

DICTION ON DICTA:

OBITER DICTA IN WTO DISPUTES

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Abstract:

This paper discusses an important legal issue raised by the United States in its recent attempt to block the reappointment of an Appellate Body member. According to the US, in some of his decisions, the member has made overreaching findings that amount to obiter dicta. As obiter dictum is a unique concept in the Common Law system, the US argument may only stand if the concept may be found in the WTO legal system as well. With a careful analysis of the concept of dicta in Common Law and a close examination of the effects of past panel and Appellate Body decisions in WTO dispute settlement, the paper rejects the US argument by refuting each of the three premises of the US argument, i.e., the WTO legal system based on Common Law; WTO follows stare decisis; and the WTO has rules against dicta. In addition to original contributions on the nature of the WTO dispute settlement system in theory, the article also provides some practical advice on how the controversy may be resolved.

Watch your thoughts, for they become words.

Watch your words, for they become actions.

Watch your actions, for they become habits.

Watch your habits, for they become your character.

And watch your character, for it becomes your destiny.

What we think, we become.

- as per Margaret Thatcher in the movie “*The Iron Lady*”

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The establishment of the Appellate Body in the World Trade Organisation (“WTO”) is widely regarded as “[o]ne of the most important innovations of the WTO dispute settlement system”¹ that is “almost revolutionary”.² It is innovative in two ways. First is the addition of an appellate phase, which is “rather creative, given that such a stage is not commonplace in State-to-State dispute settlement mechanisms”.³ The second innovation is that it is a standing body, unlike the *ad hoc* dispute settlement panels under the General Agreement on Tariffs and Trade (“GATT”) and even the WTO. As noted by Lacarte, this is “one of the most marked departures from previous GATT practice”.⁴

As a new institution, however, the Appellate Body could not benefit from the respect accorded to long-established institutions, and must instead “earn” its reputation by “everything that the Appellate Body said and did”.⁵ While it has “earned” its reputation “quickly in a short span of time”⁶, it is not free of controversy. As the result, the Appellate Body has been subject to many criticisms over the years. Some of these are minor technical issues such as the tone of the Appellate Body in its reports “that was widely perceived as excessively critical, if not derisive, of panel reports”.⁷ Others are more controversial issues such as opening the hearing to the public⁸ and the acceptance of amicus curiae briefs.⁹ However, nothing in the history of the Appellate Body has been more serious than the current re-appointment debate, which has been widely regarded as “legitimacy crisis” in the WTO.¹⁰

¹ V. Hughes, ‘The WTO Dispute Settlement System: A Success Story’, in Julio Lacarte and Jaime Granados (eds), *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches*, London: Cameron May (2004), at 121.

² J. Lacarte-Muró, ‘Launching the Appellate Body’, in G. Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Cambridge: Cambridge University Press (2017), at 477.

³ Hughes, *supra* note 1, at 121.

⁴ J. Lacarte and F. Pierola, ‘Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?’, in Lacarte and Granados (eds), *supra* note 1, at 47.

⁵ D. Steger, ‘The founding of the Appellate Body’, in G. Marceau (ed), *supra* note 2, at 451.

⁶ A. Ganesan, ‘The Appellate Body in its formative years Body’, in G. Marceau (ed), *supra* note 2, at 544.

⁷ W. Davey, ‘The first years of WTO dispute settlement Body’, in G. Marceau (ed), *supra* note 2, at 371.

⁸ J. Bacchus, ‘Let the Sunshine in: One View of Dispute Settlement Understanding Review’ in Lacarte and Granados (eds), *supra* note 1, at 141-150.

⁹ Hughes, *supra* note 1, at 117-121. See also the discussion of these issues by D. Unterhalter, ‘The authority of an Institution: the Appellate Body under Review’, in G. Marceau (ed), *supra* note 2, at 471.

¹⁰ See e.g., G. Shaffer, ‘Will the US Undermine the World Trade Organization?’, in *Huffington Post*, available at https://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html (last visited 21 October 2017). A. Sarvarian & F. Fontanelli, ‘The USA and Re-Appointment at the WTO: A ‘Legitimacy Crisis’?’, in *European Journal of International Law: Talk!*, 27 May 2016, available at <https://www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/> (last visited 21 October 2017).

Most of the discussions so far have only focused on whether the US has the right to block Appellate Body re-appointments, or if Appellate Body members may be chastised for their statements in Appellate Body reports. This article approaches the debate over the US blockage from a fresh perspective by arguing that the US allegation of *obiter dicta* is invalid as there is no basis for such claim in the WTO. Through these discussions, the paper provides important insights into the nature of the WTO dispute settlement system, the effects of panel and Appellate Body reports, and their respective functions in WTO dispute settlement.

1. The Appellate Body Reappointment Saga

On 11 May 2016, the United States (“the US”) shocked the world by announcing that they will block the reappointment of Appellate Body member Prof. Seung Wha Chang. In a joint statement issued by Deputy US Trade Representative (“USTR”) Michael Punke and USTR General Counsel Tim Reif, the US declared that

*“The United States is strongly opposed to Appellate Body members deviating from their appropriate role by restricting the rights or expanding the obligations of WTO members under the WTO agreements... The United States will not support any individual with a record of restricting trade agreement rights or expanding trade agreement obligations.”*¹¹

At the DSB meeting held on May 23, the US further clarified their position by stating that “we do not consider that his service reflects the role assigned to the Appellate Body by WTO Members in the WTO agreements”.¹² In particular, the US referred to four reports in which Prof. Chang allegedly “add[ed] to or diminish[ed] the rights and obligations provided in the covered agreements.”¹³ In three of the four reports, the US accused Prof. Chang of addressing issues

¹¹ J. Caporal, ‘Debate Erupts over US Blocking Korean Appellate Body Reappointment’, in *Inside U.S. Trade*, 13 May 2016.

¹² Mission of the United States, Geneva, Switzerland, *Statement by the United States at the Meeting of the WTO Dispute Settlement Body*, Geneva, May 23, 2016, at 11, available at https://geneva.usmission.gov/wp-content/uploads/2016/05/May23.DSB_.pdf (last visited 21 October 2017).

¹³ *Ibid.*, at 12-13. These four reports are Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016; Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015; Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R,

which were moot (*Argentina – Financial Services*), not appealed (*India – Agricultural Products*), or not raised by parties (*US – Countervailing Measures (China)*).¹⁴ According to the US, these amounted to *obiter dicta* as they are not related to “issues necessary to resolve the dispute”.¹⁵ As to the fourth report (*US – Countervailing and Anti-Dumping Measures (China)*), the US claimed that the Appellate Body has adopted “a very problematic and erroneous approach to reviewing a Member’s domestic law” by “substitut[ing] the judgment of WTO adjudicators for that of a Member’s domestic legal system as to what is lawful under that Member’s domestic law”.¹⁶

The US blockage led to widespread criticisms from the WTO membership.¹⁷ Prof. Chang’s home country South Korea, in particular, claimed that the US opposition “would seriously undermine the independence and integrity of the Appellate Body”¹⁸ and reportedly declared its opposition to the reappointment of any Appellate Body members.¹⁹ At the DSB meetings where the issue was discussed, the US position received no support from other WTO Members, which called the US blockage “extraordinary, exceptional”²⁰ and “unprecedented”.²¹ At the dedicated DSB session on the issue on 26 October, Korea, supported by Brazil, India, and Mexico, tried to solve the problem by tabling a non-paper that proposed to limit future appointments to the Appellate Body to a single term.²² As not all Members supported the proposal, however, it was not adopted.²³

adopted 16 January 2015; and Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027.

¹⁴ *Ibid.*, at 13-15.

¹⁵ *Ibid.*, at 15.

¹⁶ *Ibid.*

¹⁷ See World Trade Organisation, *WTO members debate appointment/reappointment of Appellate Body members*, 23 May 2016, available at https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm (last visited 21 October 2017). See also K. Raja, ‘Isolated US, still vetoes Chang reappointment to AB’, in *South North Development Monitor*, #8246, 24 May 2016, available at <http://www.twn.my/title2/twe/2016/616-617/8.htm> (last visited 21 October 2017) and Inside US Trade, *U.S. Slammed at DSB for Blocking Korean Appellate Body Reappointment*, 27 May 2016.

¹⁸ K. Raja, ‘US stands alone in vetoing reappointment of Chang to AB’, in *South North Development Monitor*, #8247, 25 May 2016, available at <http://www.twn.my/title2/wto.info/2016/ti160520.htm> (last visited 21 October 2017).

¹⁹ Sarvarian & Fontanelli, *supra* note 10.

