Deliberative Engagement within the World Trade Organization: A Functional Substitute for Authoritative Interpretations

Cosette D Creamer, Harvard University
Zuzann Godzimirska
DELIBERATIVE ENGAGEMENT WITHIN THE WORLD TRADE ORGANIZATION:
A FUNCTIONAL SUBSTITUTE FOR AUTHORITATIVE INTERPRETATIONS

Cosette D. Creamer & Zuzanna Godzimirška*

ABSTRACT

The transition from the General Agreement on Tariffs and Trade dispute settlement proceedings to the Dispute Settlement Mechanism (DSM) of the World Trade Organization represented a notable instance of judicialization within international economic governance, in that it significantly increased the independence of the DSM from direct government control. Since they began ruling on trade conflicts in 1995, the WTO’s adjudicative bodies have enjoyed a greater degree of interpretive autonomy than initially intended by states parties. This development largely stems from deadlock within the political organs of the Organization resulting in non-use of one of the primary means of legislative response—authoritative interpretations. This creates a predicament not only for the Organization’s political organs. The ineffective nature of this existing mechanism also deprives the DSM of constructive normative guidance from its primary constituents: the member governments of the WTO. This article proposes a functional substitute for the mechanism of authoritative interpretations, namely an increase in governments’ expression of views prior to adoption the dispute settlement rulings. We argue that such an increase would better enable the DSM to consider the interpretive preferences of the WTO membership as a whole, thus enabling it to better fulfill its fiduciary duties, and its responsibility of deliberative engagement with Members in particular. We specify how the proposal would work in practice and address potential limitations and obstacles to its implementation.
I. INTRODUCTION

Over the past century, governments have increasingly granted international judicial and quasi-judicial bodies the authority to interpret legal agreements, resolve disputes, or enforce international rules. This decision has historically been and continues to be a puzzling one for international legal scholars and government officials trained to guard jealously the boundaries of state sovereignty. Many assume that states can exercise sufficient control over these courts or exit the regime if membership costs begin to outweigh benefits. Although delegating authority to an international body is controversial and raises a number of concerns about sovereignty, legitimacy, and accountability, international courts also clarify obligations, help states overcome cooperation problems, and contribute more generally to the development of an international legal system. Perhaps for this reason, states continue to create formally independent tribunals, particularly in the area of international economic law.

In the context of international trade, however, scholars and practitioners have cautioned about a growing institutional imbalance within the World Trade Organization (WTO) between its political and quasi-judicial bodies. Despite frequent warnings over the years, no noticeable efforts have been made to tackle the challenges that the increased autonomy of the adjudicative bodies in the face of ineffective mechanisms of political response creates for various organs of the Organization. To this end, this article proposes a substitute to existing but ineffective modes of legislative response within the WTO, developing a proposal that should prove useful to both Members and the Organization’s dispute settlement bodies.

During the Uruguay Round negotiations establishing the WTO, states parties to the General Agreement on Tariffs and Trade (GATT) agreed to create an overarching institutional framework incorporating the GATT multilateral treaty into a formal international organization. To be sure, negotiating states voiced sovereignty concerns about the implications of moving from the GATT to a formal organizational model. Ultimately these concerns did not prevail. The transition from the decentralized GATT system to the formal organizational structure of the WTO created a significantly more institutionalized framework for negotiations and decision-making. Member governments of the WTO collectively comprise the organization’s political—and in some sense legislative—bodies by exercising various functions through different councils and

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committees. In fact, the WTO describes itself as ‘member-driven’ and both Member representatives and WTO officials repeat this phrase as a self-affirming mantra. Members thus view themselves as the primary constituents of the organization as a whole, and its dispute settlement system in particular.

Yet the transition from the GATT dispute settlement proceedings to the WTO’s Dispute Settlement Mechanism (DSM) also represented a notable instance of judicialization within international economic governance, in that it significantly increased the independence of the DSM from direct Member control. Although negotiating states intended to maintain political control over the WTO’s newly created adjudicative bodies, dispute settlement is the only function that the WTO exercises somewhat autonomously and the DSM effectively enjoys interpretive freedom. While the General Council sitting as the Dispute Settlement Body (DSB) formally adopts dispute reports and issues implementation recommendations under a reverse consensus rule, the primary responsibility for clarifying provisions within the WTO covered agreements rests with the dispute panels and the Appellate Body (AB). Because nearly every decision of the political bodies of the Organization requires consensus of all 160 Members, government control over and even guidance to the DSM has become somewhat of a utopian reality. This poses a problem for Members, but also represents a significant challenge for the DSM, which depends on feedback from the membership as a whole to fulfill its fiduciary duties to its stakeholders.

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4 Disagreement persists over whether and how to analogize domestic legal structures to international organizations, but a fair bit of existing scholarship presumes that the political bodies of the WTO perform what can be characterized as a legislative function. See, e.g., Armin von Bogdandy, Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship, 5 MAX PLANCK YRBK UN L. 741, 741 (2002); MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 26 (2006); Gregory Schaffer & Joel Trachtman, Interpretation and Institutional Choice at the WTO, 1 ONATI SOCIO-LEG. 1 (2011).

5 Footer, supra note 4, at 28; World Trade Organization, Understanding the WTO 101 (2011).


7 The primary political body of the WTO—the General Council—handles the day-to-day work of the organization, including administration of the dispute settlement mechanism when sitting as the DSB. Marrakesh Agreement Establishing the World Trade Organization, art. IV, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. The general rule within the DSB is to take decisions by consensus. However, for establishment of a panel adoption of panel and Appellate Body reports, and authorization of retaliation, the Dispute Settlement Understanding provides that the DSB must adopt the decision unless there is a consensus against it. Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2, arts. 6.1, 16.4, 17.5, 22.6, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU]. This decision-making procedure is referred to as negative or reverse consensus. Footer, supra note 4, at 143.

8 Although interpretations and findings developed within reports of the DSM only bind parties in the context of a specific dispute, many argue that a type of de facto stare decisis operates within the WTO. See, e.g., Zhu Lanye, The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?, 17 TEMP. INT’L & COMP. L.J. 221 (2003); Alec Stone Sweet & Thomas L. Brunell, Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization, 1 J. L. & CTS. 61, 82 (2013).
This structural relationship between the DSB and the WTO’s adjudicative bodies reflects the pervasive tension between the DSM’s judicial independence and political control, and ties into the scholarly debate over whether to best characterize international judicial bodies as agents or trustees. A growing scholarly consensus views the Dispute Settlement Mechanism of the WTO as a trustee-type judicial body in that it possesses compulsory jurisdiction, acts as the authoritative interpreter of WTO law, and its decisions are “virtually impossible” for Members to reverse. Some even characterize the DSM as a type of “super-agent” in exercising its delegated authority to enforce WTO rules against Members.

Whether one views the DSM as a trustee or an agent of member governments, the key issue underlying both approaches concerns the constituency of an international court: who it is set up to serve and thus to whom, under a fiduciary theory of judging, the DSM bears responsibilities. As the actors who have delegated authority and powers to the DSM and whose interests the DSM is entrusted to serve, the WTO membership as a whole represents its beneficiaries and those to whom the DSM owes fiduciary duties.

