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The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)

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THE MYTH ABOUT STARE DECISIS AND INTERNATIONAL TRADE LAW *(PART ONE OF A TRILOGY)*

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[T]here is *no better way* for a lawyer to get at the heart of a legal system than to ask how it handles precedent.[1]

[T]he doctrine of *stare decisis* is not accepted as an element of international law itself. *But this is insufficient* having regard to the proliferation of authoritative international judicial decisions and the natural tendency for later decisions to follow or distinguish earlier cases without overcharging the difficult question of the "sources" of the law with controversial theories of judicial precedents and their binding force.

This process has been achieved *without the development of any theory of the binding force of judicial precedents or of a hierarchy of precedents*, theories which would probably be *unacceptable* to States as a matter of State practice in the present condition of international law, and which are *not necessary* for the conduct of international relations.[2]

I. THE PROBLEM: MYTH VERSUS REALITY

A. THE MONSTROUS DISCONNECT BETWEEN MYTH AND REALITY

There is an ineluctable—and remarkably rapid—change occurring in the international legal order.[3] It is a movement away from the old-

1. D. Neil MacCormick & Robert S. Summers, *Introduction*, *in* INTERPRETING PRECEDENTS 1 (D. Neil MacCormick & Robert S. Summers eds., 1997) (emphasis added).

2. 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, at 1651-52 (3d. ed. 1997) (emphasis added).

3. *See generally* Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 776 (1996-97) (dis-

fashioned, continental-style approach[4] to international dispute resolution, and towards the *Americanization* of adjudicatory mechanisms. The fact that the World Trade Organization's ("WTO") Appellate Body increasingly functions not simply like a court, as distinct from an arbitral tribunal, but like an *American* court, is one aspect of this more general trend in the global economy of the new millennium. Like it or not, the distinction between judges as bureaucrats/arbitrators, on the one hand, and as lawmakers/legislators, on the other hand, is crumbling at the WTO.[5] A most obvious symptom

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cussing the growing demand by states to regulate their trade relations not in a diplomatic-political framework, but through legal norms and enforcement procedures that significantly limit their sovereignty); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389, 391 (1995) (arguing that the Uruguay Round resulted in a decisive move toward a more adjudicatory, legalistic approach to international trade regulation).

4. For an excellent treatment of this approach, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION ch. VI (2d ed. 1985). Professor Merryman offers a clear picture of the civil law judge:

> The picture of the judicial process [in civil law systems] that emerges is one of fairly routine activity. The judge becomes a kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows. In the uncommon case in which some more sophisticated intellectual work is demanded of the judge, he is expected to follow carefully drawn directions about the limits of interpretation.
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> The net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one.

Id. at 36. However, I contend it is inaccurate, and increasingly so, to apply this image to WTO adjudicators.

5. Perhaps it is also crumbling at the International Court of Justice. *See infra* Part III.A.3; SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 91-92 (1984). After recounting the black letter rule that "there is no place in international law for anything approaching the formal Anglo-American doctrine of the binding force of a judicial precedent of a court of record, the so-called doctrine of *stare decisis*," Rosenne acknowledges that "obviously great weight attaches to the pronouncements of the World Court, and both it and other standing tribunals manifest a natural and strong tendency to follow decisions of the World Court and their own decisions where relevant, without creating any theoretical obligation that they must do so." ROSENNE, *supra*, at 91-92 He concludes that the continental and Anglo-American approaches to case law may "in the long run . . . be a distinction

of this decay is the Appellate Body's use of precedent.[6] Yet, we have missed this symptom and trend entirely.

The egregious symptom, to be specific, of the Americanization of the Appellate Body is a monstrous disconnect between beliefs about how that Body adjudicates, or at least ought to be adjudicating, cases, and how it actually goes about finding and interpreting international trade law. On the one hand, we believe in a myth[7] that the doctrine of stare decisis does not exist or operate in WTO adjudication, that it was excluded from the pre-Uruguay Round General Agreement on Tariffs and Trade ("GATT") dispute settlement system, and continues to be barred from the post-Uruguay Round WTO system.[8] On the other hand, there is now a de facto doctrine of stare decisis[9] in inter-

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without a difference." *Id.*

6. I am using the term "precedent" throughout this trilogy to mean a prior decision, or a body of prior decisions, that functions as a model for subsequent decisions. It is, in specific, the holding or *ratio decidendi* (defined *infra* note 8) of the prior decision or decisions that has significance for future cases. *See generally* MacCormick & Summers, *supra* note 1; Geoffrey Marshall, *What is Binding in a Precedent*, *in* INTERPRETING PRECEDENTS, *supra* note 1, at 503. Later, I shall take up the issue of whether a distinction between a "binding" and "non-binding" model is tenable. *See* Part IV *infra*.

7. I am using the word "myth" throughout in the ordinary, common sense meaning of "a widely held but false notion." THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 957 (2d ed. 1995). Perhaps I could have selected the word "legend," which is "a popular but unfounded belief[,] . . . a myth." *Id.* at 817. However, I suspect that attendant to a "legend" is sometimes a kernel of truth, whereas this is not so with a "myth." Because my thesis is that the belief that stare decisis does not operate in the international trade arena is untrue, using the metaphor of myth better captures my intention.

8. I hesitate to dub this myth a "rule against precedent," or a "denial," or "rejection" of precedent. These stronger terms might imply that an affirmative decision was taken at some early point in GATT history, following a careful, reasoned debate, by the contracting parties, to banish the doctrine from international trade law. As demonstrated in Parts II and III below, that was not the case.

9. "Stare decisis" means "to stand firmly by things that have been decided. . . ." RUSS VERSTEEG, ESSENTIAL LATIN FOR LAWYERS 159 (1990). It is the shortened phrase from a Latin maxim "*stare decisis et non quieta movere*." The maxim means "to stand firmly by things that have been decided (and not to rouse/disturb/move things at rest)." *Id.* In a behavioral sense, therefore, stare decisis means that a judge must decide a case at bar in accordance with any applicable precedent that cannot be distinguished on valid grounds. *See* 2 SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 584 (1986).

national trade law. It ought to be, in my view, a de jure doctrine. In brief, there is a body of international common law of trade emerging as a result of adjudication by the WTO's Appellate Body. We have yet to recognize, much less account for, this reality in our doctrinal thinking and discussions. Our intellectual rigidity precludes us from admitting openly that the holdings[10] of the Appellate Body—and, for

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10. I am using the word "holding" in the conventional sense as the legal principle to be drawn from a judge's opinion. *See* BLACK'S LAW DICTIONARY 731 (6th ed. 1990). I regard the word "ruling" as interchangeable with the word "holding."

Sometimes the Latin term "*ratio decidendi*" is used in lieu of the word "holding," and I shall do so on occasion. *See, e.g.*, D. Neil MacCormick & Robert S. Summers, *Further General Reflections and Conclusions*, *in* INTERPRETING PRECEDENTS, *supra* note 1, at 531, 537 (equating "*ratio decidendi*" and "holding," as distinct from *obiter dicta*). There is controversy as to exactly what "*ratio decidendi*" means, and Professor Marshall of Oxford provides an excellent summary of the issues. *See* Marshall, *supra* note 6, at 503, 510-13. *Black's Law Dictionary* defines "*ratio decidendi*" as "[t]he ground or *reason* of decision," and as "[t]he point in a case which determines the judgment." BLACK'S LAW DICTIONARY, *supra*, at 1262 (emphasis added). Similarly, *ratio decidendi* has been defined elsewhere as the rationale, or explanation, in support of the holding. *See* VERSTEEG, *supra* note 9, at 156. These definitions seem to follow from John Austin's interpretation that "law made judicially must be found in the general grounds or *reasons* of judicial decisions. . . . The general *reasons* or principles of a judicial decision, as thus abstracted from any peculiarities of the case, are commonly styled, by writers on jurisprudence, the *ratio decidendi*." JOHN AUSTIN, LECTURES ON JURISPRUDENCE secs. 907-08, at 97 (1875) (emphasis added).

However, I find these definitions risk conflating the holding and reasoning of a case simply because they use the words "reason" or "rationale." Accordingly, I think the better definition of "*ratio decidendi*" is offered by Professor Marshall. He says it is "what has been decided that is extracted from the decision," i.e., the principle or rule of law, or the authoritative element, to be extracted from a case. Marshall, *supra* note 6, at 508. Professor Marshall goes on to suggest different shades of meaning associated with the term, for example, a rule of law in the light of material facts in a case that is laid down or followed, that a court believes itself to be laying down or following, or that a court ought to be laying down or following. *See id.* at 506-07. He also rightly acknowledges the problems created by this approach. For example, is the *ratio decidendi* a general principle flowing from and consistent with the past, or is it a principle established by a particular case? *See id.* at 511. Is the *ratio decidendi* the principle the deciding judge intends to lay down in a case, or is it the principle that a judge in a later case concedes that the first judge laid down? *See id.* at 512.

The above definition of "holding" is not universally followed, however, and I could just as easily take up a slightly definition offered by Professor Summers. He defines the holding as "the portion of an opinion in which the court rules on the issue (or issues) necessary to the decision." Robert S. Summers, *Precedent in the*

that matter, panel—reports actually are a source of international law. Worse yet, our narrow perspective precludes us from seeing that, as a normative matter, they ought to be a source of international law. Sadly, we remain mired in an orthodox, but nearly otiose, distinction between "binding" and "non-binding" precedent. It is high time to

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United States (New York State), *in* INTERPRETING PRECEDENTS, *supra* note 1, at 355, 383. Yet, he goes on to say that "[t]he holding of a case is not only different from the rationale . . . , but is also distinct from any general rule or principle derivable from the holding. Whereas a holding is a specific resolution of a specific issue, a rule or principle is a generalization which may be derived from the holding." *Id.* at 386. Put differently, Professor Summers distinguishes between the "holding" and "*ratio decidendi*" of a case.

Thus, I would be ignoring reality by failing to admit that the words "holding" and "*ratio decidendi*" are mildly contested concepts, and that their relationship between these concepts is not fixed. At the same time, it is quite clear that in either the conventional or Professor Summers' sense of the word, a "holding" is to be distinguished from any *obiter dictum* in a case. It is also obvious that a holding may be stated in broad terms, or narrowly confined to the facts of a case. It may be explicitly stated, or somewhat difficult to detect. In some cases, it may be unclear whether a court's statement is an alternative holding, i.e., a resolution of a second issue that is unnecessary given the resolution of the first issue, or merely *dicta*. These issues are not relevant to this analysis, but Professor Summers provides an able discussion of them in his work. *See generally* Summers, *supra*.

Technically, the outcome of a WTO panel or Appellate Body proceeding is a "recommendation," or series of "recommendations." *See, e.g.*, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 19, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU], *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS–DOCUMENTS SUPPLEMENT 419 (1996) [hereinafter DOCUMENTS SUPPLEMENT] (concerning panel and Appellate Body "recommendations"); *id.* art. 26 (stating that a panel "may only make rulings and recommendations" in non-violation nullification and impairment cases). As one scholar correctly points out, disputes never end in anything more than a "recommendation," and "[t]here is no case on record where a dispute would have ended in a 'ruling.'" Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, *in* 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT Pt. 2, at 31 (Pierre Pescatore et al. eds., 1998). However, the term "recommendation" is semantically weak. *See id.* at 31. It suggests, perhaps misleadingly, that the losing WTO Member has no obligation to comply with the "recommendation." The very term calls into question the binding nature of the outcome on the parties to the dispute. Moreover, the terms "decision," "ruling," and "holding" are quite commonly used in international trade parlance interchangeably with the term "recommendation." I shall proceed in a likewise manner, cognizant of the technical imprecision associated with using the terms as synonyms.

"come clean" about what is really happening at the WTO and adjust our doctrinal thinking, and the doctrine itself, accordingly.

It is a tall order for me to advance this entire thesis at once. I do not suggest it can be done adequately, much less thoroughly and persuasively, in the space of one article. Therefore, I will develop the thesis through a trilogy of articles, which this piece commences. Here, I confine myself to three issues. First, what is the myth about precedent in international trade law, and international law more generally, and where is that myth "written"? Second, what are the origins of the myth? Third, does the myth—particularly the language of the myth—make sense? That is, on what conceptual distinction does the myth rest, and is this distinction appropriate?

My argument in this article responds to each of these questions. First, as argued in Part II, the myth is that the doctrine of stare decisis is absent from the GATT-WTO system. In other words, in GATT-WTO adjudication, prior decisions have no official or formal binding effect on subsequent cases involving the same or similar legal or factual issues. However, locating this myth—that is, pinpointing exactly where the belief is recorded—poses some challenges. This is in large part because secondary sources in international trade law are a bit of an intellectual cul-de-sac.

Second, as argued in Part III, the myth rests in large part on a curious link between the 1948 Charter for an International Trade Organization ("ITO"), on the one hand, and the International Court of Justice ("ICJ") and its predecessor, the Permanent Court of International Justice ("PCIJ"), on the other. The myth also rests on the influence of the civil law tradition, and perhaps on the culture among legal scholars. These origins, most notably public international law[11] jurisprudence and the civil law tradition quintessentially expressed in France, are impure.

Third, as argued in Part IV, upon careful analysis, the language of the myth does not make a great deal of sense. The myth relies on a distinction between "binding" and "non-binding" precedent. In the

11. By using the modifier "public," I do not mean to endorse the distinction between "public" and "private" international law. To the contrary, I am very much in accord with the view that this traditional distinction is breaking down. I use the word "public" only to identify this critical specialty clearly in relation to international trade law.

house of intellect, there are many paralyzing distinctions. It is not too much of an overstatement to say this is one such distinction that has rendered the problem poorly understood, even insoluble. We ought to disabuse ourselves of this notion. *All precedent now in the WTO dispute settlement system is binding. The only real question is whether it is binding in a de facto or de jure sense.* Thus, I conclude by proposing a distinction between de facto stare decisis and de jure stare decisis. The new distinction, I contend, will help us stop chattering away and using terms with no precise meaning or bearing to reality.

Parts II through IV of the present Article, taken together, explain why I call the non-existence of the doctrine of stare decisis in the GATT-WTO system a "myth." First, its origins are impure; upon inspection, the origins do not provide a solid foundation for an exclusion of the doctrine. Second, the conventional belief that stare decisis does not operate in the context of international trade law rests on language relating to "binding" and "non-binding" precedent that, upon reflection, is highly problematical. Part V of the Article summarizes my discussion.

There is yet a third reason—an empirical reason—to dub the absence of the doctrine a "myth." If we read even a handful of Appellate Body reports fairly, and draw reasonable inferences therefrom, we witness the doctrine in operation. The third reason is parasitic upon the distinction proposed in the context of the second reason, that between "de facto" and "de jure" stare decisis.

Further, the third reason is the focus of the next Article of the trilogy, which makes use of this distinction. This part is entitled *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, and is to be published in the *Florida State University Journal of Transnational Law and Policy* as the 1999 Ball Chair Distinguished Lecture.[12] In the second Article, I identify methodological issues associated with the demonstration of de facto precedents, and then proceed to identify several lines of precedent in major decisions of the WTO Appellate Body. These lines of precedent concern key procedural issues, such as requirements for a com-

12. Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 1 (forthcoming Dec. 1999) (manuscript on file with author).

plaint and judicial economy, and important substantive issues, such as the interpretation of GATT Article XIII. I argue these lines illustrate the operation of a de facto doctrine of stare decisis. I also suggest they do not yet reflect what Karl Llewellyn so eloquently called in *The Bramble Bush* the "Janus-faced" nature of precedent,[13] nor do they yet reveal much about the factors that might cause differences among the normative force of de facto precedents.

The final piece in the trilogy, *The Power of the Past: Toward De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, is scheduled for publication in the *George Washington Journal of International Law and Economics*.[14] There, I argue that the de facto doctrine of stare decisis currently operating in WTO adjudication ought to be replaced with a de jure doctrine of stare decisis. In other words, we ought to amend the Uruguay Round Agreement Establishing the WTO ("WTO Agreement")[15] and Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU") to include Appellate Body reports as a source of international trade law. I do not suggest these reports ought to be a source of municipal law, as that would be far too radical an infringement on sovereignty for WTO Members to accept. I do, however, argue there are several compelling rationales in favor of adopting a de jure stare decisis regime at the WTO. These rationales include meeting party expectations; increasing certainty, transparency, harmonization, and fairness; reducing transactions costs; addressing the "Calabresi problem" of statutory obsolescence; and perhaps most importantly, enhancing legitimacy. Not surprisingly, some of these rationales are drawn from English and American legal history, jurisprudence, and constitutional legal theory.

Taken together, the trilogy offers a three-step path to ending the monstrous disconnect between the theory and practice—or myth and

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13. KARL N. LLEWELLYN, THE BRAMBLE BUSH 68 (3d prtg. 1930).

14. Raj Bhala, *The Power of the Past: Toward De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, GEO. WASH. J. INT'L L. & ECON. (forthcoming 2000-01) (manuscript on file with author).

15. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 9, 33 I.L.M. 1125, 1143 (1994) [hereinafter WTO Agreement], *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 10, at 81.

reality—of adjudication at the WTO Appellate Body. The first step, laid out here, is to recognize the existence and nature of the myth, de-emphasize the distinction between "binding" and "non-binding" precedent, and shift focus to the distinction between "de facto" and "de jure" stare decisis. The second step, set forth in the second Article, is to acknowledge the operation of de facto stare decisis in Appellate Body reports as evidenced by several very clear lines of decisional authority contained in those reports. The first two steps require an adjustment to the way we think about WTO adjudication. The final step, established in the third article, requires an adjustment to the rules of that adjudication. It calls for a switch to a de jure stare decisis regime.

B. OF CHEERLEADING, PARADIGMS, AND ATTENTION

Before embarking on the analysis of what the Appellate Body really does versus what the myth to which we subscribe tells us it does, I would do well to put the whole problem in context. Of the many facets of this context, one of the most important is the lack of any significant analysis of the positive and normative dimensions of stare decisis and WTO adjudication.

To be sure, literature on dispute resolution at the WTO has exploded. There are, for example, a number of books dedicated largely or exclusively to the DSU and adjudication thereunder.[16] There are many excellent articles about WTO adjudication covering a wide range of topics, including the operation of the DSU,[17] fairness and

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16. *See generally*, 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT, *supra* note 10; DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION (James Cameron & Karen Campbell eds., 1998); THE WTO AND INTERNATIONAL TRADE REGULATION (Philip Ruttley et al. eds., 1998); FRANK WARREN SWACKER ET AL., WORLD TRADE WITHOUT BARRIERS–THE WORLD TRADE ORGANIZATION (WTO) AND DISPUTE RESOLUTION (1995).

17. *See, e.g.*, Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 NW. J. INT'L L. & BUS. 653, 657 (1996-97); Rutsel Silvestre J. Martha, *World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule*, 30 J. WORLD TRADE, June 1996, at 107; Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 558 (1996); Norio Komuro, *The WTO Dispute Settlement Mechanism—Coverage and Procedures of the WTO Understanding*, 29 J. WORLD TRADE, June 1995, at 5; William P. Haddock, *The Uruguay Round's Dispute Settlement Understanding: Ensuring a More Stable and Predictable Trading Environment*, 3 CURRENTS: INT'L TRADE

due process,[18] the challenge to sovereignty posed by a multilateral dispute resolution mechanism,[19] the nagging problem of unilateral trade action,[20] the panel and Appellate Body reports that have been issued thus far,[21] and the similarities and differences between the DSU and the dispute settlement rules of the North American Free Trade Agreement ("NAFTA").[22] An entire 1998 issue of *The International Lawyer* is devoted to publishing papers and commentary offered in a symposium on the DSU.[23]

Yet, a sizeable portion of this literature is characterized by a near irrational exuberance—*pace* Alan Greenspan—about the new adjudicatory system. It is, for example, extolled as possibly "the core 'linchpin' of the whole trading system,"[24] and "likely to be seen in the future as one of the most important, and perhaps even watershed, developments of international economic relations in the twentieth century."[25] It is hailed as "quite successful" in practice,[26] "a major

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L.J. 25 (1994).

18. *See, e.g.*, Lei Wang, *Are Trade Disputes Fairly Settled?*, 31 J. WORLD TRADE, Feb. 1997, at 59; J.C. Thomas, *The Need for Due Process in WTO Proceedings*, 31 J. WORLD TRADE, Feb. 1997, at 45.

19. *See, e.g.*, Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161, 169 (1996); William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORD. INT'L L. J. 427 (1995).

20. *See, e.g.*, C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Settlement Dispute Settlement Mechanism*, 30 VAND. J. TRANSNAT'L L. 209 (1997); Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. 159 (1997).

21. *See, e.g.*, Terence P. Stewart & Mara M. Burr, *The WTO's First Two and a Half Years of Dispute Resolution*, 23 N.C. J. INT'L L. & COM. REG. 481 (1998).

22. *See, e.g.*, Gabrielle Marceau, *NAFTA and WTO Dispute Settlement Rules–A Thematic Comparison*, 31 J. WORLD TRADE, Apr. 1997, at 25.

23. *See Symposium on the First Three Years of the WTO Dispute Settlement System*, 32 INT'L LAW. 309 (1998).

24. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 124 (2d ed. 1997).

25. John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal, and Prospects*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 161, 175-76 (Anne O. Krueger ed., 1998).

26. JACKSON, *supra* note 24, at 127. *See also* Steger & Hainsworth, *supra* note 16, at 29 (stating that "there are numerous reasons to conclude that WTO dispute settlement experience to date has been a success"); JEFFREY J. SCHOTT, THE

success story,"[27] and indicative of the triumph of legalism over power politics.[28] Already the system is applauded for the large number of cases—well over one hundred—that have been filed in just the first three years of the operation of the DSU,[29] for the "high quality" of

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URUGUAY ROUND: AN ASSESSMENT 126-133 (1994) (extolling the virtues of the DSU, namely, remedying the problem of delays, blockage, and compliance in the pre-Uruguay Round GATT dispute settlement system).

27. Steger & Hainsworth, *supra* note 16, at 57. *See also id.* at 58 (declaring the dispute settlement system to be "working extremely effectively").

28. *See* JACKSON, *supra* note 24, at 127 (asserting that "[t]he appellate panel reports seem to strongly reinforce [sic] the 'rule orientation of the system'"). *See also* Steger & Hainsworth, *supra* note 16, at 28-30, 52-53 (declaring that GATT-WTO dispute settlement "has consistently manifested a balance between pragmatic, and increasingly judicialized, government-to-government dispute settlement," observing that the DSU "contains certain remarkable innovations that take the system in a more judicialized direction," summarizing the "highly formalized set of rules and procedures, including specific timeframes, greater automaticity in decision-making . . . and the establishment of the Appellate Body," all of which "add greatly to the judicial nature of the system," and arguing that WTO Members "are demonstrating a strong inclination to use the [dispute resolution] system rather than the alternatives of resorting to unilateral measures or bilateral negotiations" and that "[t]his tendency is very positive for the trading system"); Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the WTO Appellate Review System*, *in* DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION, *supra* note 16, at 75, 81 (viewing the DSU as "an ambitious attempt to strengthen the 'international rule of law,'" and contending that in contrast to many United Nations agencies, "the WTO has gone beyond acting as a multilateral arena for 'power politics in disguise'"); JEFFREY S. THOMAS & MICHAEL A. MEYER, THE NEW RULES OF GLOBAL TRADE 311 (1997) (discussing the American and Canadian support during the Uruguay Round negotiations for a more "legalized" dispute resolution process through "the adoption of fully automatic procedures," in contrast to the European and Japanese negotiators, who "resisted any further legalization of the GATT process" and advocated fidelity to the "'diplomatic nature' of the original GATT Articles XXII and XXIII").

29. *See, e.g.*, JACKSON, *supra* note 24, at 119-120 (estimating that since the founding of GATT, over five hundred cases have been handled, and concluding—quite rightly—this number suggests "a very impressive role for the GATT dispute settlement system"); Steger & Hainsworth, *supra* note 16, at 33-34 (noting that the number of WTO disputes exceeds one hundred, and contrasting the extensive use of the DSU with experience in the pre-Uruguay Round era); THOMAS & MEYER, *supra* note 28, at 327 (observing that "over 100 requests for consultations under the DSU were made during the first three years of the operation of the DSU, and that "[i]n less than three years, the WTO has now seen one-third as many requests for consultations than the GATT saw in 50 years," and concluding that these figures indicate "at least initial confidence in the system"). The list of cases adjudicated under the DSU is available at the WTO's website at http://www.wto.org. All

the written decisions,[30] and for the large number of international legal sources on which some panel and Appellate Body opinions draw.[31] Indeed, the system is wont to applaud itself. The Ministerial Declaration, issued following the first Ministerial Conference held in December 1996 in Singapore, stated that:

> We believe that the DSU has worked effectively during its first two years. . . . We are confident that the longer experience with the DSU, including the implementation of panel and appellate recommendations, will further enhance the effectiveness and credibility of the dispute settlement system.[32]

WTO cases mentioned herein have been obtained from this website, and also from an excellent new reporter service, *WTO Dispute Settlement Decisions: Bernan's Annotated Reporter.*

30. *See, e.g.*, THOMAS & MEYER, *supra* note 28, at 327 (opining that Appellate Body reports have been "of a high quality, helping to further clarify [sic] rights and obligations").

31. *See generally* David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998).

32. WTO, Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC, 18 December 1996, adopted 13 December 1996, *reprinted in* THOMAS & MEYER, *supra* note 28, at 345, 348.

As part of the WTO's "built-in agenda," i.e., matters to be reviewed as set forth expressly in a Uruguay Round agreement, by January 1, 1999 the Ministerial Conference is to review the dispute settlement system, and thereafter continue, modify, or terminate the system's rules and procedures. *See Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes," in Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements*, H.R. DOC. NO. 103-316, vol. 1, at 1709 (Sept. 27, 1994). As of this writing, no development has emerged from this review process that alters materially the discussion in this article. *See USTR Will Seek to Clarify WTO Rules on Dispute Settlement at Ministerial Meeting*, 16 Int'l Trade Rep. (BNA) 137 (Jan. 27, 1999); *Dispute Settlement Review Will Continue into Next Year*, 15 Int'l Trade Rep. (BNA) 2048 (Dec. 9, 1998); *WTO Begins Contentious Talks on Reform of Dispute Resolution Rules; Delays Expected*, 15 Int'l Trade Rep. (BNA) 1788 (Oct. 28, 1998). The European Union has suggested (1) the creation of a standing body of professional panelists, (2) allowing public access to all panel and Appellate Body arguments, (3) granting the general public or interested third parties the right to express their views in panel and Appellate Body hearings, (4) giving greater weight to consultations, and (5) ensuring third parties have the same access to information as the disputing parties in a case. *See EU Suggests Improvements to WTO Dispute Settlement*, 10 EUROCOM, Nov. 1998, at 2-3. It has made no suggestion regarding the official status of Appellate Body reports in WTO adjudication.

In other words, the system "ain't broke, you'll see."

All this cheerleading is understandable. We are right to be proud of the strides made toward an international rule of law in trade relations, and of the cures in the DSU for the numerous diseases of the pre-Uruguay Round dispute resolution system.[33] My concern, however, is that the present *weltanschauung*—i.e., conception of the world, in particular, of the WTO dispute settlement mechanism—may be inhibiting meaningful critical analysis of the way in which WTO panels and the Appellate Body come to a decision. Of particular worry is narrowness. Multilateral trade dispute resolution is viewed as a largely self-contained box—perhaps influenced a bit by a field such as American administrative law at the insistence of aggressive trade negotiators from the United States. But, are there not still other fruitful intra- and inter-disciplinary perspectives to pursue when considering the behavior of WTO panels and the Appellate Body? This defect, in turn, has an important practical ramification. Reverence for these tribunals can go only so far if we are to expect any meaningful revolution in the quality of their work. Their reasoning process must never become immune from a fair, constructive critique.