²⁰ B. Baschuk, ‘U.S. Blocks Korean Judge From WTO Appellate Body’, in *International Trade Daily*, 24 May 2016, available at <https://www.bna.com/us-blocks-korean-n57982072872/> (last visited 21 October 2017).

²¹ S. Donnan, ‘US accused of undermining WTO’, in *Financial Times*, 30 May 2016, available at <https://www.ft.com/content/1b89a3b4-261d-11e6-8ba3-cdd781d02d89?mhq5j=e5> (last visited 21 October 2017).

²² K. Raja, ‘DSB holds second dedicated session on AB reappointment process’, in *South North Development Monitor*, #8343, 28 October 2016; WTO Dispute Settlement Body, *Minutes OF Meeting held in the Centre William*

There were also strong reactions from both current and former Appellate Body members. On May 18, 2016, the six remaining Appellate Body members sent a letter to DSB Chairman Ambassador Xavier Carim. In the letter, they stressed that the Appellate Body reports are reports of the Appellate Body as a whole and “no case is the result of a decision by one Appellate Body Member, nor should interpretations or outcomes be attributed to a single Member”.²⁴ Moreover, they argued that “the tying of an Appellate Body Member’s reappointment to interpretations in specific cases” could undermine the trust of WTO Members “in the independence and impartiality of Appellate Body Members”.²⁵

On May 31, 2016, the 13 living former Appellate Body members also wrote another open letter to Carim, in which they warned that the US action would not only undermine the “impartiality and independence of the ... Appellate Body”, but “put the very future of the entire WTO trading system at risk”.²⁶ In particular, they pointed out that the US approach is flawed, as “[a] decision on the reappointment of a Member of the Appellate Body should not be made on the basis of the decisions in which that Member has participated as a part of the divisions in particular appeals... Nor should either appointment or reappointment to the Appellate Body be determined on the basis of doctrinal preference”.²⁷

They proposed two solutions instead. First, to the extent that “WTO Members ever conclude that the Appellate Body has erred when clarifying a WTO obligation in WTO dispute settlement”, they should try to adopt a legal interpretation according to Article IX:2 of the Marrakesh Agreement.²⁸ Second, the Members can also abolish the current system of one four-

Rappard on 26 October 2016, WT/DSB/M/387, 5 December 2016. See also Jack Caporal, DSB Kicks Off Discussions of Appellate Body Reappointment Process, in *Inside U.S. Trade*, 30 Sep 2016.

²³ Raja, *supra* note 22.

²⁴ Thomas R. Graham, Ujal Singh Bhatia, Ricardo Ramírez-Hernández, Shree Baboo Chekitan Servansing, Peter Van den Bossche, Yuejiao Zhang, *Letter to H.E. Mr Xavier Carim, Chair, Dispute Settlement Body, World Trade Organization*, Geneva, 18 May 2016, at 1.

²⁵ *Ibid.*

²⁶ Georges Abi-Saab, James Bacchus, Luiz Olavo Baptista, Lilia R. Bautista, Claus-Dieter Ehlermann, AV Ganesan, Jennifer Hillman, Merit E. Janow, Mitsuo Matsushita, Shotaro Oshima, Giorgio Sacerdoti, Yasuhei Taniguchi, David Unterhalter, letter to Ambassador Xavier Carim of South Africa, Chairman, Dispute Settlement Body, World Trade Organization, Geneva, Switzerland, 31 May 2016, at 2.

²⁷ *Ibid.*

²⁸ *Ibid.*

year term with the possibility of a second four-year term and replace it with “a single, longer term for all Members of the Appellate Body”.²⁹

The reappointment saga also generated considerable interest in academic circles, with most scholars condemning the US action and expressing their support to Prof. Chang.³⁰ Most of the discussions so far revolved around the following issues: whether it is appropriate to attribute the views in an Appellate Body report to one division member only; whether a WTO Member has the right to block the reappointment of an Appellate Body member; should the decision to reappoint an Appellate Body member be influenced by his position on certain WTO law issues or preference for certain judicial style? There are sharply divided views on all of these issues, with the US government saying yes to all, while other WTO Members, former and current Appellate Body members, and the academia mostly saying no.

Curiously, however, one key issue seems to be ignored in the debate. Everyone, no matter where he/she stands in this debate, seems to accept the US accusations that Prof. Chang’s views in these decisions amount to *obiter dicta*, or at least it is possible to have *obiter dicta* in WTO panel and Appellate Body reports. As I will demonstrate in this article, the entire theory of *obiter dictum* in WTO dispute settlement reports is flawed as none of its three underlying premises are valid. Thus, in the end, the whole US theory of the possibility of an Appellate Body member violating its role by giving *obiter dicta* in Appellate Body reports is but a *dictum on dicta*.

²⁹ *Ibid.*, at 3.

³⁰ See Shaffer, *supra* note 10; M. Elsig, M. Pollack and G. Shaffer, ‘The U.S. is causing a major controversy in the World Trade Organization. Here’s what’s happening’, in *Washington Post: Monkey Cage*, June 6, 2016, available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/?utm_term=.3917ba85d3cf (last visited 21 October 2017); G. Sacerdoti, *et al*, ‘The WTO in 2016: Systemic Developments at the WTO and at the Dispute Settlement System and Review of the Appellate Body’s Reports’, *Bocconi Legal Studies Research Paper*, March 1, 2017. Available at SSRN: <https://ssrn.com/abstract=2940107> (last visited 21 October 2017); K. Daugirdas and J. D. Mortenson, Contemporary Practice of the United States Relating to International Law: United States Blocks Reappointment of WTO Appellate Body Member, 110 *American Journal of International Law* 3 (2016), at 573-579; Sarvarian & Fontanelli, *supra* note 10. See also the following comments on the International Economic Law and Policy Blog, including S. Charnovitz, *The Obama Administration’s Attack on Appellate Body Independence Shows The Need for Reforms*, 22 September 2016, available at <http://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html>; S. Lester, *The U.S. Justification for its Appellate Body Reappointment Actions*, 27 May 2016, available at <http://worldtradelaw.typepad.com/ielpblog/2016/05/the-us-justification-for-its-appellate-body-actions.html>; H. Gao, *Why Prof. Chang?*, 27 May 2016, <http://worldtradelaw.typepad.com/ielpblog/2016/05/why-prof-chang.html>; H. Gao, *Why Prof. Chang II: A Few More Pieces of the Puzzle*, 27 May 2016, available at <http://worldtradelaw.typepad.com/ielpblog/2016/05/why-prof-chang-ii-a-few-more-pieces-of-the-puzzle.html> (last visited 21 October 2017).

2. The Concept of *Obiter Dictum*

To understand the US position, we first need to understand what is “*dictum* (plural *dicta*)”. Traditionally, 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.”³¹ Over the years, alternative definitions have been suggested. These include, for example, “a legal conclusion stated in the opinion but not applicable to the particular facts of the case”, or “overgeneralization in light of the particular facts [of the case]”.³² However, neither of these two variations add anything new. If a legal conclusion is divorced from the facts of the case, then it is not necessary to the decision of the case. Similarly, overgeneralizations would also not be necessary for the decision. Thus, both of them can be submerged into the traditional definition.

A. Categories of *Dicta*

Depending on the manner that the statement in question is pronounced, *dictum* can be divided into several categories such as *obiter dictum*, *judicial dictum*, *gratis dictum*, *dictum proprium*, and *simplex dictum*.³³ Many of the distinctions are now obsolete, and the most widely recognized distinctions are between the first two.³⁴ The key here is whether the statement in question is fully argued by the parties and deliberated upon by the court. Thus, if a point is neither argued by the parties nor fully deliberated by the court, it is regarded as *obiter dictum*.³⁵ In contrast, *judicial dicta* “are the product of a more comprehensive discussion of legal issues, and usually involve points briefed and argued by the parties”,³⁶ but they are “not essential to the decision”.³⁷ As *judicial dicta* is a more thoughtful opinion than *obiter dicta*, it is often accorded more persuasive authority, but it is still non-binding.³⁸ Nowadays, however, even this distinction

³¹ H. C. Black, *Handbook on the Law of Judicial Precedents, or, The Science of Case Law* (1912) at 166.

³² ‘*Dictum Revisited*’, 4 *Stanford Law Review* (1952) at 509.

³³ *Black’s Law Dictionary*, entry on *Dictum*.

³⁴ See e.g., *Dictum Revisited*, *supra* note 32, at 513; M. McAllister, ‘*Dicta Redefined*’, 47 *Willamette Law Review* (2011), at 167.

³⁵ McAllister, *ibid.*, at 167.

