Doctrine of Precedent in WTO

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This paper contends that the general understanding that precedent system does not apply in the WTO Dispute Settlement Mechanism. The author argues that the drafters or the negotiators always wanted to have a judicial system resembling those that apply in the common law countries with the hope that it would provide certainty and predictability to the system. It was so devised as to be a fundamental departure from the traditional judicial method applicable in public international law. The article discusses the reasons for the assertion that doctrine of precedent applies in the WTO and the implications of it.

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I

Concept of Precedent

The doctrine of precedent based on the system of stare decisis has its genesis in the common law of England which was supposed to be customary law. Actually it was the decision of the courts which made up a body of common law which the proponents of the declaratory theory stated was only found by the judges in the customs of the realm.

From the earliest times the judge’s of the king’s courts have been a small and compact body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole of realm, and establishing thereby a single homogenous system of common law, with little interference either from local custom or from legislation. The centralization and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable in any other system. The authority of precedent was great in England because of the power, the skill, and the professional reputation of the judges who made them.1

Any dispute before a court of law has factual as well as legal aspects. A court applies a law in the facts of the case. This process of application of law to the facts of the case involves interpretation of that law. The decision of the court is binding only on the parties, but the law laid down in that case in the process of interpretation of a given law is binding on all lower courts within the jurisdiction of the higher court deciding the case. Therefore the lower courts are bound to apply the ratio of the case (it is the ratio of the case that constitutes precedent) given by higher court in any case having similar facts.
The doctrine of precedent is said to have a loose as well as a strict meaning; the former used on the continent and in the 19th century England while the latter has been used since the 20th century in England and in many other common law countries. In its loose meaning the phrase means merely that precedents are reported, may be cited, and will probably be followed by the courts. In its strict meaning, the doctrine of precedent means that precedents not only have great authority but must be followed. The doctrine of precedent in Britain has adopted the second form, known as *stare decisis*, the effect of which is that judicial decisions have binding force and enjoy law quality per se.2

Supporters of the precedent system state that it gives coherence and predictability to the system. Opponents point towards the rigidity and unnecessary technicality (in the process of distinguishing) which the system acquires. However, there has never been quarrel about giving weight to the precedent system. The dissatisfaction of the opponents to the system is with its strict meaning. The process of debate has reformed the common law system of precedent and now except the Court of Appeal in England the courts are not considered bound by their own judgment.

Therefore in the present form the doctrine of precedent applies only where there is a hierarchy of courts. It is not possible to have a doctrine of precedent in the absence of hierarchy of courts. Bindingness depends on the hierarchy of courts; higher courts bind lower courts, never vice versa. Two conditions had to be satisfied before *stare decisis* could become established:3 (1) There had to be a settled judicial hierarchy to know whose decision binds whom. (2) There had also to be reliable reports of cases; if cases are to be authoritative as ‘law’, there should be precise records of what they lay down.

The modern doctrine of bindingness came into existence only when the hierarchy of courts got settled. In England it assumed its present shape in the Judicature Acts 1873-1875 which is now modified by the Courts Act 1971. The Judicature Acts reorganized the courts into a unified structure surmounted by the House of Lords as the ultimate appellate court. In the hierarchical structure of English judiciary, at the lowest levels are the courts of first instance, then further up are the Divisional Courts, followed by the Court of
Appeal; at the top of the structure is the ultimate court of appeal, the House of Lords. Cases reach the higher, appellate courts by reason of their being taken there on appeal by the party to the dispute who loses in the court below. The most authoritative decisions are of the higher courts—the Court of Appeal and the House of Lords—and it is these decisions which tend to constitute precedents, although High Court decisions can sometimes be regarded as authoritative. This concept of bindingness reached its culmination in 1898 when the House of Lords decided that it was bound by its own decisions. However, the difficulties of too rigid application of the doctrine led to the admission of exceptions, and finally in 1966 the House of Lords announced that it will no longer be bound by its decisions. The first case in which the House refused to follow a previous decision of itself was Conway vs. Rimmer.4

Let us see how the system operates in India. In India at the lowest rung of the judicial ladder are the district courts. Above them are the High Courts of the states and then the Supreme Court of India. Article 141 of the Indian Constitution states “[t]he law declared by the Supreme Court shall be binding on all courts within the territory of India”. High courts have the power to issue writs and the power of superintendence over all the courts and tribunals within the territories in relation to which it exercises jurisdiction. Precedents of the Supreme Court are binding on all the courts below it. Precedents of the high court are binding on all the district courts unless there is a conflicting judgment of another high court. However, precedent of one high court has only persuasive value for another high court. In addition to the hierarchy of courts, in India there is also an hierarchy of benches. The decision of a five-judge bench of a Supreme Court may bind division benches of the Supreme Court but would only have persuasive value to another bench of the Supreme Court of the same strength or of higher strength.

