Precedent and Principles of WTO Panel Jurisprudence

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By
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ABSTRACT

The central pillar of the GATT/WTO multilateral trading system is the dispute settlement mechanism codified in the WTO Agreement. However, forty-five years after the adoption of the first GATT panel report, the legal status of GATT interpretations underlying panel decisions remains controversial. In light of the substitution of legal for political legitimacy in the Dispute Settlement Understanding, this issue has assumed importance for the credibility of the WTO system. This paper examines these implications and addresses the legal status of panel interpretations from constitutional, political and practical perspectives. It illustrates the legal effect of panel decisions with a critical analysis of the panel-created competitive conditions principle and its related rules.

I. INTRODUCTION

The central pillar of the WTO multilateral trading system and its "most individual contribution" is the dispute settlement mechanism contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). The DSU does not simply codify the dispute settlement procedures under the General Agreement on Tariffs and Trade ("GATT") regime, but represents a significant shift to a rule-based model of dispute settlement. It estab-

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lishes a right to be heard by an independently constituted dispute settlement panel, a standing Appellate Body to hear appeals from issues of law, and the automatic adoption and enforcement of panel rulings. The most important element of the dispute settlement mechanism is the compulsory jurisdiction of the dispute settlement panels. The function of the panels is to make an objective determination of the facts and the applicability of the WTO Agreement. Unlike the International Court of Justice which has on average decided one contentious case each year since 1945, GATT dispute settlement panels resolved more than 100 cases between 1947 and 1994. Since the implementation of the DSU in 1995, the WTO has received over 100 trade disputes with 28 cases proceeding to a dispute settlement panel. However, forty-seven years after the adoption of the first GATT panel report, the legal status of GATT interpretations underlying panel decisions remains controversial. This issue has important implications for the functioning of the WTO system. First, for legal principles to be distilled from panel jurisprudence and for such principles to be of utility in future cases, GATT interpretations underlying past panel reports must have some legal effect. Absent some form of legal authority or precedential effect, outcomes of cases would lack consistency and predictability, rendering any study of panel jurisprudence pointless.

More importantly, the objective of the WTO Agreement is to raise standards of living, ensure full employment, and increase real incomes through expanding production and trade in goods and services. This requires certainty


4. DSU art 6.
5. DSU art. 17.
6. DSU art. 16.
7. DSU art. 22.
8. DSU art. 11.1.
9. Between 1946 and 1997, the International Court of Justice heard 63 contentious cases, which is an average of 1.2 cases a year.
10. Panels within the framework of GATT are listed in WTO, Analytical Index: Guide to GATT Law and Practice 772-787 (1995). The GATT dispute settlement process has become the most widely used dispute settlement mechanism between states. See Mora, supra note 3, at 105; Ernst-Ulrich Petersmann, Settlement of International and National Trade Disputes Through the GATT: The Case of Anti-Dumping Law, in Adjudication of International Trade Disputes in International and Economic Law 77, 88 (Ernst-Ulrich Petersmann et al. eds., 1992).
12. Steger, supra note 3, at 331.
13. The first reported panel report was Complaint by Norway concerning the Treatment by Germany of Imports of Sardines, Oct. 31, 1952, GATT B.I.S.D. (1st Supp.) at 30. Before that, working parties were used to resolve disputes.
15. In this paper, a reference to panels or panel reports includes a reference to the Appellate Body and Appellate Body reports respectively.
and predictability to allow entrepreneurs to make efficient investment and market development decisions. In this regard, the dispute settlement system "is a central element in providing security and predictability to the multilateral trading system." It has long been recognized that the rationale for a tribunal following its previous decisions is that it "makes for certainty and stability, which are of the essence of the orderly administration of justice." If the WTO Agreement is interpreted in an ad hoc way, without regard to previous decisions, uncertainty will arise as to whether government policies are inconsistent with the WTO Agreement. Such uncertainty will deprive panel reports of the practical value desired by contracting parties, and impair the achievement of GATT/WTO objectives. On the other hand, a general recognition of the persuasive force of previously adopted panel reports will result in "the development of a comprehensive body of law which . . . can be used not only as direct evidence of specific rules of law . . . but also as indicative of the method and the spirit in which" future cases might be resolved. Hence, the objectives of the GATT/WTO multilateral trading system require that panels follow their previous decisions unless there is good reason to do otherwise.

This argument is supported by the substitution of legal for political legitimacy in the dispute settlement process. The success of such a rule-based system requires that panels and the Appellate Body produce a jurisprudence that is legally credible and commands the respect of WTO members. It is a fundamental principle of the administration of justice in most legal systems that like cases be decided consistently. Legal credibility can hardly be achieved if judicial decisions are inconsistent, affronting even the most elementary sense of justice. Following previously adopted reports unless there is good reason to do otherwise contributes to legal credibility by avoiding the appearance of excess judi-


18. DSU art. 3.2.


21. See statements of delegates in Section III.

22. Lauterpacht, supra note 20, at 18.


24. Shahabuddeen, supra note 19, at 41.

cial discretion which may be perceived as an ex post rationalization for a conclusion influenced by realpolitik considerations.

In light of this, two questions arise: can and do panel decisions have legal effect beyond the dispute in question? The paper examines the legal effect of panel reports at three levels. Section II looks at the status of panel reports in light of the nature and sources of panel jurisdiction. Section III examines the attitudes of the contracting parties about the legal effect of panel reports. Turning from the constitutional and political levels to panel practice, Section IV analyzes the approach of panels to previously adopted reports. Section V develops the principle of subsequent practice as a legal basis for the precedential effect of panel reports. Finally, the legal effect of panel interpretations is illustrated in Sections VI and VII with a critical analysis of the panel-created competitive conditions principle and its related rules.

II.
THE LEGAL STATUS OF PANEL AND APPELLATE BODY REPORTS

A. Panel Jurisdiction Under the WTO Agreement

Under the WTO Agreement, Article IX:2 confers on the Ministerial Conference and the General Council exclusive authority to adopt interpretations of the GATT. Further, under Article 3.9 of the DSU, nothing in the dispute settlement procedures prejudices the rights of parties to seek authoritative interpretations of the GATT through Article IX:2. Since such an exclusive authority has been established so specifically, the inference is that such authority does not exist by implication or inadvertence elsewhere. The fact that the power to adopt authoritative interpretations has been exercised on several occasions supports this argument. A leading example in this regard is the interpretation of “nullification or impairment” under GATT Article XXIII:1(a). Recourse to dispute settlement procedures under Article XXIII:1 depends upon proof that some benefit accruing to the party under the GATT has been “nullified or impaired.” In Uruguayan Recourse to Article XXIII, the panel noted that where a GATT provision has been breached, that breach constitutes a prima facie nullification or impairment under Article XXIII:1. Subsequent panels have consistently applied the prima facie breach principle to Article XXIII:1(a). Thus in U.S. Tax Legislation (DISC) and the other three DISC cases, panels treated the statement in Uruguayan Recourse as “precedent.” This principle was codified by the

GATT Council in 1979.\textsuperscript{30} The concept was also included in Article 3.8 of the DSU which states that "where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification and impairment."