Consider, for example, one of the few problems with WTO adjudication identified thus far by international trade law scholars: the standard of review to be used in antidumping cases.[34] Some scholars conclude that this issue is essentially a problem of sovereignty. The

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33. These cures relate to (1) the creation of a unified dispute settlement system for all trade disputes—supplemented by specific rules for certain types of cases, (2) an end to blockage of the formation of panels and adoption of panel reports, (3) the guaranteed ability of an aggrieved WTO Member to retaliate, under the authorization of the WTO's Dispute Settlement Body, against a Member that fails to implement the recommendations contained in a panel or Appellate Body report, (4) the introduction of time deadlines for each stage in the WTO adjudicatory process, and the (5) the clarification that in the event a WTO Member's law or behavior gives rise to non-violation nullification or impairment, that Member need not modify its law or behavior, because it is not inconsistent with a GATT or Uruguay Round agreement provision, but it must provide compensation to the aggrieved Member for the loss of trade benefits suffered by the latter. These points are discussed in a variety of sources, including JACKSON, *supra* note 24, at 125-27, RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW sec. 5, at 26-46 (1998).

34. I shall discuss another concern, transparency, and its relation to stare decisis, in Part Three of the trilogy.

extent to which a WTO panel or the Appellate Body must defer to municipal authorities calls for a subtle calculation of the sovereign interests of those authorities in relation to the interests of the multilateral system.[35] Consequently, their inquiry focuses on whether the standard of review articulated by the United States Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*[36] might be appropriate for WTO tribunals.[37] As long as we are content with the dimensions of our present world view, then our concern is only with the narrowness of the inquiry itself. We could query, for instance, whether a similar standard of review in *Bowles v. Seminole Rock & Sand Company*[38] might be a bit better. Or, we could debate whether the Supreme Court's very different standard in *Salve Regine College v. Russell*[39] might be appropriate. But we do not do much in the way of criticizing the theory or practice of WTO adjudication.

A more aggressive approach, however, challenges not simply the inquiry, but the *weltanschauung* itself, and brings more analytic tools to bear. To continue the illustration, the implicit assumption made and never questioned in the literature on standard of review is that WTO panels and the Appellate Body are akin to the judiciary in a *developed*-country WTO Member such as the United States *as that*

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35. *See* THOMAS & MEYER, *supra* note 28, at 319 n.21 (discussing the changes in the American negotiating position during the Uruguay Round on standards of review); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194, 211-13 (treating the interplay between sovereignty and standards of review).

36. 467 U.S. 837, 843-45 (1984) (holding that a reviewing court will defer to an administrative agency's interpretation of a statute if the statute is silent or ambiguous with respect to the issue at hand, and if that interpretation is reasonable, even though the interpretation is not the one the reviewing court would have adopted itself).

37. *See* Croley & Jackson, *supra* note 35, at 202-11.

38. 325 U.S. 410, 414 (1945) (holding that a reviewing court will uphold an administrative agency's interpretation of its own regulation if that interpretation is plausible, even though it is not the best or most natural interpretation by grammatical or other standards, unless it is plainly erroneous or inconsistent with the regulation); *see* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) (arguing against the *Seminole Rock* standard in favor of an independent judicial check on an agency's interpretation).

39. 499 U.S. 225, 231 (1990) (holding that a federal court of appeals must review *de novo* a district court's determinations on state law).

judiciary exists today. That assumption, I think, might be better dubbed an aspiration. Quite possibly, the more appropriate analogy is not between WTO tribunals and present-day American courts. Rather, it is between these newborn tribunals *and the infant Supreme Court of Chief Justice John Marshall*. Thus, exploring—at another opportunity, of course—whether the WTO faces the same issue our great Chief Justice did might be fruitful: how to enhance the legitimacy of the judicial branch? Indeed, the question of the sovereignty of WTO Members, like the question of balance among the different branches of government and between the federal and state governments, are symptomatic of a deeper problem, namely, legitimacy. It is a problem with which Alexander Hamilton grapples in *Federalist #78*: why is it legitimate for federal judges to hold their offices during good behavior, i.e., to grant them permanent appointments?[40] Judicial review is one technique to deal with the problem of legitimacy, but the literature on standards of review in WTO adjudication has yet to examine this problem in all of its intra- and inter-disciplinary dimensions. To do so, it might well prove fruitful to turn to the work of our constitutional law and philosophy colleagues, and see what can be borrowed from their work on the Marshall court for a critical analysis of the nascent Appellate Body.

If the literature on standards of review at the WTO is as yet placid, there is virtually no critical literature on the role of precedent in WTO decisionmaking.[41] To be sure, there is some debate on the problem of implementation versus compensation, i.e., whether under the DSU a losing party has the option of complying with a panel or Appellate Body report, paying compensation, or subjecting itself to retaliation, or whether the report creates an international legal obli-

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40. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

41. For examples of sources not or hardly discussing the question of precedent in the context of WTO adjudication, see, e.g., ERNEST H. PREGG, FROM HERE TO FREE TRADE (1998); JOHN WHALLEY & COLLEEN HAMILTON, THE TRADING SYSTEM AFTER THE URUGUAY ROUND (1996); James R. Cannon, Jr., *Dispute Settlement in Antidumping and Countervailing Duty Cases, in* THE WORLD TRADE ORGANIZATION 359 (Terence P. Stewart ed., 1996); Richard O. Cunningham & Clint N. Smith, *Section 301 and Dispute Settlement in the World Trade Organization, in* THE WORLD TRADE ORGANIZATION, *supra*, at ch. 16; SWACKER ET AL., *supra* note 16, at ch. 6; and ERNEST H. PREGG, TRADERS IN A BRAVE NEW WORLD (1995).

gation to comply.[42] The "static" or "snapshot" question of the legal effect of a report on parties to a dispute at hand, however, is conceptually and practically different from the "dynamic" or "intertemporal" question of the legal effect of a report on the outcome of future disputes.[43] In other words, all of the fascinating, and difficult,

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42. In brief, on one side of this dispute are those who point out that Article 22.1 of the DSU states only a preference for implementation over compensation, but does not expressly obligate losing WTO Members to implement a report's recommendations. These advocates point out that if the Uruguay Round negotiators intended to require implementation, they could have said just that. Frieder Roessler et al., *Performance of the System IV: Implementation–Comments*, 32 INT'L LAW. 789, 792 (1998) (question and answer summary, views of Timothy Reif).

On the other side of the debate are those who think the Article 22.1 language is sufficiently strict. They note that a non-implemented panel report remains on the agenda of the DSB, and infer from this that implementation is a requirement. They also point out that: (1) nothing in the DSU contravenes the rule of Article 26 of the Vienna Convention on the Law of Treaties, which requires treaty members to perform their obligations; (2) allowing Members to choose between implementation and compensation would render the provisions of the Uruguay Round agreements that expressly authorize payment of compensation (e.g., Article 26.1(b) of the DSU, which states there is no obligation to remove a measure causing non-violation nullification and impairment) redundant; (3) most WTO Members assume implementation is required; (4) if losing Members had an option to choose whether to comply or pay compensation, then the dispute settlement system would favor large, rich Members over small, poor Members; and (5) the United States favors implementation whenever it is victorious and, therefore, ought not to be hypocritical. Finally, they suggest that Members seem quite willing to try to avoid compliance by, for example, seeking waivers—e.g., for the Lome Convention—or replacing illegal measures with legal ones that still have a protective effect. Hence, there is no need to encourage such behavior by giving them an option to comply or compensate with a panel or Appellate Body recommendation. *See id.* at 789, 790, 792-93 (comments of Professor Roessler; question and answer summary, views of Professor Jackson).

There seems to be an interesting middle ground in the implementation-versus-compensation debate. Put bluntly, it is "who cares whether a losing party implements or compensates as long as the parties to the dispute are satisfied?" The logic is that all that ought to matter in WTO dispute settlement is the achievement of a resolution of whatever sort with which the parties agree. *See id.* at 789, 790, 792-93 (comments of Richard Elliott).

43. This is not to say that the questions are unrelated, or even sometimes confused. *See, e.g.*, John H. Jackson, *The WTO Dispute Settlement Understanding–Misunderstandings on the Nature of the Legal Obligation*, 91 AM. J. INT'L L. 60, 62 (1997) (discussing Article 94 of the United Nations Charter, which obligates United Nations members to comply with ICJ decisions, in the same context as Article 59 of the ICJ Statute, which—as discussed above—states that ICJ decisions are binding only on the parties to the dispute at hand).

issues about stare decisis remain unexplored in the international trade law literature. What little discussion there is amounts to uncritical acceptance of the myth, a myth that the doctrine of stare decisis does not exist in the GATT-WTO system.

II. LOCATING THE MYTH: WHERE DOES IT SAY THAT STARE DECISIS IS ABSENT?

A. THE ABSENCE OF STARE DECISIS FROM PUBLIC INTERNATIONAL LAW

It comes as a shock to a very large number of Anglo-American scholars who do not specialize in one or another field of international law to learn there is no system of precedent in international law. Those scholars, operating in a domestic context, struggle with a surfeit of precedent. In the United States, as of 1997 there were over four million reported common law precedents.[44] In the United Kingdom, such is the grip of stare decisis that appellate courts follow the practice of writing opinions that take account of all precedents cited by advocates to the court, and distinguishing carefully each precedent not followed.[45] Indeed, an exasperated English legal historian remarked *in 1966* that:

> the sheer bulk of important decisions in the Common Law world threatens to cause a breakdown of *stare decisis* (as it may already have done in the United States). Vital precedents are overlooked by counsel, and a whole line of authorities begins to grow in the wrong direction. Perhaps only the computer can save the situation.[46]

Yet, we international legal scholars operate in specialties that know no doctrine of stare decisis, or so we are taught to believe anyway.

The doctrine of stare decisis is not simply foreign to international law, it is expressly disavowed by the near-sacred sources of the foundational field, public international law. One need look only to Articles 38.1 and 59 of the Statute of the International Court of Jus-

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44. *See* Summers, *supra* note 10, at 403.

45. *See id.*

46. ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 397 (1966).

tice ("ICJ Statute"),[47] and Section 102 of the *Restatement (Third) of the Foreign Relations Law of the United States* ("*Restatement*"),[48] to read the denials.

1. The ICJ Statute

To recount the myth as created for us in public international law, the ICJ Statute is the best starting point for three reasons: the ICJ is the "principal judicial organ" of the United Nations,[49] all members of the United Nations are *ipso facto* parties to the Statute,[50] and the Statute is the law governing the operation of the Court. Article 38.1 of the ICJ Statute provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59 [quoted below] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[51]

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47. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute], *reprinted in* LOUIS HENKIN, ET AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS 19 (3d ed. 1993). There is a very large number of excellent discussions of sources of international law, including Rosenne, *Practice and Methods*, *supra* note 5.

48. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 102 at 24 (1987) [hereinafter RESTATEMENT].

49. *See* U.N. CHARTER art. 92, 59 Stat. 1055, 1060, 3 Bevans 1179, 1186, *reprinted in* HENKIN, ET AL., *supra* note 47, at 19.

50. *See id.* art. 93.1, *reprinted in* HENKIN, ET AL., *supra* note 47, at 19.

51. ICJ Statute, *supra* note 47, art. 38(1), 59 Stat. at 1060, 3 Bevans at 1187. One of the world's leading commentators on the ICJ, Shabtai Rosenne, assures us that, "[t]he sparsity of direct jurisprudence on Article 38 illustrates its satisfactory operation. Indeed, in the combined jurisprudence of the two Courts [the ICJ and its predecessor, the Permanent Court of International Justice] in contentious cases, there are only a few direct references to Article 38." 3 ROSENNE, *supra* note 2, at

Article 38.1 bifurcates candidates for sources of international law. International agreements, customary international law, and general principles are in "tier one." They are the law itself. Judicial decisions, along with scholarly writings, are in "tier two." These decisions are not the law itself, but rather a means for determining what the law is, i.e., mere evidence of the law.[52]

Lest there be any doubt about this interpretation, Article 59 of the ICJ Statute explains that, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[53] Indeed, Article 59 goes far in denying the existence of stare decisis in international law.[54] It tells us that in a subsequent case involving different parties but involving the same or a similar issue, a prior holding is not binding. But, it goes yet further, telling us that even if one of the parties is involved in a subsequent case in which the same or a similar issue arises, a prior holding has no binding force. Finally, we can infer from it that if the ICJ is not bound by its own previous decisions, and it is the principal judicial organ in the United Nations system, then how could it possibly be bound by the decision of an "inferior" court? In brief, it teaches that—at least in theory—there is no collective memory in the international legal system, if by "collective memory" we mean prior decisional law is, in itself, a source of law for the future.

It would, however, be unfair to proceed without noting that not everyone agrees that Article 59 is concerned with the precedential effect of decisions. Judge Mohamed Shahabuddeen of the ICJ does not locate the rule against stare decisis in Article 59, declaring this provision "has *no bearing on the question of precedents*."[55] This disarming statement rests on two quite plausible claims. First, a literal parsing

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1593.

52. *See* 3 ROSENNE, *supra* note 2, at 1607 (dubbing the items listed in heading (d) as "subsidiary").

53. ICJ Statute, *supra* note 47, art. 59, 59 Stat. at 1062, 3 Bevans at 1190. *See also* RESTATEMENT, *supra* note 48, sec. 903 cmt. g at 358 (citing ICJ Statute Article 59, that judgments are binding between the parties).

54. As Rosenne puts it, the combined effect of Articles 38(1)(d) and 59 "is that the Statute itself excludes the doctrine of *stare decisis*, the binding force of a judicial decision as a law-creating precedent." 3 ROSENNE, *supra* note 2, at 1628.

55. MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 63 (1996) (emphasis added).

of the language of Article 59 indicates it is meant "to ensure that a decision, *qua* decision, binds only the parties to the particular case."[56] That is, the language is limited to defining the legal relations of the parties, seeking to circumscribe the juridical force of a decision to the parties to a particular case, but having nothing to do with whether a decision can serve as a precedent in subsequent litigation or what more general jurisprudential effect the decision may have on international law.[57]

Judge Shahabuddeen's second argument begins with the observation that Article 38.1(d) refers to decisions of tribunals other than the ICJ, whereas Article 59 refers only to the ICJ's decisions.[58] Suppose Article 59 was a rejection of stare decisis. Then, it would be a rejection only for ICJ decisions. In contrast, Article 38.1(d) expressly countenances the use of judicial opinions as a subsidiary means of uncovering the meaning of international law. Judge Shahabuddeen suggests the result would be that opinions from tribunals other than the ICJ might well have a status higher than ICJ opinions.[59] Perhaps he overstates his case, as it could be that ICJ and non-ICJ decisions are on par. But, even that result would be bizarre, and it is fair to call into question the supposition from which the results of either supremacy or parity of non-ICJ opinions could follow.

Ultimately, however, whether we construe Article 59 as having nothing to do with stare decisis does not matter. If Judge Shahabuddeen's suspicions are correct, then still no damage is done to the more fundamental point that the doctrine is, according to the myth, wholly inapplicable in ICJ jurisprudence. The presence of Article 38.1 is quite sufficient. Thus, Judge Shahabuddeen himself declares that, "[t]here is agreement on all hands that *stare decisis* is not applicable to the Court."[60]

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56. *See id.*

57. *See id.* at 63, 99-100.

58. *See id.* at 100.

59. *See id.* at 100-01.

60. *Id.* at 54. *See also id.* at 97 (stating that "[i]t is not in dispute that the doctrine [of stare decisis] does not apply in relation to the Court"); *id.* at 99 (indicating that in spite of controversy as to whether the exclusion of the doctrine is the result of Article 59, "it is universally accepted that *stare decisis* does not apply in relation to the Court").

2. The Restatement

Of course, we find reinforcement in Section 102 of the *Restatement* and the commentary thereto. International law arises from two primary sources, custom and international agreement, and one secondary source, general legal principles common to the world's major legal systems.[61] The omission of stare decisis is telling. Moreover, stare decisis cannot be said to spring from any of these recognized sources. Stare decisis cannot be a principle of customary international law, because custom refers to the practice of states followed by them out of a sense of legal obligation—*opinio juris*.[62] There is obviously no international agreement on the doctrine of stare decisis. Finally, stare decisis is a principle common to Anglo-American jurisprudence, and increasingly witnessed in practice in civil law systems.[63] But, it is premature and optimistic to hail it as a general principle common to all major municipal systems.

At best, like the ICJ Statute, the *Restatement* in Section 103 allows for "judgments and opinions of international judicial and arbitral tribunals" to be accorded "substantial weight," but only for the purpose of "determining whether a rule has become international law."[64] Their decisions are, in other words, evidence of the law, not the law itself. Lest there be any doubt, comment (b) to this section states flatly:

> [Section 103] reflects the traditional view that *there is no stare decisis in international law*. In fact, in the few permanent courts, such as the International Court of Justice, the Court of Justice of the European Communities, and the European Court of Human Rights, there is *considerable attention* to past decisions. . . . In any event, to the extent that decisions of international tribunals adjudicate questions of international law, they are *persuasive evidence* of what the law is. The judgments and opinions of the International Court of Justice are accorded *great weight*.[65]

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61. *See* RESTATEMENT, *supra* note 48, sec. 102(1) cmt. *l*, at 24, 28 (discussing general principles as secondary sources of law).

62. *See id.* sec. 102(1) cmt. c, at 25 (describing *opinio juris*).

63. *See* discussion *infra* Part III.B.2.

64. RESTATEMENT, *supra* note 48, sec. 103.

65. *Id.* sec. 103 cmt. b, at 36-37 (emphasis added).

This passage yields not only a bald statement of the myth, the well-understood "black letter" law, but also an underlying distinction on which this law rests. This distinction is neither explained nor defended elsewhere. What is the difference between stare decisis, on the one hand, and "considerable attention," "persuasive evidence," and "great weight," on the other hand? In Part V below, I argue that this sort of distinction may not be as helpful or even well-founded as it seems, and that we ought to emphasize instead a distinction between de jure and de facto stare decisis. I cannot proceed to these arguments, however, before demonstrating the existence of a supposed "no precedent rule" in international trade law.

B. THE ABSENCE OF STARE DECISIS FROM INTERNATIONAL TRADE LAW, ACT I: UNHELPFUL EVIDENCE—THE SECONDARY SOURCES

Is the myth permeating public international law also found in international trade law? Asked differently, exactly what role do GATT panel reports—both adopted and unadopted—WTO panel reports, and Appellate Body reports play in subsequent adjudications? Answering this question is not quite so straightforward as locating where the black-letter rule against stare decisis is written in public international law.

There, the existence of clear provisions in the ICJ Statute and *Restatement* give us an official and unambiguous account of whether or not the doctrine of stare decisis operates. Here, we do not possess an analogously transparent provision that satisfies immediately as a "yes-or-no" answer. Nothing in GATT Article XXIII—concerning nullification or impairment—addresses the question.[66] One way to both answer and dismiss the question is to say that if stare decisis was not recognized before the Uruguay Round, then *a foritori* it is not recognized after the Uruguay Round. After all, in the pre-Uruguay Round GATT dispute settlement system, panel reports were adopted by a consensus, which was defined in terms of an affirma-

66. *See* General Agreement on Tariffs and Trade, art. XXIII, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT], *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 10, at 46. *See generally* Steger & Hainsworth, *supra* note 16, at 29 (discussing the original purpose of GATT dispute settlement as being the prompt, mutually acceptable resolution of disputes); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT sec. 8.5, at 178-87 (1969) (analyzing Article XXIII).

tive, unanimous decision. In other words, the entire GATT membership—i.e., the Contracting Parties—threw its weight behind a report. In contrast, under the DSU panel and Appellate Body, reports are adopted automatically unless there is a consensus against such adoption—i.e., there must be unanimity to block adoption.[67] The dismissive answer is, then, that if there was no system of precedent when reports were adopted by the pro-active joint action of GATT Contracting Parties, how could there be one when the WTO Members are passive?

For at least two reasons, however, this is not the way to deal with the question. First, the question is of too great practical importance to assume it away. This reason is quite obvious and needs no elaboration other than to say parties and non-parties want and need to know the legal reach of a panel or Appellate Body report.

That the question befuddles scholars is a second motivation for not walking away. Only thin commentary—snippets in a few sources here and there—on precedent in the GATT-WTO system is available. Most of it is unhelpful, which ought to make us redouble our efforts to sort out matters. Ironically, this commentary is provided by some of the prominent thinkers in international trade law.

Consider first the remarks of Professor Andreas Lowenfeld of New York University Law School. He mentions the problem in a manner strongly suggestive that there is no doctrine of stare decisis, but then moves on without further analysis. He observes that whether WTO panel and Appellate Body "decisions are respected not only by the parties to a given dispute but by other states considering comparable [controversial trade] measures" is a gauge by which to measure the commitment of WTO Members to a more secure, predictable dispute resolution system.[68]

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67. *See* Roessler et al., *supra* note 42, at 789, 792 (comment of Richard Elliott) (stating that "one could argue that under the GATT 1994, the case for *stare decisis* is even less compelling. Under GATT 1947, decisions were adopted by unanimity. That is not how decisions of the DSB are adopted. Under the current system, there must be unanimity in order to *[b]lock* a decision of the DSB.").

68. Andreas Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 479, 487 (1994). In a similar vein, Professor Frieder Roessler and Richard Elliott, Esq., agree that Appellate Body reports "should get some deference, but not absolute deference." Roessler et al., *supra* note 42, at 789, 792 (question and answer summary).

Next, consider the advice of Debra Steger, the first Director of the Appellate Body Secretariat of the WTO, and previously a Professor of Business and Trade Law at the University of Ottawa and Canada's Principal Legal Advisor during the Uruguay Round negotiations, and Susan Hainsworth, a Legal Affairs Officer in the WTO Appellate Body Secretariat.[69] The advice is conclusory, stating that "the DSU ensures the primacy of WTO law in all forms of dispute settlement," and speaking of "[t]he binding nature of decisions."[70] "Binding" in what sense? In terms of the creation of an international legal obligation on the parties? In terms of a future precedential effect? Puzzlingly, they seem to reverse course when they add that:

> GATT dispute settlement has always been viewed as fundamentally a matter between the governments, parties to the dispute. The rulings and conclusions set out in a panel report are considered to apply only to the matter at issue and to the parties involved in the particular case. *In prior GATT practice, there was no concept of stare decisis – panel reports have not been viewed, strictly speaking, as legal precedents, although panels have regularly referred to, and followed, prior panel reports.*[71]

Still further on, they appear to reverse course yet again and offer the grand but implausible suggestion that:

> Most governments involved in dispute settlement proceedings are concerned with achieving results in specific cases, i.e. with resolving particular commercial disputes. *They are not interested simply in making law or in establishing legal principles or interpretations that will apply in the future.*[72]

It may well be that some WTO Members are shortsighted, and certainly all disputants are focused primarily on resolving their dispute. But, any intelligent Member involved in a case will have one eye to the future. Indeed, this is quite likely with some third parties, and it is

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69. *See List of Contributors*, *in* DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION, *supra* note 16, at 419, 419-20 (providing biographies of Professor Steger and Ms. Hainsworth). A slimmed-down version of their piece is republished as Debra P. Steger, *WTO Dispute Settlement*, *in* THE WTO AND INTERNATIONAL TRADE REGULATION 53 (Philip Ruttley et al. eds., 1998).

70. Steger & Hainsworth, *supra* note 16, at 32-33.

71. *Id.* at 38 (emphasis added).

72. *Id.* at 57 (emphasis added).

not uncommon for a winning party to hail the outcome as a "precedent."[73] Further, how can it be that, on the one hand, panels regularly follow reports, but, on the other hand, disputants do not care about the possible law-making effect of their case? If it is widely understood that panels follow their prior decisions, then surely all Members—parties and non-parties alike—would care.

A third scholar, Pierre Pescatore, co-editor of the *Handbook of WTO/GATT Dispute Settlement*, suggests the following:

> Though solutions arrived at in the framework of the WTO dispute settlement system are limited in their properly legal effect by the *inter partes* [i.e., between parties] rule, the same determinations, because of the multilateral framework inside which they are taken, have a much stronger impact as *precedents* than isolated panel or even AB [Appellate Body] decisions could possibly command. But this must be well understood, insofar as there is nothing like binding precedent in the field of international law. . . . The best terminology seems to be—since we are in the field of legal adjudication—to speak here of res judicata [i.e., former adjudication (that is, both claim preclusion and issue preclusion)], to characterize the typical character of judicial decisions, the effect of which must be visualized simultaneously in a close and in a remote perspective: the legally binding force, limited *inter partes*, and the dispersed influence of *precedents* on the future growth of the law.[74]

This rather obtuse prose ventures toward the brink of an admission that there is a system of precedent, however informal, operating at the WTO. There are at least ripple effects, we are told, on future cases of decisions made today. Alas, this counsel pulls back and dubs the whole mess res judicata, which of course would bar re-litigation of the same claim only as between the same parties, but have little to do with a case involving an entirely new plaintiff and defendant.[75]

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73. I shall discuss the topic of expectations in relation to stare decisis in Part Three of the trilogy.

74. Pescatore, *supra* note 10, at 32.

75. *See* BLACK'S LAW DICTIONARY, *supra* note 10, at 1305-06 (defining "res judicata"); 3 ROSENNE, *supra* note 2, at 1655-56 (explaining that the combined effect of Articles 59, 60, and 61 of the ICJ Statute is that "the judgment creates a res judicata," and that the ICJ interprets this to mean that a matter is finally disposed of for good).

Fourth, consider the answer provided by William Davey, the Legal Advisor of the WTO and Professor of Law at the University of Illinois. The comments, while clear, appear somewhat contradictory.

> [R]esults of the dispute settlement process do not in themselves constitute formal interpretations of the agreements (although they may in practice do so to the extent that their reasoning is followed in subsequent dispute settlement proceedings). . . .
>
> [T]he WTO Agreement explicitly provides that only the Ministerial Conference or General Council can adopt interpretations of the General Agreement. This makes it clear that dispute settlement panel reports *do not constitute binding precedent.* It seems likely, however, that such reports (especially those of the new Appellate Body) will often be relied upon by future panels, and *will thereby effectively constitute a fairly stable body of precedent.*[76]

To be sure, however, this answer comes as close as any to admitting there might arise a de facto system of precedent through WTO adjudication.

Yet, a fifth snippet comes from Professor John Jackson of Georgetown, a co-author with Professor Davey of *Legal Problems of International Economic Relations*,[77] who provides a different conclusion.

> The new DSU does not contain anything that would lead to a view that the legal effect more generally of a panel report is different from that of the practice [in the pre-Uruguay Round era] under GATT. This suggests that again *neither a stare decisis effect, nor any "definitive interpretation" effect* (particularly given that there is an alternative procedure for a definitive interpretation) of a panel report exists. Nevertheless, the panel report *remains persuasive*, and presumably is part of the "practice" of the parties under the agreement.[78]

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76. William J. Davey, *The WTO/GATT World Trading System: An Overview*, *in* 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT, *supra* note 10, Pt. 1, at 13, 20 (emphasis added).

77. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (3d ed. 1995).

78. JACKSON, *supra* note 24, at 126 (emphasis added). *See also* Croley & Jackson, *supra* note 35, at 210 (saying first that "there seems to be little threat that the new GATT/WTO panels will render multiple and incompatible interpretations of

We cannot ascribe the inconsistency between the passages from Professors Davey and Jackson as simply a matter of semantics or difference in emphasis. Professor Jackson counsels that the amassing of WTO rulings over time will be "persuasive," whereas Professor Davey speaks of a "fairly stable body of precedent." If a ruling is merely "persuasive," then I should query whether we can be confident *a priori* that a "fairly stable body of precedent" will be "effectively constituted" around that ruling. Persuasive, after all, is not dispositive or overwhelmingly forceful.

Yet, to turn matters around once again, Professor Jackson in the same work uses the word "precedent" repeatedly, before and after denying the existence of a stare decisis effect.[79] In a later forum, he

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the same agreement provision," next that "the principle of *stare decisis* does not govern GATT/WTO dispute settlement," and finally that "multiple panels consistent treatment of a given issue over time can assume the force of a 'practice' that guides panel interpretation of the Agreement"). Earlier, Professor Jackson provided a clear statement, though in the context of pre-Uruguay Round GATT jurisprudence.