³⁶ *Ibid.*

³⁷ *Black’s Law Dictionary*, entry on *Dictum*.

³⁸ McAllister, *supra* note 34, at 168.

is losing its significance, as many courts in major Common Law jurisdictions such as the US no longer follow the traditional distinction.³⁹

B. The Effects of *Dicta*

The traditional view is that, unlike the holding or the ratio decidendi of the court, a *dictum* is not binding.⁴⁰ As explained by Black, because *dicta* “are not the judicial determinations of the court, they are never entitled to the force and effect of precedents, in the same or other courts, and do not preclude the rendering of a subsequent contrary decision”.⁴¹ However, this does not mean that a *dictum* has no effect at all. As observed by Black, *dicta* “though not precedents, may possess considerable value as persuasive arguments”.⁴² Thus, lower courts in particular shall treat a *dictum* “with respectful consideration, not only because it proceeds from the appellate court, but also as furnishing a suggestion of the decision which that court might be expected to make if the point should come fairly before it for determination”.⁴³ In particular, “long repetition of a dictum... may clothe it with the weight of a precedent”.⁴⁴ This is especially the case for the *dicta* of the Supreme Court, which has been regarded by lower courts as “very persuasive” and followed “slavishly”.⁴⁵

As we can see from the discussions above, while in theory a *dictum* is supposed to have no effect upon the development of the jurisprudence, the ultimate fate of a *dictum* depends upon the treatment, or the “attitudes” of subsequent courts.⁴⁶ In many cases, various *dicta* have been picked up by later courts and elevated to “a position hardly distinguishable from that of a direct adjudication”.⁴⁷ Thus, some scholars have cast doubts on the utility of the formalistic categorization between holdings and *dicta*.⁴⁸ Instead, they suggested that the effect of *dicta*

³⁹ Scofield, Robert G. Scofield, The Distinction Between Judicial Dicta and Obiter Dicta, 25 Los Angeles Lawyer, 17 (Oct. 2002), at 33, as cited in McAllister, *ibid*.

⁴⁰ Black, *supra* note 31, at 176.

⁴¹ *Ibid*.

⁴² *Ibid*, at p. 179.

⁴³ *Ibid*.

⁴⁴ ‘*Dictum Revisited*’, *supra* note 32, at 513.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*., at p. 515.

⁴⁷ Black, *supra* note 31, at 179.

⁴⁸ McAllister, *supra* note 34, at 162.

should be approached with a more pragmatic method. The best attempt is the functional approach by McAllister, which divides *dicta* into three categories: vibrant *dicta*, where “the otherwise non-binding judicial pronouncement promptly flowers into law...either by the court that issues the *dicta*, or by the accumulation of rulings from other courts”;⁴⁹ “dead *dicta*”, *i.e.*, *dicta* that die either “through the issuing court’s explicit pronouncements” or “implicitly through a series of unfavourable rulings”;⁵⁰ and “divergent *dicta*”, which, as its name suggests, receives divergent treatments from subsequent courts due to their disagreements over its persuasiveness and effect.⁵¹

C. Why the Concept?

The concept of *dicta*, along with the distinction with holdings, is unique and “essential”⁵² to the Common Law system. According to the doctrine of *stare decisis*⁵³ or precedents, later courts are supposed to follow the holdings by earlier courts.⁵⁴ Without the concept of *dicta*, everything stated by the earlier courts would be binding on the later courts. This might not be a problem if the court always restricts itself to what is absolutely necessary for the resolution of the case at hand, but this is rarely the case. Instead, as has been observed by Llewellyn and Aldisert, judges tend to “over-state” their case “in the heat of the argument” and “overwrite opinions”,⁵⁵ with the result that “discussion outran the decision”.⁵⁶ Or worse still, judges may deliberately “plant” *dicta* to steer the development of the law and “preempt colleagues who might later decide a further issue in a manner not to our liking”.⁵⁷ These concerns make it necessary to draw the distinction.

⁴⁹ *Ibid.*, at 163.

⁵⁰ *Ibid.*, at 164.

⁵¹ *Ibid.*, at 164-165.

⁵² Posner, *supra* note 64, at 192-193.

⁵³ According to Black’s Law Dictionary, *stare decisis* means “to stand by things decided”. However, there has been considerable confusion in determining what “things” have in fact been “decided”. See *e.g.*, A. N. Steinman, ‘To Say What the Law Is: Rules, Results, and the Dangers of Inferential *Stare decisis*’, 99 *Virginia Law Review* (2013);, at 1810; M. Abramowicz & M. Stearns, ‘Defining *Dicta*’, 57 *Stanford Law Review* (2005), at 1094.

⁵⁴ McAllister, *supra* note 34, at 161; ‘*Dictum Revisited*’, *supra* note 32, at 513; K. Greenawalt, ‘Reflections on Holding and Dictum’, 39 *Journal of Legal Education* (1989), at 431.

⁵⁵ K. N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1996), at 43-44.

⁵⁶ Aldisert *et al.*, *Opinion Writing and Opinion Leaders*, 31 *Cardozo Law Review* (2009) 1, at 19.

⁵⁷ McAllister, *supra* note 34, at 177.

How to draw the distinction then? There are two possible approaches. The first approach is looking at the substantive merits of the respective statements. The most trustworthy statements are those made by the courts when “they are aware of the relevant facts, and the possible competing legal positions have been argued at length by lawyers”.⁵⁸ In contrast, the courts’ “passing comments on peripherally related legal subjects” are much less reliable as they “are expressions of opinions ... which may not have been argued at the bar or duly brought to the attention of the court, or that they do not embody the mature and deliberate opinion of the judges”.⁵⁹ While this approach provides a satisfactory solution to most cases, it would not be able to distinguish judicial *dictum* from holding as the former also benefits from arguments in court and the full consideration of the court. This is why we need a second approach that also takes into account the *raison d’être* for the judicial law-making power. The core function of the court is to resolve disputes, thus the law-making power is only a by-product of such function. Therefore, “the authority of a particular court should extend only to what is needed to resolve the dispute”, lest the court, as the “occasional legislators”,⁶⁰ usurp the legislative function of the “fulltime” legislature, which is the legislative branch proper.⁶¹ This means that the law-making power only extends to those statements necessary to resolve the dispute at hand, but not the unnecessary sound-bites.

3. *Obiter Dictum* in WTO Law?

As discussed above, *dictum* is a concept unique to Common Law. Thus, the argument that the concept also exists in WTO law presumes that the WTO law system is modelled after the Common Law system. Or, short of that, that there is a system of precedents in WTO law. Or alternatively, that the WTO has rules against *dictum*. However, as I will elaborate below, none of these three assumptions is valid.

A. WTO Follows Common Law

⁵⁸ Greenawalt, *supra* note 54, at 434.

⁵⁹ McAllister, *supra* note 34, at 172.

⁶⁰ R. Posner, *How Judges Think* (2008), at 81.

⁶¹ Greenawalt, *supra* note 54, at 434.

As I have demonstrated in the last part, the concept of *dicta* is used to distinguish the unnecessary parts of a decision from the key holding, or the *ratio decidendi* of the case. *Ratio*, in turn, forms the main body of precedents, or judge-made law, which is the hallmark of the Common Law system.

In contrast, neither judicial precedent or judicial law-making is recognized under the Civil Law system. In France, for examples, “[t]he central conviction... is that judges cannot be lawmakers”,⁶² Instead, “[l]aw-making ... was entirely reserved for the legislature.”⁶³ As pointed out by many comparative law scholars, such aversion to judicial law-making is a legacy of the French revolution, which viewed the judiciary as an enemy due to their excessive power under the *ancien regime* and sought to reign in the courts with the monopoly of legislative power by the legislature.⁶⁴ Such deep distrust of the judiciary even leads to explicit codifications of the prohibition on judicial law-making. The most well-known examples are “[t]he courts may not directly or indirectly take any part in the exercise of the legislative power” under Article 10 of the Code de l'organisation judiciaire (Code of Judicial Organization)⁶⁵ and “[i]t is forbidden for judges to make pronouncements by means of general and regulatory provisions on the cases submitted to them” under Articles 5 of the Code Civil.⁶⁶ While there have been references to the jurisprudence or the *jurisprudence constante* of the Cour de cassation (Court of Cassation), the fact remains that “the Cour de cassation’s jurisprudence is not officially binding on the lower Courts” and “French lower courts are always free to depart from the Cour de cassation’s jurisprudence”.⁶⁷ Indeed, as noted by de S.-O.-I’E. Lasser, the French Cour de cassation is rather annoyed with the lower court’s reference to its “so-called jurisprudence”, and jurisprudence of the Cour can not be cited by lower courts as the legal basis for overturning a decision.⁶⁸

⁶² J. P. Dawson, *Oracles of the Law* (1968) at 415.

