



The Discussion of Binding Precedent of WTO Dispute Resolution System

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Abstract: The WTO dispute resolution system has been gradually incorporating a doctrine of binding precedent. However, whether WTO has officially embraced binding precedent system remains unknown. The WTO has embraced the de facto precedent system. Including a doctrine of precedent provide would increase security and predictability to the multilateral trading system. The article firstly analytically discuss the features of current WTO Jurisprudence; following with the discussion of the necessity and urgency to develop a formal binding precedent system in DSB; thirdly, appropriate methods which should be adopted through the binding precedent system would be discussed.

Keywords: WTO dispute resolution; De facto precedent system; Binding precedent

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Terms and definition list:

1 WTO-World trade organization; 2.DSB--Dispute Settlement Body, 3.DSU- Understanding on rules and procedures governing the settlement of disputes(DSU)

1 Introduction

WTO has existed for nearly twenty-one years and until now, over 500 trade disputes among WTO members have been commenced through DSB^[1]. However, one of the heated issues is whether there is a doctrine of binding precedent existing in DSB

procedures. The answer for this question is remain unclear. In one hand, the WTO admit the practice for Panel and Appellate Body(AB) adopt previous panel or appellate body report as guidance or support for the interpretation of WTO rules in various cases^[2] Dispute settlement of WTO <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 21 April, 2020precedent effects of the Panel/AB reports for further disputes^[3]. This situation shows WTO is struggling to balance the aim to provide 'security and predictability' to multilateral trading system^[4] between the purpose to harmonize distinct adjudication habits of different countries. In fact, there are multiply proofs show that a de facto system of precedent has long been existed in the DSB reports^[5], while without textually admission of precedent system, contradictory judgement happen all the time, which bring unsecure or unpredictable sense of WTO judicatory system for complaints and respondents.

The purpose of paper is to prove that through the formal adoption of the doctrine of binding precedent in the DSB procedures, the security and predictability to the world trade system would be enhanced, as well as other benefits would be acquired.

1.1 Features of DSB procedures

Firstly, the dispute resolution system among WTO members is a process of the combination of negotiation, mediation and litigation^[6]. Disputes between or among WTO members often arisen under the complaint of violation, non-violation or situation of mutual agreement from one or more countries through the process of multilateral trade^[7].

There are four steps usually covered in the dispute settlement process: (1) consultations: a compulsory

and amicable process for complaints and respondents to discuss disputes and reach a possible mutually satisfactory solution^[8]. (2) Panel Proceedings: unsuccessful consultation would lead to the decision of complaint to refer the case to adjudication stages^[9]. The panel stage consists of establishment of a panel, written submission (argument and evidence), panel meetings and result in panel report. The panel process shows similar features as in consultation stage including the fully discretion of panel members and confidentiality of proceedings. Firstly, even though Article 12.1 of DSU regulate Panel to obey the working procedure shown in Appendix 3^[10], the working procedures are merely general requirement, when it comes to specific situations, Article 12.2 of DSU^[11] gives high degree of discretion to panel to deal with specific situation in different cases. Secondly, except the final panel report, the most parts of the panel proceeding remain confidential against public including the hearing and meeting of panel. Furthermore, though in recent years, the DSB allow the public observation under the admission of parties^[12], most parties object the public observation or there is difficulty to reach a unified opinion. The confidentiality and discretion of the WTO jurisprudence would lead to the deep political force influencing the legitimacy of DSB, as Professor Jackson stated the political power of some leading countries might overrule the DSB judgement. In the EU Banana case, the politics wrestle of United States and European Union have deep impact on the final decision. (3) Most cases in WTO have been appealed to Appellate Body (AB). Comparing to the panel stages, even though DSU require the confidentiality of the AB proceeding, Appellate Body allowed public observation for its oral hearing, as in US/Canada- Continued Suspension and US- COOL, which in other way, shows the high degree of discretion of AB body. Since the Working Procedures for Appellate Review and Appendix 3 Working Procedure only regulate basic proceeding rules. Article 17.9 of DSU and Rule 16(1) of the Working Procedure endow the rights for AB bodies to draw up working procedures themselves and adopt appropriate procedure in consistent to specific cases. Therefore, it is natural to see in various cases, AB body creates procedures, as the two cases mentioned, the public broadcast of oral hearing.