The inquiry into the legal status of panel reasons at the constitutional level does not end with Article IX:2 of the WTO Agreement: Article XVI:1 states that the WTO shall be guided by the decisions and customary practices of the GATT. Similarly, under Article 3.1 of the DSU, members affirm their adherence to the principles applied under Article XXIII (the dispute settlement provision) of the GATT. That the GATT \textit{acquis}\textsuperscript{31} is incorporated into the WTO system is supported by the practice of WTO panels relying on principles contained in GATT panel reports.\textsuperscript{32} "Indeed, the most striking aspect of the WTO is the extent to which it preserves and consolidates the body of law and practice which has evolved out of the GATT."\textsuperscript{33} It is hence necessary to ascertain the nature and source of panel jurisdiction before the WTO Agreement in order to determine the legal status of panel reasons.

\textbf{B. Panel Jurisdiction Prior to the WTO Agreement}

Ascertaining the source of panel jurisdiction before the WTO Agreement is problematic because the constitutional framework\textsuperscript{34} for administering the GATT was never adopted. As a result, the GATT did not have a formal organizational constitution but functioned wholly through the customary practice and "decla-
sions” of the Contracting Parties under Article XXV.35 Article XXV confers power on representatives of member states meeting as the “Contracting Parties” to take joint action to facilitate the operation of the GATT. This includes the power to establish panels whose function is to assist the Contracting Parties in resolving disputes by recommending appropriate GATT-consistent solutions.36 In 1960, the Contracting Parties established the Council of Representatives (“the Council”) whose responsibilities included examining panel reports and making recommendations on their adoption to the Contracting Parties.37 In 1968, the Council’s authority was expanded to cover the adoption of panel reports.38 Between 1968 and the entry into force of the WTO Agreement in 1995, panel reports have been adopted by the Council or at the annual Session of the Contracting Parties when this would afford more timely action.39

It is therefore apparent that panel reports are recommendatory in nature.40 A report which has not been adopted by the Council or its successor, the DSB, has no legal status in the GATT/WTO system.41 Unadopted reports can nevertheless provide guidance as the opinion of experts.42 Since the DSU, unadopted reports that have yet to be considered by the DSB have significant persuasive value since such reports must be adopted within 60 days of their issuance unless there is a consensus against adoption.43 Once the Council or DSB has adopted a report, its recommendations become the authoritative determination of the GATT rights and obligations of the parties to the case.44 However, whether

35. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, supra note 17, at 7; Mora, supra note 3, at 118.
36. Decision on Procedures Under Article XXIII, Apr. 5, 1966, GATT B.I.S.D. (14th Supp.) at 18, Article 5; Understanding on Notification, Consultation, Dispute Settlement and Surveillance; Annex to the 1979 Understanding: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, supra note 30, Articles 3 and 6(ii); Understanding on Rules and Procedures Governing the Settlement of Disputes, supra note 2, Article 11.1.
39. WTO, ANALYTICAL INDEX, supra note 10, at 761.
40. Indeed, the concluding paragraph of almost every panel report begins with the phrase “[t]he panel recommends that the Contracting Parties ...”
43. DSU 16.4, 17.14. Panel reports must be adopted within 60 days of their issuance unless one of the disputants formally notifies of its decision to appeal. Appellate Body reports must be adopted within 30 days of their issuance to members.
legal reasons underlying adopted recommendations can be considered authorita-
tive interpretations of the GATT or in any way applicable to subsequent disputes
remains unanswered at the constitutional level.

III.
THE APPROACH OF THE CONTRACTING PARTIES TO
ADOPTED REPORTS

The approach of the contracting parties to previously adopted reports is
diverse and lends little assistance to the inquiry. It has been argued that “neither
the manner [in which panel reports] were made nor the manner they were
adopted . . . entitle the precise legal rulings in such decisions to binding effect on
future controversies.”45 The members of the EEC, now the European Union,
who view GATT dispute settlement as a non-adjudicative, diplomatic process
take this view.46 Thus during the Uruguay Round, EEC delegates stated that
results of the panel process should not have precedential effect.47 Similar state-
ments were made by the EEC representative in discussion on the adoption of
Japan – Restrictions on Imports of Certain Agricultural Products48 where the
panel’s findings were stated to be “limited to the specific measures under
examination.”49

The major problem with this argument is that it assumes contracting parties
can adopt panel conclusions in isolation from the legal reasons behind them.
This distinction is highly artificial. The EEC Oilseeds Follow-Up Report recog-
nized that conclusions of a panel cannot be severed from their underlying rea-
soning.50 In discussion on the adoption of Spain – Measures Concerning
Domestic Sale of Soyabean Oil,51 the U.S. representative stated that “[t]here was
not . . . [an] aspect to any panel report that was perhaps more important than the
resolution of a particular dispute: panel reports, explicitly and of necessity, inter-
pret Articles of the General Agreement . . . when the Council adopted a report,
those interpretations became GATT law.”52 In discussion on the adoption of
Canada – Administration of the Foreign Investment Review Act,53 the Indian
representative, supported by the delegations of Brazil, Chile, Pakistan, Colom-
bia, Nicaragua and Peru, implicitly acknowledged the precedential effect of

45. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, supra note 17, at 263; Steger, supra note
3, at 320.
46. Ronald Brand, Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case
and the Draft Understanding on Dispute Settlement, 27 J. WORLD TRADE L. 117, 121 (1993); Mora,
supra note 3, at 131; R. Phan ran Phi, A European View of the GATT, 14 INT’L BUS. L. 150
(1986); P. Trimble, International Trade and the “Rule of Law,” 83 MICH. L. REV. 1016, 1017
(1985); Young, supra note 3, at 390.
47. TERENCE STEWART (ed.), THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-
49. Minutes of the GATT Council, C/M/217, at 20.
51. This panel report was not adopted.
52. Minutes of the GATT Council, C/M/152 at 8.
panel reports by stating that the dispute concerned two developed parties and adoption of the report could not contribute to the evolution of case law applying to less developed parties. 54 Similarly, the Korean representative stated that panel reports were not limited to the particular regime in question but “once adopted, constitute a precedent.” 55 Further, the EEC representative in its request for consultations on Chile – Internal Taxes on Spirits stated that a previous panel “has made very clear findings and constitutes a precedent applicable in the present instance to Chilean taxation of spirits.” 56 In their submissions to panels, parties have also referred to previously adopted reports as “precedents.” 57

IV.

