application of [Countervailing Duties and Non-Market Economy antidumping duties in the case referred above]
4. the finding [regarding] the conditions under which Article 14(d) of the Subsidies Agreement allows relying on ex-country benchmarks in making a benefit determination [in the *US—Countervailing Measures Art. 21.5* decision]

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145. Article 17.6(ii) of the Anti-Dumping Agreement reads as follows: "In examining the matter referred to in paragraph 5: . . . (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Anti-Dumping Agreement (Implementation of Article VI of the GATT) art. 17.6(ii), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201.

146. Dispute Settlement Body, *Minutes of Meeting*, ¶ 75, WTO Doc. WT/DSB/M/265 (Feb. 19, 2009).

147. *Id.* ¶ 81.

> 5. the finding in [A*rgentina—Footwear* that GATT Article XIX:1(a) and Article 2.1] of the Safeguards Agreement apply cumulatively[148]

All of these developments contributed to the recent crisis. Playing a crucial role is the emergence of *de facto* binding precedent. Given the resulting rigidities, the United States saw the AB as an obstacle and turned incrementally the mechanisms of control, which subpart B explains.

B. *The United States and Compliance*

There are a variety of ways in which states can express dissatisfaction and attempt to exercise control over IC decisions. One of these is strategic litigation, where countries carefully select disputes and craft legal arguments to shape jurisprudence.[149] This is commonplace at the WTO where disputes are not just about trade, but also about states' broader interests in clarifying the agreements in key areas and signaling to important constituencies.[150] Another control mechanism is attempting to influence who hears cases and makes decisions. The United States has exercised veto power over the (re)appointment of AB members to the point that the AB lost its quorum in December 2019. However, our focus is on perhaps the most severe (yet less explored) behavioral implication of precedent use: less compliance with AB decisions.

In recent years, the United States has complied less frequently with rulings. The application of precedent is a major contributing factor. To understand how precedent may affect compliance it is necessary to remember that trade deals reflect a careful political bargain. This is not just among trade partners, but also among competing domestic interest groups whose preferences governments must balance when striking deals. A successful WTO member can activate those interest groups who oppose trade liberalization with final decisions authorizing countermeasures.[151]

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148. Jorge Miranda & Manuel Sánchez Miranda, How the WTO Appellate Body Drove Itself into a Corner 5, 7, 12, 20 & 25 (May 8, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596217#.Xrm1_A8rxPo.twitter [https://perma.cc/3SG7-DQE3] (archived Feb. 27, 2021).

149. *See* Krzysztof Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547–48 (2014).

150. *See* CHRISTINA L. DAVIS, WHY ADJUDICATE? ENFORCING TRADE RULES IN THE WTO 281–86 (2012) (arguing that disputes are about appeasing audiences that might be quite narrow—but who have significant political weight).

151. *See* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules–Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 343–44 (2000).

Of course, some interest groups use WTO rules as leverage to advance their policy agendas. Those interest groups can be viewed as constituencies of compliance, especially when preferences align.[152] Not least, trade agencies act as the overseers of not only foreign compliance with WTO rules, but also with domestic compliance so as to avoid WTO disputes, supporting market liberalization. Hence, precedent can affect the ability of the states to comply. This is because the pressure to constrain domestic regulation in light of WTO rules translates into domestic political pressures.

To further assess the impact of AB decisions on such processes we obtained data on compliance with decisions during the same period, from 1995 to 2015.[153] Compliance is measured as tangible policy reform in the wake of an adverse ruling. To be sure, policy reform is not the only way to react to adverse rulings.[154] For example, a respondent that lost a case may choose to face retaliation or may engage in a strategy of what can be called "uncompliance," pursuant to which it formally complies with the ruling but finds other means to deny market access to the other parties.[155] However, reform represents the preferred institutional measure and the most meaningful test—namely, whether a government is willing to dismantle a trade barrier likely erected to protect domestic interests. Arguably, direct effect on domestic policy represents the best measure of compliance with AB decisions.[156]

The data take into account the variation in the types of measures and practices being disputed. The data also accounted for both official statutory and regulatory measures passed by defendant

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152. *See generally* Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 152 (2011).