Secondly, the source of WTO rules that Dispute Settlement Bodies refer during the procedures of dispute settlement is various, and most of them are

general and ambiguous, needing further interpretation. Generally, in order to be consistent to the complex and changing multilateral trading environment, most WTO rules, originated from international customs, are the multilateral agreements. The principle source of WTO law is the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement. It consists of a basic agreement and multiply agreements in the annex. Even though agreements in annex are made through distinct background, and by different countries, 'Single Undertaking' principle is adopted, which means that all members must adopt all WTO agreements concluded in a round. The principle in other way prove that the WTO laws would only be regulated in a general, basic way to ensure common compliance. For instance, those multiply agreements in annex including General Agreement on Tariffs and Trade 1994 (GATT 1994), which regulates the basic rules for trade in goods consisting of 'most favoured-nation' treatment; national treatment on internal taxation and regulation; antidumping duties and various other rules; the Agreement on Trade-related Aspects of Intellectual Property Rights (trips), in which the fundamental or minimum standards of Intellectual property protection is ruled. Other sources of WTO law remain controversial, as customary international law, Though DSU admit the justified application of customary law, there is lack of explicit regulation of the scope and extent of customary law could DSB and WTO members refer in particular cases therefore those international customs which could be applied in cases would often be some general international customs. As in America- Gasoline case, the good-faith and supplementary interpretation method specified in the article 31-32 of Vienna Convention is adopted by Appellate Body, in order to ensure certainty and clarity in the process of interpretation of the WTO Agreements. The interpretation methods in the Vienna Convention are general procedural international customs. Therefore, we can conclude that WTO laws are mainly a wide-ranging of principle and basic regulation, which require further interpretation and application in the context of specific cases. With the regard to that, one may doubt that how can Dispute Settlement system work well if with the threats of political influence, non-transparency and uncertainty. In fact, though with some drawbacks, a de facto precedent system has long been adopted in the WTO dispute resolving procedures.

2. De facto Existence of Precedent System in

WTO.

2.1 Actual Precedent Systems on Procedural Proceeding

Owing to lack of specific rules concerning the procedural proceeding of the WTO dispute settlement, the panels and appellate body develop a line of cases, serving as a predictable mode to solve future cases. It is necessary here to clarify exactly what is meant by procedural law. The procedural law, is mainly a conception comes from continental legal system[[[]], meaning the rules by which a court/ decision body hears and determine what happens in a legal proceedings. In common law countries, the conception could be defined as due process or fundamental justice. Generally, the procedural issues in a legal proceeding consist of right to initiate legal proceedings, the time framing of steps, role of the legal parts, the allocation of burden of proof and standard of review. Turning now to WTO Dispute, this section would focus on the burden of proof and Amicus Curiae Briefs, which are the major procedural issues and could sufficiently prove the existence of actual precedent system in WTO.

Firstly, in terms of burden of proof, there is no regulations either in DSU or in the Working Procedure. Appellate body develop criterions of proof allocations through two decisions: The first case is the US- Shirts and Blouses, in which AB decides the complaint party take the primary role of burden of proof and the sufficiency of the evidence would lead to the shift of burden of proof to other party. The criterion is frequent-cited by the following cases as the guidance for the allocation of the burden of proof. The second case is EC-Hormones, through which, AB added the threshold of 'prima facie' before the movement of proofing. From the previous discussions, it can be seen that when considering the burden of proof issues, the WTO adopt a common law's precedent system that construct precedent for allocation of burden of proofs in various cases.