> [T]he international legal system does not embrace the common law jurisprudence which calls for courts to operate under a stricter 'precedent' or stare decisis rule. Most nations in the world do not have stare decisis as part of their legal systems, and the international law also does not. This means that *technically a GATT panel report is not strict precedent*, although there is certainly some tendency for subsequent GATT panels to follow what they deem to be the 'wisdom' of prior panel reports. Nevertheless, *a GATT panel has the option to refrain from following a previous panel report*, as has occurred in several cases.

John Jackson, *Dispute Settlement Procedures*, *in* THE NEW WORLD TRADING SYSTEM: READINGS 117, 120 (Organization for Economic Co-Operation and Development ed. 1994) (emphasis added).

79. *See, e.g.*, JACKSON, *supra* note 24, at 114 (stating that "a number of panel reports during the first several decades of GATT contained reasoning that closely resembled that of an opinion of a court of law, with reference to *precedent*"); *id.* at 119 (arguing that a restrained view of judicial behavior might be a legitimate explanation for a GATT panel to refuse to rule on certain controversial issues, and that "[i]f no prior *precedent* existed, such a refusal seems fair"); *id.* at 122 (stating correctly that "under accepted doctrines of international law, *stare decisis* or the common-law concept of "*precedent*" does not apply," and that participants in the GATT system "were very influenced by *precedent*, and often mentioned *precedents* in some detail in GATT deliberations"); *id.* at 124 (mentioning "a relatively loose concept of *precedent* through panel reports"); *id.* at 135 (quoting from a previous book by the author that "[t]here are some interesting potentials in these *precedents* for the GATT and the international economic system" with respect to the participation of private parties in GATT-WTO dispute settlement proceedings); and *id.* at 137 (observing rightly that "in some GATT proceedings, Contracting

offers a similar treatment.[80] If we really mean that panel and Appellate Body reports have no precedential value, then we must seriously consider either banishing the term from our international trade law language, or re-thinking what we mean by the term and defining it accordingly. To put the point more generally, we must remember one of the many insights to be gleaned from Plato's *Philebus*, the dialogue in which Socrates discusses whether wisdom or pleasure is the greater good: language has a great power to clarify or deceive.[81]

Finally, the most recent analysis of the use of prior reports comes from a stimulating article by David Palmeter, a leading international trade attorney, and Professor Petros C. Mavroidis of the University of Neuchatel in Switzerland.[82] They dedicate six and one-half pages to the matter, and find that:

Parties other than the disputants have expressed a strong interest in a dispute process because the resultant '*precedent*' effect of a panel ruling could affect them") (emphasis added). *See also* Jackson, *Dispute Settlement Procedures*, *supra* note 78, at 119 (noting with respect to GATT panel reports in the 1980s dealing with non-violation nullification and impairment cases that "[s]ome *precedents* were established that non-violation cases would not result in a mandatory international obligation to conform to international obligations (partly because it would be unclear what these were)") (emphasis added). Professor Petersmann makes the same mistake, discussing the Appellate Body report in *Japan-Taxes on Alcoholic Beverages*, in which adopted GATT panel reports are said to be binding only on the parties to a dispute, but thereafter using the term "precedential value" in his discussion of the Appellate Body report in *Brazil-Measures Affecting Desiccated Coconut*. *See* Petersmann, *supra* note 28, at 91-93 (discussing the 1996 Appellate Report on Japan's Taxes on Alcoholic Beverages). This Appellate Body report is treated *infra* in Part II.C.

80. In a "Symposium on the First Three Years of the WTO Dispute Settlement System" held on 20 February 1998, Professor Jackson's remarks on the precedent issue are summarized as follows:

> While there is no true *stare decisis* that applies to Appellate Body decisions, and while that doctrine does not apply in civil law countries, even in civil law countries there is a tendency towards consistency of decision making by judicial bodies. It certainly is reasonable to look at precedent even if that precedent is not absolutely binding. In sum, there is a tendency towards consistency, even if no one has ever viewed Appellate Body decisions as having a *stare decisis* effect.

Frieder Roessler et al., *Performance of the System IV: Implementation–Comments*, 32 INT'L LAW. 789, 792 (1998) (question and answer summary).

81. *See* Plato, *Philebus*, *in* THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 1086 (Edith Hamilton & Huntington Cairns eds., Hugh Tredennick trans., 1989).

82. Palmeter & Mavroidis, *supra* note 31.

> Other than the texts of the WTO Agreements themselves, no source of law is as important in WTO dispute settlement as the reported decisions of prior dispute settlement panels. These include the reports of GATT panels as well as WTO panels, and now, of course, reports of the Appellate Body. . . .
>
> Adopted reports have *strong persuasive power* and may be viewed as a form of *nonbinding precedent* whose role is comparable to that played by *la jurisprudence* in the contemporary civil law of many countries, such as France, and that played by decisions of courts at the same level in the United States. As a practical matter, parties will continue to cite prior reports to panels, and panels will continue to take them into account by adopting their reasoning—in effect, following precedent—unless panels conclude, for good and articulated reasons, that they should do otherwise. . . .
>
> As a formal matter, Appellate Body reports, like panel reports, bind only the parties to the particular dispute, and *do not create binding precedent.*[83]

Here, we have a statement that there is no doctrine of stare decisis in GATT-WTO adjudication that is, perhaps, slightly stronger in tone than that of Professor Jackson, and thereby again in apparent conflict with the observation of Professor Davey.

However, there is a serious problem with the Palmeter-Mavroidis conclusion. To characterize a report as "non-binding precedent" is to create a paradox. In Part IV below, I shall have more to say about this sort of characterization. For present purposes, let me simply ask, is not "precedent" by its nature binding, at least in the Anglo-American sense of the term, and at least where we are talking about tribunals in the same adjudicatory hierarchy? Stare decisis does not seem to admit easily, if at all, to half-pregnancy. That is not to imply deviation from prior cases is impermissible, but rather to underscore the legal presumption, as it were, that is extraordinarily difficult to rebut in favor of deference to the past.

Worse yet, the paradox masks deeper theoretical and methodological shortcomings. There is no discussion of how or why a formal doctrine of stare decisis might be useful in WTO adjudication. As a normative matter, what are the arguments, pro and con? Nor is there

83. *Id.* at 400-402, 404 (emphasis added).

any methodology for discerning "strong persuasive power" from outright precedent. If stare decisis does not exist, then it is quite important to be able to demarcate this line as clearly as possible. It will not do to simply rely on well-chosen, but nonetheless ad hoc quotes here and there. Indeed, such reliance jeopardizes the Palmeter-Mavroidis "non-binding precedent" formulation, which states, "While the words 'we stressed' and 'we noted' are not the same, in a legal context, as 'we held,' there is an authoritative tone to them that suggests *more than mere persuasion.* The tone suggests that, in the view of the Appellate Body, those issues are closed."[84] So, is there or is there not "binding" precedent? Is it a rather secret affair? That is, does a WTO panel or Appellate Body report have precedential effect on non-party Members that all Members more or less understand, but none openly acknowledges?

We cannot really say from the secondary sources. Professor Lowenfeld's counsel is ambiguous. At least part of what Ms. Steger and Professor Hainsworth, and Professor Jackson, write declares the absence of stare decisis from the multilateral trade dispute resolution system. At least part of what Professors Pescatore and Davey write seem to point a bit in the opposite direction. Mr. Palmeter and Professor Mavroidis leave us with a paradox and no theoretical or methodological means of resolution.

The point of trotting out these six examples is *most definitely not* to sound bumptious and poke fun at distinguished scholars and practitioners. Nor is it to engage in pettifoggery and imply that hardly a word of what they pen makes sense. Rather, it is to illustrate the frustrating and embarrassing state of our collective knowledge. This basic question is not as easy to answer with certainty as it might appear, and as it is in public international law or, for that matter, in most municipal legal systems. It seems safe to say there is no consensus. Or, to be more blunt, no amount of reading and re-reading of the above-quoted statements will render them all simultaneously correct in their entirety. There are non-trivial ambiguities, inconsistencies, and disagreements within and across the statements. Therefore, we leave them as we approach them: uncertain as to the exact weight for the future of the holding of a WTO tribunal's report.

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84. *Id.* at 406 (emphasis added).

Further, the point is to highlight the importance of the issue. It is one to which we all ought to know the answer. If we cannot provide a consistent answer, we need to backtrack and consider the matter. Finally, the point is to show the unfortunate, casual, undisciplined terminology that defines the problem. Indeed, the usage exacerbates the problem. In short, if we are to uncover the myth, then we shall have to look elsewhere.

C. THE ABSENCE OF STARE DECISIS FROM INTERNATIONAL TRADE LAW, ACT II: FLAWED EVIDENCE—WTO APPELLATE BODY STATEMENTS

If the secondary sources are not of much help, then the obvious move is to primary sources. There are two categories of such sources: WTO panel and Appellate Body reports, and the Uruguay Round agreements. The first category can be dispensed with rather quickly. We need look no further than the 1996 Appellate Body report in *Japan-Taxes on Alcoholic Beverages*.[85] In just its second report, the Appellate Body intoned that adopted panel reports are:

> an important part of the GATT *acquis* (acquired). 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. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.[86]

However, there are three problems with relying on this rendition as evidence of the myth of the non-existence of the doctrine of stare decisis.

First, the above-quoted statement is made with respect to pre-Uruguay Round GATT panel reports, and in the context of a distinction between adopted and unadopted reports.[87] The Appellate Body

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85. WTO Appellate Body Report on Japan-Taxes on Alcoholic Beverages, Nov. 1, 1996, WTO Doc. WT/DS8/AB/R, at 14-15, para. 5.4, *reprinted in* 1 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 183, 193 [hereinafter Japan-Taxes on Alcoholic Beverages].

86. *Id.* (emphasis added).

87. *See id.* at 13-15, paras. 5.1-5.8.

does not expressly include WTO panel reports, or its own reports. Of course, the Appellate Body does not exclude these reports either, and it would not be unfair to extend the coverage of the statement by inference.

Second, locating the myth in Appellate Body statements is circular. If the doctrine really does not operate, then *ipso facto* the Appellate Body's statements that it is non-operative—or, for that matter, statements about anything else—are not precedent. We are stuck with a logical conundrum.

Third, the GATT-WTO legal system—with or without stare decisis—is a text-driven one. With the Uruguay Round, there was an explosion of agreements. Accordingly, perhaps we ought to comb these agreements for evidence—or lack thereof—about stare decisis.

The third reason, in particular, leads me to urge that Article 3.2 of the DSU, coupled with Article IX.2 of the WTO Agreement, provide the best written evidence of the myth. They provide a reasonably solid textual basis for concluding stare decisis is not supposed to operate in international trade law, that is, in the multilateral dispute resolution system. In other words, from these provisions it can be inferred that GATT panel reports—whether adopted or unadopted—WTO panel reports, and Appellate Body reports are not to be used as a formal source of law for subsequent disputes. Future panelists and Appellate Body members have no legal obligation to look at, much less follow, the work of their predecessors.

D. THE ABSENCE OF STARE DECISIS FROM INTERNATIONAL TRADE LAW, ACT III: BETTER EVIDENCE—THE DSU AND WTO AGREEMENT

1. DSU Article 3.2

We are informed by DSU Article 3.2 that "[r]ecommendations and rulings of the DSB [i.e., the WTO Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."[88] To be sure, this hardly qualifies as an unequivocal rejection of the doctrine of stare decisis. Indeed, there are perhaps three ways—two extreme and one intermediate—to read this sentence. All

88. DSU, *supra* note 10, art. 3.2.

three, however, imply that stare decisis is not supposed to exist. Thus, I shall present them all, but need not pick among them.

First, at one extreme, the sentence is not too far from being a clear rejection of the doctrine, albeit a cloaked one. WTO panels and Appellate Body reports, were they to have precedential effect, would indeed affect the rights and duties of WTO Members in the future that are not parties to the dispute at hand. For instance, if India wins an action against Tunisia, then Pakistan is bound in a dispute with Qatar by the holding in the India-Tunisia case. The provision can be read as an instruction to the India-Tunisia panel and to the Appellate Body that they cannot increase or decrease Pakistan's rights or obligations vis-a-vis Tunisia, much less Pakistan's rights or obligations in relation to a non-party like Qatar. Thus, two commentators remark that "panel and Appellate Body decisions are *interpretive only*; they cannot add to or diminish the rights and obligations provided for under the covered Agreements."[89]

Second, at the other extreme, the sentence can be taken literally. No Member's rights or obligations, whether the Member is a party or non-party to a dispute, can be altered. I readily concede this interpretation may be flawed, because it deprives DSU Article 3.2 of any common sense meaning. It risks turning Article 3.2 into an empty vessel. After all, every adjudication in some way or another, however minor, adds to the rights or diminishes the obligations of the winner, or diminishes the rights or adds to the obligations of the loser. By its nature, there is a zero-sum element to every adjudication. For a WTO panel or the Appellate Body to follow the literal interpretation would be to do nothing.

Third, an interpretation that lies between these two extremes is that the sentence falls short of a cloaked statement against stare decisis, but still has some important substantive content. It is, in specific, a check against judicial activism.[90] It reminds panelists and Appellate Body members that in every case, the rights or obligations of one or more Members who may or may not be a party are bound to be af-

89. THOMAS & MEYER, *supra* note 28, at 323 (emphasis added).

90. *See generally* Hon. Charles B. Blackmar, *Judicial Activism*, 42 ST. LOUIS U. L.J. 753, 755 (1998) (discussing the meaning and significance of activism in courts of "last resort").

fected. Accordingly, it is a mnemonic device to the effect that WTO panels and the Appellate Body are not supposed to legislate. They are, in common law terms, supposed to "find" the law and not "make" it—an incantation recited by no less than the ICJ in the *South West Africa (Second Phase)* cases.[91] It follows that this third interpretation is not inconsistent with the first one, just less extreme.

Article 3.4 of the DSU, like Article 3.2, is not a clear denial of the existence or operation of the doctrine of stare decisis in the GATT-WTO system. But, it is not too far off the mark either. It provides that "[r]ecommendations or rulings by the DSB shall be aimed at achieving a satisfactory settlement *of the matter* in accordance with the rights and obligations under this Understanding and under the covered agreements."[92] In one sense, the provision states the obvious: of course the point of the adjudication is to solve the dispute at hand. What is interesting is what is missing. There is no mention of building a body of international common law on trade. There is not even a hint of possible effects on future parties involved in similar disputes. Indeed, the preceding provision, Article 3.3, keeps a narrow focus on the dispute at hand. It identifies "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member" as being "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of the Members."[93] In sum, a reasonable inference to draw from the silence of Article 3.4, and the context set by the preceding provision, is that the effect of adjudicatory outcomes is limited to the parties.

There is one provision of the DSU that might give some pause to this conclusion, though it does not alter it. Article 10.1 concerns third parties, saying that "[t]he interests of the parties to a dispute *and*

91. *See* South West Africa, Second Phase, Judgment, 1966 I.C.J 6 (July 18), para. 89, at 48 (describing the Court's duty as "to apply the law as it finds it, not to make it"); 1 ROSENNE, *supra* note 2, at 172 (commenting that the ICJ's function "is to 'declare the law,' that "[i]ts pronouncements are solely concerned with the law as it is," and that it is not for the ICJ to pronounce on political or moral duties that its legal conclusions may involve, or to speculate on future developments in the law); *see also infra* Part V.C.1 (concerning the source of the common law).

92. DSU, *supra* note 10, art. 3.4 (emphasis added).

93. *Id.* art. 3.3.

those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process."[94] Further, under Article 10.2, "[a]ny Member having a *substantial interest* in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel."[95] A close reading of these provisions suggests the existence of three constituencies in any dispute settlement proceeding. First, there are the parties to the dispute. Second, based on Article 10.2, there are third parties, who are Members with a "substantial interest"—a term not defined elsewhere in the DSU—that are participating actively in the dispute. Third, based on Article 10.1, there are non-disputant, non-third-party Members, i.e., the rest of the Membership sitting on the sidelines watching the events unfold.

Suppose that indeed stare decisis does not operate in our context. Then, requiring WTO panels and the Appellate Body to account for third-party Members does no violence to this supposition. After all, third-parties are participating voluntarily as a result of their avowed "substantial interest," and by assumption, the outcome does not bind third parties. Yet, if a de facto doctrine of stare decisis operates—as I argue in the second Article of this trilogy[96]—then the "substantial interest" of third parties compels them to get involved in the dispute at hand and try to influence the result. Indeed, DSU Article 10.4 contemplates this very scenario. It invites a third party that "considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement"[97] to initiate dispute settlement procedures, and requires that where possible the dispute be referred to the original panel.[98] A third party's alternative is to remain silent. If it pursues this course, and the decision in the original case cuts against its substantial interests, then it may have to re-litigate matters in the future and distinguish or argue

94. *Id.* art. 10.1 (emphasis added).

95. *Id.* art. 10.2. Only the complainant or respondent, however, can appeal a panel report to the Appellate Body. Third parties do not have the right of appeal. *See id.* art. 17.4.

96. *See* Bhala, *supra* note 12.

97. DSU, *supra* note 10, art. 10.4.

98. *See id.*

against the earlier "non-precedent precedent." With hindsight, it may wish it had tried to affect the outcome of the earlier case.[99]

Like the make-up of third parties, the composition of non-third party Members is determined by self-selection. The latter do not view themselves as having a "substantial interest" in the dispute. But, an expansive way to interpret Article 10.1 is to see it as saying their view might be shortsighted. They might have such an interest in the issues at hand in the future. Circumstances change, sometimes very rapidly, in the modern global economy. The pattern of trade of the economies of Members now on the sidelines may shift as different sectors develop and some gain a comparative advantage while others lose their edge. The Members on the sidelines may adopt different international policies, perhaps because of change in government or the onset of an economic crisis. So, Article 10.1 could be the following, somewhat cloaked, admonishment to panelists and Appellate Body members: "While your decision cannot bind Members not involved in the dispute, and those Members may now be quite apathetic about your decision, you must anticipate a very different context in which they are faced with a similar issue, and they will look at what you decided. Thus, you must adjudicate with systemic interests in mind."

The bottom-line point is this. Even an expansive reading of Article 10.1 hardly defeats the conclusion that we can locate in Article 3.2 the myth that stare decisis does not operate in international trade law. To the contrary, Article 10.1 makes a bit of a mockery of the purported rule against the application of precedent. It tells us what must be true about any club. The club's Members have a shared interest in how disputes are resolved, whether or not they now recognize it.

2. WTO Agreement Article IX.2

Article IX.2 of the WTO Agreement makes it plain that the Ministerial Conference and General Council are the exclusive organs for

99. Indeed, third parties not only contribute to the reasoning in a specific case, but "have also shown an ability and an interest in bringing systemic concerns to bear in the proceedings." Steger & Hainsworth, *supra* note 16, at 36.

rendering a definitive interpretation of a provision of GATT or a Uruguay Round agreement.[100]

> The Ministerial Conference and the General Council shall have the *exclusive* authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1 [i.e., all Uruguay Round agreements other than the DSU (Annex 2), the Trade Policy Review Mechanism (Annex 3), and the Plurilateral Trade Agreements (Annex 4)], they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement [i.e., the Councils for Trade in Goods, Trade in Services, and Trade-Related Aspects of Intellectual Property Rights, established by Article IV.5 of the WTO Agreement]. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. . . .[101]

This provision establishes in different words the proposition that panels and the Appellate Body are empowered to decide matters only for the parties in front of them, not render interpretations of disputed textual provisions for other WTO Members, much less the entire membership. Indeed, the Appellate Body in its report on *Japan-Taxes on Alcoholic Beverages* seems to read Article IX.2 in precisely this manner. "The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the WTO

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100. Interestingly, during the pre-Uruguay Round era, it was not clear whether Contracting Parties could render a binding decision—whether on disputing parties or in terms of establishing a precedent for the future—as to the interpretation of GATT or an agreement reached pursuant to GATT. To be sure, the Chairman of the Contracting Parties sometimes offered interpretative statements that purportedly reflected the consensus of the Contracting Parties, and such statements may well have bound parties to a dispute at hand. *See* JACKSON, *supra* note 24, at 122-23. But, they were at best guidance for the future, and surely ought not to have any higher status than this in the post-Uruguay Round era. As for joint interpretative action, GATT Article XXV.1 mandates that Contracting Parties "meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally with a view to facilitating the operation and furthering the objectives this Agreement. . . ." GATT, *supra* note 66, art. XXV.1. Professor Jackson indicates this language is sufficiently broad to authorize the Contracting Parties to provide textual interpretations, but wisely cautions that whether it was intended to be interpreted so broadly is dubious. After all, the ITO Charter contained an express provision on authority to interpret, and the charters of other international organizations tend to spell out whether those organizations have this power. *See* JACKSON, *supra* note 24, at 123.

101. WTO Agreement, *supra* note 15, art. IX.2 (emphasis added).

Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere."[102] Less than a year later, the Appellate Body reiterated the same point in *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.[103]

To top off Article IX.2 of the WTO Agreement, Article XVI.1 of the Agreement provides that the WTO "shall be guided by the decisions, procedures and customary practices" followed by GATT in the pre-Uruguay Round era. To the extent prior GATT panel reports—especially those that were adopted by the Contracting Parties—are "decisions," this Article reinforces the point that such reports are to be used only as "guidance."[104] Indeed, in the *Japan-Alcoholic Beverages* case, the Appellate Body distinguishes—quite rightly—between adopted and unadopted GATT panel reports. An adopted panel report, it says, creates "legitimate expectations" among Members, hence the report ought to be taken into account when relevant to a dispute.[105] But, an unadopted report can "have no legal status in the GATT or WTO system" because it has "not been endorsed through decisions by the Contracting Parties to GATT or WTO Members."[106] Even here, though, the Appellate Body leaves maneuvering room. It agrees that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be rele-

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102. Japan-Taxes on Alcoholic Beverages, *supra* note 85, at 14, para. 5.4.

103. WTO Appellate Body Report on United States-Measure Affecting Imports of Woven Wool Shirts ad Blouses from India, May 23, 1997, WTO Doc. WT/DS33/AB/R, at 10, 19-20, paras. 2.25, 6.8, *reprinted in* 2 WTO DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTER 1, 10, 16.

104. In the *Japan-Taxes on Alcoholic Beverages* case, the Appellate Body reversed the panel's conclusion that GATT panel reports adopted by the Contracting Parties were "decisions" of the Contracting Parties for purposes of paragraph 1(b)(iv) of Annex 1A incorporating GATT 1994 into the WTO Agreement. *See* Japan-Taxes on Alcoholic Beverages, *supra* note 85, at 34-35, paras. 9.1-9.2. The Appellate Body's finding is consistent with Article XVI.1 of the WTO Agreement, in that each gives the past only the role of guide.

105. *Id.* at 14, para. 5.6.

106. *Id.* at 15, para. 5.8. *See also* Pescatore, *supra* note 10, at 3, 31 (concluding that "[n]on-approved reports may have an interest from a[n] historical point of view, but they have no convincing authority as precedents properly speaking" (citation omitted)).

vant."[107] Is it not reserving for itself and WTO panels the right to use prior unadopted panel reports, without specifying exactly the nature and extent of the reliance, by taking advantage of the fuzzy distinction between "persuasion" and "binding" precedent?

In sum, the non-existence of stare decisis is *ostensible* "black letter" international trade law. DSU Article 3.2 and WTO Agreement Article IX.2 are as close to an official denial of the doctrine of stare decisis as is to be found in the GATT-WTO legal framework. They are close enough. The WTO Appellate Body agrees it is laboring in a regime without the doctrine. The secondary sources scarcely alter this regime. But, this "black letter" law is, as argued in Parts III and IV below, a *myth* of impure origins re-told with language employing a dubious distinction. It is, moreover, incongruous with the behavior—measured in Part Two of the trilogy—of the Appellate Body.

III. IN SEARCH OF THE ORIGINS OF THE MYTH

Whence the myth of exclusion of the doctrine of stare decisis from the GATT-WTO adjudicatory system? This question is even trickier to answer than scouring secondary sources, Appellate Body reports, and WTO texts to assure ourselves that the doctrine does not operate in the system, or at least is not supposed to. There are a number of candidates for the position of "origin of the myth." While they are not mutually exclusive, some are more speculative than others. Three prominent candidates are assessed below: the ICJ, the civil law influence, and professorial self-interest.

A. TRANSFERENCE FROM THE ICJ TO THE WTO?

1. The ICJ-Havana Charter Nexus

Is it possible that the drafters of the ITO Charter and GATT simply inherited the myth about stare decisis from the ICJ?[108] The answer

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107. Japan-Taxes on Alcoholic Beverages, *supra* note 85, at 15, para. 5.8.

108. The ITO Charter is set forth in United Nations, Final Act and Related Documents, U.N. Conference on Trade and Employment, held at Havana, Cuba from 21 November 1947 to 24 March 1948, Interim Commission for the International Trade Organization, Lake Success, New York, April 1948, U.N. Doc. E/Conf. 2/78. It is reprinted as the Appendix to HON. JAMES G. FULTON & HON. JACOB K. JAVITS, 80TH CONG, 2D SESS., THE INTERNATIONAL TRADE

is yes, but there is an irony here. The source itself has proven over the decades to be impure. In fact, "precedent" lives well in ICJ jurisprudence.

The "missing link" between GATT-WTO adjudication, on the one hand, and the ICJ, on the other hand, is in the ITO Charter. Chapter VIII of the Charter, consisting of Articles 92 through 97, established an ITO dispute settlement mechanism. Significantly, Article 96—entitled "Reference to the International Court of Justice"—created a right to appeal interpretive legal issues to the ICJ.

> 1. The [International Trade] Organization may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations [which provides for other United Nations organs and specialized agencies to request advisory opinions of the ICJ on legal questions arising within the scope of their activities], request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.
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> 2. Any decision of the Conference [i.e., as defined in Article 74.1 of the Charter, all the ITO members] under this Charter shall, *at the instance of any Member whose interests are prejudiced by the decision*, be subject to review by the International Court of Justice by means of a request, in appropriate form, for an advisory opinion pursuant to the Statute of the Court.
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> 3. The request for an opinion shall be accompanied by a statement of the question upon which the opinion is required and by all documents likely to throw light upon the question. This statement shall be furnished by the Organization in accordance with the Statute of the Court and after consultation with the Members substantially interested.
>
> 4. Pending the delivery of the opinion of the Court, the decision of the Conference shall have full force and effect; *Provided* that the Conference shall suspend the operation of any such decision pending the delivery of the opinion where, in the view of the Conference, damage difficult to repair would otherwise be caused to a Member concerned.
>
> 5. *The Organization shall consider itself bound by the opinion of the Court* on any question referred by it to the Court. In so far as it does not

ORGANIZATION—AN APPRAISAL OF THE HAVANA CHARTER IN RELATION TO UNITED STATES FOREIGN POLICY, WITH A DEFINITIVE STUDY OF ITS PROVISIONS 59-120 (subcom. print 1948).

> accord with the opinion of the Court, *the decision in question shall be modified.*[109]

This link is rather remarkable. Any ITO Member whose interests are prejudiced by an ITO decision could appeal to the ICJ. The ITO would be bound by the ICJ's opinion, and the ITO would have to modify the offending portions of its decision. The link also raises some interesting unanswered questions. For example, under paragraph 2, who is to judge whether the interests of an ITO Member are prejudiced? Is it self-judging? As for paragraph 5, does it mean to say that the entire ITO is bound by the ICJ's opinion? If so, then is that opinion in effect a precedent not only for the ITO Members involved in the underlying dispute that generated the reference to the ICJ, but also for all non-party ITO Members? In turn, is this not a wink at the development of a common law of international trade?

This possibility seems incongruous with what we know about ICJ jurisprudence. ICJ decisions, as noted in Part II.A above, are at least supposed to be subject to a rule manifest in Articles 38.1 and 59 of that Court's governing Statute against the use of stare decisis. Thus, it may well be that the drafters of the ITO Charter and GATT had no choice but to accept the non-operation of the doctrine. Taking this approach, they may have thought of paragraph 5 of Article 96 of the ITO Charter as saying nothing more than that the ITO was supposed to pay attention to an ICJ opinion. In other words, the ITO was to regard the opinion as binding for purposes of resolving only the interpretive legal issue in the particular underlying case, but the Organization was not obligated to give it any broader import.

