The Role of the Appellate Body and its Precedents in the World Trade Organization: A Constructivist Approach to the Multilateral Trading System

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ABSTRACT

The World Trade Organization (WTO) has been in a crisis of multilateral negotiations since its inception. From this observation, this thesis addresses the question of how the multilateral trading system has been able to function in the context of continued failures to reach multilateral agreements to pursue the so-called rules-based regime. It suggests that the answer to this question lies in the dispute settlement system and the Appellate Body of the WTO. This thesis demonstrates that WTO Members have relied on the Appellate Body to create *de facto* precedents. With such precedents, the Appellate Body has served as a means for preserving and deepening the principles on which the multilateral trading system is based. To demonstrate the role of the Appellate Body and especially its precedents in the multilateral trading system, this thesis examines the concept of multilateralism and adapts it to the WTO rules-based model. In this respect, it shows that the role of the Appellate Body in the multilateral trading system is that of an *institutional mechanism*, as conceptualized in the constructivist approach, i.e., central to the functioning of the WTO. This observation sheds light on the questions raised by the current demise of the Appellate Body, particularly with respect to the ability of the trading system to continue to function on a multilateral basis. This thesis concludes that the interim solution adopted by a small group of WTO Members, the *Multi-Party Interim Appeal Arbitration Arrangement*, could lead the WTO to a global trading system similar to the one that existed prior to its creation, i.e., a global trade operating under a "club approach" that relies *inter alia* on power and diplomacy, rather than on a *truly* rules-based multilateral system.

RÉSUMÉ

L'Organisation mondiale du commerce (OMC) est plongée dans une crise des négociations multilatérales depuis sa fondation. Partant de ce constat, cette thèse aborde la question à savoir comment le système commercial multilatéral a continué de fonctionner dans le contexte des échecs continus à conclure des accords multilatéraux pour maintenir le régime dit « fondé sur des règles ». Elle suggère que la réponse à cette question réside dans le système de règlement des différends et l'Organe d'appel de l'OMC. Cette thèse démontre que les membres de l'OMC se sont appuyés sur l'Organe d'appel pour créer des précédents *de facto*. Avec de tels précédents, l'Organe d'appel a servi de *mécanisme institutionnel* pour préserver et approfondir les principes sur lesquels le système commercial multilatéral est fondé. Afin de mettre en lumière le rôle de l'Organe d'appel et particulièrement de ses précédents dans le système commercial multilatéral, cette thèse examine le concept du multilatéralisme et l'adapte au modèle fondé sur les règles de l'OMC. À cet égard, elle démontre que le rôle de l'Organe d'appel dans le système commercial multilatéral est celui d'un *mécanisme institutionnel*, tel que conceptualisé par l'approche constructiviste, c'est-à-dire, au cœur du fonctionnement de l'OMC. Cette observation permet de souligner les questions que soulève la paralysie qui affecte actuellement l'Organe d'appel, et plus particulièrement sur la capacité du système commercial de fonctionner sur une base multilatérale. Cette thèse conclut que la solution provisoire adoptée par un groupe restreint de membres de l'OMC, l'*Arrangement multipartite concernant une procédure arbitrale d'appel provisoire*, pourrait conduire l'OMC à (re)devenir un système commercial mondial similaire à celui qui existait avant sa création, c'est-à-dire un commerce mondial fonctionnant selon une « approche de club » qui repose entre autres sur la diplomatie et le pouvoir, plutôt que sur un système multilatéral *véritablement* fondé sur des règles.

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ABBREVIATIONS

AB	Appellate Body
ADA	*Anti-Dumping Agreement*
DSB	Dispute Settlement Body (of the WTO)
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
ECJ	European Court of Justice
EU	European Union
GATS	*General Agreement on Trade in Services*
GATT	*General Agreement on Tariffs and Trade*
ICJ	International Court of Justice
ITO	International Trade Organization
JSIs	Joint Statement Initiatives
MPIA	Multi-Party Interim Appeal Arbitration
MPIA Arrangement	*Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*
PPA	*Protocol of Provisional Application*
PTAs	Preferential Trade Agreements
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
TBT Agreement	*Agreement on Technical Barriers to Trade*
UK	United Kingdom
US	United States of America
WTO Agreements	Annex 1 of the *Agreement Establishing the World Trade Organization*
WTO	World Trade Organization

INTRODUCTION

Since its inception, the World Trade Organization (WTO) has been facing a multilateral crisis. While it was created as a "negotiating machine,"[1] supposed "to preserve the basic principles and to further the objectives underlying th[e] multilateral trading system,"[2] the WTO Members have been unable to make progress in terms of trade negotiation.[3] After the World War II and the negotiation of the *General Agreement on Tariffs and Trade* (GATT),[4] world trade has been the subject of trade rounds aimed at reducing tariff and nontariff trade barriers between GATT Members.[5] The 8th of those rounds, the Uruguay Round, concluded with a package of trade agreements (WTO Agreements) entered into force with the creation of the WTO on January 1, 1995.[6] This package of agreements still forms the legal framework governing world trade to this date.[7] In addition to these agreements, the Uruguay Round sets a "built-in agenda" for future work in a subsequent trade round.[8] In fact, a 9th round began in 2001, the Doha Round, with the objective of continuing progress on trade liberalization through the reduction of trade barriers.[9] However, the round never concluded because WTO Members were never able to achieve the negotiation

[1] Nicolas Lamp, "The Club Approach to Multilateral Trade Lawmaking" (2016) 49:1 Vand J Transnat'l L 107 at 107 [*Club Approach*].
[2] WTO, *Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) at Preamble [*Marrakesh Agreement*].
[3] According to the Preamble of the *Marrakesh Agreement*, Members should negotiate and enter into new agreements to contribute to the objectives of the multilateral trade regime. See *Ibid* ("[b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations" at preamble) [emphasis added].
[4] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948) [GATT].
[5] WTO, "The GATT years: from Havana to Marrakesh" (last consulted 10 December 2022), online: WTO <https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm> [WTO, *The GATT years*].
[6] WTO, "The Uruguay Round" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> [WTO, *Uruguay Round*].
[7] A few instruments came into force after the Uruguay Round. An example is the *Declaration on Global Electronic Commerce*, adopted at the Second Ministerial Conference in May 1998, according to which WTO Member agreed on a provisional moratorium on customs duties on electronic transmissions. See WTO Ministerial Conference, *Geneva Ministerial Declaration on Global Electronic Commerce*, 2nd session held on 18 and 20 May 1998, WTO Doc WT/MIN(98)/DEC/2, online: WTO <https://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm>.
[8] WTO, *Uruguay Round*, *supra* note 6.
[9] WTO, "The Doha Round" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm>.

objectives.[10] The round was even called "dead" by the Financial Times in 2018, when any attempt to make progress on trade negotiation was definitely considered over.[11]

Nevertheless, it would be mistaken to conclude that because of these stalled negotiations, the WTO has not functioned over the past 25 years. On the contrary, world trade has grown steadily since 1995, and WTO Members have continued to trade under WTO rules and to engage with the organization, especially through the dispute settlement system.[12] The dispute settlement system is an important achievement of the Uruguay Round. The *Understanding on Rules and Procedures Governing the Settlement of Disputes,* known as the Dispute Settlement Understanding (DSU), establishes a dispute settlement system to resolve disputes arising from rights and obligations found in the WTO Agreements.[13] The dispute settlement system is conceived as a "central element" for the purpose of "providing security and predictability to the multilateral trading

[10] Negotiations covered topics such as agriculture, non-agricultural market access, services, trade facilitation, fisheries subsidies and regional trade agreements, the environment, and geographical indications. Almost none of the objectives were met; especially the increase of market access and the elimination of trade barriers for each topic of negotiations. See WTO, "Doha Round: what are they negotiating?" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/tratop_e/dda_e/update_e.htm>.

[11] Financial Times, "The Doha round finally dies a merciful death" (21 December 2015), online: FT <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879> [FT, *Doha Round Dies*]. WTO Members never officially declared the death of the Doha Round, but a reading of the *Nairobi Ministerial Declaration* of December 2015 (see para 32) leads to the conclusion that negotiations under the Round have stalled since then. Indeed, there have been no multilateral negotiation activities under this round since 2015. See Meredith Kolsky Lewis, "The Origins of Plurilateralism in International Trade Law" (2019) 20:5 JWIT 633 at 636, no 8 citing WTO Ministerial Conference, *Nairobi Ministerial Declaration* (19 December 2015), 10th session (held from 15 to 19 December 2015), WTO Doc WT/MIN(15)/DEC. However, it should be noted that negotiations have recently resumed in the context of fisheries and subsidies. At the 12th Ministerial Conference on 17 June 2022, the WTO Members negotiated and adopted the *Agreement on Fisheries Subsidies*. The agreement is not yet operational since the requirement that two-tiers of WTO Members deposit instruments of acceptance with the WTO has not yet been met. See WTO Ministerial Conference, *Agreement on Fisheries Subsidies*, Ministerial Decision, 12th session (held from 12-15 June 2022), WTO Doc WT/MIN(22)/33, online: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf&Open=True> [*Agreement on Fisheries*].

[12] As of 2015, the "dollar value of world trade has nearly quadrupled, while the real volume of world trade has expanded by 2.7 times […] [and] [a]verage tariffs have almost halved, from 10.5% to 6.4%" since the establishment of the WTO. See WTO, "The WTO's 25 years of achievement and challenges" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/news_e/news20_e/dgra_01jan20_e.htm>. In addition, the dispute settlement system has been widely used. "As of 31 December 2021, WTO members referred 607 disputes to the Dispute Settlement Body." WTO, "Dispute settlement activity — some figures" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm> [WTO, *Dispute Settlement – Some Figures*].

[13] WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 U.N.T.S. 401 (entered into force 1 January 1995), art 1(1) [DSU].

system."[14] To this end, the DSU provides for the establishment of panels to hear trade disputes, but also for a standing Appellate Body,[15] both tasked to preserve WTO Members' rights and obligations stemming from the WTO Agreements, and to clarify the provisions of those agreements.[16]

This thesis argues that the WTO multilateral trading system has operated through the dispute settlement system, and in particular the Appellate Body, by virtue of the doctrine of precedent. In this regard, we argue that the "intersubjectivity"[17] of expectations on which the WTO is based has been forged by the Appellate Body. In fact, the Appellate Body has served as a platform for dialogue in the absence of negotiated decision-making activity in the WTO.[18] Consequently, we argue, pursuant the constructivist approach, that the Appellate Body rulings have served as an "institutional mechanism" for preserving and furthering the principles underlying the multilateral trading system.[19] We argue that the Appellate Body, by relying on these principles contained in the WTO Agreements, has forged intersubjectivity among Members. In this context, the paralysis of the Appellate Body is of particular concern for the WTO's ability to pursue a rules-based multilateral trading system.[20]

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[14] *Ibid*, art 3(2).
[15] *Ibid*, art 6 (for panels),17 (for the Standing Appellate Body).
[16] *Ibid*, art 3(2). As of 31 December 2021, 607 disputes have been referred to the DSB. 365 of these disputes have led to the establishment of a panel, and 189 to an appeal. See WTO, *Dispute Settlement – Some Figures*, *supra* note 12.
[17] See John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order" in Stephen D. Krasner, ed, *International Regimes*, (Ithaca, NY: Cornell University Press, 1983) 195 at 380 & 405 [Ruggie, *International Regimes*]. According to Ruggie, "intersubjectivity" refers to the shared expectations on which a regime is based.
[18] Although there has been no significant progress in terms of multilateral negotiations at the WTO and the adoption of multilateral instruments, there are a few exceptions to be noted, including the *Declaration on Global Electronic Commerce*, adopted at the Second Ministerial Conference in May 1998. The Declaration was supposed to be temporary, but it remains in force to this day, as no new instrument has been adopted to replace it. A notable recent exception is the *Agreement on Fisheries Subsidies* that was adopted at the 12th Ministerial Conference in June 2022. The Agreement is not yet applicable. See references at footnote 7.
[19] The principles underlying the multilateral trading system are found in the *Marrakesh Agreement*, *supra* note 2, preamble. Regarding the "institutional mechanism," see Geoffrey Garrett & Barry R. Weingast, "Ideas, Interests, and Institutions: Constructing the European Community's Internal Market" in Judith Goldstein & Robert O. Keohane, eds, *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca and London: Cornell University Press, 1993) 173 at 191 [Garrett & Weingast, *Ideas, Interests, and Institutions*].
[20] The Appellate Body has not been able to review appeals since 10 December 2019 due to unfilled vacancies. As a result, the Appellate Body no longer has the quorum required by Article 17(1) of the DSU to hear cases. See American Journal of International Law, "U.S. Refusal to Appoint Members Renders WTO Appellate Body Unable to Hear New Appeals" (2020) 114:3 AJIL 518.

The interim solution to replace the Appellate Body, the *Multi-Party Interim Appeal Arbitration* (MPIA), limited to the "participating Members,"[21] cannot be considered part of the multilateral trading system of the WTO. Indeed, the MPIA presents similar characteristics to those of the "club" which existed before the establishment of the WTO.[22] During the GATT days, "major trading powers […] manipulate[d] the circle of participants in trade negotiations depending on how these powers weighed the costs and benefits of the participation of additional states."[23] Conversely, the WTO has an ambition of universalization of the global trade regime.[24] In fact, the WTO is based on the principle that each Member has an equal weight in decision-making, regardless of its actual trading weight.[25] In this context, we suggest that the WTO is characterized by a rules-based multilateralism, whereby relations among Members are coordinated through the use of legal means and "on the basis of generalized principles" enshrined in the WTO Agreements.[26]

This thesis mobilizes interdisciplinarity as a methodological strategy.[27] Interdisciplinarity allows us to transcend the boundaries of the legal field by drawing on theoretical and conceptual constructs developed in another discipline.[28] Specifically, we mobilize the constructivist approach

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[21] WTO, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, Communication from Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay, WTO Doc JOB/DSB/1/Add.12 (30 April 2020) [MPIA Arrangement].The countries listed in the MPIA are referred to as the "participating Members," which include Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay. According to Article 1 of Annex 1 of the MPIA and Article 25 of the DSU, *supra* note 13, after the publication of a final report, a party can request arbitration.

[22] Lamp, *Club Approach*, supra note 1.

[23] *Ibid* at 107.

[24] For a discussion on the ambition of universalization, see e.g. *Ibid* at 107 & 176 (Lamp referred in his article to the universal ambit that the US had imagined for the world trade order. He also pointed out to the fact that EU called the principle of single undertaking as the principle of "globality.")

[25] Decision-making by consensus at the WTO reflects the equal weight of each Member.

[26] This is an adaptation to the WTO context of the general definition developed by John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution" (1992) 46:2 Int'l Org. 562 at 571 [Ruggie, *Multilateralism*].

[27] Douglas W. Vick defined "interdisciplinarity" as follows: "[...] interdisciplinarity implies an integration or synthesis – an interconnection between different academic disciplines." See Douglas W. Vick, "Interdisciplinary and the Discipline of Law" (2004) 31:2 JL & Soc'y 163 at 164 [*Interdisciplinary*]. See also M. Nissani, "Fruits, Salads, and Smoothies: A Working Definition of Interdisciplinarity" (1995) 29:2 J. of Educational Thought 121 at 125; Garry D. Brewer, "The Challenges of Interdisciplinarity" (1999) 32:4 Policy Sci. 327.

[28] International law and international relations are two disciplines that complement each other. See e.g. Anne-Marie Slaughter et al. "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92:3 AJIL 367 at 367; Robert O. Keohane, "International Relations and International Law: Two Optics" (1997) 38:2 Harv Int'l L J 487; John K. Setear, "An Iterative Perspective on Treaties: A Synthesis of

and the definition of multilateralism[29] that have been developed in the field of international relations.[30] While the disciplines of law and international relations traditionally "operate largely in isolation from one another,"[31] the study of the WTO multilateral trading system requires looking into the discourses and paradigms of the two disciplines. Indeed, the WTO multilateral trading system is as much a legal regime as a phenomenon of international relations. To understand its functioning, we must therefore adjust our gaze to analyze it as a whole, that is, as a legal, diplomatic, and political phenomenon.

In this context, the constructivist approach is particularly appropriate to analyze the WTO and investigates the multilateral twofold crisis: the non-functioning of negotiated decision-making at the WTO, as manifested in the failure of the Doha Round, and the recent paralysis of judicial decision-making, with the demise of the Appellate Body, and the establishment of the MPIA. This thesis especially focuses on the latter crisis as we argue that the demise of the Appellate Body is the ultimate blow that could hamper the WTO's ability to pursue a *truly* rules-based multilateral trading system.

This thesis is divided into two parts. Part 1 discusses the world trade system, from its beginnings with the GATT to the creation of the WTO. Section I provides an understanding of the concept of multilateralism in the context of the WTO. Section II discusses the doctrine of precedent, the debate over its existence in the international law context, and its emergence in the WTO dispute settlement system. Part 2 studies the role of the Appellate Body and the doctrine of precedent in the multilateral trading system. Section I argues that the WTO has operated through the Appellate Body by demonstrating that world trade has moved from a system of negotiated decision-making to a system of judicial decision-making with the creation of the WTO. It then elaborates on the role of precedents as a means for dialogue. This section further argues that the Appellate Body has

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International Relations Theory and International Law" (1996) 37:1 Harv Int'l L J 139; Michael Byers, "Taking the Law out of International Law: A Critique of the Iterative Perspective" (1997) 38:1 Harv Int'l L J 201.

[29] This definition was developed by Ruggie, *Multilateralism*, *supra* note 26 at 571.

[30] See e.g. Garrett & Weingast, *Ideas, Interests, and Institutions*, *supra* note 19; Ruggie, *Multilateralism*, *supra* note 22; John Gerard Ruggie, *Constructing the World Polity: Essays on International Institutionalisation* (London: Routledge, 1998) [Ruggie, *Constructing*]; Andrew T. F. Lang, "Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime" (2006) 9:1 J. Int. Econ. Law 81.

[31] Vick, *Interdisciplinary*, *supra* note 27 at 167.

acted as an institutional mechanism in the multilateral trading system that has permitted the necessary dialogue to forge intersubjectivity among WTO Members. To this end, this section demonstrates that the Appellate Body has relied on the generalized principles, as embodied in the WTO Agreements. We also point out to the judicial authority that the Appellate Body has exercised over WTO Members to demonstrate that its precedents have indeed had a significant impact on Members' conduct. Section II argues that the demise of the Appellate Body risks paralyzing not only the WTO dispute settlement system, but also the multilateral trading system as a whole. To this end, we point out to the current strategy of "contested multilateralism" used by the US to hamper the multilateral trading system. Finally, we argue that the impact of the interim solution to revive the dispute settlement system is a return to a world trade system operating through a "club approach,"[32] and no longer through a *truly* multilateral rules-based approach.

We conclude that after the paralysis of multilateral negotiations, the paralysis of the dispute settlement system is alarming. Without the Appellate Body, the preservation and evolution of the generalized principles underlying the multilateral trading system are no longer assured. An institutional mechanism that facilitates dialogue among actors in a multilateral system is essential to ensure the normative intersubjectivity of the generalized principles. Thus, without an institutional mechanism, the multilateral trading system can hardly survive.

PART 1 – THE WORLD TRADE SYSTEM: MULTILATERALISM AND THE DOCTRINE OF PRECEDENT

In this first part, we undertake a discussion of the world trade system. More specifically, we discuss in Section I of the multilateralization of trade that has led to the creation of the WTO in 1995. In Section II, we elaborate on the doctrine of precedent, a concept that has generated discussions in the WTO context, both in the academic community and among States.

[32] Lamp, *Club Approach*, supra note 1, *passim*. Lamp acknowledged that many authors have described the club approach in trade lawmaking. However, he argued that the meaning of the club concept has not been clarified. In response, he proposed a conceptualization of the club approach to trade lawmaking, using the economic theory of clubs. We use his conceptualization of the club approach since it provides a thorough and analytical perspective of the concept and transcends it by studying the multilateral trading system from the GATT days to the WTO.

I. The WTO and the Multilateralization of World Trade

The WTO is a fairly recent organization; its creation dates back to 1995. Nevertheless, world trade existed long before the creation of the WTO.[33] In the following subsections, we provide an overview of the modern history of world trade, focusing on the period from the negotiation of the still existing agreement on trade in goods, the GATT, to the creation of the WTO (A). We then discuss the concept of multilateralism and adapt it to the context of the WTO (B).