Secondly, the acceptance and consideration of the effect of amicus curiae briefs is another evidence showing the existence of De Facto Stare Decisis on the conduct of DSB proceedings. The amicus curiae briefs or 'friend of the court' is the procedure to include individuals, companies, organization into the dispute settlement system in order to provide assist for decision body. While in WTO laws, those 'friend of the court' do not have rights to be heard in the proceeding, only

in the article 13 of DSU entitles the rights of panel and appellant body to 'seek information from relevant sources'. AB constructed practice of incorporation of Amicus Curiae Brief in the US-Shrimp case,.AB considered that under the nature of article 13 of DSU, if the amicus curiae brief is weighted as the high degree of the relevancy and acceptability to the particular case, the panel would accept as evidence. Since the decision, the panel/AB members begin to accept and consider amicus curiae in subsequent cases.

Overall, the actual precedent system adopted in procedural part of WTO Dispute resolving procedures.

2.2 Actual Precedent Systems on Substantive Proceedings

WTO admits in its website the guidance effect of the panel and AB report on the subsequent cases when considering similar facts and legal problems however at the same time deny the existence of stare decisis simply under the excuse that there is no such practice in other area of international law. However, there is an inconsistency in reality with this statement, for a long time, reports of WTO panels and the Appellate Body are the major source of interpretation of WTO laws in subsequent cases but just within the dubious attitude of WTO, leading to equivocal conditions.

Firstly, some people might argue that a Panel/ AB Report's function does not include interpreting provisions of WTO agreements and the Reports are not binding over later Panel/AB Report, merely Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of this Agreement and the Multilateral Trade Agreement. However, there is an inconsistency with this argument when relating to reality. According to the WTO related survey, up until 2007, AB Reports are cited 687 times and Panel Reports are cited 263 times, which means that almost every WTO cases have cited former reports in their final decisions. Furthermore, two leading WTO cases analysed here would prove the existence of actual precedent system on the substantive issues of particular cases: they are United States - Reformulated Gas and US-Shrimp. In United State-Reformulated Gas, the compliant parts are Brazil and Venezuela, who alleged the 'Clear Act' of respondent United States set out different baseline treatment on domestic and imported gasoline. Discontented with the panel decision that 'Clear Act' and gasoline standard is unjustifiable discrimination violating the chapeau to Article XX., US appealed the case, the AB constructed a two-step test as

matrix to examine whether the environmental measure taking by USA violated, including the examination of fitness of sub-paragraphs of Article XX and following with the examination fitness of requirements of the chapeau of Article XX. The two-step test is made as reference to various cases of environmental issues in subsequent cases, for example, reducing risks to human health posed by asbestos in EC Asbestos case[[]], health arising from the accumulation of waste tyres. Furthermore, in US – Shrimp case, a detailed statement of appellate body provide further support for adoption of Panel/AB Report as precedent. In the case, the appellate body upheld the panel decision when the complaint Malaysia argued that panel erred in using former appellate report in United States - Reformulated Gas as a way to reasoning finding, while the Appellant Body affirmed the panel’s using of AB report as reasoning tool.

Secondly, the practice of panel/Appellate Body to make interpretation or even clarification of WTO rules is another proof for the actual precedent system. This shows a need to be explicit about exactly what is meant by the system of precedent system. In common sense, a precedent is” a decided case that furnishes a basis for determining subsequent cases involving similar facts or issues’. When relating to contemporary common law system, the system comprises of the right of court to construct precedent including interpretation of laws, regulation referring to particular cases. Therefore, interpretation or clarification of rules by decision body are an important symbol of precedent system. Though some people challenge the ability of AB/Panel to make rules considering the WTO regulation that only through the formal consent of most Member States, would single provision be further interpreted since the most WTO rules are general and ambiguous so the interpretation need to be generally admitted by all WTO members. WTO admit that through the guidance of article 11 of DSU, in order to bring predictability for judicial systems, if a previous report’s interpretation of a WTO rule is persuasive, then future decisions will likely follow it. There are various cases show the applicability of the AB/Panel interpretation. For example, the two examination tests of Article XX in United States - Reformulated Gas, as mentioned before. One of the leading case could serve as evidence is the Tuna–Dolphin case, through which, the compliant Mexico and some other countries set up complaint against certain legal instruments of the United States that establishing

the conditions for the use of a “dolphin-safe” label on importing tuna products under the “Dolphin Protection Consumer Information Act” or the “DPCIA”. The major dispute is weather the changeability of safeguards agreement has modified obligations. The appellant body constructed interpretation of Agreement on the International Dolphin Conservation Program (“AIDCP”) is a “relevant international standard” within the meaning of Article 2.4 of the TBT Agreement that the WTO agreement is a single undertaking and full application would be given to all parts of the WTO treaty. This case also raises questions about ‘constructing new precedent’ which will be discussed in the next section.