We must base this construction of Article 96.5 of the ITO Charter on consequentialist reasoning, as well as on the supposed lack of stare decisis in ICJ jurisprudence, rather than on the plain language of the text, which is obviously flexible. If some trade disputes were

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109. Charter for an International Trade Organization, Final Act and Related Documents, art. 96, U.N. Conf. On Trade and Employment, Mar. 24, 1948, U.N. Doc. ICITO/1/4 (1948), *reprinted in* FULTON & JAVITS, *supra* note 108, at 106 (emphasis added). Unfortunately, in their report to the House Foreign Affairs Committee, Fulton and Javits provide little commentary on this provision. *See id.* at 24-25; *see also* Petersmann, *supra* note 28, at 87 (discussing Article 96); THOMAS & MEYER, *supra* note 28, at 308 (noting the ability to refer interpretive issues to the ICJ).

referred to the ICJ, and the ICJ's decisions were not binding in future cases, how could the drafters expect to overrule the ICJ, and impart a precedential effect to the ICJ's decisions? If the drafters had really wanted a doctrine of stare decisis, at best they could have crafted a rule that issues decided without reference to the ICJ had precedential value. Such a rule could not apply to issues referred to the ICJ in view of Articles 38.1 and 59 of the ICJ Statute. Yet, this rule would have created a two-tiered structure. A case referred to the ICJ would not create precedent, but a case not referred to the ICJ would create a precedent.

The drafters, of course, were not so foolish as to embark down this path. Accordingly, they seem to have accepted their position. The doctrine of stare decisis could not operate in the ITO-GATT system, because there was no stare decisis in the ICJ system.

Does this conclusion mean the drafters of the ITO Charter and GATT scrupulously avoided considering the future implications of the outcome of past adjudications? Hardly. Does it mean that precedent did not sometimes creep in the back door? Hardly. There is some evidence the drafters anticipated the use of adjudicatory outcomes as "precedent" in a very loose sense. In his 1949 book, *A Charter for World Trade*, Clair Wilcox, the Vice-Chairman of the American delegation to the Havana Conference, writes that by referring questions on the law applicable to a dispute to the ICJ, "[a] basis is thus provided for *the development of a body of international law to govern trade relationships*."[110] Here we do have a wink at the creation of an international common law of trade.

Mr. Wilcox's statement proved to be prescient. After the collapse of the ITO, between 1947 and 1955, trade disputes among GATT Contracting Parties were not handled by panels of experts.[111] Initially, they were dealt with at the plenary bi-annual meetings of the Contracting Parties. Later, intercessional committees of the Contracting Parties were assigned the task of resolving disputes, and still later, working parties were used. The working parties had no ability to

110. CLAIR WILCOX, A CHARTER FOR WORLD TRADE 159 (1949) (emphasis added).

111. *See* JACKSON, *supra* note 24, at 115-16, and THOMAS & MEYER, *supra* note 28, at 309 (discussing further the early GATT dispute resolution mechanism).

render binding decisions. Rather, their purpose was to clarify the relevant issues. But, in 1955, then-GATT Director-General Eric Wyndham-White successfully brought about a change in the dispute resolution procedures. The working party mechanism, which had relied on Contracting Parties designating members of a working party and issuing instructions to them, was replaced by the use of panels comprised of experts acting independently from the Contracting Parties. During this early period, there are glimmers of the emergence of the international common law of trade that Mr. Wilcox seems to have foreshadowed.

The 1952 case of *Australian Ammonium Sulphate* is an example of this emerging common law.[112] The dispute involved the difficult language of GATT Article XXIII concerning actions by one Contracting Party that nullify or impair the trade benefits that accrue, or ought to accrue, to one or more other Contracting Parties. That Article, of course, bifurcates claims into violation and non-violation categories. Nowhere, however, does it expressly discuss the situation where the actions of a Contracting Party that cause harm to the trade interests of the aggrieved Contracting Party are not, and could reasonably have been, anticipated by the aggrieved party. Yet, the decision introduces the concept of reasonable expectations, indicating that benefits are nullified or impaired by actions that the aggrieved party could not reasonably have been anticipated. This concept was used approvingly the very next year, 1953, in the *German Duty on Sardines* case, where it was agreed that reasonable expectations of the Contracting Parties should be protected.[113] From this seed, the jurisprudence on the nullification or impairment concept developed—hence,

112. *See* The Australian Subsidy on Ammonium Sulphate, adopted Apr. 3, 1950, GATT, B.I.S.D. (vol. II) at 188, 193 para. 12 (1952) (stating that the working party "agreed that such impairment [under GATT Article XXIII] would exist if the action of the Australian Government . . . could not reasonably have been anticipated by the Chilean Government [which claimed nullification and impairment of a benefit], taking into consideration all pertinent circumstances and the provisions of the General Agreement. . . .").

113. *See* Treatment by Germany of Imports of Sardines, adopted Oct. 31, 1952, GATT, B.I.S.D. (1st Supp.) 53, 58 para. 16 (1953) (stating that the Panel on Complaints "agreed that such impairment [under GATT Article XXIII] would exist if the action of the German Government . . . could not reasonably have been anticipated by the Norwegian Government [which claimed nullification and impairment of a benefit] at the time it negotiated for tariff reductions. . . .").

Professor Hudec dubs the *Australian Ammonium Sulphate* case the *Marbury v. Madison* of GATT.[114] Ultimately, the practices emerged that a panel would find prima facie nullification or impairment when a Contracting Party had breached a GATT obligation, and that a panel would make a prima facie ruling as to whether nullification or impairment occurred when a Contracting Party had taken an action that was not an outright breach—such as providing a lawful subsidy to a product, or imposing a lawful quantitative restriction on a product—but had failed to meet its burden of proof that its action did not nullify or impair another Contracting Party's benefits.[115]

The point is not to trace all of the decisional lines in early history here. Exploring the extent and nature of the use of GATT panel decisions in the pre-Uruguay Round era is for another article. However, it is to indicate that such lines do exist. Thus, we must be careful not to suggest the "passive rejection," if we can call it that, of stare decisis by the drafters of the ITO Charter and GATT was followed pervasively in early practice. While they may well have inherited it from the ICJ, they thought about their inheritance. Must we, then, agree with the following conclusion of Professor Jackson?

> [U]nder accepted doctrines of international law, *stare decisis* or the common-law concept of "precedent" *does not apply*. Thus, a World Court decision (formally the International Court of Justice, ICJ) in a dispute between countries A and B provides no binding precedent as such in a dispute between C and D, nor for A and C, nor even for another dispute at another time between A and B. Yet, in practice, the diplomats and officials who participated in the GATT system *were very influenced by precedent, and often mentioned precedents in some detail* in GATT deliberations, as well as in the formal dispute-settlement panel findings. *A common-law lawyer would find himself very much at home in GATT legal discussions.*[116]

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114. *See* ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 159-67 (1975); Robert E. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 483-89 (1975); Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1341 (1971).

115. *See* JACKSON, *supra* note 24, at 115.

116. JACKSON, *supra* note 24, at 122 (emphasis added).

It seems reasonable enough. Indeed, it is quite consistent with the thesis that the absence of stare decisis from the GATT-WTO system is a myth, for it instructs us that while the doctrine "does not apply," in actual fact precedent animated through the decision-making process in the early GATT years.

For two reasons, however, we ought not to rest too comfortably with this conclusion. The first reason takes us back further into the past. We ought to examine the origins of the ICJ doctrine itself. The second reason brings us to a present-day retrospective. Is the absence of stare decisis from ICJ jurisprudence itself a myth? These matters are discussed in turn below.

2. *Origins of the ICJ Doctrine*

First, if stare decisis does not exist in the GATT-WTO system as a result—at least in part—of an inheritance from ICJ doctrine, whence this doctrine? In other words, at some point in legal history there is a break between, on the one hand, the development and implementation of stare decisis in Anglo-American jurisprudence, and, on the other hand, the exclusion of this doctrine from ICJ jurisprudence. When does this break occur, and why?

Addressing this question poses a risk of extended, though not infinite, regress. The idea of precedent and the birth of the common law has been traced reliably at least as far back as the work of Sir Edward Coke in late sixteenth century and early seventeenth century England,[117] and by some sources still further back.[118] Coke compiled thirteen volumes of cases, known as "the Reports," wherein he noted all previous authorities relevant to each case he reported. Coke thereby provided not only a study of medieval case law,[119] but also a framework that could be used to justify legal arguments. Coke also helped create case law by appealing a large number of decided cases, and helped establish it by exalting the common law above the King's pre-

117. *See* HARDING, *supra* note 46, at 199-200, 220-21 (discussing the system of precedent emerging in the Middle Ages).

118. *See, e.g.*, C.K. ALLEN, LAW IN THE MAKING 183-98 (6th ed. 1958) (discussing the work of Bracton, the compilation of the Year Books reports, and the use of precedent in the thirteenth and fourteenth centuries).

119. *See* HARDING, *supra* note 46, at 199, 223; *see also* ALLEN, *supra* note 118, at 203-04.

rogative when he was a judge, and using legal precedent as a weapon of Parliament when he served in the House of Commons.[120]

Tempting as it is, we need not try to trace parallel developments pointing in opposite directions, namely, the rise of English common law and the denial of precedent in international law, as far back as Coke. But, it is useful to explore the lineage back one generation before the ICJ Statute. Article 38.1 of the ICJ Statute is drawn from the statute of its predecessor, the PCIJ, and "differs from it only slightly."[121] In discussing this Article, the leading scholarly treatise on the earlier court, *The Permanent Court of International Justice 1920-1942*, by Manley O. Hudson, a PCIJ judge, makes clear that "[n]o direction has been given to the Court which would require it to follow precedents established in its own jurisprudence."[122] Similarly, Article 59 of the ICJ Statute is handed down from the PCIJ Statute. This Article appeared not in the 1920 draft statute prepared by the Advisory Committee of Jurists, but later during the debates of the Council of the League of Nations.[123]

To be sure, the Council understood that PCIJ decisions "could at least affect the development of international law."[124] In fact, Judge

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120. *See* HARDING, *supra* note 46, at 200, 214, 278.

121. RESTATEMENT, *supra* note 48, sec. 903 reporters' note 1, at 359. *See also* 3 ROSENNE, *supra* note 2, at 1590 (stating that Article 38.1 "is taken virtually unchanged from the corresponding provision of the Statute of the Permanent Court"). *Compare* ICJ Statute, *supra* note 47, art. 38.1, 59 Stat. at 1060, 3 Bevans at 1187 *with* PCIJ Statute art. 38, *reprinted in* MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, sec. 187, at 194, App. No. 4, at 677 (1943).

122. HUDSON, *supra* note 121, sec. 556, at 626. Chapter 7 of Judge Hudson's treatise discusses the creation of the PCIJ through the League of Nations, and Chapter 10 deals exhaustively, in an article-by-article manner, with the drafting of the PCIJ Statute. For the drafting history of Article 38 of that Statute, see *id.* sec 187, at 194-95; *see also* Jan Hostie, *The Statute of the Permanent Court of International Justice*, 38 AM. J. INT'L L. 407, 425-26 (1944). For the drafting history of Article 59, see HUDSON, *supra* note 121, sec. 208, at 207-08.

123. As suggested, it is not necessary for present purposes to trace the lineage through the Council debates and back further, though it would be fascinating to do so in a different context.

124. SHAHABUDDEEN, *supra* note 55, at 55. *See also* HUDSON, *supra* note 121, at 195 (quoting a report of a sub-committee of a League of Nations committee to the effect that it was an important task for the PCIJ "to contribute, through its jurisprudence, to the development of international law").

Hudson states in his treatise that the PCIJ relied on its own prior decisions for, at a minimum, guidance.

> If Articles 38 and 59 [of the PCIJ's Statute] taken together do not exclude the Court's adoption of the principle of *stare decisis* with respect to its own jurisprudence, they do not encourage that course, *and the Court has taken no step in that direction.* On the other hand, these Articles place no obstacle in the way of the Court's finding *guidance* in its earlier judgments, *or even treating them as precedents.* Any tribunal which seeks to administer justice in an impersonal manner will be disposed to rely upon precedents where they exist. The Court has complete freedom in this respect, and nothing prevents it from following a general rule that it will be *guided* by the principles applied in its earlier adjudications unless cogent reasons should appear for departing from them.
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> In its jurisprudence to date [i.e., 1942], the Court has not evolved a definite principle as to the weight which it will attach to its earlier judgments. In numerous instances references have been made to principles previously applied, frequently with citations of the cases in which they were enunciated, and some principles have been so repeatedly applied that they may now be said to have become part of the international law of the Court. Various principles of jurisdictional and procedural law have been followed through a long course of action, and in the field of substantive law some principles are outstanding for their repeated application. . . .
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> [Thus,] without declaring that it is bound to do so the Court has shown itself disposed to follow basic principles once they have been established in its jurisprudence.[125]

But, as Judge Hudson also points out, the language of Article 38 of the PCIJ Statute—and, therefore, that of the ICJ Statute as well—indicates that judicial decisions are subsidiary sources of law, which he suggests means they are subordinate to the other sources listed in the Article—international agreements, customary law, and general principles.[126] Hence, they are to be used only if none of the other sources provides sufficient guidance. Moreover, the PCIJ was to be criticized for creating a body of decisional law. Quoting an Italian observer, Judge Hudson remarks that "those who created the Court did not in-

125. HUDSON, *supra* note 121, sec. 556, at 626 (emphasis added).

126. *See id.* sec. 551 at 612; *see also id.* sec. 547, at 606-07.

tend 'that it should act as a factory of international law or that its judgments should build up a system of international law.'"[127]

Thus, during the Council debates, Article 59, along with the introductory words of Article 38.1(d), were added to the PCIJ Statute "to provide directly what some delegations thought was implied indirectly by Article 63."[128] Article 63.2 of the ICJ Statute, which is the same as that in the PCIJ Statute, provides every state with "the right to intervene in the proceedings," but cautions that "if it uses this right, the construction given by the judgment will be equally binding upon it."[129] In 1944, the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice observed about Article 59 that:

> What it means is *not* that the decisions of the Court have no effect as precedents for the Court or for international law in general, but that they *do not possess the binding force of particular decisions in the relations between the countries who are parties to the Statute.* The provision in question in no way prevents the Court from treating its own judgments as precedents. . . . *It is important to maintain the principle that countries are not "bound" in the above sense by decisions in cases to which they were not parties. . . .*[130]

In other words, the 1944 Committee rested its view of Article 59 on a distinction between "binding" and "non-binding" precedent—the very distinction I called into question at the outset of this article and that I challenge in Part IV below—and did nothing to defend the distinction or the more general principle it asserted to be "important." Nonetheless, the Committee's recommendation to retain the principle embodied in Article 59, and the language of the provision itself, was

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127. *See id.* sec. 187, at 195 (quoting Mr. Scialoja).

128. 3 ROSENNE, *supra* note 2, at 1628; HUDSON, *supra* note 121, at 207.

129. *Compare* ICJ Statute, *supra* note 47, art. 63.2, 59 Stat. at 1063, 3 Bevans at 1191, *with* PCIJ Statute art. 63.2, *reprinted in* HUDSON, *supra* note 121, sec. 212, at 209, App. No. 4, at 680.

130. *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, 10th February 1944, British Parliamentary Paper, Misc. No. 2 (1944), Cmd. 6531, *reprinted in* 39 AM. J. INT'L L. Documents Supp. Section at 1 (1945), *also quoted in* 3 ROSENNE, *supra* note 2, at 1628 (emphasis added).

accepted,[131] and each generation has accepted the heirloom more or less uncritically ever since. The provision in the ICJ Statute is identical to that in the PICJ Statute.[132]

During the PCIJ's life span, and through the decades of the ICJ's existence, these courts have interpreted Article 59. Never have these interpretations added much value to what is quite apparent from the plain meaning of the statutory language.[133] The exceptions are, perhaps, the 1926 *Certain German Interests in Polish Upper Silesia (Merits)* case, when the PCIJ ruled that Article 59 does not bar it from rendering a purely declaratory judgment,[134] the 1963 *Northern Cameroons* case, when the ICJ extended the non-binding effect of its decisions from simply non-parties to all other organs of the United Nations,[135] and the 1986 *Military and Paramilitary Activities in and*

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131. *See* 3 ROSENNE, *supra* note 2, at 1628 (stating that "[n]o proposals for amendment of Article 59 were made at the San Francisco Conference [on International Organization, held between 25 April-26 June 1945], and the provision is retained in the Statute of the present Court unchanged").

132. *Compare* ICJ Statute *supra* note 47, art. 59, 59 Stat. at 1062, 3 Bevans at 1190, *with* PCIJ Statute art. 59, *reprinted in* HUDSON, *supra* note 121, sec. 208, at 207, App. No. 4, at 680.

133. For a summary of these interpretations, see 3 ROSENNE, *supra* note 2, at 1629-37 (summarizing the PCIJ's and ICJ's various interpretations of Article 59).

134. *See* Certain German Interests in Polish Upper Silesia, Merits, 1926, PCIJ (ser. A) No. 7, at 19, *also discussed and cited in* SHAHABUDDEEN, *supra* note 55, at 102, n. 17.

The PCIJ reaffirmed this point the following year, in the 1927 *Chorzow Factory* case. *See* Chorzow Factory, 1927 P.C.I.J. (ser. A) No. 13, at 20, *also discussed and cited in* SHAHABUDDEEN, *supra* note 55, at 102 n.18. *See Judgment No. 11, Interpretation of Judgments Nos. 7 and 8 (Chorzow Factory)*, FOURTH ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE (JUNE 15, 1927-JUNE 15, 1928), (ser. E) No. 4, at 184, 187-88. *See also Digest of Decisions Taken by the Court in Application of the Statute and Rules*, THIRD ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE (JUNE 15, 1926-JUNE 15, 1927), Series E-No. 3, at 173, 218 (concluding on the basis of numerous references the PCIJ made to earlier judgments that "the Court has in practice been careful not to reverse precedents established by itself in previous judgments and opinions, and to explain apparent departures from such precedents").

135. *See* Case Concerning the Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 3, 33 (Jan. 11) (extending the non-binding effect of ICJ decisions from solely non-parties to all organs of the United Nations). The court stated that "[i]n accordance with Article 59 of the Statute, the judgment would not be binding on Nigeria, or on any other State, *or on any organ of the United Nations. Id.* (emphasis

against Nicaragua (Merits) case, when the ICJ held that a state that chooses not to appear remains a party to the case and thus bound by the eventual judgment.[136]

In sum, the PCIJ Statute is the obvious parent of Articles 38.1(d) and 59 of the ICJ Statute. We might take one more step back into the past and query whether there is an additional intellectual forefather, and indeed it seems there is. International arbitral practice in the late nineteenth century and throughout the twentieth century could also be part of the genealogy.[137] Arbitral rulings could not, and cannot, bind parties other than those involved in the dispute.[138] That is, arbitral awards have only preclusive effects on the parties.[139] As Article 1476 of the French Code of Civil Procedure states, "[t]he [arbitral] award has, from the moment it is rendered, res judicata effect *with respect to the dispute it decides*."[140] To be sure, there are some open questions about the binding effect of an award. For example, is the binding effect of an initial partial arbitral award limited to the order,

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added).

136. *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United States (Merits)), 1986 I.C.J. 14, 24, para. 28 (June 27) (holding that a state choosing not to appear in a case in which it is a party remains a party regardless of its participation and thus is bound by the eventual judgment).

137. For a treatment of international arbitral practice in the late nineteenth and early twentieth centuries, see HUDSON, *supra* note 121, at chs. 1 (discussing the Permanent Court of Arbitration (sometimes referred to as "the Hague Tribunal") created by the 1899 and 1907 Hague Conventions on the Pacific Settlement of International Disputes); *id.* at 5 (discussing proposals for a court of arbitral justice at the turn of the century). Publication of the awards of the Permanent Court of Arbitration was sometimes delayed, often restricted in one way or another, and no serial form developed. Judge Hudson concludes that while the awards "have served and . . . will continue to serve as important jural materials for the development of international law,"they "lack the continuity and consistency which would constitute them a body of cumulating jurisprudence," perhaps in part because some of the cases "were not adequately grounded on citations of existing law." *Id.* sec. 31 at 34-35.

138. *See* RESTATEMENT, *supra* note 48, sec. 904(3), at 375, cmt. e, reporters' note 6 (discussing the rule that "[a]n award by an arbitral tribunal is binding *on the parties* unless they have agreed otherwise") (emphasis added).

139. *See* TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 522 (1999) (discussing Dutch and Egyptian arbitration rules).

140. NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1476 (Fr.), *quoted in* VARADY ET AL., *supra* note 139, at 609 (emphasis added).

or does it extend to the *ratio decidendi*?[141] Indeed, arbitral awards differ somewhat from court decisions in that they have a lesser degree of self-contained finality: while an arbitral award can be enforced in most instances as soon as the arbitration proceeding is completed and the award announced. In some instances an award can be set aside by a court of competent jurisdiction, or the award simply may be denied recognition and enforcement.[142]

Still, the point is that perhaps the intellectual heritage of the supposed non-operation of stare decisis in the GATT-WTO system can be traced through the ICJ and PCIJ Statutes back to international arbitration rules. This part of the lineage, however, is uncertain. Rosenne, one of the world's leading commentators on the ICJ, questions its contemporary relevance with words that easily could fit the GATT-WTO system:

> The conceptual underpinning of the [ICJ] Statute is that normally there are only two parties to a given legal dispute, with the intellectual exception of a dispute in which the construction of a multilateral treaty is in issue. That bilateral approach—carefully articulated in Article 59 – *was certainly appropriate in nineteenth century arbitration—and indeed in all arbitration*. But, the unforeseen expansion in the employment of the multilateral treaty . . . and the ever-increasing complexity and multilateralization of international relations in general, must give rise to doubts whether a dispute settlement mechanism based on the single assumption that disputes exist only between two parties is adequate or even appropriate for modern needs.[143]

Rosenne's remarks suggest an interesting aspect of the lineage. Can we tie early international arbitration on the one hand, to dispute resolution in international trade, on the other hand?

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141. *See supra* note 10 (defining "*ratio decidendi*"); *Mexican Construction Co. v. Belgian Co.*, Arbitral Award (International Chamber of Commerce) 1984, 12 Y.B. COMM. ARB. 87 (1987), *excerpted in* VARADY ET AL., supra note 139, at 622.

This controversy also has been discussed in the context of ICJ litigation. Article 59 of the ICJ Statute uses the word "decision," whereas Articles 60 and 63 use the word "judgment." One commentator concludes that the two words are synonymous, and refer "not only to the operative clause of the judgment, but to its reasons as well." 3 ROSENNE, *supra* note 2, at 1661.

142. *See* VARADY ET AL., *supra* note 139, at 586.

143. 3 ROSENNE, *supra* note 2, at 1654 (emphasis added).

In other words, independent of Articles 38.1 and 59 of the ICJ Statute, can we say that the DSU is somehow related to the arbitration paradigm? We seem to have at best only weak circumstantial evidence, one example being the comment of two observers—that the GATT panel system that emerged in the mid-1950s "began to take on the appearance of arbitration. . . ."[144] The hunch, however, seems reasonable.

3. *Is the ICJ Doctrine Also a Myth?*

The second reason why we ought not to be too complacent with the conclusion of Professor Jackson[145] that common law lawyers would have been at home in the early GATT environment, is that it fails to bring us up to date. To the extent that the purported absence of stare decisis from the GATT-WTO system is inherited at least in part from the ICJ rule, can we say with the benefit of hindsight that the source is as pure as it would appear? What Mr. Wilcox,[146] could not have foreseen in 1949 is just how important a role precedent plays—in a de facto sense—in ICJ adjudication. In other words, given the use of "precedent" by the ICJ, how ironic it is that the myth about stare decisis in the GATT-WTO system might be based in part on ICJ practice.

The ICJ itself characterizes some of its prior decisions as "settled jurisprudence."[147] Judge Mohamed Shahabuddeen of the ICJ adds that "though having the power to depart from them, [the ICJ] *will not lightly exercise that power*."[148] He agrees that "[p]recedents may be followed or discarded, but not disregarded."[149] But, it is for another article to trace ICJ decisional lines and, as intimated earlier,[150] perhaps yet another to trace early GATT decisional lines. It suffices for

144. THOMAS & MEYER, *supra* note 28, at 309.

145. *See supra* note 116 and accompanying text.

146. *See supra* note 110 and accompanying text.

147. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 18 para. 33 (May 24)

148. SHAHABUDDEEN, *supra* note 55, at 3.

149. *Id.* at 131 (emphasis added), *quoting* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 56 (2d rev'd ed. 1985).

150. *See supra* note 115 and accompanying text.

my purposes to rely on two sapiential secondary sources that not only speak openly of "precedent," but more importantly acknowledge its resonance throughout ICJ jurisprudence.

First, the *Restatement* informs us that the ICJ "has frequently followed the *precedents* established by its predecessor."[151] Second, no less an authority than Rosenne informs us that:

> Article 38, paragraph 1(d), in its reference to judicial decisions (*les decisions judiciaires*), by mentioning Article 59 of the Statute . . . contains an *apparent* limitation on the Court's freedom to employ judicial decisions as a subsidiary means for the determination of the rules of law. This, however, is *not* the interpretation placed upon that provision by the Court, *which habitually refers to its own decisions and those of the Permanent Court*. The reference to Article 59 simply means that the legal consequences of a decision *qua* decision are limited to the parties and to that particular case. . . . While there is no formal hierarchy of international courts and tribunals, the pre-eminence of the Permanent Court and the present International Court is today generally accepted. Any other international adjudicatory body which ignored relevant *dicta* and decisions of the International Court *would jeopardize its credibility. The constant accretion of judicial precedents is creating what is now a substantial body of international case law*. The effect of this has been the incorporation of a sensible modification into the apparent rigidity of Article 38, paragraph 1(d). . . .
>
> The Court has carefully avoided any statement which could indicate that it felt itself "bound" by a previous decision – indeed, for it to do so would not be compatible with the opening words of paragraph 1(d). . . .
>
> The point was well expressed by President Winiarski in an address delivered on the fortieth anniversary of the inauguration of the Permanent Court. Pointing out that the present Court has from the beginning been conscious of the need to maintain a continuity of tradition, case-law and methods of work, he explained that "without being bound by *stare decisis* as a principle or rule," the Court "often seeks guidance in the body of decisions of the former Court, and the result is a remarkable unity of precedent, an important factor in the development of international law."
>
> Corresponding to this is the care evinced by the Court not formally to overrule earlier decisions but rather, where necessary, to try to explain away an earlier decision which it feels unable to follow.[152]

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151. RESTATEMENT, *supra* note 48, sec. 903 reporters' note 1 at 359 (emphasis added). *See also* reporters' note 13 at 373 (observing that the ICJ "frequently follows the jurisprudence of its predecessor").

Rosenne actually applauds as a "*very significant and positive* development" the fact that Article 59 of the ICJ Statute "has *not* prevented extensive use now normally being made of judicial precedents, especially those of the International Court itself."[153]

To be sure, these secondary sources do not declare the ICJ to be bound, as a matter of international law, by its prior decisions, i.e., they do not say the common law doctrine of stare decisis exists in ICJ jurisprudence. We should not expect them to be so bold in view of the ICJ's lack of compulsory jurisdiction unless agreed to by a United Nations member—a topic discussed in Part III.A.4 below. But, these sources take us to the brink of stare decisis, where supposedly we ought to be able to see the line between reliance on authority to bolster credibility, on the one hand, and a legally binding effect, on the other hand. I do not wish to debate whether these sources should—as both a positive and normative matter—take the final step in the ICJ context. I simply wish to point out that by admitting a de facto system of precedent exists in ICJ jurisprudence, they go quite far enough toward diluting the purity of this jurisprudence as a source for the supposed non-existence of stare decisis in GATT-WTO adjudication.

