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The Appellate Body's Judicial Pathway

Precedent, Resistance, and Adaptation

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1. Introduction

What are the limits of change of international law in highly judicialized environments? The World Trade Organization's (WTO) Appellate Body (AB) provides a good case study of the limits of the judicial pathway of international law.[1] The AB is unique: an international, multilateral, and appellate court with general jurisdiction over an entire area of WTO members' policy, routinely interpreting a discrete number of treaties. Initially regarded as a significant step forward in international trade law enforcement, the AB's difficulties arose quickly, in part due to the role of their decisions. Today, the future of the body is uncertain.[2]

There are different ways to tell the story of the rise and downfall of the AB. We choose one that highlights the limits of the judicial pathway of change.[3] Despite a formal rule against the application of precedent, the AB has become rather consistent in the use of prior decisions as it gains authority.[4] Yet, in following a de facto precedent norm, the AB has often given an expansive treatment to its own decisions, including in sensitive areas such as the regulation of anti-dumping duties.[5]

The extension of precedent did not go unnoticed by the most active (and powerful) members of the organization, including the US. The parties to these

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[1] Jeffrey L Dunoff and Mark A Pollack, 'The Judicial Trilemma' (2017) 111 American Journal of International Law 225.

[2] Cosette D Creamer, 'From the WTO's Crown Jewel To Its Crown Of Thorns' (2019) 113 American Journal of International Law Unbound 51; see also Gregory C Shaffer, 'A Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations' (2019) 43 Yale Journal of International Law 37.

[3] Nico Krisch and Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame' in Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023).

[4] Other articles have discussed the role of precedent in the demise of the AB. See James Bacchu and Simon Lester, 'The Rule of Precedent and the Role of the Appellate Body' (2020) 54 Journal of World Trade 183; Mariana Clara de Andrade, 'Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism' (2020) 11(2) Journal of International Dispute Settlement 262 <doi.org/10.1093/jnlids/idaa006> accessed 14 October 2022.

[5] Jeffrey Kucik and Sergio Puig, 'Extending Trade Law Precedent' (2021) 54 Vanderbilt Journal of Transnational Law 539.

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disputes, often the states on the losing side of the case, reacted by complaining, delaying, and, eventually, by failing to comply with the decisions of the WTO's 'judicial' body. Non-compliance represented a challenge to the legal authority of an international dispute body. The decline in compliance rates became a strong signal of dissatisfaction of states—a backlash against the WTO's authority.[6] This resistance raises the question: how did the AB adapt to such strong signalling by states?

We believe, based on our evidence, that the AB has adapted precedent more often by narrowing and distinguishing its own decisions when members failed to comply with rulings.[7] This suggests that while the judicial path is not generally adept for radical transformations, legal bodies can be sensitive to—and can adjust to—political backlash. Yet, that adaptation also has limits. Changes that upend complex balances of power, including expansive readings of the law, might generate additional backlash.

Why do we focus on how the AB applies prior rulings in the face of non-compliance? From one point of view, reliance on precedent is unsurprising given international legal bodies' incentives to generate predictability. However, as the WTO illustrates, leaning too heavily on precedent can cause political problems. A trade dispute decision can alter treaty commitments and applying it as binding may expose the body to resistance from dissatisfied governments that do not agree with that interpretation. One way to show resistance to judicial overreach—perhaps the most radical way—is by failing to abide to the decisions of the body.[8]

Dispute settlement bodies are not unaware of this tension. These bodies often face a choice: in the face of non-compliance, adjudicators can stick with past precedent, a strategy we have termed elsewhere the 'legal coherence' approach. This approach prioritizes coherence across decisions but risks upsetting (even more) the member states. This behaviour is what some WTO members argue about the AB—ie, that the AB adheres to overly stringent readings of the law, and, therefore, strong members like the US have decided not to cooperate. Alternatively, adjudicators can adapt decisions over time in response to the dissatisfaction governments

[6] Jeffrey Kucik, Lauren Peritz, and Sergio Puig, 'Legalization and Compliance: How Judicial Activity Undercuts the Global Trade Regime' (2022) British Journal of Political Science 1, arguing that 'extending previous decisions can reduce the flexibility that states include deliberately in their agreements [and finding] strong evidence that extending precedent reduces on-time compliance. It also leads to longer delays before members comply.'

[7] Jeffrey Kucik and Sergio Puig, 'Do International Dispute Bodies Over-reach?' (2022) 66 International Studies Quarterly 1

[8] Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlnaes, Thomas Risse, and Beth A Simmons (eds), *The Handbook of International Relations* (Sage 2002) 538. See also Karen J Alter, Emilie Marie Hafner-Burton, and Laurence R Helfer, 'Theorizing the Judicialization of International Relations' (2019) 63 International Studies Quarterly 449 (explaining how compliance in the context of delegation is difficult because governments often do not control the timing, nature, or extent to which political and policy decisions are adjudicated).

express in different ways—and by doing so prevent a possible backlash. We have termed this the 'adaptation' approach.[9]

We have investigated this choice and its implications for the WTO and the judicial pathway. Here, we describe our approach in the context of this book relating to change in international law. As we explain, our findings speak not only to the validity of current criticisms of the WTO, which paint the AB as politically naïve, but also to the role of signalling and authority in the judicial path—the behaviour of states to legal interpretations as the main agents of change. By implication, the results speak to how international adjudicators apply precedent strategically and are, potentially, less beholden to legal coherence than is commonly argued. Paradoxically, change is a common feature of the judicial path, but it is constrained by the limited 'autonomy' of judicial bodies from states that can use compliance as a 'control tool' of change.[10]

The chapter is organized as follows. Section 2 discusses the competing incentives of ICs that inform our hypotheses with respect to the judicial path of change. Section 3 discusses our recent empirical work on this point. Section 4 uses the framework of this volume and our empirical results to propose ways in which the AB of the WTO case helps to improve our understanding of change in international law in highly legalized environments.