Under a fiduciary theory of judging—for both agent- and trustee-type courts—judges bear three fundamental responsibilities: loyalty, care and deliberative engagement. This article focuses on the third responsibility of judges—deliberative engagement—as applied to the WTO’s judicial bodies. Deliberative engagement refers to the “affirmative duty” courts have to engage in a type of dialogue with those whose interests it holds in trust. To be clear, this does not refer to a literal dialogue but rather to “being genuinely open to beneficiary preferences” and to provide reasoned decisions in response. Transferred to the WTO context, a fiduciary theory of judging implies that the DSM should seek to uncover the interests and preferences of a representative sample of the DSM membership or risk breaching its obligations to its beneficiaries.

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11 Stone Sweet & Brunell, supra note 5, at 62.


13 Leib, Ponet & Serota, supra note 12, at 731.

14 Id., at 699.

15 Id., at 741, 744.
While the DSM possesses considerable interpretive authority and autonomy, the WTO Agreement provides for two mechanisms through which the members of the DSM may become apprised of governments’ interpretive preferences at a given moment of time. These mechanisms of legislative feedback or response include amendment of the covered agreements and adoption of authoritative interpretations. Members thus formally possess the ability to specify what the law is or should be when collectively they disagree with interpretations developed by the DSM, as well as in situations where WTO rules are unclear or permit multiple interpretations. However, as many have noted, both of these formal means of legislative response are difficult if not impossible to employ in practice. This implies that the judicial bodies are left without any effective counterbalance and raises the question of how panels and the AB may properly assess common interpretive views among Members, in order to fulfill their fiduciary duty of deliberative engagement.

Trade officials and scholars recognized the difficulty generated by the absence of an effective mechanism of deliberative engagement nearly a decade ago, when WTO Director General Supachai Panitchpakdi convened a Consultative Board to examine and address institutional challenges faced by the system. The resulting Sutherland Report on the *Future of the WTO* suggested that the DSB should play a “more constructive role…with respect to criticisms of jurisprudence.” While many of the reform proposals contained within the Sutherland Report had the potential to address what many viewed as a growing institutional imbalance and to enable the DSM to fulfill its fiduciary duties, nearly ten years later there have been no significant efforts to make these proposals a reality.

The DSM’s inability to fulfill its duty of deliberate engagement with the *full* membership stems partly from the fact that only the interpretive views of parties and third parties pleaded during the course of dispute proceedings officially reach the DSM. This

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16 WTO Agreement, *supra* note 4, art. X.
17 *Id.*, art. IX:2. Although waivers under art. IX:3 and art. IX:4 of the WTO Agreement permit a Member to depart from an existing WTO obligation for a limited period of time, their purpose and effects differ from the formal mechanisms of legislative response discussed herein. First, waivers are intended to be temporary measures with limited duration and without lasting legal effect. Second, while a waiver does relieve a Member from a particular WTO obligation, it is “exceptional in nature, subject to strict disciplines and should be interpreted with great care,” and thus cannot be taken as direct evidence of Members’ views on the interpretation of WTO obligations or a “subsequent agreement” in the sense of art. 31(3)(a) of the Vienna Convention on the Law of Treaties. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU (26 November 2008); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 of the DSU by the United States*, paras 380, 390, WT/DS27/AB/RW/USA (26 November 2008). Still, the WTO membership has sometimes used waivers in situations where a multilateral interpretation “could…have been more suitable,” i.e. the so-called Kimberly Waiver granted in 2003. See Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article XI:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT’L ECON. L. 803, 815 (2005).
18 See Peter Sutherland et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millenium* (2005); see also Ehlermann & Ehring, *supra* note 17.
19 Sutherland et al., *supra* note 18, para. 250.
implies that dispute panels and the AB are formulating interpretations of WTO rules based on incomplete information about all of the Members’ preferences. Given this, although it remains to be studied empirically, the DSM’s interpretations cannot but be biased towards a powerful minority. An existing practice within the Dispute Settlement Body—the expression of views prior to the adoption of panel and AB reports—could address this deficiency. While the primary purpose of these statements is to express views on the report under adoption, government representatives can and in fact often do use these statements to address systemic issues and broader jurisprudential developments as well.

DSB statements in no way legally bind the WTO’s quasi-judicial bodies, particularly given that governments often voice widely divergent views on the same issue. Rather, they fulfill an important informational function, in that they make available for consideration by the DSM the interpretive preferences of Members. However, to date an unrepresentative subset of countries make statements in this context, which again suggests that the DSM is only fulfilling its duty of deliberative engagement (to consider its beneficiaries’ preferences) with respect to a minority of Members. In order to remedy this and to assist the Organization’s judicial bodies in fulfilling their delegated role, this article outlines how WTO Members can improve the normative guidance received by the DSM, by adopting a more widespread and forward-looking practice of expressing views prior to report adoption. This will permit less active countries within the dispute settlement system to familiarize themselves with WTO rules and jurisprudence and, more importantly, improve the functioning of the DSM by increasing its ability to fulfill its fiduciary obligations to all WTO Members.

This article proceeds as follows. Section II outlines the formal mechanisms of legislative response available to Members under the WTO Agreement, focusing on Members’ exclusive right to adopt authoritative interpretations. It examines the few unsuccessful efforts to adopt such interpretations and discusses how the non-use of Article IX:2 contributes to an institutional imbalance between the political and judicial bodies of the Organization not intended by Members when drafting the WTO Agreement. We then demonstrate how Members may functionally circumvent their inability to engage in legislative response through authoritative interpretations and still provide normative guidance to the WTO’s adjudicative organs by expressing views, in the context of report adoption within the Dispute Settlement Body, on interpretations articulated by panels and the AB. Drawing on an original dataset of all report statements made within the DSB from 1995-2012 and a series of interviews with Member representatives and WTO Secretariat officials, Section III examines the use of this informal mechanism to date. It demonstrates that Members that express report views do not constitute a representative sample of the WTO membership as a whole, along critical and relevant characteristics.

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20 A total of twenty-nine interviews were conducted during 13-17 January 2014 in Geneva, Switzerland. Three interviewees were officials within the WTO Secretariat; twenty-five interviews were conducted with current or former delegates representing their respective Members within DSB meetings; one interview was conducted with a representative from the Advisory Centre on WTO Law, an independent organization that provides legal advice and assistance to developing and least-developed countries. Members interviewed varied across relevant characteristics, including size, wealth, use of the dispute settlement system, and vocal participation within meetings of the DSB. The identities of all interviewees have been redacted and replaced with random numbers, to ensure interviewee confidentiality.
This suggests that report statements currently provide panels and the AB with a skewed picture of the membership’s views on certain jurisprudential developments. In order to remedy this, Section IV proposes that a broader range of Members actively formulate and express views, individually or jointly, prior to report adoption. This section also addresses potential obstacles to or limitations of this proposal. Section V concludes.