In sum, it is quite reasonable to conclude that the link in the ITO Charter to the ICJ is at least one possible source of the myth that stare decisis does not operate in international trade law. The drafters of the Charter and GATT were aware of the potential use of adjudicatory decisions in future controversies, and seem not to have minded. Subsequent ICJ history, however, suggests that notwithstanding the severe caution of Articles 38.1 and 59, the source itself is, or at least has become, impure. To extend the metaphor, perhaps the "no precedent rule" established in these Articles for the ICJ is as much of a myth as that rule is in the WTO realm.

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152. 3 ROSENNE, *supra* note 2, at 1609-11 (emphasis added). *See also id.* at 1662 (noting that "although a judgment *qua* judgment can never bind non-parties," the case law and realities of international litigation are that the ICJ does decide matters that may affect third-party interests even when those interests are not the subject matter of the claim at bar, and justifying this outcome because Articles 62 and 63 of the ICJ Statute accord third parties the right to intervene). For more on the jurisprudential continuity between the PCIJ and ICJ as intended by Article 92 of the United Nations Charter, see SHAHABUDDEEN, *supra* note 55, at 22-23.

153. 3 ROSENNE, *supra* note 2, at 1651 (emphasis added).

Two final points that bear on ICJ jurisprudence as an origin of the myth about stare decisis in international trade law ought to be made clear here. First, "[n]o dispute involving GATT or its associated agreements has ever been taken to the World Court."[154] Thus, the ICJ-Havana Charter link never had any practical importance in the past. Second, and more importantly, the link has no practical importance today. Any vestiges of a GATT-ICJ connection were lost during the Uruguay Round. Article 23.1 of the DSU makes clear that:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.[155]

This is fairly clear language that the exclusive means for resolving disputes is the WTO dispute settlement mechanism, and indeed scholars seem to interpret Article 23.1 in this way.[156]

These two points reinforce the above conclusion. When the link existed, it was never used, and now there is no link. Why, then, even contemplate justifying the myth on the formalism of an ICJ Statute that itself bears a poor relationship to reality?

4. *Compulsory Jurisdiction and the Contemporary Irrelevance of the ICJ Doctrine to WTO Adjudication*

Just how forceful this rhetorical question is should be obvious from the fact that as a result of the Uruguay Round, the jurisdictional systems in the WTO and ICJ are now very different. Here we also see that parts of the *Restatement* are dreadfully in need of updating. We are informed in its *Introductory Note* that "[t]here is no international judiciary with general, comprehensive and compulsory jurisdiction."[157] In fact, unless otherwise indicated in the Uruguay Round

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154. JACKSON, *supra* note 24, at 124.

155. DSU, *supra* note 10, art. 23.1.

156. *See, e.g.*, JACKSON, *supra* note 24, at 124 (stating that "it can be argued that the parties have agreed in the WTO treaty that the WTO dispute-settlement procedure is the exclusive recourse for disputes concerning any of the WTO texts).

157. RESTATEMENT, *supra* note 48, pt. 1, introductory note, at 17.

agreements themselves, WTO panels and the Appellate Body have general and comprehensive jurisdiction over those agreements, and their jurisdiction is compulsory. That is, unlike the ICJ system, WTO Members do not, under international law, have the option of opting out of the DSU and yet expect to remain Members of the WTO.[158]

Article 36 of the ICJ Statute and Article 96 of the United Nations Charter create four types of jurisdiction for the Court: (1) jurisdiction by consent of the parties; (2) jurisdiction by agreement providing for submission of disputes to the Court; (3) compulsory jurisdiction pursuant to a declaration by each party under Article 36.2 of the ICJ Statute that accepts the Court's jurisdiction; and (4) jurisdiction to render an advisory opinion at the request of the United Nations General Assembly, Security Council, or United Nations organ or agency.[159] United Nations members are not required to submit to the Court's compulsory jurisdiction, and less than one-third of all United Nations members accept the ICJ's compulsory jurisdiction.[160] The United States did from 1946 through 1985.[161] But, in October 1985, it withdrew—effective April 1986[162]—in the wake of the infamous *Military and Paramilitary Activities in and against Nicaragua* case.[163] Even among the declarations by some United Nations mem-

158. Indeed, before 1946, the compulsory jurisdiction provision in PCIJ Statute Article 36.2, was known as the "optional clause" (emphasis added). 2 ROSENNE, *supra* note 2, at 728. The principle embodied in this provision was imported into the ICJ Statute. *See id.* at 732. However, given the comparatively stronger jurisdiction under the WTO Agreement and DSU than under the ICJ Statute, Rosenne's conclusion that "[t]he essential concept of international jurisdiction . . . has not progressed far in substance from what it was before the establishment of the Permanent Court" is faulty unless qualified. *Id.* at 732.

159. *See* ICJ Statute, *supra* note 47, art. 36, 59 Stat. at 1060, 3 Bevans at 1186-87; U.N. CHARTER art. 96, 59 Stat. 1035, 1052, 3 Bevans 1153, 1175, *reprinted in* HENKIN ET AL., *supra* note 47, at 20; RESTATEMENT, *supra* note 48, sec. 903(1)-(2) at 355, cmts. a-b, h, at 355-57, 358; *and* reporters' note 1 at 360-61. For an exegesis of Article 36.2, see 2 ROSENNE, *supra* note 2, at 732-45.

160. *See* RESTATEMENT, *supra* note 16, reporters' note 1, at 361; Petersmann, *supra* note 28, at 85.

161. *See* RESTATEMENT, *supra* note 48, sec. 903 cmt. c, at 357, reporters' note 3, at 362-66.

162. *See* RESTATEMENT, *supra* note 48, sec. 903 cmt. c, at 357.

163. *See* Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. United States (Merits)), 1986 I.C.J. 14 (June 27).

bers calculated to accept the ICJ's compulsory jurisdiction, there are worrisome "carve out" provisions.[164] India's notorious reservation, for example, excludes from the ICJ's compulsory jurisdiction all past, present, or future disputes connected with hostilities or armed conflicts, such as its Kashmir border dispute with Pakistan.[165] Some United Nations members, in order to avoid immediate suits—e.g., upon becoming a member—or to preclude the ICJ from exercising jurisdiction retroactively—that is, over a dispute regardless of when it began—have an "exclusion" clause in their declaration. This clause sets a date—known as the "exclusion" or "critical" date—before which their acceptance of compulsory jurisdiction does not take effect.[166] Many members take an "objective" reservation for domestic jurisdiction. That is, they exclude from the ICJ's compulsory jurisdiction disputes about matters that come within the domestic jurisdiction of the reserving member, but leave it to the ICJ to draw the line.[167] The more aggressive cousin is a "subjective" reservation of domestic jurisdiction, in which the member itself decides what is within its domestic jurisdiction. The United States through its 1946 declaration, the "Connally Amendment," and various other United Nations members such as France, India, Liberia, Malawi, Mexico,

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164. *See* RESTATEMENT, *supra* note 48, sec. 903 reporters' note 2, at 361. For a detailed discussion of compulsory jurisdiction declarations and reservations thereto, see 2 ROSENNE, *supra* note 2, at 751-52 (discussing form); *id.* at 759-66 (discussing reciprocity); *id.* at 766-82 (reservations); *id.* at 782-802 (discussing temporal reservations); *id.* at 802-02 (discussing special reservations); *id.* at 805-09 (discussing war reservations).

165. *See* RESTATEMENT, *supra* note 158, sec. 903 reporters' note 2, at 361. For a discussion of war exclusion clauses, see 2 ROSENNE, *supra* note 2, at 805-09.

166. *See* RESTATEMENT, *supra* note 48, sec. 903 reporters' note 2, at 362; 2 ROSENNE, *supra* note 2, at 782-90. There are three basic versions of an exclusion clause that differ according to precision. The first or "single exclusion" version simply limits jurisdiction to disputes arising after the exclusion date. A somewhat more specific second version, the "double formula," limits jurisdiction to disputes concerning situations or facts that arise after the exclusion date. The third and most precise version, the "complex double formula," limits jurisdiction to disputes that arise after the exclusion date concerning situations or facts that occur after the exclusion date. *See* 2 ROSENNE, *supra* note 2, at 786. For still other variations, see *id.* at 798-802.

167. *See* 2 ROSENNE, *supra* note 2, at 774-80.

Pakistan, the Philippines, South Africa, Sudan, and the United Kingdom, have taken this kind of reservation.[168]

In brief, "[s]ince a declaration under Article 36 is optional, the declaring state can, subject to the Court's Statute, determine the scope and limits of its acceptance of the Court's jurisdiction."[169] Consequently, Articles 38.1(d) and 59 need to be seen, and indeed make sense, in the context of Article 36. The principle of binding only parties directly involved in a case protects the interests of third countries that elect not to intervene in the case, i.e., do not accept the Court's compulsory jurisdiction over the matter at issue.[170]

There is no such context in the WTO system. WTO Members cannot avail themselves of such disingenuous foreign policy—e.g., take

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168. *See id.* at 778-79; RESTATEMENT, *supra* note 48, sec. 903 reporters' note 2, at 361, reporters' note 3, at 362-63 (discussing "self-judging" clauses, including the American version in its 1946 declaration, the so-called Connally Amendment).

169. RESTATEMENT, *supra* note 48, sec. 903 reporters' note 3, at 364.

170. *See, e.g.*, Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240, 261 (June 26) (observing that "the interests of the third State which is not a party to the case are protected by Article 59"); Case Concerning the Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, 577-78 (Dec. 22) (noting that "[t]he rights of the neighbouring State, Niger, are . . . safeguarded by the operation of Article 59" and that "there would be nothing to prevent Niger from claiming rights, vis-à-vis either of the Parties" to certain territories"); Continental Shelf (Libyan Arab Jamahiriya/Malta) (Application to Intervene), 1984 I.C.J. 3, 26 (Mar. 21) (discussing the choice between (1) intervening and thus being subject to the res judicata effect of the Court's judgment or (2) refraining from intervention and relying on Article 59, and reiterating the limits of a judgment under Article 59, including that the judgment "will be expressed, upon its face, to be without prejudice to the rights and titles of third States"). *But see id.* at 157-58, paras. 27-28 (dissenting opinion of Judge Sir Robert Jennings, stating that "the slightest acquaintance with the jurisprudence of this Court shows that Article 59 does by no manner of means exclude the force of persuasive precedent," and that because of this force the protection of third-party, non-intervening states afforded by Article 59 is "illusory," and declaring that every state member of the Court is "under a general obligation to respect the judgments of the Court"); Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Application to Intervene), 1981 I.C.J. 3, 30 (Apr. 14) (separate opinion of Judge Oda, stating that Article 59 does not in fact immunize a state that chooses not to intervene from the Court's interpretations of international law); 3 ROSENNE, *supra* note 2, at 1644-50 (discussing criticism of Article 59) and 1653 (arguing that "[p]rotection for a third State can only be assured if the Court is in full possession of the relevant facts *as that third State sees them* and as the principal parties can contest them in adversarial proceedings").

a reservations to the DSU—in the post-Uruguay Round adjudicatory system as United Nations members can with respect to the ICJ's jurisdiction. To join the WTO means just that. Thankfully for the interests of the multilateral trading system, the DSU is not a document into or out of which Members can contract at their discretion. They are required to utilize the WTO's dispute settlement procedures for all issues arising under the WTO Agreement or its Annexes. Even the controversial bastion of unilateralism in American trade law, Section 301, recognizes this fact. It obligates the United States to invoke the DSU if an issue involves a Uruguay Round trade agreement.[171]

This is not to say WTO-style compulsory jurisdiction is airtight. Who, for example, is to judge whether matters arise under a trade agreement? There is room for self-judging, not unlike the ability of United Nations members to include "self-judging clauses" in their Article 36 declarations, i.e., to take subjective reservations of domestic jurisdiction.[172] But, there remains a stark contrast between the GATT-WTO and ICJ system, and even between the GATT-WTO system and the PCIJ system, with respect to compulsory jurisdiction. At the end of 1939, when fifty states were party to the PCIJ's Statute, 73 percent of the states accepted the PCIJ's compulsory jurisdiction.[173] The figure dropped markedly after World War II.[174] As of December 1996, when the international judicial community consisted of 187 states—185 United Nations members plus two non-members that were parties to the ICJ Statute—sixty states had taken reserva-

171. *See* 12 U.S.C. sec. 2413(a)(2); BHALA & KENNEDY, *supra* note 33, sec. 10-3(c)(2), at 1036.

172. *See generally*, Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1 (1997) (discussing the sanctions controversies and the use of Article XXI as a justification for trade sanctions). To illustrate the point in the international trade context, it appears the United States remains ready to invoke the GATT Article XXI exception for national security measures if pressed to the limit by the European Union on its controversial Helms-Burton and Iran-Libya sanctions legislation. *See id.* Indubitably, the American argument would be that Article XXI is self-judging. *See id.*

173. *See* 2 ROSENNE, *supra* note 2, at 832 (comparing the pre World War II percentage of states that accepted the compulsory jurisdiction of the ICJ to the significantly lower 1996 percentage). This figure includes two non-party states that accepted the PCIJ's compulsory jurisdiction. *See id.*

174. *See id.*

tions to Article 36.2.[175] Thus, only 32 percent of this community was bound by the ICJ's compulsory jurisdiction.[176] The number of WTO Members "accepting" the use of WTO dispute settlement procedures? One hundred percent, of course.

The retort might be that the comparison is unfair. First, there are differences between the subject matter of disputes that would otherwise be dealt with by the PCIJ and ICJ versus the subject matter of claims adjudicated by WTO panels and the Appellate Body. Second, it might be thought that WTO disputes are not as politicized as those that otherwise would have been dealt with by the PCIJ or would be handled by the ICJ. I think the first suggestion is ambiguous and the second dubious. Even if we lend some credence to either or both, we cannot help but be impressed by the numerical differences. In any case, the PCIJ, ICJ, and GATT-WTO systems are the foremost—indeed, the only—multilateral efforts we have to compare.

Moreover, the insight I want to draw from the contrast in compulsory jurisdiction is rather simple. It is that the lack of stare decisis, in a formalistic sense, in the ICJ Statute is consistent with the lack of universal compulsory jurisdiction. How could the holding in *A* versus *B* bind *C* if *A* and *B*, but not *C*, acknowledge the compulsory jurisdiction of the ICJ? The situation is different at the WTO. Put indelicately, in the world of public international law, the inmates are in charge of the asylum; in the world of international trade law, the inmates are not, or at least are not supposed to be. *A*, *B*, and *C* have no choice but to accept the compulsory jurisdiction of panels and the Appellate Body over disputes arising under WTO agreements, unless those agreements say otherwise. Thus, *C* cannot protest that it does not respect the WTO dispute settlement system on matters such as those between *A* and *B*.

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175. *See id.*

176. *See* 2 ROSENNE, *supra* note 2, at 832 (suggesting that the dramatic drop may be explained by an artificial inflation in the size of the "international judicial community" since 1945). The dramatic drop may, as Rosenne suggests, be explained in part by an artificial inflation in the size of the "international judicial community." Membership in that community—i.e., being a party to the ICJ Statute—follows automatically from United Nations membership. *See id.* Membership in the League of Nations did not automatically result in a state being a party to the PCIJ Statute; in addition, a separate protocol of accession was required. *See id.* at 832-33.

This difference heightens the irony of ICJ jurisprudence as an origin of the conventionally-assumed exclusion of the doctrine of stare decisis from GATT-WTO jurisprudence. This origin ought to be viewed as a curiosity of legal history and given no contemporary importance.

B. INFLUENCE OF THE CIVIL LAW?

It seems quite natural to hypothesize that the myth of the absence of the doctrine of stare decisis from WTO adjudication, and indeed in public international law, reflects in part the civil law tradition. Civil law systems of one form or another are found in the predominant number of WTO Members and United Nations members. The doctrine is not recognized in such systems, thus prior holdings are not an authoritative or primary source of law therein.[177] Why would we expect representatives from WTO Members marinated in civil law culture to admit into the corpus of international trade law a source of law they exclude from the corpus of their own municipal law?

But, if this hypothesis is correct, then it is also ironic. In truth, as a number of comparative law scholars point out, the situation is not so clear cut. A far greater number of legal systems apply precedents in fact than is sometimes realized. As early as 1934, A.L. Goodhart cautioned against overstating the difference between the common and civil law systems.[178] More recently, other observers have made the same point about *all* of the European legal systems.

> It is a fundamental principle of the administration of justice that like cases should be decided alike. Inconsistency in judicial decisions affronts even the most elementary sense of justice. In this sense the principle of *stare decisis*, of abiding by previous decisions, *figures prominently in most le-*

177. *See* MERRYMAN, *supra* note 4, at 22-24 (discussing "legislative positivism," i.e., the concept that "only statutes enacted by the legislative power could be law," and stating that "the accepted theory of sources of law in the civil law tradition recognizes only statutes, regulations, and customs as sources of law," hence a judge "cannot turn to . . . prior judicial decisions for the law).

178. *See* A.L. Goodhart, *Precedent in English and Continental Law*, 50 LAW Q. REV. 41, 42 (1934) (noting that all legal systems follow precedents, and that it is inaccurate to suggest that precedents play little or no part in the law's development or that French jurisprudence is not influential).

> *gal systems, including those of all the Member States of the [European] Communities.*[179]

Lest there be any doubts about the shared interest in justice as consistency and the consequent potency of judicial opinions in civil law countries, we may consider the purest example of formal non-recognition of stare decisis, which is found in the French legal system. Naturally, not all civil law systems are alike. The logic is, however, that if precedent is at all operative in France, then *a fortiori* it is likely to be in other civil law countries. That is, France is representative, not aberrational, so we need not involve ourselves in the specific happenings of other civil law countries.

1. Precedent and French Legal Theory

Article 5 of the French Civil Code "prohibits judges from 'rendering decisions by way of general or regulatory dispositions in respect of the matters submitted to them.'"[180] In other words, it "expressly prohibits the establishment of rules of precedent by judges."[181]

> Article 5 dictates that a judge is prohibited from deciding cases before him by laying down general rules. He is therefore required to dispose of the case by reference to *enacted* rules, not by reference to prior decisions.

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179. L.N. BROWN & F.G. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 311 (3d ed. 1989) (discussing the legal systems of European Union members) (emphasis added).

180. *See* Jacques Sales, *Why Judicial Precedent is a Source of Law in France*, 25 INT'L BUS. LAW., Jan. 1997, at 20 (describing the importance of judicial precedent despite the statutory prohibitions of Article 5); *see also* Michel Troper & Christophe Grzegorczyk, *Precedent in France*, *in* INTERPRETING PRECEDENTS, *supra* note 1, at 103 (discussing both the theoretical and practical aspects of precedent in French law). The translation of Article 5 by Troper & Grzegorczyk is perhaps a bit more accessible; they state, "it is prohibited for judges to decide by way of general provisions and rules on the cases that are brought before them." *Id.* at 104. *See generally* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995) (arguing persuasively there are two conceptions, or "portraits" of the role of the French civil judge: the official portrait, wherein the judge performs the passive, mechanical function of applying Code provisions, and the unofficial portrait, wherein the judge actively creates and interprets legal norms).

181. *See* CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 40 (2d. ed. 1996) (discussing the history and sources of French law).

> He knows no authority other than enacted law. In the event that he does refer to prior decisions, this consideration may not in itself determine the outcome of the case.[182]

Article 5 is buttressed by Article 1351 of the *Code Civil*, which—reminiscent of Article 59 of the ICJ Statute—indicates that a judicial decision binds only the parties to the case at hand.[183] It is also buttressed by Article 455 of the Code of Civil Procedure, which states that "[t]he judgment must describe briefly the claims of the parties and their arguments; It must be motivated."[184] This Article means that a decision relying exclusively on precedent[185] is not "motivated" and, therefore, void.[186]

The theory of Article 5 derives from the French Revolution and is enshrined in the *Declaration of the Rights of Man and Citizen* of 1789, namely, that a privileged position should be accorded to *enacted* law.[187] Because pre-Revolutionary France was characterized by distinct legal traditions, particularly as between the north, above the Bordeaux-Geneva axis, and south, below this axis, the protagonists of the Revolution sought uniformity through law passed by a national legislature that was, moreover, representative of the people.[188] Uniformity—or lack thereof—through the gradual and uneven development of case law by unelected judges was to be avoided.

Moreover, influenced by Montesquieu,[189] the revolutionaries also championed the doctrine of separation of powers. A key ramification

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182. *See* Benjamin Watt, *Why French Law Rejects Judicial Precedent*, 25 INT'L BUS. LAW. 18, 19 (1997) (emphasis original) (describing the Revolutionary origins of Article 5 and legislatively enacted laws as the sole legitimate expression of the people).

183. *See id.* at 19; Sales, *supra* note 180, at 20.

184. Troper & Grzegorczyk, *supra* note 180, at 115. This Code governs judicial courts, but a rule similar to Article 455 exists for administrative courts. *See id.*

185. *See id.* (noting that a judicial decision, even that of a *Cour de Cassation*, violates Article 455).

186. *See id.*

187. *See* Watt, *supra* note 182, at 18.

188. *See id.*

189. *See* CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 10-30 (Anne M. Cohler et al. trans., Cambridge University Press 1989) (1748) (concerning the laws and principles of democratic, monarchical, and despotic govern-

of this doctrine, as they saw it, was that only a representative legislature could make laws.[190] Hence, the judiciary had to be barred from playing a creative role in legal development, otherwise it would be the supreme branch.[191] Not surprisingly, the doctrine of stare decisis had to be, and was, expressly rejected,[192] and each court decision commences with the recitation, "*Au nom du Peuple Francais*"[193]—in the name of the French People. The "official portrait," then, of the French judge is one who is "passive and invisible" in the face of an all-encompassing civil code that already has judged.[194] She renders a "grammatical" reading of a code, i.e., a reading that assumes the vocabulary and syntax of a text mechanically generate the correct interpretation that, in turn, can be unproblematically applied to a set of facts to yield the correct legal result.[195]

2. *Precedent and French Legal Practice*

On the basis of Article 5 and its underlying theory, Professors Cross and Harris observe correctly that:

> [f]rom the standpoint of strict legal theory, French law is *not* based on case-law (*la jurisprudence*) at all. The Civil and Penal Codes are theoretically complete in the sense that they (and other statutory provisions) are supposed to cover every situation with which the ordinary courts are concerned. It can still be argued that, strictly speaking, *case-law is not a*

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ments), 154-86 (defining political liberty and the Constitution and the relationships among the judicial, legislative, and executive powers); Zenon Bankowski et al., *Rationales for Precedent*, *in* INTERPRETING PRECEDENTS, *supra* note 1, at 481, 482-84 (discussing the repercussions of Montesquieu's thought for the civil law).

190. *See* MERRYMAN, *supra* note 4, at 36 (comparing the doctrine of stare decisis in various civil law countries).

191. *See* Watt, *supra* note 182, at 19 (detailing the deep distrust of the judiciary in French revolutionary thought).

192. *See* MERRYMAN, *supra* note 4, at 36.

193. *See* Troper & Grzegorczyk, *supra* note 180, at 108 (describing the character and magisterial style of French judicial decisions).

194. Lasser, *supra* note 180, at 1327 (explaining the official concept of the French Code as the sole source of law).

195. *Id.* at 1327; 1330, 1334-43 (relating the historical roots of the conviction that judges cannot make law and of the official image of civil law judges as merely mechanical appliers of legislative provisions to particular facts).

> *source of law in France because a judge is not obliged to consider it when coming to a decision.*[196]

However, Professor Merryman is equally correct in dubbing this a "dogmatic conception of what law is [that] has been eroded by time and events."[197] Indeed, Professors Cross and Harris are quick to cast doubt on the consistency between theory and practice.[198] They point out that previous tribunal decisions shape—even determine—outcomes in subsequent decisions.[199] "[T]here is a substantial body of case-law dealing with the construction of the Codes and the solution of problems on which they are in fact silent."[200]

Similarly, Professors Dadomo and Farran urge that an informal body of law—*la jurisprudence*—is inevitable given the professional obligations of judges:

> [N]ot only do judges have a duty to decide all cases which come before them, but courts have to apply rules of law established by legislation – some of it several centuries old – to contemporary situations and give life to the law by adapting and updating the interpretation of the law. The dif-

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196. RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 10 (4th ed. 1991) (emphasis added).

197. *See* MERRYMAN, *supra* note 4, at 24.

198. *See* CROSS & HARRIS, supra note 196, at 11.

199. *See id.* (recounting the practical importance of case law despite the imperatives of strict legal theory); *see also* RENE DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY 186 (Michael Kindred trans., 1972) (indicating that as a practical matter lower courts follow the decisions of higher courts, especially decisions of the *Cour de Cassation*).

200. CROSS & HARRIS, *supra* note 196, at 11. The authors observe that in spite of Article 5, court decisions "may, through constant repetition, acquire greater legislative effect even than decisions of the House of Lords."). *See id.* at 15. Likewise, Professor Taruffo observes that:

> At one extreme of the scale there is the case of France, where no precedent is ever quoted by the judgments of the *Cour de Cassation. Of course this does not mean that precedents are not actually used.* On the contrary, it is clear that in practice French judges use precedents no less than their colleagues in other European countries. But, the "French style" is aimed at showing that the decision is no more than a logical consequence of statutory premises, and of nothing else except legal logic. So, *at least officially*, precedent cannot be explicitly used.

Michele Taruffo, *Institutional Factors Influencing Precedents*, *in* INTERPRETING PRECEDENTS, *supra* note 6, at 437, 454 (discussing the legal institutions that affect the use of precedent) (emphasis added).

> ference between the application of the law by the judges in France and that of the judges in England, is that the text of a law, as interpreted by the courts, does not itself become law. Law-making remains the preserve of the legislature and indirectly, the people. The judge is to decide a case by reference to primary sources. Judicial precedent simply demonstrates past applications of a legal text. However, although a judge is not bound to follow a previous judicial decision, and may even depart from a decision of the Court of Cassation, *the need for continuity and certainty in the law tends to result in like following like.*[201] [Unofficially dubbed the "*Cour Supreme*," the *Cour de Cassation* is the highest court in the French judiciary (specifically the *ordre judiciaire*, or ordinary, non-administrative courts) and sits in Paris, in the *Palais de Justice.*[202] In practice, 90 percent of French judges follow the position of the *Cour de Cassation* rather than risk reversal on appeal.[203]] *Thus a long line of similar decisions may amount to something resembling a rule of precedent under the doctrine of jurisprudence constante (settled jurisprudence).* If such a doctrine is established then it may become a rule of customary law – which elevates it to an authoritative source – rather than merely a series of prior decisions. *Also, in practice the collegiate response of the courts, combined with considerations of economy of effort, legal predictability and stability, support a tendency for previous decisions to influence the determination of future cases.* Moreover there is no restriction on referring to case decisions during the course of legal argument.[204]

In other words, the French judge faces a paradox. On the one hand, Article 4 of the *Code Civil* bars her from refusing to pass judgment on a case on the pretext that extant enacted law is silent, obscure, or

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201. DADOMO & FARRAN, *supra* note 181, at 40 (discussing the reality of French jurisprudence).

202. *See id.* at 82-83. DADOMO & FARRAN, *supra* note 181, at 85. The courts of the *ordre judiciaire* have general jurisdiction. Courts of the *ordre administratif* have specific jurisdiction, and at the apex of this hierarchy is the *Conseil d'Etat*, which sits in Paris at the *Palais Royal. See id.* at 89-90. For a clear treatment of the origins and reasons for France's dual system of courts, see *id.* at 46-52.

203. *See* DADOMO & FARRAN, *supra* note 181, at 42 n.58.