2. Precedent and the Competing Incentives of International Courts

After having been initially regarded as a significant step forward in trade law enforcement, the AB's difficulties arose quickly. Dissatisfaction with the AB decisions has contributed to a decline in compliance rates in recent years. Total compliance rates, measured as bringing policy into conformity with WTO rulings, fell across the membership by more than 10 per cent in the last decade. Some believe that the change in behaviour is, in part, connected with the decision in *US—Continued Zeroing* as well as *US—Stainless Steel (Mexico)*, which introduced the concept that, 'absent cogent reasons' to deviate from precedent, WTO adjudicators should

[9] Kucik and Puig, 'Do International Dispute Bodies Over-reach?' (n 7) (noting that the results reveal that the AB is more likely to adapt precedent in the wake of past non-compliance, implying that the AB is arguably more responsive than common criticisms suggest. The evidence shows a strong, positive correlation between past non-compliance and adaptation whereas the correlation is negative between past non-compliance and following precedent.)

[10] See Jacob Katz Cogan, 'Competition and Control in International Adjudication' (2008) 48 Vanderbilt Journal of International Law 411, 420. (providing a taxonomy for controlling international courts (internal and external) and five categories of external controls over courts: (1) mandates; (2) rules it can apply; (3) staffing; (4) budget; and (5) ability to make and apply decisions).

follow it. Some states saw this decision as overreach as the AB indicated its intention to follow a strong norm of precedent.[11] Hence, declining compliance rates.

Given that non-compliance sends a clear signal of dissatisfaction, we hypothesize that adjudicators face a choice. How do they handle decisions that failed to induce compliance when those issues arise again in future disputes? The AB can attempt to reinforce the strength of past rulings by directly applying—that is, following—previous decisions. Alternatively, the AB can adapt precedent in the hope that new rulings are more palatable to governments. Here we explain how we tested these competing hypotheses after discussing precedent as a judicial technique, a technique that ensures some consistency, but also enables changes in law through 'judicial' means.

2.1 The Use of Precedent and the Judicial Path

Precedent as a judicial technique typically means following prior readings. In this sense a rigid application of precedent is the antithesis of change—it is stability at its best. However, while precedent typically means following prior readings, a more nuanced understanding of how courts actually apply precedent allows legal scholars to move away from an unhelpful binary. Judges can utilize (and often do use) the plasticity encountered in legal discourse to distinguish prior readings, or to change their prior decisions without necessarily overriding precedent.[12]

This behaviour of changing or refining a prior reading can have added value for the judicial body. For example, distinguishing precedent can bolster the importance of previous readings or generate greater coherence in legal interpretations over time. Scholars also recognize other ways to adapt precedent—most notably, narrowing.[13] Narrowing takes place in instances where the best prior reading applies, but where the court decides to shrink the scope of that reading to have a more limited bearing on the decision at hand. By doing so, at least in international law, overly broad readings of states' commitments can be avoided. Narrowing precedent can be done slowly over time, or by abruptly interpreting a precedent less broadly than it might have been construed otherwise. It is generally done slowly, often noticed only by communities of practice deeply immersed in the legal doctrines and practice of that subject. Yet, narrowing precedent means that the court, without directly disregarding its own precedent, is able to trim back its reach.

[11] Roger P Alford, 'Reflections on US—Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body' (2006) 45 Columbia Journal of Transnational Law 196, 197.

[12] Harlan G Cohen, 'Theorizing Precedent in International Law' Interpretation in International Law 268 (Andrea Bianchi et al eds. 2015) <digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2286&context=fac_artchop> accessed 14 October 2022.

[13] Richard M Re, 'Narrowing Precedent in the Supreme Court' (2014) 114 Columbia Law Review 1861, 1869.

Courts may also use precedent where it does not apply clearly to the case at hand. In order to do so, judges may read and apply a precedent more broadly, effectively extending precedent so that it applies to the current case. Extending precedent involves the widening of a prior reading's *ratio decidendi*—this is the opposite of narrowing. This can occur when the court adopts a justificatory approach to a precedent that extends the application to domains not previously covered by the prior decision. As such, extending precedent goes a step beyond a simple following of prior readings. It adheres to that reading but applies it to a different set of facts or issues.