II. LEGISLATIVE RESPONSE WITHIN THE WTO

The WTO relies on a decentralized form of enforcement, with governments challenging within the dispute settlement system other Members’ laws and policies as being in violation of WTO rules. Although member states formally adopt dispute rulings and issue implementation recommendations under a “reverse consensus” rule, the primary responsibility for clarifying WTO rules and interpreting the scope of international trade rules rests with panels and the Appellate Body. Governments are bound by these decisions, face retaliatory concessions if they do not comply with their rulings, and as a result most governments do eventually make costly changes to domestic laws and regulations to bring their measures into compliance.

Under the WTO Agreement, Members possess two mechanisms of legislative response to interpretations articulated by the DSM: Article X amendments of the covered agreements and Article IX:2 authoritative interpretations. In this article, legislative response refers to the response of the WTO’s political bodies—the membership as a whole—to interpretations or practices of its judicial bodies that are perceived to be at odds with governments’ intention, will, or preferences. The power to adopt amendments represents a clear ability to re-contract, in that amendments may add to, alter, or diminish existing rights and obligations. The procedures for amending the various WTO agreements are fairly complex and differ according to the agreement and provision at issue. In practice, the amendment procedure does not make for an efficient mechanism of legislative response, as the process is understandably lengthy. For example, the first treaty amendment agreed upon by WTO Members—the Protocol Amending the Agreement on Trade-Related Aspects of Intellectual Property Rights adopted in 2005—is not currently in effect, with two thirds of the WTO’s Members yet to formally deposit an instrument of acceptance with the Director General.

The right to issue Article IX:2 interpretations endows Members with a less severe

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21 Infra, footnote 7.
23 Members may seek an amendment for reasons other than legislative response, such as to address time-inconsistent preferences on international trade or in response to changes in the uncertain environment of international economic relations. See Barbara Koremenos, Contracting around International Uncertainty, 99 Am. Pol. Sci. Rev. 549 (2005).
24 General Council, Amendment of the TRIPS Agreement: Decision of 6 December 2005, WT/L/641 (8 December 2005); WTO, Members accepting amendment of the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (providing a list of Members that have deposited instruments of acceptance with the WTO’s Director General).
tool to implicitly re-contract, not by altering existing rights or obligations but by filling in interpretive gaps or ambiguities.\textsuperscript{25} This provides governments with the authority to shape future dispute settlement jurisprudence if it begins to move away from WTO Members’ interpretive preferences. Article IX:2 assigns the exclusive right to adopt authoritative interpretations to the Ministerial Conference or the General Council (GC), with adoption requiring a three-fourths majority, though consensus would likely be required in practice.\textsuperscript{26} While the WTO Agreement does not specify their legal effects, the AB has noted that such interpretations have “a pervasive legal effect” and are “binding on all Members,” and therefore on panels and the AB as well.\textsuperscript{27} This is one of the fundamental differences between Article IX:2 interpretations and interpretations undertaken by the DSM in the course of dispute settlement, which only formally bind the parties to a given dispute.\textsuperscript{28} Article IX:2 thus grants WTO Members an opportunity to refine and shape the interpretation of existing rules, with the effect of determining the scope of rules prospectively as well as correcting future applications of interpretations contained within adopted reports.

In some respects, Articles IX:2 and X of the WTO Agreement encourage a type of deliberative engagement between Members and the DSM bodies. This is particularly important given the difficulty (if not impossibility) of blocking report adoption, due to the reverse consensus rule. Because reports of panels and the AB have significant political and economic implications for the membership as a whole, the ability of Members to respond to their decisions encourages a dialogical relationship with the DSM about Members’ rights and obligations under the covered agreements.

Within the domestic context, mechanisms of legislative response play a similarly important role in ensuring accountability between branches of government and minimizing the “countermajoritarian difficulty” of unaccountable judges overruling the “will of the legislature.”\textsuperscript{29} Although reversals of interpretations do not occur on a daily basis at the domestic level, the availability of legislative response provides an important mechanism to secure a majoritarian check on what the law is or should be. While the domestic model is not directly transposable to the international level, where a

\textsuperscript{25} The Appellate Body has noted that an art. IX:2 interpretation is “meant to clarify the meaning of existing obligations, not to modify their content” and “can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31(3)(a) of the Vienna Convention, as far as the interpretation of the WTO agreements is concerned.” Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse to Article 21.5 of the DSU by Ecuador, paras. 350, 383, WT/DS27/AB/RW2/ECU (26 November 2008).

\textsuperscript{26} Ehlermann & Ehring, supra note 17, at 805-6.

\textsuperscript{27} Appellate Body Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes, para. 250, WT/DS406/AB/R (24 April 2012).

\textsuperscript{28} Appellate Body Report, United States—Final Anti-Dumping Measures on Stainless Steel from Mexico, fn 308, WT/DS344/AB/R (20 May 2008).

decentralized system is recognized and accepted, legislative response still provides a useful reference point to ensure proper functioning of an institution. More importantly, it likely enhances the quality and representativeness of decision-making undertaken by various branches in that it encourages a continuing and dynamic ‘dialogue’ over the meaning of the law. Even the strongest supporters of the juridification of the multilateral trading system have not advocated for relinquishing all political or diplomatic input into the activities of the DSM. In light of the WTO’s ambition to function as a Member-driven organization and to facilitate cooperative international economic relations, it seems just as important as in the domestic context that governments make use of the mechanism under Article IX:2 to provide normative guidance to the bodies of the Organization tasked with facilitating the resolution of trade disputes.

However, since the establishment of the World Trade Organization almost twenty years ago, Members have made few efforts to employ Article IX:2 interpretations and none have been adopted to date. On 21 January 1999, the European Communities (EC) requested an authoritative interpretation regarding the relationship between Articles 21.5 and 22 of the Dispute Settlement Understanding (DSU) and called for a special meeting of the GC to consider this “sequencing issue.” The GC did not adopt the requested interpretation, with the Chairman instead suggesting that the DSB consider the issue. Three years later, several countries proposed that the GC adopt an Article IX:2 interpretation on Article 30 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Ultimately, Members first made use of a waiver and subsequently formally amended the treaty. A few governments within the DSU Review negotiations

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have suggested employing authoritative interpretations to clarify certain aspects of the DSU and provide normative guidance to the DSM regarding, *inter alia*, discretionary law theory, the sequencing issue, and provisions affecting developing countries, though to date no authoritative interpretations have been adopted.37

Similarly, WTO Members have not employed Article IX:2 interpretations in instances where we might have expected responses to jurisprudential developments disfavored by the majority of Members. For example, when panels and the AB began accepting unsolicited amicus curiae briefs, Members merely criticized the practice during the course of a GC meeting.38 In *Australia—Automotive Leather II*, the Article 21.5 compliance panel’s interpretation of “withdraw the subsidy” under Article 4.7 of the Agreement on Subsidies and Countervailing Measures (SCM) likewise elicited strong criticism from a large number of Members, but no authoritative interpretation was sought.39 To be sure, the WTO’s customary practice of consensus decision-making largely explains the non-use of authoritative interpretations. While Members may be able to agree on what constitutes an incorrect interpretation, this does not necessarily imply they would be able to reach a consensus on the appropriate authoritative interpretation to adopt.