THE PRECEDENTIAL EFFECT OF ADOPTED REPORTS

A. Precedent in Panel Jurisprudence

Despite these references to “precedents,” to state that a doctrine of binding precedent, in the common law sense, exists in panel jurisprudence is misleading. There are prominent cases where applications of legal rules to identical facts have not been followed. The leading example is EEC – Restrictions on Imports of Dessert Apples – Complaint by Chile. 59 It concerned an EEC market intervention scheme intended to fix the prices of apples. The scheme’s operation and targets were essentially price-related. The issue was whether the scheme was justified under Article XI:2(c)(i)), which provides an exception for import restrictions on agricultural products which were necessary to enforce governmental measures restricting the quantities of the like domestic product permitted to be marketed or produced. The same parties litigated the same measure in relation to the same product nine years earlier in EEC – Restrictions on Imports of Apples from Chile. 60 The earlier panel held that the scheme fell within the Article XI:2(c)(i) exception. However, the subsequent panel “did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report,” 61 hence it was not relieved of the responsibility to carry out its own

54. Minutes of the GATT Council, C/M/174 at 16.
55. Minutes of the GATT Council, C/M/236.
57. See, e.g., Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, supra note 17, para. 3.21 and 3.22.
60. Supra note 28. An earlier panel in the EEC – Program of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, supra note 28, decided that a similar scheme in relation to fresh tomatoes did not fall within the Article XI:2(c)(i) exception.
61. EEC-Restrictions on Imports of Dessert Apples - Complaint by Chile, supra note 59, para. 12.1.

https://scholarship.law.berkeley.edu/bjil/vol16/iss2/3
DOI: https://doi.org/10.15779/Z38WW7R
examination of the issue. It departed from the earlier panel’s decision, holding that the scheme fell outside the exception.

However, the fact that the doctrine of binding precedent does not apply does not mean that panel decisions have no precedential value. A system of precedents exists in most legal systems where there is a substantial body of case law. The common law doctrine of binding precedent is merely one of several ways in which a system of precedents may operate. An examination of panel practice indicates that legal reasons of previously adopted panel reports are generally followed by subsequent panels unless there is good reason for deciding otherwise. This is exemplified by panels’ interpretation of “like products” in the context of one of the fundamental principles in GATT: the national treatment obligation. Primarily expressed in Article III, this obligation requires the treatment of imports, once they have entered the country and cleared customs, to be no worse than that of domestically produced goods. Article III:2, one of the most frequently litigated GATT provisions, states:

The products of . . . any contracting party imported into . . . any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products.

“Like domestic products” is neither defined in the GATT, nor has it been authoritatively interpreted by the Contracting Parties. Rather, its meaning has evolved through customary panel practice. The Working Party on Border Tax Adjustments stated that in determining whether two goods are “like products,” it is relevant to consider the products’ end-uses in a given market, consumers’ tastes and habits, and the products’ properties, nature and quality. This ap-
approach has been followed by almost all subsequent adopted reports. In each case, past panel decisions were referred to and expressly followed. Indeed, referring to previously adopted reports, the panel in Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages—stated that such an interpretation was "clearly established" by "past GATT practice."  

Apart from following interpretations in previously adopted reports, other customary practices reveal panels' awareness that their legal reasons may be used as precedents. First, this is exemplified when they expressly limit the applicability of their reasons to the measures in question. Thus, in U.S. – Section 337 of the Tariff Act of 1930, the panel emphasized that whilst its observations relating to the application of section 337 may be applicable to cases outside the field of intellectual property, its findings and conclusions are limited to patent-based cases. In EEC – Regulation on Imports of Parts and Components, the panel examined whether anti-circumvention duties imposed by the EEC fell under the Article XX(d) exception which provides that nothing in the GATT shall prevent adoption of measures "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement." The panel construed its terms of reference so narrowly as to prevent itself from considering whether the laws in question were "not inconsistent" with the GATT. Its analysis of Article XX(d) proceeded on the assumption that the laws sought to be enforced by the anti-circumvention duties were consistent with the GATT. The panel emphasized that this assumption was limited to that case and "without prejudice to any examination of these regulations in any other dispute settlement proceeding." Similarly, the panel in Japan – Restrictions on Imports of Certain Agricultural Products, in applying the term "enforcement of governmental measures" in Article XI:2(c)(i), took into account the practice of "administrative guidance" which is a traditional Japanese government policy tool based on consensus and peer pressure. In view of this special characteristic of Japanese society, the panel stressed "its approach in this particular case should not be interpreted as a precedent in other cases where societies are not adapted to this form of enforcing government policies." Thus by expressly limiting the applicability of their decisions to subsequent cases, panels implicitly acknowledge that, despite the absence of the doctrine of precedent in panel juris-


70. Supra note 69, para. 5.5.
71. Supra note 58, para 5.4.
73. Id., para. 5.13.
74. Supra note 48, para. 5.4.1.4 (emphasis added).
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prudence, their reasons and findings may have precedential effect in practice. Indeed, some panels have gone further and used the term "precedent" to describe the reasons of previous panels. 75

Second, panels have been asked on several occasions to rule on measures that have expired or been withdrawn. 76 Panels have justified their decisions to grant such rulings on various grounds, including the fact that the case involved "questions of great practical interest," as well as the risk that the party in question may impose similar import restrictions in the future. 77 The Appellate Body has continued this practice in U.S. – Measures Affecting the Imports of Woven Wool Shirts and Blouses from India 78 where U.S. transitional safeguard measures challenged by India were withdrawn prior to the completion of the panel process. India requested the panel to continue its work and upon the release of the report, India notified the DSB of its decision to appeal certain issues of law in the report. Parties request, and panels grant rulings on withdrawn measures in the belief that these rulings have practical value for future implementation of the GATT. 79 These reports can only be of such practical value if parties believe that the reports' reasons have precedential effect and are likely to be followed in subsequent disputes.

The more legalistic approach to GATT interpretation following the introduction of an Appellate Body to review issues of law has led to a strengthening of the precedential effect of previously adopted reports. This is exemplified by the recent introduction of a distinction between ratio decidendi and obiter dicta in panel jurisprudence. In Canada – Certain Measures Concerning Periodicals, 80 the U.S. cited four panel reports as authorities for its interpretation of Article III:8(b). The Appellate Body distinguished three of the reports. In relation to the fourth report, the Appellate Body found that the statement relied upon by the U.S. was obiter dicta and hence not binding. If panel reports did not have significant precedential effect, there would be no need to carefully rationalize the decision not to apply the principle enunciated by previous panels. Implicit in the Appellate Body's distinguishing of cases and its distinction between ratio


77. See U.S. – Prohibition of Imports of Tuna and Tuna Products from Canada, supra note 76; EEC – Restrictions on Imports of Dessert Apples – Complaint by Chile, supra note 59. See the submission of the U.S. in Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, supra note 17, para. 6.14. See also PETERSMANN, supra note 44, at 139.

