

30 Years of WTO Dispute Settlement Mechanism: Achievements, Dilemma and Future

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Abstract: The World Trade Organization (WTO) dispute settlement mechanism has been widely viewed as a paradigmatic model of international dispute settlement. It has not only drawn extensively on the customary rules of international law, but has also contributed materially to the development of international law. However, allegations of the so-called “judicial activism” and the imbalance between the negotiation and dispute resolution function of the WTO have sparked numerous criticisms. During the tumultuous period of international law and in the context of escalating unilateralism, the restoration of the WTO dispute settlement mechanism remains uncertain. Although several pragmatic interim options have emerged, none has secured broad multilateral consensus. The lack of dialogue and coordination among these options is likely to deepen institutional segmentation and ultimately accelerate fragmentation. The establishment of a centralized dispute settlement mechanism and the broader restoration of international rule of law will depend on narrowing substantive and institutional divergences among members, strengthening incentives and capacity for participation to rebuild consensus.

Keywords: WTO Dispute Settlement Mechanism, Judicial Activism, International Rule of Law, WTO Jurisprudence

I. ACHIEVEMENTS AND CONTRIBUTIONS

Drawing on the experience of the General Agreement on Tariffs and Trade (GATT) era and the realities of globalization, the WTO dispute settlement mechanism (DSM) integrated methods of dispute resolution widely used in the international community and established a distinctive multilateral system for trade dispute settlement. The creation of it symbolizes a shift from power to rules. It has not only strengthened members’ confidence in the multilateral trading order, but has also made substantial contributions to the development of international law.

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A. A Hallmark in International Dispute Settlement

Dispute settlement has always been an important part of the course of human history. It is believed that as early as around 2500 BC, a territorial dispute between the Mesopotamian city-states of Lagash and Umma was resolved through arbitration.¹ From war to peace, and from power politics among state to cooperation-oriented international law, the history of human development is, in many respects, a history of dispute settlement.

After the debate between the legalists and the anti-legalists in the 1960s, the transformation of dispute settlement under GATT came to symbolize a move away from interstate political bargaining and toward a process more firmly anchored in objective international legal obligations.²

The DSM has, to a large extent, inherited the experience of GATT and achieved further development. Having operated for three decades, it has been widely regarded as one of the leading mechanisms of international dispute resolution and is often hailed as the “crown jewel” of the multilateral trading system. Combining arbitration with quasi-judicial adjudication, the mechanism allows members to engage in consultations at both stages, thereby minimizing confrontation at any time. This makes the system one of the most comprehensive toolboxes and one of the most flexible platforms for dispute settlement.

The DSM can be said to draw heavily on arbitration elements. Some believe that the panel exercise at the WTO looks essentially similar to that of an arbitration process in terms of panel composition and panel proceeding. Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) likewise expressly provides an additional arbitration option as a special arrangement between the disputing members.

Moreover, the DSM possesses remarkably distinctive quasi-judicial features. Backed by the single undertaking of the WTO covered agreements, it has moved beyond the fragmented GATT *à la carte* approach. To a significant extent, it has also addressed the issue of lack of compulsory jurisdiction that characterizes many international dispute settlement mechanisms. The Appellate Body (AB) was largely structured in the mode of an international judicial body.

¹ Sophie Démare-Lafont, *L'arbitrage en Mésopotamie*, *Revue de l'Arbitrage*, No. 4, 2000, pp. 566–567.

² John Jackson, *World Trade and the Law of GATT*, The Bobbs-Merrill Company, Inc., 1969, p. 174.

It includes detailed provisions on member selection, qualifications, terms of office, ethical requirements, and the procedures that all parties should follow in the appeal process, thereby ensuring the independence and impartiality of its functions.

As a standing mechanism for correcting legal errors, AB is authorized to review legal interpretations by the panels. It is also authorized to decide whether to revise or repeal the decisions of the panels through appeals. During the decision-making process, the collegial requirement of AB ensured consistency and predictability of its reports, and ultimately automatically adopted these reports under the reverse-consensus rule, thus making the reports of AB become *de facto* binding and *res judicata* like those judgments of judicial bodies. Besides, the reasoning of the adopted AB reports is generally respected by future panels, and this practice helps achieve the goal set out in Article 3.2 of the DSU, that is, to ensure that legitimate expectations regarding the interpretation of their rights and obligations are realized.

Yet even though the DSM largely reflects a judicial institution, it does not evolve into a purely judicial organ, at least, that is not the original intention of the negotiators when deciding to establish the Dispute Settlement Body (DSB). From the deliberately neutral terms of “panel” and “body”, as well as many members themselves’ remarks, it can be seen that the establishment of a “world trade court” is more of an “afterthought”.³ There are still significant political influences. For example, the DSU has expressed a preference for trade experience, rather than a purely legal one when selecting panelists and AB members. The panels have been composed predominantly of diplomats and trade experts for many years, with the Secretariat providing dedicated administrative and legal support. In this way, the DSM deftly reconciled the tension between judicialization and pragmatism by grounding the legally structured dispute settlement mechanism in the political will of WTO Members. Such a delicate design has forged the broadest possible consensus among members and established a model dispute settlement system designed to operate under political constraints.

³ Peter Van den Bossche, The Making of the “World Trade Court”: The Origins and Development of the Appellate Body of the World Trade Organization, In: Rufus Yerxa et al. (Eds.), *Key Issues in WTO Dispute Settlement: The First Ten Years*, Cambridge University Press, 2005, p. 63.

B. Carrying on the Basic Principles of International Law

The second achievement of the DSM lies in its absorption and internalization of the normative resources of international law.

First, Article 2(3) of the Charter of the United Nations establishes the obligation of States to settle their disputes by peaceful means. The DSM can be understood as a trade-law embodiment of the obligation. Under the WTO's single undertaking, trade disputes are subject to unified management. The DSB is empowered to establish panels to exercise jurisdiction and adjudicate disputes, supervise the implementation of adopted rulings and recommendations, and ultimately authorize countermeasures to be taken. Developments relative to disputes must be notified to the relevant councils and committees. Legal confrontations supported by collective authorization thus replace the uncontrolled unilateral measures. By accepting the DSB's collective discipline, members can keep their disputes within the WTO framework, exercise restraint and prevent escalation. If economic development is a precondition for achieving world peace, then the peaceful settlement of international trade disputes becomes particularly important in international relations.⁴ By the end of 2024, 112 members had participated in dispute settlement proceedings. The DSB had handled more than 600 requests for consultations,⁵ making significant contributions to the peaceful resolution of trade disputes, the maintenance of international trade order, and the stability of international relations.