Thus, at a high level of generality, and with many caveats, the use of precedent is not a binary choice and can refer to, at least, four possible outcomes. When a prior reading clearly applies, a court may follow that precedent through a simple, direct, and mechanical application of a previous decision or it may extend precedent by applying that past reading to a new circumstance, effectively expanding the scope of previous rulings. Conversely, it may narrow precedent through a refinement of those past readings. When a precedent may not necessarily apply, the court can distinguish the current reading from the previous one by explaining why invoking a prior decision is inappropriate. We consider both behaviors – narrowing and distinguishing – examples of adaptation.[14]

In the next section, we discuss how we employed our data set that included more than 5,500 applications of precedent at the WTO to test if the AB was more likely to adapt in the face of non-compliance with its prior decisions. This, in turn, can serve to think more broadly about the judicial path of change in complex judicial settings.

2.2 Exploring the Judicial Path through Non-compliance

The use of precedent in ICs could be understood as two competing choices for a court when it comes to affirming its prior choice in the face of pushback. On the one hand the 'legal coherence' approach predicts that because courts place a premium on consistency across cases, judges will follow prior decisions. A rich vein of legal studies literature shows that coherence can bolster a court's authority, and this applies doubly to international legal systems, which have extra incentives to rule predictably given their contested legitimacy.[15] Moreover, in a world where states guard their trade policy sovereignty fiercely, consistent decisions can reduce the court's exposure to accusations of bias or arbitrariness. Thus, legal coherence—bolstered

[14] See David L Shapiro, 'In Defense of Judicial Candor' (1987) 100 Harvard Law Review 731, 739–40.

[15] See generally Karen J Alter, Laurence R Helfer, and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' (2016) 79 Law and Contemporary Problems 1, 11–12; see also Thomas M Franck, 'Legitimacy in the International System' (1998) 82 American Journal of International Law 705.

by a strict adherence to precedent—lends greater credibility to the court. It reduces the chance that rulings appear arbitrary, capricious, or politically motivated.[16]

In addition to the court's incentives, there are institutional and sociological factors at play. The secretariats and operational staff of many ICs, including the WTO, are legal professionals, not political appointees. Lawyers who litigate and hear disputes are trained to value candour to the law. That does not mean they are blind to political context. However, the likelihood is that these actors see consistent interpretations of the law as a positive feature of the system.[17]

In light of these incentives, the 'legal coherence' approach implies that adjudicators respond to non-compliance with prior decisions by following precedent. Following precedent involves the direct application of a previous decision to a current dispute. For example, the AB considered ten previous rulings in its decision on *US—1916 Act (EC)*, one of the WTO's many disputes over anti-dumping duties. The AB followed the cited precedent in each instance. This included several references to the highly influential *EC—Hormones* decision. In *EC—Hormones*, the AB made important rulings relating to the burden of proof that complainants must meet when relying on scientific evidence to allege trade discrimination. The AB also ruled in *EC—Hormones* that panels have discretion over whether to grant third parties 'enhanced' rights. The AB upheld both of these findings in its subsequent ruling on *US—1916 Act (EC)*. That is to say, it followed precedent.

The AB has been asked to consider a previous ruling in almost every decision, a practice that has naturally increased over time as WTO case law expands. By 2015, references to previous rulings were so frequent that the average number of individual precedents interpreted in a given AB ruling was 58 [SD: 50.6]. The AB follows precedent over 75 per cent of the time, a significant majority, which is what we would expect from any legal body concerned with coherence (Table 11.1). However, that 75 per cent may seem low if coherence was the only goal. That is why it is also important to notice that the AB adapts precedent in nearly 15 per cent of its applications of prior readings. These are split relatively evenly between decisions that distinguish (7 per cent) and those that narrow (8 per cent) prior readings. Adapting precedent 15 per cent of the time might sound rare, but it cuts against the incentives to remain consistent. It shows that the AB is willing, on a regular basis, to drift from its previous decisions, which it has done at a relatively consistent rate over the course of the WTO's existence. The question is: when and where is the AB more likely to adapt? It turns out that the majority of adaptations

[16] For a similar discussion, see Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31 European Journal of International Law 797.

[17] See Gregory Shaffer, Manfred Elsig, and Sergio Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2016) 79 Law and Contemporary Problems 237, 271; Joost Pauwelyn, 'Minority Rules: Precedent and Participation Before the WTO Appellate Body' in Joanna Jemielniak, Laura Nielsen, and Henrik Palmer Olsen (eds), *Judicial Authority in International Economic Law* (CUP 2016).

Table 11.1 Precedent use by the WTO's Appellate Body[a]

Precedent Type	Total Number	Previous Compliance	Prev. Non-Compliance
Follows	3,744	1455 (39%)	2289 (61%)
Adapts	636	180 (28%)	456 (72%)
Narrows	351	110 (31%)	241 (69%)
Distinguishes	285	70 (25%)	215 (75%)
Other	540	192 (36%)	348 (64%)

[a]Kucik and Puig, 'Do International Dispute Bodies Over-reach?' (n 7).
Note: 'Other' includes mentions of previous rulings without a definitive application in the current dispute. The share of applications adapted is higher after non-compliance (14.74 per cent) than after compliance (9.85 per cent).

(72 per cent) occur after the *cited* dispute ended in non-compliance. Put another way, when a previous ruling failed to induce compliance, the AB adapts in future considerations of similar issues. This is because the AB faces competing incentives.