A. A Brief History of World Trade From Bretton Woods to the Uruguay Round

The post-Second World War period marks a turning point in the history of world trade, with the victors' desire for peace and security underpinning the *raison d'être* of the international economic system.[34] During the Bretton Woods Conference, held in July 1944, the US suggested the creation of an International Trade Organization (ITO), which was supposed to become one of the pillars of the international economic order, along with the International Monetary Fund and the International Bank for Reconstruction and Development.[35] In parallel to discussions on the ITO, and also on a US initiative, negotiations between the principal trading countries started on 8 April 1947 on a "Multilateral Trade Agreement Embodying Tariff Concessions"[36] with the goal of entering into "reciprocal and mutually advantageous negotiations directed to the substantial reduction of tariffs and the elimination of preferences."[37] The agreement resulting from these intensive negotiations, the GATT, was signed on 30 October 1947 by 23 contracting parties.[38] Only 6 of these parties

[33] See e.g. John J McCusker & Thomson Gale (Firm), *History of world trade since 1450*, Gale Virtual Reference Library (Farmington Hills, MI: Thomson Gale, 2006).
[34] The Atlantic Charter, agreed upon by the UK and the US in 1941, comprises "common principles" on which both countries based their "hopes for a better future for the world" (see WTO, "Trade in War's Darkest Hour" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/thewto_e/history_e/tradewardarkhour41_e.htm>).
[35] See e.g. Richard Toye, "The International Trade Organization" in Martin Daunton, Amrita Narlikar & Robert M Stern, eds, *The Oxford Handbook on The World Trade Organization* (Oxford: Oxford University Press, 2012) 85; Rorden Wilkinson, *Multilateralism and the World Trade Organisation* (London: Routledge, 2000).
[36] Roy Santana, "70th Anniversary of the GATT: Stalin, the Marshall Plan, and the Provisional Application of the GATT 1947" (2017) 9:2 Trade L & Dev 1 at 4.
[37] *Ibid*.
[38] The 23 contracting parties were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom, and the United States. See WTO, "Fiftieth Anniversary of the Multilateral Trading System" (last consulted 13 December 2022), online: WTO

initially signed the *Protocol of Provisional Application* (PPA),[39] which allowed the GATT to provisionally apply until the creation of the WTO in 1996.[40] Indeed, the GATT never entered into force and only the PPA allowed for the provisional application of the GATT from 1947 to 1996.[41]

After the signature of the GATT began the Havana Conference, during which the creation of the ITO was discussed. This led to the *Havana Charter*, signed but ultimately never ratified by most legislatures, including importantly the US Congress, initially the proponent of the organization.[42] The ITO never came into existence and the GATT was therefore the only instrument governing world trade on a multilateral basis. The GATT was modified over the years, and the efforts to reduce tariffs between the contracting parties continued through negotiations known as "trade rounds."[43] The incentive to reform the world trade regime started with the end of the Tokyo Round, with world trade rapidly evolving, and the GATT being insufficient to address all of the new issues, such as trade in services.[44] The Uruguay Round, held from 1986 to 1994 as the 8th trade round, was the longest and most important one, as it led to the creation of the WTO and the adoption of the *Marrakesh Agreement*.[45] The *Marrakesh Agreement* was the logical conclusion to the negotiating parties' desire to reinforce multilateral world trade.[46] Indeed, the Uruguay Round brought not only a new trade organization, but new agreements, covering services and intellectual property, and importantly, a dispute settlement system.[47]

<https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm#:~:text=On%201%20January%201948%2C%20GATT,Kingdom%20and%20the%20United%20States>.

[39] These parties were Belgium, Canada, Luxembourg, the Netherlands, the UK, and the US. See *Protocol of Provisional Application*, 30 October 1947, 55 UNTS 308 (entered into force 1 January 1948) [PPA].

[40] The PPA was terminated on 1 January 1996, one year after the entry into force of the *Marrakesh Agreement*. See WTO, Transitional Co-Existence of the GATT 1947 and the WTO Agreement, Preparatory Committee for the World Trade Organization, Implementation Conference (held on 8 December 1994), online: WTO <https://www.wto.org/gatt_docs/English/HTM/7583.WPF.htm> at para 3.

[41] WTO, The GATT years, *supra* note 5. See also WTO, "GATT 1947 and the grueling task of signing" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/tratop_e/gatt_e/task_of_signing_e.htm> [Grueling Task].

[42] WTO, *Grueling Task*, *supra* note 41. *Havana Charter For an International Trade Organization*, United Nations Conference on Trade and Employment, Final Act and Related Documents, 24 March 1948, E/CONF.2/78 (not entered into force) [*Havana Charter*].

[43] WTO, *The GATT years*, *supra* note 5 ("[t]here were additions in the form of a section on development added in the 1960s and "plurilateral" agreements (i.e. with voluntary membership) in the 1970s, and efforts to reduce tariffs further continued" [emphasis added].

[44] *Ibid*.

[45] WTO, *Uruguay Round*, *supra* note 6.

[46] See *Marrakesh Agreement*, *supra* note 2, annexes.

[47] WTO, *Uruguay Round*, *supra* note 6.

The WTO has transformed world trade from a club into a quasi-universal trading system.[48] For instance, the Uruguay Round saw developing countries take on unprecedented obligations to join the WTO.[49] Indeed, under the principle of the "single undertaking," also known as the "single protocol," each candidate for accession has had to become a party to all WTO Agreements to accede to the organization.[50] That being said, upon accession, each Member benefits from an equal voice in the WTO, a distinctive feature of the WTO multilateral trading system.[51] In the same vein, it is one of the principles of WTO negotiations that "[v]irtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately."[52] The following section explores how the literature in international relations understands the concept of multilateralism and adapts it to the context of the WTO.

B. Multilateralism in the WTO Context

Some thirty years ago, a scholar in the field of international relations, John Gerard Ruggie, came up with a definition of multilateralism to which the international community, including the international legal community,[53] still refers today:

> [M]ultilateralism is an institutional form which coordinates relations among three or more states on the basis of "generalized" principles of conduct—that is, principles which specify appropriate conduct for a class of actions, without regard to the

[48] Lamp, *Club approach*, *supra* note 1 at 176 ("[i]n the negotiations up until that point, the "single undertaking, or principle of "globality," as the Europeans liked to call it, had been repeatedly invoked in attempts to adjust the pace of negotiations in one area to the progress in another").
[49] *Ibid* at 182.
[50] See e.g. *ibid* at 175 (the "single undertaking" or "single protocol" approach). See also WTO, "How the negotiations are organized" (last consulted 13 December 2022), online: WTO <https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm#:~:text=Principles,agreed%20until%20everything%20is%20agreed%E2%80%9D> [WTO, *How the negotiations are organized*].
[51] In fact, the general rule at the WTO is that decisions are taken by consensus among the Members, so as to ensure that each Member's interests are considered. See WTO, "Whose WTO is it anyway?" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm>. That being said, a vote may be held in some instances when consensus is not possible. In such case, each Member has one vote, and the majority rule applies. See *Marrakesh Agreement*, *supra* note 2, art IX(2), IX(3), X(1), XII(2).
[52] Therefore, "[n]othing is agreed until everything is agreed." WTO, *How the negotiations are organized*, *supra* note 50.
[53] See e.g. Jutta Brunnée, "Multilateralism in Crisis" (2018) 112 Am Soc'y Int'l L Proc 335 [Juttée, *Multilateralism*].

> particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence.[54]

There are two components to Ruggie's definition of "multilateralism." First is the quantitative component. To be considered "multilateral," an international regime should comprise "three or more" members.[55] Second is the qualitative element, which is the adherence of the membership to a certain set of "generalized principles" that specify and coordinate the "appropriate conduct" or "expected behaviour" regarding a certain number of actions.[56] According to Ruggie's definition, the fact that a regime involves more than three members is not sufficient to qualify it as multilateral.[57] To be considered as such, members must comply with generalized principles:[58] "[w]hat makes a regime multilateral in form, beyond involving three or more states, is that the substantive meanings of those terms roughly reflect the appropriate generalized principles of conduct."[59]

Ruggie noted that his definition lacks a component, which is "how" multilateralism is achieved, or in other words, "how" States' relations are coordinated.[60] He responded to this by reasoning that the "how" is found in the regime through which a multilateral order operates:

> A regime is more concrete than an order. Typically, the term "regime" refers to a functional or sectoral component of an order. Moreover, the concept of regime encompasses more of the "how" question than does the concept of order in that, broadly speaking, the term "regime" is used to refer to common, deliberative, though often highly asymmetrical means of conducting interstate relations.[61]

In light of this identified gap, this thesis explores "how" the WTO operates as a system. In this regard, Jutta Brunnée's discussion on multilateralism is especially interesting. She argued that "[international law], because it transcends ends and issue areas, [...] by providing "generalized"

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[54] Ruggie, *Multilateralism*, *supra* note 26 at 571.
[55] *Ibid* at 566, 571-73.
[56] *Ibid*.
[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid* at 573.
[60] *Ibid* ("[t]o the extent that the characteristic condition or conditions are met, the order in question may be said to be multilateral in form. In short, multilateralism here depicts the character of an overall order of relations among states; definitionally it says nothing about how that order is achieved" at 572).
[61] *Ibid* at 572-73.

principles of conduct and interaction, is an important component of multilateralism."[62] She continued her argument by stating that international law has served "to anchor the many multilateral institutions that have grown into and endured as forums for addressing a wide range of collective concerns."[63]

In the context of multilateral trade at the WTO, States have used a "code-of-laws approach"[64] notably to enshrine the principle that "the 'rule of law' embodied in the trade regime can protect the weak against the strong."[65] Nicolas Lamp even wrote that "a commitment to a 'rules-based system' has become the one goal that the entire WTO membership can agree on."[66]

To reflect the importance of rules in the WTO, this thesis builds on Ruggie's definition of multilateralism, but adapts it to the legal context of the WTO. We emphasize that multilateralism, considered only in its quantitative dimension, i.e., in terms of the number of parties ("3 or more") is an impoverished view of what the concept has come to mean in international relations, as Ruggie explained.[67] We suggest that multilateralism, as experienced at the WTO, refers to the institutionalized legal means that spur expected behaviour among Members, regardless of their number. Our proposed definition applicable to the context of the WTO consequently reads as follows: multilateralism is the institutional form of the WTO trading system, whereby relations among WTO members are coordinated through the use of legal means and "on the basis of generalized principles."[68] This definition embraces the rules-based approach that characterizes the WTO.

In light of this definition, this thesis argues that relations among WTO Members are coordinated through legal means, i.e., the WTO Agreements and the dispute settlement system. The focus on the legal means is appropriate in light of our discussion on the generalized principles. Indeed, we

[62] Brunnée, *Multilateralism*, *supra* note 53 at 336.
[63] *Ibid* at 336.
[64] Nicolas Lamp, *Lawmaking in the multilateral trading system* (PhD Thesis, London School of Economics and Political Science, 2013) [unpublished] at 272 [Lamp, *Lawmaking*], citing, Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago/London: University of Chicago Press, 1970) at 13.
[65] Lamp, *Lawmaking*, *supra* note 64 at 277.
[66] *Ibid* at 278.
[67] Ruggie, *Multilateralism*, *supra* note 26 at 571.
[68] Ruggie, *Multilateralism*, *supra* note 26 at 571.

argue that they are enshrined in the WTO Agreements, and thus central to dispute settlement. Therefore, we examine multilateralism through a legal lens to demonstrate that the multilateral crisis must be examined through "how" relations are coordinated, which is, in the WTO context, through legal rules, as opposed to methods of power or diplomacy.[69]

The generalized principles are central to the definition of multilateralism, and thus to the WTO multilateral trading system, because they frame Members' expected behaviour.[70] In Ruggie's words, they "specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence."[71] Therefore, this means that a defection from these generalized principles by a member or a group of members involved in a multilateral system calls multilateralism into question.[72] In the context of the WTO, the generalized principles are found in the WTO Agreements, to which all WTO Members are parties. Pursuant to the principle of the single undertaking, each Member has joined the WTO by becoming a party to all WTO Agreements.[73] This means that all WTO Members are committed to the generalized principles.

It should also be noted that multilateralism must be distinguished from plurilateralism. The concept of plurilateralism is not widely understood. However, in the international economic context, it is generally accepted that plurilateralism refers to "associations of like-minded countries, from different parts of the world, which have chosen to pursue economic objectives together."[74] In the WTO, there exist plurilateral agreements that are of "minority interest."[75] In other words, they are

[69] See generally Meinhard Hilf, "Power, rules and principles - which orientation for WTO/GATT law?" (2001) 4:1 J. Int. Econ. Law 111; Kyle Bagwell & Robert W Staiger, "The World Trade Organization: Theory and Practice" (2010) 2:1 Annu Rev Econ 223.
[70] Ruggie, *Multilateralism*, *supra* note 26 at 574.
[71] *Ibid* at 571.
[72] This conclusion draws from Ruggie. *Ibid*.
[73] WTO, *How the negotiations are organized*, *supra* note 50.
[74] Nicholas Bayne, "International Institutions: Plurilateralism and Multilateralism" in Stephen Woolcock & Nicholas Bayne, *The New Economic Diplomacy: Decision Making and Negotiation in International Economic Relations* (London: Routledge, 1988) 229 at 235. See also Peter-Tobias Stoll, "World Trade Organization" (October 2014) at para 9, online: Max Planck Encyclopedias of International Law <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1555?rskey=NQIvyY&result=1&prd=MPIL>, citing Peter Sutherland et al., *WTO The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organization, 2004).
[75] WTO, "Plurilaterals: of minority interest" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt>.

agreements to which not all WTO Members are part.[76] There are currently two plurilateral agreements in force, the *Agreement on Trade in Civil Aircraft* and the *Agreement on Government Procurement*.[77] These agreements are an exception to the single protocol principle, and are therefore outside of the WTO multilateral trade regime. They "enable like-minded governments to develop agreed positions which can be advanced or accommodated in wider multilateral contexts."[78]

II. The WTO Dispute Settlement System and the Doctrine of Precedent

The structure of the WTO comprises several organs, the primary being the Ministerial Conference, referred to as the "topmost decision-making body,"[79] which meets twice a year and is composed of all WTO Members.[80] Under the Ministerial Conference is the General Council, composed of WTO Member representatives who carry on the Ministerial Conference's role in between meetings. The General Council is divided into two bodies: the Trade Policy Review Body and the Dispute Settlement Body (DSB), under which are the panels and the Appellate Body.[81] The following section focuses on the dispute settlement system (A), and the doctrine of precedent (B), first in the international context (1) and second in the specific context of the WTO (2).

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[76] *Ibid*.

[77] Another example of plurilateral initiatives at the WTO are the Joint Statement Initiatives (JSIs). Although JSIs are open to all WTO Members, the "shared and ultimate goal of the JSIs is to strengthen and reinforce the multilateral trading system." They are initiatives between interested Members who agree to negotiate on subjects of interest to them. The current JSIs cover "e-commerce, investment facilitation for development, services domestic regulation and micro, small, and medium-sized enterprises". See WTO, "Joint initiatives" (last consulted 10 December 2022), online: WTO <https://www.wto.org/english/news_e/news20_e/jsec_18dec20_e.pdf> [WTO, *Joint initiatives*]. See *Agreement Establishing the World Trade Organization*, 15 April 1994, *Annex 4(a) Agreement on Trade in Civil Aircraft*, 1867 UNTS 154 (entered into force 1 January 1995); *Agreement Establishing the World Trade Organization*, 15 April 1994, *Annex 4(b) Agreement on Government Procurement* (as amended on 30 March 2012), 1867 UNTS 154 (entered into force 1 January 1995).

[78] See Nicholas Bayne & Stephen Woolcock, "What is Economic Diplomacy?" in Nicholas Bayne & Stephen Woolcock, eds, *The New Economic Diplomacy: Decision Making and Negotiation in International Economic Relations*, 4th ed, Global, Governance Series (London: Routledge, 2017) 1 at 8-9.

[79] Lorand Bartels, "The Separation of Powers in the WTO: How To Avoid Judicial Activism" (2004) 53:4 ICLQ 861 ("[b]ut if in theory the Ministerial Conference and the General Council are very much the masters of the WTO agreements, in reality their powers are very much reduced by the fact that, according to settled practice, they vote by consensus on every issue" at 864).

[80] *Marrakesh Agreement*, *supra* note 2 art IV(1).

[81] *Ibid*, art IV(2).

A. An Overview of the WTO Dispute Settlement System

The DSU provides the rules to resolve disputes arising from the WTO Agreements between Members.[82] The DSU creates the DSB, an organ composed of representatives of all WTO Members.[83] Its role has several components: establishing dispute settlement panels, adopting reports and recommendations of panels and the Appellate Body, monitoring the implementation of recommendations and rulings contained in reports, and authorizing suspension of concessions in the event of non-compliance with reports and recommendations.[84]

The DSU establishes the WTO dispute settlement procedure.[85] The first step to resolve a dispute is through consultations, notified to the DSB by the Members involved.[86] When consultations are unfruitful, the second step is for the complaining Member(s) to either request alternative dispute settlement procedures, such as good offices, conciliation, mediation, or the establishment of a panel.[87] When a panel is established, hearings are then conducted and the panel eventually issues its report and recommendations. The reports and recommendations are further presented to the DSB, which needs to adopt them so they can become binding.[88] Alternatively, one of the parties to the dispute may notify the DSB of its decision not to submit the report to adoption, but instead to appeal the report.[89] Pursuantly, the Appellate Body may uphold, modify, or reverse the panel's reports.[90] Again, Appellate Body reports become binding only upon adoption by the DSB, following the "reverse consensus" process.[91]

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[82] DSU, *supra* note 13.
[83] DSU, *supra* note 13, art 2(1).
[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid*, art 4.
[87] *Ibid*, art 4(7), 5(4).
[88] In practice, reports are *automatically* adopted unless they are blocked by consensus of the DSB (commonly refers to as "reverse consensus"). See *Ibid*, art 16(4); WTO, "WTO Bodies involved in the dispute settlement process" (last consulted 15 December 2022), online: WTO <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm>.
[89] DSU, *supra* note 13, art 16(4).
[90] *Ibid*, art 17(13).
[91] *Ibid*, art 2(1)(4).

B. The Doctrine of Precedent at the WTO

The Appellate Body, as the judicial organ of the WTO,[92] has issued a number of decisions from which a jurisprudence has emerged.[93] We demonstrate in this section that the jurisprudence developed by the Appellate Body is in fact characterized by the doctrine of precedent. This assertion is essential to understand the role of the Appellate Body, as we argue that its role is not strictly limited to dispute settlement, as is traditionally expected of dispute settlement organs in international organizations.[94] In the first subsection (1), we introduce the doctrine of precedent and the debate over its existence at the international level, where it is both asserted that this doctrine has no legal ground, but that there exists a *de facto* rule of precedent. The second subsection (2) discusses the doctrine of precedent at the WTO and demonstrates the emergence of the doctrine of *stare decisis* at the WTO.

1. Unpacking the Doctrine of Precedent and the Debate Over its Existence at the International Level

In the context of international adjudication, the doctrine of precedent, and especially the common

[92] We consider the Appellate Body to be a judicial organ because it benefits from a separate status within the WTO and is created by the "constitution" of the WTO, i.e. the *Marrakesh Agreement*. Moreover, the Appellate Body presents significant elements of judicial independence. For example, several characteristics of judicial independence are found in the Appellate Body's institutional and regulatory frameworks (see subsection *The Appellate Body and the Doctrine of Stare Decisis*). The members of the Appellate Body are appointed on the basis of their knowledge and experience in the field of international trade law, their salaries and fees are fixed and transparent, and cannot change during tenure based on their judicial conduct. See the discussion on judicial independence in Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge Studies in International and Comparative Law Series, 2d ed (Cambridge: Cambridge University Press, 2005) at 217, 235. In addition, the judicial independence of the Appellate Body is apparent from the sources of law it has used in its adjudicative function. Indeed, the Appellate Body has often referred to general principles of international law and customary principles of international law in its rulings. Also, DSU, *supra* note 13, art 3(2) even provides that the Appellate Body should "clarify the existing provisions of" the WTO Agreements "in accordance with customary rules of interpretation of public international law." See e.g. *United States – Standards for Reformulated and Conventional Gasoline (Bolivarian Republic of Venezuela)* (1996), WTO Doc WT/DS2/AB/R at 22 (Appellate Body Report) [AB, *US – Gasoline*]. In this matter, the Appellate Body held that this "reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law." In support of the idea of judicial independence and the Appellate Body as a "World Trade Court," see Claus-Dieter Ehlermann, "Six Years on the Bench of the "World Trade Court." Some Personal Experiences as Member of the Appellate Body of the World Trade Organization", (2002) 36:4 J. World Trade 605. *Contra* Joost Pauwelyn & Krzysztof Pelc, "Who Guards the 'Guardians of the System'? The Role of the Secretariat in WTO Dispute Settlement" (2022) 116:3 AJIL 534.

[93] Isabelle Van Damme, "Treaty Interpretation by the WTO Appellate Body" (2010) 21:3 EJIL 605 at 614-15.