Given the non-use of Article XI:2, the DSM essentially enjoys complete interpretive autonomy from the political bodies of the Organization. This has led some to observe that the political decision-making process of the WTO appears “weak and inefficient” compared to its dispute settlement process 40 and that the non-use of authoritative interpretations has been “uncomfortable for the dispute settlement system, notably the AB, who is aware that mistakes or disapproved legal interpretations will not be corrected.”41 The non-use of legislative response mechanisms within the WTO has effectively given decisions of the AB “a kind of de facto finality as interpretations of law, even if they lack de jure finality.”42

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41 Ehlermann & Ehring, supra note 17, at 819.

42 Howse, supra note 29, at 15. Panels have made clear that they will follow the Appellate Body’s prior interpretations unless confronted with “cogent” reasons to reach a different conclusion, which would include an art. IX:2 interpretation. See Panel Report, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, para. 7.317, WT/DS449/R (27 March 2014).
While it does serve important purposes, the practice of consensus decision-making within the WTO also raises concerns about the institutional balance between the Organization’s political and judicial bodies, leading to multiple reform proposals over the years. In December 2002, for example, Chile and the United States (U.S.) issued a joint proposal in the context of DSU Review negotiations to address Member concerns that “some limitations in the current procedures may have resulted, in some cases, in an interpretative approach or legal reasoning applied by WTO adjudicative bodies...that could have benefitted from additional Member review.”43 They suggested that Members might provide additional interpretive guidance through, among other mechanisms, the “partial adoption” of reports.44 While controversial among Members, the proposal did garner some support and remains on the agenda of DSU Review discussions.45 More critically, it clearly reflects a concern that once adopted, interpretations within dispute reports are difficult if not impossible to change through legislative response by the Members. Others have proposed to make authoritative interpretations more operational in practice, to provide both Members and the adjudicative bodies “normative guidance in the context of ambiguous rules, instead of resorting to dispute settlement.”46 While a laudable goal, it is highly unlikely that this mechanism, which to date has never been employed, will ever function as envisioned by the founders of the WTO.

Although it is debatable and far beyond the scope of this article to assess whether the non-use of legislative response weakens the legitimacy of the Dispute Settlement Mechanism, the fact that the Organization’s judicial bodies are left with few systematic or efficient feedback mechanisms is worrisome from a normative perspective.47 Member’s non-use of authoritative interpretations raises the question of how the DSM can assess common interpretive views or practices among all WTO Members. To put it differently,

43 Special Session of the Dispute Settlement Body, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication by Chile and the United States, para. 2, TN/DS/W/28 (23 December 2002).
44 Id., para. 6(c).
46 Ehlermann & Ehring, supra note 17, at 813.
47 While it could be argued that interim review does provide an efficient feedback mechanism, it is limited to the parties’ preferences and does not shed light on the preferences of the membership as a whole. Third-party participation within disputes could potentially contribute to enhancing the representativeness of views made available to the DSM, but interviews revealed that many third parties find it difficult to actively participate in proceedings and are often, due to capacity constraints, relegated to passive observers. See, e.g., Interview 2.1, Geneva, Switzerland (14 January 2014); Interview 5.5, Geneva, Switzerland (17 January 2014)).
non-use of formal legislative response leaves unspecified the means through which the membership as a whole and the DSM do and should engage in deliberative engagement. In order to address this shortcoming, we argue that Members should increase reliance on an existing practice—the expression of views prior to adoption of panel and Appellate Body reports within DSB meetings—as a functional substitute for formal legislative response. To be sure, the legal effects of these two mechanisms—authoritative interpretations and expression of views—differ significantly, in that the former bind future dispute settlement proceedings while the latter do not. However, both tools fulfill the underlying goal of providing to the DSM iterative feedback, guidance and information on Members’ interpretive preferences.

III. EXPRESSION OF VIEWS PRIOR TO REPORT ADOPTION: CURRENT PRACTICE

While the WTO Agreement formally provides Members with the ability to shape interpretation of the covered agreements, Article IX:2 is not utilized in practice and there is considerable reason to doubt it will ever operate effectively. Yet the intended function of Article IX:2—legislative response—is an important one. Even if legislative reversal is not possible, from both an institutional and a normative perspective it is critical that the DSM be aware of interpretive views held by a representative cross-section of the WTO membership. Declarations and views expressed by governments within the WTO’s various committees provide one indirect way in which the DSM could become apprised of Members’ views on the meaning or interpretation of provisions within particular covered agreements. These may be helpful when considering provisions not previously interpreted, but are less informative in terms of providing a systematic way for the DSM to assess Member consensus or dissensus over interpretations already articulated.

We argue that views expressed prior to report adoption have the potential to fulfill this function, providing the DSM with a wealth of information about Members’ interpretive preferences to which it can, if it so chooses, refer in future disputes. This section describes the current practice of report views in the WTO, drawing on an original dataset of statements made within meetings of the DSB between 1995 and 2012 and a series of interviews with Member representatives and WTO Secretariat officials. It highlights the current deficiencies in and limitations on the use of report statements to date, before turning to proposals for improving the practice so as to enable the DSM to better fulfill its fiduciary duty of deliberative engagement with WTO Members.

Panels and the Appellate Body report their findings directly to Members in plenary sessions of the General Council sitting as the DSB. These reports do not directly bind parties to the dispute, but must be adopted by the DSB, which then issues implementation recommendations that create the second-order legal obligations in terms

48 See Schaffer & Trachtman, supra note 4, at 15. For instances in which the DSM has referred to WTO committee statements, see, e.g., Panel Report, India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, para. 7.47 (5 September 1997); Panel Report, European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, para. 7.321, WT/DS219/R (7 March 2003); Appellate Body Report, European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, para. 80, WT/DS219/AB/R (22 July 2003).
of compliance. While the DSU does not expressly create a right for government representatives to express report views, it does provide that the report adoption procedure is “without prejudice to the right of Members to express their views.”\(^{49}\) In practice this has taken the form of statements by interested governments made on the record of a DSB meeting, following which the report is adopted under the reverse consensus rule. Panel reports must be adopted or appealed within sixty days of their date of circulation; if one or more parties decide to appeal the report, they typically postpone its consideration by the DSB until the conclusion of the appellate proceeding.\(^{50}\) For this reason, many panel reports have not been discussed by the DSB separate from their consideration prior to adoption of the AB report.

Members have engaged in little explicit discussion of the purpose of statements made prior to report adoption. Those that have invariably stress that this right in no way undermines parties’ unconditional acceptance of adopted report findings.\(^{51}\) Some have noted that such views “may furnish cogent reasons that would ultimately lead to further clarification of the issues in question”\(^{52}\) and that such discussion was critical in terms of providing structured feedback “in the interest of the long-term viability and health of the dispute settlement system.”\(^{53}\) Within interviews, several representatives similarly noted that the right to make report statements provides an opportunity for the membership to inform the Secretariat and ultimately the Appellate Body about its views on both jurisprudence and the conduct of dispute proceedings.\(^{54}\) The expression of report views thus serves a similar purpose to that of Article IX:2 interpretations, in that both create a feedback mechanism to assist the DSM in ascertaining and assessing Members’ interpretive preferences. They differ significantly in that, unlike Article IX:2 interpretations, views expressed within DSB meetings are not legally binding upon Members, panels, or the AB. In this difference, however, lies the strength of this mechanism in fulfilling its proposed informational role. Precisely because such views are not legally binding, Members may be less restrained in elaborating on their interpretive views than when attempting to reach consensus in order to adopt an authoritative interpretation.