As we have explained in our study of precedent, there is another approach by a dispute settlement body in the face of non-compliance.[18] While the coherence approach, wherein adjudicators adhere faithfully to past legal decisions, may sound politically naïve in the face of pushback from governments, the 'legal adaptation' approach sees change as an effort to manage political backlash. In this sense, rather than hammering the same legal nail repeatedly, an alternative approach is that legal bodies modify precedent in the face of situations that threaten the court's authority.

2.3 Change and Adaptation of Precedent

In practice, adaptation may occur merely because some facts of the current dispute differ from previous cases and therefore the body may focus on the differences between cases. But in making a choice, adjudicators might be interested in two, related goals: promoting compliance with the law and limiting the occurrence of future disagreements.[19] In other words, the premise behind many ICs, including the AB, is that promoting compliance is in the shared interest of the WTO as well as the WTO's member governments.

[18] ibid.
[19] In the context of the WTO, art 22.1 of the Dispute Settlement Understanding states that 'prompt compliance with [DSB rulings] is essential in order to ensure effective resolution of disputes to the benefit of all Members'.

Adapting precedent—ie, shrinking or differentiating legal interpretations of treaty text over time—provides one way to demonstrate responsiveness to government dissatisfaction. As mentioned earlier, adaptation can take two forms.

First, adjudicators can distinguish the current dispute from the cited precedent. For example, the AB may decide that a past ruling does not apply to the case at hand or that there is not a compelling legal argument to lean on a prior decision. That is what happened in *Chile—Price Band System*, where the AB rejected Argentina's reference to the previous rulings in *Canada—Periodicals*. In that previous case, the AB considered obligations under the General Agreement on Tariffs and Trade (GATT) (1994) Article II:1(b), which states that certain products are exempt both from 'ordinary customs duties' and from 'other duties or charges'. These two obligations were interpreted to be 'part of a logical continuum'. In *Chile—Price Band System*, the AB distinguished precedent, stating that the two components of Article II:1(b) were distinct obligations and should be interpreted separately when evaluating the disputed measures. Distinguishing precedent offers a way to determine that the precedent does not apply to the case at hand, and it may open the door for a new or different legal analysis.[20]

The second form of adaptation is narrowing. Narrowing occurs when the AB restricts the scope of previous decisions. For example, the AB may decide that a previous ruling was too vague (or too far-reaching) in its application. In response, the AB can refine its jurisprudence by narrowing precedent. That is what happened in *US—Foreign Sales Corporations (FSC)*, a case under the WTO's Subsidies and Countervailing Measures Agreement, where the European Communities challenged US tax policies relating to 'foreign sales corporations'. In the *US—FSC* ruling, the AB narrowed the scope of *Canada—Dairy*. That previous decision included an expansive definition of export subsidies under the Agreement on Agriculture of the WTO. The AB previously stated that direct payments by, and 'revenue foregone' to, a government authority both constituted export subsidies in general. However, in *US—FSC*, the AB effectively narrowed by refining the definition of subsidies only to foregone revenues that are 'otherwise due'. This important distinction limits the precedent. The prior interpretation of 'payments' in Article 9.1(c) of the Agreement on Agriculture, which extended to the definition of 'subsidy' under the Agriculture and Subsidies and Countervailing Measures (SCM) Agreements, was narrowed. In essence, *US—FSC* whittled down *Canada—Dairy* because incentives other than payments such as grants or payouts would no longer qualify as prohibited subsidies.[21]

[20] World Trade Organization, 'Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Report of the Appellate Body' (WT/DS207/AB/R).

[21] World Trade Organization, 'United States—Tax Treatment for 'Foreign Sales Corporations: Report of the Appellate Body' (WT/DS108/AB/R). Notice that the initial interpretation of the word 'payments' in *Canada—Dairy*, in the specific context of art 9.1(c) was an expansive one, imputing into its meaning, 'payment in kind' which may be read to include foregone revenue. In *US—FSC*, the AB effectively shrinks the meaning of subsidy for the entire agreement to mean only foregone revenue in a move that

In the above examples, both cited disputes, *Canada—Periodicals* and *Canada—Dairy*, failed to result in on-time compliance by a generally compliant member. The respondent in both cases, a member with a strong voice at the WTO, resisted the ruling, sending a signal of dissatisfaction with the decision. In the subsequent rulings, made in view of that prior non-compliance, AB adapted its position, saying that those precedents did not apply universally. As such, distinguishing and narrowing precedent both provide the AB with alternatives to strict adherence to prior rulings. These techniques also provide an alternative to directly overruling a precedent entirely. Wholly overturning a previous ruling would come at a high cost for the body since it could be perceived as an admission that the prior decision was wrong. In this way, breaking entirely from precedent, as distinct from adaptation, could worsen backlash against the AB. It is telling that, in twenty-five years, the AB has never entirely overruled a previous interpretation.[22] Only specific panel decisions are reversed on occasion.[23]

Hence, the 'legal adaptation' approach predicts that the AB is more likely to adapt precedent when there was non-compliance with past rulings. The idea is that the court, seeing the limits of its previous decisions, adapts the law in response to political resistance. Such behaviour is consistent with the idea that adjudicators are strategic and care more about being perceived as effective than as correct. There is also some evidence that adaptation has downstream benefits. Compliance is actually (slightly) more likely after AB decisions that adhere less strictly to following precedent. As a result, the AB may reasonably anticipate that, despite an interest in legal coherence, adaptation offers a way to promote the Dispute Settlement Body's (DSB) ultimate goals.[24]

