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The crucial role of a WTO appeals court

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Imagine there were no Supreme Court, and questions about fundamental issues such as free speech, religious freedom and equal protection were left up to various lower courts to decide. One court might rule one way; a different court might rule another way. There would be no certainty as to what the law meant and what policies were in place.

In domestic legal systems, the highest court has a special role in interpreting the nation's laws. The “precedents” it sets through its interpretations do more than simply resolve a dispute. They also create a body of law for lower

courts to apply and for the high court itself to follow in the future. This reliance on precedent provides certainty and foreseeability to individuals, businesses and other domestic actors within the society.

In international law, there is no single high court and no law of precedent. Even so, there is an informal practice of taking into account past rulings to help ensure certainty and foreseeability for all those who may be affected by rulings, whether they are formal parties to them or not.

The role of precedent is one of the causes of the current crisis involving the Appellate Body, the highest court of appeal for the World Trade Organization. The United States is blocking appointments of new judges to fill vacancies on the Appellate Body. This threatens to prevent the tribunal from hearing new appeals and thus threatens to undermine the continued functioning of the WTO dispute settlement system. One of the reasons the United States cites as a justification for its stonewalling of new judicial appointments is what the U.S. alleges is the Appellate Body's treatment of its past rulings as "binding precedent," which, in the U.S. view, is not appropriate for the world trading system.

In fact, this allegation is unfounded. Since its creation in 1995, the Appellate Body has been aware of the potential for controversy over its use of its previous rulings, and it has always emphasized that they are not "binding precedents." In an early case, the tribunal said that past reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute," but it also explained that these reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute."

The U.S. objections arise in response to a later case, where the Appellate Body said: "Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, *absent cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." It is through this language, according to the United States, that the Appellate Body elevated its past cases to the level of

“binding precedent,” rather than simply being “persuasive,” the preferred U.S. standard.

We think the United States is reading too much into these words. In our view, the use of the phrase “absent cogent reasons” was essentially a restatement of the position previously expressed by the Appellate Body that, where the legal issues are the same, it is “appropriate” and to be “expected” that panels will rely on Appellate Body reasoning and rulings in previous disputes. In fact, in a recent ruling, a WTO panel (in effect, the lower court) found “cogent reasons” not to follow the Appellate Body’s reasoning in a past case.

Nevertheless, the Trump administration has cited the Appellate Body’s approach to reliance on past cases as one reason for blocking new appointments to the Appellate Body. Without a resolution to this and several other issues, the Appellate Body may soon cease to function. That would be a significant loss for the world trading system. The “security and predictability” provided by an Appellate Body independent of political pressures and intimidation is crucial to the continued success of the WTO dispute settlement system.

A court system, including an appellate court, that offers interpretations to guide future cases is extremely valuable. No one claims perfection for the Appellate Body or thinks its rulings are set in stone, unchangeable for all time. All human institutions are fallible, and all must adapt and learn from experience.

Yet the value of an appellate court for resolving WTO disputes is indisputable, and all necessary efforts must be made to maintain the independence and the very existence of the Appellate Body. The role of past cases has always been vexing for some, but the differences in viewpoint, between “cogent reasons” and “persuasiveness” are not actually all that great, and a compromise should be possible through a reasoned discussion of the issues in good faith.

Before the WTO, when panels judging disputes operated without the possibility of an appeal, panel reports often diverged on the meaning of core principles, creating confusion in the trading system. **Through its clarifications of treaty obligations in WTO dispute settlement, the Appellate Body has brought more consistency, and thus more certainty and foreseeability, to the meaning of WTO law and, thus, to the smooth and rising flow of trade in the world everywhere and every day. Forging a consensus on the meaning of precedent in the WTO can help end the current crisis.**

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