While the WTO Agreement permits all Members to express report views, in practice only a select group of governments make use of this device and even these do not make full use of its potential to act as a constructive feedback mechanism. Between 1995 and 2012, the DSB has considered and adopted 169 reports (see Table 1), with an average of 9.39 reports adopted per year. Members have made a total of 1,038 statements expressing views on these reports (11.3 per cent of all statements made within DSB meetings), with an average of 6.14 statements made per report and an average of 5.57

\(^{49}\) DSU, supra note 7, arts 16.4, 17.14.

\(^{50}\) Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 27 (Rufus Yerxa et al., eds., 2005).

\(^{51}\) See, e.g., Dispute Settlement Body, Minutes of Meeting held on 1 August 2008, paras 71-88, WT/DSB/M/254 (22 October 2008).

\(^{52}\) Id., para. 76.

\(^{53}\) Dispute Settlement Body, Minutes of Meeting held on 23 May 1997, pp. 5-10, WT/DSB/M/33 (25 June 1997).

\(^{54}\) Interview 1.1, Geneva, Switzerland (13 January 2014); Interview 2.4, Geneva, Switzerland (14 January 2014) Interview 5.5, Geneva, Switzerland (17 January 2014).
Members expressing views prior to report adoption. On very rare occasions, parties to the dispute also circulate written report statements. Overall, only thirty-nine per cent of the WTO membership in 2012 (fifty-one Members in total) has expressed at least one view on an AB report, with the percentage even smaller for panel or Article 21.5 reports.

Members typically express fewer total views on panel reports than AB or Article 21.5 compliance proceeding reports, although views expressed on AB reports do often reference panel findings. The average number of views expressed does not differ considerably across the trade agreement(s) interpreted within the report. This pattern is fairly consistent across time and understandably contingent on the type of disputes empaneled. It would appear, then, that reports interpreting newer disciplines do not elicit significantly more statements than those interpreting agreements with fairly established pre-WTO jurisprudence (such as the GATT). This suggests that Members do not presently use these statements as an explicit means to provide views on newly interpreted provisions, for which the DSM might benefit from additional guidance on governments’ interpretive preferences.

Participation within DSB meetings varies across Members in fairly predictable ways, as not all countries are active users of the dispute settlement system and many often do not have a direct interest in DSB agenda items. Larger countries and the most frequent users of the dispute system attend every meeting of the DSB, while smaller or not very active ones will send a representative when convenient. Government representatives do not take the decision to express a view prior to report adoption lightly. Not surprisingly, the majority of report statements have been made by the most active users of the dispute system, with the U.S. and the European Union (EU) (formerly EC) the most vocal in absolute terms and controlling for years of membership (see Table 2). Among newer Members, those that participate in more disputes (either as a party or a third party) are slowly increasing their expression of views prior to report adoption (i.e. China, Vietnam and Saudi Arabia). Tellingly, only two Members that have never participated in any empaneled dispute (either as a party or a third party) have expressed a view prior to report adoption. Controlling for empaneled dispute participation reveals a different picture,

56 Percentage of membership calculated excluding all EU member states, as only the EU representative may express views or make statements within the DSB. See Interviews 1.2 & 1.3, Geneva, Switzerland (13 January 2014).
57 Interview 2.1, Geneva, Switzerland (14 January 2014).
58 Prior to adoption of the Appellate Body and panel reports in United States—Section 211 Omnibus Appropriations Act of 1998 (WT/DS176/AB/R; WT/DS176/R), Haiti issued a brief statement praising the Appellate Body’s findings and supporting Cuba’s position. See Dispute Settlement Body, Minutes of Meeting held on 1 February 2002, para 34, WT/DSB/M/119 (6 March 2002). Prior to adoption of the Appellate Body and panel reports in European Communities—Trade Description of Sardines (WT/DS231/AB/R; WT/DS231/R), Morocco expressed its frustration with its inability to defend its interests as a third-party and its resort to submission of an amicus curiae brief as an alternative procedure.
with the less frequent users of the system relatively more vocal. For example, Malaysia is by far the most vocal Member relative to its participation as a party or third party. While frequent users of the system deliver more report statements in absolute terms, they are not necessarily more willing to express views when not directly involved in a dispute.

[Insert Table 2 about here]

The subset of Members that have expressed at least two views prior to report adoption differs considerably from the WTO membership as a whole, along a number of relevant characteristics (see Table 3). First, wealthier countries tend to express report views, with the average Gross Domestic Product (GDP) per capita for speaking Members nearly twice as large as the average for the membership as a whole.\(^{59}\) Second, the average share of international trade in GDP for vocal governments is slightly lower (7.32 per cent) than for the membership as a whole. This measure proxies the importance of international trade within countries, with international trade tending to be more important for small countries with lower levels of economic self-sufficiency. Third, larger countries are disproportionately expressing views, with the average total population of speaking Members 2.5 times that of the membership as a whole. However, vocal governments appear broadly representative of the total membership in terms of level of urbanization. Fourth, more powerful countries tend to be the ones that express report views, with their average military expenditure and military size over twice that of the averages for the membership as a whole.\(^{60}\) Finally, the average level of democracy for speaking governments is almost twice that of the membership as a whole.\(^{61}\) These differences clearly demonstrate that the countries making report statements are not representative of the entire WTO membership in terms of wealth, trade dependency, size, power or degree of domestic democratic governance.

[Insert Table 3 about here]

Although parties have extensive opportunities to develop their legal arguments within written and oral submissions as well as during the interim review stage, it is still ‘almost customary’ for parties to make a statement prior to report adoption\(^{62}\) and to date

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\(^{59}\) Panel data for GDP per capita (current USD), international trade as a percentage of GDP, total population and urban population (percent of total population) obtained from the World Bank’s World Development Indicators databank, available at: [http://databank.worldbank.org/](http://databank.worldbank.org/).

\(^{60}\) Panel data for Military Expenditure and Military Personnel obtained from the Correlates of War National Military Capabilities (v4.0) data set. See J. David Singer, Reconstructing the Correlates of War Dataset on Material Capabilities of States, 14 INT'L INTERACTIONS 115 (1988).


\(^{62}\) Interview 1.3, Geneva, Switzerland (13 January 2014). 