⁶³ *Ibid.*, at 392.

⁶⁴ Dawson, *supra* note 62, at 263; J. H. Merryman, *The Civil Law Tradition* (1969), at 37; R. J. Cummins, ‘The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France’, 35 *International & Comparative Law Quarterly* (1986) at 599; M. de S.-O.-I’E. Lasser, ‘Judicial (Self-Portraits: Judicial Discourse in the French Legal System’, 104 *Yale Law Journal* (1995), at 1330.

⁶⁵ *Code de l'organisation Judiciaire*, tit. II, art. 10. Aug. 16-24. 1790, as cited in Lasser, *ibid.*, at 1335.

⁶⁶ *Ibid.*

⁶⁷ J. Komárek, ‘Judicial Lawmaking and Precedent in Supreme Courts’, *LSE Legal Studies Working Paper No. 4/2011*, at 21-27. Available at SSRN: <https://ssrn.com/abstract=1793219>.

⁶⁸ Lasser, *supra* note 64, at 1338-1339.

Similarly, in Germany, there has been a long tradition of following Justinian's maxim “*non exemplis sed legibus iudicandum est*” (decisions should be based on legislations, not on precedents).⁶⁹ While there has been increasing reference to court decisions after the Second World War,⁷⁰ there is still “no more inclination than before to urge a strict theory of precedent on German courts”.⁷¹ Indeed, attempts to make the decisions of the Constitutional Court binding were explicitly rejected by the Great Senate for Civil Matters, which noted that making the decisions of the court binding on all organs of the government “would be to elevate a court into a supreme law-making body not chosen by the people, to eliminate the safeguarding formalities essential to law-making in a Rechtsstaat, to destroy the separation of governmental powers and the federal system, and to borrow from the Anglo-Saxon legal world conceptions of judicial power that are alien to Germany.”⁷²

As I will demonstrate in the next two sub-sections, the WTO rules do not recognize either a binding precedent system or judicial law-making power. This clearly rules out the possibility that the WTO is based on the Common Law model.⁷³ Instead, if one has to choose one between the two systems, the Civil Law system has a much stronger claim for influencing the WTO legal system. There are three reasons for this:

⁶⁹ Dawson, *supra* note 62, at 440. See also C. Allen, *Law in the Making 172-73* (1966), as cited in W. T. Tete, *Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 *Tulane Law Review* 1, 24 (1973-1974), at footnote 30.

⁷⁰ Dawson, *supra* note 62, at 432-502.

⁷¹ *Ibid.*, at 499.

⁷² 13 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 265, 279-282, as cited in Dawson, *supra* note 62, at 491.

⁷³ This article uses “Common Law” in its traditional sense, *i.e.*, as a domestic legal system. This should not be confused with the emerging usage of Common Law in the context of international law, with two major schools of thoughts. The first, “International Common Law” as coined by Bhala, Guzman and Meyer, refers to the case law built on the decisions of international tribunals. In my view, as such “common laws” are not binding, they are better referred to as the “common jurisprudence” of international courts. See R. Bhala, ‘The Precedent Setters: *De Facto Stare decisis* in WTO Adjudication (Part Two of a Trilogy)’, 9 *Journal of Transnational Law and Policy* 1 (1999); A. T. Guzman & T. L. Meyer, ‘International Common Law: The Soft Law of International Tribunals’, 9 *Chicago Journal of International Law* 2 (2009), at 515-536. The second is the “Common Law of International Trade” as suggested by Weiler and Cottier, which refers to the common traits and overall coherence between the WTO and other regional and bilateral agreements. As they focus on the common rules of different trade agreements, I think they are better named as “common rules”. See J. H.H. Weiler, *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (2000); Thomas Cottier, ‘The Common Law of International Trade and the Future of the World Trade Organization’, 18 *Journal of International Economic Law* 1 (2015), at 3-20.

First, the main source of law in Common Law is judicial decisions or judge-made law, while legislations reign supreme in Civil Law countries.⁷⁴ Similarly, the paramount role of formal legislations in the WTO has been repeated *ad nauseam*. In the WTO parlance, these legislations are known as “covered agreements”, *i.e.*, agreements listed in Appendix 1 of the Dispute Settlement Understanding (“DSU”).⁷⁵ In the DSU, the phrase “covered agreement”, in either singular or plural forms, appeared 72 times in the main text and 7 times in the Appendixes and footnotes. The key provision is Art. 3.2, which emphasizes that the purpose of the dispute settlement system is “to preserve the rights and obligations of Members under the covered agreements”. It also warns that the DSB “cannot add to or diminish the rights and obligations provided in the covered agreements” in its recommendations and rulings, which is repeated verbatim in Art. 19.1. Similarly, according to Arts. 7.1 and 11, the function of the panel is confined to examine the consistency of the challenged trade measure with the relevant provisions in the “covered agreements”. Such slavish reliance on legislations can only be found in the Civil Law system.

Second, as the legislature monopolizes the law-making power in Civil Law countries, the role of the judiciary is reduced to that of a technical⁷⁶ or even grammatical⁷⁷ interpreter within rigid parameters.⁷⁸ This approach is grounded in the idea that the Codes provide a complete and perfect set of legal text that can encompass “all cases that life could possibly offer”⁷⁹ and judges are “merely applying pre-existing rules – the rules laid down in the code”.⁸⁰ Again, such an approach is adopted by the WTO legal system, which does not recognize any source of law other than the sacred “covered agreements”. The role of a WTO panel, according to Art. 11.1 of the DSU, is to make “an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”. The wordings suggest that all that a WTO panel need to do is to mechanically apply the covered agreements and then determine the

⁷⁴ See J. Dainow, ‘The Civil Law and the Common Law: Some Points of Comparison’, 15 *American Journal of Comparative Law* (1967), at 423-424. See also G. Sacerdoti, ‘Precedent in the Settlement of International Economic Disputes: The WTO and Investment Arbitration Models’, *Bocconi Legal Studies Research Paper No. 1931560* (2011). Available at SSRN: <https://ssrn.com/abstract=1931560>, at 4.

⁷⁵ See Art. 1.1 and Appendix 1 of the DSU.

⁷⁶ Dainow, *supra* note 74, at 421.

⁷⁷ Lasser, *supra* note 64, at 1327.

⁷⁸ Sacerdoti, *supra* note 74, at 4.

⁷⁹ C. de la V. Benayas, ‘Judicial Method of Interpretation of Codes’, 42 *Louisiana Law Review* (1982), at 1645.

⁸⁰ Posner, *supra* note 60, at 144.

conformity of the challenged measure accordingly. Indeed, it could even be argued that, strictly speaking, WTO panel and Appellate Body do not even have the power to “interpret” the covered agreements. Instead, according to Art. 3.2 of the DSU, they only have the power to “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”. On the other hand, one could argue that such approach is naive and unworkable and may even point to the reference to “legal interpretations developed by the panel” under Art. 17.6 as an implicit acquiescence of the interpretive power of the panel. But any faith one might place on such implicit interpretive power must be severely shattered in the face of the explicit warning under Art. 3.9 that “[t]he provisions of [the DSU] 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”. In other words, here the WTO legal system is again taking the traditional Civil Law approach. One could even say that it is much stricter than that of most modern Civil Law countries, and only falls an inch short of the explicit ban on the interpretive power of judges by the Roman emperor Iustinianus in his *Codex*.⁸¹

Third, another key difference between Common and Civil law systems is whether the judicial decisions are made on a collective or individual basis. In Civil Law jurisdictions, “judicial decision is rendered by the entire court as a unit” with judges remain “anonymous”.⁸² Individual opinions such as “[d]issenting and concurring opinions are forbidden”⁸³ or at least discouraged.⁸⁴ In contrast, a defining feature of Common Law courts decisions is the “personalisation” of views⁸⁵, with each judge given the freedom to expound on his own point of view.⁸⁶ Indeed, it could even be said that a Common Law judgment is “the sum of the decisions of the individual judges”.⁸⁷ Again, between the two, the WTO legal system bears more resemblance to the Civil Law approach for the following reasons:

⁸¹ Sacerdoti, *supra* note 74, at footnote 11.

⁸² Dainow, *supra* note 74, at 432, D. Terris, C. P.R. Romano, and L. Swigart, ‘International Judges and International Law’, in D. Terris, C. P.R. Romano, and L. Swigart (eds), *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007), at 123.

⁸³ Lasser, *supra* note 64, at 1342.