153. Litigation can take years, as can any policy reform by respondent countries. Therefore, our data extends only through the disputes where we are confident enough time has elapsed. *See The Process – Stages in a Typical WTO Dispute Settlement Case, 6.1 Flow Chart of the Dispute Settlement Process*, WTO, www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm [https://perma.cc/XNT8-JHJC] (archived Feb. 27, 2021).

154. Money damages are always an additional option to settle trade disputes. *See generally* Joint Communication from Brazil and the United States, *United States – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/45 (adopted Aug. 31, 2010).

155. *See* Stephen Chaudoin, Jeffrey Kucik & Krzysztof Pelc, *Do WTO Disputes Actually Increase Trade?*, 60 INT'L STUD. Q. 294, 296 (2016).

156. *See* John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 63–64 (1997); Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416, 416–17 (1996). Warren Schwartz & Allan Sykes, *The Economic Structure of Renegotiation and Dispute Settlement in the WTO*, 31 J. LEGAL STUD. 179, 189 (2002), advanced a different argument. In their view, WTO dispute settlement is structured to allow efficient breach in certain circumstances. This means it allows persistence in violations as long as the "violator is willing to pay" the price. While this might be correct as a conceptual matter, the removal of a measure in breach of WTO law remains the best way to comply with decisions.

governments—either of which represent tangible policy changes in the wake of rulings. Hence, the coding reflects official legislation as well as administrative measures implemented by defendant governments.[157] In the sample, the respondent country complied fully in 101 instances, partially in fourteen, and failed to comply in forty-one cases.

Table 4. Compliance Rates by WTO Member[158]

Respondent	Adverse Rulings (#)	Compliance (#)	Compliance (%)
US	46	27	58.7
EU	19	9	47.4
Canada	9	7	77.8
Mexico	6	4	66.7
Argentina	6	5	83.3
China	5	3	60.0
South Korea	5	4	80.0
Japan	4	2	50.0
Chile	3	0	0.0
Australia	3	1	33.3

Table 4 reports compliance rates by member for the ten countries that have faced the largest number of adverse rulings. Looking at these numbers, compliance rates are generally good: compliance occurs about two-thirds of the time across the WTO's caseload.[159] Considering that the WTO lacks the centralized enforcement power found in domestic legal settings, an overall compliance rate of over 60 percent is non-negligible, especially given that compliance refers to tangible policy change.

Table 4 raises a couple of additional issues. For one thing, the United States is subject to far more adverse rulings. However, as noted above, the actual loss rate for the United States has been relatively steady over time (and consistent with the broader membership).

157. Additional information on this data can be found in Jeffrey Kucik & Lauren Peritz, *How Do Third Parties Affect Compliance in the Global Trade Regime?*, J. POL. (forthcoming 2021) (on file with authors).

158. The data on compliance is adjusted for repeated fillings on the same measure. *See id*.

159. This includes compliance decisions that may occur years down the road. On-time compliance—measured as reforming by the stated deadline in the adopted reports—is far lower.

Therefore, the accumulation of adverse rulings, while certainly a frustration for the United States, is unlikely to be the main reason that political opposition to the AB has accelerated in the last decade.