78. Appellate Body Report, April 25, 1997, WT/DS33/AB/R.

79. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, supra note 17, at 262.

and obiter is the recognition that legal reasons in panel reports should be followed unless there is good reason for deciding otherwise. 81

B. Japan – Taxes on Alcoholic Beverages Appellate Body Report: The Appellate Body’s Approach to Precedent

The precedential value of previously adopted reports was raised formally for the first time in Japan – Taxes on Alcoholic Beverages. 82 The panel held that reports adopted by the GATT Council and DSB are an integral part of GATT 1994 on two grounds. First, adopted reports constituted “subsequent practice” under Article 31(3)(b) of the Vienna Convention on the Law of Treaties 84 which states that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account when interpreting the treaty. The panel accepted Article 31(3)(b) as part of the “customary rules of interpretation of public international law” which it was bound to use, under Article 3.2 of the DSU, in interpreting the GATT. The effect of construing past reports as “subsequent practice” is to require panels to interpret the GATT in light of any previously adopted reports on the provision in question.

Second, adopted reports constituted “other decisions of the Contracting Parties to GATT 1947” under paragraph 1(b)(iv) of Annex 1A incorporating GATT 1994 into the WTO Agreement. 86 This incorporates all panel reports adopted prior to the WTO Agreement into GATT 1994 itself, together with GATT 1947 and other Understandings on the interpretation of the GATT. This renders past panel reports binding on future panels as provisions of GATT 1947 itself. The U.S. appealed, claiming the panel erred in incorrectly characterizing adopted panel reports as “subsequent practice” under the Vienna Convention and “decisions of the Contracting Parties” under paragraph 1(b)(iv) of the language incorporating GATT 1994 into the WTO Agreement. The EEC, as intervening third party to the dispute, supported the U.S. position.

The Appellate Body rejected the panel’s finding on this issue. 87 It found “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention requires a “‘concordant, common and consistent’ sequence of acts or pronouncements sufficient to establish a discernible pattern implying the parties’ agreement regarding its interpretation.” 88 Hence, an isolated act, such as the

81. To draw the distinction between ratio and obiter is “to accept the doctrine of stare decisis at a theoretical level.” CROSS & HARRIS, supra note 19, at 17. See also SHAHABUDDEEN, supra note 19, at 110, 152-164.
82. Supra note 17.
83. Id. para. 6.10.
85. GATT 1994 is incorporated into the WTO Agreement through its inclusion in Annex 1A of the Agreement. GATT 1994 is defined in Annex 1A as including the provisions of GATT 1947 as well as instruments falling within the categories listed in paragraph 1(b) of Annex 1A. One such category is “other decisions of the Contracting Parties to GATT 1947.”
86. Japan – Taxes on Alcoholic Beverages, supra note 17, para. 6.10.
87. Id. at 13-15.
88. Id. at 13.
adoption of a panel report, is generally not sufficient to establish subsequent practice. The Appellate Body held that the character and legal status of panel reports has not changed since the WTO Agreement came into force:

Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.\(^89\)

Hence, panel jurisprudence indicates that even though legal reasons of previously adopted reports are not binding in the same way as common law precedents, they are followed by subsequent panels unless there is good reason for deciding otherwise. Such an approach is similar to the practice of the International Court of Justice.\(^90\)

V.
THE SUBSEQUENT PRACTICE PRINCIPLE: A LEGAL BASIS FOR THE PRECEDENTIAL EFFECT OF ADOPTED REPORTS

Given the desirability of certainty and predictability, and absent a doctrine of binding precedent, on what legal basis do past panel reasons have precedential effect? It is important to establish clear grounds for the precedential effect of panel reasons to enable parties to predict which reasons will be applied in future disputes. This section argues that despite the decision of the Appellate Body in the Japan Alcohol Case, the principle of subsequent practice constitutes a basis for the precedential effect of previously adopted reports.

Article 3.2 of the DSU requires panels to interpret the WTO Agreement in accordance with "customary rules of interpretation of public international law." Kuyper notes there is "little doubt that the drafters of this provision intended it to be an indirect reference to the principles of Articles 31 and 32 of the Vienna Convention, but the Convention as such could not be referred to because several WTO Members are not party to it."\(^91\) Indeed, like other international tribu-

\(^89\). Id.

\(^90\). See Barcelona Traction, Light and Power Company Limited (Belg. v. Spain), Second Phase, 1970 ICJ 3, 38 (Feb. 5); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunis. v. Libya), 1985 ICJ 191, 207 (Dec. 10); Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), Application for Permission to Intervene, 1990 ICJ 3, 4 (Feb. 28); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 ICJ 221, 233 (Advisory Opinion of Jul. 18) (dissenting opinion of Judge Read); Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 583 (1986); Lauterpacht, supra note 20, at 9-14; S. Rosenne, The Law and Practice of the International Court 612 (1985); Shahabuddeen, supra note 19, at 110.

nals.\cite{92} the Appellate Body has recognized that Article 31 has attained the status of customary international law.\cite{93}

Article 31(3)(b) of the Vienna Convention states that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account when interpreting the treaty. This rule has been applied as a principle of international law by the International Court of Justice.\cite{94} Two issues arise as to its applicability to the adoption of panel reports by the GATT Council and now the DSB. First, the preliminary question arises as to whether the acts of an organ established by a treaty can constitute subsequent practice of the parties to that treaty. Judges Lauterpacht and Spender have noted the artificiality of arguing that the practice of an organ established under a treaty can constitute “subsequent practice of the parties” under this principle.\cite{95} In relation to the Charter of the United Nations,\cite{96} Judge Spender stated that the practice of an organ such as the General Assembly cannot be equated with the practice of the member states under this principle. He based his objection on the fact that in such organs, majority rule prevails and so determines the practice.\cite{97} Where the practice was opposed by individual parties who have been outvoted, the requisite agreement of the parties does not exist.\cite{98} This objection, if valid, does not apply to the practice of the GATT Council before the WTO Agreement since the adoption of panel reports could only occur by the consensus of the contracting parties. However, since the establishment of the DSB, panel reports are automatically adopted in the absence of a consensus against adoption.\cite{99} This casts doubt on the applicability of the subsequent practice principle to reports adopted under the new system.

Given that the subsequent practice principle is capable of applying to decisions of the GATT Council, at least prior to the DSU, can the adoption of panel reports by consensus constitute “subsequent practice” establishing the agreement

\cite{92} International Court of Justice: Certain Expenses of the United Nations, 1962 ICJ 151, 158 (Advisory Opinion of Jul. 20); Territorial Dispute (Libya v. Chad), 1994 ICJ 6 (Feb. 3); Golder v. United Kingdom, 57 I.L.R. 201, 213-214 (European Court of Human Rights 1975); Inter-American Court of Human Rights: Restrictions to the Death Penalty, 70 I.L.R. 449, 466 (1983).


\cite{95} Certain Expenses of the United Nations, supra note 92, at 160 and 189 (separate opinion of Judge Sir Percy Spender).

\cite{96} 1976 Y.B.U.N. 1043.

\cite{97} Certain Expenses of the United Nations, supra note 92, at 192 (separate opinion of Judge Sir Percy Spender).

\cite{98} T. SATO, EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS 30-33 (1996).