Second, sovereign equality is a cornerstone of the contemporary international legal order, and the DSM is constructed on this basis. Members voluntarily accept the discipline of dispute settlement and enjoy equal rights while assuming corresponding obligations. During the litigation process, regardless of economic size or political influence, members shall resolve disputes and end controversies through the procedures of the WTO. The independence and impartiality requirements for panels and the AB, as well as the balanced rulings, help ensure the objective application of WTO rules.

The DSU also contains a number of provisions that offer special and

4 Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes*, Cambridge University Press, 2018, p. 276.

5 WTO, Dispute Settlement Activity – Some Figures, https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm (Last Visited on February 10, 2026).

differential procedural aid to developing and Less Developed Country (LDC) members. These provisions provide facilitation and support for capacity-constrained members and, to the greatest extent possible, seek to promote the substantive equality between them and the developed ones. Most importantly, the adoption of reports follows the reverse-consensus rule, rather than weighted voting, simple majority voting, or positive consensus, which are common in other international organizations, thereby minimizing the possibility of political interference in outcomes.

Reagarding responsibility for complying with rulings and recommendations of the DSB, Article 23 of the DSU requires members to refrain from taking unilateral retaliatory measures outside the WTO framework and to submit to the disciplines of WTO rulings; any retaliation must be predicated on authorization, preventing the use of power to infringe upon other members' sovereign equality. Indeed, one of the considerations behind establishing WTO dispute settlement mechanism was to check unilateral measures taken by the US Section 301 investigations,⁶ which are often associated with economic coercion and undermine sovereign equality. The idea of sovereign equality thus runs through the entire WTO dispute settlement process, curbing the major powers from hegemony practices and enabling many smaller and weaker members to defend their rights under the shelter of the WTO and even challenge the trade measures of more powerful members.

Based on the widely recognized customs and principles of international law, the DSM keeps itself within the spirit and principles of international law. It remains a harmonious part of the parcel of the body of rules under international law.

C. Contributing to the Development of International Law

The third major achievement of the WTO DSM lies in its contribution to the development of international law.

With respect to institutional design, its two-tier structure is still a unique arrangement. This serves as an important template for the design and reform of other international dispute settlement mechanisms, notably the ongoing reform

⁶ Manfred Elsig and Jappe Eckhardt, *The Creation of the Multilateral Trade Court: Design and Experiential Learning*, *World Trade Review*, Vol. 14, No. S1, 2015, pp. S26–S28.

of Investor-State Dispute Settlement (ISDS) under Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). Some participants have drawn extensively on the WTO's appellate design in an effort to enhance the legality and coherence of investment arbitration and to promote consistency in the application and interpretation of rules. Although the proposal for an independent, standing multilateral appellate mechanism⁷ differs from the Multilateral Investment Court system,⁸ both approaches share a common core, which is to set up an appellate review mechanism to review first-instance decisions.⁹ In this sense, the DSM has offered a direct reference for ISDS reform, and its experience may even facilitate deeper convergence between the two regimes in the future.¹⁰

The DSM has also made notable contribution to mitigating the fragmentation of international law and promoting its development through its interpretations. The interpretation usually starts with the ordinary meaning of the words, and then considers the contexts, objects, and purposes of the provision and the treaty as a whole, and the surrounding circumstances of the treaty conclusion in a holistic way.¹¹ When conducting contextual analysis, techniques such as cross-referencing are always applied. Moreover, the DSM may also adopt an evolutionary interpretation by embracing the contemporary meaning of the terms. This would enable the long-standing provisions to keep up with the development of international trade and other spheres of international law.¹²

The interpretation process is simultaneously guided by the *effet utile* principle. On the one hand, it helps to recalibrate the outcome of the contextual

7 UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Morocco, Note by the Secretariat, A/CN.9/WG.III/WP.161, March 4, 2019.

8 UNCIRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and Its Member States, A/CN.9/WG.III/WP.159, January 24, 2019.

9 UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes, UN Doc. No. A/CN.9/WG.III/ WP.239, February 8, 2024.

10 Giorgio Sacerdoti and Niall Moran, *International Trade and Investment Dispute Settlement: From Rise to Crisis and Reform*, Routledge, 2025, p. 256.

11 WTO Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, Adopted on February 4, 2009, para. 268.

12 Gabrielle Marceau, Evolutive Interpretation by the WTO Adjudicator, *Journal of International Economic Law*, Vol. 21, No. 4, 2018, p. 813.

interpretation of single provisions and ensures the enforceability of the treaty.¹³ On the other hand, by following this principle, AB gives meaning to all the provisions of the covered agreements by reading the rest of the covered agreements inseparably¹⁴ to achieve broader coherence and harmony¹⁵ of the WTO legal regime.

The DSM has made further contribution to achieving the coherence of international law through systemic interpretation. Due to the fact that international lawmaking processes are not centralized and not coordinated in any systematic manner, international law is inherently fragmentary and normatively conflict-generating. WTO rules, aimed at promoting trade liberalization and enhancing welfare for all, may have extensive influences on daily life as well as domestic and international law. International judges are often expected to settle normative conflicts of international law and furnish the system with internal coherence whenever they confront issues involving such problems.¹⁶ It is not surprising that the WTO has become one of the most prominent international adjudicatory settings for addressing norms or even hidden value conflicts.

During the interpretation process, panels and AB have often read relevant norms into WTO rules, including customary international law and general legal principles and other international treaties, because the GATT rules should not be interpreted in “clinically isolation” from general international law.¹⁷ In addition, judgments of other judicial bodies such as the International Court of Justice (ICJ), non-binding legal instruments, expert reports from international organizations, including the World Intellectual Property Organization and the International Monetary Fund, and other informal sources also serve as important references. By reconciling different rules and referring to comprehensive sources, the DSM, as a centralized adjudication institution in the trade field,

13 Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Cambridge University Press, 2009, pp. 295-230.

14 WTO Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Adopted on December 14, 1999, paras. 81-88.

15 WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Adopted on May 20, 1996, p. 23.

16 David Caron, *Towards a Political Theory of International Courts and Tribunals*, *Berkeley Journal of International Law*, Vol. 24, No. 2, 2006, p. 409.