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all have done so, with one exception. Parties to a dispute have made almost half (46.5 per cent) of all report statements, although third parties also regularly express views (34.1 per cent of all report statements). While third party expression of views has decreased slightly from the early years of the WTO’s dispute settlement system, a trend that some Member delegates have noted, the difference is not substantial. Moreover, even though the average number of third parties per dispute has grown steadily over the years, the percentage of third parties to a dispute expressing views has not declined significantly (see Figure 1). Third parties do tend to be more willing to express views on AB (2.42 statements per report) and Article 21.5 compliance (2.57 statements per report) decisions than on panel reports (1.31 per report), though statements on AB reports typically discuss the panel findings as well. Members not party or third party (the ‘non-parties’) to a dispute have made 19.4 per cent of total report statements, and tend to express views primarily on decisions of the AB (1.73 statements per report) and not panel (0.49 statements per report) or Article 21.5 (0.64 statements per report) decisions.

[Insert Figure 1 about here]

Overall, third parties and non-parties are much more cautious about expressing views on the record, and typically reserve such interventions for procedural and systemic issues. Despite this, a number of government representatives indicated that statements by third or non-parties could be particularly valuable in terms of providing “more neutral feedback to the Secretariat.” As discussed further below, the ability to express a substantive view on a report requires the legal capacity and resources necessary to analyze its systemic legal implications. Participation as a third party may be one method to develop such capacity, and not surprisingly countries that regularly participate as third parties are also more likely to express report views in general.

The substance of a report statement understandably varies according to whether the Member was a party to the case, had a direct economic interest in the dispute, or whether the report addressed issues with potential implications for future disputes. Report views can roughly be placed into three categories: (1) those that focus on the merits of the report findings in that particular dispute; (2) those that note findings, interpretations or procedural decisions adopted within a report and highlight their implications for future decisions.

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63 Prior to adoption of the Appellate Body and panel reports in Mexico — Taxes on Soft Drinks (WT/DS308/AB/R; WT/DS308/R), Mexico did not express a view. See Dispute Settlement Body, Minutes of Meeting held on 24 March 2006, paras 1-11, WT/DSB/M/208 (28 April 2006).
64 Interview 5.5, Geneva, Switzerland (17 January 2014).
65 Interview 1.3, Geneva, Switzerland (13 January 2014); Interview 2.4, Geneva, Switzerland (14 January 2014); Interview 3.2, Geneva, Switzerland (15 January 2014).
66 Interview 1.1, Geneva, Switzerland (13 January 2014).
68 See, e.g., Dispute Settlement Body, Minutes of Meeting held on 15 July 2011, paras 2-4, WT/DSB/M299 (1 September 2011) (expressing support of the Philippines, a party to the Thailand—Cigarettes (Philippines) (WT/DS371/AB/R; WT/DS371/R) dispute, with the Reports and emphasizing that the Reports had given clear guidance as to the contents of the disputed rules).
disputes, the system as a whole or broader interpretive consistency;\(^ {69}\) and (3) those that merely ‘take note’ of an interpretation or finding, in order to flag it as an issue deserving further consideration, without adopting a substantive view.\(^ {70}\) A Member might express all three types of views within one statement, though parties largely focus on the first category while third and non-parties tend to highlight the second. Parties to a dispute typically reiterate legal arguments made within their submissions and highlight particular report findings or procedural aspects with which they strongly agree or that they find problematic. Third and non-parties generally limit their comments to specific findings or procedural issues that raise systemic concerns or that might affect their interests in the future. For the most part, these statements are shorter than those of parties, though there are exceptions.

Third parties do tend to be more vocal regarding politically or economically sensitive disputes, as was the case with reports regarding the *EC—Bananas III* dispute, for which a number of third parties had direct economic interests in its resolution.\(^ {71}\) Similarly, adoption of the panel report in *US—Section 301 Trade Act,*\(^ {72}\) regarding the controversial U.S. legislation permitting unilateral authorization of trade sanctions, generated the largest number of third party statements on any one report to date (twelve in total) and a significant number of non-party statements (six in total).\(^ {73}\) Reports for which non-parties express views are also typically those that raise systemic or procedural issues of concern to the membership as a whole. For example, prior to the adoption of the AB report in *US—Lead and Bismuth II,*\(^ {74}\) sixteen non-party governments expressed views (the largest number of non-party statements made on a report to date). All sixteen of these statements discussed the AB’s decision to accept and consider amicus curiae submissions in that dispute.\(^ {75}\)

The tone of views expressed understandably varies across reports, with some representatives noting that because panel reports do not have the same authority as those issued by the AB, Members might be a bit more critical towards the former. For third

\(^ {69}\) See, e.g., Dispute Settlement Body, *Minutes of Meeting held on 23 March 2012,* para. 76, WT/DSB/M/313 (29 May 2012) (expressing views of Canada (a third party to *US—Large Civil Aircraft (Second Complaint)* (WT/DS53/AB/R; WT/DS53/R) dispute) on two interpretive issues with systemic implications found within the Reports: the causal analysis required to support a panel finding that subsidies caused serious prejudice and the scope of the specificity analysis under art 2.1(a) of the SCM Agreement).

\(^ {70}\) See, e.g., Dispute Settlement Body, *Minutes of Meeting held on 6 November 1998,* p.13, WT/DSB/M/50 (14 December 1998) (noting prior to adoption of the Appellate Body and panel reports in *US—Shrimps* (WT/DS58/AB/R; WT/DS58/R) Australia’s recognition that “[t]he Appellate Body’s finding had pointed to some important aspects of these tests which deserved further consideration”).

\(^ {71}\) For example, prior to the adoption of the Appellate Body and panel Reports in *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/AB/R; WT/DS27/R/ECU; WT/DS27/R/GTM; WT/DS27/R/HND; WT/DS27/R/MEX; WT/DS27/R/USA), eight third parties and two non-parties issued statements. See Dispute Settlement Body, *Minutes of Meeting held on 25 September 1997,* pp. 14-25, WT/DSB/M/37 (4 November 1997).


\(^ {73}\) Dispute Settlement Body, *Minutes of the Meeting held on 27 January 2000,* paras 10-20, WT/DSB/M74 (22 February 2000).


\(^ {75}\) Dispute Settlement Body, *Minutes of Meeting held on 7 June 2000,* WT/DSB/M/83 (7 July 2000).
parties or non-parties in particular, expression of views might represent the only chance “to make a statement and voice criticism against a report.”

The tone of views also appears to vary across Members, with some interviewees noting apparent differences in tone between the EU and the U.S. in particular. Whereas the U.S. tends to be more willing to voice overt criticism of AB interpretations, the EU tends to be a bit more reluctant to express strong disapproval. A key word analysis of EU and U.S. report statements tentatively supports this observation, with the EU expressing relatively more “satisfaction” within its statements than the U.S. Differences in Members’ willingness to express overt disapproval or censure within report statements arguably relates to cultural differences and different attitudes about the proper role of international adjudicative bodies. While the personality of the individual delivering the oral statement may partly impact perceived tone, the influence of individual characteristics is likely minimal, as most of these statements are drafted prior to the DSB meeting and must be approved by the Member’s capital.