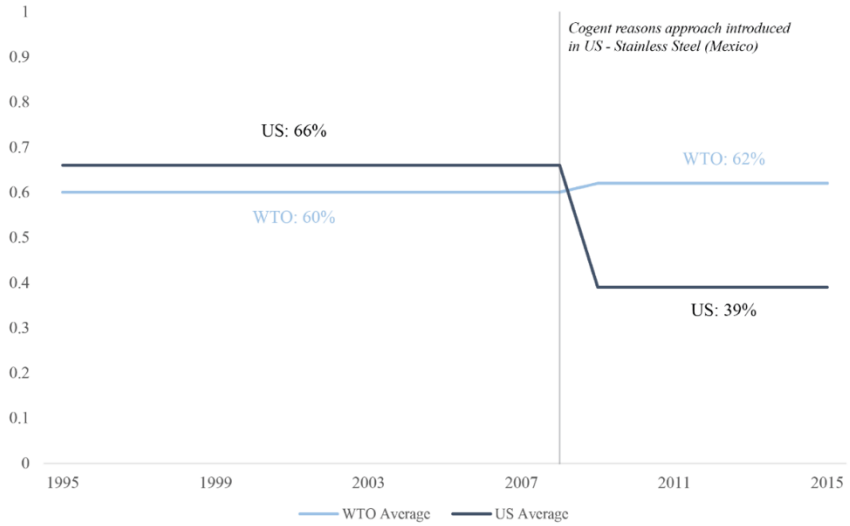
In fact, the change in US behavior is traceable more directly to the aforementioned decision in *United States—Continued Zeroing* as well as *United States—Stainless Steel (Mexico)*, introducing the "absent cogent reasons" approach.[160] To reiterate, that ruling stated that the AB would adopt prior rulings unless there were cogent (i.e., compelling) reasons to depart from precedent. In fact, since that time—roughly year 2009—the US compliance rates dropped off precipitously. Figure 2 shows the break in average compliance rates before and after *United States—Stainless Steel (Mexico)* and *United States—Continued Zeroing*. The United States complied at a slightly higher rate than the rest of the WTO membership prior to that decision. However, its compliance rate dropped afterward.

To be sure, many other things happened around this time and there is noncompliance that goes under the radar of our measure. But US trade officials were originally content with the AB's reading of its role in dispute settlement.[161] As a result, the United States complied with most rulings early in the WTO's history. This includes its losses in *United States—Gasoline*, the high-stakes *United States—Shrimp* case, and other disputes. Over time, however, the accumulation of precedent led to a less favorable policy response from the United States, which indicates a change in approach.

160. *See US – Continued Zeroing*, *supra* note 138; *US – Stainless Steel (Mexico)*, *supra* note 105.

161. In USTR's recent report on the AB, it singles out the early decision in *Japan – Alcoholic Beverages II*, which states that prior decisions have no binding precedential value. *See* U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 61 (2020) [hereinafter USTR REPORT].

Figure 2. Shift in Compliance Trends



One influence on compliance is the extension of precedent by the AB, especially in trade remedies disputes. These extensions, combined with other factors such as the need for policy space to deal with China's industrial policy may have exacerbated the response. At the time of writing this Article, the United States was in noncompliance—or, partial compliance—with key disputes that include *United States—Stainless Steel (Mexico)*, *United States—Zeroing (EC)*, and *United States—Anti-Dumping and Countervailing Duties (China)*.[162] In all three of these disputes a prior precedent was applied and extended. For example, *United States—Anti-Dumping and Countervailing Duties (China)* extended the interpretation of prior AB decisions in four previous disputes.[163]

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162. *See generally* Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008); Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WTO Doc. WT/DS350/AB/R (adopted Feb. 19, 2009); Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011).

163. For these four previous disputes, see generally Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/AB/R (adopted Oct. 27, 1999); Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WTO Docs. WT/DS139/AB/R (adopted June 19, 2000); Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004); Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WTO Doc. WT/DS296/AB/R (adopted July 20, 2005).

Noncompliance is a significant action or omission by governments. It amounts to the most direct challenge to the WTO's legal authority—short of crippling the enforcement system or abandoning the agreement. The decline in US compliance rates, measured as a failure to bring domestic policies into alignment with DSB decisions, comes only after repeated applications of a particularly strong version of precedent. The extension of previous rulings in defiance of the AB's stated mandate constitutes a form of judicial overreach. The United States' response has been threefold. Like many countries, it carefully chooses the complaints it files. It has also exercised control through the vetoing of AB member (re)appointments. And, more dramatically, it has openly shirked DSB recommendations to dismantle "WTO-illegal" policies.