[94] See generally Felix, *supra* note 92 at 217-270 (chapter on "Judicial Organs").

law doctrine of *stare decisis*, is a contentious notion.[95] For instance, Article 38(1)(d) of the *Statute of the International Court of Justice* (Statute of the ICJ) limits the use of judicial decision to "subsidiary means for the determination of rules of law."[96] In this respect, several authoritative authors in international law have pointed out that the debates of the Committee of Jurists indicate that Article 59 of the Statute of the ICJ "rule[d] out the system of binding precedent."[97] Alain Pellet and Daniel Müller considered the reference to Article 59, found in Article 38, as a "warning" that "the Court is not bound by the common law rule of *stare decisis*, even if some judges of Anglo-Saxon origin seem to have somewhat ignored this guideline."[98] Nonetheless, they contended that "this reference [to Article 59] clearly encourages the Court to take into account its own case law as a privileged means of determining the rules of law to be applied in a particular case."[99] Although Article 59 can be considered as encouraging international adjudicators to take into account their case law, Gilbert Guillaume reasoned that the prudence with which international courts refer to their precedents demonstrate that they generally do not follow the common law rule of *stare decisis*.[100] In sum, although international adjudicators can follow previous decisions, they are under no obligation to follow previous decisions of their own court (if there is an established body)

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[95] While judicial decisions of international courts are not considered formal sources of law, they are considered by certain international courts and tribunals as source of evidence of international law. See e.g. James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 35-37 ("[a] coherent body of previous jurisprudence will have important consequences in any given case. Their value, however, stops short of precedent as it is understood in the common law tradition"). On the role of judicial decisions of the ICJ and case law in international law, see also Alain Pellet and Daniel Müller, "Article 38" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm and Christian Tomuschat, eds, *The Statute of the International Court of Justice. A Commentary*, 3rd ed (Oxford: Oxford University Press, 2019) 819 [Pellet and Müller, *Article 38*]. Indeed, the proliferation of international courts, such as the ICJ (and previously the Permanent Court of International Justice), the International Tribunal for the Law of the Sea, the Appellate Body, and the International Criminal Court has brought attention to precedent in international law. See Barton Legum, "The Definitions of 'Precedent' in International Arbitration" in Emmanuel Gaillard & Yas Banifatemi, eds, *Precedent in International Arbitration* (Huntington: Juris Publishing Inc., 2008) 5 at 5–6.

[96] *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, (entered into force 24 October 1945), art 38(1)(d) [*ICJ Statute*].

[97] Crawford, *supra* note 95 at 35, no 117, citing Max Sørensen, *Les Sources du Droit International. Étude sur la jurisprudence de la Cour Permanente de Justice Internationale* (Copenhagen: Einar Munksgaard, 1946) at 161. *C.f.* Hersch Lauterpacht, "Development of International Law by the International Court" (New York: Praeger, 1958) at 8; *Certain German Interests in Polish Upper Silesia* (1926), Merits, PCIJ Ser A No 7 ("[t]he object of this article is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes" at 19). The *Rome Statute* goes further in specifying that "[t]he Court may apply principles and rules of law as interpreted in its previous decisions." See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 21(2).

[98] Pellet and Müller, Article 38, *supra* note 95 at 946.

[99] *Ibid*.

[100] Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators" translated by Brian McGarry (2011) 2:1 JIDS 5 at 14 [Guillaume, *Precedent*].

or from other international courts and tribunals.[101]

In practice, however, although the decision of an international court or tribunal is only binding on the disputing parties,[102] legal counsel cite previous decisions to support their arguments, and international adjudicators respond to them.[103] Also, while the International Court of Justice's (ICJ) decisions have no official binding character,[104] to ensure "consistency of jurisprudence," as stated by the majority in the *Kosovo* case,[105] the ICJ often refers to its past rulings.[106] In fact, several factors, when they converge, can enhance the authority of international tribunals and their case law. For instance, Pellet and Müller pointed out, while discussing the "exceptional authority" of the ICJ, that these factors include the prestige of the court, its status, its scope of competence over international disputes, and its capacity to develop a body of case law overtime.[107] For example, in upholding its mandate, the ICJ participates in the "progressive development" of international law. This observation led Pellet to describe the ICJ judges, in another article, as the "législateurs" or the "adaptateurs de droit [international] les plus efficaces de l'ordre juridique international."[108] In

[101] Pellet and Müller, *Article 38*, *supra* note 93; Guillaume, *Precedent*, *supra* note 100 at 12.
[102] *Ibid* at 8; *ICJ Statute*, *supra* note 96, art 59.
[103] Guillaume, *Precedent*, *supra* note 100 at 5; Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals - An Empirical Analysis" (2008) 19:2 EJIL 301 at 335. For illustrations regarding the *refusal* to departs from earlier decisions by the ICJ, see e.g. Crawford, *supra* note 95 at 36, no 125, citing *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, [1998] ICJ Reports 275 at 291, citing *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, [1957] ICJ Reports 125 at 146. In addition, regarding the decision of the ICJ to *ignore* calls to departs from earlier decisions, see e.g. (also cited by Crawford, *supra* note 95 at 36, no 126) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, [2008] ICJ Reports 412 at 434 & 435.
[104] See Guillaume, *Precedent*, *supra* note 100 at 9.
[105] *Legality of Use of Force (Serbia and Montenegro v Portugal)*, Preliminary Objections, Judgment, [2004] ICJ Rep 1160 at 1208 [*Legality of Use of Force*].
[106] See e.g. (cited by Pellet and Müller, *Article 38*, *supra* note 95 at 947, no 920, 921 & 922) *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgement, [1949] ICJ Rep 4 at 24 (citing the Permanent Court of International Justice); *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgement, [1999] ICJ Rep 1054 at 1076; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at 154-156. For instance, in *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (Judgment) [1998] ICJ Rep 275, 290, s 21, the ICJ stated that "[t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases" (also cited by Pellet and Müller at 947, no 927).
[107] Pellet and Müller, *Article 38*, *supra* note 95 at 949.
[108] Alain Pellet, *L'adaptation du droit international aux besoins changeants de la société international*, Collected Courses of the Hague Academy of International Law, vol 329 (The Hague: Brill Publishers, 2007) at 21.

that regard, Pellet and Müller referred to the "*de facto* legislative power" used by the ICJ to determine the "law of the delimitation of maritime spaces."[109]

Despite the limits imposed by international instruments on the use of precedents by international adjudicators,[110] in practice, international courts and tribunals depart from previous case law only when they have a *cogent reason* to do so.[111] This is despite the fact that these tribunals adhere to different types of precedent, such as *jurisprudence constante*[112] or the doctrine of *stare decisis*.[113] In this regard, the distinction between arbitral tribunals and permanent adjudicative mechanisms is important with respect to the use of precedent. In the context of international arbitration, the fact that tribunals are constituted on an *ad hoc* basis to hear a specific case and dissolved once the decision is rendered might affect legal coherence and consistency between decisions.[114]

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[109] Pellet and Müller, *Article 38*, *supra* note 95 at 957. See also Robert Kolb, "Principles as Sources of International Law (With Special Reference to Good Faith)" (2006) 53:1 NIRL 1 at 10–11.

[110] *ICJ Statute*, *supra* note 96, art 38(1)(d) limits the use of judicial decision to "subsidiary means for the determination of rules of law."

[111] See Anne Scully-Hill & Hans Mahncke, "The Emergence of the Doctrine of Stare Decisis in the World Trade Organization Dispute Settlement System" (2009) 36:2 L.I.E.I. 133 at 155.

[112] In international investment law, several commentators and scholars have spoken of the emergence of a *jurisprudence constante* by pointing to the efforts of arbitral tribunals to contribute to the harmonious development of the law while allowing investors and host States to make their case. See e.g. Yas Banifatemi, "Consistency in the Interpretation of Substantive Investment Rules: Is it Achievable?" in Roberto Echandi & Pierre Sauvé, eds, *Prospects in International Investment Law and Policy: World Trade Forum*, 15th ed (Cambridge: Cambridge University Press, 2013) 200 at 227. According to Andrea K. Bjorklund, *jurisprudence constante* means the creation of a "consistent line of cases, rather than the establishment of a rule by an individual case." See Andrea K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante" in Colin Picker, Isabelle D Bunn & Douglas W Arner, eds, *International Economic Law: the State and Future of the Discipline*, (Oxford: Hart, 2008) 265 at 272-273. Although previous decisions are not binding precedent, the emergence of a *jurisprudence constante* is deemed to contribute to the development of norms in international investment law. See Jan Paulsson, "The Role of Precedent in Investment Treaty Arbitration" in Katia Yannaca-Small, ed, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford: Oxford University Press, 2018) 81 at paras 4.26–4.29, 4.59. This is in line with the statement made by the frequently appointed arbitrator, Gabrielle Kaufmann-Kohler, that arbitral investment tribunals "have a *moral* obligation to follow precedent," although the reasoning of previous decisions does not legally bind them. See Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23:3 Arb. Int'l 357 at 374. In light of this discussion, we note that arbitral tribunals have a different approach to precedent than standing international tribunals. See generally Claude E Barfield, "Free Trade, Sovereignty, Democracy: Future of the World Trade Organization" (2001) 2:2 Chi J Int'l L 403–416.

[113] See Raj Bhala, "The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)" (1999) 14:4 Am U Int'l L Rev 845 at 849-850 [Bhala, *Myth about Stare Decisis*] See also Raj Bhala, "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)" (1999) 9:1 J Transnat'l L & Pol'y 1 [Bhala, *Precedent Setters*]; Raj Bhala, "Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)" (2001) 33:3 and 4 Geo Wash Int'l L Rev 873 [Bhala, *Stare Decisis*].

[114] See e.g. Guillaume, *Precedent*, *supra* note 100 at 14. Moreover, decisions in some areas of international arbitration, such as commercial law, are often not made public, which prevents tribunals from having knowledge of most decisions rendered, and thus makes it almost impossible to ensure coherence and consistency between awards. See e.g. Mary Zhao, "Transparency in International Commercial Arbitration: Adopting a Balanced Approach" (2019) 59:2 Va J Int'l L 175–219.

International tribunals have to carefully consider whether a departure from previous reasonings is appropriate, in order to strike the right balance between correctness, consistency and the "evolution of the law."[115] Indeed, the rationale for the existence of the doctrine of precedent in international adjudication is the need for the "consistency of jurisprudence,"[116] which creates certainty and foreseeability, on which the dispute settlement system is based.[117] However, and as pointed out by the former president of the ICJ, Gilbert Guillaume, the use of precedents by international tribunals can nevertheless raise the concern of judicial activism.[118] Therefore, and as summarized by Guillaume, "[t]he challenge [with the doctrine of precedent] is to navigate between two risks: that of jurisprudential incoherence and that of government by judges."[119]

In the context of the WTO dispute settlement system, the existence of an appellate mechanism brings up other considerations, such as the binding character of higher court decisions. As pointed out by Guillaume: "subordinate organs are courteously invited and naturally inclined to respect the decisions rendered at a higher level."[120] Taking the argument further, Raj Bhala even referred to the "myth" surrounding the inexistence of the use of precedent and the doctrine of *stare decisis* in WTO appellate adjudication.[121] Raj Bhala pointed out to the existence of a "de facto doctrine of stare decisis" and called for the recognition of a "de jure doctrine of stare decisis" at the WTO.[122]

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[115] Guillaume, *Precedent*, *supra* note 100 at 6, 10-11.
[116] *Legality of Use of Force*, *supra* note 105 at 367, 374.
[117] Guillaume, *Precedent*, *supra* note 100 at 6.
[118] Guillaume, *Precedent*, *supra* note 100 at 6. See Barfield, *supra* note 112 at 408 & 411 (to prevent judicial activism, Claude E. Barfield, one of the main critics of the Appellate Body, proposed to return to a GATT dispute settlement system, where diplomatic methods were favoured). See also *WTO, DSB Meeting, Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, held on 18 December 2018, online: WTO <https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.asdeliv. fin_.public.pdf>* at para 26 (in the context of the WTO, the creation of precedents by the Appellate Body is being criticized by the US. The US is arguing that the Appellate Body is overstepping its role because according to them, the Appellate Body's function is not to create law, a privilege that belongs exclusively to States, but rather to resolve disputes between parties). The U.S. criticisms of the Appellate Body are well summarized by Mariana Clara de Andrade, "Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism" (2020) 11:2 JIDS 262 at 263–69.
[119] See Guillaume, *Precedent*, *supra* note 100 at 5. The concept "government by judges" is attributed to Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris: Giard, 1921). For a historical account of the notion, see Michael H. Davis, "A Government of Judges: An Historical Re-View" (1987) 35:3 Am. J. Comp. L. 559.
[120] Guillaume, Precedent, *supra* note 100 at 13.
[121] Bhala, *Myth about Stare Decisis*, *supra* note 113 at 849-850. See also Bhala, *Precedent Setters*, *supra* note 113; Bhala, *Stare Decisis*, *supra* note 113.
[122] Bhala, *Myth about Stare Decisis*, *supra* note 113 at 849-852. ("[i]n brief, there is a body of international common law of trade emerging as a result of adjudication by the WTO's Appellate Body. We have yet to recognize, much less

The following subsection will engage in the discussion on the existence of the doctrine of *stare decisis* in the WTO dispute settlement system.

2. The Appellate Body and the Doctrine of *Stare Decisis*

The WTO was created on the principle of rules-based trade relations rather than the power-based conduct of trade relations.[123] The WTO comprises a dispute settlement system to adjudicate the alleged violations of WTO obligations.[124] This mechanism is intended to resolve disputes between Members in accordance with Article 3(2) of the DSU. Because the way the mechanism for adopting reports and recommendations operates, the power of WTO Members to reject a report with which they disagree is, in practice, very limited.[125] Indeed, the adoption of reports and recommendations are made pursuant to the reverse consensus,[126] whereby reports are automatically adopted, if, within sixty days of their issuance, there is no unanimous rejection or appeal.[127] Nonetheless, although reports and recommendations are adopted by *all* WTO Members, they are theoretically binding only on the disputing parties and do not affect other WTO Members' rights and obligations.[128] That being said, because of the doctrine of precedent, reports and recommendations may impact the rights and obligations of other WTO Members than that of the disputing parties.[129]

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account for, this reality in our doctrinal thinking and discussions. Our intellectual rigidity precludes us from admitting openly that the holdings of the Appellate Body – and, for that matter, panel – reports actually are a source of international law. Worse yet, our narrow perspective precludes us from seeing that, as a normative matter, they ought to be a source of international law. Sadly, we remain mired in an orthodox, but nearly otiose, distinction between "binding" and "non-binding" precedent. It is high time to "come clean" about what is really happening at the WTO and adjust our doctrinal thinking, and the doctrine itself, accordingly" at 850).

[123] William J Davey, "The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges" (2014) 17:3 J. Int. Econ. Law 679 at 685.

[124] WTO, *A Handbook on the WTO Dispute Settlement System* (Cambridge University Press, 2017) at 15 [WTO, *Handbook*].

[125] Van Damme, *supra* note 93 at 647.

[126] DSU, *supra* note 13, art 2(4), 16(4), 17(14).

[127] *Ibid*, art 16(4).

[128] *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico (Mexico)* (2008), WTO Doc WT/DS344/AB/R at para 158 (Appellate Body Report) [AB, *US – Stainless Steel (Mexico)*].

[129] See generally Joost Pauwelyn, "Minority rules: precedent and participation before the WTO Appellate Body" in Henrik Palmer Olsen, Joanna Jemielniak & Laura Nielsen, eds, *Establishing Judicial Authority in International Economic Law*, Cambridge International Trade and Economic Law (Cambridge: Cambridge University Press, 2016) 141 [Pauwelyn, *Minority Rules*].

Three factors argue for the existence of a *de facto* precedent at the WTO, characterized by the doctrine of *stare decisis*: 1) the regulatory framework, i.e., Article 3(2) of the DSU and Article IX(2) of the *Marrakesh Agreement*; 2) the institutional framework, which refers to dispute settlement system and the standing Appellate Body; and 3) the Appellate Body case law itself.[130]

a) The Regulatory Framework

The DSU "instructs judges on the rules and procedures governing the adjudication of WTO disputes."[131] Article 3(2) of the DSU reads as follows:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[132]

The first sentence establishes that there should be a form of continuity in decision-making. The second sentence refers to the common law principle that higher courts must provide "statutory interpretation," meaning that these courts "preserve and uphold the rules laid down by the Parliament."[133] In other words, this allows the organs of the dispute settlement system to clarify the meaning of the law. The Appellate Body has notably done so through textual interpretation,[134]

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[130] The argument draws on the work of Scully-Hill & Mahncke, *supra* note 111 at 141-155. According to Scully-Hill & Mahncke, there are four key aspects of the doctrine of *stare decisis* that exist in the WTO dispute settlement system: 1) a "two-tier system," 2) a "centralized court structure," 3) a "manageable number of cases," and 4) the "nature of the judiciary" (Scully-Hill & Mahncke at 143-145). For the purposes of our analysis, we do not refer to the "manageable number of cases" because, while this aspect is not inconsistent with our argument, it does not inform the broader argument we are making in this thesis, namely the effect of precedent in the regime. Moreover, because the article was published in the early 2000s, the discussion on the new areas of WTO law being brought before the Appellate Body is no longer relevant (Scully-Hill & Mahncke at 144-145).

[131] *Ibid*, *supra* note 111 at 146.

[132] DSU, *supra* note 13, art 3(2).

[133] Scully-Hill & Mahncke, *supra* note 111 at 146. See also Lauterpacht, *supra* note 97 ("[i]nternational tribunals, when giving a decision on a point of international law, do not necessarily choose between two conflicting views advanced by the parties. They state what the law is. Their decisions are evidence of the existing rule of law" at 21).

[134] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 ("[t]he proper interpretation of the Article is, first of all, a textual interpretation" at para 37) (Appellate Body Report) [AB, *Japan — Alcoholic Beverages II*].

a common law method.[135] The last sentence of this provision has been the subject of a debate: some have argued that the last sentence of Article 3(2) must be understood as a prohibition on *stare decisis* at the WTO.[136] Conversely, others have argued that it simply prevents the dispute settlement organs from creating new legal rights; these organs can thus only defer to the existing ones and clarify them, or interpret them in a statutory fashion, i.e., by deferring to the legal text and interpret it in a way accepted by the "legislature."[137] As pointed out by Scully-Hill & Mahncke, "[t]herefore, Article 3(2) does not preclude decisions on the interpretation of existing legislation being binding in future cases."[138]

Another important provision to understand the role of the dispute settlement system is the first sentence of Article IX(2) of the *Marrakesh Agreement*, which provides that "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[139] In *US – Foreign Sales Corporation*, the Appellate Body explained this provision by distinguishing between "authoritative interpretations," which belong exclusively to [WTO] Members,[140] and "clarifications" of WTO legal texts, which belongs to panels and the Appellate Body.[141] Again, as asserted by Scully-Hill & Mahncke, "[t]his explication is congruent with the common law approach to statutory interpretation. […] When the words are not plain and clarification from the judges is required, it is the meaning of the statute and not the words of the judge that is the law."[142] In the same vein, Van Damme contended that because WTO Members have been incapable of adopting authoritative interpretations, "[t]he responsibility for clarifying the provisions of the WTO covered agreements lies mainly, if not exclusively, with panels and the Appellate Body."[143] This point is echoed by

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[135] Scully-Hill & Mahncke, *supra* note 111 ("[t]his method is [also] analogous to the customary international rules of interpretation in public international law as set out in Article 31 and 32 of the [VCLT]" at 147).
[136] *Ibid* at 147, referring to David Palmeter & Petros C. Mavroidis, "The WTO Legal System: Sources of Law", (1998) 92:3 AJIL 404.
[137] Scully-Hill & Mahncke, *supra* note 111 at 147.
[138] *Ibid*.
[139] *Marrakesh Agreement*, *supra* note 2 art IX(2).
[140] *United States – Tax Treatment of Foreign Sales Corporation (European Communities)* (2000), *WTO* Doc WT/108/AB/R at para 112, no 127 (Appellate Body Report) [AB, *US — FSC*]. As explained by Hill & Mahncke, *supra* note 111 at 149, WTO Members have made declarations that could be understood as a use of this provision, but they have never formally invoked it.
[141] AB, *US — FSC*, *supra* note 140.
[142] Scully-Hill & Mahncke, *supra* note 111 at 149.
[143] Van Damme, *supra* note 93 at 611. Van Damme continued the argument by asserting that although interpretations of the panels and Appellate Body are only binding on the disputing parties, "decisions [of the Appellate Body] are

Pauwelyn, who considered decision-making by the Appellate Body as "rule refinement, if not rule-making, with legal ramifications for all WTO Members and not just the disputing parties."[144]

b) The Institutional Framework

The WTO institutional framework also shows key aspects of the doctrine of *stare decisis*,[145] which is primarily manifested in the existence of a standing Appellate Body.[146] Indeed, the very existence of the Appellate Body implies that the highest organ's rulings bind the "first instance" panels, resulting in a "hierarchization of the judicial system."[147] This "verticality" created by the existence of an appeal level means in practice that "if a panel strays from a previous AB holding or interpretation, it is very likely that the panel will be overturned on appeal"[148] The question of the two-tier system also relates to the phenomenon called by Scully-Hill and Mahncke, the "nature of the judiciary."[149] In common law systems, not every judge set precedents.[150] Only higher courts' judges in appeals set precedents.[151] Similarly, at the WTO, only the Appellate Body, hearing appeals, sets the precedent at the WTO.[152]

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likely to have a kind of de facto finality as interpretations of law" (quoting Robert Howse, "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power" in T. Cottier and P.C. Mavroidis, eds, *The Role of the Judge in International Trade Regulation – Experience and Lessons for the WTO, World Trade Forum* (Ann Arbor: University of Michigan Press, 2003) 11 at 11, 15). Furthermore, as noted by Scully-Hill and Mahncke, "[n]o legislative declaration is needed in the common law to confer binding authority." See Scully-Hill & Mahncke, *supra* note 111 at 150 (in the context of the WTO, the regulatory framework does not prohibit *stare decisis*, and there is no declaration by the Ministerial Conference of the General council that binding precedents are prohibited).