⁸⁴ Sacerdoti, *supra* note 74, at 4.

⁸⁵ *Ibid.*, 4

⁸⁶ Dainow, *supra* note 74, at 432.

⁸⁷ Terris *et al* (eds), *supra* note 82, at 123.

1. Under the DSU, strictly speaking, it is not the panel or the Appellate Body which decides individual disputes. Their role is limited to making recommendations to the DSB,⁸⁸ which is the WTO Membership acting on a collective basis.⁸⁹ As argued by Debra Steger, “[t]he Appellate Body only has jurisdiction for a particular appeal once a notice of appeal has been submitted to the DSB, and that jurisdiction is lost once its report has been circulated and adopted by the DSB. It does not have any continuing jurisdiction outside of these periods during particular appeals. There is no true separation of powers in the WTO. The DSB (a political body) governs the dispute settlement system: it decides to establish panels, adopt panel and Appellate Body reports (which have no legal status until they are ‘blessed’ by the DSB) and authorize suspension of concessions”.⁹⁰ In other words, “[i]t is the DSB that makes decisions, and the role of the Appellate Body is to advise the DSB on what to do”.⁹¹ Thus, “their status is clearly subsidiary to that of the Dispute Settlement Body”.⁹² Such approach could not be further from the individualist approach in the Common Law system.
2. In the DSU, reference to the panel or Appellate Body decision in a given case always refer to “the report”, implying that it is the decision by the panel or Appellate Body as a whole rather than the sum of individual opinions. The Working Procedure of the Appellate Body made this explicit, by stating that the Appellate Body shall “make every effort to take their decisions by consensus”⁹³ as the appellate process is a collegial process that is designed to “ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members”.⁹⁴ One may argue that this is not the case, as Art. 17.1 of the DSU states that only three out of seven Appellate Body members shall “serve on any one case” as a Division. However, one should not mistake this to mean that the other four Members play no

⁸⁸ See e.g., Art. 11 of the DSU, which states that “[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements.”

⁸⁹ WTO Agreement, Art. IV. 2 & 3.

⁹⁰ Steger, *supra* note 5, at 448.

⁹¹ M. Matsushita, ‘Reflections on the Functioning of the Appellate Body’, in G. Marceau (ed), *supra* note 2, at 548.

⁹² L. Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’, 53 *International and Comparative Law Quarterly* (2004) 4, at 864.

⁹³ WTO Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/6, 16 August 2010, Rule 3(2).

⁹⁴ *Ibid.*, at Rule 4(1).

role as there is the practice of “Exchange of Views”,⁹⁵ whereby “the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members”.⁹⁶ To ensure even members who are not part of a Division would make meaningful contributions, the Working Procedures also explicitly state that “each Member shall receive all documents filed in an appeal”. As explained by former Appellate Body Secretariat Director Valerie Hughes and former Appellate Body Chairman Claus-Dieter Ehlerman, such exchange of views is not merely rubberstamping the decision of the Division but has been “of enormous benefit to the work of the Appellate Body” by allowing Divisions “to draw on the individual and collective expertise of all members”.⁹⁷ This is confirmed by the first Appellate Body Secretariat Director Debra Steger, who noted that “[i]n one particular early appeal, the exchange of views took five days, including two days during which the Appellate Body members listened with tremendous respect to a member who was not part of the division for that particular case as he tried several different ways to convince the division of his point of view”.⁹⁸

3. Under the DSU, there is no explicit prohibition of dissenting or individual opinions like in the European Court of Justice.⁹⁹ The only implicit reference to dissent can be found in Rule 3(2) of the Working Procedure, which states that the Appellate Body shall “make every effort to take their decisions by consensus”¹⁰⁰. While there have been calls to allow dissenting opinions by some scholars,¹⁰¹ they remain extremely rare in both Panel and Appellate Body reports.¹⁰² In practice, as the DSB always adopts the panel or Appellate Body report as a whole, the Common Law approach of allowing individual and sometimes conflicting opinions could create difficulties for

⁹⁵ Hughes, *supra* note 1, at 127-128.

⁹⁶ Working Procedures, *supra* note 93, at Rule 4(3).

⁹⁷ Hughes, *supra* note 1, at 127-128; C.D. 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’, 36 *Journal of World Trade* (2002) 4, at 612-613.

⁹⁸ Steger, *supra* note 5, at 453.

⁹⁹ Terris *et al* (eds), *supra* note 82, at, 123.

¹⁰⁰ Working Procedures, *supra* note 93, Rule 3(2).

¹⁰¹ Matsushita, *supra* note 91, at 556-557. See also M. K. Lewis, ‘The Lack of Dissent in WTO Dispute Settlement’, 9 *Journal of International Economic Law* (2006) 4, at 895-931.

¹⁰² This does not mean that there are no disagreements among Appellate Body members, but the Appellate Body worked very hard to reach consensus. See *e.g.*, Lacarte-Muró, *supra* note 2, at 478-479.

WTO Members. If a report with dissent is adopted, does it mean that the dissenting opinion is accepted by the WTO Membership as well? Thus, it seems safer to follow the Civil Law tradition of not allowing dissents, or at least not encouraging them.

Steger provided some hint into the origin of the Appellate Body's aversion of dissent when she noted that one of the reasons for the lack of dissents is because "some of [the Appellate Body members] emphasises that in their legal systems dissents were not common". Apparently, these members must be from Civil Law countries.

4. The fourth hint for the Civil Law influence can be found under Arts. 14.3 and 17.11, which mandates that opinions expressed in the panel or Appellate Body report by individual panellists or Appellate Body members "shall be anonymous". Instead, the reports are issued by the "faceless foreign judges"¹⁰³ and nobody is supposed to know who authored particular parts of the decision. This again is a hallmark feature of the Civil Law system.

B. WTO Follows *Stare decisis*

As I have demonstrated above, the view that the WTO follows the Common Law model is a fallacy. However, is it possible that the WTO, while not adopting the Common Law system on a wholesale basis, still follows the rule of *stare decisis* or binding precedents? Again, the answer has to be no.

At the outset, we should recall, as John Jackson has pointed out, "the international legal system does not embrace the common law jurisprudence ... which calls for courts to operate under a stricter 'precedent' or '*stare decisis*' rule".¹⁰⁴ Thus, it is no surprise that most international tribunals do not follow the rule of *stare decisis*.¹⁰⁵ Some courts explicitly reject the

¹⁰³ J. Bacchus, 'Table Talk: Around the Table of the Appellate Body of the World Trade Organization', 35 *Vanderbilt Journal of Transnational Law* (2002) 4, at 1021-1040.

¹⁰⁴ J. Jackson, 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects', in A. Krueger (ed), *The WTO as an International Organization* (1998), at 178.

¹⁰⁵ For example, in his comprehensive review on the treatment of precedents by international adjudicators, former ICJ President Gilbert Guillaume notes that, while international courts "construct an entire jurisprudence based on their own precedent", they all "distance themselves in principle from the rule of *stare decisis*". Similarly, while "[t]he arbitration tribunals are ... inclined to rely on precedent ... with rather excessive zeal", "*stare decisis* rule is no more applied in ICSID than it is in other international jurisdictional instances." See G. Guillaume, '*The Use of Precedent by International Judges and Arbitrators*', 2 *Journal of International Dispute Settlement*, (2011) 1, at 7-16.

idea. For example, the Statute of the International Court of Justice made it very clear that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”¹⁰⁶ While other tribunals do not have such explicit language in their constituting documents, they usually do not recognize the binding authority of previous decisions.¹⁰⁷ There has been some suggestions that the International Criminal Court is different in this regard, as Art. 21.2 of the Rome Statute states that “[t]he court may apply principles and rules of law as interpreted in its previous decisions.”¹⁰⁸ In my view, however, this is far from acceptance of the doctrine of *stare decisis*, as it merely uses the permissive language “may”, which still falls far short of granting binding force to precedents.

Similarly, the concept of precedent is also far from uncontroversial in the multilateral trading system. During the GATT era, the Contracting Parties took differing views on the issue. The European Economic Community (“EEC”), for example, argued that Panel findings shall be “limited to the specific measures under examination” and should not have precedential effect.¹⁰⁹ The US, on the other hand, argued that “when the Council adopted a report, those interpretations became GATT law”.¹¹⁰ Moreover, even GATT panels themselves have not recognized the precedential effect of previous panel reports. For example, in the 1989 case of *EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile*, the Panel refused to follow the 1980 Panel report on *EEC - Restrictions on Imports of Apples from Chile*¹¹¹, even though it involves “the same product and the same parties as the present matter and a similar set of GATT issues”.¹¹²

See also J. Pauwelyn, ‘Minority rules: Precedent and participation before the WTO Appellate Body’, in J. Jemielniak, L. Nielsen, & H. Olsen (eds), *Establishing Judicial Authority in International Economic Law* (2016), at footnote 1, which notes that “[t]he only international tribunal to date that was set up with a binding rule of precedent (*stare decisis*) is the Caribbean Court of Justice”.