17 WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Adopted on April 29, 1996, p. 17.

ensures that members can comply with their various treaty obligations without breaking multilateral commitments and promotes the coherence between international trade law and other branches of international law.

The jurisprudence developed by the WTO DSM has also provided valuable guidance for the substantive development of other fields of international law. International adjudicatory bodies such as the International Tribunal for the Law of the Sea (ITLOS) and ISDS Tribunals have taken reference to the rationality of the AB report. Interpretive approaches to rules, concepts, and interstitial norms have been drawn upon by international investment law, international environmental law and human rights law. The jurisprudence generated by the DSM has created fertile ground for cross-fertilization among different branches of international law, significantly unified the normative development and helped alleviate the fragmentation of international law.

With respect to remedies and enforcement, the DSU's rules on compliance and countermeasures have advanced the law of state responsibility in the form of *lex specialis*. Enforcement mechanisms before standing international courts such as the ICJ have long been limited, while the WTO DSM has developed a structured enforcement mechanism. This includes the implementation of recommendations, and in cases where necessary, it also authorizes suspension of concessions. For situations where obligations cannot be actually fulfilled, compensation for breach of duty will be provided. Thus, on the multilateral level, a relatively mature and effective enforcement procedure for fulfilling State responsibilities has been established. Consequently, the DSB can go beyond general international law on the road by exemplifying WTO, consolidating its legal system in the wake of an institutionalization of international responsibility.¹⁸

Most importantly, the DSM has played a pivotal role in promoting the international rule of law. Rule of law requires the following elements: i) governance through rules; ii) supremacy of rules; iii) equality before law; iv) independent adjudication and; v) a shared political commitment to the rule of law ideal.¹⁹

¹⁸ Pascal Lamy, The Place of the WTO and Its Law in the International Legal Order, *European Journal of International Law*, Vol. 17, No. 5, 2006, p. 975.

¹⁹ David Lefkowitz, *Philosophy and International Law: A Critical Introduction*, Cambridge University Press, 2020, p. 90; Hong Zhao, International Law at a Crossroad – The International Rule of Law: An Ideal and the Reality, *Journal of WTO and China*, Vol. 10, No. 1, 2020, p. 6.

The supremacy of rules, *inter alia*, remains the weakest point in building the international rule of law,²⁰ and the political commitment is even less readily achieved in international governance. However, it can be concluded that the DSM has collected nearly all the elements. The DSM has effectively ensured that all members, whether weak or strong, are subject to the same set of rules. The unique compulsory jurisdiction and binding reports have reinforced the authority of multilateral rules and helped prevent unilateral measures from undermining the international rule of law. In addition, the reports of AB, by resisting political interference, are highly regarded by the majority of WTO Members and the international academic community, marked by a high degree of consistency and coherence. The DSM has developed a body of high-quality jurisprudence that has secured members' expectations and provided practical guidance for the implementation of trade policies. It has facilitated the formation of a shared rule of law ethos within the WTO community, and promoted the development of the rule of law in the multilateral trading system.

The international rule of law is a shared aspiration of the international community. Although the DSM operates primarily in trade, its influence is far-reaching. At a time when the international rule of law is repeatedly challenged, the DSM, as an exemplar of international dispute settlement, continues to offer institutional wisdom and confidence to the broader international community in order to advance the international rule of law.

II. THE CRISIS OF THE DSM

There have been concerns surrounding the DSM since the creation of it. For instance, in light of judicial activism by the AB, some kind of political or diplomatic control needed to be re-established over judicialized dispute settlement, but these calls never developed lasting traction among WTO Members.²¹ However, the seemingly overreaching of the AB, to a large extent, has been heavily attacked by the key founding Member of the WTO, the United States. Moreover, excessive reliance on the DSM has contributed to the

²⁰ *Ibid*, David Lefkowitz (2020), p. 92.

²¹ Robert Howse, The World Trade Organization 20 Years on: Global Governance by Judiciary, *European Journal of International Law*, Vol. 27, No. 1, 2016, p. 11.

weakening of the negotiating function.

In a broader context, against the intricate geopolitical conflicts and the growing imprint of domestic politics on foreign economic policies, multilateralism and international law are facing unprecedented hurdles. As unilateralism continues to intensify, the future of the DSM remains uncertain.

A. The Controversy of the So-called Judicial Activism

Since the AB clearly announced that it would accept *amicus curiae* submissions,²² criticisms of so-called judicial activism have multiplied. In 2016, the US vetoed the reappointment of Seung Wha Chang, citing concerns about judicial activism.²³ As a result, debates surrounding alleged judicial activism within the DSM incurred wide discussion. Overreaching, said to go beyond the mandate, and ultimately the generation of additional rights and obligations — all of these have drawn the majority of criticisms. The common critique is that the AB has embraced a purportedly activist approach, infringing on state sovereignty. Similar accusations directed at the DSM or even at AB members have seemingly evolved into a form of political orthodoxy.

Many people argue that the AB should exercise judicial restraint rather than be active. However, the internal allocation of powers within the WTO renders this proposition difficult to realize. Judicial restraint is rooted in the constitutional philosophy of separation of powers, under which judicial authority must not overstep its bounds so as to infringe the legislation. Such an imagination appears fundamentally incompatible with the institutional architecture of the WTO. Despite there is the concept of quasi-constitutionalism, the WTO does not possess a system analogous to the separation of powers, and this institutional reality runs throughout international law.²⁴ In essence, these accusations reflect the following problems: the persistent difficulties in treaty interpretation, and the imbalance between civil law and common law traditions in international dispute settlement.

22 WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Adopted on October 12, 1998, para. 110.

23 US Mission Geneva, Statement by the United States at the Meeting of the WTO Dispute Settlement Body, May 23, 2016.

24 José Alvarez, *International Organizations as Law-makers*, Oxford University Press, 2006, p. 533.

The alleged overreaching has attracted most of the accusation of judicial activism. However, the practice is mostly driven by the *lacunae* and ambiguities embedded in the WTO covered agreements and the persistent deadlock of members in updating the rule book of multilateral trade through negotiation.