To a certain extent, Members already use report statements to provide interpretive feedback to the WTO bodies responsible for dispute resolution. Within interviews, a number of representatives indicated that the primary intended audience for these statements is the system as a whole (the Legal Affairs Division of the Secretariat, panelists, the AB, and the Appellate Body Secretariat), with the purpose being to place on the official record a government’s views on legal interpretations or procedural decisions. Some representatives noted that report statements can “pass a message” to the Secretariat or panelists in future disputes, particularly with respect to procedural issues. A few smaller or less active delegations, however, firmly averred that the Secretariat or AB members were not the intended audiences of such statements.

Many of the most active Members—particularly those that stressed the independence of the AB and the authoritativeness of their reports—did not see any value in regularly expressing criticism of a report’s reasoning or findings, and indicated they only voice a critical statement to signal that the issue raised is of considerable importance. Almost all representatives independently employed the language of “sending messages” to the AB or Secretariat, emphasizing that report statements “do have a systemic value for the legitimacy of the institution,” though the strength of the signal might depend on how many Members

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76 Interview 1.3, Geneva, Switzerland (13 January 2014).
77 Interview 2.4, Geneva, Switzerland (14 January 2014).
78 Interview 1.3, Geneva, Switzerland (13 January 2014).
79 Using the program WordSmith, this analysis found that the EU employed the term “satisfaction” within statements more often than would be expected by chance in comparison with U.S. report statements.
80 Interview 2.2, Geneva, Switzerland (14 January 2014); Interview 2.3, Geneva, Switzerland (14 January 2014).
81 Interview 3.4, Geneva, Switzerland (15 January 2014); Interview 5.5, Geneva, Switzerland (17 January 2014); Interview 5.6, Geneva, Switzerland (17 January 2014).
82 Interview 1.3, Geneva, Switzerland (13 January 2014); Interview 5.5, Geneva, Switzerland (17 January 2014).
84 Interview 1.3, Geneva, Switzerland (13 January 2014); Interview 2.2, Geneva, Switzerland (14 January 2014).
85 Interview 2.4, Geneva, Switzerland (14 January 2014).
expressed or supported the same view.  

Moreover, a number of representatives believe that the Secretariat’s Legal Affairs Division and the Appellate Body Secretariat are paying attention to their report views.  

Representatives from the Legal Affairs Division of the Secretariat and the Appellate Body Secretariat sit in on DSB meetings, and interviews with WTO officials confirmed that these two bodies pay particular attention to systemic and procedural issues raised by Members in the context of report adoption. To be sure, as almost all interviewees emphasized, whether particular views or statements actually influence or play a decisive role in subsequent decisions is a separate question, and if it does occur at all is likely “very subtle” due to the independent authority of the WTO’s judicial bodies.  

While the panels and the AB often cite the minutes of DSB meetings in relation to the procedural history of a dispute or as indirect evidence of a panel’s terms of reference, a search of all adopted reports to date indicates that they have never cited statements made prior to report adoption. This is not problematic, however, as we are not arguing that the panels or AB should begin to cite expression of views within their reports, but rather that they should look to such statements as a source of information about Members' interpretive preferences.  

For the purpose of our argument, this section provided considerable evidence that expression of report views does provide a systematic mechanism through which the WTO membership’s interpretive preferences could be made known to the Organization’s judicial bodies. However, as described above, the use of expression of views prior to report adoption is limited in important respects. Moreover the subset of governments that regularly express views is not representative of the distribution of wealth, trade dependency, size, power or degree of domestic democratic governance across the membership as a whole. For these reasons, we propose that a broader range of Members actively formulate and express report views, either individually or jointly. The following section further elaborates the normative justification for this proposal and outlines how it would work in practice, addressing potential obstacles and limitations to its implementation.  

IV. DELIBERATIVE ENGAGEMENT THROUGH EXPRESSION OF VIEWS  

As recently outlined by Ethan J. Leib, David L. Ponet, and Michael Serota, a fiduciary theory of judging is one that attempts to addresses the diverse—and oftentimes conflicting—responsibilities of judges within democracies. It views the judicial role in

86 Interview 5.5, Geneva, Switzerland (17 January 2014).  
87 Interview 2.4, Geneva, Switzerland (14 January 2014); Interviews 5.1, 5.2 and 5.5, Geneva, Switzerland (17 January 2014).  
88 Interview 2.3, Geneva Switzerland (14 January 2014).  
90 For example, the panel and the Appellate Body cited extensively to DSB meeting minutes in the context of US—Large Civil Aircraft (Second Complaint), in order to establish the procedural history regarding requests for Annex V procedures under the SCM Agreement. See Appellate Body Report, United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint), paras 8, 85, 388, 482, 538-9, 541, WT/DS353/AB/R (12 March 2012).  
91 Leib, Ponet & Serota, supra note 12, at 700.
terms of a fiduciary relationship, which is characterized by one actor (the fiduciary) holding “discretionary power over the practical interests of another (the beneficiary).”

In the domestic context, citizens represent the beneficiaries of courts to which they delegate authority over their legal interests. In the international context, a court’s set of beneficiaries differs across institutions. As mentioned previously, in the context of the ‘member-driven’ WTO, Members represent the primary constituents and beneficiaries that have delegated authority over their legal interests to the DSM.

Under a fiduciary theory, judges are under an obligation to engage in deliberative engagement with their beneficiaries. In the context of the WTO, skeptics might argue that such engagement could endanger the independence and impartiality of the DSM’s decision-makers. However, the obligation to engage in deliberative engagement does not require that the DSM always conform its decisions to the preferences of its beneficiaries. Rather, it stipulates that the DSM should consider and provide reasoned decisions that in some way speak to these views or interests. In addition, considerable evidence suggests that the DSM already pays attention to what is said within DSB meetings. The current problem is that these views rarely represent those of the membership as a whole. The duty of deliberative engagement also needs to be understood in relation to judges’ other obligations, namely care and loyalty. While care is meant to ensure reason-based decisions, the loyalty obligation emphasizes the importance of impartiality, which is the cornerstone of a judge’s ethical commitment.

The duty of deliberative engagement may further be seen in relation to the customary rules of interpretation on which DSU Article 3(2) specifies the DSM should rely, and particularly Article 32 of the Vienna Convention on the Law of Treaties (VCLT), which comes into play when supplementary means of interpretation are required. Article 32 directs the DSM to look to Members’ “intention when they accepted a given provision and their understanding as to its content,” and as a rule of interpretation encourages the DSM to fulfill its duty of deliberative engagement by actively seeking to uncover beneficiary preferences. In a similar fashion, report

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93 While industry organizations, corporations, consumer interest groups, and individual citizens may all be affected by trade measures and panel and Appellate Body reports and thus could be regarded as beneficiaries, their views will often be reflected within and through the expressed views of WTO Members, either in proceedings or through statements in meetings of the political bodies of the Organization. The DSU itself indirectly supports the claim that the membership as a whole, in contrast to the narrow subset of active participants in disputes, constitutes the beneficiaries. See DSU, supra note 7, art. 17(3) (establishing that “the Appellate Body membership shall be broadly representative of the WTO,” presumably so that the AB will render decisions that reflect the broader membership).
statements provide the DSM with supplementary information regarding current preferences or understandings of ambiguous provisions.