[144] Pauwelyn, *Minority Rules*, *supra* note 129 at 145.

[145] *Ibid* at 141-45.

[146] Scully-Hill & Mahncke, *supra* note 111 at 143-44.

[147] de Andrade, *supra* note 118 at 276 (in the context of a two-tiers system, lower organs are invited to follow the decisions of the higher organs).

[148] Scully-Hill & Mahncke, *supra* note 111 at 143. For example, in the context of the zeroing saga, the Appellate Body has twice overturned panel reports that departed from established precedents. See *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Argentina)* (2004), WTO Doc WT/DS268/AB/R at paras 208-15 (Appellate Body Report) [AB, *US – Oil Country*]. See also AB, *US — Stainless Steel (Mexico)*, *supra* note 128 at paras 134, 139, 143.

[149] Scully-Hill & Mahncke, *supra* note 111 at 145.

[150] *Ibid*.

[151] *Ibid*.

[152] *Ibid*.

Another key aspect of the doctrine of *stare decisis* is the "centralized" structure of the Appellate Body.[153] de Andrade pointed out that a "consequence ensuing from the institutional design of an adjudicatory system with an appeals mechanism is that an appeal organ concentrates the decisions in one permanent body of law."[154] Hence, it is the same group of people who is constantly involved in the decision-making process. In this context, these people are more likely to follow their own previously established reasonings, in the absence of any reason to deviate from them. [155]

c) The Jurisprudence of the Appellate Body

Finally, the jurisprudence of the Appellate Body also argues for the existence of a *stare decisis* precedent at the WTO. Indeed, the Appellate Body stated in *US – Shrimp* that its reasoning should be relied upon by all future panels:

> 107. Malaysia also objects to the frequent references made by the Panel to our reasoning in our Report in United States – Shrimp. The reasoning in our Report in United States – Shrimp on which the Panel relied was not dicta; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the Panel made frequent references to our Report in United States – Shrimp. Indeed, we would have expected the Panel to do so. The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on this issue and, more important, had provided interpretative guidance for future panels, such as the Panel in this case. [156]

In *US – Stainless Steel (Mexico)*, the Appellate Body further indicated that panels should not depart from its interpretations when dealing with similar issues: "[w]e are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues."[157] The Appellate Body also specified that without "absent

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[153] *Ibid* at 144; de Andrade, *supra* note 118 at 276.
[154] de Andrade, *supra* note 118 at 276.
[155] Scully-Hill & Mahncke, *supra* note 111 ("[c]entralization aids the consistent development of the law because it is the same small group of people who are involved in the decision-making process for every case on appeal" at 144); see also de Andrade, *supra* note 118 at 276.
[156] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (India; Malaysia; Pakistan; Thailand)* (1998), WTO Doc WT/DS58/AB/R at paras 107, 109 (Appellate Body Report) [AB, *US – Shrimp*]. See also Amrita Bahri, "'Appellate Body Held Hostage': Is Judicial Activism at Fair Trial?" (2019) 53:2 J. World Trade 293 at 304 [Bahri, *Appellate Body*].
[157] AB, *US — Stainless Steel (Mexico)*, *supra* note 128 at para 162. See also AB, *US – Oil Country*, *supra* note 148 at paras 188.

cogent reasons," a panel must not depart from the reasoning of the Appellate Body on the same legal questions.[158] Accordingly, only if a panel has clear and convincing reasons can it departs from the reasoning of the Appellate Body on a legal issue for which the latter has elaborated a clear jurisprudence.[159] After stating "that a panel must take the Appellate Body's prior interpretation as a point of departure in its interpretative analysis," the panel in *US – Countervailing Measures (China)* proposed the following reasons for deviating from the jurisprudence of the Appellate Body: (i) a multilateral interpretation of a provision that departs from a prior Appellate Body interpretation; (ii) a prior interpretation by the Appellate Body that proves to be unworkable; (iii) a prior interpretation of the Appellate Body that leads to a conflict with another provision of a covered agreement that had not been raised in the initial case before the Appellate Body; or (iv) a prior interpretation of the Appellate Body that was based on a factually incorrect premise.[160] In light of these criteria, the concept of "absent cogent reasons," as developed by the Appellate Body, shows similar features to the common law concept of *stare decisis*, according to which judges are bound by previous decisions unless they have a justifiable reason – a cogent reason – to depart from them.[161]

The common law doctrine of *stare decisis* implies that judicial decisions are binding sources of law.[162] In fact, in the WTO context, "no one can successfully engage in WTO dispute settlement

[158] AB, *US — Stainless Steel (Mexico)*, *supra* note 128 at para 160.
[159] Bahri, Appellate Body, *supra* note 156 at 304.
[160] *United States – Countervailing Duty Measures on Certain Products from China (China)* (2015), WTO Doc WT/DS437/AB/R at para 7.317 (Appellate Body Report).
[161] In fact, the term "absent cogent reasons" is taken from the common law. See Scully-Hill & Mahncke, supra note 111 (according to these authors, panels cannot revise established interpretations. Only the Appellate Body can do it, only if there is a cogent reason to do so: "[i]n the interest of consistency, future panels must follow the AB's interpretation. Accordingly, only the AB has the authority to revise established interpretations, and even then, it can only do so when there are cogent reasons for such revision. This is congruent with the House of Lords' Practice Statement, outlined above, adopting cogent reasons for departure from precedent such that departure is permitted to avoid injustice or to prevent an undue restriction on the 'proper development of the law'. The AB concluded that '(w)hile the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case'. By inference, and seen in light of the AB's other holdings, this statement seems to offer a formal recognition of stare decisis" at 155). According to the common law doctrine of *stare decisis*, courts cannot depart from established precedents. See generally, Bora Laskin Law Library, "Primary Sources of Law: Canadian Case Law" (last consulted 11 December 2022), online: University of Toronto Faculty of Law <https://library.law.utoronto.ca/step-2-primary-sources-law-canadian-case-law-0#:~:text=The%20law%20in%20Canada%20is,levels%20of%20courts%20in%20Canada>.
[162] Scully-Hill & Mahncke, *supra* note 111 at 134.

without knowing prior Appellate Body case law."[163] In its more than 100 reports, the Appellate Body has followed a trend of *de facto* common law-style decision-making, including the creation of rules through the issuance of persuasive precedents, and the use of *obiter dicta* in decision-making.[164] The use of *obiter dicta* by the Appellate Body is very revealing of the existence of the doctrine of *stare decisis* at the WTO. Indeed, it means that the Appellate Body considers itself allowed to engage with issues that are not necessary to resolve the dispute.[165] Although *obiter dicta* do not have the value of precedent, they are persuasive arguments, and can thus impact future decisions.[166]

Finally, because the Appellate Body treats its past decisions as binding precedent, they continue to live long after a dispute is over.[167] This is a conclusion that Pauwelyn has reached in an article based on network analysis.[168] From his observation of the high number of explicit cross-references from one Appellate Body report to another, he concluded that the Appellate Body frequently relied on its past decisions, which therefore influence or even dictate its reasoning.[169] Consequently, we draw the conclusion that a *de facto* doctrine of precedent has emerged from the Appellate Body reports, in the form of *stare decisis* precedents. This conclusion thus means that the precedents of the Appellate Body have a significant impact on the multilateral trading system and thus on WTO Members.

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[163] Pauwelyn, *Minority Rules*, *supra* note 129 at 144; see also See also Lauterpacht, *supra* note 97 ("[decisions] are not binding *upon States. Neither* are they *binding* upon the Court. However, no written provision can prevent them from showing authoritatively what international law is, and no written rule can prevent the Court from regarding them as such" at 22).

[164] Bahri, *Appellate Body*, *supra* note 156 at 305-07.

[165] Henry Gao, "Dictum on Dicta: Obiter Dicta in WTO Disputes" (2018) 17:3 World Trade Rev. 509 at 514, citing H. C. Black, *Handbook on the Law of Judicial Precedents, or, the Science of Case Law* (St. Paul: West Publishing Company, 1912) ("[t]raditionally, a dictum is defined as 'an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court" at 166) [Gao, *Dictum*].

[166] Gao, *Dictum*, *supra* note 165 at 515. The US criticism of the Appellate Body is largely based on the use of *obiter dicta* by the Appellate Body. See WTO, DSB Meeting, *Statement by the United States at the Meeting of the WTO Dispute Settlement Body*, Statement, held on 23 May 2016, online: WTO <https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf> [US, *Statement*].

[167] Scully-Hill & Mahncke, *supra* note 111 at 156.

[168] Pauwelyn, Minority Rules, *supra* note 129 ("[f]rom its creation, the Appellate Body has opted for a strong *de facto* rule of precedent: in 108 reports, the Appellate Body has dropped a total of 2,957 cross-references to earlier reports for an average of 27.4 cross-references per report and an average number of 0.3 cross-references per page (indeed, this trend began with the second report, which cross-referenced the first report four times" at 143).

[169] *Ibid*.

PART 2 – THE ROLE OF THE APPELLATE BODY AND THE DOCTRINE OF PRECEDENT IN THE MULTILATERAL TRADING SYSTEM

Part 2 examines the role of the Appellate Body and the doctrine of precedent in the WTO multilateral trading system. Section I demonstrates that the WTO has functioned through its dispute settlement system since its inception. Based on the constructivist approach, Section II argues that the Appellate Body has been the institutional mechanism of the multilateral trading system that has enabled the necessary dialogue among WTO members, and therefore ensure the normative intersubjectivity of the generalized principles. Section III argues that the demise of the Appellate Body risks impairing not only the WTO dispute settlement system, but also the multilateral trading system.

I. The WTO Operates Through its Dispute Settlement System

In this section, we first demonstrate that the multilateral trading system has moved from a system of negotiated decision-making to a system of judicial decision-making with the creation of the WTO (A). Following this observation, we analyze the role of precedents in the context of a judicial decision-making system and observe that precedent has provided security and predictability to the trading system (B).

A. From a Negotiated Decision-Making System to a Judicial Decision-Making System

The GATT years saw a high number of intensive and fruitful multilateral negotiations, with multiple trade rounds taking place at the time.[170] The conclusion of the Uruguay Round that led to the *Marrakesh Agreement* even proved wrong some commentators who argued that multilateralism was utopian in practice.[171] With the increasing accession of new WTO Members in the early years of the WTO, things quickly turned around and the golden age of WTO negotiations ended before it even began.[172] In the years that followed the entry into force of the *Marrakesh Agreement*,

[170] WTO, *The GATT years*, *supra* note 5. There have been 8 trade rounds between 1947 and 1994.
[171] See e.g. Ruggie, *Multilateralism*, *supra* note 26 ("limited multilateral successes" at 563).
[172] Financial Times, *Doha Round Dies*, *supra*, note 11. While there has been no significant progress resulting from negotiations at the WTO, there have been some progress on a few very specific issues, including the *Declaration on*

despite the need to reach agreements on important aspects of international trade, WTO Members failed in most of their attempts to agree on new rules.

The Uruguay Round established a "built-in agenda" for future work.[173] The agenda included "over 30 items" with "new or further negotiations" and the "assessments or reviews of the situation."[174] The items comprised *inter alia* maritime services, government procurement of services, basic telecommunications, financial services, intellectual property, textiles and clothing, and more.[175] In addition to these items, others were added over time, including e-commerce, which is still being negotiated as of this date.[176] Some of the topics being negotiated, notably financial services and basic telecommunications, were partially completed in the subsequent round of negotiations, but the agenda of negotiations was never completed.[177] In fact, the Doha Round that begun in 2001 have never officially concluded, because the negotiation objectives were never fully meet.[178]

The failure to conclude trade negotiations at the WTO was the subject of an article written by Lamp, who explored "why multilateral trade lawmaking used to work, and why it is no longer working today."[179] He argued that the WTO, while initially a "successful employment of the club logic," with new participants joining already-negotiated agreements, has discontinued the club approach.[180] The club approach was a key to successful negotiations because of the "desire to enforce the principle of reciprocity,"[181] whereas at the WTO, the adoption of new rules or the

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Global Electronic Commerce, adopted at the Second Ministerial Conference in May 1998. The Declaration was intended to be temporary but is still in force. Recently, the *Agreement on Fisheries Subsidies* was adopted at the 12th Ministerial Conference in June 2022, which is not yet applicable. WTO, *Agreement on Fisheries*, *supra* note 11.

[173] WTO, *Uruguay Round*, *supra* note 6.

[174] *Ibid*.

[175] *Ibid*.

[176] WTO, "E-Commerce" (last consulted 12 December 2022), online: WTO <https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm>.

[177] See generally WTO, "Financial services" (last consulted 14 December 2022), online: WTO <https://www.wto.org/english/tratop_e/serv_e/finance_e/finance_e.htm>; WTO, "Telecommunication services" (last consulted 14 December 2022), online: WTO <https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm>.

[178] For instance, the 12th WTO Ministerial Conference was a partial success. While there was no progress on the dispute settlement system front, WTO Members concluded the *Agreement on Fisheries Subsidies*. See WTO, *Agreement on Fisheries*, *supra* note 11.

[179] Lamp, *Club Approach*, supra note 1 at 107.

[180] *Ibid* at 108.

[181] *Ibid* at 107-8, 190 (Lamp refers to the definition of "reciprocity" of the *Havana Charter*: "[n]o Member shall be required to grant unilateral concessions, or to grant concessions to other Members without receiving adequate concessions in return" at 126-27). See also *Havana Charter*, supra note 42, art. art. 17(2)(b).

modification of existing rules is subject to the assent of all WTO Members, which is in fact impracticable because of the large number of Members and their divergent views.[182] Lamp recalled that the Uruguay Round gave rise to an entirely new situation of discord between the interested parties:

> In the Uruguay Round, by contrast, there was from the outset a fundamental disagreement about whether negotiations on services, intellectual property rights, and investment measures should take place in the GATT framework at all. This was an entirely new level of discord, and it resulted in, by GATT standards, brutal confrontations and tortured compromises throughout the round.[183]

More than that, Lamp argued that the developing countries, who operated outside of the pre-WTO club, have "become adept at resisting the club dynamics of the GATT era"; conversely, "the very success of the club approach in the Uruguay Round also means that the multilateral trading system is now too valuable to the developed countries for them to credibly threaten to abandon it in favour of a new club."[184] This shows that the club approach of the GATT is irreconcilable with the new dynamics of the WTO. It is in these circumstances that the multilateral trading system has evolved, and that alternative means to multilateral negotiations have emerged to ensure the mission of the WTO "to preserve the basic principles and to further the objectives underlying this multilateral trading system."[185]

The consequence of the virtual absence of "lawmaking" is that the gaps and lack of clarity in the trade rules have, for the most part, not been filled by new or updated rules, gradually giving way to growing uncertainties in the trade regime.[186] Such uncertainties go against the security and predictability that WTO Members have established as a basis of the multilateral trading system.[187]

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[182] Lamp, *Club Approach*, supra note 1 at 112.
[183] *Ibid* at 166-67.
[184] *Ibid*.
[185] *Marrakesh Agreement*, *supra* note 2, preamble. We recall that the *Marrakesh Agreement* provides that to contribute to the objectives of the trading system, the Parties shall enter into "reciprocal and mutually advantageous arrangements." Since virtually no arrangement have been concluded, other means necessarily had to emerge to nevertheless pursue the objectives of the system.
[186] Lamp, *Club Approach*, supra note 1, *passim*. We refer to the term "lawmaking" as used by Lamp in his study of the club approach, which refers to the conclusion of negotiated agreements. See also Lamp, *Lawmaking*, *supra* note 64.
[187] DSU, *supra* note 13, art 3(2).

In this context, the dispute settlement system has been essential in providing security and predictability to the multilateral trading system, pursuant Article 3(2) of the DSU.[188]

Because security and predictability require clarity in the rules applicable to a dispute,[189] panels and the Appellate Body have had to engage in rules clarification in the exercise of their mandate.[190] Indeed, the lack of clarity and the legal gaps in WTO Agreements and the GATT regarding WTO Members' rights and obligations have led Members to request clarifications from the dispute settlement organs.[191] In the recent *Handbook on the WTO Dispute Settlement System*, the WTO Secretariat used the title "Clarification of Rights and Obligations through Interpretation" to explain the role of the dispute settlement system and its organs.[192] It stated that WTO Agreements are "drafted in broad terms so as to be of general applicability," which explains the need for continued clarifications of the rules therein[193]:

> the WTO Agreement is a text forged in compromise; it is the result of arduous and contentious negotiations between dozens of countries with divergent interests and different legal traditions. To make compromise possible, negotiators sometimes reconcile diverging positions by agreeing to a text that can be understood in more than one way. This means that applying legal provisions to a given set of facts is not always straightforward. Adjudicators must first determine the meaning of the legal provision at issue before they can apply it to the facts as they have been established.[194]

The Appellate Body has also agreed that it must interpret and clarify the rules of the WTO.[195] Generally, the Appellate Body has relied on interpretative rules that are the same as those of public

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[188] The first sentence of Article 3(2) of the DSU reads as follows: "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."
[189] Wolfgang Weiss, "Security and predictability under WTO law" (2003) 2:2 World Trade Rev. 183 at 183.
[190] WTO, *Handbook*, *supra* note 124 at 12. This is because although the right to adopt authoritative interpretations is reserved to WTO Members pursuant Article IX:2, in practice, due to the Members' inability to adopt such interpretations, the interpretation of the provisions falls exclusively to panels and the Appellate Body (see Van Damme, *supra* note 93 at 611).
[191] The DSU specifies that the WTO judicial organs findings "cannot add to or diminish the rights and obligations provided in the covered agreements." The vagueness of the terms "add or diminish" has in practice allowed the WTO judicial organs the necessary leeway to clarify rights or obligations. See DSU, *supra* note 13, art 3(2), 19(2). See also Mark Daku & Krzysztof J Pelc "Who Holds Influence Over WTO Jurisprudence?" (2017) 20:2 J. Int. Econ. Law 233.
[192] WTO, *Handbook*, *supra* note 124 at 7.
[193] *Ibid* at 7.
[194] *Ibid* at 8.
[195] See e.g. AB, *US – Shrimp*, *supra* note 156 at para 155.

international law.[196] According to Article 3(2) of the DSU, the clarification of "the existing provisions of th[e] [covered] agreements [shall be made] in accordance with customary rules of interpretation of public international law."[197] The use of these rules of interpretation ensure predictable outcomes, as they are well known due to their codification in the *Vienna Convention on the Law of Treaties*.[198]

In addition to relying on interpretative rules aimed at providing security and predictability, the Appellate Body has also used "dynamic interpretation," enabling the continued development of concepts and terms.[199] Indeed, there have been circumstances in which the Appellate Body has had to advance some WTO rules, while staying within the limits of the covered agreements.[200] To this end, the Appellate Body even quoted the ICJ that held that some concepts are "'by definition, evolutionary', their 'interpretation cannot remain unaffected by the subsequent development of law ... Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'"[201] In light of the above, Isabelle Van Damme observed that the Appellate Body has constructed a judicial identity

[196] *Ibid* at para 183.
[197] These rules are found in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [VCLT], which codify customary international law. See e.g. Giovanni Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* (Leiden: Brill Nijhoff, 2019) at 373.
[198] AB, *US – Shrimp*, *supra* note 156 at paras 114, 192 (for example, the Appellate Body has consistently emphasized that in interpreting the WTO rules, it must examine the ordinary meaning of the words of the treaty, read in their context and in light of their object and purpose).
[199] See Weiss, *supra* note 189 at 187-88. The Appellate Body interpreted the term "natural resources" in Article XX(g) of the GATT has not being "'static' in its content or reference but [being] rather by definition, evolutionary." See AB, *US – Shrimp*, *supra* note 156 at para 130.
[200] Weiss, *supra* note 177 at 188-89. We recall that pursuant the DSU, *supra* note 13, art 3(2), the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements." For an illustration of the use of dynamic interpretation by the Appellate Body, see *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products (European Communities)* (2000), WTO Doc WT/DS98/AB/R at paras 68-82 (Appellate Body Report) [AB, *Korea – Dairy*]; *Argentina — Safeguard Measures on Imports of Footwear (European Communities)* (2000), WTO Doc WT/DS121/AB/R at paras 79-85, 88-89 (Appellate Body Report) [AB, *Argentina – Footwear (EC)*]. In these two reports, the Appellate Body held that the concept of "unforeseen developments," although not mentioned in the *Agreement on Safeguards* was a requirement for applying safeguard measures. *Agreement on Safeguards*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1869 U.N.T.S. 154 (entered into force 1 January 1995).
[201] AB, *US – Shrimp*, *supra* note 156 at para 130, no 109, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971] ICJ. Rep 16 at 31.

based on the key features of its interpretative practice,[202] which has permitted the "produc[tion] [of] a consistent body of interpretations of WTO law."[203]

The zeroing saga illustrates the role of rules clarification by the Appellate Body.[204] Zeroing is a practice used in the calculation of dumping margins.[205] Dumping margins are calculated when anti-dumping duties are imposed by a WTO Member.[206] The margins are obtained by calculating the differences between the export prices and the home market prices.[207] By putting "a value of zero on instances when the export price is higher than the home market price," the import industry benefits from the imposition of duties on the export industry, based on an artificial inflation of the dumping margin.[208]

The *Anti-Dumping Agreement* (ADA), which regulates anti-dumping measures, does not address the practice of zeroing, leading to uncertainty as to the consistency of this practice with the ADA. This uncertainty opened the door to the use of zeroing by WTO Members to justify anti-dumping duties, subsequently giving rise to a series of WTO cases involving no fewer than 19 countries. In the first zeroing case, *EC – Bed Linen*,[209] dating back to 1999, the Appellate Body upheld the panel finding that the application of zeroing by the European Commission, which involved "negative dumping margins," was inconsistent with the ADA.[210] The European Commission complied with the report and stopped zeroing. However, this case did not settle the issue of zeroing at the WTO.