The WTO covered agreements were predominantly written by diplomats. It is the essence of diplomacy that expressions are used that cater for diversified demands in treaty languages readily acceptable to participants, so that agreements can be reached. Consequently, the WTO agreements contain provisions that are not always the best examples of lawyerly rigour and accuracy.²⁵ It is unquestionable that the rules need interpretative clarification. In theory, interpretative authority is shared between the members and the AB. However, authoritative interpretations by the members require three-quarters political consensus. It is evident that members could hardly utilize it on a frequent basis. As a result, the task of clarifying the rules has effectively fallen upon the AB when disputes over controversial legal matters are raised before it.

As Judge Fitzmaurice noted in his separate opinion in the Barcelona Traction Case, the adjudicatory bodies bear, to a variable degree, the task of addressing *lacunae*:

Judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development.²⁶

This is also true of the WTO,²⁷ especially at present when *non-liquet* is generally not a widely accepted alternative within the DSM,²⁸ since it would jeopardize the adjudication function or even the effectiveness of the treaty in the long run.

The judicial body can select appropriate interpretative methods under the Vienna Convention on the Law of Treaties (VCLT) and interpret in good

25 Luis Baptista, A Country Boy Goes to Geneva, In: Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Cambridge University Press, 2015, p. 566.

26 *Barcelona Traction* (Belgium v. Spain), 1970 I.C.J. Judgment of February 5, 1970, Separate Opinion of Judge Sir Gerald Fitzmaurice.

27 Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO – Addressing Institutional Challenges in the New Millennium*, para. 247.

28 Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, 2003, pp. 150–154.

faith within its mandate, for the needs of the communities.²⁹ The AB gains its legitimacy of interpretation directly from the members' authorization. That being said, no regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints.³⁰ The AB is aware of the consequences of overreaching, thus interpretation formed discretely by panels and the AB is arguably *bona fide* and within its mandate. Compared with other international judicial bodies, it shows a clear cautious attitude in choosing interpretative tools and tends to adopt the principle of literal interpretation.

The real challenge lies in how to distinguish between clarifications of rules and lawmaking. Despite numerous discussions, this issue still remains unclear. It would be unfair to arbitrarily hold the DSM accountable for the interpretations, since whether clarifications or filling of loopholes falls outside the scope of judicial legislation is purely a matter of perspective. Taking the zeroing issue for instance, many members led by the EU did not support the accusation against the AB by the US.³¹ AB rulings inevitably provoke dissatisfaction from the losing party, and the blurred boundary between interpretation and lawmaking provides a convenient basis for challenging the legitimacy of AB decisions.

It can be affirmed that the attitude toward the AB's practice ultimately depends on how members perceive the function of the DSM. Do they want a mechanism confined to resolving individual disputes, or a more judicial institution capable of generating consistent treaty interpretations of WTO covered agreements? European members, for instance, may have long been accustomed to the European Court of Justice (ECJ) conceiving itself as a "community court" and engaging assertively in the governance of the European community. They may be very willing to accept the AB's exercise of its dispute settlement function, and expect it to play a greater role in the development of international trade norms. Other members, in contrast, may treat the WTO primarily as an economic cooperation arrangement and consider the transformation of dispute settlement into a social policy enforcer to be inappropriate.

29 Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, *British Yearbook of International Law*, Vol. 26, 1949, p. 74.

30 Martin Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, 1986, p. 34.

31 WTO, Minutes of Meeting, WT/DSB/M/250, July 1, 2008.

Beyond the alleged interpretative overreaching, the reliance on adopted reports has also been criticized as an embrace of the common law tradition and an implicit creation of case law. The WTO is not a common law system. Adopted reports have no binding force on future disputes, and international law does not recognize the doctrine of precedent. Nevertheless, following jurisprudence is an indispensable means of providing security and predictability to members, which is a goal the DSM is designed to achieve.

Apart from the panels, members who frequently engage with the DSM (including the US itself) routinely cite prior reports to support their arguments in the proceeding of the WTO DSM. In fact, this practice was already well recognized during the GATT era, and early WTO cases commonly cited GATT panel reports. More broadly speaking, while international law generally does not recognize *stare decisis*, it is nonetheless inevitable that international courts and arbitral tribunals to variable degrees rely on prior decisions in their reasoning.³² This has almost become a custom in international adjudication practices on all fronts, although there are disputes regarding the lack of clear rules in international law as a basis.

It is noteworthy that although the citation of prior reports has become an accepted practice among all participants, the AB has consistently and explicitly denied that such reports are legally binding for all. Instead, although in relatively general terms, the AB has articulated conditions under which departure from prior reasoning can be accepted.³³ So, the real question behind the critics might be: is the DSM the very source of the so-called caselaw practice and the rigidity problem?

Overall, it is undeniable that the allegations that the AB engages in judicial lawmaking and creating caselaw reflect the influence of the common law tradition, or more specifically, the influence of the judicial philosophy of its key major players. The adversarial design of the DSM litigation exhibits clear common law characteristics; lawyers and the participants are highly influenced by common law traditions and tactics by constantly referring to past reports

³² Gilbert Guillaume, The Use of Precedent by International Judges and Arbitrators, *Journal of International Dispute Settlement*, Vol. 2, No. 1, 2011, pp. 7–18.

³³ WTO Appellate Body Report, *United States — Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, Adopted on December 17, 2004, para. 188.

in the proceedings of the DSM.³⁴ Consequently, civil law members have to follow and adapt themselves to the practice of the DSM. More broadly, this issue is not unique to the WTO DSM, but is prevalent across most international dispute settlement mechanisms. Despite having a civil law background, Judge Ehrlich of the Permanent Court of International Justice (PCIJ) maintained that principle of *stare decisis* should be applied.³⁵ Similarly, Judge Shahabuddeen acknowledged that the ICJ employs prior judgments in a manner akin to common law practice, and argued that judicial decisions contribute indirectly to lawmaking in fact.³⁶

For decades, the fusion of civil law and common law has been evident on the domestic level, but it is certain that in the WTO DSM and in the broader field of international law, the contribution and influence of civil law system are more limited than those of the common law family. This raises further questions: why has the DSM, like most of the international dispute settlement mechanisms, been mainly shaped by common law tradition? Does the fact that English has become the *de facto* or mostly utilized international litigation language contribute to the disparity of legal capacities among members? It is evident that civil law members possess relatively limited discursive influence in the current “US against US” style debate. Therefore, they should no longer merely passively accept the DSM dominated by the common law, but should consider what the civil law tradition can bring to the reform.³⁷

B. The Imbalance between Negotiation and Dispute Resolution

Dispute settlement and rule negotiations are the two pillars of the WTO. However, the underperformance of the negotiation function has rendered the organization lopsided, which has given certain members another justification to curb the DSM.