We acknowledge an alternative explanation for why adjudicators adapt precedent. Namely, the AB sometimes hears arguments that do not apply directly to the case at hand. Litigants may cite extraneous precedents when making their legal arguments. Litigants themselves behave strategically, introducing certain legal arguments specifically to establish useful precedents for the future. Given widespread use of judicial economy and the fact that AB is an appeals court, the mere existence of an AB decision is prima facie evidence that the AB considered the legal issue fundamental to the dispute. In other words, for our analysis, the AB will have

all but destroys the young and fragile precedent set in *Canada—Dairy*, and creates expansive implications for the entire Agreement on Agriculture, with that limited interpretation.

[22] The closest the AB has come to overruling precedent is with regard to pre-WTO panel reports. For example, the rejection of the processes and production methods analysis in the first *Tuna—Dolphin* case—although even then the AB did it carefully and not explicitly citing the precedent.

[23] Out of the 420 legal claims ruled on the AB in DS1-450, the AB differed from the panel report on only 113 occasions—ie 27 per cent of the time.

[24] The AB adapts precedent about 15 per cent of the time per dispute. In dispute rulings that adapt above the mean, downstream compliance rates are 47.6 per cent. In rulings below the mean—ie, that follow precedent more closely—compliance rates are 36.1 per cent. We do not test those downstream implications directly in this chapter. Rather, we focus on the AB's decision.

the tendency to 'filter out' references to disputes where the precedent simply does not apply.

3. Testing Change by Looking at Adaptation

3.1 Design

To examine AB behaviour, we collected data on precedent applications in the first one hundred AB decisions (spanning 1995–2015). An individual 'precedent application' is each instance in which the AB interprets references to prior findings. These may be brought to the AB's attention in arguments by the complainant, respondent, or a third party. Given the DSB's heavy reliance on judicial economy, whereby panels and the AB typically rule on only a small set of claims made in each dispute, we do not code for the manner in which each precedent is introduced. The data contain 5,518 unique applications.

We were interested mainly in whether the AB follows or 'adapts' rulings in the wake of past non-compliance. As mentioned, adaptation can take two forms. The AB can distinguish the current issue from a previous one by ruling that a prior decision does not apply to the dispute at hand. The AB can also narrow a previous ruling, refining the scope of the cited precedent. Both application types represent alternatives to strict adherence to prior findings. We coded each application of a prior ruling for whether it follows or adapts—that is, whether the AB sticks to the cited decision or whether it modifies that decision in some meaningful way.

Like many legal systems, the AB typically follows its past rulings, doing so 75 per cent of the time. By contrast, the AB adapts precedent 15 per cent of the time. Adaptations are meaningful. They cut against courts' traditional emphasis on legal coherence, and they can potentially amend past doctrines by distinguishing prior cases or by narrowing formal grounds. That is how we believe judicial change happens: by slow evolution and reassessment of the law or its context of application. Each adaptation, in that sense, can represent an incremental change in how the law is read and applied.

Using this precedent data, we conducted a large-n analysis, which correlates AB behaviour with past (non-)compliance. Our main explanatory variable is non-compliance with the previous (cited) ruling. Non-compliance is coded using data from Peritz.[25] Peritz codes compliance in terms of tangible policy changes. Under WTO law, respondents do not necessarily need to dismantle their policies if they lose a dispute. They can 'comply' with WTO rulings merely by absorbing retaliation. However, policy change is, in our view, the more meaningful test. The Peritz

[25] Lauren Peritz, *Delivering on Promises: The Domestic Politics of Compliance in International Courts* (University of Chicago Press 2022).

data measure whether a respondent made concrete efforts to dismantle WTO-illegal measures.

Our sample of precedent applications is reasonably balanced between citations of disputes that ended in compliance (44 per cent) and those that ended in non-compliance (56 per cent). However, adaptations are far more likely given past non-compliance. Approximately 70 per cent of all adaptation occurs when the cited dispute previously resulted in non-compliance.

3.2 Results

Our results show a strong, positive correlation between non-compliance with a past dispute and adaptation of precedent in the dispute at hand. Conversely, there is a negative, though less significant, correlation between prior non-compliance and following precedent. We infer that the AB is more likely to adapt precedent in the wake of past non-compliance, implying that the AB is arguably more responsive than common criticisms suggest.

The substantive effects of our analysis are presented in Figure 11.1.