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[202] Van Damme, *supra* note 93 at 621-39 (Van Damme argues that these key features are "contextualism" and "effectiveness").
[203] *Ibid* at 614-15.
[204] The zeroing cases have largely targeted the US and its methodology for calculating margins of dumping. Zeroing is the issue on which the WTO judicial organs have spent the most time, with 13% of panel reports and 20% of Appellate Body reports. See Chad P. Bown & Thomas J. Prusa, "U.S. Antidumping: Much Ado About Zeroing" World Bank Policy Research Working Paper No. 5352 1 at 29.
[205] WTO, "Glossary Term – Zeroing" (last consulted 11 December 2022), online: WTO <https://www.wto.org/english/thewto_e/glossary_e/zeroing_e.htm> [WTO, *Zeroing*].
[206] *Agreement on the Implementation of Article VI of GATT 1994* (Anti-Dumping Agreement), 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1868 U.N.T.S. 201 (entered into force 1 January 1995) [ADA].
[207] WTO, *Zeroing*, *supra* note 205.
[208] *Ibid*. For deeper explanation of the practice of zeroing, see Bown & Prusa, *supra* note 204 ("[z]eroing drops transactions that have negative margins and hence increases the overall dumping margins and the resulting size of the applied antidumping duty. […] zeroing makes it extremely difficult for a firm to avoid dumping. This makes zeroing a major irritant to exporters but highly desired by import-competing industries" at 3).
[209] *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (India)* (2001), WTO Doc WT/DS141/AB/R (Appellate Body Report) [AB, *EC – Bed Linen*].
[210] *Ibid* at para 55. Specifically, zeroing was considered inconsistent with Article 2.4.2 of the ADA.

In particular, the US continued to practise zeroing, which led to several cases challenging the practice. In these cases, the Appellate Body consistently held that zeroing, and the methodology adopted by the US to calculate dumping margins, was prohibited by the ADA, notwithstanding the absence of a clear prohibition in the text of the agreement.[211] Despite these rulings, the US persistently refused to comply with the Appellate Body's interpretation of the ADA.[212]

Of all the reports issued on zeroing, two panel reports were partially inconsistent with the Appellate Body ruling that zeroing was prohibited; the panels ruled that zeroing in original investigations was inconsistent with the ADA, but that zeroing in review proceedings was consistent with it.[213] These reports were subsequently reversed by the Appellate Body,[214] which held that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially when the disputed issues are the same."[215] In a subsequent zeroing case, the complainant argued at the Appellate Body level that the panelists had "fail[ed] to follow well-established Appellate Body jurisprudence."[216] In its report, the Appellate Body introduced the criterion that "absent cogent reason," the panels should indeed resolve the same issue in the same way[217] such as to permit the "development of a coherent and predictable body of jurisprudence."[218]

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[211] See AB, *US — Stainless Steel (Mexico)*, *supra* note 128 at paras 133-35, 139, 143; *United States — Measures Relating to Zeroing and Sunset Reviews (Japan)* (2007), WTO Doc WT/DS322/AB/R at paras 166, 169, 170, 174, 176, 183, 185, 186, 190(b)-(f) (Appellate Body Report) [AB, *US – Zeroing and Sunset*].
[212] See e.g. Bernard Hoekman & Jasper Wauters. "US Compliance with WTO Rulings on Zeroing in Anti-Dumping" (2011) 10:1 World Trade Rev. 5 at 42, *passim*.
[213] *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Argentina)* (2004), WTO Doc WT/DS268/R; WT/DS268/R/Corr.1 at para 8.1(d)(i)(ii) (Panel Report); *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico (Mexico)* (2006), WTO Doc WT/DS344/R at para 8.1 (Panel Report).
[214] AB, *US – Oil Country*, *supra* note 148 at paras 208-15. See also AB, *US – Steel (Mexico)*, *supra* note 128 at paras 134, 139, 143.
[215] AB, *US – Oil Country*, *supra* note 148 at para 188.
[216] AB, *US – Steel (Mexico)*, *supra* note 128 at para 154.
[217] *Ibid* at para 160. In other words, panels must justify a finding that is inconsistent with the established jurisprudence of the Appellate Body to depart from it.
[218] *Ibid* at para 160.

B. The Role of Precedents in the WTO Judicial Decision-Making System

The Appellate Body's consistent interpretation of the ADA – and the expectations that panels subsequently follow such interpretation – demonstrate the Appellate Body's ability to establish strong precedents. Such precedents provide the "consistency of jurisprudence"[219] that ensures the certainty and foreseeability necessary to any dispute settlement system to guarantee "equality of treatment" whereby "comparable situations are treated as comparable."[220] Pursuant to the doctrine of *stare decisis*, a ruling of the Appellate Body is binding on future panels.[221] In practical terms, this means that "like cases are treated alike."[222] This is a principle that the Appellate Body made clear in the context of zeroing, where panels were expected to find that zeroing is prohibited by the ADA, as already decided by the Appellate Body.[223]

The zeroing cases are not the only example where the Appellate Body has established a binding precedent. In the context of the general exceptions under Article XX of the GATT, the Appellate Body established in one of its earliest cases that to qualify for such an exception, a measure must not only fall within one of the exceptions listed, but also be applied in accordance with the chapeau of Article XX.[224] This test has been consistently applied ever since,[225] and is one of the first precedents of the Appellate Body, which was established as early as 1996, one year after the creation of the WTO.

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[219] *Legality of Use of Force*, *supra* note 105 at 1208.
[220] Guillaume, *Precedent*, *supra* note 100 at 6.
[221] Van Damme, *supra* note 93 at 610.
[222] Scully-Hill & Mahncke, *supra* note 102 at 137.
[223] AB, *US – Oil Country*, *supra* note 148 at para 188.
[224] AB, *US – Gasoline*, *supra* note 92 at 22.
[225] See e.g. AB, *US – Shrimp*, *supra* note 156, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Canada)* (2001), WTO Doc WT/DS135/AB/R (Appellate Body Report) [AB, *EC – Asbestos*]; *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Canada)* (2001), WTO Doc WT/DS135/AB/R (Appellate Body Report) [AB, *Korea – Beef*]; *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes (Honduras)* (2005), WTO Doc WT/DS302/AB/R (Appellate Body Report) [AB, *Dominican Republic – Import and Sale of Cigarettes*]. For recent cases, see *United States — Certain Country of Origin Labelling (COOL) Requirements (Canada)* (2015), WTO Doc WT/DS384/AB/RW; WT/DS386/AB/RW at para 5.370 (Appellate Body Report) [AB, *US – COOL*]; *India — Certain Measures Relating to Solar Cells and Solar Modules (United States)* (2016), WTO Doc WT/DS456/AB/R at para 5.56 (Appellate Body Reports) [AB, *India — Solar Cells*]; *Indonesia — Importation of Horticultural Products, Animals and Animal Products (United States)* (2017), WTO Doc WT/DS477/AB/R, WT/DS478/AB/R at para 5.97 (Appellate Body Report). While the exceptions have been interpreted and clarified over time, the test has remained the same.

Another area in which the Appellate Body has, from its inception, set a strong precedent is that of safeguards. Two reports in particular, which were published almost simultaneously in 2000, *Korea – Dairy* and *Argentina – Footwear (EC)*,[226] have had a very significant jurisprudential value in the WTO.[227] Both cases concerned the conditions for triggering the safeguard mechanism found in the *Agreement on Safeguards*.[228] In the two cases, the Appellate Body found that safeguard measures adopted to address the increased quantities of imports causing injury to domestic producers are not justified if the increased quantities of imports are not the result of "unforeseen developments."[229] The Appellate Body found that despite the absence of the term "unforeseen developments," in the *Agreement on Safeguards*,[230] "unforeseen developments" is a condition for triggering the safeguard mechanism.[231] Thus, the Appellate Body concluded that the safeguard mechanism could only be used in "emergency" situations that were not foreseeable.[232]

These two Appellate Body reports have subsequently been cited in every single case on safeguards.[233] For example, in *US – Line Pipe* the panel relied on *Korea – Dairy* and *Argentina – Footwear (EC)* when it held the following regarding the "unforeseen developments":

> We note that the requirement to demonstrate the existence of unforeseen developments in order to apply a safeguard measure under Article XIX is an issue that is well established in WTO law. […] [W]e do not understand the United States

[226] AB, *Korea – Dairy*, *supra* note 200; AB, *Argentina – Footwear (EC)*, *supra* note 200.
[227] See Krzysztof J. Pelc, "The politics of precedent in international law: A social network application" (2014) 108:3 A.P.S.R. 547 ("[e]very single subsequent safeguards case has cited these two rulings" at 554) [Pelc, *Politics of Precedent*].
[228] See generally AB, *Korea – Dairy*, *supra* note 200; AB, *Argentina – Footwear (EC)*, *supra* note 200.
[229] AB, *Argentina – Footwear (EC)*, *supra* note 200 at para 131; AB, *Korea – Dairy*, *supra* note 200 at para 84-85.
[230] AB, *Korea – Dairy*, *supra* note 200 paras 68-82. In its analysis, the Appellate Body applied the interpretive principle of "effectiveness" according to which all applicable provisions of a treaty should be read together harmoniously. Thus, the Appellate Body analysed Article 2 of the *Agreement on Safeguards* in light of GATT, *supra* note 4, art XIX, which contains the term "unforeseen developments." See AB, *Argentina – Footwear (EC)*, *supra* note 200 at paras 79-85, 88-89.
[231] *Korea – Dairy*, *supra* note 200 at paras 86, 90, 151(a); *Argentina – Footwear (EC)*, *supra* note 200 at paras 92 & 97.
[232] *Korea – Dairy*, *supra* note 200 at paras 86-87; *Argentina – Footwear (EC)*, *supra* note 200 at para 93.
[233] See e.g. *European Union — Safeguard Measures on Certain Steel Products (Turkey)* (2022), WTO Doc WT/DS595/R; WT/DS595/R/Add.1 at paras 7.84 & 7.162 (Panel Report); *India — Certain Measures on Imports of Iron and Steel Products (Japan)* (2018), WTO Doc WT/DS518/R; WT/DS518/R/Add.1 at para 7.86 (Panel Report); *Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (Honduras)* (2012), WTO Doc WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R at paras 7.128, 7.141 (Panel Report); *Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches (Chile)* (2003), WTO Doc WT/DS238/R at paras 7.12, 7.17 (Panel Report).

> to dispute the existence of the requirement to demonstrate the existence of unforeseen developments.[234]

By upholding the prohibition on zeroing, by interpreting the GATT's general exceptions in a consistent manner, and by establishing that the "unforeseen developments" is a condition for applying the safeguard mechanism, the Appellate Body has established rules that can only be departed from on the basis of a "cogent reason." Richard Steinberg pointed to the exercise of precedent-setting by the Appellate Body as creating a "body of law that bears on the behaviour of all Members"[235]

Steinberg argued that the WTO's legal discourse permits expansive judicial lawmaking, because the DSU imposes few "constitutional" constraints preventing the Appellate Body from engaging in judicial lawmaking.[236] For instance, in the GATT era, reports could be blocked by any party to the dispute,[237] whereas in the WTO, only a consensus among WTO Members can prevent a report from being adopted, which means that reports are in practice automatically adopted.[238] Therefore, the broad "constitutional space" that the reverse consensus has given to the Appellate Body has provided it with an extensive authority to establish its precedents.[239] This is even more true as the Appellate Body has no power to declare a case inadmissible, to suspend proceedings in the event of *lis pendens*, or to declare that the law is incapable of being determined.[240] In other words, in any given case, the Appellate Body must rule on the issue before it and make a decision.

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[234] *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (Republic of Korea)* (2002), WTO Doc WT/DS202/R at para 7.295 (Panel Report).
[235] Richard H. Steinberg, "Judicial Lawmaking at the WTO" (2004) 98:2 AJIL 247 at 254.
[236] Steinberg, *supra* note 235 (regarding the term "constitutional constraints," the author refers to the WTO legal rules that "define[...] checks and balances against the Appellate Body" at 263).
[237] GATT, *Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures*, Decision, Contracting Parties Meeting (held on 12 April 1989) at para G:2, online: WTO <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a3s1p1_e.htm>.
[238] DSU, *supra* note 13, art 17.14. As pointed out by Barfield, a double consensus would be required to correct a judicial decision: the consensus to block a report and the consensus to legislate. See Barfield, *supra* note 112 at 411-12.
[239] Steinberg, *supra* note 235 at 254, 263.
[240] See generally Bartels, *supra* note 79 ("[a]rticle 7.2 DSU states that '[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'. In the same vein, Article 17.12 DSU requires the Appellate Body to address each of the issues raised on appeal" at 862).

Our objective is not to demonstrate whether or not the Appellate Body has engaged in "judicial lawmaking," but to demonstrate that the precedents set by the Appellate Body have had a meaningful role in the multilateral trading system, leading the Appellate Body to act as the institutional mechanism of the multilateral trading system, as understood by the constructivists.

II. The Appellate Body is the *Institutional Mechanism* of the Multilateral Trading System

To demonstrate that the Appellate Body and its precedents have been the institutional mechanism of the multilateral trading system that has enabled the necessary dialogue among WTO Members, we first demonstrate that the Appellate Body has engaged with the *generalized principles* of the system to ensure their *living nature* (A). We then demonstrate the judicial authority that the Appellate Body and its precedents have exercised over the conduct of WTO Members (B). Finally, we address the main challenge to our argument (C). Before turning to this agenda, we introduce the theoretical framework on which we based our argument.

Constructivists have developed an original understanding of international institutions and the mechanisms that foster cooperation between their members. The constructivist approach was first developed in the field of international relations, and emerged in the late 1980s as a response to other approaches deemed insufficient to understand international phenomena such as multilateral institutions.[241] In its simplest form, this approach was defined by scholars in the field of international relations as being concerned with the "stud[y] [of] the construction of social reality by norms."[242] The constructivist approach is a social theory that aims to conceptualize the

[241] For example, Ruggie, *Constructing*, *supra* note 30 (the constructivist approach "[p]ermits us to describe a profound limitation of neo-utilitarianism: it lacks any concept of constitutive rules. […] This feature [constitutive and regulative rules] accounts for the fact that within the terms of their theories, neorealism and neoliberal institutionalism explain the origins of virtually nothing that is constitutive of the very possibility of conducting international relations: not territorial states, not systems of states, not any concrete international order, nor the whole host of institutional forms that states use, ranging from promises or treaties to multilateral organizing principles. All are assumed to exist already or they are misspecified—as, for example, when the post-World War II international order is attributed to American hegemony, taking the specificity of American identity for granted" at 23). See also Emanuel Adler, "Constructivism in International Relations: Sources, Contributions, and Debates" in Walter Carlsnaes, Thomas Risse, and Beth A Simmons, eds, *Handbook of International Relations*, 2nd ed (London: SAGE Publications, 2013) 112 at 114; Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39:1 Colum J Transnat'l L 19 at 26 [Brunnée & Toope, *International Law and Constructivism*].

[242] Adler, *supra* note 241 at 113. Constructivists scholars in the field of international relations consider *norms* "as a standard of appropriate behavior for actors with a given identity." The concept of *norms* is often also referred to as

relationship between, on the one hand, the agents or the actors, and on the other hand, the structures.[243] Specifically, the constructivists analyze the *meaning* given by specific actors to their actions.[244] This trend in international relations gained interest from the international legal community,[245] and legal scholars began writing about constructivism in the context of international law, to the point that a commentator even referred to a "legal constructivist approach."[246]

Constructivism has no common and accepted definition. A point of convergence that can nonetheless be identified from the constructivist scholarship in international relations, political science, and international law, is the role played by "idea(s)."[247] The constructivist approach is in fact also known as the "theory of the role of ideas."[248] In 1993, Geoffrey Garrett and Barry R. Weingast asked, "how [does] a specific idea or set of ideas translate into action[?]"[249] To answer the question, they developed a three-component model: (1) the parties' motivations to cooperate (i.e. the gains), (2) an idea that expresses these motivations, and (3) the mechanism for translating

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institutions. See Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int. Organ. 887 at 891 & 894-905 [Finnemore & Sikkink, *International Norm Dynamics*], citing Peter J. Katzenstein, "Introduction" in Peter J. Katzenstein, ed, *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 1; Martha Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press, 1996); Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, N.Y.: Cornell University Press, 1995).

[243] See e.g. Alexander Wendt, "The Agent-Structure Problem in International Relations Theory" (1987) 41:3 Int. Organ. 335; Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 242; Alexander Wendt, *Social Theory of International Politics*, Cambridge Studies in International Relations Series (Cambridge: Cambridge University Press, 1999); Frédéric Mérand & Vincent Pouliot, "Le monde de Pierre Bourdieu: Éléments pour une théorie sociale des Relations internationales" (2008) 43:1 Can J Polit Sci 603; Audie Klotz & Cecelia Lynch, "Le constructivisme dans la théorie des relations internationales" (1999) 2:1 Critique internationale 51; Vincent Pouliot, "The Essence of Constructivism" (2004) 7:3 J. Int. Relat. Dev. 319.

[244] *Ibid*.

[245] For early accounts of constructivism in international law, see e.g. Brunnée & Toope, *International Law and Constructivism*, *supra* note 241; Phillip A. Karber, "'Contructivism' As a Method in International Law" (2000) 94 Am Soc'y Int'l L Proc 189; David J. Bederman, "Constructivism, Positivism, and Empiricism in International Law" (2001) 89:2 Geo LJ 469.

[246] Enrique Cáceres Nieto, "The Foundations of Legal Constructivism" in Jorge Luis Fabra-Zamora & Gonzalo Villa Rosas, eds, *Conceptual Jurisprudence: Methodological Issues, Classical Questions and New Approaches Law and Philosophy Library* (Cham: Springer International Publishing, 2021) 295 at 295.

[247] In the context of the constructivist approach, the term *institution* has been defined as "a relatively stable collection of practices and rules defining appropriate behavior for specific groups of actors in specific situations." See generally James G. March and Johan P. Olsen, "The Institutional Dynamics of International Political Orders" (1998) 54:2 Int. Organ. 943 at 948. See also Karber, *supra* note 245 at 189; Garrett & Weingast, *Ideas, Interests, and Institutions*, *supra* note 19 at 204-205.

[248] Garrett & Weingast, *Ideas, Interests, and Institutions*, *supra* note 19 at 203. See also Anna Leander, "Pierre Bourdieu on Economics" (2001) 8:2 Rev Int Polit Econ. 344 at 350-351; Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 242 ("[p]ersuasion is the process by which [...] ideas become norms, and the subjective becomes the intersubjective" at 914).

[249] Garrett & Weingast, *Ideas, Interests, and Institutions*, *supra* note 19 at 205.

the idea into a "shared belief system so as to affect expectations, enhance behaviour."[250] These three components are based on the premise that parties cooperate together towards focal point(s) to achieve the gains of cooperation.[251] The concept of *idea* is central to the model of Garrett and Weingast, whereby ideas aims to "capture the gains from cooperation."[252] According to their model, from the "idea(s)" emerged "shared beliefs" as "focal point(s)," towards which actors converge.[253]

From their three-component model, Garrett and Weingast described the role of institutions in bringing parties to cooperation.[254] They asserted that "[t]he principal role of the institution would thus be to create a shared belief system about cooperation and defection in the context of differential and conflicting sets of individual beliefs that inhibit the decentralized emergence of cooperation."[255] According to them, institutions are central to foster cooperation between actors, because they play the role of constructing focal points in a context where actors are so different that no obvious focal point can emerge.[256] They asserted that institutions can also be understood as mechanisms for transmitting ideas in a way "that changes or establishes a set of shared expectations about behavior."[257] The mechanisms "capture the gains from cooperation," the ultimate reason for the parties to cooperate.[258]

To support their point, the authors gave the example of the European Court of Justice and argued that "[i]f this significant delegation of authority is to be in the interests of the EC's members, the court must faithfully implement the spirit of the internal market rules to which they agreed."[259] In this context, the authors defined the ICJ as the "institutional mechanism" of the European Community.[260] According to them, such mechanism comprises two elements; one that is formal

[250] *Ibid* at 203.
[251] *Ibid* at 178.
[252] *Ibid* at 204.
[253] *Ibid* at 176.
[254] *Ibid* at 176-79, 181-84.
[255] *Ibid* at 184.
[256] *Ibid* at 183.
[257] *Ibid* at 204.
[258] *Ibid* at 204.
[259] *Ibid* at 199.
[260] *Ibid* at 191. Garrett & Weingast use this term only once in their piece but refer several times to mechanism and institutions together.

or "organizational," and one that is informal, which embedded "shared understanding about [sic] and expectations of "fair" behavior."[261]

In the same vein, the international legal scholars Jutta Brunnée and Stephen Toope defined institutions as "social structures [which] foster "shared understandings" that can shape both the identity of actors and the further evolution of the structures themselves."[262] They argued that constructivists do not view ideas as direct causes of actions; rather they believe that institutions (or social structures) "constrain and enable actors in their choices" and foster "shared understandings."[263] This understanding of the institutions echoes Garrett and Weingast's point that an institutional mechanism is needed – as they demonstrated in the case of the European Community – to translate ideas into expected behaviours that capture gains from cooperation between actors.