Former United States Trade Representative (USTR) Robert Lighthizer

³⁴ Joost Pauwelyn, The Limits of Litigation: “Americanization” and Negotiation in the Settlement of WTO Disputes, *Ohio State Journal on Dispute Resolution*, Vol. 19, No. 1, 2003, p. 126.

³⁵ *Factory at Chorzow* (Germany v. Poland), 1928 P.C.I.J. Series A, No. 17, Dissenting Opinion by M. Ehrlich, p. 76.

³⁶ Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge University Press, 1996, pp. 68–69.

³⁷ Hong Zhao, Equal Justice under the Treaty – A Farewell Speech, *Journal of WTO and China*, Vol. 11, No. 1, 2021, p. 13; See also WTO, Farewell Speech of Appellate Body Member Prof. Dr. Hong Zhao, https://www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm (Last Visited on February 12, 2026).

has argued that the WTO has concentrated excessively on dispute settlement while neglecting other matters that ought to be addressed within its framework, most notably, the creation of a conducive environment for negotiations,³⁸ and that certain members have used litigation to obtain results unattainable through bargaining. His successor advanced a closely related critique, suggesting that members have overused dispute settlement, thus deviating from its original telos.³⁹

The paucity of multilateral rule-making appears to create space for judicial legislation, which then invites political backlash against judicialization. In fact, the two are not closely related.

Regarding new multilateral agreements, the persistence of negotiation impasse bears limited causal connections to the employment of dispute settlement. Since the Doha Round, negotiations under the WTO framework have proceeded slowly and produced scant multilateral outcomes. On the one hand, this development can be attributed to external political-economic conditions, including the legitimacy challenges faced by neoliberal globalization, heightened geopolitical tensions, and the rise of emerging economies, which have weakened the traditional dominant position of powerful members in rule-making. On the other hand, it is reinforced by internal institutional constraints, the most significant of which are the WTO's consensus-building and the single undertaking. These two mechanisms together exacerbate collective action problems and elevate the costs of agreements. The WTO has struggled for a prolonged period to reach multilateral consensus for generating new multilateral disciplines on emerging issues such as digital trade, supply chain security, and sustainability. However, the members have consequently pursued other routes, including Joint Statement Initiatives (JSIs) or bilateral and regional frameworks from outside the forum. Although these approaches are attractive and practical, they have attracted criticism regarding their legitimacy, transparency, and participation. More importantly, they have

38 USTR, Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr> (Last Visited on February 10, 2026).

39 USTR, Ambassador Katherine Tai's Remarks as Prepared for Delivery on the World Trade Organization, <http://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tai-remarks-prepared-delivery-world-trade-organization> (Last Visited on February 10, 2026).

further fragmented the multilateral negotiating function.

With respect to the existing covered agreements, rather than amending the existing provisions, it would be more appropriate to fill legislative *lacunae* through authoritative interpretations in accordance with Article 9.2 of the Agreement Establishing the WTO. In this context, it is questionable whether the DSM has poisoned the atmosphere of negotiation.

In theory, members can provide authoritative interpretations and address the *lacunae*; however, in reality, the economic and political costs of gaining the requisite consensus frequently lead proposals to dissipate. During the Doha Round, as part of a defensive strategy by developed members vis-à-vis developing members, the procedural threshold for authoritative interpretations was deliberately set so high, that in fact, it is no longer usable.⁴⁰ Nonetheless, given the mutual checks and balances between developed and developing members, this arrangement was accepted as a compromise. This compromise, to a large extent, laid the groundwork for the subsequent negotiating deadlock.

Admittedly, Article 9.2 itself serves as no handy tool for negotiations, but feasibility is one matter, while political willingness is another. Members show little interest in advancing the application of Article 9.2. Taking the US as an example, although it raised the above accusation, it seems that it has not attempted to initiate a proposal for such an interpretation. On the contrary, when the European Communities requested an authoritative interpretation,⁴¹ it opposed, claiming that it might constitute a treaty amendment.⁴² But one may still wonder why there is still no popular initiative to offer an authoritative interpretation even after the paralysis of the DSM. This may serve as a useful illustration of the low willingness of providing authoritative interpretations at the WTO and to some extent, a tacit agreement to maintain the *status quo* of the relevant provisions.

It would be unfair to say that the DSM is the sole contributor to the

40 Nicolas Lamp, Arrested Norm Development: The Failure of Legislative – Judicial Dialogue in the WTO, *Leiden Journal of International Law*, Vol. 38, No. 3, 2025, pp. 575–577.

41 Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization: Communication from the European Communities, WT/GC/W/133, January 25, 1999.

42 Response to European Communities' Request for an Authoritative Interpretation of the Dispute Settlement Understanding Pursuant to Article IX:2 of the WTO Agreement: Communication from the United States, WT/GC/W/144, February 5, 1999.

constant non-employment of Article 9.2, and thus undermines the negotiation function as a whole. Dispute settlement pillar and negotiation pillar were designed to be mutually reinforcing. An effectively functioning DSM can enhance confidence in the credibility of WTO rules, thereby increasing the predictability and security of subsequent bargaining. Conversely, if the DSM fails to function properly, it is more likely to further impede the negotiation function. Once the members are free from the discipline of dispute settlement, unilateral measures may become more attractive, and the enthusiasm for participating in multilateral negotiations will also decline. In the last years, it is evident that this dynamic has further undermined multilateral negotiation function rather than revitalizing multilateral negotiations. The rebalance can never be achieved by the regression of adjudication functions of the DSM; instead, members shall focus more on how to dismantle the procedure barriers to negotiation and build confidence and political will.⁴³

C. The Waning of International Rule of Law

In recent years, the international rule of law has been increasingly shaped and strained by shifts in geopolitical alignments, renewed North-South cleavages, and domestic political-economic realignments within powerful states. These have intensified challenges across three interconnected dimensions of international law: rule-making, rule-compliance, and international adjudication.

In terms of rule-making, the deepening divergence between developed and developing states, combined with collective action problems, has contributed to a gap between the pace of rule development and evolving needs for the rule of law. Contentious issues including climate change, supply-chain security, and differential treatment have repeatedly exposed the limits of consensus-based rule formation.