\cite{99} DSU Art. 16.4.
of the parties to interpretations contained in the reports? In this regard, the Ap-pellate Body’s statement in the Japan Alcohol Case is critical. It stated:

The essence of subsequent practice in interpreting a treaty has been recognized as a “concordant, common and consistent” sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.\(^{100}\)

It concluded that the decision to adopt a panel report is an isolated act which cannot constitute subsequent practice and cannot be recognized as constituting a definitive interpretation of the relevant GATT provisions.

On its face, this statement appears to reject the view that the subsequent practice principle is capable of applying to the adoption of panel reports.\(^{101}\) However, a careful analysis of the Appellate Body’s statement indicates that it does not deny the applicability of the principle per se. Rather, it noted that the principle did not apply generally to a decision to adopt a panel report because such an isolated decision does not amount to a “sequence of acts sufficient to establish a discernible pattern implying the agreement of the parties” to the legal reasoning contained in that panel report. The statement does not exclude the adoption of several panel reports which contain the same interpretation crucial to the finding in each case, from constituting the requisite consistent sequence of acts establishing the agreement of the parties to that interpretation of the GATT. Indeed, a leading example of this approach is the adoption of the principle that the national treatment obligation protects competitive conditions rather than trade volumes. The existence of the principle and its associated rules support the subsequent practice principle as a basis for the precedential effect of previously adopted reports.

VI.

THE COMPETITIVE CONDITIONS PRINCIPLE

One of the most frequently applied principles in panel jurisprudence is the notion that, absent an express intention to the contrary, GATT provisions protect competitive conditions between imported and like domestic products, not expectations of trade volumes. Although this principle is not expressed in the GATT, it is regarded as well-established\(^ {102}\) and practically binding on subsequent panels because it constitutes the ratio decidendi of a long line of consensually-adopted panel reports. Despite its significance, the scope and content of this principle is not immediately apparent from individual panel reports, nor has there been any major discussion of this principle in the secondary literature.

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100. Supra note 17, at 13.

101. See also Jackson, The Legal Meaning of A GATT Dispute Settlement Report, supra note 14, at 157; Petersmann, supra note 44, at 75-76.

A. Defining the Competitive Conditions Principle

The competitive conditions principle originated from Article III of the GATT which is the primary expression of the national treatment obligation. It requires the treatment of imported goods, once they have entered the country and cleared customs, to be no worse than that of domestically produced goods, especially in regard to internal taxes and regulation. Article III's purpose is to prevent "indirect protection,"\(^{103}\) that is, the use of internal taxes and other regulatory measures to undermine negotiated tariff concessions.\(^{104}\) This provision was the subject of the first reported GATT dispute, Brazil—Internal Taxes.\(^{105}\) Brazil conceded that its tax law discriminated between imports and like domestic products. However, since the tax measure had little or no impact on import volumes, Brazil argued that the measure did not "afford protection to domestic production"\(^{106}\) and hence did not nullify or impair benefits\(^{107}\) accruing under Article III:2. This argument was rejected by the contracting parties on the ground that what is relevant is the effect of the impugned measure on trade opportunities. Article III was "equally applicable whether imports from other contracting parties were substantial, small or non-existent."\(^{108}\) This broad interpretation of Article III is the first statement of the principle that the GATT protects competitive relationships, not trade volumes.

The issue arose for consideration again in U.S. - Taxes on Petroleum and Certain Imported Substances.\(^{109}\) The U.S. did not contest the claim by Canada, the EEC, and Mexico that an excise tax imposed at a higher rate on imported petroleum products than on domestic substitutes was inconsistent with Article III:2. Its defense was that the tax differential of 3.5 U.S. cents per barrel was so small that its trade effects were minimal or nil, and hence did not nullify or impair benefits accruing to the complainants under the GATT.\(^{110}\) The panel rejected this, stating that the trade effects of the measure were irrelevant to the question of nullification and impairment. The mere exposure of a product to a risk of discrimination is itself a form of discrimination.\(^{111}\) Article III:2 protects the competitive relationship between imported and like domestic products, not expectations of trade volumes.\(^{112}\) A similar approach was applied in U.S. - Measures Affecting Alcoholic and Malt Beverages where the panel held that

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104. Japan - Taxes on Alcoholic Beverages, Appellate Body Report, supra note 17, at 17. This is consistent with the statements of delegates to the Tariff Agreement Committee at the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment 1947 (EPCT/TAC/PV.10 at 3 and 33).
106. GATT Art. III-1.
107. GATT Art. XXIII.
108. Para. 16 (emphasis added).
109. Supra note 69.
110. Id. para. 5.1.2.
112. Para. 5.1.9.
even if only 1.5 percent of domestic output benefits from the lower tax rate, that
discrimination constitutes a breach of Article III:2.113 The national treatment
obligation is not conditional on a trade effects test nor is it qualified by a de
minimis standard.114

This principle has been applied to Article III:2,115 other paragraphs of Arti-
cle III,116 as well as Articles II,117 XI,118 and XXIII:1(b).119 In each case
panels have referred to earlier pronouncements of the principle as settled law. In
its two most recent reports, adopted July 30, 1997 and September 25, 1997, the
Appellate Body accepted this principle as “well-established” in panel jurispru-
dence.120 GATT provisions are to be interpreted in light of the principle pro-
tecting competitive conditions between imported and like domestic products: absent express intention to the contrary, GATT provisions protect competitive
conditions, not trade volumes. The trade impact of an impugned measure is
irrelevant to the question of nullification and impairment. What is relevant is
the potential impact of the measure rather than the actual consequences for spe-
cific imported products.

B. The Mandatory Nature of the Principle

Given that most rules of international law may, in their application between
states, be modified or dispensed with by agreement between them,121 the ques-