In 1983, Ruggie undertook a constructivist analysis of international institutions by studying the trade regime.[264] Interestingly, at the time he wrote his piece, the world trade regime was not embedded in an international organization, as it is the case with the WTO today.[265] Nevertheless, the absence of a formal organization did not prevent Ruggie from considering international trade as an institutionalized regime, which later led to the creation of the WTO, a few years after his piece was published.

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[261] *Ibid* at 203-204.

[262] Brunnée & Toope, *International Law and Constructivism*, *supra* note 241 at 31. This definition echoes the definitions of "norms" and "institutions" as proposed by scholars in the field of international relations. See also footnote 242.

[263] Brunnée & Toope, *International Law and Constructivism*, *supra* note 241 at 31.

[264] Ruggie, *International Regimes*, *supra* note 17. This piece is one of the earliest attempts at applying a constructivist approach to the world trade regime.

[265] Indeed, the GATT was not an "international organization" *per se* because it lacked a "formal and material organization." Indeed, Clive Archer defined the notion of "international organization" as "[...] a form of institution that refers to a formal system of rules and objectives, a rationalized administrative instrument and which has 'a formal technical and material organization: constitutions, local chapters, physical equipment, machines, emblems, letterhead stationery, a staff, an administrative hierarchy and so forth.'" See Clive Archer, *International organizations* (London: Routledge, 2014) at 2 [references omitted].

Ruggie explained that the trade regime was made of "expectations."[266] He understood these expectations as shared in a collective way that he identified as "intersubjective."[267] According to him, intersubjectivity is based on "a shared narrative about the conditions that had made these regimes necessary and what they were intended to accomplish."[268] In other words, regimes are not just set of rules; they create social actions, such as trade relations.[269]

Regarding the role of intersubjectivity, Lang, an author analyzing Ruggie's work reasoned:

> This intersubjective nature gives regimes some distinctive qualities. For one thing, they exist and take the form that they do, precisely because the relevant actors believe that they do and act accordingly. For another, they change as those actors shared ideas about them change. Moreover, because they are based on collective intentionality (a sense of 'we-feeling') they are dialogic in character, in the sense that they are produced by constitutive processes of communication and interpretation.[270]

This analysis of the concept of intersubjectivity shows that constructivism provides an enriched approach to understanding multilateral institutions. Indeed, a multilateral institution is based on generalized principles that are intersubjective in nature, i.e., that are shared by the members of the institution.[271] To ensure this intersubjectivity over time, the members must pursue the dialogue they began when they settled on the generalized principles. This dialogue is necessary to ensure the *living nature* of a multilateral institution.[272] A multilateral institution thus needs an institutional mechanism to operate. In the context of the WTO, the Appellate Body has acted as such

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[266] Ruggie, *International Regimes*, *supra* note 17 at 380.
[267] Ruggie, *International Regimes*, *supra* note 17 at 380 & 405. The "expectations" in Ruggie's analysis corresponds to the "shared beliefs" of Garrett and Weingast's model. An author analyzing Ruggie's work even used the term "shared beliefs" to refer to the used of the term "expectations" by Ruggie. See Lang, *supra* note 30 at 103.
[268] Ruggie, *Constructing*, *supra* note 30 at 21, cited by Lang, *supra* note 30 at 104.
[269] Lang, *supra* note 30 at 104.
[270] Lang, *supra* note 30 at 103, developing on Ruggie, *Constructing*, *supra* note 30 at 63 [footnotes omitted].
[271] Ruggie observed that "successful cases of multilateralism in practice appear to generate among their members what Keohane has called expectations of "diffuse reciprocity." That is to say, the arrangement is expected by its members to yield a rough equivalence of benefits in the aggregate and over time. Bilateralism, in contrast, is premised on specific reciprocity, the simultaneous balancing of specific quids-pro-quos by each party with every other at all times." See Ruggie, *Constructing*, *supra* note 30 at 571-72.
[272] Lang, *supra* note 30 at 103. In other words, without dialogue, a multilateral regime is subject to extinction.

institutional mechanism.

A. The Necessary Dialogue Between WTO Members and the Generalized Principles of the Multilateral Trading System

Following the constructivist approach, an institutional mechanism is central to foster shared understandings, which are embedded in generalized principles.[273] These generalized principles are the foundation of any multilateral system.[274] In this regard, Garrett and Weingast wrote the following to demonstrate that the ECJ acted as the institutional mechanism of the European Community by engaging with the principles of the internal market:

> Indeed, it is inconceivable that the members of the EC could have sought to write an exhaustive set of rules to govern the internal market. Rather, they knew that if they were to forge a cooperative agreement with any chance of longevity, they would have to do so on the basis of an incomplete contract, delegating to another institution the application of its general intent to specific cases. This is precisely the role played by the ECJ in the internal market: to uphold and interpret the doctrine of mutual recognition in all disputes that arise.[275]

Similarly, in the context of the multilateral trading system, States negotiated and concluded a set of agreements that are, as we explained under Section I, incomplete and lacking in clarity. Again, the WTO Secretariat stated that "the WTO Agreement is a text forged in compromise; it is the result of arduous and contentious negotiations between dozens of countries with divergent interests and different legal traditions."[276] Like the European Community members did, the WTO Members decided to establish a dispute settlement system "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements."[277] In

[273] For the use of the term "generalized principles," see Ruggie, *Multilateralism*, *supra* note 26 at 572, 573, 574, 578. See also Ruggie, *International Regimes*, *supra* note 17 at 111. For the use of the term "shared understanding," see Ruggie, *Constructing*, *supra* note 30 at 89, *passim*; Brunnée & Toope, *International Law and Constructivism*, *supra* note 241 at 31; Garrett & Weingast, *Ideas, Interests, and Institutions*, *supra* note 19 at 204 (Garrett & Weingast also use "shared beliefs").
[274] Ruggie, *Multilateralism*, *supra* note 26 at 572, 573, 574, 578.
[275] Garrett & Weingast, *Ideas, Interests, and Institutions*, *supra* note 19 at 199.
[276] WTO, *Handbook*, *supra* note 124 at 8.
[277] DSU, *supra* note 13, art 3(2).

particular, they created the Appellate Body, and gave it ample room to interpret and clarify the rules, and even fill the gaps of the WTO Agreements.[278]

The set of rules of the multilateral trade regime includes what Ruggie called the "constitutive" rules and the "regulative" rules.[279] According to him, while the former set the rules of the game, the latter coordinate the game.[280] Specifically, Ruggie asserted that the "[c]onstitutive rules are the institutional foundation of all social life. No consciously organized realm of human activity is imaginable without them, including international politics […]," [281] and "these constitutive rules prestructure the domains of action within which regulative rules take effect."[282]

We suggest that in the context of the WTO, the "rules of the game" or the constitutive rules, are found in legal texts, which establish "who plays, what the objectives are, what roles are to be assumed, what particular kinds of activity count as in the context of the game."[283] Specifically, we observe that these rules are found in the *Marrakesh Agreement* and the DSU, which provide the framework in which the multilateral trading system operates. As a matter of fact, Article 1 of the *Marrakesh Agreement* establishes the WTO, and the following articles define *inter alia* the scope, functions, structure, status, and membership of the organization.[284] The DSU establishes the Dispute Settlement Body and gives it its scope and functions, in addition to creating the standing Appellate Body.[285]

On the other hand, the regulative rules or those that "prohibit, require and constrain" are also found in legal texts, such as the *Agreement on Technical Barriers to Trade* (TBT Agreement), according to which the technical regulations, standards and conformity assessment procedures adopted by

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[278] See subsection *The Appellate Body and the Doctrine of Stare Decisis* for a discussion on the doctrine of precedent and the *stare decisis*. We argue that the regulatory and institutional framework provide the Appellate Body with the leeway to establish its *stare decisis*, as demonstrated in its case law.
[279] Ruggie, *Constructing*, *supra* note 30 at 22.
[280] *Ibid*, cited by Lang, *supra* note 30 at 104.
[281] Ruggie, *Constructing*, *supra* note 30 at 24-25 (Ruggie gave the following examples to demonstrate that the constitutive rules are the "institutional foundation": "[s]ome constitutive rules, like exclusive territoriality, are so deeply sedimented or reified that actors no longer think of them as rules at all. But their durability remains based in collective intentionality, even if they started with a brute physical act such as seizing a piece of land" at 25).
[282] *Ibid* at 33.
[283] Lang, *supra* note 30 at 104.
[284] *Marrakesh Agreement*, *supra* note 2, art II, III, IV, VIII, XI and XII.
[285] DSU, *supra* note 13, art 2 and 17.

WTO Members must respect the principle of non-discrimination and not create unnecessary obstacles to trade;[286] the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement), which establishes the framework for allowing Members to set their standards on food safety and animal and plant health;[287] the *Agreement on Subsidies and Countervailing Measures*, which regulates the use of subsidies and the actions taken to counter the effect of subsidies;[288] the *Agreement on Safeguards*, which establishes the rules for the application of safeguard measures;[289] and the ADA, which provides the requirements a Member must fulfill to take actions against dumping.[290] Of course, the GATT itself also contains most of the regulative rules of the WTO, providing for WTO Members' major obligations with respect to trade in goods.[291] These agreements provide the rules for the conduct of trade relations.

It is precisely in the context of these latter rules that the Appellate Body has played a central role in upholding and furthering the generalized principles on which the multilateral trading system is based. In fact, Members have entrusted the Appellate Body with the role of interpreting and applying these regulative rules that provide for the conduct of trade, and, in doing so, engaging in a dialogue with the generalized principles of the system. Thereon, the Appellate Body has not ruled in the exclusive context of each dispute, but within the framework of generalized principles. In fact, the generalized principles transcend the regulatory rules that the Appellate Body has had to interpret and apply. They have therefore guided the reasonings of the Appellate Body and formed the basis for its decisions.

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[286] *Agreement on Technical Barriers to Trade*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1868 U.N.T.S. 120 (entered into force 1 January 1995) [TBT Agreement].
[287] *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 U.N.T.S. 493 (entered into force 1 January 1995) [SPS Agreement].
[288] *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1869 U.N.T.S. 14 183154 (entered into force 1 January 1995).
[289] *Agreement on Safeguards*, *supra* note 200.
[290] ADA, *supra* note 206.
[291] GATT, *supra* note 4. See also the GATS for the rules with respect to trade in services. *General Agreement on Trade in Services*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, 1869 U.N.T.S. 183, (entered into force 1 January 1995) [GATS].

The generalized principles, as enshrined in the WTO Agreements, reflect the shared understandings of WTO Members, to which they subscribed when they joined the WTO.[292] This is why the Appellate Body precedents are so central to the multilateral trading system. They provide for the continued dialogue among Members which ensures the intersubjectivity of the generalized principles. The precedents then condition the behaviour of members who then act in a certain way that corresponds to the established principles and objectives of the multilateral trading system.

B. The Generalized Principles of the Multilateral Trading System

During the Uruguay Round, the parties to the *Marrakesh Agreement* expressed their resolution "to develop an integrated, more viable and durable multilateral trading system."[293] In this context, WTO Members decided to pursue their trade relations through a multilateral trading system that relies on rules. In establishing the multilateral trading system, WTO members agreed on the "generalized principles" that underlie the rules through which the regime operates. These principles are notably found in the texts of the WTO Agreements.[294] The Appellate Body, by engaging with these principles, has upheld and furthered these generalized principles.

The most important general principle found in the WTO Agreements is trade liberalization, codified in the Preamble of the *Marrakesh Agreement* and GATT 1947, as well as in other agreements.[295] The principle of trade liberalization refers to the elimination of obstacles to international trade, including tariffs and other barriers to trade.[296] The Appellate Body has been called upon to uphold the principle of trade liberalization, as one of the generalized principles of the multilateral trading system, while balancing it with other principles, such as the principle of

[292] There is no opt-in or opt-out mechanism at the WTO, a member must sign on to all rules, enforce them domestically and abide by them. See WTO, *A Handbook*, *supra* note 124 at i-ii, 1-20; WTO, *How the negotiations are organized*, *supra* note 50.
[293] *Marrakesh Agreement*, *supra* note 2, preamble.
[294] See Hilf, *supra* note 69 at 116-17. The principles we expand on are based on Hilf's discussion of these principles. Several of these principles are notably found in the preambles of the WTO Agreements. Pursuant the VCLT, *supra* note 197, art 31(2), the preambles have an interpretative function.
[295] TBT Agreement, *supra* note 286, preamble, art 2.2, 2.5, 5.1.2 & Annex 3 (the TBT Agreement mentions several times the elimination of "unnecessary obstacles to international trade"). See Hilf, *supra* note 69 at 117.
[296] Hilf, *supra* note 69 at 117.

domestic regulatory sovereignty.[297] In *US – Shrimp*, which involved the US prohibition of the import of shrimp and shrimp products from countries that had not used a certain device to catch shrimp,[298] the Appellate Body had to balance competing policies in its analysis of Article XX(g) of the GATT, namely the protection of exhaustible natural resources and the prohibition on quantitative restrictions.[299] The Appellate Body decided that although the US import ban was indeed related to the conservation of exhaustible natural resources and was thus covered by the general exceptions provision, it was not justified under the chapeau of Article XX of the GATT because of its "arbitrary and unjustifiable" discriminatory character.[300] In other words, by finding that the US measure was unfairly restrictive, the Appellate Body upheld the principle of trade liberalization. This analysis of the general exceptions provision, including the balancing exercise between trade liberalization and the general exceptions, has been largely relied upon since the report was issued in 1998.[301]

Sovereignty and deference to States' regulative powers are also one of the core principles of the WTO legal regime.[302] These principles are notably reflected in the general exceptions articles, according to which Members can deviate from their obligations to protect national interests.[303] The

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[297] See Tracey Epps, "Recent Developments in WTO Jurisprudence: Has the Appellate Body Resolved the Issue of an Appropriate Standard of Review in SPS Cases" (2012) 62:2 U Toronto LJ 201 at 203 ("[t]he SPS Agreement speaks about measures being necessary to protect animal, plant, or human health" at 207).
[298] AB, *US – Shrimp*, *supra* note 156 at para 2.
[299] *Ibid* (the US accepted the finding of the panel that its import ban violated GATT Article XI (prohibition on quantitative restrictions), but it challenged the panel's finding on GATT Article XX(g) (general exceptions)).
[300] AB, *US – Shrimp*, *supra* note 156 at para 184.
[301] AB, *US – Gasoline*, *supra* note 92 at paras 22-30; *United States — Import Prohibition of Certain Shrimp and Shrimp Products (India; Malaysia; Pakistan; Thailand)* (1998), WTO Doc WT/DS58/R; WT/DS58/R/Corr.1 at paras 7.31-7.62 (Panel Report); AB, *US – Shrimp*, *supra* note 156 at paras146-186; *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (European Communities)* (2011), WTO Doc WT/DS155/R; WT/DS155/R/Corr.1 at paras 11.309-11.331 (Panel Report); *European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Canada)* (2001), WTO Doc WT/DS135/R; WT/DS135/R/Add.1 at paras. 8.224-8.240 (Panel Report); *United States — Import Prohibition of Certain Shrimp and Shrimp Products (India; Malaysia; Pakistan; Thailand)* (1998), WTO Doc WT/DS58/RW, at paras 5.43-5.144 (Article 21.5– Malaysia, Report of the Panel); *United States — Import Prohibition of Certain Shrimp and Shrimp Products (India; Malaysia; Pakistan; Thailand)* (2001), WTO Doc WT/DS58/AB/RW at paras 111-152 (Article 21.5 – Malaysia, Report of the Appellate Body); *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (India)* (2004) at paras 7.225-7.235 (Panel Report); *Brazil — Measures Affecting Imports of Retreaded Tyres (European Communities)* (2007), WTO Doc WT/DS332/R at paras 7.217-7.357, 7.375-7.380 (Panel Report); *Brazil — Measures Affecting Imports of Retreaded Tyres (European Communities)* (2007), WTO Doc WT/DS332/AB/R at paras 213-252 (Appellate Body Report).
[302] See e.g. *DSU*, *supra* note 13, art 3.2, 19.2; Hilf, *supra* note 69 at 118.
[303] GATT, *supra* note 4, art XX, XXI; GATS, *supra* note 291, art XIV.

Appellate Body has interpreted these principles in several reports.[304] For example, in *EC – Hormones*, the Appellate Body recognized that in applying the rules found in the SPS Agreement, WTO Members may "establish their own appropriate level of sanitary protection, which level may be higher (i.e. more cautious) than that implied in existing international standards, guidelines and recommendations."[305] It further held that "[a]rticle 5.1 stipulates that SPS measures must be based on a risk assessment, *as appropriate to the circumstances*, and this makes clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1."[306] Similarly, in *US – Shrimp*, the Appellate Body recognized that WTO Members should be given deference in determining what is of significance for them in protecting and preserving the environment.[307]

Another important principle found in the vast majority of WTO Agreements is the principle of non-discrimination, particularly in the disciplines of most-favoured nation and national treatment.[308] The Appellate Body has played an important role in ensuring the consistency of the non-discrimination principle. In fact, the Appellate Body has been called upon to correct divergent interpretations developed by panels, to ensure the security and predictability of the multilateral trading system.[309] In *US – Clove Cigarettes*, the Appellate Body upheld the panel's finding that clove cigarettes from Indonesia and menthol cigarettes produced in the United States were "like products" pursuant Article 2.1 of the TBT Agreement.[310] Nonetheless, the Appellate Body disagreed with the Panel that "likeness" focuses on the legitimate objectives and purposes of the

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[304] See e.g. *Japan — Alcoholic Beverages II*, *supra* note 134 at 15; *European Communities — Measures Concerning Meat and Meat Products (Hormones) (United States)* (1998), WTO Doc WT/DS26/AB/R ; WT/DS48/AB/R at paras 104, 129 no 154, 165 (Appellate Body Report) [AB, *EC – Hormones*]. See also *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (Republic of Korea)* (2002), WTO Doc WT/DS202/AB/R at para 158 (Appellate Body Report) [AB, *US — Line Pipe*].

[305] AB, *EC – Hormones*, *supra* note 304 at para 124.

[306] *Ibid* at para 129. This paragraph has been cited multiple times by panels. See e.g. *European Communities — Measures Affecting the Approval and Marketing of Biotech Products (United States)* (2006) WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9 at para 7.3032 (Panel Report).

[307] AB, *US – Shrimp*, *supra* note 156 at para 185.

[308] For instance, GATT, *supra* note 4, art I, III. See also Ruggie, *Multilateralism*, *supra* note 26 at 571; Hilf, *supra* note 69 at 117-18; *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain (United States)* (2004), WTO Doc WT/DS276/AB/R at paras 84 & 100 (Appellate Body Report).

[309] In fact, inconsistent interpretations undermine security and predictability. See e.g. James Bacchus & Simon Lester, "The Rule of Precedent and the Role of the Appellate Body" (2020) 54:2 J. World Trade 183 at 186-187. See the discussion on zeroing in subsection *From a Negotiated Decision-Making System to a Judicial Decision-Making System*.

[310] *United States — Measures Affecting the Production and Sale of Clove Cigarettes (Indonesia)* (2012), WTO Doc WT/DS406/AB/R at para 160 (Appellate Body Report).

technical regulation.[311] It instead considered that the determination of whether products are "like" relates to the competitive relationship between the products, because the latter informs physical characteristics, end use, consumer tastes and habits, and tariff classification.[312] This latter reasoning, which has been followed by subsequent panels and cited by WTO Members, provides a clear framework of interpretation of the concept of "likeness," and as such, has crystallized into a binding precedent.[313]

Several other generalized principles of the multilateral trading system are found in the WTO Agreements. Some examples are the exceptions for developing countries, the sustainable development, and the principle of transparency.[314] These principles have also been the subject of Appellate Body's decisions. For example, the Appellate Body upheld the principle of transparency in *US – Cotton and Underwear* as follows:

> Article X:2, General Agreement, may be seen to embody a principle of fundamental importance - that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures. We believe that the Panel here gave to Article X:2, General Agreement, an interpretation that is appropriately protective of the basic principle there projected.[315]

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[311] *Ibid* at para 112.
[312] *Ibid* at paras 110-11.
[313] See e.g. AB, *US – COOL*, *supra* note 225 at para 267, no 474; *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides (Japan)* (2019), WTO Doc WT/DS495/AB/R at paras 7.390, 7.406 (Panel Report); *European Union and its Member States — Certain Measures Relating to the Energy Sector (Russian Federation)* (2018), WTO Doc WT/DS476/R at 7.845 (Panel Report).
[314] Hilf, *supra* note 69 at 118-119. Regarding the exceptions for developing countries, see e.g. *Marrakesh Agreement*, *supra* note 2, preamble; GATT, *supra* note 4. For the principle of sustainable development, see *Marrakesh Agreement*, *supra* note 2, preamble, TBT Agreement, *supra* note 286 at 2.2 and *General Agreement on Trade-Related Aspects of Intellectual Property*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1869 U.N.T.S. 299 33 I.L.M. 1197 (entered into force 1 January 1995), art 27.2. For the principle of transparency, see e.g. GATT, *supra* note 4, art X, TBT Agreement, *supra* note 286, art 2.5, 2.7, 7.3, 7.5, 10.1; SPS Agreement, *supra* note 287, Annex B.
[315] *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear (Costa Rica)* (1997), WTO Doc WT/DS24/AB/R at 21 (Appellate Body Report).