As discussed above, WTO adjudication system adopt substantive common law practice.

2.3 Weakness of Current System

Having discussed the existence of de facto precedent system in the DSB in the procedural and substantive aspects, it is now necessary to analyse that comparing to formal legal doctrine of stare decisis, the weakness of de facto precedent system in WTO jurisprudence should be recognized in this part in order to set forth the establishment of formal precedent system. This part will focus on the two aspects of drawbacks which are currently existent in the WTO legal system: the ambiguity and inefficiency problems.

Firstly, the ambiguity problems are mainly shown on the procedural part of WTO adjudication. As mentioned in the above paragraph, the appellant body construct the standard of burden of proof through certain cases. While as Grando pointed out in his works that panels and appellant body could not produce a consistent line of cases to use as predication model for subsequent cases due to the lack of formal precedent system. The explanation of traditional common law practice on the allocation of proof would serve as example to show the contrast against current insufficiency of WTO system. Burden of proof in common law system comprises of two aspects: (1) burden of production, (2) burden of persuasion. The burden of production means that the party bearing the burden, usually the claimant, in the outset of case, should take the obligation to bring the evidence to support all the disputed laws and facts in the case; the burden of persuasion refers to the obligation of a party to introduce evidence that persuades the factfinder, to a requisite degree of belief, that a particular proposition of fact is true. The risk the claimant might take after the evaluation of the evidence

from both side, the situation might remain equipoise. Furthermore the standard of the proof is closely consistent with particular cases, under the judgement of adjudication man, and usually the standard of proof in civil case would be preponderance of the evidence. Comparing to the common law system, the WTO seems to make confusing situations on the allocation of burden of proof. Appellant body allocates the burden of proof on claimant and state that if the evidence is sufficient, the burden of proof shifts. However, what exact the evidence is, evidence of major disputes or part of laws interpretation? What is the standard of sufficiency? Even though, appellant body introduce the conception of 'prima facie', while the truth is in contrast to the common standard of preponderance of the evidence, the 'prima facie' is a common law "weak sense" would mean the situation in favour of the claimant is permissible, not mandatory, and the threshold of proof is lower in 'prima facie', only requiring minimum standard. So the simply 'prima facie' standard could not truly allocate the burden of proof equally. A formal precedent system is needed to construct a complex evidence system.

Secondly, WTO de facto precedent system is shown in the disobedience or disregard of earlier reports by the panels in subsequent cases, which lead to inefficient judgement. This situation is event in the case of US-Stainless Steel: Mexico, as compliant, stated that the anti-dumping decision including the overall margin of dumping methodology by the US on the imports of stainless steel sheet and strip in coils from Mexico is against Anti-Dumping Agreement and other WTO rules. WTO has developed the simple zeroing dumping methodology to calculate the dumping margin through several cases, while in the panel stage, the panel disregarded the former practice and made different interpretation of anti-dumping judgement methodology. The case was appealed. AB stated that the disregard of former reports would have serious impact on the proper function of WTO judgement and reversed the panel reports. This case has shown that without a former legal regulations on the precedent system, far more measures would WTO decision bodies take to remain their De Facto case law, which is time-consuming. Furthermore, this case, as well as Tuna–Dolphin Ilcase (mentioned before), raises the issue often discussed in the common law system that which level of the adjudication man would have rights to create new precedent, reversing former cases. This issue would be discussed in next

section.

Therefore, the normal operation of the WTO procedural process would be damaged due to the uncertainty of evidence system and dubious binding or not binding precedent system impact the dispute settlement process.

3 A De Jure Doctrine of Stare Decisis System

3.1 Necessity of establishment of formal precedent system in WTO

Over the past decades of operation of DSB, the necessity of a formal precedent system is shown through the benefits it would bring for firstly, increase the transparency of dispute settlement procedures, secondly, bring predictability for subsequent cases and lastly the efficiency of the DSB procedures would be advanced.