It is worth repeating that precedent is not the only issue that influences whether states abide by their trade-liberalizing commitments. However, it clearly influences the behavior of one of the WTO's most powerful members—and original patrons of the system.[164] It is also clear that the use of precedent cannot prove by itself the collapse of the AB without comparing it to the role of precedent in a comparable IC. This analysis points out the contrasting ways powerful states have dealt with other ICs. Chief among them is the continuation of investor-state arbitration in US treaty practice as a form of international investment dispute settlement with states deemed to have a weak rule of law. Moreover, despite controversial decisions, the United States has attacked the addition of an appeal process to correct or control decisions by investment tribunals. In many ways, with one instance of *ad hoc* adjudicators appointed to hear the specific case, states have more control to prevent the cementing of controversial decisions into accepted "caselaw."

V. INTERNATIONAL PRECEDENT AND LEGALIZATION

The AB is an exception in almost every respect—it is the sole appeal level multilateral body with general jurisdiction over an entire area of US policy. Yet, the erosion of US trust in the AB illustrates a well-known tension between the enforcement of international law and cooperation: stricter enforcement can actually decrease compliance with the law.[165] The reason is that enforcement mechanisms can result

164. *See generally* J. Kucik, L. Peritz & S. Puig, *Legalization and Cooperation in the Global Trade Regime* (Ariz. Legal Stud., Discussion Paper No. 20-41, 2020), in which we provide stronger evidence of the relationship between the expansion of precedent and compliance.

165. *See* James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269, 296 (1998); George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 380–81 (1996).

in over-legalization and increase the costs of upholding treaty commitments. As explained in this Part, these findings have implications for trade adjudication and beyond.

A. *Extension and Institutional Design*

The main finding suggests that there is reason to remain concerned about the tightening of international rules, whether it is through the application of precedent or any other mechanism that may reduce the permissible policy space and change the nature and extent of treaty commitments. The problem is that governments have to trade off between competing domestic interests when deciding whether to comply with international law.[166] In the context of international trade, striking that balance is especially difficult.[167] Trade is known to generate "winners and losers."[168] There will always be some segment of the economy that loses from economic policies, including trade openness. These players will lobby hard for states to shirk their trade-liberalizing commitments, endangering the formation of agreements and the longer-term compliance with those agreements.

Treaty negotiators understand this difficulty, often referred to as "time-inconsistency problems" in the economics and political science literature.[169] The idea is that governments recognize their shared vulnerabilities to domestic interest groups. Those interests may pull states away from compliance at some point in the future. Take trade disputes, the example at issue. Disputes often arise precisely because governments have chosen to prioritize a domestic commercial interest when implementing domestic economic policy. Hence, trade disputes tend to reflect tensions between liberalization and interests that prefer noncompliance of international deals. In response, agreement designers try to "contract around" the threat of noncompliance. One mechanism for doing so is including flexibility and strategic ambiguity in the rules. That way, governments enjoy greater freedom in their

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166. *E.g.*, Stephen Chaudoin, *Promises or Policies? An Experimental Analysis of International Agreements and Audience Reactions*, 68 INT'L ORG. 235, 253 (2014); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* THE HANDBOOK OF INTERNATIONAL RELATIONS 538, 542–44 (Walter Carlnaes, Thomas Risse & Beth A. Simmons eds., 2002).

167. *See* Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833, 833–34 (1994).

168. *E.g.*, Michael J. Hiscox, *Class Versus Industry Cleavages: Inter-Industry Factor Mobility and the Politics of Trade*, 55 INT'L ORG. 1, 1 (2001); HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 9 (1997).

169. *See* Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 189, 193 (2007).

domestic policy choices—particularly when trying to appease special (i.e., protectionist) interests.