In terms of compliance with international law, a shift in the global balance of power and heightened strategic competition among major states have reduced space for cooperative expectations. The phenomena such as non-observance of international obligations, using international law to defend *mala fide* conducts may gradually weaken the perceived credibility and predictability of international legal commitments.

⁴³ WTO, Written Report by Facilitator to the General Council, JOB/GC/483, December 12, 2025, pp. 4–5.

In international adjudication, a trend towards de-judicialization has become increasingly salient. The difficulties encountered by international dispute settlement mechanisms provide a concrete lens through which the above tendency can be examined. States appear less willing to submit their disputes to an independent third-party for effective dispute resolution,⁴⁴ and the international courts and tribunals have less constraints over certain state behaviors. In such accounts, international law is portrayed less as a neutral governance framework and more as a site where underlying power hierarchies are reflected and contested.

In the WTO DSM, there is an increasing tendency to strengthen the control power of members, which ultimately leads to an impasse for AB. Evidently, there has been a duopoly in adjudication within the WTO since the creation of it. The two powers tacitly bind themselves to the current legal framework with the belief in the rule of law for many years until one of the dominant players, disappointed with DSM practice after experiencing a series of setbacks, finally turns its back for its own interests. The deadlock of AB selection is the sacrifice of the rival between the traditional major powers for WTO leadership, and clearly indicates that the international rule of law is in decline.

The divorce can be traced back to the Obama Administration era. In 2011, AB member Merit Janow did not seek reappointment, and the reappointment of Jennifer Hillman was not supported by her own country. Many accounts link these to dissatisfaction with jurisprudence on zeroing in anti-dumping disputes. Moreover, certain WTO Members were evidently unwilling to accept an AB member who, in the name of institutional independence, issued rulings contrary to their own interests.⁴⁵ However, it is worth noting that during this period, the DSM continued to be viewed by the key player as a distinctive and valuable means for managing trade frictions.⁴⁶

The Trump Administration maintains opposition to AB member appointments, which, in practice, renders AB inoperative. The efforts of Walker

⁴⁴ Despite of the fact that 2025 has witnessed the largest number of disputes registered at the WTO DSM since 2019.

⁴⁵ Manfred Elsig and Mark A Pollack, Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization, *European Journal of International Relation*, Vol. 20, No. 2, 2014, p. 30.

⁴⁶ USTR, Keynote Remarks by US Trade Representative Michael Froman at the World Trade Organization Public Forum on Innovation and the Global Trading System, <https://ustr.gov/about-us/policy-offices/press-office/speeches/transcripts/2013/october/froman-wto-innovation-global-trade> (Last Visited on February 10, 2026).

process or the Molina proposals for the restoration of the AB are less likely to prove to be as effective as anticipated. At the end of 2024, the US statement at the DSB meeting indicated a preference not for a return to the pre-crisis era but for “fundamental reform”.⁴⁷ In May 2025, members reportedly agreed to treat dispute settlement reform as a priority for MC14, yet uncertainty remained, particularly given that the prior agenda articulated at MC12 to restore dispute settlement mechanism by the end of 2024 had not been realized.

As a pioneer of multilateralism, when the Capitol Hill enacted the Uruguay Round Agreements Act, the US ultimately opted for the rule of law rather than politics. Despite significant partisan disagreements, the US took the initiative to accept the rules and constraints of the WTO. Today, however, the Trump Administration (whether the first or the second) no longer regards multilateral rules as aligning with its interests. The new USTR, Jamieson Greer, has claimed that President Trump has established the Turnberry System through a carrot and stick strategy combining market access and tariffs: unilateral tariff penalties would supplant multilateral DSM as the principal rule enforcer. The US has concluded economic and trade arrangements with multiple countries outside the WTO, once again seeking to realize the expectation articulated at the creation of the WTO during the Uruguay Round, namely, to “ensure that the mechanism can better enforce US rights”.⁴⁸ Such practices, however, sit in clear tension with core WTO obligations, including non-discrimination and Most-Favoured-Nation treatment, as well as with the general international law principle of *pacta sunt servanda*.

The US recently showed its willingness to participate in reform negotiations on DSM. According to Cathrine Tai, former USTR, who publicly postulated her view at a Harvard Conference in November 2025, feasible options for future appellate review could include the following possibilities in the WTO DSM: i) No appellate review for anyone; ii) An optional appeal process that the US or others could opt out of or join, in general or in specific cases; iii) An appellate review process that is more *ad hoc* and less institutional; iv) A standard for appellate review that gives more deference to panels.⁴⁹

47 WTO, Minutes of Meeting, WT/DSB/M/496, December 18, 2024.

48 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No.100-418, § 1101(b)(1), 102 Stat. 1121 (1988) (Prior to 2018 Amendment).

49 Simon Lester, Catherine Tai on WTO Dispute Settlement Reform, <https://ielp.worldtradelaw.net/2026/01/katherine-tai-on-wto-dispute-settlement-reform-2/> (Last Visited on February 10, 2026).

Members have constantly affirmed that a reformed WTO is a WTO with a reformed DSM on multiple occasions.⁵⁰ Immediately after the 2025 General Council Meeting, Colombia has, on behalf of 130 members, proposed for the 93rd time to restore the selection process of AB members.⁵¹ Many members reaffirmed the necessity to restore the DSM with a functional AB. Obviously, most WTO Members still tend to a resumed selection process with the main features of appellate review to be maintained. However, the US showed little interest, and the process was again not initiated. Evidently, the position of the US could still be a much difficult bargain for other members. The continued paralysis of the DSM will ultimately remain a concrete threat to the international rule of law for a long time.

III. REFORM PROPOSALS AND THE FUTURE OF DSM

The restoration of the DSM still remains the priority of reform for the majorities. A range of alternatives have been proposed to address the current crisis in DSM. Notably, the MPIA has been operationalized and issued awards. Outside the WTO framework, dispute settlement mechanisms under regional trade agreements (RTAs) have also begun to function.

Restoring a two-tier and binding adjudicatory mechanism to its original characters remains difficult. While the available options are diversified, they also risk further intensifying the fragmentation of trade dispute settlement, countering the goal of the DSM set out in Article 3.2 of the DSU. The key to restoring a two-tier institutionalized dispute adjudication mechanism lies in reconciling divergent interests and concerns, and making the DSM a more inclusive and fairer option for all members.