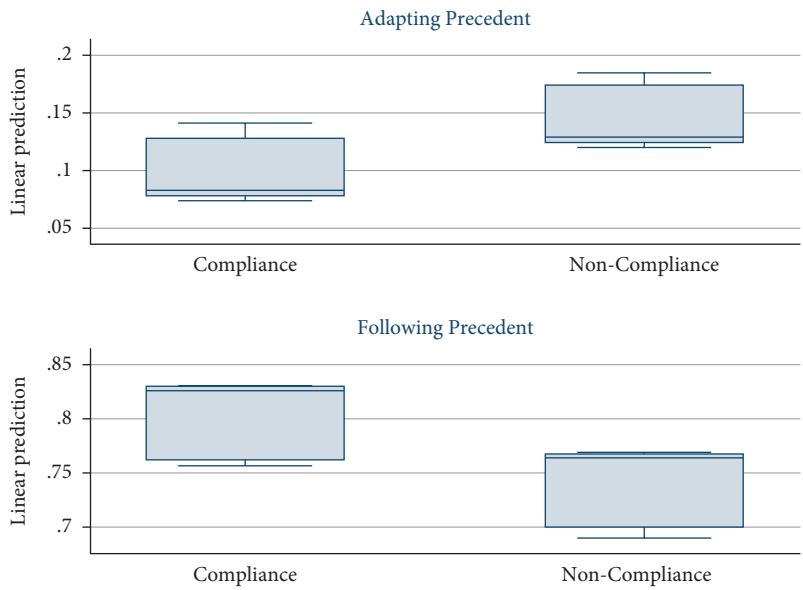

Figure 11.1 Adapting precedent is more likely after non-compliance[a]

Note: The top pane graphs the point predictions for adapting precedent given compliance (0.10 [0.07, 0.14]) or non-compliance (0.14 [0.12, 0.18]). The bottom pane graphs the point predictions for following precedent given compliance (0.79 [0.75, 0.83]) or non-compliance (0.74 [0.69, 0.77]).

[a] ibid.

The AB is 45 per cent more likely to adapt precedent when the cited ruling failed to induce compliance in the past. The point prediction is 0.10 [0.07, 0.14][26] after compliance. The point prediction is 0.14 [0.12, 0.18] after non-compliance. The absolute difference (0.04) may appear small. However, it is substantively meaningful given the fact that the AB, like so many legal bodies, typically follows precedent.

Figure 11.1 also shows the point predictions for our estimates of whether the AB follows precedent. Given past compliance, the AB is more likely to follow the previous reading (0.79 [0.75, 0.83]). However, following is less likely in wake of non-compliance. Contingent on non-compliance, the predicted rate of following is 6 points lower (0.73 [0.69, 0.77]).

The estimates were robust to a wide variety of estimation techniques and model specifications. We started with bivariate estimations, which were consistent across ordinary least squares regression, fixed effects for the citing dispute, and maximum likelihood estimation. We also included a wide variety of controls, including indicators for disputed issue-area, traits of the AB members, and the use of judicial economy. Disputed issue-area is especially important since some GATT/WTO Agreements are disputed more frequently. Notably, these include subsidies and anti-dumping. It is possible that the AB may be more or less likely to adapt precedent in highly sensitive areas of the law.

The controls do not alter our core results. They are generally insignificant. However, we do find a significant correlation between adaptation and whether the US was the respondent in the cited dispute. Given that the US is a vocal critic of the AB and given that it has the political influence and market power to resist rulings, it makes sense that the AB may adapt precedent in an effort to address the US's concerns. If so, this finding is important. It suggests that the AB is more responsive—at least, more than commonly argued—to political backlash from one of the WTO's largest members. Even here, following previous rulings remains the most common form of precedent. But there is more adaptation after non-compliance than we otherwise witness.

Finally, our analysis recognizes that past non-compliance is non-random. For example, in sensitive areas like anti-dumping, the high number of disputes may itself be evidence of persistent non-compliance. Once a respondent (eg the US) fails to comply with some ruling A, it leads to follow-on disputes B, C, and D. The interconnectedness between disputes is a concern for any large-n analysis of legal systems. In our case, it means that the AB's decision today is affected by a series of decisions in disputes that may date back many years. Drawing from the large-n literature, we model non-random selection into non-compliance.[27] The core finding

[26] Brackets include 95 per cent confidence interval.

[27] Strong correlates of past non-compliance, such as the number of third-party participants in the cited dispute, are poor predictors of precedent use. The relevant diagnostic tests for two-stage estimation give us confidence that the system of equations is suitably identified.

holds when attempting to correct for this bias. While controlling for the predictors of past behaviour by respondents, there remains a strong correlation between non-compliance and adaptation.

The extended design and empirical analysis can be consulted in the related papers.[28]

4. The Judicial Path and Precedent

Based on our empirical results we believe that states may exercise different pressures on the 'receptors' of change. One way that pressure can be especially significant is by delaying compliance or by non-complying with decisions of judicial-like bodies. In our case study of the AB of the WTO, we find that the judicial change was limited and perhaps insufficient to reverse the backlash against the body. However, we think that the judicial pathway of change is available, but rocky in part because states tend to be zealous in protecting the nature and extent of the legal obligations they commit to. In this final section, we develop our argument with reference to the framework of this book.

4.1 The Paths Framework and Judicial Change

In the introduction to this volume, Krisch and Yildiz propose a framework of five ideal-typical pathways that explain change in international law. The authors recognize that change is contingent to actors that are 'recognized as authorit[ies]', including judicial authorities like the AB. Yet, each path differs in meaningful ways and rely on different types of authority.[29] The different paths have their own mechanisms through which change occurs or upon which actors rely to propose change attempts. The paths serve different purposes, and their effectiveness is contingent on different conditions.