Thus, it is clear that doctrine of precedent applies only where there is hierarchy of courts and decisions of the higher courts bind the lower courts. Non-application of the doctrine of precedent within a judicial system would mean that each court sits as an independent entity and decides according to its own judgment. But once we introduce a process of appeal, we introduce a precedent system because the appellate court would
always see that the law stated by it in a previous case is followed in a subsequent case. This becomes necessary to maintain predictability and faith in the neutrality of the system.

Another thing that needs to clarified is that a decision whether based on the doctrine of precedent or otherwise is always binding only on parties. It does not automatically bind other parties- individual or states, although they are free to take lessons from it. The doctrine of precedent is the rule laid down for the lower courts that are deciding a similar subsequent case. The lower courts need to follow the ratio laid down by the higher courts that have decided the same issue in a previous case.

II

Doctrine of Precedent in International Law and in WTO

The doctrine of precedent is said to be inapplicable in international law. In the context of discussions in the previous section, can it at all apply? Article 59 of the Statute of the International Court of Justice (ICJ) provides, “the decision of the Court has no binding force except as between the parties and in respect of that particular case”. Article 38(1)(d) of the statute states that judicial decisions are subsidiary means for the determination of rule of law. In one judgment the court said, “The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes”.

The doctrine of precedent could not have been applied in International law in any way prior to the WTO given the structure and jurisdiction of the ICJ. The application of the doctrine of precedent would have meant building a rigid body of decision in a still developing field of international law because there is no hierarchical structure in the ICJ.

The GATT dispute settlement mechanism has been more effective than other dispute settlement mechanism in international law. The dispute settlement mechanism under the GATT/WTO has introduced new concepts which are new to international law.
GATT and now the WTO provides for compulsory jurisdiction. Another major contribution brought in the WTO is introduction of the institution of the Appellate Body. Moreover, the enforcement mechanism of the decisions under the WTO is comparatively more effective than in any other international institution. Introduction of the concept of negative consensus has remedied the lacunae of the GATT system of adoption of report by contracting parties by positive consensus. A major highlight of the dispute settlement understanding of the WTO is that it has introduced consultation, conciliation, arbitration and judicial settlement of disputes under one umbrella. However, it has made a sharp distinction between these various processes of dispute settlement. There are provisions for consultations, good offices, conciliation, mediation, judicial settlement of dispute by the Panel and the Appellate Body and arbitration.

Let us briefly discuss the dispute settlement process under the WTO. An aggrieved Member can ask for consultation with the Member against whom it has a grievance. If the consultations fail to yield any result the aggrieved Member may ask the Dispute Settlement Body to set up a Panel. The dispute settlement body by a negative consensus would decide to set up a Panel. The Panel is constituted after consultation by the parties usually from the list of experts in various areas maintained by the Secretariat. Panel gives its recommendations after considering written and oral submission of the parties. The Panel report has to be adopted by the DSB by negative consensus unless the one of the parties decides to appeal. Unlike the Panel, there is a standing Appellate Body of seven members in the WTO, three of whom at a time hear any particular case. An appeal has to be “limited to issues of law covered in the panel report and legal interpretations developed by the panel”. The Appellate Body submits its conclusions and recommendations to the DSB after considering the written and oral submissions of the parties. The DSB then adopts the report by negative consensus.

It is noteworthy that the Panel and the Appellate Body technically do not decide the case. They give recommendations which the DSB decides to adopt, or not. An unadopted Panel and Appellate Body decision does not have any binding force. Indeed during the GATT era some of the reports remained unadopted because of the process of
positive consensus. To remedy this situation the DSU introduced the concept of negative consensus. But the DSB has the power to adopt or reject the recommendations of the Panel or Appellate Body. The DSU however, does not confer power on the DSB to modify the recommendations.

Members are encouraged to settle disputes by non-judicial process. That is why Article 4:2 states,

Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.

Article 5:5 further provides,

If the parties to the dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

These provisions while on the one hand facilitate mutually satisfactory settlement of dispute, on the other hand they sharply contrast with the process of judicial settlement of disputes by the Panel and the Appellate Body.