113. Supra note 66, para. 5.6.
114. Id. para. 5.6. See also Japan – Taxes on Alcoholic Beverages, Appellate Body Report,
supra note 17, at 25.
115. Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic
Beverages, supra note 69, para. 5.11; Japan – Taxes on Alcoholic Beverages, Appellate Body Re-
port, supra note 17, at 25; EC – Regime for the Importation, Sale and Distribution of Bananas,
116. Italian Discrimination Against Imported Agricultural Machinery, supra note 103, para. 12;
Canada – Administration of the Foreign Investment Review Act, supra note 53, para. 6.6; U.S. –
Section 337 of the Tariff Act of 1930, supra note 58, para. 5.13; Canada – Import Distribution and
Sale of Certain Alcoholic Drinks by Provincial Marketing Authorities, Mar. 22, 1988, GATT
B.I.S.D. (35th Supp.) at 37, para. 5.6; U.S. - Measures Affecting Alcohol and Malt Beverages, supra
note 66, para. 5.31; U.S. – Measures Affecting the Importation, Internal Sale and Use of Tobacco,
supra note 25, para. 99.
117. EEC- Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related
Animal-Feed Proteins, supra note 111, para. 151; EEC – Import Regime for Bananas, unadopted,
Feb. 11, 1994, DS/38/R, para. 135 (quoted with approval in Argentina – Measures Affecting Imports
of Footwear, Textiles, Apparel and Other Items, supra note 17, paras. 6.29 and 6.46).
118. Panel on Japanese Measures on Imports of Leather, supra note 17, para. 55; U.S. – Taxes
on Petroleum and Certain Imported Substances, supra note 69, para. 5.2.2.
119. Treatment by Germany of Imports of Sardines, supra note 13, para. 9; Other Barriers to
Trade, Mar. 3, 1955, GATT B.I.S.D. (3rd Supp.) at 222, 224; EEC – Production Aids Granted on
Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, unadopted, Feb. 20, 1985,
L/5778, para. 77; U.S. – Trade Measures Affecting Nicaragua, unadopted, Oct. 13, 1986, L/6053,
para. 5.6; EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related
Animal-Feed Proteins, supra note 111, paras. 150-151.
120. Canada – Certain Measures Concerning Periodicals, Appellate Body Report, supra note
80, at 19; EC – Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Re-
port, supra note 115, para. 253. See also India – Patent Protection for Pharmaceutical and Agri-
121. ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW, 1292 (9th ed.
tion arises as to whether parties can contract out of the application of the uncodified \(^{122}\) competitive conditions principle. In *EEC – Payments and Subsidies Paid to Processors of Oilseeds and Related Animal-Feed Protein*, \(^{123}\) the EEC argued that as between the parties that signed it, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII prescribed the appropriate interpretations of those provisions. Pursuant to this, the EEC sought to displace the competitive conditions principle, arguing that Article 8:4 of the Subsidies Code no longer protected competitive conditions but protected expectations of trade volumes. The panel rejected this argument. It noted that previous panels have consistently applied the competitive conditions principle, and held that any agreement between the parties must be interpreted in conformity with it. \(^{124}\)

This decision has two important implications. First, it demonstrates that the competitive conditions principle is so entrenched in panel jurisprudence that it is practically binding on subsequent panels as well as the contracting parties. Second, it sheds light on the legal status of panel-created principles. Whilst it is premature to draw analogies between these principles and the rules of *jus cogens*, \(^{125}\) the *EEC Oilseeds* decision suggests that derogation by agreement of the disputants is not permitted from the competitive conditions principle. A definitive answer awaits the outcome of a case where the disputants agree on terms of reference which expressly prohibit the panel from applying the principle. In light of the compulsory jurisdiction of panels, \(^{126}\) prohibiting derogation from the competitive conditions principle may be imposing too strict a discipline on a system with “the most shallow habits of obedience.” \(^{127}\) The viability of such a prohibition depends on the rationale and credibility of the principle from which derogation is not permitted.

**C. The Rationale of the Principle**

Article III:1, the provision from which the competitive conditions principle was first derived, provides that internal taxes and other regulations should not be applied to imported or domestic products “so as to afford protection to domestic production.” The ordinary meaning of the phrase “so as to afford protection” implies some causal connection between the impugned measure and the protective effect on domestic production. The competitive conditions principle as developed in this paper is distinguished from the *prima facie* breach concept codified in Article 3.8 of the DSU. Article 3.8 provides that where an infringement of a GATT provision is shown, there is a presumption that the breach has nullified or impaired benefits under the GATT. It is essentially an evidential rule which applies only to violation complaints under Article XXIII:I(a). The competitive conditions principle is a substantive principle of law which applies whether or not a violation of the GATT has occurred.

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\(^{123}\) *Supra* note 111.  

\(^{124}\) *Id.* para. 154.  

\(^{125}\) Article 53 of the Vienna Convention on the Law of Treaties provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law. See also, JENNINGS & WATTS, *supra* note 121, at 1292; PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 183 (1995); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 21 (1973).  

\(^{126}\) DSU art. 23.2(a).  

\(^{127}\) HUDEC, *ENFORCING INTERNATIONAL TRADE LAW*, *supra* note 17, at 358.
XXIII:1, the provision by which disputes are submitted to the panel process. It provides that a party may bring a complaint before the contracting parties where any benefit accruing to it "is being nullified or impaired" by the conduct of another party. The reasons for which panels have rejected this textual interpretation for the broader principle protecting competitive relationships rather than trade volumes sheds light on their interpretive approach.

1. Security and Predictability

Having recognized the importance of security and predictability in trade relations in efforts to achieve the objectives of the GATT, panels rejected the above textual interpretation because it "would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III." The competitive conditions principle was required "not only to protect current trade but also create the predictability needed to plan future trade." The importance panels attach to the predictability of competitive conditions indicates that panels are not merely resolving each dispute as commercial arbitrators. Rather, they are conscious of their role in achieving the wider objective of security and predictability in international trade relations.

2. Administrative Necessity

Second, the competitive conditions principle provides an example of the panels' pragmatic approach in interpreting the GATT. Requiring proof that the impugned measure caused actual detriment imports would render the GATT unadministrable. Evaluating the trade effects of a measure would require speculation on consumer purchasing behavior and production plans of firms in the hypothetical situation where the impugned measure is absent. Whilst some parties have provided panels with econometric analyses of the effects of impugned measures, the reliability of such analyses is questionable. U.S. -

128. U.S. Manufacturing Clause, supra note 17, para. 39; Japan - Measures on Imports of Leather, supra note 17, para. 55; EEC - Panel on Newsprint, supra note 17, para. 52; Norway - Restrictions on Imports of Apples and Pears, supra note 17, para. 5.6; EEC - Import Regime for Bananas, supra note 117, para. 135; Japan - Taxes on Alcoholic Beverages, Appellate Body Report, supra note 17, at 34; Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, supra note 17, para. 6.29.


130. Panel on Japanese Measures on Imports of Leather, supra note 17, para. 55; U.S. - Taxes on Petroleum and Certain Imported Substances, supra note 69, para. 5.2.2; EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, supra note 111, para. 150; EEC - Import Regime for Bananas, supra note 117, para. 135 (quoted with approval in Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, supra note 17, para. 6.29).

131. DSU Art. 3.2.


133. For example, Canada in Canada - Import Restrictions on Ice Cream and Yoghurt, supra note 66, provided the panel with econometric analysis to support its claim that in the absence of government restrictions, production would be higher by 31 to 39 percent. The panel did not have to decide the issue on the basis of the analysis.
Taxes on Petroleum and Certain Imported Substances\textsuperscript{135} best illustrates the problem. The U.S. imposed an excise tax on imported petroleum at a higher rate than on like domestic products. The tax discrimination was 3.5 U.S. cents, or about 0.19 percent of the purchase price. It had no effect on prices as exporters absorbed the extra amount. The U.S. argued that the minimal trade impact could not constitute a violation of Article III:2. The panel rejected the argument noting that the U.S. could bring the tax on petroleum in conformity with the GATT in a number of ways: raising the tax on domestic products, lowering the tax on imports, or fixing a new common tax rate for both imported and domestic products. Each solution would have different trade results.\textsuperscript{136} Hence, it is logically impossible to determine the difference in trade impact between the impugned tax and one consistent with the GATT. As a result, it is impossible to determine the trade impact resulting from the non-observance of Article III:2.\textsuperscript{137} Therefore, panels have taken a pragmatic approach to the national treatment obligation: the GATT cannot be interpreted as protecting trade volumes or individual producers; administrative necessity requires that it only protects the competitive conditions between imports and like domestic products.