In this chapter we are concerned with what Krisch and Yildiz call the judicial pathway. In particular, in this path:

> Change … is recognized as the result of decisions and findings of courts and quasi-judicial bodies. It relies on judicial expert authority and often also on the delegation from states, and typically comes about through mechanisms of (broader or narrower) interpretation or channeling of views expressed in other legal instruments (both soft and hard)—without open claims to effecting change.

[28] For a discussion of our results, see Kucik and Puig, 'Do International Dispute Bodies Overreach?' (n 7).

[29] Krisch and Yildiz, this volume.

> International courts are the typical anchor of this path, but institutions such as the UN human rights treaty bodies or the OECD National Contact Points feature here as well, just as much as national courts when they interpret international (rather than national) law.[30]

In addition, Krisch and Yildiz argue that to usefully conceptualize these pathways, we need to think in three stages that affect change. The first is the selection stage, where change agents choose and activate a pathway to realize their vision of change. In the judicial pathway this could be located in the decision to bring or participate in litigation before the organization instead of ignoring a violation or settling a dispute. The second stage is that of construction. Here the actors and authorities associated with the pathway process the change attempt and generate statements about the status of the norm in question—confirming or refuting the change attempt or finding some middle ground—or avoid a positioning. In the context of judicial change, this stage involves the adjudicatory body deciding on the interpretation of a rule and the possible consequences of that interpretation. The third stage is the reception stage, 'where the outcome of [the] construction stage is appraised by a broader range of actors'.[31] In this stage that state and other 'constituencies of compliance' react by accepting or pushing against the plausible change resulting from legal interpretations.

International judicial actors are most relevant in the last two stages. ICs may attempt change by issuing a judicial interpretation, which is then either fully accepted, partially accepted, or rejected by state authorities and other relevant constituencies. According to Krisch and Yildiz, '[a]ctors in the reception stage will assess a proposed change on substance but also on pedigree. If the actors and institution at the construction stage are recognized as authorities, members of the community of practice will often defer to them even if they disagree with the result.'[32]

A key point made by Krisch and Yildiz is the observation that different pathways operate in different conditions. For one, change constructed by judicial actors will be limited by factors that affect the authority of ICs, including *ex-ante* and *ex-post* mechanisms of state control over a court. One of those tools—perhaps the most powerful tool of control—is the state resistance to compliance. One hypothesis resulting from this observation is that the judicial change may operate with 'less support by, or even in the face of objections from, states'.[33] This is a relevant point, and we believe that the conditions of the judicial pathway might indeed enable change even in the face of resistance to comply. However, there is a limit to that as states—or, at the very least powerful states that can dictate terms of agreement—have

[30] ibid.
[31] ibid.
[32] ibid.
[33] ibid.

mechanisms to push back against unwelcome or undesirable changes. Chief among these mechanisms, as we observed from our analysis, is non-compliance with unpalatable precedents, which might cement into the jurisprudence and become settled law. Therefore, compliance and resistance operate as signalling for adjudicators to create incentives for the IC to reverse course. As we now explain, this observation can help to refine the theory of judicial change proposed by Krisch and Yildiz in two ways.

4.2 The AB and Judicial Change

We have found that the AB, despite having incentives to uphold prior rulings, modifies precedent regularly—especially in the face of resistance to comply with rulings. Our results also show that the AB is less intransigent than its critics argue; it is more likely to adapt if members failed to comply with previous decisions.

These findings have implications for understanding change in international law and to refine the story of change at the WTO, including the role of the Trump administration in the current crisis.[34] Conceptually, our chapter highlights the tension between the judicial path and cooperation between states. The judicial pathway has clear limits imposed by states, and often exercised by *ex-post* control tools. The tension between independence and control is not unfamiliar to states that delegate to ICs the ability to decide disputes resulting from the application of international agreements. In fact, controlling the effects of the decision of ICs, by establishing limits on the effects of precedent, may be an important way to avoid undesirable evolutions or changes of the rules. The more 'binding' a precedent is, the more likely it is that precedent can lead to permanent changes over time.

As the AB case demonstrates, as ICs try to increase their authority, often by prioritizing precision and legal coherence, they effectively may strip away some of the term's flexibility, deterring policy experimentation as well as political bargaining over the legality of controversial policies. At that point states are left with limited tools to control the work of ICs and repair the effects of their decisions. One important way is by signalling the distaste for resistance, either delays or non-compliance. In this sense, the judicial pathway is limited by methods of *ex-post* control of courts, including non-compliance. Such tools operate as determinants of real, permanent change.