¹⁰⁶ Statute of the International Court of Justice, Art. 59, available at <http://www.icj-cij.org/en/statute> (last visited 21 October 2017).

¹⁰⁷ Sacerdoti, *supra* note 74, at 7-10.

¹⁰⁸ Rome Statute of the International Criminal Court, available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (last visited 21 October 2017).

¹⁰⁹ A. T. L. Chua, ‘Precedent and Principles of WTO Panel Jurisprudence’, 16 *Berkeley Journal of International Law* (1998), at 177.

¹¹⁰ *Ibid.*

¹¹¹ GATT Panel Report, *EEC Restrictions on Imports of Apples from Chile*, L/5047, adopted 10 November 1980, BISD 27S/98.

¹¹² *GATT Panel Report, European Economic Community – Restrictions on Imports of Apples – Complaint by the United States*, L/6513, adopted 22 June 1989, BISD 36S/135, at para. 12.1. See also Chua, *supra* note 108, at 178.

When the WTO came into being, the Ministerial Conference and the General Council was bestowed exclusive authority to adopt interpretations of the covered agreements.¹¹³ With such explicit grant of the interpretive power, it is not unreasonable to infer that such authorities cannot be exercised by other institutions.¹¹⁴ This in turn means that, in principle, the legal interpretations adopted by the Panel and Appellate Body do not have precedential power. Notwithstanding this, many commentators have argued that *stare decisis* does exist¹¹⁵ and WTO Appellate Body reports do have “precedential value”.¹¹⁶ In the paragraphs that follows, I will investigate the validity of this claim with a detailed survey of the key WTO cases.

The first WTO case to address the precedential effect of panel reports is the 1996 case *Japan – Alcoholic Beverages II*. In its report, the Panel stated that “panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted panel reports constitute subsequent practice. Such reports are an integral part of GATT 1994, since they constitute ‘other decisions of the CONTRACTING PARTIES to GATT 1947’”.¹¹⁷ This view was rejected by the Appellate Body, which noted that, first, under GATT 1947, adopted panel reports only bound “the parties to the dispute in that particular case”, but not subsequent panels; second, only “the conclusions and recommendations in an adopted panel report” are binding, but not the “legal reasonings” in the report.¹¹⁸ Citing the grant of exclusive authority to adopt interpretations by the Ministerial Conference and General Council under Article IX:2 of the WTO Agreement, the Appellate Body also held that Panel reports would not “constitute a definitive interpretation of the relevant provisions of [covered agreements]”.¹¹⁹ At the same time, the Appellate Body also noted that “[a]dopted panel reports are an important part of the GATT acquis... often considered by

¹¹³ WTO Agreement, Art. IX.2.

¹¹⁴ Chua, *supra* note 109, at 174.

¹¹⁵ See e.g., R. Bhala, ‘Myth about *Stare decisis* and International Trade Law (Part One of a Trilogy)’, 14 *American University International Law Review* (1998), at 845; K. J Pelc, ‘The welfare implications of Precedent in International Law’, in Jemielniak *et al* (eds.), *supra* note 105, at 177.

¹¹⁶ Chua, *supra* note 109, at 195.

¹¹⁷ Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, p. 125, para. 6.10.

¹¹⁸ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, [WT/DS8/AB/R](#), [WT/DS10/AB/R](#), [WT/DS11/AB/R](#), adopted 1 November 1996, DSR 1996:I, p. 97, at 13.

¹¹⁹ *Ibid.*

subsequent panels”, which “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute”.¹²⁰ Even unadopted panel reports could provide “useful guidance” to future panels.¹²¹ However, to prevent any illusion on the binding effect of panel reports, the Appellate Body also made it explicit that “they are not binding, except with respect to resolving the particular dispute between the parties to that dispute”.¹²²

In a way, it is not surprising that the Appellate Body took a cautious approach on the presidential value of panel reports in this case. The Appellate Body was barely one year old when the case was decided, thus it is better to avoid controversial statements so as not to undermine its own legitimacy as a new institution. Moreover, the Appellate Body did not address the precedential effects of its own reports, a question that is only answered in the subsequent case of *US - Shrimp (Article 21.5 Malaysia)*. In that case, the Appellate Body expanded its approach in *Japan – Alcoholic Beverages II* in two very important ways. First, the Appellate Body confirmed that Appellate Body reports, just like panel reports, “provided interpretative guidance” for panels.¹²³ This is not very surprising, because it is only natural that the Appellate Body, as the institution reviewing panel decisions, would have at least the same power as the panel. Second, in addition to confirming that “[t]he Panel was correct in using [the Appellate Body’s] findings as a tool for its own reasoning”,¹²⁴ the Appellate Body went one step further by stating that the Panel “was right to use” and “rely on” the “reasoning” of the Appellate Body report in *US - Shrimp*.¹²⁵ This is one big step towards recognizing the precedential effect of Appellate Body reports, as the key in a precedent is its *ratio decidendi* or reasoning. Furthermore, to dispel any speculation that the reasoning in the Appellate Body report in *US - Shrimp* applied to the current case only because the two cases concern the same dispute on the same measure

¹²⁰ *Ibid.*, at 14.

¹²¹ *Ibid.*, at 15.

¹²² *Ibid.*, at 14.

¹²³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481, at para. 107.

¹²⁴ *Ibid.*, at para. 109.

¹²⁵ *Ibid.*, at para. 107. The report referred to here is Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755.

between the same parties, the Appellate Body also made clear that such reasoning shall be relied on by not only “the Panel in this case”, but also all “future panels”.¹²⁶

Some “future panels”, however, chose to ignore the Appellate Body’s edict, resulting in a tug of war between the panel and the Appellate Body. The most contentious battle is fought over the legality of “zeroing” practices by the US, where some WTO panels persistently refused to follow settled Appellate Body jurisprudence on the issue. In the *US - Stainless Steel (Mexico)* case, for example, the Panel refused to follow previous Appellate Body decisions even though it was aware that its reasoning is very similar to those of the two Panel decisions that have been overruled by the Appellate Body.¹²⁷ According to the Panel, such an approach is mandated by Article 11 of the DSU, which requires panels to carry out an objective examination of the matter at issue.¹²⁸ The EU, one of the third parties in the case, became so frustrated that it asked the Appellate Body “to unambiguously re-confirm that all panels are *expected and therefore also obliged*, to follow its rulings on these issues” (emphasis original).¹²⁹ Their frustration is shared by the Appellate Body, which stated that they “are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues”.¹³⁰ Citing the need to ensure “security and predictability” in the dispute settlement system in Article 3.2 of the DSU, the Appellate Body held 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.”¹³¹ Thus, the Appellate Body concluded, “absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”¹³²

¹²⁶ *Ibid.*

¹²⁷ Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, p. 599, at para. 7.106.

¹²⁸ *Ibid.*

¹²⁹ In the World Trade Organisation before the Appellate Body AB-2008-1, DS344 United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, *Third participant notification and written submission by the European Communities*, 25 February 2008 Geneva, at para. 56.

¹³⁰ Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, [WT/DS344/AB/R](#), adopted 20 May 2008, DSR 2008:II, p. 513, at para. 162.

¹³¹ *Ibid.*, at para. 161.

¹³² *Ibid.*, at para. 160.

Does this statement mean that Appellate Body reports now shall be treated as binding precedents? While WTO Members differ widely on this issue,¹³³ the strong wordings of the Appellate Body certainly provided plenty of ammunition for the claim that the WTO now has a system of binding precedents, or *stare decisis*.¹³⁴ However, I think that such exuberance about the existence of a precedent system in the WTO dispute settlement system is not only irrational but also premature, as the Appellate Body itself explicitly stated, at the beginning of its discussion on the issue, that “[i]t is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties.”¹³⁵ Compared to the highly cautionary language used earlier, the Appellate Body has made it very clear, in a straightforward and unequivocal manner, that there is no formal or *de jure* system of precedents in WTO dispute settlement.¹³⁶

Therefore, at most, one can only claim the existence of a *de facto* precedent system in the WTO, but “it is certainly not *stare decisis*”,¹³⁷ as pointed out by John Jackson, who argued that

“[the] precedent effect in the jurisprudence of the WTO ...is not so powerful as to require panels or the Appellate Body considering new cases to follow prior cases, with the possible exception that one prior case have been numerous regarding a particular issue and approach, and apparently accepted by all members of the WTO, then the language of the Vienna Convention Appellate Body out ‘practice under the agreement,’ may suggest a stronger impact. But short of that situation, it appears that the ‘flavor’ of the precedent effect in the WTO is still somewhat fluid, and possibly will remain somewhat fluid for the time being.”