A. MPIA

As an interim arrangement designed to fill the gap left by the AB, the MPIA not only preserves most of the features of appellate review, but also introduces

⁵⁰ 50 Members Review Possible Deliverables for MC14 at Final 2025 General Council Meeting, https://www.wto.org/english/news_e/news25_e/gc_16dec25_255_e.htm (Last Visited on February 10, 2026); WTO, General Council Report, WT/GC/270, March 4, 2025; WTO, Statement by H.E. Mr. Petter Ølberg, Chairperson of the General Council, JOB/GC/DSR/5, December 18, 2024.

⁵¹ WTO, Minutes of Meeting, WT/DSB/M/508, December 19, 2025.

reforms relating to time limits, transparency, and the availability of awards, thus responding to the United States' criticisms of the AB to some extent. Overall, the MPIA largely replicates the original two-tier design, thereby maintaining a certain degree of binding force of the DSM. Colombia, as a respondent, has spoken highly of the MPIA, describing it as "a viable and well-functioning interim mechanism that can provide a temporary replacement for the AB while preserving members' right of appeal".⁵²

However, the MPIA's primary task is to manage its relationship with WTO jurisprudence. Although the MPIA commits itself to maintaining consistency with the reports adopted by the WTO, participating in the arrangement entails an institutional segmentation among members. Dispute settlement risks being divided into disputes i) between MPIA participants, ii) between non-participants, and iii) between a participant and a non-participant. WTO panels are under no obligation to follow MPIA awards. Unless the panels and the MPIA reach a consensus on maintaining the jurisprudence, there might be a risk that an autonomous MPIA jurisprudence could emerge as a semi-detached sub-regime within WTO dispute settlement.

Concerns have already been raised by DS591, where the MPIA approach to Article 17.6(ii) of the WTO Anti-dumping Agreement appeared to diverge from established WTO jurisprudence.⁵³ During the Uruguay Round, some negotiators reportedly viewed Article 17.6(ii) as a means to limit the intensity of panel review.⁵⁴ Yet, the AB rarely relied on the negotiating history and intent of parties — this approach in turn led to members being dissatisfied with certain interpretations. The MPIA should be understood as a declaratory move: by aligning with members' criticisms towards the AB, it may be intended to increase the likelihood of member's re-engagement with the WTO DSM. In fact, the US expressed its positive remarks at this arbitration.⁵⁵

The MPIA is first a political commitment among participating members, and it depends on reciprocal expectations. Compared to the prospect of

⁵² WTO, Minutes of Meeting, WT/DSB/M/475, March 13, 2023.

⁵³ Award of the Arbitrators, *Colombia – Anti-dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands under Article 25 of the DSU*, WT/DS591/ARB25, Circulated on December 21, 2022, paras. 4.13–4.14.

⁵⁴ Steven Croley and John Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, *American Journal of International Law*, Vol. 90, No. 2, 1996, pp. 195–199.

⁵⁵ *Supra* n. 52.

“appealing into the void” and the resulting loss of potential litigation gains, members may be more inclined to accept the constraints of the MPIA in exchange for the respect of other members for their favorable outcomes.⁵⁶

By keeping a distance from politics and diplomacy through independent interpretation, the AB consolidated its quasi-judicial status.⁵⁷ Permanent judicial bodies not only address immediate political disputes, but also tend to orient themselves toward the future, placing greater weight on precedent and the continuity of legal development.⁵⁸ Backed by its distinctive institutional design and ethical standards, the AB was often able to preserve a measure of autonomy amid political contestation. In contrast, the MPIA is built upon criticisms of the AB, so it is inherently more shaped by political compromise, and naturally, legal reasoning may no longer be the sole determinant of MPIA decision-making.

B. Waiving the Appeal

Since the AB became inoperative, many members have settled their disputes either through negotiations or complying with the panel reports.⁵⁹ Some countries have even signed written agreements to waive appeals. By waiving appeals, the parties secure the finality of rulings, thereby sustaining the WTO DSM at a minimal level. A representative example is the dispute concerning Indonesia’s steel safeguard measures, in which Vietnam and Chinese Taipei, as complainants, issued a written statement to Indonesia agreeing not to appeal.⁶⁰ In the *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines* dispute, the parties agreed to establish a bilateral consultation mechanism (BCM), appointed a facilitator, and relied on consultations and dialogues to encourage implementation of the panel report.⁶¹ It is certain that the

56 Stratos Pahis, Appeals after the Appellate Body, *World Trade Review*, Vol. 23, No. 3, 2024, p. 313.

57 Georges Abi-Saab, The Appellate Body and Treaty Interpretation, In: Malgosia Fitzmaurice and Phoebe Okowa (Eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, Brill Nijhoff, 2010, p. 102.

58 John Barton et al., *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*, Princeton University Press, 2006, p. 78.

59 WTO, Annual Report 2025, p. 8.

60 WTO, Understanding between Indonesia and Vietnam Regarding Procedures under Articles 21 and 22 of the DSU, *Indonesias – Safeguard on Iron and Steel Products*, WT/DS496/14, March 27, 2019.

61 WTO, Report of the Facilitator Pursuant to Paragraph 5 of the “Understanding between the Philippines and Thailand to Pursue Facilitator-Assisted Discussions Aimed at Progressing and Resolving Outstanding Issues in Regard to DS371”, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/46, July 5, 2022.

close intra-regional ties among ASEAN members, as well as their shared status as developing countries in many instances, have been an important enabling condition for such arrangements, giving them a degree of contextual specificity.

Waiving appeals can avoid “appeal into the void”. However, from a historical perspective, the cost is a loss of control over the quality of panel reports: those controversial and even *ultra vires* findings may be left standing without appellate scrutiny.⁶² In the GATT era, consensus has guaranteed the legitimacy of panel reports. Under the negative consensus rule, if an appeal is waived, the power of the AB to review and developing jurisprudence in effect shifted to first-instance panels through the *ex post* agreement of the disputing parties. At the same time, the parties, particularly the stronger one, may acquire *de facto* leverage over the “last word” that would otherwise have belonged to the AB.

Once the parties opt to waive, an unavoidable question arises. In the absence of appellate review, who is entitled to steer the development of WTO jurisprudence? The panels, whose reports become effectively final, or the disputing parties who decide not to appeal? Neither answer is fully satisfactory. Treating panel reports as final may mean that the quality of WTO jurisprudence no longer benefits from AB expertise; without guidance and discipline from an independent appellate review, the system risks drifting away from its aim of providing security and predictability.