204. DADOMO & FARRAN, *supra* note 181, at 41-42 (emphasis added). *See also* Troper & Grzegorczyk, *supra* note 180, at 111 (observing that "precedent" in French legal language means, in a strong sense, an authoritative argument, without being binding, which ought to be followed, or in a weak sense, a positive (or negative) model, which if followed will save the court an extensive re-analysis and is justified by the principle of equality before the law); *id.* at 119 (agreeing that "[t]oday, French scholars recognize the fact that 'jurisprudence' is a source of law and therefore that a reversal inflicted by a higher court on a lower court's decision can be based on the violation by the latter of a rule based on precedent").

insufficient.[205] She "may be prosecuted as guilty of a denial of justice."[206] On the other hand, Article 5 and its supporting cast bar her from interstitial law making. What is she to do but, in practice, creatively interpret existing rules, refer to earlier rulings, and apply *la jurisprudence*, that is, decide similar cases in a similar manner?[207] What is she to do but, in practice, render a "hermeneutic" reading of the *Code Civil*, i.e., interpret a text in terms of a political, social, economic, religious, or cultural theory to explain and justify a particular interpretation when multiple interpretations are possible?[208] This, then, is the "unofficial" portrait of the French judge.[209]

To be sure, as yet perhaps the "disconnect" between judicial behavior and legal doctrine is not as severe in France as I contend it to be at the WTO, but that is another matter. One leading French practitioner exclaims that, "[i]n French law, the debate on whether *jurisprudence* constitutes a source of law is endless, because the answer depends on whether one considers theory or practice."[210] There need not be so dramatic a disconnect to see the irony in the influence of the civil law as a possible origin of the myth that stare decisis does not operate in the GATT-WTO system. That is, I hardly wish to advance the proposition that stare decisis is formally recognized in France, or in any other civil law system, and my thesis does not rest on such a dubious claim. Rather, I want to underscore the observation of the same practitioner to the effect that, "[French case law] is far from the binding rule of stare decisis in Anglo-Saxon law, but in many instances, it is a '*nearly mandatory*' rule of stare decisis."[211] This observation follows logically from one of the critical roles of

205. *See id.*; Sales, *supra* note 182, at 20.

206. Sales, *supra* note 180, at 20.

207. *See* Watt, *supra* note 182, at 19; Sales, *supra* note 180, at 35. As Professor Merryman states, "[d]espite rejection of the doctrine of *stare decisis*, the practice of courts is to decide similar cases similarly, in much the same way as do common law courts." MERRYMAN, *supra* note 4, at 147.

208. *See* Lasser, *supra* note 180, at 1328.

209. *See* Lasser, *supra* note 180, at 1328-29, 1331, 1343-1409 (comparing the official and unofficial portraits of a judge in the French civil judicial system, and asserting that this duality is a result of the French Revolution's defining influence).

210. *See* Sales, *supra* note 180, at 35.

211. *Id.* (emphasis added).

the *Cour de Cassation*, which is to ensure case law is uniform and decisions are based on sound, authoritative sources of law.[212] In this regard, the origins of the *Cour* are noteworthy: the *Tribunal de Cassation*, which was founded in 1790 after the French Revolution "on the fundamental principle of the *uniform* interpretation of the rule of law."[213]

In sum, we must guard against overstating the distinction between common and civil law systems with respect to the future value of a judicial decision.[214] To do so would be to see the civil law tradition as a better explanation of the myth about stare decisis in international trade law than it really is. Because civil law theory sits somewhat

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212. *See* DADOMO & FARRAN, *supra* note 181, at 41.

213. DADOMO & FARRAN, *supra* note 181, at 83 (emphasis added).

214. Professor Merryman puts it crisply:

> Whatever the ideology of the revolution may say about the value of precedent, the fact is that courts do not act very differently toward reported decisions in civil law jurisdictions than do courts in the United States. The judge may refer to a precedent because he is impressed by the authority of the prior court, because he is persuaded by its reasoning, because he is too lazy to think the problem through himself, because he does not want to risk reversal on appeal, or for a variety of other reasons. These are the principal reasons for the use of authority in the common law tradition, and the absence of any formal rule of stare decisis is relatively unimportant. Those who contrast the civil law and the common law traditions by a supposed nonuse of judicial authority in the former and a binding doctrine of precedent in the latter exaggerate on both sides. Everybody knows that civil law courts do use precedents. Everybody knows that common law courts distinguish cases they do not want to follow, and sometimes overrule their own decisions.

MERRYMAN, *supra* note 4, at 47 (emphasis added). *See also* MacCormick & Summers, *supra* note 1, at 2, 12 (arguing that civil and common law systems are increasingly converging); Taruffo, *supra* note 200, at 460 (concluding that "the massive and intensive use of precedents is a general and growing trend in all the modern systems of justice"); MacCormick & Summers, *supra* note 10, at 531-32 (observing that "precedent now plays a significant part in legal decision making and the development of law in all the countries and legal traditions that we have reviewed. This is so whether or not precedent is officially recognized as formally binding or merely as having other normative force to some degree.").

An interesting dimension of the convergence between common and civil law systems is the apparently increasingly common practice of American appellate courts to publish slip opinions with a warning that the opinions are not to be cited. This behavior, viewed systemically, might represent a retreat from stare decisis, and perhaps even a movement toward continental-style adjudication. This hypothesis has yet to be explored.

uneasily alongside civil law practice, this theory is an impure source of, and hence a weak justification for, the myth.

C. CULTURE OF INTERNATIONAL LAW?

Could it be that, in addition to ICJ jurisprudence and the influence of the civil law tradition, we law professors are a third source of the myth of non-operation of the doctrine of stare decisis in the GATT-WTO system, and indeed in international law generally? Article 38.1(d) of the ICJ Statute provides that scholarly works, specifically, "teachings of the most highly qualified publicists"—*la doctrine des publicistes les plus qualifies*—may be "subsidiary" evidence of international law, along with the opinions of judges.[215] The same hierarchy exists in Section 103 of the *Restatement*: "substantial weight" is accorded to scholarly writings and judicial opinions.[216] What is important to observe about these sources is the parity in the hierarchy between law professors and judges. What "we" law professors say in our books and articles as regards the content of international law is as important as what "those" judges say in their opinions.

Suppose their opinions become precedent with the introduction of a formal doctrine of stare decisis. Then, we law professors are relegated in importance. What we say remains mere *evidence* of the law. What the jurists do *is* the law. Perhaps, then, we law professors are partly to blame for the purported absence of stare decisis from WTO adjudication: we dare not advocate a doctrine that might marginalize us further from the real world. Already, as Rosenne points out, both the PCIJ and the ICJ "are *very reticent* in direct citation of named publicists in support of any proposition of law."[217] Our decision not to advocate may well be reinforced by debate among ourselves about which scholars are among "the most highly qualified" within the meaning of Article 38.1(d) of the ICJ Statute so that their teachings are worthy of citation. If we are not cited much as it is, and we argue among ourselves as to who is an expert, why would we want to

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215. *See* ICJ Statute, *supra* note 47, art. 38(1)(d), 59 Stat. at 1060, 3 Bevans at 1187. For a discussion of this provision, see 3 ROSENNE, *supra* note 2, at 1615-16.

216. *See* RESTATEMENT *supra* note 48, sec. 103(a), (c).

217. 3 ROSENNE, *supra* note 2, at 1615 (discussing the ICJ's decision-making) (emphasis added).

worsen our collective and individual competitive positions by elevating judges?

I am not at all suggesting that all law professors secretly harbor these zero-sum-game thoughts, or that they have conspired to keep stare decisis out of international trade law. Certainly, there is no evidence to support this notion. I might add that most of us are too collegial, and insufficiently well-organized and Machiavellian, to attempt such a feat! But, I do want to highlight a motivation—quite possibly unconscious, and certainly unduly pessimistic as to the continuing vitality of our work—for not wanting to see the doctrine introduced, and not studying the matter to any great extent.

IV. THE LANGUAGE OF THE MYTH

In a nutshell, Part II of this Article locates the myth about stare decisis and international trade law, and indeed the related myth about public international law. Part III uncovers the origins—and attendant irony—of the myth. It highlights the bases of the belief that stare decisis is inoperative. If the argument thus far is accepted, then there is plainly a chink in the armor, some doubt in our belief. Its origins—most notably ICJ jurisprudence and the influence of the civil law—are, in a word, impure.

At this point, we could move immediately to an empirically-motivated demonstration of the de facto operation of stare decisis in WTO Appellate Body litigation. Such a move is especially tempting in view of the commandment of Article 3.2 of the DSU. This telling provision declares the centrality of the dispute settlement mechanism "in providing security and *predictability* to the multilateral trading system."[218] Accordingly, it is strong circumstantial evidence that stare decisis must, in fact, operate in WTO adjudication. How else can the Appellate Body assure predictability unless it consistently treats like cases alike?

However tempting, that direct move would be unwise for two reasons. First, we would miss the opportunity to point out and then deconstruct an important distinction on which the myth rests, namely, between "binding" and "non-binding" precedent. Second, we would neglect to define our terms with precision, and thereby miss an op-

218. *See* DSU, *supra* note 10, art. 3.2 (emphasis added).

portunity to shift the terms of the debate. The very basis on which we comprehend any problem, legal or otherwise, is brought about discursively, and what I have tried to suggest in Parts II and III is that the manner in which we have represented the problem of precedent in international trade law has made the problem less well understood, even insoluble. In brief, we would pass on a chance to strengthen the justification for calling the absence of stare decisis a "myth." Thus, I shall attend to the important matters of delineation and terminology below, and leave the demonstration to the second part of the trilogy of articles.

A. CHALLENGING THE DISTINCTION BETWEEN "BINDING" AND "NON-BINDING" PRECEDENT

With respect to both ICJ and GATT-WTO jurisprudence, several of the secondary sources referred to in Parts II and III are premised on a distinction between "binding" and "non-binding" precedent. This distinction, for example, is relied upon heavily by Judge Shahabuddeen, and it resonates to one degree or another in the remarks of Professors Davey and Jackson, Ms. Steger and Ms. Hainsworth, and Mr. Pescatore. It obviously forms the basis of the conclusion of the analysis by Mr. Palmeter and Professor Mavroidis, also quoted in Part II.B above.

These international legal scholars are in good company with, and indeed probably are standing on the shoulders of, scholars in other fields of law. For instance, in his classic on English legal history, *Law in the Making*, Sir Carleton Kemp Allen writes:

> [I]n general the forces which produce the streams of "prevailing doctrine" are deeper and subtler than the mere practice of courts and the officers of courts. It is possible to find in every legal system certain elemental principles which seem to be permanent, others which perpetually adapt themselves to environment. Both are vital, as they are in all organisms, and together they constitute a body of doctrine which is the primary preoccupation of every court. Precedent and example are at once the most convenient and the most reliable means for discovering them; but they form only one, though the chief, among many such means. *The difference between the authoritative and the so-called "persuasive" sources is one of degree, not of kind.*[219]

219. ALLEN, *supra* note 118, at 287 (emphasis added).

Still another secondary source—the engaging comparative study by Professors MacCormick and Summers, *Interpreting Precedent*—devises a more elaborate distinction than "authoritative" and "persuasive." They construct a four-part categorization as to the bindingness of precedent:

> (1) "*Formal bindingness*" – A judgment in this category is unlawful and, therefore, subject to reversal on appeal if it does not respect the force of precedent.
>
> (2) "Not formally binding but having force" – A judgment in this category that does not respect the force of a precedent is subject to criticism, and possibly reversal.
>
> (3) "Not formally binding and not having force" – A judgment in this category that does not follow a precedent is lawful and may, with some difficulty, be justified.
>
> (4) "Mere illustrativeness or other value" – A judgment in this category may or may not take into account a precedent depending on the inclinations of the judge.[220]

In this scheme, the first category contains what we have referred to thus far as "binding" precedents. Judgments in the second category would be "binding," if at all, through their normative force. Judgments in the third and fourth categories clearly would be what we have been calling "non-binding" precedents.

The secondary sources are not alone in distinguishing between "binding" and "non-binding" precedent. Articles 38.1(d) and 59 of the ICJ Statute, Section 102 of the *Restatement*, Article IX.2 of the WTO Agreement, and Article 3 of the DSU are all premised on this distinction.[221] Indeed, it is fair to say that the "binding"-"non-

220. *See* D. Neil MacCormick & Robert S. Summers, *Appendix: Final Version of the Common Questions, Comparative Legal Precedent Study, September 1994*, *in* INTERPRETING PRECEDENTS, *supra* note 1, at 551, 554-55; *see also* MacCormick & Summers, *supra* note 1, at 9; Summers, *supra* note 10, at 368.

221. *See also* CROSS & HARRIS, *supra* note 196, at 12 (suggesting this distinction when contrasting English and French judges by saying "[f]rom the practical point of view one of the most significant differences between English and French case-law lies in the fact that the French judge does not regard himself as *absolutely*

binding" precedent distinction underlies the myth of the absence of stare decisis from international trade law, and relatedly, public international law. It is, in brief, an indispensable part of the written and spoken language of the myth.

Far be it from me to argue that this language—that is, the distinction between "binding" and "non-binding," or "authoritative" and "persuasive," that explicitly or implicitly runs through all of these sources—is entirely wrong-headed. But, I would like to argue that the distinction—however elaborately it may be drawn—while ostensibly appealing, is upon careful reflection neither as enlightening nor tenable as it appears. In the modern era of international law, at least of international trade law, *all precedent is binding. It is just a question of whether a precedent is binding in a de facto or a de jure sense.* To cling to the distinction between "binding" and "non-binding" precedent is not only to deceive ourselves about how the WTO Appellate Body really behaves, but also to neglect the fact that the distinction collapses even for those who rely on, and indeed, advocate, it. In sum, as we would expect with the language of most myths, the language of this myth does more to obfuscate than illuminate reality.

B. SOCRATIC ILLOGIC AND COGNITIVE DISSONANCE?

Why Anglo-American legal scholars and practitioners, at least, did not look askance at the distinction between "binding" and "non-binding" precedent long ago is a mystery. The distinction, after all, mixes two opposite qualities—"binding" and "non-binding"—in a concept—precedent—that we normally take to have only one of these qualities—namely, "binding." We can flesh out this intuitive reaction by referring to one of the teachings of Plato's *Phaedo*. In that wonderfully rich dialogue, Cebes—a principal interlocutor—challenges Socrates' proposition that the soul is immortal. Socrates' proof lies in the logical point that:

> *opposites themselves do not admit one another* . . . [and] any things which, though not themselves opposites, always have opposites in them, similarly do not admit the opposite form to that which is in them, but on its approach either *cease to exist* or retire before it. . . .

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bound by the decision of any court in a single previous instance" (emphasis added)).

> Not only does an opposite not admit its opposite, but if anything is accompanied by a form which has an opposite, and meets that opposite, then *the thing which is accompanied never admits the opposite of the form by which it is accompanied.*[222]

Socrates' example clarifies the point—and also introduces the theory of the forms, whose merits do not affect the present discussion, and into which I shall not even begin to delve.[223] There is a form of "oddness," i.e., odd numbers. The number three is an odd number. The opposite of oddness is evenness, i.e., even numbers. Oddness cannot admit to evenness, and so the number three, which accompanies oddness, cannot admit to evenness. Likewise, the soul accompanies life, i.e., the soul must be present in the body to make it alive, and the opposite of life is death. The soul will not admit to the opposite of that which it accompanies anymore than three could be an even number—to do so would destroy the soul of the number three. Hence, the soul cannot admit to death. That which does not admit to death is "immortal," so Socrates concludes—and Cebes is persuaded—that the soul is immortal.

The concept—or "form," to use the Platonic term—of "binding" cannot admit to its opposite, which is "non-binding." Either a thing is or is not binding. Nor can a thing that accompanies "binding" admit to its opposite. Precedent is just such an accompaniment. A precedent is a judicial decision that, at least in our common law way of thinking, accompanies the concept of "binding." As Professor Summers indicates in his discussion of precedent in New York State:

> [T]he word 'precedent' is used in a variety of ways, but when used most strictly, precedent means *binding* decisions of *higher* courts of the same jurisdiction as well as decisions of the *same appellate court.* Courts generally accord such precedent *decisive, authoritative* value. . . .[224]

Thus, to entertain the possibility that precedent can be non-binding is, following the Socratic methodology, to agree that three can contain the quality of evenness or the soul can contain the quality of

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222. Plato, *Phaedo*, *in* PLATO-THE COLLECTED DIALOGUES, *supra* note 81, at 85-86, at 104:c and 105:a (emphasis added).

223. *See id.* at 85-87, at 104:a-105:e.

224. Summers, *supra* note 6, at 355, 364 (first and last emphasis added).

death. Such a move would destroy the very thing, precedent, three, or soul, whose nature we seek to comprehend.

One of the few who approached the distinction between "binding" and "non-binding" precedent with Socratic, indeed Cartesian, skepticism was Professor Alf Ross. In 1947, he wrote, in *A Textbook of International Law,* with respect to Article 38 of the ICJ Statute that:

> [T]he judicial decision is not mentioned as an actual source but only as "subsidiary means" to deciding what is law. Nevertheless it necessarily follows from the tendency of the law to regularity that *precedents must exercise a decisive influence on later decisions.* The reluctance to admit this is connected with the reluctance to concede that courts are law-creating. Hence the *illusion* that practice is merely "subsidiary means", [sic] and not an actual source. And as a matter of fact courts as well as the authors constantly quote precedents in support of their results. In the face of this everything else is *merely futile speculation.* . . . There is reason to believe that gradually, as the number of precedents of the Permanent Court increases, *an international judge-made law will be established by practice,* a law which will be of the greatest importance by giving to International Law that stability in which it is now so wanting. *Whether or not the court formally believes in the binding force of precedents is actually of no great consequence.*[225]

We must credit Professor Ross with foresight, for writing more than half a century ago that he knows all ICJ decisions will, in essence, be treated as binding. Unfortunately, it seems that few paid much attention. He also anticipates the resistance sovereign states will have to putting the ICJ in the role of a law-creating institution, as undoubtedly WTO Members would have were the Appellate Body cast in—or to cast itself in—that role wearing the vestments of stare decisis.[226]

Had this passage in Professor Ross' *Textbook* received more careful attention, it likely would have become quite apparent that the distinction between "binding" and "non-binding" precedent engenders cognitive dissonance. On the one hand, it tells us there are "precedents" that need not be followed. On the other hand, our common

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225. ALF ROSS, A TEXTBOOK OF INTERNATIONAL LAW 86-87 (1947) (emphasis added) (stating that precedence maybe defined as earlier judicial decisions in which a body of rules is plainly objectified).

226. I shall return to the matter of sovereignty in Part Three of the trilogy.

understanding of the word "precedent" is aptly put in *Black's Law Dictionary*:

> An adjudged case or decision of a court, *considered as furnishing an example or authority* for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a court for a particular type of case *and thereafter referred to* in deciding similar cases. *See also* Stare decisis.[227]

Similarly, the *Oxford English Dictionary* explains the meaning as "a previous case or legal decision, etc., *taken as a guide* for subsequent cases or as a justification."[228] If we turn to the *Black's Law Dictionary* definition of "stare decisis," we see that it means:

> To *abide by*, or *adhere to*, decided cases.
>
> Policy of courts *to stand by precedent and not to disturb settled point.* Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, *it will adhere to that principle, and apply it to all future cases*, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, *is an authority, or binding precedent* in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy.[229]

Likewise, Professor VerSteeg reminds us that "stare decisis" means "to stand firmly by things that have been decided."[230] The term is actually the shortened phrase from a Latin maxim "*stare decisis et non quieta movere.*"[231] The maxim means "to stand firmly by things that have been decided and not to rouse/disturb/move things at rest."[232]

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227. BLACK'S LAW DICTIONARY, *supra* note 10, at 1176 (emphasis added).

228. THE OXFORD ENGLISH DICTIONARY AND THESAURUS 1170 (Am. ed. 1996) (emphasis added).

229. BLACK'S LAW DICTIONARY, *supra* note 10, at 1406 (emphasis added).

230. VERSTEEG, *supra* note 9, at 159.

231. *Id.*

232. *Id.*

Thus, our cognitive dissonance arises because nowhere in these definitions of "precedent" or "stare decisis" are we instructed that such a thing as "non-binding" precedent exists. The essence of "precedent," or "stare decisis," is that a decided case has binding force.

C. COLLAPSING THE DISTINCTION

As for scholars, practitioners, and primary sources wherein we have located the myth of the absence of stare decisis and observed to more or less of an extent the language of "binding" and "non-binding" precedent, we can identify two broad categories. First, there are those sources accepting the distinction uncritically. They use it, without much definition or further delineation, and with little or no analysis—in brief, they take it for granted. In this category we can put most of the international trade law scholars and practitioners, save perhaps Mr. Palmeter and Professor Mavroidis, quoted in Part II.B above.[233] We can add to this category the ICJ Statute, *Restatement*, WTO Agreement, and DSU. Second, there are sources that discuss the distinction in some detail that suggest a certain level of advocacy in its favor.

There is not much point pouring over the sources in the first category to support an argument that the distinction between "binding" and "non-binding" precedent should be de-emphasized. Because these sources assert the distinction with little or no defense, we hardly would be slaying the dragon. Rather, the second category is most interesting because we can see the distinction collapsing therein. It is obviously most damaging to the distinction if it is untenable in the very sources that most rely upon it.

Possibly the most prominent and recent of the sources in the second category is *Precedent in the World Court*, an edifying and provocative book by Mohamed Shahabuddeen, an ICJ judge.[234] I shall confine myself to analyzing briefly the use of the distinction between "binding" and "non-binding" precedent that resonates very strongly throughout Judge Shahabuddeen's book.[235] This economy is justified

233. *See supra* notes 82-84 and accompanying text (critiquing Mr. Palmeter and Professor Mavroidis' analysis of precedent in the WTO).

234. *See supra* note 55.

235. The distinction is implicit, for instance, in the Preface, where Judge Sha-

not only in the interests of space, but also because Judge Shahabuddeen draws on so many other works that I should think it reasonable to take his book as a leading light in the second category. The gist of my analysis is this: there are four central difficulties with the distinction and, thereby, with the essential language of the myth.

1. Problem #1: Confusing and Contradictory Statements

First, *Precedent in the World Court* is peppered with statements about the distinction made all-too-casually, without elaboration, that are confusing if not irritatingly contradictory. For example, in Chapter 1 we read that "the fact that the doctrine of binding precedent does not apply means that decisions of the [International] Court [of Justice] are not binding precedents; it does not mean that they are not 'precedents.'"[236] The first clause is tautological; the second clause demands a definition of "precedents." Later in Chapter 1, we read that a "system of precedent may operate in one of several ways:"

> [S]uch a system may authorise the judge to consider previous decisions as part of the general legal material from which the law may be ascertained; or it may oblige him to decide the case in the same way as a previous case unless he can give a good reason for not doing so; or, still yet, it may

habuddeen states that "the World Court was established on the Continental model, which knows no doctrine of precedent . . . [a]nd yet decisions of the Court are almost as replete with references to precedents as are decisions of a common law court." SHAHABUDDEEN, *supra* note 55, at xviii. It is stated more directly at the end of Chapter 1: "[a]lthough the Court does not regard its previous decisions as laying down the law with binding effect, for practical purposes it 'treats them as sufficient authority for the principle under consideration.'" *Id.* at 12. As for examples from later in the book, in Chapters 6 and 8 the distinction underlies the discussion of the irrelevance of Article 59 to stare decisis. *See id.* at 64-65 (stating that "[i]t requires no doctrine of judicial precedent to explain" the "natural process of looking to previous decisions for *guidance* in the solution of similar problems" (emphasis added)); *id.* at 99-100 (arguing that Article 59 "has no bearing on the question whether decisions exert *precedential effect with binding force*" (emphasis added), and attempting to draw a not altogether clear distinction between (1) a decision *qua* decision as binding on the parties and (2) a decision *qua* precedent as shaping international law but not imposing on states "a judicial definition of their relations on any particular matter").

236. SHAHABUDDEEN, *supra* note 55, at 2.

> oblige him to decide it in the same way as the previous case even if he can give a good reason for not doing so.[237]

Judge Shahabuddeen concludes that Continental systems are of the first kind—though they occasionally incline to the second or even third kind—whereas a "system of the last kind is said to be based on the doctrine of *binding* precedent."[238] His three categories are drawn from the excellent analysis of Professors Cross and Harris in *Precedent in English Law*.[239] However, Judge Shahabuddeen neglects the all-important point they make before articulating the categories: "[i]n a system based on case-law, a judge in a subsequent case *must* have regard to these matters [the rules and principles of earlier decisions]; they are not, as in some other legal systems, merely material which he *may* take into consideration in coming to his decision."[240]

Subsequent chapters present other similar examples. In Chapter 6, for instance, we read that "[t]he fact that the *binding force* of a decision is confined to the parties to the case is distinct from the *influence* which the decision could have in gradually moulding and modifying the general law." Perhaps containment of "binding force" is distinct from systemic "influence," but exactly how? That is, if a decision cannot add to or subtract from the existing body of international law, then by what mechanism might it be influential without corroding the doctrine of the sources of that law? In Chapter 8, we are told—without much subsequent elaboration—that "[e]ven if the non-applicability of *stare decisis* means that decisions of the Court cannot create law, it does not mean that they do not have precedential effect."[241] This statement flatly contradicts Judge Shahabuddeen's admission in Chapter 7—discussed below in the context of Problem #4—that ICJ decisions do create international law. The Judge's effort to square the circle at the end of Chapter 8 is unconvincing and adds

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237. *Id.* at 9.

238. *Id.* at 9-10 (emphasis added).

239. *See* CROSS & HARRIS, *supra* note 196, at 4 (noting that the study of jurisprudence is divided into three parts: theory of law, sources of law, and analysis of legal concepts).

240. *Id.* (stating that "[i]t is a basic principle of the administration of justice that like cases should be decided alike").

241. SHAHABUDDEEN, *supra* note 55, at 107.

to the confusion. He offers that an ICJ decision becomes part of international law and thus obligatory for all states not as a binding precedent *per se*, but as part of the law.[242]

There is no need to dilate this discussion any further. The point is our exasperation by the end of the book. The problematical statements in which a distinction between "binding" and "non-binding" precedent is tacit or overt leave us eager for a more detailed—dare we say honest?—analysis.

2. *Problem #2: Asking Common Law Questions*

Second, Judge Shahabuddeen raises a number of issues about the effect of the ICJ's decisions.[243] Do they create new law, or at least influence the development of existing law? Do they contain a clear delineation between *ratio decidendi* and *obiter dictum*? Do they focus on distinguishing previous cases? What is the impact of individual and dissenting opinions?[244] Ironically, these stimulating questions are quite appropriate in a common law regime.

In a regime where stare decisis does not operate, their importance is diminished, perhaps even negligible, and the answers seem quite obvious. ICJ decisions do not, indeed cannot, create new law in the sense of adding to or subtracting from the extant legal corpus, though whether and how they might influence that corpus is unclear in the abstract. Whether the *ratio decidendi* is distinguished from *obiter dictum* matters only for the case at hand. Whether previous cases are distinguished may bolster the legitimacy of the opinion at hand, but no more. Individual and dissenting opinions affect the force of the opinion at hand, full stop. So, then, is Judge Shahabuddeen abjuring the "binding" versus "non-binding" precedent distinction to pursue these inquiries? We cannot be sure.

3. *Problem #3: ICJ Behavior and the Remarks of Judges*

There is yet a third difficulty with the distinction between "binding" and "non-binding" precedent that constitutes the core language

242. *See id.* at 109.

243. *See id.* at 3, 54.

244. *See id.*

of the myth. Judge Shahabuddeen takes pains to emphasize that the ICJ relies heavily and extensively on its precedents. Consequently, the behavior of the ICJ and remarks of individual judges that Judge Shahabuddeen discusses in his analysis undermine the distinction.

"It is," Judge Shahabuddeen says rightly, "scarcely necessary to state that the Court also follows its own case law [i.e., in addition to PCIJ opinions]."[245] What follows is a litany of illustrations in which the ICJ expressly cites and discusses previous cases, as well as instances in which it simply cites—confidently—to the cases. Thereafter, we are treated to quotes from opinions of individual PCIJ and ICJ judges, two of which are worth recalling. One passage comes from a non-common law PCIJ member, Judge Ehrlich, who observed in a dissenting opinion in 1928 that "a rule of law applied as decisive by the Court in one case, *should, according to the principle [of] stare decisis, be applied by the Court as far as possible in its subsequent decisions*."[246] The second quote, from a 1966 opinion of Judge Koretsky, is equally clear in obliterating any distinction between "binding" and "non-binding" precedent:

> [I]t cannot be said that what today was for the Court a *veritas*, will tomorrow be a *non-veritas*. A decision binds *not only* the parties to a given case, *but the Court itself. One cannot forget that the principle of immutability, of the consistency of final judicial decisions, which is so important for national courts, is still more important for international courts.*[247]

Though even the most enthusiastic supporter of the common law would not want it to be "immutable," we expect after this quotation to hear Judge Shahabuddeen admit to the operation, at least in fact of, stare decisis. Instead, his conclusion is a mixture of diffidence and wonderment:

> These arresting remarks by judges from different legal cultures may well be taken as indicative of the Court's own preoccupation to perceive itself and to be in turn perceived as pursuing a constant judicial policy of *precedential consistency*. The understanding is clear that the Court would *normally* follow its previous decisions where applicable. It is *right* that the Court should not regard itself as subject to any doctrine of *binding*

245. *Id.* at 26.