The Article 3:2 of the DSU provides:

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.

It was to attain this security and predictability in the multilateral system that the institution of the Appellate Body was introduced by the negotiators in the Uruguay Round. Introduction of the Appellate Body in the WTO for the first time brought a hierarchical judicial structure in the realm of international law. This hierarchical judicial structure paved the way for the application of the doctrine of precedent in the WTO. Now let us see the application of the doctrine so far under the WTO dispute settlement proceedings.
IV

Application of Doctrine of Precedent in WTO

The WTO Agreements are bargained texts. They contain rights and obligations which none of the Members would like to disturb. Therefore the role of the Panel and the Appellate Body are curtailed by the very nature of the WTO Agreement. Let us see what provisions are there in the WTO Agreements in this regard. To begin with Article 3:2 states, “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered Agreements.” The provision on its bare reading asserts the general principle that the decisions of the DSB are binding only on parties to the dispute which happens in any dispute settlement process.

Furthermore, Article 3:9 further provides;

The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

Article 3:9 in a way accepts the fact that the process of decision making itself involves interpretation of the provisions on which the parties claim rights and obligations. In order to apply the law to the facts of the case it is necessary first to know what that law is. This involves interpretation of the provisions containing that law. We do not need a doctrine to emphasise the practical necessity of this law to remain consistent for a period of time. The Panel or the Appellate Body can not often give conflicting interpretations to the same provisions. This would undermine the very rationale for having a legally binding treaty. Therefore it is a practical necessity in order to maintain the system, the system should at least have a semblance of consistency and fairness. This explains why any decision making body does not deviate from its own past decisions without giving reasons. This explains that the doctrine of precedent would always be applicable in the loose sense if there is a judicial system.

But does the doctrine also apply in strict sense also. It does. To understand this we need to take into account the hierarchical structure of the WTO judicial system. Rulings of the Appellate Body are binding on the Panel and the Panel follows them in subsequent
cases having similar facts. This can be illustrated with the help of decision of the Appellate Body in cases involving safeguard measures. In the first two cases involving safeguard measure the issue was whether conditions for the application of safeguard measures provided in Article XIX of the GATT add to the conditions given in the Agreement on Safeguards. The Panel had held that Agreement on Safeguards to that extent modified Article XIX. Therefore condition of existence of unforeseen development given in Article XIX of the GATT but omitted from Agreement on Safeguard no longer would apply in the application of safeguard measures now. However, the Appellate Body disagreed with the Panel and held that all the provisions of the WTO should be so interpreted as to give full meaning to each one of them unless there is an express conflict between them. Therefore according to the Appellate Body existence of unforeseen development was necessary for the application of the safeguard measures. In subsequent cases the Panel has followed this reasoning and has examined whether application of safeguard measures were under unforeseen developments. Was the Panel free to disagree with the Appellate Body reasoning in the subsequent cases. No would argue that it was so. This would undermine the idea of giving security and predictability to the WTO system. Moreover, it would not help also because the aggrieved party would go to the Appellate Body which would modify the Panel report.

Opponents would argue that in Japan-Alcoholic Beverages Case⁸ the Appellate Body had held that decisions of the Contracting Parties adopting the GATT Panel report are not binding under the WTO. According to the Appellate Body they only raise reasonable expectations. But the decision of the Appellate Body in Japan-Alcoholic Beverages case concerned adopted GATT panel report and the issue was whether they were binding as decision of the Contracting Parties. Appellate Body rightly held that they were not decision in the sense of joint action by Contracting Parties under Article XXV of GATT 1947. As to their constituting a precedent they can only raise reasonable expectation. The reasoning of the Appellate Body was again correct because while Panel under the WTO in relation to the GATT Panel would be like a court holding a co-ordinate jurisdiction and Appellate Body would be a higher court which cannot be bound by the decision of the GATT Panel.
As we noted above Article 3:9 accepts the fact that decision making involves the process of interpretation of the provisions on which the decisions are based. Indeed the judiciaries around the world only claim to state the law or to find the law and to apply the law as found. But it is this process of interpretation which at times necessitates judicial creativity and if stretched to the extreme leads to judicial activism. It is this judicial activism which the Members of the WTO did not fully anticipate while drafting the DSU. Possibly they relied on the understanding that precedent system does not apply in the international law. However, it is clear that they did not want an activist judicial system. This is clear from Article IX:2 of the Marrakesh Agreement establishing the WTO;

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by three-fourths majority of the Members.