C. Dispute Settlement under RTAs

Some disputes have also spilled over beyond the WTO DSM into the RTA DSM. RTAs expanded rapidly after the Doha Round and now number as many as 380.⁶³ Following the paralysis of the AB, for members that have neither joined the MPIA nor concluded interim arbitration arrangements, RTA dispute settlement has become attractive, as it can provide neutral recommendations between the disputing parties and avoid an appeal into the void.

The RTA DSM remains at its early age. For reasons of judicial economy and institutional path dependence, it is unrealistic to abandon the experience of the GATT era and build separate jurisprudential systems from scratch. Many

⁶² WTO, Minutes of Meeting, WT/DSB/M/75, March 7, 2000.

⁶³ WTO, Regional Trade Agreements Database, <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (Last Visited on February 10, 2026).

RTA rules restate WTO commitments and overlap substantially with WTO disciplines; accordingly, a number of RTAs were designed from the outset with an eye to maintaining coherence with WTO jurisprudence.

Nevertheless, some degree of divergence from WTO jurisprudence may ultimately be unavoidable. The specific rules governing the relationship between the two regimes indicate that WTO jurisprudence does not automatically bind RTA panels, and RTAs vary significantly in the extent to which they incorporate WTO jurisprudence. For example, panels under the EU FTAs must show a relatively high level of deference to WTO jurisprudence; the United States-Mexico-Canada Agreement (USMCA) is more flexible, requiring the panels to interpret in accordance with the VCLT without expressly specifying the status of WTO jurisprudence. Regional Comprehensive Economic Partnership (RCEP), in a hybrid approach, leaves the decision whether to consider WTO jurisprudence to the discretion of the RTA panels. Consequently, even if the disputes concern the same subject matter, it will still be difficult to make the decisions of RTA panels consistent with WTO jurisprudence.

Moreover, in practice, RTAs have moved beyond WTO jurisprudence in areas such as labour and other sustainability-related issues. On current evidence, a trend toward the gradual separation of RTA and WTO DSM practices has begun to emerge.⁶⁴

In all, the RTAs would provide more competing dispute settlement forums in the future. The march of regionalism will definitely reshape the global trade dispute settlement, but at the cost of coherence and consistency.

D. The Future of the DSM

Members are not short of proposals for WTO DSM reform. The principal obstacle, however, is the absence of multilateral consensus on reform option, which makes the restoration of a centralized DSM exceedingly difficult. The core task is to reconcile divergent conceptions among members, which is an essential condition for rebuilding consensus and ultimately for revitalizing

⁶⁴ WTO Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, Adopted on September 29, 2010, para. 7.87; WTO Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R, Adopted on March 21, 2017, paras. 7.235–7.236, Final Report of the Panel, *Issues Relating to Guatemala's Obligations under Article 16.2.1(a) of the CAFTA-DR*; June 14, 2017, para. 189; Report of the Panel of Experts, *Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement*, January 20, 2021, para. 73.

multilateral governance.

First, developing country members and LDCs have made relatively limited use of the DSM. Some members have regarded the DSM as a framework that disproportionately benefits developed countries. On the one hand, the WTO rules have largely been shaped by the major players while the interests and concerns of developing countries and LDCs have often been neglected. On the other hand, the increasing techniques of trade litigation have raised the entry barriers: considerable time and financial costs, uncertain results, and the possibility of economic coercion which deters many developing countries and LDCs from initiating proceedings.

With more participation, the DSM can restore member's confidence and its status as the centralized multilateral trade dispute settlement mechanism. Therefore, reforms should place greater emphasis on the role of LDCs in the DSM. For one thing, members should consider providing more support or lowering the burden of participation, for example, by strengthening non-adversarial approach such as consultations, good offices, conciliation, and mediation, thereby reducing litigation pressures and enhancing the willingness and capacity of such members to participate. For another, it is crucial to enhance the enforceability of the rulings. Although it might be difficult to evolve the current enforcement mechanism into a collective undertaking as suggested by some,⁶⁵ it would be attractive for the less powerful members to have another layer of guarantees for enforceability.

Second, DSM reforms should be oriented toward consensus-building rather than creating new divisions. There have been cases in which MPIA members appeal the panel report into the void against non-participants, producing a pattern in which MPIA participants assume responsibility internally while avoiding constraint externally. This is unhelpful for forging consensus on restoring the DSM. Given the combinatorial proliferation of reform options, differentiation and institutional segmentation may recur. The reform process should therefore place greater emphasis on coordination and dialogue among different reform options, so as to prevent the emergence of entrenched institutional isolations and conflicts.

65 Joost Pauwelyn, Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach, *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 339–340.

Finally, and most critically, members should seek, to the greatest extent, to narrow substantive divides in rule-making and rule book updating. It might be hard to achieve real democracy, but certainly there are informal club-styled practices such as the Quad Club and the Green Room meeting⁶⁶ that have gradually weakened the LDCs' participations, thereby leading to an expansion of the gap in consensus. The WTO is not a platform for major powers to invent rules solely to advance their own interests, nor is the DSM a tool for entrenching the preferences of the powerful. The effective governance of the international economic and trade order requires the participation of all WTO Members.

IV. CONCLUSION

As a typical international dispute settlement mechanism, the WTO DSM has made a substantial contribution to the development of the international rule of law over the past three decades. Admittedly, the DSM has some limitations, the underlying reasons lie primarily in the original institutional design at the creation of it and in the profound historical transformations of the turbulent international order.

Various new proposals and mechanisms may undoubtedly facilitate the resolution of disputes. Nevertheless, it is the commitment to consensus and multilateralism that ultimately determines whether an international dispute settlement mechanism can endure over time and evolve into a mutually reinforcing relationship with international law. After all, few would accept the WTO departing from a centralized governance and devolving into a fragmented regime akin to that of international investment law. Accordingly, in the future reforms of the DSM, all parties should adopt a more inclusive approach to disagreements, solicit a broader range of views, and finally seek to restore the DSM to its former prominence.

⁶⁶ Ngangjoh Hodu Yenkon, Reflecting on the Rule of Law Contestations Narratives in the World Trading System, *Journal of International Dispute Settlement*, Vol. 15, No. 2, 2024, p. 250.