¹³³ See e.g., David’s discussion on the heated debate between WTO Members when the Appellate Body Report in US - Stainless Steel was adopted. F. David, ‘The Role of Precedent in the WTO - New Horizons?’, *Maastricht Faculty of Law Working Paper No. 2009-12* (2009). Available at SSRN: <https://ssrn.com/abstract=1666169>, at 8-9.

¹³⁴ See Sacerdoti, *supra* note 74, at 14; C. Davis, ‘Deterring Disputes: WTO Dispute Settlement as a Tool for Conflict Management’, Prepared for presentation to the *Annual Meeting of the International Political Economy Society* (2016), at 20; S. Cho, ‘Precedent as a Social Phenomenon: System, Language and Symbol’, *Chicago-Kent Research Paper Series*, June 1, 2016, available at SSRN: <https://ssrn.com/abstract=2791744>, at 20-21; R. Alford, ‘The Role of Precedent at the WTO’, *Opinion Juris*, 2 May 2008, available at <http://opiniojuris.org/2008/05/02/the-role-of-precedent-at-the-wto/>.

¹³⁵ Appellate Body Report, *supra* note 130, at para. 158.

¹³⁶ This view is shared by many Appellate Body insiders. For example, Unterhalter stated that “[t]he WTO dispute settlement system knows no formal system of precedent” in Unterhalter, *supra* note 9, at 473. Matsushita stated that “in the WTO jurisprudence *stare decisis* is not recognized” in Matsushita, *supra* note 91, at 552. Hughes stated that “*stare decisis* does not apply in the WTO dispute settlement system” in V. Hughes, ‘Working in WTO Dispute Settlement: Pride without Prejudice’, in G. Marceau (ed.), *supra* note 2, at 421.

¹³⁷ J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006), at 177.

To paraphrase Jackson, much of the confusion regarding the precedential effect of the panel and Appellate Body reports arose because the word “precedent” is a “complex concept” with “many flavors”.¹³⁸ To avoid this, Jackson proposed to view the word as “a multi-layered concept, or at least as having a number of different approaches of different flavors”. However, as we can see from the foregoing discussion, such an approach could still lead to confusions. Instead, I would suggest ceasing to refer to the previous decisions of the Appellate Body as precedents, but to call them as “jurisprudence” instead.

Moreover, as Beshkar and Chilton have argued, conferring binding force on Appellate Body reports could raise substantive systematic costs.¹³⁹ For example, WTO Members might rush to bring cases, or at least participate as third parties, in a bid to shape the jurisprudence through litigation.¹⁴⁰ Wrong judicial precedents might perpetuate over time as the consensus requirement makes it difficult for the legislative branch to correct them.¹⁴¹ All these will be unfair for the small and poorer countries as they are less likely to participate in WTO disputes.¹⁴²

In addition to these practical reasons, I would add another very important constitutional reason. The Appellate Body was set up as a “safety valve”¹⁴³ to check against “rogue” panels¹⁴⁴ which might render “bad reports”.¹⁴⁵ It was never meant to be a judicial branch that is on par with the legislative branch to safeguard the so-called separation of powers as under some domestic legal systems. Elevating Appellate Body reports to the status of binding precedents could seriously undermine the nature of the WTO as a “Member-driven” organization.¹⁴⁶

¹³⁸ *Ibid.*, at 173.

¹³⁹ M. Beshkar & A. Chilton, ‘Revisiting Procedure and Precedent in the WTO: An Analysis of US – Countervailing and Anti-Dumping Measures (China)’, 15 *World Trade Review* (2016) 2, at 386-388.

¹⁴⁰ *Ibid.*, at 386-387.

¹⁴¹ *Ibid.*, at 387-388.

¹⁴² *Ibid.*, at 387.

¹⁴³ R. E. Hudec, Dispute Settlement, in J. Schott (ed.), *Completing the Uruguay Round: A Results-oriented Approach to the GATT Trade Negotiations* (1990), at 191.

¹⁴⁴ Hughes, *supra* note 1, at 121-122.

¹⁴⁵ Steger, *supra* note 5, at 447. See also P. V. D. Bossche, From Afterthought to Centrepiece, The WTO Appellate Body and Its Rise to Prominence in the World Trading System, in G. Sacerdoti, A. Yanovich and J. Bohannes (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006), at 292-294.

¹⁴⁶ For discussions on WTO as a “Member-driven” organization, see M. Elsig, ‘The World Trade Organization at Work: Performance in a Member-driven Milieu’, 5 *Review of International Organizations* (2016) 3, 345–363.

C. WTO Has Rules Against *Dicta*

Even if the WTO does not have a system of precedent, could it still have rules against *dicta*? This is more than pure academic speculation, as many WTO Members, especially the US, has repeatedly referred to certain parts of panel reports as “*dicta*” in their written submissions. This point, however, is highly contestable as what a WTO Member might view as “*obiter dictum*” may often be a necessary link in the panel’s overall analysis leading to the final findings. For example, in a case involving the non-discrimination obligations, the panel would have to first determine if the two products are alike before deciding whether the measure at issue is indeed discriminatory. If the panel makes a negative finding on likeness, this does not mean that the panel should stop its analysis there, because such a finding might be overturned on appeal. Thus, a more prudent course of action for the panel would be to continue making findings on the discrimination issue, lest the Appellate Body do not have sufficient facts to “complete the analysis” when the likeness finding is reversed.¹⁴⁷

Compared to the allegations from WTO Members, what is even more worrying is the usage of the concept of “*dicta*” by the Appellate Body itself in its own reports. What does the Appellate Body mean by “*dicta*” then? Again this can only be found out from the Appellate Body’s own words.

The very first case where the Appellate Body mentioned *dicta* is the *Canada – Periodicals* case, in which the Appellate Body held that, the statement by the panel in *EEC - Oilseeds*¹⁴⁸ that “it can reasonably be assumed that a payment not made directly to producers is not made ‘exclusively’ to them” is “*obiter dicta*” because the panel already found that subsidies paid to oilseeds processors were not made “exclusively to domestic producers”.¹⁴⁹ However, the Appellate Body does not explain further why such statement is considered *dicta*. We can only surmise that the statement is regarded as *dicta* because it is about a moot issue.

¹⁴⁷ For an analysis on the issue, see A. Yanovich & T. Voon, ‘Completing the Analysis in WTO Appeals: The Practice and its Limitations’, *Journal of International Economic Law* 9 (2006), 933–950.

¹⁴⁸ GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins*, L/6627, adopted 25 January 1990, BISD 37S/86.

¹⁴⁹ Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449, at 33.

In the *US - Shrimp (Article 21.5 – Malaysia)* case, the Appellate Body told us what is *not dicta* by stating that “[t]he reasoning in our Report in *United States – Shrimp* on which the Panel relied was not dicta; it was essential to our ruling”.¹⁵⁰ This suggests that *dicta* is something that is not essential to the ruling of the Appellate Body.

In the *US-Gambling* case, the Appellate Body revisited the issue again, when the parties debated whether the Panel’s statement on whether “practice” as such may be challenged as a “measure”.¹⁵¹ The Appellate Body ruled that, as Antigua, the Complaint, was not challenging a practice as such, the Panel’s statement did not constitute a “‘finding’ of the Panel”. Thus, the Appellate Body concluded, “the Panel’s statement on ‘practice’, in our view, was a mere *obiter dictum*, and we need not rule on it.”¹⁵² Ironically, however, the Appellate Body followed this statement with yet another *dictum on dicta*, by stating that,

“*We nevertheless express our disagreement with the Panel’s understanding of previous Appellate Body decisions. The Appellate Body has not, to date, pronounced upon the issue of whether “practice” may be challenged, as such, as a “measure” in WTO dispute settlement.*”¹⁵³

From these three cases, we can see that the Appellate Body’s main criteria for distinguishing *dicta* from holding is whether the statement at issue is relevant or essential to the decision. However, like with any other legal issue, the Appellate Body’s position here must be supported by provisions in the covered agreements. Unfortunately, the covered agreements do not include any explicit prohibition of *dicta*. Instead, the claim that *dicta* are not allowed can only be inferred from WTO provisions, as the US alleged in their statement at the DSB meeting on 23 May 2017. According to the US, “more than two-thirds of the Appellate Body’s analysis [in *Argentina — Measures Relating to Trade in Goods and Services*] – 46 pages – is in the nature of *obiter dicta*” because:

¹⁵⁰ Appellate Body Report, *supra* note 123, at para. 107.