However, a strong norm of applying precedent may reduce this space, often by extending prior decisions. Inevitably, some of these decisions will be disappointing, incorrect, or unworkable to the parties. This means governments have fewer safe routes when trying to navigate the choppy waters of competing domestic interests. Powerful states understand the different arguments enabled by the ambiguous terms of WTO provisions; precedent constrains their options in that respect regardless of their position as respondent and complainant. In many ways, it is not surprising that trade remedies, mechanisms designed to afford flexibility to governments on the use of tariffs and quantitative restrictions, are at the center of concerns over adjudication at the WTO.

States that take commitments seriously are therefore left with limited choices.[170] They can comply with international obligations and pay a steep domestic political cost. Or they can ignore their international commitments in favor of the domestic interests. Many governments, especially democratically elected ones, will feel pressure to choose the latter option. That is what the examples of the WTO illustrates. The United States has relied heavily on trade remedies to maintain its commitment to the WTO while, at the same time, providing industries like steel or solar panels insulation from global market forces. Over time, however, the AB's application of precedent resulted in stricter rules. So, how can the design of international dispute settlement bodies prevent this while recognizing the need and incentives to apply precedent?

There is no silver bullet that can be applied to all ICs as these are distinct types of institutions, varied in scope, power, and vitality.[171] However, one characteristic is common: ICs enjoy the formal power that states delegate to them, including the possibility of finding policies in breach of international law. These rulings may signal the trustworthiness of a state to different audiences.[172] In some sense, what our exploration of precedent shows is that the larger linguistic formulation of a decision may be more relevant for some audiences of legal proceedings. As Hume explains, "though sometimes overlooked,

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170. *See* Laurence R. Helfer, *Flexibility in International Agreements*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 175, 189 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

171. *See* Julia Gray, *Life, Death, or Zombie? The Vitality of International Organizations*, 62 INT'L STUD. Q. 1, 1–2 (2018).

172. *See* Shuhei Kurizaki & Taehee Whang, *Detecting Audience Costs in International Disputes*, 69 INT'L ORG. 949, 949–52 (2015); Michael Tomz, *Domestic Audience Costs in International Relations: An Experimental Approach*, 61 INT'L ORG. 821, 821–22 (2007).

the language of court opinions can be as important as the disposition of cases."[173] In some sense, the court decision is part of a political discourse and the "[p]olitical discourse cannot be reduced to mere factual information—the tone of a text may be as influential as its substantive content."[174]

The controversy around precedent is, in part, an institutional design issue to calibrate the politics of trade adjudication. It is unlikely that a better definition of the role of precedent will resolve the tensions, especially at the WTO. Instead, changes can aim at encouraging decision-making that is more palatable to states by building some features of control into the system or by narrowing the scope of issues to be decided by adjudicators, hopefully allowing for the adjudication of less controversial issues. It can also establish strong controls like binding interpretations or systemic safety-valves.[175] WTO reformers should also consider a less legalized committee oversight system rather than adjudication of trade remedies. These features are, of course, well-travelled terrain in the literature, especially in international economic law, including the WTO where controlling the use of precedent is particularly hard.[176]

Outside of the WTO, more attention could be given to "sunset" or termination clauses in treaties.[177] Sunset clauses could be useful in new treaties with strong delegation (e.g., that include appeal or processes for review) and active political constituencies, to fine-tune or even overturn precedent that is incorrect or unworkable. A discrete number of agreements are starting to experiment with these clauses. For example, Article 34.7(1) of the USMCA provides that the treaty shall terminate sixteen years after it enters into force unless each of the three parties to the treaty affirmatively confirm a desire to continue the agreement for a new sixteen-year period.[178] Such clauses are strong, perhaps too strong, but may allow for parties to renew their commitments and can encourage an active revision of interpretations

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173. Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court,* 40 L. & SOC'Y REV. 817, 817 (2006).

174. Lori Young & Stuart Soroka, *Affective News: The Automated Coding of Sentiment in Political Texts*, 29 POL. COMM. 205, 205 (2012)*;see also* Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411, 414–17 (2013). On the broader relationship of mass publics to courts, see generally John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41 (2002).