This paragraph has been cited over and over again in subsequent reports, either by the Appellate Body or the panels, to affirm that the principle of transparency is embodied in Article X(2) of the GATT.[316] The Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* went even further and held that "[t]he function of Article X:2 of ensuring transparency and protecting traders' expectations as to the publication and enforcement of certain measures is relevant to the interpretation of the obligations contained in this provision."[317] This statement demonstrates that the Appellate Body has in fact used this generalized principle in its interpretation functions.

In addition to these principles found in WTO legal texts are principles that are "outside the WTO,"[318]which include principles found in other legal texts, such as the statutes of other international organizations and in other treaties, as well as principles of customary international law and general principles of international law.[319] In fact, the Appellate Body held in *US – Gasoline* that "the General Agreement is not to be read in clinical isolation from public international law."[320] The Appellate Body has also referred to principles that are common to the domestic legal regimes of WTO members, such as the principle that the burden of proof is on the claimant.[321]

Finally, there is one generalized principle that is in a different situation from the others: it is the principle of proportionality.[322] Indeed, although this principle does not appear expressly in the WTO Agreements, unlike the other generalized principles, it underlies the entire regime and the rules contained therein. In other words, the principle of proportionality is embedded in WTO rules,

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[316] See e.g. *United States – Countervailing and Anti-Dumping Measures on Certain Products from China (China)* (2011), WTO Doc WT/DS449/AB/R at para 4.66 (Appellate Body Report) [AB, *US – Anti-Dumping and Countervailing Duties (China)*]; *United States – Countervailing and Anti-Dumping Measures on Certain Products from China (China)* (2011), WTO Doc WT/DS449/R at para 7.234 (Panel Report); *European Communities and its Member States — Tariff Treatment of Certain Information Technology Products (United States)* (2010), WTO Doc WT/DS375/R / WT/DS376/R / WT/DS377/R at para 7.1094 (Panel Report).
[317] AB, *US – Anti-Dumping and Countervailing Duties (China)*, *supra* note 316 at para 4.67.
[318] Hilf, *supra* note 69 at 121. These principles include the rules of interpretation of customary international law. See AB, *US – Shrimp*, *supra* note 156 at para 158, no 157.
[319] *DSU*, *supra* note 13, art 3(2).
[320] AB, *US – Gasoline*, *supra* note 92 at 17. This is consistent with Article 3(2) of the DSU which provides that the Appellate Body must "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."
[321] See Hilf, *supra* note 69 at 124-25; *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India (India)* (1997), WTO Doc WT/DS33/AB/R at 14 (Appellate Body Report).
[322] Hilf, *supra* note 69 at 120-21.

and ensure that measures taken by States are not trade restrictive or limit the negative effect on trade.[323] For example, both the TBT and the SPS Agreements contain rules that reflect the principle of proportionality, such as Article 2.2 of the TBT Agreement, according to which "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective."[324] In fact, the role of the Appellate Body has been to balance the competing rules and interests of the multilateral trading system, in particular State sovereignty and trade liberalization.[325]

C. The Judicial Authority of the Appellate Body

The dialogue established in the precedents of the Appellate Body has been widely recognized by WTO Members as demonstrated by the broad acceptance of the judicial authority of the Appellate Body.[326] This conclusion is founded on a study of the judicial authority of the Appellate Body by Gregory Shaffer, Manfred Elsig and Sergio Puig, based on a two-component framework: "(1) the recognition and acceptance of an obligation to comply with a court's rulings; and (2) some form of meaningful practice giving effect to such rulings, whether involving meaningful steps toward compliance or acceptance of authorized sanctions, a form of contractual remedy."[327]

Building on this two-component framework, Shaffer, Elsig and Puig developed a typology of court's judicial authority that they applied to the Appellate Body. The typology comprises the three following categories: 1) "narrow authority," which relates to the sentiment of bindingness of the parties to the dispute that brings them to give effect to the decision; 2) "intermediate authority,"

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[323] *Ibid* at 120-21 (citing the *Encyclopedia of Public International Law*, Hilf suggested that the principle of proportionality means "the due balancing of competing rights").
[324] TBT Agreement, *supra* note 286, art 2.2. Hilf, *supra* note 69 at 120-21 (Hilf also gave the example of the SPS Agreement, *supra* note 287, art 5.4).
[325] See AB, *US – Shrimp*, *supra* note 156 ("[t]he task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ" at 159).
[326] Gregory Shaffer, Manfred Elsig & Sergio Puig, "The Extensive (but Fragile) Authority of the WTO Appellate Body The Variable Authority of International Courts" (2016) 79:1 Law & Contemp Probs 237 at 238.
[327] *Ibid*. Shaffer, Elsig, Puig's study builds on the following piece: Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, "How Context Shapes the Authority of International Courts" (2016) 79:1 Law & Contemp Probs 1 at 7 [Alter, Helfer & Madsen, *Context and Authority*].

which refers to the fact that other WTO Members modify their practices and new initiatives in light of the case law; and 3) "extensive authority," according to which the Appellate Body's rulings broadly inform policy debates at the domestic and international level.[328] The authors concluded that the judicial authority of the Appellate Body embodies all three types of authority.[329] We, in our turn, discuss the three categories in light of our broader discussion on the role of the Appellate Body and its precedents in the multilateral trading system.

Regarding "narrow authority," the wide use of the Appellate Body by WTO Members is a testament to the recognition and acceptance of the decisions of the Appellate Body. As of 2021, a total of 111 WTO Members had been a party or a third party to a WTO dispute.[330] In light of these numbers, it is doubtful that WTO Members would have engaged in the WTO dispute resolution system if they were not to accept and recognize their obligation to comply with the reports and recommendations once adopted by the DSB.[331] In fact, compliance is high at the WTO: compliance actions and retaliation authorizations are infrequent, which means that disputing parties give effect to the Appellate Body reports and recommendations.[332]

As for "intermediate authority," the Appellate Body has developed a *stare decisis* type of precedent, to which WTO Members adhere through their reliance on the case law and their compliance with the reports and recommendations to which they are not a disputing party. The decisions of the Appellate Body thus have practical implications for WTO Members' interests.[333] In an article published in 2014, Krzysztof J. Pelc raised the question, whether "precedent in international law affect[s] state behaviour?"[334] He concluded that precedents indeed shape the behaviour of the WTO Members since they use the dispute settlement mechanism to "reshape the

[328] Shaffer, Elsig & Puig, *Authority*, *supra* note 326 at 240.
[329] *Ibid* at 244.
[330] WTO, *Dispute Settlement – Some Figures*, *supra* note 12. According to Shaffer, Elsig & Puig, *supra* note 326 at 256, this is the most important use of any international courts.
[331] Shaffer, Elsig & Puig, *supra* note 326 at 257.
[332] *Ibid* ("[i]n virtually all of these cases the WTO Member found to be in violation has indicated its intention to bring itself into compliance and the record indicates that in most cases has already done so" at 256). Compliance actions and retaliation authorizations amount for around 25% and 18% respectively of the Appellate Body decisions as of 2013. See Bruce Wilson, "Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date" (2007) 10:2 J. Int. Econ. Law 397 at 397.
[333] *Ibid* at 257.
[334] *Ibid* at 551.

meaning of the rules in their favor," by strategically filing claims to achieve what he called a "rule gain."[335] Pelc argued that WTO Members engage in seminal cases that are "commercially unimportant and target smaller countries" for further exploitation in future high stakes disputes.[336] To prove his point, he referred to the EU and its two claims on the issue of safeguards against WTO members with which it had marginal trade relations.[337] In these two cases, the EU advanced the argument that safeguard actions should be limited to domestic circumstances that are not "foreseen" or "expected."[338] These arguments were successful in both cases.[339]

Pelc asserted that the Appellate Body reports in both *Korea – Dairy* and *Argentina – Footwear (EC)* have "ha[d] disproportional jurisprudential impact."[340] Indeed, "[e]very single subsequent safeguards case has cited these two rulings" to a point that "there exists a shared, WTO wide understanding that safeguards flout the rules unless the domestic circumstances leading to their use are "unforeseen"."[341] In fact, the EU has been successful in subsequent cases it has filed or participated in regarding safeguards, which then involved significant amount of trade.[342] In fact, the disputes were resolved on the basis of the precedent set through *Korea – Dairy* and *Argentina – Footwear (EC)*.[343]

Regarding "extensive authority," it goes back to our point that the Appellate Body, because of its capacity to create *stare decisis* precedents, has ensured the dialogue among WTO Members. The

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[335] Pelc, *Politics of Precedent*, *supra* note 227 at 547-48.
[336] *Ibid* at 548.
[337] *Ibid* at 553, citing AB, *Korea – Dairy*, *supra* note 200 and AB, *Argentina – Footwear (EC)*, *supra* note 200.
[338] Safeguards are available to Members to avoid their trade obligations in the context of difficult domestic circumstances. Because of the rise of the use of safeguards by WTO Members, the European Union decided to bring the issue of safeguards to dispute settlement. In AB, *Korea – Dairy*, *supra* note 200 and AB, *Argentina – Footwear (EC)*, *supra* note 200, the European Union argued that a Member invoking safeguards should be faced with developments not foreseen or expected (see AB, *Korea – Dairy*, *supra* note 200 at paras 36-44; and AB, *Argentina – Footwear (EC)*, *supra* note 200 at paras 38-44).
[339] Pelc, *Politics of Precedent*, *supra* note 227 at 553 citing AB, *Korea – Dairy*, *supra* note 200 and AB, *Argentina – Footwear (EC)*, *supra* note 200. In both cases, the Appellate Body recognized the requirement of "unforeseen developments" in the exercise of safeguard actions (see AB, *Korea – Dairy*, *supra* note 200 at paras 82, 85, 90, 151(a); and AB, *Argentina – Footwear (EC)*, *supra* note 200 at paras 90, 91, 92, 97, 131, 151(b)).
[340] *Ibid* at 554.
[341] *Ibid* at 554.
[342] *Ibid* at 555, citing *United States — Definitive Safeguard Measures on Imports of Certain Steel Products (European Communities)* (2003), WTO Doc WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R (Appellate Body Report); AB, *US — Line Pipe*, *supra* note 304.
[343] *Ibid*.

dialogue that has lived through the Appellate Body precedents has created an "intersubjective framework of meaning" that has given a sense of community to WTO Members, "about the objectives and values which the trade regime embodies."[344] This is evidenced by the fact that the role played by the Appellate Body has allowed WTO Members to continue to work together towards the common goal of "an integrated, more viable and durable multilateral trading system."[345] In fact, as a consequence of the authority that the Appellate Body has built throughout its existence, it has acted as the institutional mechanism of the multilateral trading system.[346]

Although the role of the Appellate Body has been significant throughout the WTO's existence, notably because of the precedents it has set, "which ha[ve] led to a more legalized and coherent body of jurisprudence,"[347] it is now being challenged by a major disputing Member of the WTO, the US.[348] Before addressing this situation, we address Joost Pauwelyn's argument on minority rules.[349] Pauwelyn's argument that Appellate Body precedents represent the minority rules is a major challenge to our argument that the Appellate Body is the institutional mechanism of the multilateral trading system, but we think it fails for the reasons set out below.

D. A Limit to the Judicial Authority of the Appellate Body?

Pauwelyn has argued that the authority of the Appellate Body reflects the interests of the major disputing WTO Members involved in the disputes before the Appellate Body.[350] As a consequence, he has pointed to the jurisprudence of the Appellate Body as the "minority rules," reflecting his observation that only a few stakeholders truly shape precedents.[351] According to Pauwelyn, the

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[344] Lang, *supra* note 30 at 111.
[345] *Marrakesh Agreement*, *supra* note 2, preamble. It has even been said that "this system has emerged as the most successful achievement of multilateral trading system." See Amrita Bahri, "'Appellate Body Held Hostage': Is Judicial Activism at Fair Trial?" (2019) 53:2 J. World Trade 293 at 311 [Bahri, *AB Hostage*].
[346] Alter, Helfer & Madsen, *Context and Authority*, *supra* note 327 at 3, *passim* spoke about the "de facto legal authority" of international courts.
[347] Shaffer, Elsig & Puig, *supra* note 327 at 306.
[348] Bahri, *AB Hostage*, *supra* note 345 (suggesting that the US blockage of the Appellate Body "could be interpreted as a disguised attempt by the US to paralyse the multilateral trading system" at 299).
[349] See Pauwelyn, *Minority Rules*, *supra* note 129.
[350] *Ibid* at 145, 166.
[351] *Ibid* (Pauwelyn argued that "if a WTO member does not participate as either party or third-party participant in an Appellate Body proceeding, then the Appellate Body case law is developed without weighing that member's input, arguments, or preferences" at 168).

risk of a too-strong rule of precedent is that it becomes the rule of the minority of States that bring disputes to the WTO.[352] Pauwelyn's argument is based on the observation that "[t]he network of cross-references between AB reports is both large and dense (35.4 percent), [while] the network of participants before the AB is small and sparse (0.8 percent)."[353]

While the data introduced by Pauwelyn effectively demonstrates that only a small number of WTO Members were *directly* engaged in disputes before the Appellate Body as of 2013,[354] we respond to Pauwelyn that the *indirect* engagement of the WTO membership as a whole is equally important in elevating the Appellate Body rulings to the status of precedents because of the intersubjective nature of the generalized principles on which the multilateral trading system is based. Indeed, as we demonstrate above, the Appellate Body precedents are based on the generalized principles enshrined in the multilateral trading system to which all WTO Members have adhered when they agreed to be bound by the WTO Agreements.[355]

These generalized principles on which the Appellate Body decisions are based are "inherently intersubjective in nature."[356] Intersubjectivity refers to "a state of affairs existing among the actors that comprise any given regime. What is their understanding of the nature of the regime and of what constitutes unacceptable deviations from it?"[357] The generalized principles reflect the "convergent expectations as the constitutive basis of [the trade] regime[...], [which] gives [the] regime[...] an inescapable intersubjective quality."[358] Through its decisions, the Appellate Body has preserved and furthered these generalized principles, which has allowed for the continued

[352] *Ibid*.
[353] *Ibid*.
[354] *Ibid* at 167-168 (see table 5.6).
[355] Indeed, according to the principle of sovereignty of nations, States freely enter into treaties. This principle is codified in the *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945), art 2(1). When a treaty is in force, it is binding upon the parties and must be performed in good faith pursuant the principle of *pacta sunt servanda*. See VCLT, *supra* note 197, art 26. See also the discussion on the validity of treaties in Jean Salmon, "Observance of Treaties, Art.26 1969 Vienna Convention" in Olivier Corten & Pierre Klein, eds, *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford Commentaries on International Law (Oxford: Oxford Univ. Press, 2011) 659 at 674. Lamp, *Club Approach*, *supra* note 1 ("[t]he central feature of the new regime, which would distinguish it from the GATT framework, would be that any country that wanted to join it had to subscribe to all the agreements concluded in the Uruguay Round" at 166).
[356] Ruggie, *International Regimes*, *supra* note 17 ("[r]egimes, according to the standard definition, are constituted by convergent expectations, shared principles, and norms—that is, they are inherently intersubjective in nature" at 85).
[357] *Ibid* at 85.
[358] *Ibid* ("[i]t follows that we know regimes by their shared understandings of desirable and acceptable forms of social behavior" at 89).

dialogue among Members, so as to ensure the *living nature* of the multilateral trading system and therefore to preserve its existence, even in the context of the failure of the Doha Round. The Appellate Body has enabled dialogue among but beyond the disputing Members by setting precedents that affect all WTO Members, but that is carefully crafted on the generalized principles of the multilateral trading system.[359]

In fact, without this intersubjectivity, the WTO would probably not have functioned as it did for the past 25 years. In other words, since the intersubjectivity is inherent in a multilateral system, the trading system would not have been multilateral absent this "state of affairs."[360]

III. The Demise of the Appellate Body Undermines the Multilateral Trading System

The paralysis of the Appellate Body destabilizes the multilateral trading system. In this section, we demonstrate that this is the result of the US using a strategy of "contested multilateralism" to prevent the Appellate Body from functioning (A). We assert that the impact of the interim solution to revive the dispute settlement system is a return to a trade regime operating under a club approach, rather than a *truly* multilateral rules-based approach (B), the former operating to the detriment of the WTO's functioning as a multilateral organization.

A. The Tensions Created by Multilateralism and the Current WTO Impasse

As of December 2019, the Appellate Body became inoperable as a result of the US blocking the appointment of new judges until there was not enough judges for the judicial organ to function. According to Article 16(4) of the DSU, a disputing party is entitled to appeal a panel report, and that is notwithstanding the existence of a standing appellate organ.[361] Consequently, panel reports

[359] See previous subsection *The Judicial Authority of the Appellate Body*.
[360] Ruggie, *supra* note 17 at 85.
[361] *DSU*, *supra* note 13, art 16(4) reads as follows: "4. [w]ithin 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting (7) unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report" [emphasize added].

may be appealed "into the void" as long as the Appellate Body does not function.[362] Appeals into the void prevent the adoption and compliance with panel reports, thus jeopardizing the functioning of the dispute settlement system. This is the current impasse in which the dispute settlement system finds itself, and the multilateral trading system in its entirety.

The US blockage of new appointments is the result of its use of a veto. In fact, since the appointment of the persons serving on the Appellate Body is made by the DSB,[363] which makes decision by consensus,[364] each Member has a *de facto* veto power. In blocking new appointments with its veto, the US pointed out to its dissatisfaction with the rulings of the Appellate Body.[365] It accused the Appellate Body of judicial activism and of being engaged in rule-making activities by setting binding precedents.[366] In truth, the US expressed its disagreement with the Appellate Body acting as the institutional mechanism of the WTO.

Political scientists would argue that the US has engaged in an exercise of "contested multilateralism," in preventing the regime to function.[367] Contested multilateralism refers to the use by an actor that is party to a multilateral institution of "intra-institutional" pathways to block the functioning of the institution and any attempt to reform it.[368] The exercise of contested multilateralism must be distinguished from complementary initiatives such as preferential trade agreements (PTAs), whereby WTO Members choose to engage in international trade on different platforms.[369] PTAs are not intended to prevent the WTO from functioning; they are intended only to further trade liberalization among interested parties, through more ambitious instruments.[370]

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[362] Joost Pauwelyn, "WTO Dispute Settlement Post 2019: What to Expect?" (2019) 22:3 J. Int. Econ. Law 297 at 303.
[363] *DSU*, *supra* note 13, art 17(2).
[364] *Ibid*, art 2(4).
[365] US, *Statement*, *supra* note 166 at 3-5.
[366] *Ibid*.
[367] Julia C. Morse & Robert O. Keohane, "Contested multilateralism" (2014) 9:4 Rev Int Organ 385 at 389.
[368] *Ibid*.
[369] According to GATT, *supra* note 4, art XXIV(4), called the "enabling clause," WTO Members can enter into arrangements "to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."
[370] Under WTO rules, Members are permitted to enter into preferential trade agreements, but they must abide by the rules set out in WTO Agreements. See GATT, *supra* note 4, art XXIV, ad art XXIV; WTO, *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A (entered into force 1 January 1995); GATS, *supra* note 291, art V; GATT, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, Decision, GATT Doc L/4903; WTO, Transparency Mechanism for Regional Trade Agreement,

Although PTAs are outside the multilateral system, they are used to bring together like-minded countries in a context where such initiatives can hardly be achieved with the entire WTO membership. They do not prevent the WTO from pursuing its objectives; on the contrary, they complement it.[371]

In fact, the US objective seems to be the disruption of the multilateral trading system.[372] This appears to be a reaction to the fact that the Appellate Body has permitted a dialogue among WTO Members on the generalized principles that has ensured their intersubjectivity. The US concern in fact goes back to our observation in Section I of this Part 2 that the WTO has moved from a negotiated decision-making system to a judicial decision-making system. It is in this context that the Appellate Body has emerged as an alternative institutional mechanism to the one originally envisaged, treaty negotiations.[373] In this context, the Appellate Body has had the delicate mandate of balancing competing interests in upholding and furthering the generalized principles. This situation has led to discontent on the part of the US, as its interests have sometimes been found to conflict with the rulings of the Appellate Body.[374] That being said, this situation reflects the necessary compromise of a rules-based multilateral system. In order to find intersubjectivity between the generalized principles, the institutional mechanism necessarily has to find "focal points" between the different interests involved, and not only those of a single actor.