¹⁵¹ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, [WT/DS285/AB/R](#), adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475), at paras. 129-130.

¹⁵² *Ibid.*, at para. 131.

¹⁵³ *Ibid.*, at para. 132.

*“The Appellate Body reversed the panel’s findings on likeness and said that this reversal rendered moot all the panel’s findings on all other issues, including treatment no less favorable, an affirmative defense, and the prudential exception under the GATS. Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS. These interpretations served no purpose in resolving the dispute – they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body’s analysis is comprised simply of advisory opinions on legal issues.”*¹⁵⁴

As mentioned earlier, such a position is premised on the Common Law view that the law-making power of the court arises from its function to solve disputes, thus the rulings which are necessary to resolve the disputes become the holdings, while those which are unnecessary become *dicta*. Therefore, the hidden assumption of such argument is that the roles of the Panel and Appellate Body are limited to resolving trade disputes. A closer reading of the DSU reveals, however, not only there is no support for such a view in the text of the DSU, but also the DSU explicitly requires the panel and Appellate Body to go beyond merely solving disputes.

First, according to Art. 3.2 of the DSU, the WTO dispute settlement system serves not only to “preserve the rights and obligations of Members under the covered agreements”, but also to “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”. As explained by Art. 3.4, the first function is achieved through “prompt settlement” of disputes. But this apparently does not apply to the second function, as clarifications of treaty provisions often have to be conducted beyond the narrow confines of individual disputes. Indeed, it could be argued that the use of the term “clarify” here widens the general roles of panels and Appellate Body and enables them to provide “guidance” to the Members’ future conducts under the covered agreements.¹⁵⁵

Second, the panel is under an explicit obligation to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute”.¹⁵⁶ This means that,

¹⁵⁴ Mission of the United States, *supra* note 12, at 13.

¹⁵⁵ G. Sacerdoti, *The Dispute Settlement System of the WTO in Action: A Perspective on the First Ten Years*, in G. Sacerdoti, A. Yanovich and J. Bohannes (eds.), *supra* note 145, at 49.

¹⁵⁶ DSU, Art. 7.2.

even if a provision cited by a party turns out to be inapplicable because the issue is moot, the panel still has to address it. Otherwise, the panel could well be accused of failing to fulfil its obligation under Arts. 7.2 and 11, especially if the Appellate Body decides to overturn the panel's finding that the specific provision is inapplicable.

Third, Art. 17.12 imposes similar obligation on the Appellate Body with even more explicit language by requiring the Appellate Body to "address each of the issues raised in accordance with paragraph 6 during the appellate proceeding." Again, failure to comply with the obligation could expose the Appellate Body to allegations of violations of its duties under the DSU.

Fourth, more importantly, even for issues or provisions not raised by the parties, neither Art. 7 nor Art. 17 prohibits the panel or the Appellate Body from considering or ruling on such issues. To the contrary, as every lawyer knows, they often need to consider the unnamed provisions in order to assess the contexts of the provisions at issue in the litigation. One might argue that such a restriction can be found under Art. 17.6, which states that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." However, this provision at best only delineates what may be appealed by the parties to the dispute, but it does not impose restrictions on what the Appellate Body may rule upon. Even though Art. 17.12 refers to Art. 17.6, one cannot conclude that the Appellate Body is thus subject to the same restriction as it only states that "[t]he Appellate Body shall address each of the issues raised in accordance with [Art. 17.6]". To the contrary, had the Members intended to also limit the power of the AB, they would have used the same language as Art. 17.6 here by stating that "the rulings of the Appellate Body shall be limited to issues raised in accordance with paragraph 6 during the appellate proceeding."

To sum up, as the discussions above have illustrated, the covered agreements do not really distinguish between holdings or *dicta* in a decision. Thus, if anything, the Appellate Body's announcement on so-called "*dicta*" in panel and Appellate Body reports is nothing but *dictum on dicta*. This approach is dangerous not only because it lacks legal basis in the covered agreements, but also because it could backfire when Members in turn borrow the term and

accuse the Appellate Body itself of rolling out *dicta*, which is exactly what the US has done in the reappointment saga.

4. Conclusion

As Hersch Lauterpacht has wisely warned 60 years ago, "[i]t is not conducive to clarity to apply to the work of the Court the supposedly rigid delimitation between *obiter dicta* and *ratio decidendi* applicable to a legal system based on the strict doctrine of precedent."¹⁵⁷ The reason for this, as explained by former International Court of Justice President Jennings, is that when international lawyers talk about an *obiter dictum*, they imply "the existence in international law decisions of something that the common lawyer calls the *ratio decidendi*."¹⁵⁸ Similarly, "whenever judges or publicists talk about *obiter dicta* the point of the distinction from the *ratio decidendi* is conceded by implication."¹⁵⁹

However, as I have argued in this article, the Appellate Body has consistently rejected the idea that there is a system of binding precedents or *stare decisis* in the WTO. To be consistent, the Appellate Body should then stop using such loaded words like *ratio* and *dicta*, both of which are unique to the Common Law system of binding precedents. If the Appellate Body agrees with the previous rulings of the panel or itself, they shall just refer to it as "persuasive jurisprudence", or "*jurisprudence constante*" if they prefer to use a more established term. If they do not like the ruling on a particular issue, the Appellate Body should just state that it is wrong, or that it is not relevant to the issues raised in the case, not necessary for the resolution of the dispute at hand, or concerns a moot issue that is not argued by the parties, rather than bury it under the ambiguous and unhelpful tombstone of "*obiter dicta*".

This is not just a petty issue of mere semantics, because words could influence people's thinking. As shown by my previous discussions, with such injudicious usage of terms, the

¹⁵⁷ H. Lauterpacht, *The Development of International Law by the International Court* (2nd ed, 1958), at 61.

¹⁵⁸ R. Y. Jennings, 'The Judiciary, International and National, and the Development of International Law', 45 *International & Comparative Law Quarterly* (1996) 1 at 10.

¹⁵⁹ *Ibid.*, at 12.

Appellate Body has brought the destiny upon itself when Members started to fling accusations of *dicta* towards the Appellate Body's own reports.

Does this mean that the WTO Members have no way of controlling unwanted or unpopular emanations from the AB? The answer is no. Instead, I think the WTO Members could make use of any or all of the following suggestions:

First, the DSB could choose to adopt only the findings and recommendations of the panel and Appellate Body. As stated in Arts. 11 and 19.2 of the DSU, what really matters in the panel and Appellate Body reports are their "findings and recommendations". This is confirmed by Art. 21 and 22, which states that the losing party only need to comply with "recommendations or rulings of the DSB." The findings are simply the legal conclusions without the detailed reasoning. As the reasoning is not adopted, there is no need to debate whether it falls under ratio or *dicta*. However, amendment of the DSU might be needed as one could argue that, under Arts. 16.4 and 17.14, the entire panel or Appellate Body report shall be adopted.

Second, if the Appellate Body's interpretation on a particular provision is so universally endorsed by the Members that the Members really want it to become part of WTO law, it shall be adopted only with a three-fourths majority of the Members. This is how an authoritative interpretation by the General Council or Ministerial Conference may be adopted, and it should also be how the interpretations of the Appellate Body are accorded authoritative status. It would create perverse incentives if such interpretation could be sneaked in through back-door via the operation of the negative consensus rule for the adoption of Appellate Body reports while a proper authoritative interpretation has to go through the painful process of garnering the requisite majority among all WTO Members.

Third, on the other hand, if the Members are so appalled by what they perceive to be a blatantly wrongful interpretation by the Appellate Body in its report, they could always prevent further contamination of the WTO jurisprudence by trying to adopt an authoritative interpretation of the relevant provision and explicitly reject the approach taken by the AB, just like a parliament would do in a Common Law jurisdiction. Of course, as at least one disputing party

always stands to benefit from the interpretation at issue, it might be difficult to reach the consensus required to adopt the authoritative interpretation, unless such benefiting Member is also willing to join the consensus for systemic reasons.

In view of the current paralysis of the decision-making mechanism of the WTO, it might take some time before such suggestions may be accepted in practice. In the meantime, the Appellate Body should at least rid its reports off words such as “*dicta*”, lest the self-fulfilling prophecy ultimately becomes the Appellate Body’s own destiny.