175. *See* Miranda & Miranda, *supra* note 148, at 40.

176. *See* Sergio Puig, *International Regime Complexity and Economic Law Enforcement,* 17 J. INT'L ECON. L. 491, 500–08 (2014) (presenting strategies to be used in economic adjudication); *see also* Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 516–17 (2009); B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 AM. POL. SCI. REV. 389, 389 (2005).

177. For a discussion on the potential role of sunset clauses, see Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 210 (2020).

178. USMCA, *supra* note 12, art. 34.7.

after a process of states' engagement with relevant constituencies. A stronger temporal dimension to treaties entails the possibility of revision of the parties' understanding over key treaty text and practices over time.

Of course, there may be many costs associated with sunset clauses, and mechanisms to ensure that states undertake the required negotiations in good faith should be considered. However, the benefit is that strong uses of precedent are eventually subject to review. Countries (and adjudicators) have reassurance that, at some point down the road, a round of revisions will take place. Any deviations from the original intention of the agreement, caused by extending precedent, can be revised through a diplomatic/political process. Since design choices are, ultimately, about providing countries with some degree of "international insurance,"[179] the promise of revisiting the agreement in the future may increase compliance today. Moreover, the inclusion of this device could incentivize ICs to be careful of infringing on policy space where agreements are ambiguous in order to preserve their own authority and existence.

B. *Extension and International Law*

States place limits on international adjudicatory bodies precisely to address the tension between enforcement and cooperation that can cause a backlash against ICs.[180] Limiting precedent is one way in which states avoid unrealistically tight rules.

Conversely, the application of precedent can result in the tightening—an increase in precision—of the rules, potentially beyond the point at which governments are willing or able to cooperate. As in the case of the WTO's AB, precedent results in the hardening or strengthening of obligations over time. This effectively does two things. First, the application of rules as interpreted by precedent to a broader set of circumstances, potentially removes rulemaking from the political process. States are wary of delegating such authority to ICs in the first place; they do so only under specific conditions. Effectively, this process transfers power from the political process to the adjudicatory one, where the negative consequences of precedent cannot be corrected.

Second, a strong norm of precedent removes an important source of flexibility from the system, which cannot be regained by relying on exceptions to the rules. International treaties, especially in the

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179. Barbara Koremenos, *Contracting Around International Uncertainty,* 99 AM. POL. SCI. REV. 549, 549 (2005).

180. *See* Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences,* 27 EUR. J. INT'L L. 293, 293–94 (2016).

economic domain, are often analogized to incomplete contracts.[181] International rules—broad standards of governmental conduct—are often left deliberately vague by treaty negotiators so that governments enjoy some leeway in their domestic policy choices and, over time, can bargain within the confines of such terms over the legality of complex policies.[182] However, a strong norm of precedent is likely to lead to extensions that reduce some necessary ambiguities in rules, especially when adjudicators privilege systemic logic. Therefore, as ICs try to increase their authority, often by prioritizing precision and legal coherence, they effectively strip away some of the term's flexibility, deterring policy experimentation as well as political bargaining over the legality of controversial policies.

Restating the obvious: precedent is necessary and not "bad" *per se*, but has costs (and of course multiple benefits). The cost of a strong norm of precedent includes, among others, that it essentially works against the benefits of designing flexible agreements with broad rules that restrict states' practices (or as in the case of antidumping establish the conditions to react against certain practices) with limited exceptions, or carve-outs from such provisions. Such flexibility is useful to overcome the time inconsistency problems endangering international economic cooperation.[183] In fact, political economists show that countries are (i) more likely to enter into agreements, (ii) more likely to make deeper commitments, and (iii) more likely to remain in agreements over time when those agreements include flexible provisions.[184] Precedent, even when applied correctly to the extent that it resolves ambiguities in the law, effectively reduces flexibility over time and is more likely to result in incorrect or unworkable legal standards. According to the economics literature on cooperation, less flexibility raises the costs of compliance. It provides governments less space to navigate competing domestic interest groups, increasing a potential failure of coordination between relevant constituencies of the agreement. This can lead to the obsolescence of a treaty.[185]

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181. *See* Henrik Horn, Giovanni Maggi & Robert W. Staiger, *Trade Agreements as Endogenously Incomplete Contracts*, 100 AM. ECON. REV. 394, 394 (2010); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 782 (2001).