246. *Id.* at 30 (emphasis added).

247. *Id.* (emphasis added).

> precedent; it is *remarkable* that it has never rested a new holding on the non-applicability of the doctrine.[248]

Why is it "right" that the ICJ ought not to regard itself as subject to a doctrine of "binding" precedent? The quoted remarks from judges suggest quite the opposite. Why is it "remarkable" that it has yet to rest a new holding by declaring "we are not bound by 'precedent'"? Again, the declarations and case illustrations suggest an almost mechanistic consistency in applying case law. If the ICJ "normally" follows its previous decisions, then why not build on this "understanding" and identify the disconnect between doctrine and reality?

Why, therefore, persist with the "binding"-"non-binding" distinction? Why simultaneously toss in the confusing and redundant term "precedential consistency"? In brief, why not follow—rather than fight—the behavior of the ICJ and the remarks of its judges to their logical conclusion?

4. Problem #4: Self-Inflicted Wounds

Fourth, and perhaps most importantly, at unpredictable junctures in the book, Judge Shahabuddeen himself—as distinct from the behavior of the ICJ and the remarks of other judges—undermines, without necessarily intentionally doing so, the distinction between "binding" and "non-binding" precedent. The damage arises from comments that the ICJ relies on prior decisions as authoritative expressions of what international law is, juxtaposed with comments indicating this reliance crosses the very fuzzy boundary between "authoritative" and "authority." For instance, in Chapter 1, he remarks that:

> the fact is that the Court seeks guidance from its previous decisions, that it regards them as reliable expositions of the law, and that, though having the power to depart from them, *it will not lightly exercise that power*. . . . [T]he Court uses its previous decisions *in much the same way as that in which a common law court of last resort will today treat its own previous decisions*. Thus, the fact that decisions of the Court are not precedentially binding is not likely to interest the common [law] lawyer very much, *not*

248. *Id.* at 31 (emphasis added).

> *at any rate in the period following the House of Lords Practice Statement of 1966.*[249]

Unfortunately, Judge Shahbuddeen does not provide us with the Practice Statement, made by Lord Gardiner, the Lord Chancellor, but it is worth quoting:

> Their Lordships regard the use of precedent as an *indispensable foundation* upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognize that *too rigid adherence* to precedent may lead to *injustice* in a particular case and also *unduly restrict* the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as *normally binding*, to depart from a previous decision when it *appears right to do so.*[250]

This Practice Statement does *not* admit the possibility of a distinction between "binding" and "non-binding" precedent. Rather, it is motivated by a desire to avoid injustice in specific cases, and petrification of the law, and thus at issue is the rigidity with which to apply precedent.[251] Their Lordships resolve the issue in exactly the way we would expect of English judges: they opt for balance and reason. All House of Lords decisions are presumptively to be applied, but the presumption can—with difficulty—be rebutted. That is, their Lordships might be persuaded to depart from a precedent, but we can be quite confident that it will "appear right to do so" only in rare instances. If Judge Shahbuddeen's remark connotes the ICJ could itself

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249. *Id.* at 2-3 (emphasis added).

250. House of Lords, Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234 (issued 26 July 1966) (emphasis added).

251. The Statement marks a crucial departure from the strict doctrine of stare decisis articulated by the Lords in the 1898 case of *London Street Tramways v. London County Council*, [1898] 67 Q.B. Div. 559, wherein the Lords "renounced the power to depart from one of their own precedents, even when they think their earlier decision was probably wrong." HARDING, *supra* note 46, at 397. *See also* W. Barton Leach, Comment, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797 (1967) (discussing the meaning of the Practice Statement).

have issued this Practice Statement, then what is the sense of clinging to the notion of "non-binding" precedent?

In Chapter 4, entitled "The Bases of the System," we find another illustration of self-inflicted damage to the distinction between "binding" and "non-binding" precedent. Judge Shahabuddeen provides us with an extensive quotation from Sir Gerald Fitzmaurice. Yet, Judge Shahabuddeen seems not to notice the critical portion that undermines the distinction:

> When an advocate before an international tribunal cites juridical opinion, he does so because it supports his argument, or for its illustrative value, or because it contains a particularly felicitous or apposite statement of the point involved, and so on. When he cites an arbitral or judicial decision he does so for these reasons also, but there is a difference – for, additionally, he cites it as something *which the tribunal cannot ignore* [emphasis original], *which it is bound to take into consideration and (by implication) which it ought to follow unless the decision can be shown to have been clearly wrong, or distinguishable from the extant case, or in some way legally or factually inapplicable* [emphasis added]. Equally the tribunal, while it may well treat juridical opinion as something which is of interest but of no direct authority, and which the tribunal is free to disregard, *will not usually feel free to ignore a relevant decision, and will normally feel obliged to treat it as something that must be accepted, or else – for good reason – rejected, but which must in any event be taken fully into account* [emphasis added].[252]

Fitzmaurice is instructing us that in international legal practice, though not in doctrine, tribunals do feel bound by prior decisions, and Judge Shahbuddeen is forced to admit that "there is an inevitable sense in which precedents are *always* used, even where the specific common law doctrine of stare decisis does not prevail."[253]

Judge Shahabuddeen also seems to miss the deep insight in a passage from J.L. Brierly he quotes alongside the Fitzmaurice excerpt:

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252. Sir Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 171-72 (1958) (footnote omitted), *quoted in* SHAHABUDDEEN, *supra* note 55, at 42. Earlier, in Chapter 2, Judge Shahabuddeen quotes approvingly from Fitzmaurice to the effect that "the Court regards itself as de facto bound." SHAHABUDDEEN, *supra* note 55, at 28.

253. SHAHABUDDEEN, *supra* note 55, at 43 (emphasis added).

> Precedents are not therefore binding authorities in international law, but the English theory of their binding force merely elevates into a dogma a natural tendency of all judicial procedure. When any system of law has reached a stage at which it is thought worth while to report the decisions and the reasoning of judges, other judges inevitably give weight, though not necessarily decisive weight, to the work of their predecessors.[254]

Is not Brierly telling us that prior international law decisions are not authority, though the English theory of precedent is a useful formalism that captures the actual behavior of all judges? Put differently, and at the risk of simplifying their points a bit, Fitzmaurice seems to tell us that "in practice, all is binding," and Brierly seems to tell us that "technically, nothing is binding." At this juncture, we need not choose between the two options because the inference from either is the same: the distinction between "binding" and "non-binding" precedent is a chimera; what really matters is the *actual behavior* of adjudicators.

Without a doubt, the most serious damage Judge Shahabuddeen does to the language of the myth is in Chapter 7, "The Possibility of Judge-Made International Law." Here, he does nothing short of admit that ICJ opinions do more than contribute to the development of international law. They actually are a *source* of law, albeit a "subsidiary" or "indirect" one—to use Oppenheim's term[255]—or a "quasi-formal one"—to use Fitzmaurice's term.[256]

Initially, his analysis is somewhat tentative:

> [I]f decisions of the Court cannot make law but can contribute to its development, presumably that development ultimately results in the creation of new law; and, however minute this might be in any one instance, *incrementally it acquires mass. It does not accord with reality* to suggest that the Court may develop the law only in the limited sense of bringing out the true meaning of existing law in relation to particular facts, as, to take the ordinary example, by determining whether a statutory reference

254. J.L. Brierly, *Regles Generales du Droit de la Paix*, HAG R, 58 (1936-IV) at 64, *quoted in* SHAHABUDDEEN, *supra* note 55, at 42 (emphasis added).

255. *See* 1 OPPENHEIM'S INTERNATIONAL LAW para. 13 at 41 (9th ed. 1992) (stating that "[d]ecisions of courts and tribunals are a *subsidiary* and *indirect* source of international law" (emphasis added)).

256. *See* Fitzmaurice, *supra* note 252, at 172-73, *quoted in* SHAHABUDDEEN, *supra* note 55, at 88.

> to "domestic animal" includes some particular animal. As Judge Alvarez remarked, 'in many cases *it is quite impossible to say where the development of law ends and where its creation begins.*' . . .
>
> Another way of putting it is to ask whether decisions of the Court can serve as sources of law. . . . It would do for present purposes that, as stated in *Oppenheim*, decisions of the Court 'are a subsidiary and indirect source of law.'[257]

But, soon Judge Shahabuddeen throws the weight of Article 38.1(d) of the ICJ Statute and the *Oxford English Dictionary* behind the proposition that the Court can create law. Article 38, of course, obligates the ICJ to apply "subject to the provisions of Article 59, judicial decisions . . . as subsidiary means for the *determination* of rules of law."[258]

He argues the Article admits of two interpretations. First, decisions of the ICJ "may serve as material for the determination of a rule of law by a later decision."[259] This is the conventional view in which a judicial decision is, following the statutory language, a "subsidiary means for the determination of rules of law."[260] But, the language also can be construed to mean that:

> [J]udicial opinions . . . effect[] the determination of rules of law on the basis of earlier judicial decisions. The new decision by which a rule of law has been determined on the basis of earlier decisions *is not a subsidiary means; it is the source of a new rule of international law*; it is made by the Court alone.[261]

Much turns on what the word "determination" means in Article 38.1(d). Is it merely to "ascertain definitively by observation, examination, calculation, etc.?" Or, can the word also mean to "lay down decisively or authoritatively, to pronounce, declare, state," to "settle or fix beforehand; to ordain, decree"? Citing the *Oxford English Dictionary* for these quoted meanings, Judge Shahabuddeen points

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257. SHAHABUDDEEN, *supra* note 55, at 68-69 (emphasis added).

258. ICJ Statute, *supra* note 47, art. 38(1)(d), 59 Stat. at 1060, 3 Bevans at 1187 (emphasis added).

259. SHAHABUDDEEN, *supra* note 55, at 76.

260. *Id.*

261. *Id.* (emphasis added).

out that "determination" means all of the above.[262] Thus, he finds that "[i]n a legal context, the meaning is *not* limited to a finding or discovering of what already exists; *it may include the bringing into being of a new legal phenomenon.*"[263]

It follows, then, that Article 38.1(d) allows ICJ opinions to be a source of law. Or, to put it differently, that the first and rather narrow interpretation of the Article understates the value, as a source of law, of ICJ precedents.[264] Indeed, once a decision creates a rule of law, then it enters into the corpus of "international law" referred to in the *chapeau* of Article 38.1. At that point, the ICJ is directed by the *chapeau* to decide cases in accordance with "international law," which includes its own previous decisions.[265]

In sum, Judge Shahabuddeen offers us an expansive interpretation of Article 38.1. Using the lexicographic meaning of "determination," it is reasonable to say that the ICJ can create new law. That new law becomes part of the body of international law that the ICJ must apply. We ought not to be surprised, then, by Judge Shahabuddeen's consequent admissions, namely, that "it is *not* much in doubt today that decisions of the Court *can create law*,"[266] and that "even though it may be open to a State to take the position that a new holding by the Court is not part of international law, the practical enjoyment of that right *is not likely to mean much* before the Court."[267]

Judge Shahabuddeen's admission in Chapter 7 puts him in an uncomfortable position. If ICJ decisions are a source of law, then must it not also be true that stare decisis operates at the Court? After all, by what means are they becoming law other than through the opera-

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262. *Id.* at 77 n.35. We can quibble that Judge Shahabuddeen ought to have cited to the edition of the *OED* available at the time the ICJ Statute was drafted, not the 1989 edition.

263. *Id.* at 77 (emphasis added).

264. *See id.* at 78.

265. *See* SHAHABUDDEEN, *supra* note 55, at 80-81.

266. *Id.* at 90 (emphasis added). *See also id.* at 91 (stating that "it is difficult to visualise a process of development which does not at some point eventuate in creation [of law]. That point, it is submitted, is located within the judicial process itself and is represented by some particular decision or decisions of the Court").

267. *Id.* at 95 (emphasis added). *See also id.* at 95-96 (reiterating that a previous ICJ decision is for all practical purposes international law).

tion of "binding" precedent? We would expect, then, a dramatic denouement: a further admission that stare decisis is alive and well, that the conventional wisdom pertaining to the distinction between "binding" and "non-binding" precedent no longer makes sense.

No such luck. Immediately in Chapter 8, beguilingly entitled "*Stare Decisis*," Judge Shahbuddeen intones that, "[i]t is not in dispute that the doctrine does not apply in relation to the Court."[268] Thereafter, he resurrects—at least implicitly in the following passage, and elsewhere, more overtly—the old distinction between "binding" and "non-binding" precedent.

> Some part of the hesitation to regard a decision adopting a new principle as creative of new law seems to stem from apprehension that to take that view is necessarily to imply that the doctrine of *stare decisis* applies in relation to the Court. It is submitted that this would *not* follow. *A precedent may well be law even if stare decisis does not apply on the common law model.*[269]

His submission, then, is that ICJ decision—and, by extension, WTO Appellate Body reports—are a source of law, but that stare decisis is inapplicable. How is this puzzling submission defended?

Judge Shahabuddeen's principal argument is that "the existence of *stare decisis* is not a precondition to the creation of judge-made law."[270] Exhibit A is the common law of England.

> Even in England, the doctrine did not always have the rigidity which came to be associated with it in the late nineteenth and early twentieth centuries; over the greater part of its history, it seems to have rested merely on a *practice* of following previous decisions, and not on a *rule of law* requiring previous decisions to be followed. The crystallization of the *strict* rule was a relatively late occurrence; by contrast, the existence of judge-made law went further back. The doctrine . . . still of course applies in England, but subject to a considerable modification effected at the top

268. *Id.* at 97.

269. *Id.* at 106-07 (emphasis added). *See also id.* at 97-98 (declining to endorse "the strict doctrine of *binding* precedent" (emphasis added)); *id.* at 102-05 (using the term "binding precedents," and quoting approvingly a 1984 opinion of Judge Jennings, who speaks of "persuasive precedent").

270. *Id.* at 106.

> by the 1966 House of Lords Practice Statement. . . . So judge-made law can come into being even in the absence of a *strict stare decisis* rule.[271]

I would submit that Judge Shahabuddeen deceives himself with this argument.

First, the argument misses the mark. All it tells us is that there are different dimensions to stare decisis, and one such dimension is the strictness of the doctrine. At one end of this dimension, the doctrine may be adhered to very rigidly, as in England in the late nineteenth century until 1966. At the other extreme, it may be adhered to rather loosely, as in some periods of English legal history before the late nineteenth century. In between the two extremes, the doctrine may be adhered to reasonably tightly, as the 1966 House of Lords Practice Statement quoted earlier[272] suggests. In this "strictness dimension," the point at which a judicial system operates has nothing whatsoever to do with the operation of the doctrine *per se*. The footprints of the doctrine are more or less visible depending on that point, but indubitably they are there.

Second, the argument presents a moving target. Initially, the claim is that "[a] precedent may well be law even if *stare decisis* does not apply on the common law model."[273] At the end, the contention is that "judge-made law can come into being even in the absence of a *strict stare decisis* rule."[274] Exactly what, then, is the argument? If it is the second contention, then of course the reply is that the contention is true, but that hardly means stare decisis is non-existent. Again, it goes only to the rigidity of its application. If the key proposition is the first one, then my preceding and subsequent points should suffice in reply.

Third, the argument obfuscates the meaning of terms. It says that "judge-made law" and "stare decisis" are not the same. True, but there is more. One is ordinarily thought to follow from the other. That is, unless we are talking about an arbitration, typically we comprehend "judge-made law" to be the logical result of the operation of

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271. SHAHABUDDEEN, *supra* note 55, at 105-06 (emphasis added).

272. *See supra* note 250 and accompanying text.

273. SHAHABUDDEEN, *supra* note 55, at 106.

274. *Id.* at 107 (emphasis added).

"stare decisis." By departing from this understanding, Judge Shahabuddeen neglects the actual behavior of adjudicators. In lieu of focusing on what they really do in practice, he lapses into the utterly confusing contention—one that appears to contradict his earlier admission about sources of international law—that, "[e]ven if the non-applicability of *stare decisis* means that decisions of the Court cannot create law, it does not mean that they do not have precedential effect."[275]

Finally, the fact that judge-made law arose before the strict version of the doctrine crystallized does not mean the doctrine is unnecessary for the creation of the common law. Rather, it suggests another dimension to the doctrine: there may be stare decisis as a matter of practice, and in contrast there may be stare decisis as a matter of legal obligation. They generate precisely the sort of distinction I argue in the next Part that we should embrace, the distinction between de facto and de jure stare decisis.

V. SPEAKING A NEW LANGUAGE

A. A NEW DISTINCTION: "DE FACTO" STARE DECISIS VERSUS "DE JURE" STARE DECISIS

We concluded in Part IV with a second argument to support the proposition that the absence of stare decisis from international trade law, and it seems public international law as well, is a myth. That argument is based on the language of the myth, specifically, the distinction between "binding" and "non-binding" precedent. It seems to be an illogical and dissonant language. Taking Judge Shahabuddeen's *Precedent in the World Court* as the quintessence, we have seen four rather grave difficulties posed by the language.

The irresistible implication is that we ought to depart from the prevailing language of the myth. But, are we then left with nothing more than "binding" precedent? I should not think so. Instead, as I have intimated above, we ought to realize the existence of a distinction between "de facto" and "de jure" stare decisis, or equivalently, between "de facto" precedent and "de jure" precedent.[276]

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275. *Id.*

276. I do not mean to use the terms "precedent" and "stare decisis" inter-

What do I mean by de facto stare decisis, on the one hand, and a formal or de jure doctrine of stare decisis, on the other hand? After all, it would be no service to legal scholarship for me to look askance at the distinction between "non-binding" and "binding" precedent, and thereafter create a new but recondite distinction. As the Latin prefix suggests, in a de jure[277] stare decisis regime, there is a legal obligation incumbent on the adjudicator to accord due respect to its prior decisions and the prior decisions of a higher authority. To put it more strongly, these earlier decisions are officially recognized as a source of law for future disputes, hence the development of a common law from the decisions. It is indisputable that de jure stare decisis does not apply in WTO adjudication. In brief, "de jure" stare decisis is what we normally understand the term, unmodified, to mean.

In contrast, again as the Latin terms suggests, a "de facto"[278] doctrine of stare decisis is one that exists in fact. We need only watch how the adjudicator comes to its conclusions to see stare decisis in operation. We may, for example, see the adjudicator referring to and

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changeably. We may think of a *particular* judicial holding as setting or following a "precedent," whereas the *general* doctrine that propels our thought is that of "stare decisis."

Interestingly, Professors Troper and Grzegorczyk suggest the distinction between de facto and de jure precedent is applicable in the French legal system, and speak approvingly of "de facto bindingness" in that system. They state that the rule of Article 455 of the Code of Civil Procedure, discussed *infra* in Part III.B.1, is "true *de jure*, it is generally understood, not only that it is possible for courts to follow precedents, but that there is a de facto obligation to do so, which simply derives from the hierarchy of courts. . . ." Troper & Grzegorczyk, *supra* note 180, at 118. *See also* Aleksander Peczenik, *The Binding Force of Precedent*, *in* INTERPRETING PRECEDENTS, *supra* note 1, at 461, 461 (observing that because "precedents are regularly followed by the courts" in civil law countries, "some jurists say that precedents in the continental legal systems are binding *de facto*, but not *de jure*"); *id.* at 465-66 (critiquing the distinction between "de facto bindingness" and "de jure bindingness"); MacCormick & Summers, *supra* note 10, at 532-33 (criticizing the term "binding de facto" insofar as it suggests precedent has no important normative role in civil law systems, and preferring the term "normative force de jure" to connote that precedent has normative force as a matter of law).

277. *See* BLACK'S LAW DICTIONARY, *supra* note 10, at 425 (defining "de jure" as "[o]f right; legitimate; lawful . . ." and the contrary of de facto); VERSTEEG, *supra* note 9, at 128 (translating "de facto" as "[f]rom the law").

278. *See* BLACK'S LAW DICTIONARY, *supra* note 10, at 418 (defining "de facto" as "[i]n fact, in deed, actually" and the contrary of de facto); VERSTEEG, *supra* note 9, at 128 (translating "de facto" as "[f]rom that which has been done").

citing cases repeatedly in ways that suggest it feels bound by the force of the past. We may see the adjudicator struggling mightily to distinguish prior cases from the case at bar, and infer therefrom the binding force of precedent. We may even see lines of precedent, spawned by leading cases, on certain issues that do indeed appear to bind future disputants. Whatever our evidence, however, we cannot conclude that de jure stare decisis exists, because prior decisions are not recognized officially as a source of law governing future disputes. Moreover, the prevailing mythology is that each decision binds only the parties involved in the dispute, that the doctrine simply does not operate. In sharp contrast to the myth stands what we actually observe.

Consequently, in both a "de facto" and "de jure" stare decisis regime, prior holdings have a "binding" force beyond the immediate parties to a dispute. But, only in the latter regime are we honest about what is going on. In the de facto regime, we are hypocritical: we see how the adjudicator behaves, yet we let stand the myth that no system of precedent exists. It is my contention, advanced in the second and third Articles of this trilogy,[279] respectively, that WTO adjudication presently is characterized by de facto stare decisis, and that we ought to formalize the doctrine into a de jure one.

What gives a prior holding its "binding" force? When the de jure doctrine of stare decisis operates, the answer is obvious: the law itself. The very meaning of the doctrine is the legal obligation incumbent on the adjudicator noted above. When, however, the de facto doctrine of stare decisis operates, the answer is not so obvious. A prior holding does indeed bind future disputants, albeit only because that is *the way the adjudicatory process works in reality*, not because of a legal mandate obligating the adjudicator to pay attention to what it has done in the past. That is, there is an unstated rebuttable presumption that the prior holding governs the new case.

That presumption arises because of a complex mix of *extra*-legal factors—or, at least, *quasi*-legal factors—that include the habit—or customary practice—of the adjudicator, the expectations of the parties involved in the dispute, the need for efficiency in dispute resolution—i.e., avoidance of "reinventing the wheel"—an overall sense of

279. *See* Bhala, *supra* note 12; Bhala, *supra* note 14.

fairness embodied in the principle that like cases should be treated alike, and the widespread opinion of legal and non-legal scholars and practitioners. We cannot be too precise or constrictive here, simply because we cannot get inside the heads of the individual adjudicators at the time they are making their decision. Typically, we cannot even interview them immediately after they have made their decision. We are forced to infer from the text of their reports, anecdotal evidence, hearsay, journalistic sources, and the like that the adjudicators did, in practice, feel themselves bound by the past even though they were not legally bound.

At least one point, however, will be certain in advance. As the above examples suggest, the extra- and quasi-legal factors are not only positive, but also normative. The normative justifications for the binding force of precedent are discussed in greater detail in Part Two of the trilogy.[280] A definition of de facto stare decisis that is non-normative would be both naive as a matter of theory and dangerous as a matter of practice.[281] It hardly seems plausible that the universe of justifications contemplated by WTO Appellate Body members for following a precedent in a de facto stare decisis regime is limited to value-free reasons. If the Appellate Body confined itself to that universe, then it would rightly be subject to accusations that it makes irrational or incomprehensible decisions, or does not reveal the true subjective motivations behind its decisions. Indeed, this point would hold in a de jure stare decisis regime. Aside from the basic difference concerning a legal obligation to follow precedent present only in a de jure regime, the normative factors affecting the binding force of precedent in that regime are not necessarily materially different from those in a de facto regime.[282]

Hence, in a de facto stare decisis regime, a prior holding is like a cane that the adjudicator is only in theory—specifically, legal the-

280. *See* Bhala, *supra* note 12.

281. *See* Peczenik, *supra* note 276, at 465-66 (arguing that a conception of "de facto bindingness" that is non-normative might be theoretically naive, contrary to the understanding among legal practitioners of how courts operate, and uninteresting because it leaves out the real reasons a court follows precedents).

282. Professor Peczenik suggests that in a legal system in which precedents are de facto binding, the normative justifications for following precedents could be "in some sense somewhat weaker." *Id.* at 467. I do not dispute this possibility, but rather find it unnecessary to pursue for present purposes.

ory—free to use or toss, but in fact always uses whenever the opportunity arises, or in the rare cases when it chooses to toss the cane, it takes great care in explaining why. Wielded properly, the cane takes on attributes of a scepter, adding authority and credibility to the adjudicator's new decisions. Or, to put it differently and in the GATT-WTO context, the Appellate Body sees itself, and is seen, more as an *American* style, law-making court.

It is worth adding that we ought not to be troubled by a de facto-de jure distinction in international trade jurisprudence. These Latin terms are now an integral part of the WTO subsidies regime. In the tests for specificity of subsidies set forth in Article 2.1 of the Uruguay Round Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), there is an important and clear distinction drawn between subsidies provided by law, on the one hand, and subsidies provided in fact, on the other hand.[283] The Clinton Administration's Statement of Administrative Action on the SCM Agreement that accompanied the 1994 Uruguay Round Agreements Act employs the widely-used trade jargon for this distinction: de jure versus de facto specificity.[284]

From the above comments, it ought to be easy to infer a final definitional point, namely, the difference between so-called "nonbinding" precedent and "de facto" stare decisis. The effect of a "nonbinding" precedent—as I understand those who use and advocate this term seek to convey—is limited to guidance or persuasion. It has no obligatory force as a matter of law or as a matter of the observed behavior of the adjudicator. Rather, it is accorded respect episodically, only insofar as it might be of assistance in instructing how to resolve a dispute at hand, much like a cane that one might choose to use or toss depending on one's ambulatory needs. Put differently, each case is seen more like an arbitral decision than a court judgment, and the adjudicator views itself, and is seen, as a bureaucratic, arbitration-style tribunal.[285] My definition of de facto stare decisis sets a higher

283. *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 2.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 229.

284. *See* H.R. DOC. NO. 103-316, *supra* note 32, at 913.

285. *See generally* 2 ROSENNE, *supra* note 2, at 10-15 (comparing arbitration

threshold for the meaning of past decisions and the institutional role of the adjudicator. It says the adjudicator has an institutional memory and puts it to work at every, or almost every, opportunity. A "de facto" precedent is, in other words, far more potent than a "non-binding" precedent. It provides greater certainty and predictability than does a "non-binding" precedent, though not quite as much as a "de jure" precedent.

An illustration ought to make clear the above delineations. Begin with an Appellate Body holding in the hypothetical case of WTO *Member A* versus *Member B*. What effect, if any, does this holding have on a subsequent case, that between *Member C* versus *Member D*, in which the same or a similar issue is raised, and what is the reason for any such effect?

In a de jure stare decisis regime, the answer is that the holding in *A* versus *B* governs the dispute in *C* versus *D*. The *A* versus *B* holding *is* the law for the case of *C* versus *D*. In a de facto stare decisis regime, the answer is that the holding in *A* versus *B* again governs *C* versus *D*, but the reason is different. The binding effect occurs only by virtue of the *near-ubiquitous practice* of the adjudicator, the Appellate Body, to apply its previous decisions to new cases. This practice results from an amalgam of extra- and quasi-legal factors, such as those listed earlier. It does *not* arise because the Appellate Body itself is bound by a fundamental legal principle commanding it to observe its prior rulings. Finally, in a regime of "non-binding" precedent, the *A* versus *B* holding has whatever importance in the *C* versus *D* adjudication the Appellate Body chooses to give it. At best, this importance is as an *heuristic* device to assist the Appellate Body to discover for itself how to resolve the *C* versus *D* dispute.