3. STATE SOVEREIGNTY

Prior to the DSU reforms, the establishment of panels and adoption of reports required a consensus among the contracting parties. This meant that panels were conscious of the need for their reasons to be politically acceptable in order for the reports to be adopted. A manifestation of this awareness is the argument that a state's liability to claims under the GATT should not depend on factors which it does not control. Arguably, this line of reasoning is not unique to the GATT system but is merely an application of the general principle that a government cannot be liable for an injury which it did not commit, or for not preventing a loss when it is out of its power to prevent it.\textsuperscript{138} In any event, it is impossible to accurately determine the extent to which a decline in trade is attributable to the impugned measure as opposed to other factors such as economic conditions, changes in consumer tastes and product quality. Since governments cannot predict with precision the trade impact of their measures, making liability dependent on whether a measure has caused a decline in imports would expose them to liability dependent on factors beyond their control.\textsuperscript{139}


\textsuperscript{135} Supra note 69.

\textsuperscript{136} This is due to the different elasticities of demand for imports and domestic substitutes. The elasticity of demand measures the responsiveness of consumer demand to a change in price.

\textsuperscript{137} U.S. – Taxes on Petroleum and Certain Imported Substances, \textit{supra} note 69, para 5.1.9.

\textsuperscript{138} Corfu Channel, \textit{supra} note 94, at 18 and 52; \textit{Bin Cheng, General Principles of Law As Applied By International Courts and Tribunals} 218 (1953).

\textsuperscript{139} EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, \textit{supra} note 111, para. 151.
VII.
APPLICATIONS OF THE COMPETITIVE CONDITIONS PRINCIPLE

The competitive conditions principle is not merely a subsidiary means of filling gaps in the GATT. It has provided a coherent basis for the incremental development of specific rules directed at achieving greater certainty in competitive conditions. This section examines three of these rules.

A. Mandatory and Discretionary Legislation

By making a violation of the GATT dependent on a change in competitive conditions rather than on a change in trade volumes, the competitive conditions principle renders the mere exposure of a product to a risk of discrimination itself a form of discrimination.\(^{140}\) This has given rise to the rule that legislation mandating the executive to take action inconsistent with the GATT is a violation whether or not the legislation has been applied, whereas legislation merely giving the executive the possibility to act inconsistently with the GATT would not, by itself, constitute a violation. The security and predictability which the competitive conditions principle seeks to achieve cannot be attained if contracting parties could not challenge legislation mandating a breach of the GATT until administrative acts implementing it had actually been applied to their trade.\(^{141}\)

The importance of this rule is that it permits parties to challenge the GATT-consistency of mandatory legislation as a means of preventing adverse effects, not merely to obtain redress \textit{ex post}.\(^{142}\)

The rule was first enunciated in \textit{U.S. – Taxes on Petroleum and Certain Imported Substances},\(^{143}\) where the GATT-consistency of the U.S. Superfund Amendments and Reauthorization Act 1986 ("the Superfund Act") was challenged. The Act imposed a tax on certain imported substances such as petrochemicals and inorganic chemicals. However, the tax was not to take effect until two years after the date of the challenge. The U.S. objected to the examination of the tax because it had no immediate effect on trade and hence could not cause nullification or impairment under Article XXIII. The panel rejected this argument, noting that the GATT not only protected current trade, but was also intended to create the predictability needed to plan future trade. This objective cannot be achieved if parties could not challenge existing legislation mandating a breach of the GATT until the administrative acts implementing it had actually been applied to their trade.\(^{144}\)

In the same case, the panel considered the GATT-consistency of the Act’s enforcement provision. The Act required importers to provide sufficient infor-

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\(^{140}\) \textit{Id.} para. 151; \textit{U.S. – Measures Affecting the Importation, Internal Sale and Use of Tobacco}, \textit{supra} note 25, para. 95.

\(^{141}\) \textit{U.S. – Taxes on Petroleum and Certain Imported Substances}, \textit{supra} note 69, para. 5.2.2.

\(^{142}\) \textit{U.S. – Section 337 of the Tariff Act of 1930}, \textit{supra} note 58, para. 5.13; \textit{EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins}, \textit{supra} note 111, para. 151; \textit{Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items}, \textit{supra} note 17, para. 6.45.

\(^{143}\) \textit{Supra} note 69.

\(^{144}\) \textit{Id.} para. 5.2.2.
mation regarding the chemical inputs of taxable substances to enable the authorities to determine the tax liability. Failure to furnish such information resulted in a penalty of 5 percent of the appraised value of the imported substance. The Act permits the Secretary of the Treasury to prescribe by regulation, in lieu of the 5 percent rate, a rate which would equal the amount that would be imposed if the substance were produced using the predominant method of production. No such regulation had been issued at the time of the panel decision. The panel considered that the penalty of 5 percent would be inconsistent with the national treatment principle in Article III:2 because it would impose a higher rate on the value of imported substances. However, unlike the provision imposing the tax itself, the provision imposing the penalty was not mandatory. It provided the tax authorities with the possibility of avoiding the need to impose the penalty by issuing regulations in place thereof. Thus, the panel held that the existence of the provision as such does not constitute a violation of the GATT. 145

Subsequent panels have frequently and uniformly applied this two-limbed rule. 146 Like the general principle protecting competitive conditions, this rule originated from an interpretation of Article III, but has since been applied to GATT obligations generally. 147 It is now well established that legislation mandating GATT-inconsistent action is a violation per se, whilst legislation conferring a discretion on the executive to take GATT-inconsistent action can only be challenged if the legislation has been implemented. Whether legislation is mandatory or discretionary is a matter of construction. 148 "Mandatory legislation" imposes on the executive authority requirements that cannot be modified by executive action. 149 In Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, 150 the U.S. argued that Thai legislation providing for a higher tax ceiling (80 percent as opposed to 60 percent) on imported cigarettes was inconsistent with the national treatment obligation. The panel rejected this because the tax ceilings referred to the maximum rate that could be imposed. The authorities could apply the legislation in a GATT-consistent way. Hence, the maximum rates that could be levied under the legislation need not be non-

145. Id. para. 5.2.9.
149. U.S. – Taxes on Petroleum and Certain Imported Substances, supra note 69, para. 5.2.2; U.S. – Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil, supra note 66, para. 6.13.
150. Supra note 146.
discriminatory. Where the legislation is ambiguous and capable of a range of interpretations, violation *per se* is avoided if one of the possible interpretations allows the executive to act consistently with the GATT.