However, the Appellate Body is now and then accused of judicial activism. Indeed by its process of interpretation in Asbestos case⁹, in Shrimp-Turtle case¹⁰, it is bringing in new set of rights and obligations to which some of the Members of the WTO would object to. In many of these interpretations given by the Appellate Body it can be doubted whether this is what the original drafter intended? We cannot remain under the illusion that this development is not a threat because precedent system does not apply in international law. We have seen that it is as much applicable in WTO dispute settlement proceeding as it is applicable in any common law country.

This process of judicial activism may be detrimental to international trade agreements which are bargained text. While we need security and predictability in the system, we do not want to be party to the obligations to which we had not consented to or
rather had specifically objected to. Not only this sometimes literal interpretations of the Appellate Body raise doubts as to the intention of the drafters.\textsuperscript{11} Then what is the way out of any unacceptable decision of the Appellate Body. There can be three ways:

1. Some countries have provision for intervention by the legislative body which is constituted by the representatives of the people and hence represents the democratic will over the oligarchic. In India the Parliament although cannot directly nullify the decision by amendment but it can bring such an amendment in the concerned law as to change the basis of the decision. However, Amendment of the WTO Agreements is a cumbersome and difficult task.

2. The other alternative is given in Article IX:2 of the Marrakesh Agreement Establishing the WTO. Article IX:2 read with Article 3:9 allows Members to seek authoritative interpretation to the provisions of the WTO Agreement even when the Appellate Body has given a specific interpretation to the provisions of the WTO Agreement. This interpretation would bind the WTO Panel and the Appellate Body in future. One because it is more democratic and secondly, because while Article 3:9 of the Dispute Settlement Understanding (DSU) is without prejudice to Article IX:2 of the WTO Agreement, latter is not without prejudice to the former. This can be inferred by the wordings of the two provisions. Article IX:2 states that this provision is without prejudice to the right of the Members to seek amendment to the WTO Agreements it does not state that it is without prejudice to the power of the dispute settlement body under the DSU. However, Article 3:9 of the DSU expressly states that it is without prejudice to the rights of the Members under Article IX:2 of the WTO Agreement. Therefore even though for practical purposes the constitution of the General Council and the DSB is the same their powers differ. Therefore Members should make a more frequent use of Article IX:2 rather than pleading that precedent system does not apply in international law.

3. Third way is to extend the provision of Article 17.6(ii)\textsuperscript{12} of the Antidumping Agreement to the other Agreements of the WTO. How this would be done needs to be worked out. But writers are advocating this reform for some time now.
This provision would go a long way to check the tendency of judicial activism in the WTO Appellate Body, something that is common to any judicial process. International community is still not ready for a judicial structure resembling national ones. In such a case we need to have a judicial process that gives more power to the Members to interpret the provisions of the Agreement. Their interpretation can always be contested by the other party. But the whole process would probably make the Appellate Body more cautious and sensitive to the concerns and assertions of Members.

VI
Conclusion

The negotiators in the Uruguay Round have established in the WTO a judicial structure somewhat replicating those found in the Common Law countries. While this adds to the certainty and predictability much needed in a trading system it also raises concerns of judicial activism. This is not healthy for a globalizing economy because it raises concerns especially in less developed countries that they are being subjected to obligations which they never bargained for and are being deprived of their rights where they legitimately expected. The WTO is a bargained Agreement. Much needs to be done to keep its sanctity as a bargained text because countries have made only those concessions to their sovereignty to which they had expressly agreed to. Therefore while there needs to be some reform in the Dispute settlement understanding, there is also a need for a more active General Council where Members regularly review the Appellate Body decisions. While it is true that a rule based system is better for developing countries than a bargaining position, developing countries need to ensure that the rules are fair and that they are democratically made.

References:
1. Dias, Jurisprudence (5th ed.) Aditya Books.1994 (Indian reprint)


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1 P.J. Fitzgerald, Salmond On Jusprudence (12th ed.) 141-142.
2 Ibid.
5 This is one of the reasons why many countries prompted by strong pharmaceutical lobby wanted TRIPs to be part of the Uruguay Round negotiating agenda.
6 Article 17:6 of the Understanding on Settlement of Disputes Japan-Taxes on Alcoholic Beverages WT/DS8/AB/R adopted 4 October 1996.
10 Article 17.6(ii) embodies what is known as the national deference principle. The Article states: “the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”