182. The principal flexibility provisions at the WTO include anti-dumping as well as safeguards and countervailing duties. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 62 (2005).

183. *See* Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT'L ORG. 477, 477, 480 (2008).

184. *See* Rosendorff, *supra* note 177, at 389–90 (2005); B. Peter Rossendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829, 831–32 (2001).

185. *See* Marcelo G. Kohen, *Desuetude and Obsolescence of Treaties*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 350, 352–53 (Enzo Cannizzaro ed.,

Stricter rules resulting from application of precedent at the AB may have implications for international legal theory—although, as previously noted, the AB is the exception and not the norm of international legalization. Nevertheless, it shows how legal interpretation may lead to over-judicialization. This is relevant for compliance theory because most interest-based theories argue that states comply mostly for three reasons: (1) there are no direct benefits to defecting, (2) there is a chance that the affected parties will retaliate, and (3) states wish to preserve a reputation for abiding by agreements.[186]

Under the approach followed by most interest-based theories—from constructivist to institutionalist theorists—rules tend to be a static aspect of compliance, capacious enough to resolve at least some cooperation problems. But precedent, and the extension of it, can affect the expectations over time about a state's future actions. Its application adds a delicate temporal element to international commitments that are subject to strong delegation, often applying precedent norms. In other words, when a strong norm of precedent is present over time, the tightening of rules increases precision while also increasing the benefits of defecting.[187] Hence, the increase in precision can complicate the balance that rules often represent, including the balance between different branches of government, the balance afforded to ordinary regulatory policymaking, or the balance between different constituencies. Hence, the "over-enforcement" of rules may limit the potential for cooperative behavior as such balances become less reliable over time.

To this effect, compliance theory should internalize that international commitments subject to constant adjudication may have a more limited time effectiveness given the domestic dynamics that they can engender. This is because from the standpoint of political officials, international trade agreements need to result in net political gains relative to political costs. Given the uncertainty about the future, it is necessary for states to contemplate conditions where the political costs and benefits to them are somewhat unpredictable—a process facilitated by flexibility and some level of ambiguity in text. For states,

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186. *See* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 198–99 (2008); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95, 98–99 (2002); Beth A. Simmons, *Compliance with International Agreements*, ANN. REV. POL. SCI. 75, 80–83 (1998).

187. *See* Karen J. Alter, Emilie Marie Hafner-Burton & Laurence R. Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449, 449 (2019) (explaining how over time compliance in the context of delegation is difficult because governments often do not control the timing, nature, or extent to which political and policy decisions are adjudicated).

such ambiguity can help tailor the degree of commitments as new information comes to light. Therefore, it is important to develop concrete periodization and testable hypotheses that explain what type of structural conditions explain the variation of compliance as a function of the costs imposed by international adjudication.

VI. CONCLUSION

The use of precedent is celebrated as a fundamental feature of dense legal systems. It enhances values like correctness, fidelity, and candor to the law, and with that, the authority of ICs. International legal scholars tend to see such benefits, but often forget that precedent may also inflict costs. Social scientists interested in interstate cooperation, on the other hand, often focus on judicialization of politics, but ignore the actual ways in which the application of law may be implicated in judicialization and over-legalization. By looking at twenty years of practice of the "World Trade Court," this Article contributes to this conversation. As this Article explained, the following and extension of precedent through a strong yet unwritten norm of the *stare decisis* doctrine can lead to the drifting of the original commitments of treaty parties, beyond the point at which governments are willing to cooperate. Without a mechanism to correct for this erosion, the case of the AB of the WTO will remain as a cautionary tale of the legalization of international politics.