Firstly, as far as concerned in the above section, the two main features of the dispute settlement are confidentiality and high degree of discretion, which might cause corruption and the serious impact of political influence on the judgement of case. Through the construction of case law mechanism, when the Panel/AB members decide the case, they should review, regard or obey the former case decision, which would restrict the excessive discretion of complaint parties and panel/AB members. Furthermore, the confidentiality of cases would be lowered, since in order to be served as precedent, more details of cases should be disclosed. The idea that the 'good faith' and 'due process' regulation in the DSU would serve as sufficient restrictions for panel/ AB members and parties for unfair acts should be challenged by the fact that the general and ambiguous concept 'good faith' and 'due process' is needing further interpretation in cases. For example, in US-offset Act, the appellate body brought the interpretation of intentioned violation of substantive WTO rules as against 'good faith'; in the Thailand-Cigarettes (2011), the appellate body gave the interpretation of the 'due process' obligation of panel/ AB members to afford sufficient chance for consulting parties and conduct the proceeding in orderly and corrected manner. In this way, the importance of case law system is obvious.

Secondly, the nature of WTO dispute settlement decides its needing for precedent system. As Bagwell and Staiger mentioned in their works, the major purpose of the WTO is to solve disputes and ensure the operation of multilateral trading system. Article

3.2 of the DSU further regulate that the nature of the WTO dispute settlement system is to provide 'security and predictability to the multilateral trading system'. Multilateral trade is the most complex and distinctive trade system, which embody thousands of categories of international laws and different legal system. A formal precedent system would help providing predictable results for disputes and furtherly, afford suggestions in future trade. Some might argue that the difference between civil law system and common law system would serve as an impediment for the construction of precedent system in WTO. In fact, precedent system would serve as a tool to harmonization of different legal system. As Professor Bankowski pointed out, as same as European Union(EU), the Court of Justice harmonize the EU legal system through their decision on the cases, which serve as precedent for both common law and civil law countries. The same condition is suitable for WTO, as there are multiply distinct judicial systems in EU, the precedent system in WTO would serve as coherence tool for different judicial system to find settlements.

Thirdly, overall efficiency would be increased. As described in the previous page, the former panel/AB report would serve as guidance for subsequent cases, which help solve disputes faster. For instance, the decisions in the U.S. Gasoline, EC Banana, and EC Hormone cases have been cited in more than sixty Panel and AB Reports. Therefore, a formal precedent system would help increase the dispute settlement speeds. As far as concerned, there is necessity to build up formal precedent system.

3.2 Construction of Binding Precedent

When it comes to WTO legal system, due to its two – level (panel-AB) adjudication, a practical approach that the Appellate Body have the rights in combination of the functions of higher courts and Supreme Court, while the panel would act the role as lower court, bound by previous cases. This suggestion would be justified through two cases: Tuna–Dolphin II case and US–Stainless Steel. In Tuna–Dolphin II case, under article XIX(1)(a) of GATT 1994, based on the Appellate Body's report of Brazil–Desiccated Coconut and the logical arguments, the panel rightly decided that if the language of the later agreement differed from the earlier agreement, the latter would to that extent be considered

amended by the former. However, when the case came to AB stage, the appellate body reverse the former decision that, distinguishing from the former Brazil case by making interpretation of 'single undertaking' doctrine and their application in all the cases. It could be concluded from the case that, endowing the rights to create precedent and reverse former decision would benefit the function of WTO juris system to be adaptable to changing environment. Nevertheless, the disrespect of previous report in the panel stage of US–Stainless Steel case, is a negative example to show the lower level of decision body disrespect the former cases. Which would have bad impact on the setting up of a series of precedent cases.

4 Conclusion

As conclusion, it is clear to see that the actual existence of precedent system in the current WTO jurisprudence due to the high degree of confidentiality and discretion of panel/AB stages. At the same time, the several weaknesses of De facto precedent system, including the inefficiency and constriction problems, demand for the establishment of formal precedent system.

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