Whilst the first limb of this rule relating to mandatory legislation is clearly consistent with the competitive conditions principle, it is questionable whether the second limb relating to discretionary legislation is also consistent. A corollary to the principle is that the mere exposure of a product to a risk of discrimination is itself impermissible discrimination under Article III. Legislation conferring a discretion on the executive to discriminate against imports in a GATT-inconsistent way exposes imports to a risk of discrimination, whether or not the discretion has been exercised. The second limb, which allows such legislation to stand absent a GATT-inconsistent exercise of the discretion, creates uncertainty over future competitive conditions and hence is inconsistent with the object of the GATT. Certainty requires that discretionary legislation be subject to challenge whether or not the discretion has been exercised.

**B. Unfilled Quotas: Violation Per Se**

Article XI prohibits the use of import restrictions such as quotas and non-tariff barriers. It is designed to bring about a general elimination of quantitative restrictions which, in effect, block the functioning of the price mechanism. An interpretive rule arising from the competitive conditions principle is that the very existence of an import quota is an infringement of the GATT whether or not the quota has been filled. In *Japan—Measures on Imports of Leather*, the panel accepted the U.S. argument that Japanese restrictions on imports of certain semi-processed and finished leather were inconsistent with Article XI. Japan's defense was that the existence of the quotas themselves did not necessarily mean that benefits accruing to the U.S. had been nullified or impaired under Article XXIII. Japan pointed out that U.S. exporters had not filled the large quota opened for them and hence the quota could not be said to have limited U.S. exports to Japan. Indeed, the panel found that U.S. exports of leather to Japan had in fact increased considerably both in percentage terms and in absolute figures in the period under consideration. However, the panel held that the mere existence of a quantitative restriction on imports is a nullification or impairment whether or not it has actually impeded imports. This is a concrete application of the general principle that the GATT protects competitive conditions, not trade...

151. *Id.* para. 84.
155. *Id.* para. 44.
156. *Id.* para. 53.
157. *Id.* para. 55.
C. Rejection of Balancing of Trade Effects

A corollary to the competitive conditions principle is the rejection of the argument that in deciding whether a nullification or impairment has occurred, more favorable treatment to some products can be balanced against less favorable treatment to others.

The rule was first stated in U.S. – Section 337 of the Tariff Act of 1930. In the U.S., all claims of patent infringement against domestic products were dealt with in federal district courts. Section 337 set up a separate procedure, before the United States International Trade Commission, applicable only to imported products alleged to infringe a U.S. patent. Infringement claims against imports could also be brought in a federal court. However, patent owners often preferred Section 337 because it was faster and provided more sweeping border remedies. The EEC claimed that this meant that imports were receiving less favorable treatment than domestic goods and hence violated Article III:4 of the GATT. In defense, the U.S. argued that any unfavorable treatment of imports was offset by more favorable elements of treatment relating to differences in the elements of the cause of action, procedure and the possibility that relief under Section 337 might be modified on public policy grounds, which possibility did not exist in federal district courts. Rejecting this argument, the panel held that the national treatment obligation in Article III:4 has to be understood as applicable to each individual imported product. The panel rejected any notion of balancing more favorable treatment of some imports against less favorable treatment of other imports. This rule has been reaffirmed and extended to other GATT provisions by subsequent panels and the Appellate Body. Similarly, more favorable treatment of one contracting party cannot be cited as justification for less favorable treatment of another.

If the balancing of trade effects was allowed, it would entitle a party to derogate from its obligation in respect of one product, or in respect of one party, on the ground that it accords more favorable treatment in some other case, or to some other party. Balancing trade effects in deciding whether a violation of the GATT has occurred implicitly accepts the proposition that liability depends on proof that the impugned measures caused a decline in trade volumes. Such a
rule would prompt the same objections which gave rise to the competitive conditions principle. It would also create uncertainty over the competitive conditions between imports and like domestic products and thus defeat the security and predictability desired by contracting parties. Therefore, it is a corollary to the competitive conditions principle that in deciding on whether a nullification or impairment has occurred, more favorable treatment to some products cannot be balanced against less favorable treatment to others.

It flows from this that an imported product need not be treated less favorably than all domestic equivalents for a violation of Article III to occur. It is sufficient that imports are treated less favorably than some domestic equivalents. Thus, in U.S. – Measures Affecting the Importation, Internal Sale and Use of Tobacco, under the statutorily mandated averaging formula for calculation of the impugned tax, the tax on imported tobacco will always be higher than one type of domestic tobacco and lower than another type of domestic tobacco where there is any price differential between the two types of domestic tobacco. This does not prevent it from being in violation of the GATT.

VIII. CONCLUSION

This paper has shown that although panel interpretations of the GATT are not binding on subsequent disputes, in practice, they have significant precedential value. For the subsequent practice principle to apply to a particular line of legal reasoning, that reasoning must form the ratio decidendi of a sufficient number of consensually-adopted panel reports so as to constitute a "concordant, common and consistent" sequence of acts sufficient to establish the agreement of the parties to that reasoning. This practice provides greater certainty as to the GATT-consistency of government regulations, thus creating the conditions for firms to invest in exploiting new market opportunities created by the WTO Agreement. Further, the more precise knowledge of how future disputes will be resolved assists states in the conduct of their trade relations, and promotes acceptance of the stricter discipline of the rule-based system.

Whilst it is tempting to draw analogies between the role of precedent in panel jurisprudence, and the common law doctrine of stare decisis or the civil law concept of jurisprudence constante, it is premature to do so. With only seven Appellate Body reports adopted so far, the Appellate Body’s impact on the precedential value of panel reports remains uncertain. Without any limitation on the right to appeal from issues of law, panel interpretations of the GATT are likely to decline in significance whilst Appellate Body interpretations are significant.

165. Supra note 25, para. 95-98.
166. Under the jurisprudence constante model, the practice of courts does not become a source of law until it is definitely fixed by the repetition of consistent precedents on a single point. This is contrasted with the common law approach where courts are more likely to rely on a single case as sufficing to establish a legal principle. See DAVID & DE VRIES, supra note 64, at 113-121; SHAHABUDDEEN, supra note 19, at 10-11.
likely to command greater respect by panels which are now subject to the Appellate Body’s legal filter. However, the precise value of previously adopted reports is not crucial in itself. As Hersch Lauterpacht observed, “the power of judicial precedent is in the long run not greater than the inherent value of the legal substance embodied in it.”

In this regard, this paper has analyzed the scope and content of the competitive conditions principle. The principle and its related rules have been directed at achieving security and predictability in international trade relations. More importantly, they have sought to achieve this, not through accepting narrow interpretations which restrict trade, but by construing GATT obligations with a bias in favor of open markets. This is most evident in the imposition of liability for GATT-inconsistent trade restrictions whether or not they have had an impact on trade flows. Such an approach has the merit of recognizing what economists since the time of Adam Smith have understood: free trade promotes the efficient allocation of resources and makes possible higher standards of living across nations.