Judicial authorities in charge of enforcing international law are not blind to potential backlash. In fact, our results show that these authorities can be rather subtle

[34] See Pollack, this volume (highlighting that '[t]he administration of United States (US) President Donald Trump is the most significant "change agent" in the international legal order in recent decades' including at the WTO).

in addressing and in responding to pressures.[35] One of the ways in which adjudicators navigate this tension and the political realities of international law enforcement is by adapting, that is, narrowing or distinguishing precedent. At the WTO adjudicators seemed rather aware of—and attempted to adapt to—backlash from the organization's membership, in particular the US.[36]

More generally, the case of the adjudicatory system of the WTO shows the relationship between the 'construction' and the 'reception' stages of change. The construction of legal change is of course dependent on the judicial authorities that might enable change selected by strategic litigation or otherwise. Yet, the reception of that change in systems with sophisticated dispute settlement processes operates in the long-term horizons—the eventual acceptance by states needs to happen for change to effectively succeed. Hence, systems of constant adjudication may invite complex dynamics that make them less, rather than more, nimble to change. This is because, from the standpoint of domestic political officials, international agreements need to result in net political gains relative to political costs. And, from the perspective of adjudicators, their decisions should remain effective and result in compliance. This calculation, of course, depends on how judges assess the general likelihood that states (and other actors) will comply. The AB had, we believe, become relatively confident about its authority and only noticed the depth of dissatisfaction late in the game. Hence, the story of adaptation is perhaps one of 'too little too late'.[37]

Our results also illustrate a mechanism by which ICs learn and evolve in light of change. Rather than adhering to a strict interpretation of the law, rulings shift and adapt over time, as in other areas of law. That is not to deny that areas of contention remain unchanged. However, it appears that international law, as law in general, is always in motion. As such, our findings are also relevant for studies of international agreement life cycles. To understand change across time, one has to account for the behaviour of different actors, including international judicial bodies, but also the officials that will need to comply with the rules. While the judicial change depends heavily on the strategic behaviour of litigants, authorities, in particular judicial authorities, should possess a certain level of political knowledge to manage or control

[35] On this point, see Mark A Pollack, 'Trump as a Change Agent in International Law: Ends, Means, and Legacies' (2022) <ssrn.com/abstract = 4137754> accessed 14 October 2022. See also Wolfgang Streeck and Kathleen Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies* (OUP 2005) 1–39.

[36] See Nicolas Lamp, 'Arrested Norm Development: The Failure of Legislative-Judicial Dialogue in the WTO', manuscript on file with the authors, noting, in particular:

> [I]f the WTO Membership had clarified the interpretation of the Anti-Dumping Agreement after the first 'zeroing' case, decades of litigation could have been avoided. And if the WTO Membership had instructed the Appellate Body how it should deal with situations in which it could not meet its 90-day deadline, it could have spared itself many acrimonious debates in the Dispute Settlement Body and prevented the frustration with the Appellate Body from mounting.

[37] We thank Krisch and Yildiz for this point.

political dissatisfaction that could hamper legal change. As put by Pollack in this volume, law can also produce negative feedbacks and '[s]elf-undermining institutions, by contrast, "can cultivate the seeds of their own demise," by producing negative feedbacks and increasing demands for change over time.'[38]

Future work should look more closely at whether adaptation helps resolve lingering resistance to change. It also remains to be seen whether adaptation promotes downstream compliance, a hypothesis that we did not test, but which could be fertile ground for expanding our research. It will take several more years before the recent crisis in Geneva is resolved—and before we observe compliance decisions with ongoing trade disputes. In the interim, this chapter shows that looking at the content of trade rulings, not just the outcomes, reveals a more nuanced, strategic approach to change. The crisis of the WTO is not simply the result of the 'activism' of the AB, but certainly it is a significant part of it.[39]

5. Conclusion

What is the pathway of change of international law in highly judicialized environments? In many systems with such environments, governments have expressed concern that courts use legal decisions and subsequent precedent to change the law. In particular, the resistance to the WTO AB's behaviour caused gridlock in the system when the US starting to veto the reappointment of AB members. Was the AB indifferent to the backlash caused by the perceived change through the judicial path?

By looking at twenty years of practice of the 'World Trade Court', this chapter contributes to this conversation about the limits of change in international law. It clarifies the role of the judicial pathway and how resistance to complying with rulings may serve as a mechanism to limit change. As we explained, the application of precedent through a strong *stare decisis* norm at the AB led to dissatisfaction beyond the point at which governments were willing to cooperate. But our results also show that the WTO is adaptive when it needs to be. Despite a strong norm to

[38] Pollack (n 35); referencing Avner Greif and David D Laitin, 'A Theory of Endogenous Institutional Change' (2004) 98(4) American Political Science Review 633–52, 634; see also Laurence R Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 Columbia Law Review 1832, 1832–911.

[39] See also Lamp (n 38), noting that 'the crisis in WTO dispute settlement is not simply the result of the "activism" of the WTO Appellate Body or the United States' turn away from the "rules-based international order", but rather reflects deeper flaws in the institutional design of the World Trade Organization. A good starting point to illuminate these flaws is the distinction with which I began this article, namely, the distinction drawn by the European Economic Community in the 1980s between the "two activities involved in dispute settlement": "resolution of the conflict on the one hand and authoritative interpretations of GATT provisions on the other". The two activities are in tension because they require different actors to exercise control over the process of dispute settlement.'

follow prior rulings, the AB has modified precedent regularly—especially in the face of past non-compliance.

This important finding has at least two implications for the framework proposed by Krisch and Yildiz. On the one hand, we note that judicial change is limited by the receptors of legal change. These receptors might express dissatisfaction by failing to comply, rendering ICs decisions ineffective. On the other hand, we observed that authorities, in particular adjudicators, must also be strategic with respect to the change enabled with their decisions. In the end, the judicial pathway will be conditioned by the ability of their decisions to result in compliance. An IC that prioritizes change over authority might see backlash that renders them ineffective.