B. THE SIGNIFICANCE OF THE NEW DISTINCTION

What difference does it make when we move away from the language of the myth, the "binding" versus "non-binding" precedent distinction, and speak a new language, "de facto" versus "de jure" stare decisis? There is no point bothering ourselves with a new mode of discourse that is entirely uninsightful. I suggest shifting the terms is significant for three reasons.

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and dispute settlement).

First, in a very practical sense, it ought to cause us to analyze Appellate Body reports with greater care, and ought to push the Appellate Body to construct their reports in a more complete and overt manner, and to enhance the efficacy of argumentation before the Body. Second, from a theoretical standpoint, the distinction ought to discourage the application of voluntarist theories to WTO adjudication, and ought to propel us to re-consider the "all-or-nothing" nature of precedent. Third, and perhaps most importantly, speaking in terms of "de facto" and "de jure" stare decisis ought to help rectify the monstrous disconnect between, on the one hand, the myth about stare decisis and international trade law and, on the other hand, actual GATT-WTO practice.

1. Distinguishing Holdings from Obiter Dicta, and Improving Argumentation

One obvious significance of the new distinction is that in a stare decisis regime—be it a de jure or de facto one—it becomes important to distinguish the holding from both the rationale and any *obiter dicta*—a thing said in passing[286]—in the opinion.[287] After all, the *ratio decidendi* has precedential effect,[288] but not *dicta*, and only *ratio de-*

286. *See* VERSTEEG, *supra* note 9, at 149 (defining obiter dicta). *Obiter dicta* include not only statements irrelevant to the disposition of a case, but also (1) statements relevant to its disposition but not relevant to the holding, (2) statements relevant to a collateral issue, and (3) statements relevant to the disposition of important issues in other cases. *See* Marshall, *supra* note 6, at 515.

287. For a discussion of whether it is necessary to distinguish between *ratio decidendi* and *obiter dictum* in ICJ opinions, given the lack of a formal doctrine of stare decisis in ICJ jurisprudence, see SHAHABUDDEEN, *supra* note 55, at ch. 11. For a discussion of how to distinguish between *ratio decidendi* and *obiter dicta*, see Marshall, *supra* note 6, at 515-16.

288. *See* Summers, *supra* note 10, at 370, 383 (instructing that in New York state courts, "[o]nly the 'holding' in a precedent opinion can be formally binding."); *Id.* at 383 (stating that in New York state courts, "[t]he only part of the opinion which can be formally binding or have high normative force is the 'holding' or 'holdings'"); Marshall, *supra* note 6, at 514 ("[t]he critical [normative] view of precedent implies that what is binding is the ruling that is required on a proper assessment of the law and the facts of the case – as compared with a positive attitude that merely reports what as a matter of fact a judge believes himself (perhaps confusedly or shortsightedly) to be laying down"); CROSS & HARRIS, *supra* note 196, at 39 (stating that in the English system "the *only* part of a previous case which is binding is the *ratio decidendi* (reason for deciding)" (emphasis

cidendi, not *dicta*, is persuasive. Thus, one English legal historian argues the failure of medieval judges to distinguish their holdings from inessential comments was a principle obstacle to the development of a strict rule of stare decisis during the Middle Ages.[289] If, by contrast, we speak in terms of "binding" and "non-binding" precedent, then we may tend to pay less attention to this distinction, particularly where we believe the precedent is not binding. Why argue over what is holding versus *dicta* if whatever the holding is has no real grip on future disputants?

To be sure, this answer is rather prosaic. Still, it is a useful reminder that we may have to begin reading opinions with a bit more care. In turn, we may begin arguing about their constituents and meaning with greater ferocity.

The answer also may be a useful catalyst for the Appellate Body to write reports that accommodate better their status as de facto—and possibly ultimately de jure—precedent. Exactly what are the central issues to be resolved? Exactly what facts are critical, and which ones are irrelevant, to deciding each issue, i.e., what facts circumscribe the scope of the precedent being set? In clear terms, what is the holding on each issue? Is this holding intended to be fact-specific, or is it a more general principle applicable to a wide variety of factual predicates? What factors might lead to an exception in a future case? What factors might cause a modification, even a reversal, of the present holding in a future case? The answer also might catalyze the Appellate Body to clarify yet further its use of past holdings. On what precedents does it rely, and why? What precedents does it mean to distinguish, and on what grounds? All these questions, if answered in an Appellate Body report, will transform that report from a rather dry, arbitration-style document into an engaging, transparent common law-style opinion. In turn, the report will serve better the needs and expectations of WTO Members, enabling them to shape their behavior in accordance with carefully-crafted, clearly-articulated,

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added)); ALLEN, *supra* note 118, at 213 (arguing along with Lord Chief Justice Mansfield that every precedent is an illustration of principle, and discussing "what we really mean when we say that the only part of a precedent which is authoritative is its *ratio decidendi*," which is none other than the general principle of the case the judge must extract and interpret in light of the facts).

289. *See* HARDING, *supra* note 46, at 222 (discussing historical impediments to implementing a strict rule of stare decisis).

and well-reasoned principles the Appellate Body lays down. Ultimately, the effect of the accretion of reports, coupled with their effect on the behavior of Members, will contribute to the international rule of law.

In brief, the accretion of de facto precedents, premised on the proposed new distinction, will help WTO Members shape their trade policies to conform with the new common law. But, there is more. We should also expect an "empowerment effect," namely, the WTO Members are likely to be more able to make effective legal arguments. The reason for this expectation again lies in the proposed distinction. A mode of discourse, such as de jure and de facto stare decisis as opposed to "binding" and "non-binding" precedent, that better captures the actual behavior of an adjudicator should enhance the quality of legal argumentation offered by parties appearing before that adjudicator. After all, the parties have a language in which to conceptualize what moves the adjudicator that is reasonably accurate, or at least more precise than their previous terms and phrases. Each party can create, package, and deploy its arguments in the new discursive mode that transports the adjudicator to a point in its collective mind where the party wants the adjudicator to be.

Put in terms of the present context, we can expect to see more persuasive advocacy from WTO Members before the Appellate Body. After all, the Members will have a more accurate picture of the sources of law—in theory and in practice—to which the Appellate Body refers. The Members will not fret that the Body might disregard a prior holding because it is "non-binding," and thus they will not wonder as much as they might have about the extent to which they should rely upon the holding for their arguments. Rather, the Members can write their briefs on a more secure foundation, de facto precedents, and leverage off of the high degree of persuasive force of those precedents. That is not to say the Members now can be complacent, that mere citation to a de facto precedent will guarantee victory. Any competent lawyer knows all too well that even in a de jure stare decisis regime, precedents occasionally are—and should be—overturned—a topic discussed in Part Two of the trilogy. It is simply to say that the new distinction ought to give WTO Members greater certainty and predictability about the behavior of the Appellate Body, and thereby raise their own comfort levels with certain modes of discourse.

2. *Jurisprudential Ramifications*

The thesis—that in the international trade law context, "all precedent is binding, it is only a question of whether the precedent is binding in a de facto or de jure sense"—has at least two important jurisprudential implications. First, the initial part of the thesis, that "all precedent is binding," runs head up against voluntarist theories of the law. Second, the latter part of the thesis, concerning the de facto-de jure distinction, is ambivalent as to the all-or-nothing nature of precedent.

a. Casting Doubt on Voluntarist Theories

Voluntarist theories, advocated by eminent thinkers such as Jeremy Bentham and Hans Kelsen,[290] address the question of "what is law?" with strict and somewhat narrow answers. Law, at bottom, is the official implementation of popular will through legislative enactments, administrative regulations, or other formal decrees. One feature shared by these forms of implementation is generality. A statute, regulation, or decree is universally applicable. Another commonality is that each form is, more or less, an expression of popular will. Legislators are elected by the people, administrators and officials are appointed by elected officials and held accountable to them and to the legislature. In brief, law is the body of generalized acts of will.

Voluntarist theorists would argue—and there is, naturally, a risk of over-generalizing here—that judicial decisions, in contrast, do not share these characteristics. A decision arises because of a dispute between two or more parties arising out of a particular set of facts. While the decision may purport to contain a broadly applicable *ratio decidendi*, what really matters is the resolution of the specific dispute. Further, judges, with exceptions in some American states, tend

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290. One of Bentham's concerns about decisional law was that out of respect for precedent a judge would be compelled to follow a rule that not only was incongruous with the judge's sense of justice, but also that was widely agreed to be a bad rule. *See* ALLEN, *supra* note 118, at 306.

I do not wish to entertain a long exposition of these theories, and confess I am still very much a student of them. However, an excellent, succinct treatment of them, on which I base the above discussion, may be had in MacCormick & Summers, *supra* note 10, at 542-45.

not to be elected or otherwise accountable to the popular will. They are liable only to a higher court for committing a reversible error, or to a judicial or legislative authority for engaging in egregious personal misconduct.

When I say that "all precedent is binding," I mean to cast doubt on a voluntarist approach to judicial decisions. The reports of the WTO Appellate Body have systemic implications. I would go so far as to say that these implications are not just realized in a post hoc fashion by non-party Members. Rather, they are anticipated *a priori* by all Members able and willing to follow closely adjudicatory processes and outcomes. Wealthy WTO Member countries are, of course, in a better position to foresee what effects a particular case might have on the multilateral trading system than are poor Members, but not because the wealthy Members are naturally endowed with a higher level of "trade law smarts" than developing countries. Rather, First World countries are better endowed with—i.e., can afford a larger army of—trade diplomats and lawyers to monitor adjudications and assess the implications of the outcomes from a self-interested perspective. Most Third World Members, in the meantime, struggle just to enact and enforce WTO-compliant laws and deal with any cases in which they are directly involved.[291] Nevertheless, my point is that WTO Members, or at least the major trading partners, would regard only the most insignificant of cases as purely or even largely discrete events spawned by unique facts. In the vast majority of cases, I suspect strongly that Appellate Body pronouncements are seen as universally applicable in future like contexts.

As regards the second voluntarist characteristic of judicial decision making, that it is unaccountable, this too seems erroneous in the

291. Indeed, in the case of *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, St. Lucia was successful in hiring two private attorneys. For a discussion of this case, see BHALA & KENNEDY, *supra* note 33, sec. 5(k), at 33-34. Indonesia made the same move in the case of *Indonesia-Certain Measures Affecting the Automobile Industry*. For a discussion of this case, see RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW–1999 SUPPLEMENT sec. 5(k) (forthcoming 1999) (manuscript on file with Lexis Law Publishing). In both cases, the objection that government attorneys ought to be used for confidentiality reasons was defeated. The adjudicators understood that in order to participate fully and adequately in WTO proceedings, it may be necessary for developing countries to hire outside, i.e., private, counsel, because such countries lack the resources to maintain a full-time, sophisticated staff of government trade lawyers.

GATT-WTO context. Should they wish to do so, there is nothing to prevent WTO Members from coming together, through the Ministerial Conference or General Council, and implementing textual changes or interpretations that modify or even reverse an Appellate Body precedent or line of precedents. It is a far cry, to be sure, from individual citizens in Member countries checking over the behavior, and correcting perceived errors, of the Appellate Body. From where a lowly citizen stands, the Appellate Body is likely to seem both magisterial and remote. But, that citizen—particularly if she lives in a developed country—can take some comfort in knowing that her elected representatives are watching that behavior. Indeed, the White House-Dole Agreement, proposed but not enacted as the Uruguay Round Agreements Act was making its way through Congress,[292] illustrates the monitoring responsibilities over WTO adjudication American government officials seek on behalf of private citizens.

If both of the voluntarist characteristics of judicial decision making are assailable, then voluntarist theories about the sources of law, if and when applied to the international trade law context, ought to be doubted. Such theories are likely to be conceptually inadequate in the present context simply because they understate the extent to which Appellate Body precedents are a source of law. Their fallacy, in brief, lies in their exclusiveness.[293] Certainly, I admit the possibility that there are other dimensions of these theories that could be apposite to this context. But, this matter is beyond the scope of the present discussion.

b. The All-or-Nothing Nature of Precedent

To contend that when studying international trade law and the behavior of the Appellate Body we should pay less attention to the language of the myth, and give greater thought to whether stare decisis operates in a "de facto" or "de jure" sense, is also to say something about the "all-or-nothing" nature of precedent. At one level, I mean to discountenance the idea of a theoretical continuum characterized

292. *See* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS 174-78 (1996).

293. *See* MacCormick & Summers, *supra* note 10, at 544 (discussing the voluntaristic fallacy that treats certain procedurally formal judicial acts as the "exclusive body of valid law").

at one end by "binding" precedent and at the other end by "non-binding" precedent. After all, I believe the holdings in each of the Appellate Body's reports create "binding" precedents, and this continuum owes its existence to the question "how binding?"

At another level, I mean to promote the idea of a different continuum that is not easily distinguished from that just delineated. The continuum I have in mind, which I shall discuss more fully in Part Two of this trilogy, is based on the question "how much *force*, in a normative sense, do Appellate Body reports have?" At all points on the continuum it is agreed that the Appellate Body reports are binding. At one extreme, they are binding in the "de jure" sense that the Appellate Body is legally obligated to follow its prior holdings, though these precedents are defeasible for good cause as identified by the Appellate Body or as a result of action by the WTO Ministerial Conference or General Council. At the other extreme, the reports are binding in the "de facto" sense that the Appellate Body follows them as a matter of habit, expectations, and the like. In between these points we inquire what normative force the reports exert on the minds of the Appellate Body members.

In other words, not every Appellate Body report is equally sound. Some are more powerful, some exert a stronger and more durable grip, than others, simply because the discursive justification for some is better than for others. Obviously, I would rather eschew couching the exemplary character of a precedent in the terms that "not all reports are equally binding" for fear of reincarnating the "binding"-"non-binding" distinction. Instead, the inquiry I want to suggest is one into the factors influencing the *potency* of a particular report. These factors, broadly conceived of, are likely to concern the *substantive acceptability* and *reasonable coherence* of the report. Thus, the continuum that interests me is one in which precedents, binding in either a de facto or de jure sense, differ as to their "merits" and their "fit" within the established international trade law context.

Accordingly, while I not only applaud their excellent analysis, but rely on many features of it in this trilogy, I am ambivalent as to whether the following statement by Professors MacCormick and Summers would be helpful if applied to the international trade law context, or possibly even the international law context generally: "the very effort to construct a framework within which the authoritative

character of precedent can be represented in terms of a continuum rather than purely as all-or-nothing bindingness gets at something that we take to be an important truth."[294] If we take this statement to mean a continuum of the first type—different degrees of bindingness—then I cannot agree. If we take it to connote a continuum of the second type—different degrees of normative force—then I am in complete accord. It is not clear exactly what their intended meaning is.

Perhaps it is both. Based on their comparative analysis, they conclude that "[p]recedents do not have validity in the all-or-nothing way characteristic of acts performed under requirements of procedural formality,"[295] for example, a statutory enactment, administrative regulation, or official decree. They indicate that "[t]he *validity*, it might be better to say the '*soundness*,' indeed, the '*bindingness*' or '*force*' of precedent is not an all-or-nothing matter."[296] In other words, they suggest, and I question whether, the highlighted terms are more or less synonymous.

3. *Ending the Disconnect*

The third and perhaps most important significance of the distinction between "de facto" and "de jure" stare decisis lies in the problem of the disconnect. I began this first article by identifying the disconnect. I should hardly think this piece, much less the entire trilogy, would be much of a success if I offer a different mode of discourse that does not rectify the problem.

If we are satisfied with characterizing WTO Appellate Body decisions as "non-binding precedent," then we condemn ourselves to understate the true force of these decisions. If we admit the existence of stare decisis, then we come closer to grasping what the Appellate Body does in fact, and indeed a bit closer to ending the disconnect between myth and reality. We are more sensitive to why the Appellate Body exercises the art of distinguishing cases, and why it is reluctant to depart from previous decisions. We can see that the decisions of the Appellate Body, upon adoption by the DSB, create law.

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294. MacCormick & Summers, *supra* note 1, at 11.

295. MacCormick & Summers, *supra* note 10, at 544.

296. *Id.* (emphasis added).

In brief, we can witness the evolution of the international common law of trade, much like lawyers in Chief Justice Marshall's era must have marveled at the unfolding of constitutional law doctrine.

But, understanding the significance of the distinction between "de facto" and "de jure" stare decisis is not enough. The remainder of my argument, in a nutshell, is not only that the Appellate Body operates in a de facto stare decisis regime, as opposed to a regime of non-binding precedent. It is also that we would end once and for all the monstrous disconnect between doctrine and reality if we changed the regime to one of de jure stare decisis. It is in Parts Two and Three of the trilogy that I shall turn to these points.

C. DIMENSIONS YET TO BE EXPLORED

Having elaborated why I think the proposed distinction ought to enter our discourse, it is only fair that I admit two dimensions of the distinction that I am not addressing in detail. The first dimension concerns the essence of common law, while the second dimension pertains to the operation of precedent in the institutional confines of the WTO.

1. The Essence of the Common Law

If we speak seriously about WTO Appellate Body reports as de facto or de jure precedent, then inevitably we also converse about an international common law of trade. In turn, we may inquire about the essence of that common law. Is it, as early Anglo-American common law lawyers thought of their own common law, pre-existing, i.e., is it "the law because it always was the law"?[297] Or, is common law—and, by extension, the Appellate Body's jurisprudence—a part not of history but, as Blackstone suggests, immanent in Nature and discoverable through Reason granted to humans by Divine Providence?[298] Or,

297. CHARLES REMBAR, THE LAW OF THE LAND 43 (1980). *See also id.* at 46 (discussing the *a priori* view of law). One of the interesting implications of this older view is that a holding does not become a part of the common law but rather bears witness to it. *See id.* at 44.

298. *See* 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70-71 (Philadelphia, Robert Bell, 1st Am. ed. 1771) (1769); REMBAR, *supra* note 297, at 43, 46-47 (discussing various theories on the sources of common law). This positivistic approach is sometimes called the "declaratory theory"

as still a third possibility suggested by the legal realists, is the common law what the courts make it?[299]

Under either of the first two theories, the familiar admonition obtains: a judge is supposed to find, not make, the law, whatever its essence.[300] The debate between them is more about the ultimate source of the common law. The third theory (or more accurately, group of theories, as there is no one strain of legal realism), however, posits not only a different source, but also a different vision of the role of a judge. I should hardly pretend to be able to resolve this ancient debate, if it ever can be resolved satisfactorily. In any event, I think it unnecessary to attempt to do so for present purposes. I simply wish to highlight the exciting possibility that the debate finds a new context—the multilateral trade dispute resolution mechanism.

In this context, we would do well to recall the very common-sense approach of Sir Allen's *Law in the Making*. He rejects the Benthamite criticism that it is a "childish fiction" for a judge to disclaim the capacity to "make" the law.[301] There is an enormous body of precedent with which an English judge must deal, thus it is seldom that she cannot find some relevant guidance, if not authority. Thus, in the vast majority of cases, she really is engaged in "finding" the applicable rule. As for the WTO Appellate Body, it does not yet have to struggle with an enormous body of precedent. The pre-Uruguay Round decisions of GATT panels are contained in forty-one supplements of *Basic Instruments and Selected Documents*. The number of volumes of *WTO Dispute Resolution Decisions* published in *Bernan's Annotated Reporter* still numbers less than a dozen. But, the number of volumes is increasing, and rapidly so. Inevitably, then, the Appellate Body will have more rules to "find," and less to "make."

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of the common law because it leads immediately to the conclusion that a precedent declares, but does not make, the law, i.e., that it is evidence of the law. *See* Bankowski et al., *supra* note 189, at 482.

299. *See* REMBAR, *supra* note 297, at 45, 47 (discussing the legal realist challenge to traditional views of common law).

300. *See id.* at 43 (explaining the role of the common law judge was to declare law rather than make it).

301. *See* ALLEN, *supra* note 118, at 290-300 (observing that the English body of precedent is vast and leaves judges little opportunity to make law).

But, what about the instances where, as Sir Allen puts it, "[t]he thousands of volumes of reports are silent on this one point"?[302] Here a genuinely unprecedented question, a case of first impression, arises. Sir Allen observes that the judge:

> in laying down a rule to meet these situations, is certainly making a new contribution to our law, *but only within limits, usually well defined* [emphasis added]. If he has to decide upon the authority of natural justice, or simply "the common sense of the thing," he employs that kind of natural justice or common sense which he has absorbed from the study of the law and which he believes to be consistent with the general principles of English jurisprudence. The "reason" which he applies is, as Coke said, not "every unlearned man's reason," but that technically trained *sense of legal right* [emphasis original] – we need not follow Coke so far as to call it "the perfection of reason" – with which all his learning imbues him. The public policy which he will apply to a new point is what he understands public policy to be from studying it in other legal connections. The phrase commonly used is that he decides "not on precedent, but on principle." *The difference is that in the one case he is applying a principle illustrated by previous examples, in the other case he is applying a principle not previously formulated, but consonant with the whole doctrine of law and justice* [emphasis added]. Although, therefore, he is making a definite contribution to the law, he is not importing an entirely novel element into it.[303]

No doubt the Appellate Body members are constrained in the same way as the English judge.

Surely these Members know how seriously they would undermine the legitimacy of their tribunal, perhaps of the WTO itself, were they to fail to employ their understanding of natural justice, or their common sense.[304] Moreover, aside from an odd individual situation, it seems hard to believe they could so fail. It is required by Article 17.3 of the DSU that Appellate Body members are of "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."[305] It would be quite contrary to their training for them to apply principles incongruous with natural justice or common sense. Consequently, to the ex-

302. *See id.* at 288.

303. ALLEN, *supra* note 118, at 292-93 (citations omitted).

304. I shall discuss the topic of legitimacy in Part Three of this trilogy.

305. DSU, *supra* note 10, art. 17.3.

tent they "make" the law in such circumstances, it is a constrained creation. WTO Members, under the auspices of the Ministerial Conference or General Council, are free to make the law as they will, to legislate *de novo*. The instincts and training of the Appellate Body members prevent it from those sorts of original acts of creation.

2. *Differential Adherence to Precedent*

The second unaddressed dimension is the possibility of differential adherence to precedent—whether de facto or de jure—by the Appellate Body and a panel. Is there a distinction between these two entities in the way that precedent operates? Ought there to be a distinction? As suggested earlier, if we pay less attention to the orthodox distinction between "binding" and "non-binding" precedent, then we are saying that both the Appellate Body and a panel are bound by the Appellate Body's holdings. But, are they bound to the same extent?

The easy answer is "no." It could be argued that because a panel is subservient to the Appellate Body, surely the panel is obligated in either a de facto or de jure sense to follow, or distinguish, the holdings of the Appellate Body. In this regard, the argument would go, a panel bears a relationship to the Appellate Body that a federal district court has to the federal court of appeals in the circuit of that district court, and as both a district and circuit court bear to the Supreme Court. In contrast, continues the easy answer, the Appellate Body feels, or at least ought to feel, a looser adherence to its own precedents.

There are two problems with the easy answer. First, in the report *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the panel stated boldly that "[p]anels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same."[306] The panel is rejecting what we might call the concept of "vertical" stare decisis, that is, the idea that a lower court is bound by a decision of a higher court where both courts are in the same jurisdiction, i.e., in the same judicial hierarchy. This con-

306. WTO Dispute Panel Report on India-Patent Protectioin for Pharmaceutical and Agricultural Chemical Product, Aug. 24, 1998, WTO Doc. WT/DS79/R, at 60 para. 7.30.

cept is to be contrasted with "horizontal" stare decisis, where a decision of a court at one level—for example, the court at the highest level, like the American Supreme Court—bind that court across time, or possibly bind—in some sense anyway—courts at the same level in other jurisdictions. We tend to assume, not unreasonably, that the horizontal manifestation of stare decisis is less severe than the vertical manifestation. For example, we would anticipate the Appellate Body is more willing and able to depart from one of its prior holdings than is a panel from an Appellate Body holding. Thus, the panel's statement in the *India-Patent Protection* case is all the more striking.

Second, as between the Appellate Body and panels, it is unduly pessimistic to forecast that only the Appellate Body is a force for change in the international common law of trade. It is entirely possible that from time to time panels can issue new rulings that nudge the common law, or even represent a real innovation. This "bottom up" dynamism helps ensure the common law is tolerant. It is especially likely where a panel report has not been appealed, such as the famous *Kodak-Fuji* case,[307] but it can occur whenever the Appellate Body adopts an innovative approach of a panel. Surely this grassroots-inspired change ought to be encouraged.

Recognizing the issue of the relationship between stare decisis and judicial infrastructure is a fascinating one, I shall nonetheless leave the matter here. Like the first problem of the essence of the common law, the second issue may be capable only of accommodation, not ultimate resolution. I think it not essential to attempt an accommodation in order to urge the simpler point that the distinction between "binding"and "non-binding" precedent ought to be given far less weight than the distinction between de facto and de jure stare decisis.

VI. SUMMARY

At bottom, my thesis in this first Article of a trilogy is a reaction against complacency. Rosenne states in his four-volume treatise:

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307. WTO Dispute Panel Report on Japan-Measures Affecting Consumer Photographic Film and Paper, Mar. 31, 1998, WTO Doc. WT/DS44/R. The United States chose not to appeal the decision, which favored Japan. *See* Raj Bhala, *Letter Update for International Trade Law: Cases and Materials, 1996* 16 (1998) (available from Lexis Law Publishing).

> The tendency to recognize that the decisions of a permanent tribunal have precedential value is a *natural one for all tribunals, and it can develop without any need for artificial doctrines of the binding force of precedents*, or difficult theories of judicial legislation.[308]

I agree and disagree. It is only natural for the WTO Appellate Body to recognize the precedential value of its prior decisions, and it does so with no formal doctrine of stare decisis. Given the impure origins of the supposed absence of stare decisis from international trade law, and given the problematic terminology of the discourse, to believe the supposition is true is to believe in a myth.

There is nothing "artificial," however, about the doctrine of stare decisis. It responds to an ancient question, "what is law?," by announcing that a tribunal's decision is at least one source of law to which future tribunals and parties that come before them must respect. When one Appellate Body report after another is issued under the prevailing mythology, such as in the absence of an officially-recognized doctrine of stare decisis, yet at the same time virtually all of the reports cite repeatedly to and rely on past opinions, perhaps there is clarity and transparency for the WTO Members involved in a single case to whom one report is addressed. But, there is systemic uncertainty and opaqueness. Potential disputants cannot know for sure if there is now a new rule to the game which, if they test matters, presumptively will be applied to them. Nor can they know for sure how or why exactly the rules of the game are retained or changed—on a case-by-case basis, with each case theoretically independent of the other, or by forceful argument addressing a recurring dilemma.

In brief, to accept the Rosenne observation uncritically is not only to be satisfied with the distinction in the language of the myth between non-binding and binding precedent, but also to validate the myth. At least in the context of WTO Appellate Body jurisprudence, the distinction is one without a difference that only the casuist can maintain. I am not content to risk letting this jurisprudence, which is

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308. 3 ROSENNE, *supra* note 2, at 1610 (emphasis added). For an overview of the ICJ, see SHABTAI ROSENNE, THE WORLD COURT–WHAT IT IS AND HOW IT WORKS (1995). For a compilation of perspectives, see, e.g., D.W. Bowett et al., *The International Court of Justice: Process, Practice and Procedure* (1997).

so important in the twenty-first century global economy, develop like a patchwork with holes under the hegemony of the myth. I suspect that a de facto doctrine of stare decisis now operates. Further, I suspect that under a de jure stare decisis regime, Appellate Body jurisprudence could evolve into something approaching asymptotically a smooth and seamless fabric. It is to these suspicions that I turn in the remaining two articles of the trilogy.

In *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*,[309] we shall see first hand de facto stare decisis resonating in WTO Appellate Body reports by tracing several lines of decisional authority. We shall also consider the implications of the theory of stare decisis for the Appellate Body. In *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*,[310] we shall explore the many rationales for a formal doctrine of precedent and see whether adoption of such a doctrine might once and for all end the monstrous disconnect between myth and reality.

309. Bhala, *supra* note 12.

310. Bhala, *supra* note 14.