US disaffection with the WTO multilateral system as it has evolved, which has resulted in the paralysis of the Appellate Body, is now hampering the multilateral trading system. This paralysis prevents the WTO from functioning as it was designed to, i.e., through legal means that preserve

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Decision, WTO Doc WT/L/671, General Council held on 14 December 2006, online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/L/671.pdf&Open=True>.

[371] See Gráinne de Búrca, "Contested or competitive multilateralism? A reply to Julia C. Morse and Robert O. Keohane" (2016) 5:3 Glob. Const. 320 (in response to Morse and Keohane, De Búrca responded as follows: "[h]owever, in several of the cases they present, the alternative institution is one that in my view is better characterised as advancing the goals and practices of the first institution, or supplementing and enhancing them, rather than necessarily challenging or undermining them" at 322).

[372] See footnote 348.

[373] Indeed, the *Marrakesh Agreement* provides that to contribute to the objectives of the trading system, the Parties shall enter into "reciprocal and mutually advantageous arrangements." Since virtually no arrangement have been concluded, another means necessarily had to emerge to pursue the objectives of the system. See *Marrakesh Agreement*, *supra* note 2, preamble.

[374] The US interests have notably conflict with the Appellate Body rulings in the cases on zeroing and States owned enterprises. See US, *Statement*, *supra* note 166, *passim*.

and advance generalized principles. As a solution to this situation, a group of WTO Members have decided to establish the MPIA.[375]

B. The Multi-Party Interim Appeal Arbitration: A Return to the Club Approach

On April 2020, a group composed of 20 WTO Members led by the EU submitted to the DSB a document entitled *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU* (MPIA Arrangement).[376] According to this document, the participating Members agreed to submit their future appeals to arbitration,[377] pursuant Article 25 of the DSU.

The MPIA aims to overcome the paralysis of the Appellate Body by providing an alternative means of appealing panel reports.[378] The preamble of the MPIA Arrangement reads as follows, for its relevant parts:

> *Re-affirming* their commitment to a multilateral rules-based trading system,
>
> *Acknowledging* that a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features,
>
> *Determined* to work with the whole WTO Membership to find a lasting improvement to the situation relating to the Appellate Body as a matter of priority, and to launch the selection processes as soon as possible, so that it can resume its functions as envisaged by the DSU,

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[375] In parallel, a large group of WTO Members are pushing proposals to restart the selection process for appointing Appellate Body Members. At a DSB meeting held on March 28, 2022, 123 Members joined their voices to this proposal, which the US continued to oppose. See WTO, "Members continue push to commence Appellate Body appointment process" (last consulted 13 December 2022), online: WTO <https://www.wto.org/english/news_e/news22_e/dsb_28mar22_e.htm> [WTO, *Commence AB Appointment*].

[376] MPIA Arrangement, *supra* note 21. Following the appointment of ten arbitrators, the MPIA became operational, and to this date, one appeal has been submitted to it. See *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands (European Union)* (2022), WTO Doc WT/DS591/8. (Recourse to Article 25 of the DSU) [*Colombia — Frozen Fries*, Recourse to MPIA Article 25].

[377] According to the MPIA Arrangement, *supra* note 21 and DSU, *supra* note 13, art 25, after the publication of a final report, a party can request arbitration. The appeal is heard by an arbitral tribunal composed of three arbitrators chosen from among the ten who have standing. The award must be issued within 90 days of the notice of appeal. The MPIA Arrangement also provides that the appeal shall be limited to the questions of law covered by the panel report and must deal only with issues that have been raised by the parties. Furthermore, the MPIA can only be used by and between the participating Members. In other words, the WTO Members that are signatories to the MPIA.

[378] See MPIA Arrangement, *supra* note 21, preamble.

> *Resolved*, in the interim, to put in place contingency measures based on Article 25 of the DSU in order to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports, and thereby to preserve their rights and obligations under the WTO Agreement,
>
> […][379]

The preamble affirms the importance of the WTO dispute settlement and the desire of the participating Members to resolve the Appellate Body paralysis. Accordingly, the participating Members agreed to find an interim solution to the impasse, and consequently worked together to put in place the MPIA. The MPIA is a testament to the commitment of the participating Members to an important aspect of the WTO, namely that the multilateral trade system should be rules-based.[380] Such a rules-based system needs a functioning dispute resolution system to ensure that the principles on which it is based are properly interpreted and applied.

What is striking about the preamble of the MPIA Arrangement is the third paragraph, which states that the main desire of the participating Members is that the Appellate Body "resume[s] its functions." The participating Members reiterating the importance of the proper functioning of the Appellate Body reinforces our argument that it has authority over WTO Members. The reference to "the whole WTO Membership" demonstrates the desire of the participating Members to find a common solution for the resumption of the Appellate Body to allow for the continuation of rules-based relations on a multilateral basis.

Despite this laudable desire stated in the preamble, the MPIA highlights a profound impasse in the WTO multilateral trading system. Lamp demonstrated that multilateral trade lawmaking used to operate through a club approach, which ceased with the creation of the WTO, notably because of the single undertaking approach.[381] The MPIA demonstrates that the ultimate mechanism for the functioning of the WTO multilateral trading system, the dispute settlement system, if it works again, will involve the emergence of a new club – perhaps not as like-minded as the "Quad" was

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[379] *Ibid*.
[380] *Ibid*.
[381] Lamp, *Club Approach*, *supra* note 1 at 182, no 333 ("the single undertaking resulted in a large number of countries being "deeply involved in decision-making and often making sure that nothing happens in the WTO" at 183-84 referring to its correspondence with Andrew Stoler).

on most trade issues, but enough to create a *judicialized club approach*.[382] The Quadrilateral Group, called the Quad, was a group of countries composed of the US, the EU, Canada and Japan, which negotiated with each other in GATT trade rounds to subsequently extended their agreements to other countries for approval.

To demonstrate that the MPIA reproduces a club dynamic, we draw on the four practices identified by Lamp as governing the club dynamic in multilateral trade negotiations, from the early days of the GATT to the conclusion of the Uruguay Round. These practices are: "who can negotiate," "what can be negotiated," "who needs to agree," and "who gets to be in the room."[383] While the identified practices are specific to the context of multilateral trade negotiations, in the following paragraphs, we demonstrate how these practices, adapted to the context of dispute settlement, attested of the club dynamic, as conceptualized by Lamp, in the MPIA.

Who can appeal.[384] For this first identified practice of the club dynamic, Lamp pointed out to the principle of payment and the principal supplier rule to demonstrate that only those with something to sell and those being principal suppliers had their say in negotiation.[385] In the context of the MPIA, we suggest that this practice refers to the fact that the EU, in initiating the MPIA, targeted large trading economies that are "heavy users" of the dispute settlement mechanism[386] and developing countries that have considered the two-tier dispute settlement system as a major element in their choice to join the WTO.[387] In fact, WTO Members participating in the MPIA Arrangement include major trading countries and frequent users of the system such as China, Mexico and Brazil, and several developing countries with a strong desire for the resumption of a rules-based dispute settlement system, including Colombia, Guatemala, and Costa Rica.[388] Only

[382] See John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) 175-78, 184, 199-204.
[383] *Ibid* at 131-65.
[384] Following Lamp's piece, this corresponds to the practice "who can negotiate." See Lamp, *Club Approach*, *supra* note 1.
[385] *Ibid* at 131.
[386] See footnote 388.
[387] See Elisa Baroncini, "Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: The EU and the Multi-Party Interim Appeal Arbitration Arrangement" (2020) 29:1 Ital.Y.B.Int'l L. 33 at 39.
[388] *Ibid* at 42, citing Bernard M. Hoekman and Petros C. Mavroidis, "To AB or Not to AB? Dispute Settlement in WTO Reform", EUI Working Paper RSCAS 2020/34 1 at 2. The disputes between the participating Members brought to the dispute settlement system between 1995-2019 amount to a quarter of the total cases.

those that are participating Members can appeal to the MPIA. Participating Members must be ready to be a potential party to an arbitration involving them, agree to conduct the arbitration proceedings as provided in the MPIA Arrangement, and accept arbitral awards as final.[389] The participating Members therefore need to "be prepared to play by the rules of the game."[390] In this regard, for having chosen to comply with the rules contained in the MPIA Arrangement, a participating Member must necessarily have had an interest in doing so. This is likely because it has important interests at stake that it must defend. We will come back to this.

What can be appealed (and the conduct of the appeal).[391] Lamp argued that under the club approach, only the "products and trade policy instruments that were of most interest to them [the major trading nations]" were negotiated.[392] Turning back to the MPIA, the participating Members agreed to use the MPIA to appeal "any future dispute between any two or more participating Members […] as well as to any such dispute pending on the date of this communication."[393] To this end, they streamlined the conduct of appeals to fit their needs. In light of the above, it can be said that what participating Members are most interested in is seeing the Appellate Body resumes its function as an institutional mechanism. Indeed, the participating Members include major trading economy and frequent users of the Appellate Body, in addition to WTO Members seeing the Appellate Body has a shield against "the prevalence of the law of force" because the "Appellate Body represented the force of law."[394] Consequently, the participating Members have reproduced many of the features of the rules and procedures of the Appellate Body, while at the same time addressing some of the problems associated with these rules and procedures. [395] To apply Lamp's terms to this context, they "circumscribe[d]" the scope of the rules and procedures of the MPIA to reflect what is of "most interest to them."[396]

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[389] The participation to the MPIA is subject to the endorsement of the MPIA Arrangement, *supra* note 21 at para 12.
[390] Lamp, *Club Approach*, *supra* note 1 at 132.
[391] Following Lamp's piece, this corresponds to the practice "what can be negotiated." See Lamp, *Club Approach*, *supra* note 1.
[392] Lamp, *Club Approach*, *supra* note 1 at 132-33.
[393] MPIA Arrangement, *supra* note 21 at para 9.
[394] Baroncini, *supra* note 387 at 40, citing WTO, Minutes of Meeting, WTO Doc WT/GC/M/181, General Council (held in the Centre William Rappard on 9-10 December 2019) para. 5.193, online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/M181.pdf&Open=True>.
[395] See MPIA Arrangement, *supra* note 21, art 3 (the appeal arbitration procedure is based "on the substantive and procedural aspects of Appellate Review pursuant to Article 17 of the DSU, in order to keep its core features, including independence and impartiality," with some modifications to increase procedural efficiency).
[396] Lamp, *Club Approach*, *supra* note 1 at 132-133.

Who needs to appeal.[397] Lamp argued that the club in the context of trade negotiations operated through what he called the "critical mass approaches to lawmaking."[398] Correspondingly, we argue that the MPIA Arrangement, while binding only on a small number of WTO Members, also encompasses a critical mass approach to dispute settlement. As mentioned, the participating Members include some of the most frequent users of the WTO dispute settlement system.[399] Therefore, given that the MPIA Arrangement provides that the appeal arbitration procedure can only be used for disputes between the participating Members, it is likely that these Members considered it worthwhile to establish an interim appeal, even if it can only be used to resolve disputes between them. That being said, given the importance of the participating Members in terms of their trading weight and their use of the dispute settlement system, they probably also considered that their participation in the MPIA would have the power to influence other Members to eventually move towards a return to the Appellate Body.[400] In addition, participating Members have accepted that third parties with substantial interest make written submission and be heard by arbitral tribunals, which shows that the participating Members encourage other trading partners to participate into the MPIA.[401] This echoes the concept of "critical mass approach," whereby the participating Members "considered that they collectively constituted a critical mass." [402] In the context of the MPIA, this means that the participating Members consider themselves likely to engage in "meaningful" disputes among themselves.[403]

Who gets to be involved.[404] This last identified practice of the club dynamic refers to the broader issue of participation and contribution to negotiations.[405] In the context of the MPIA, one example

[397] Following Lamp's piece, this corresponds to the practice "who needs to agree." See Lamp, *Club Approach*, *supra* note 1.
[398] *Ibid* at 137.
[399] See footnote 386.
[400] And they were not wrong since the MPIA has been joined by several WTO Members since its creation. Moreover, 124 WTO Members are pushing to find a solution to the impasse. See WTO, *Commence AB Appointment*, *supra* note 375.
[401] MPIA Arrangement, *supra* note 21, art 16, annex 1.
[402] Lamp, *Club Approach*, *supra* note 1 at 140, citing Peter Gallagher & Andrew Stoler, "Critical Mass as an Alternative Framework for Multilateral Trade Negotiations" (2009)15:3 Glob. Gov. 375 at 384.
[403] Lamp, *Club Approach*, *supra* note 1 at 140.
[404] Following Lamp's piece, this correspond to the practice "who gets to be in the room." See Lamp, *Club Approach*, *supra* note 1.
[405] *Ibid* at 152-65.

of this practice is that now that the MPIA Arrangement has been concluded, a Member wishing to join must accept all of its terms. This is a return of the single protocol or single undertaking principle, whereby a Member can only join upon acceptance of the entire terms. Another example is the fact that only participating Members can benefit from the MPIA, in addition to having the exclusive power to nominate candidates to the pool of arbitrators, even though non-participating WTO Members may have an interest in the disputes submitted to those arbitrators. Furthermore, for an award to be binding, it does not have to be adopted by the DSB, it is automatically binding upon issuance. The non-participating Members therefore have no say. This latter point is interesting in relation to the doctrine of precedent.

We argued throughout this thesis that as a multilateral judicial body, the Appellate Body has set binding precedents affecting all WTO Members. Conversely, since it is established by a plurilateral agreement, the MPIA cannot claim to have a role similar to that of the Appellate Body. We have based our argument regarding the role of the Appellate Body as an institutional mechanism on the observation that because of the single undertaking principle, the decisions of the Appellate Body, insofar as they have confirmed and allowed for the evolution of the generalized principles, have set precedents affecting all WTO members.

The regulatory and institutional frameworks of the Appellate Body explain why it was able to create such precedents. The MPIA is not subject to the regulatory and institutional framework of the WTO.[406] For example, unlike the Appellate Body, the MPIA, as an interim solution, does not have a permanent vocation. In addition, since it only has jurisdiction over the disputes of a limited subset of WTO Members, the MPIA is not likely to concentrate the decisions into one body of law; it rather risks creating a parallel jurisprudence.[407] Furthermore, the Appellate Body jurisprudence, which has established that its precedents are binding on panels,[408] is not binding on

[406] See subsection *The Appellate Body and the Doctrine of Stare Decisis*. Regarding the regulatory framework, see Divyansh Sharma, "The Move Towards Multi-Party Interim Appeal Arbitration: How Efficacious?" (2022) 88:1 Int'l J. of Arb. Med. & Disp. Man. 117 at 125. Although the MPIA Arrangement does not reproduce DSU, *supra* note 13, art 3(2), nor does it refer to it, the sixth paragraph of MPIA Arrangement, *supra* note 21, preamble "re-affirm[] that consistency and predictability in the interpretation of rights and obligations under covered agreements is of significant value to Members and that arbitration awards cannot add to or diminish the rights and obligations provided in the covered agreements."
[407] *Ibid* at 130.
[408] See subsection *The Jurisprudence of the Appellate Body*.

the MPIA as a parallel appellate tribunal. That being said, it is not clear whether the MPIA will consider itself bound by the precedents of the Appellate Body, since the MPIA Arrangement is silent on the matter.[409] Even if it was to refer to the precedents of the Appellate Body, the MPIA's own decisions would not bind future panels for the following reasons.

The MPIA is a plurilateral arbitral tribunal, established by a plurilateral agreement. Of the 164 WTO members, 20 were part of the initiative to establish the MPIA and a few more are currently signatories to the MPIA Arrangement. This means that not all WTO members have agreed to participate in the MPIA, unlike the Appellate Body. It is precisely its multilateral character that has given the Appellate Body its judicial authority over WTO Members. In fact, all WTO Members were involved in the appointment of the Appellate Body members and all WTO Members were able to have recourse to the Appellate Body and to engage with its decisions.[410] As a result, the Appellate Body has issued rulings that have been widely accepted and recognized by WTO Members, such as to become binding precedents. Indeed, as demonstrate, WTO Members have largely modified their practices to comply with these rulings and have relied on the Appellate Body precedents in subsequent disputes. Being limited in its jurisdiction to a subset of WTO members, the MPIA is not likely to have the judicial authority that the Appellate Body has enjoyed *vis-à-vis* the entire WTO membership. Indeed, the decisions of the MPIA are not likely to have authority over all WTO Members, which neither recognizes nor accepts its jurisdiction over their disputes. In other words, the MPIA does not replace the Appellate Body as an institutional mechanism, which means that the WTO and the multilateral trading system more generally is still devoid of an institutional mechanism to function.

Finally, in addition to the existence of the four practices of the club dynamic in the MPIA, the motivations for the club dynamic, as identified by Lamp, also appear to exist in the MPIA. Indeed, the MPIA Arrangement evidences that (1) a smaller group of WTO Members can more easily reach an agreement, (2) the small number of participating Members gave each of them a greater ability to shape the content of the agreement (which in this case was to reproduce the Appellate

[409] *Colombia — Frozen Fries*, Recourse to MPIA Article 25, *supra* note 376.
[410] In fact, as of 2021, a total of 111 WTO Members had been a party or a third party to a WTO dispute. See WTO, *Dispute Settlement – Some Figures*, *supra* note 12.

Body's rules and procedures), and (3) through the MPIA, the participating Members created the opportunity for "outsiders" to join the MPIA, but on the "insiders'" terms.[411] These motivations demonstrate that WTO Members have an incentive to return to a club approach to get the world trade system back on track.

The MPIA demonstrates that the club approach, as it existed in the context of trade negotiations prior to the creation of the WTO, can be revived and might be the world trade's lifeline. In fact, in addition to the MPIA, there are other plurilateral initiatives at the WTO that reflect the motivations for the club dynamic, such as the Joint Statement Initiatives (JSIs).[412] The JSIs are used by interested Members to address issues of interest among themselves when there is no general interest in the WTO. Following the conclusion of JSIs among interested Members, all other WTO Members are invited to join these initiatives.[413] That said, the club approach would imply significant changes in the institutional form of the system, i.e., the multilateral trading system would no longer be multilateral in nature, but rather would operate on a plurilateral basis.

CONCLUSION

The purpose of this thesis was to lead readers to see how the WTO undertook a judicial turn to maintaining the multilateral nature of the trading system. It was not the aim of this thesis to determine whether this judicialization is (im)proper, nor to analyze whether such an integrated judicialization of the system to ensure its multilateral character was intended by those who negotiated it. But the analysis of the Appellate Body and its precedents has demonstrated the central role it has played in the multilateral trading system. It is therefore appropriate here to recall how this thesis attempts to demonstrate the critical role that the Appellate Body has played in maintaining the multilateral trading system.

Starting with an analysis of the concept of multilateralism, we first determine what it means for a regime to be multilateral, as opposed to plurilateral. We observe that while the two concepts have

[411] Sharma, *supra* note 406 at 129.
[412] See footnote 77.
[413] *Ibid*.

a similar quantitative dimension in terms of the number of parties (3 and more), the distinction between the two concepts lies in their qualitative dimension. In this regard, in a multilateral system, members do not simply share objectives that lead to circumscribed initiatives, as would be the case in a plurilateral context, but rather, they share generalized principles that are highly integrated and that guide their behaviour in an institutionalized context.[414] Constructivists have been particularly interested in multilateralism as an institutional form because of the way in which ideas shared by a number of actors can be translated into a global and structuring institution.

Turning our analysis to the WTO, we study the trading system in light of its multilateral nature and in light of the constructivists' understanding of multilateral institutions. We argue that if the WTO trading system has remained multilateral in nature, it was because of the judicialization of the generalized principles found in WTO Agreements. Specifically, we demonstrate that through its precedent-setting exercise, the Appellate Body has given a *living nature* to the multilateral trading system by ensuring a consistently intersubjective character to the generalized principles. In fact, the Appellate Body has allowed for the continuity of the dialogue among Members, despite the near absence of conclusive multilateral negotiations, by upholding and furthering the generalized principles to which all WTO Members are committed.

In this context, the demise of the Appellate Body not only adds to the trading system multilateral crisis, but also makes the death of the system almost inevitable. Indeed, the paralysis of the institutional mechanism by which the system has operated means that either it will cease to operate on a multilateral basis, or a new mechanism will have to be identified by WTO Members and made operational. The multiplication of plurilateral initiatives, such as the MPIA, shows that the latter option is rather unimaginable. In fact, the MPIA proves that the future of the trade system probably lies in plurilateral initiatives, as many of them already exist and are proving effective.[415]

The analysis of the multilateral trading system and its current impasse leads us to confirm Ruggie's observation that "multilateralism is a highly demanding institutional form," and that multilateral

[414] Ruggie, *Multilateralism*, *supra* note 26 at 574.
[415] See the discussion on the JSIs in footnote 77.

successes are therefore infrequent.[416] In this respect, we conclude that the WTO will have been an outstanding instance of multilateral success for a period in the history of modern world trade.

[416] Ruggie, *Multilateralism*, *supra* note 26 at 572.

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