When the negotiating states agreed to provide for authoritative interpretations and amendments within the WTO Agreement, they arguably envisioned that the relationship between the WTO’s political and judicial bodies would entail a type of deliberative engagement. While the WTO Agreement strengthened the independence of the DSM, by insulating it from the direct Member control exercised under the GATT, it simultaneously encouraged interpretive feedback, by creating these mechanisms of legislative response. However, due to the practice of consensus decision-making within the WTO, governments have not been able to make effective use of the mechanism of authoritative interpretation in particular, depriving the DSM of a critical source of information regarding interpretive preferences. Compounding this imbalance, informal precedent within the dispute settlement system enables the first movers—active users of the WTO’s system since its inception—to delimit the range of preferred interpretations actively considered by the DSM. As parties to the dispute, the most active users not only possess numerous opportunities to present their legal arguments during the course of proceedings, but in practice they dominate statements made in the context of subsequent report adoption. Because the majority of views reaching the DSM represent only a minority of views potentially held by the WTO membership as a whole, the panels and AB are forced to operate in an environment of incomplete information regarding Members’ interpretive preferences, biased towards a powerful minority.

In contrast, a strategy of majoritarian activism—issuing judicial interpretations that a majority of (but not necessarily all) Members might be expected to adopt independently—represents a form of deliberative engagement that arguably helps international courts manage increased judicialization and the legitimacy problems associated with judicial lawmaking. While panels and the AB do sometimes adopt a strategy of majoritarian activism by assessing Article XX GATT defenses against policy outcomes on which a majority of countries would agree, this only occurs in a small number of disputes. Even if the WTO AB has occasionally interpreted the law in “ways that were unwanted by powerful actors,” the fact that it consistently and disproportionately receives feedback from a subset of Members suggests that their views inevitably inform jurisprudential developments. In this respect, the DSM is currently unable to pursue deliberative engagement through anything but a strategy of minority activism, a clearly questionable development.

Given that governments likely will not begin to employ authoritative interpretations, they should increase their use of expression of report views within DSB meetings as a functional substitute. An increase in the proportion of Members making statements has the potential to address the current imbalance in the feedback received by the DSM. In particular, governments should more actively engage in an iterative albeit

97 Stone Sweet & Brunell, supra note 7, at 64.
98 Id. Stone Sweet & Brunell examined all panel and AB reports that addressed the respondent government’s defensive claims under art. XX (GATT) or art. XV (General Agreement on Trade in Services) between 1995 and 2011, for a total of 22 reports.
99 Alter, Agents or Trustees, supra note 8, at 52.
indirect form of ‘dialogue’ when a report raises issues with potentially systemic implications or procedural matters. A greater and more representative sub-set of countries engaging in such a dialogue would benefit both the adjudicative bodies and the membership as a whole, and help strengthen the fiduciary relationship.

To address the issue of representativeness, a greater number of third and non-parties should seek to place their views on the record. Increasing the number of third and non-party report views would also lead to a broader focus within statements, as governments not affected directly by a report’s findings may focus more on system-wide implications. Presently, report views tend to reiterate legal positions pleaded during the dispute, with the winning party typically supporting the report and the losing party voicing unequivocal criticism, sometimes moving from criticism of a specific dispute finding to challenges to the DSM’s authority. Third or non-parties, with a relatively more modest stake in the dispute’s specific outcome, have fewer incentives to express narrow views and for this reason may provide more constructive guidance on Members’ interpretive preferences.

To be sure, increasing the number of views expressed would increase the length of DSB meetings and place additional resource burdens on many countries, giving rise to a potential tradeoff between widespread participation and efficiency. To address this, Members could establish a practice of coordinating interpretive preferences prior to DSB meetings and employing joint statements whenever feasible. Within GC meetings, governments often issue joint statements that express views on behalf of others (10.6 per cent of all statements made within the General Council between 1995 and 2012). For many of these statements, representatives speak on behalf of WTO coalitions or groups formed in the context of negotiations, based on shared positions or interests. Compared to GC meetings, however, they employ joint statements much less frequently within DSB meetings (0.8 per cent of all statements made within the DSB between 1995 and 2012).

This could be because the DSB is inherently more individualistic than the GC, as it focuses on specific disputes between two (or more) countries, and thus is not susceptible to coalitional or group statements. Members might not want to expressly take sides in a dispute by voicing support for an interpretation that may have benefited one party to the detriment of the other. For this reason, the idea of interpretive coalitions in the DSB could be diplomatically or politically untenable to certain governments. However, the practice of joint statements is still transposable to the DSB, where groups of countries could come to share common interpretive preferences. For example, common interpretive preferences emerged during discussion of the amicus curiae question within DSB and GC meetings in 2000 and following Honduras’ second panel request in the

100 See Schaffer & Trachtman, supra note 4, at 17.
101 For an overview of coalition groups within negotiations, see WTO, Groups in the negotiations, http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm.
102 Between 1995 and 2012, Members have issued 74 joint statements within DSB meetings, many of which expressed concern about another Member’s noncompliance with a DSB ruling.
103 Dispute Settlement Body, Minutes of Meeting held on 17 November 2000, paras 126-37, WT/DSB/M/92 (15 January 2001); General Council, Minutes of Meeting held on 22 November 2000, paras 4-130, WT/GC/M/60 (23 January 2001).
Moreover, the practice of forming coalitions within the DSB exists in the context of DSU review negotiations. In addition, third parties occasionally present joint written submissions or oral statements. The practice of joint interpretive statements within the DSB is thus possible and would help mitigate the potential tradeoff between widespread participation within and efficiency of DSB meetings. More critically joint statements would permit smaller delegations—that often cannot attend every DSB meeting—to place their interpretive views on the record, as a statement could be circulated to and agreed upon by the relevant Members beforehand.

A potential obstacle to increasing the number and representativeness of report views stems from Members’ hesitancy to put their views on the record, for fear of taking sides or because of uncertain implications for potential future disputes. This could be addressed if governments understood that the purpose of these statements would not be to adopt a position on the substantive dispute resolved within the report, but rather to consider implications for the jurisprudential development of the system as a whole. In addition, Members already express views within DSB meetings that might not always be well received by others, and there seems to be a custom that this is acceptable so long as they inform those with whom they disagree beforehand. They should also understand that they would not be formally bound by their interpretive view in the future, even if placed on the record of a DSB meeting. It is understandable that interpretive preferences of countries may change over time. Given the relative frequency with which reports are adopted (though admittedly not every interpretive issue will arise in every report), this mechanism, compared to the relatively static mechanism of authoritative interpretations, permits Members to update and change their interpretive positions as their preferences change.

A more serious concern is that many countries, particularly smaller delegations and non-users of the dispute settlement system, simply do not have any interest in expressing a view prior to report adoption. However, a number of less active and smaller

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104 On 25 September 2013, Honduras submitted a second panel request ten months after its original panel request. Australia questioned whether this could be considered the second panel request, subject to automaticity, given the lengthy period of time between requests. Members engaged in a protracted debate within the DSB, with 26 Members making a statement. See Dispute Settlement Body, Minutes of Meeting held on 25 September 2013, paras 4.1-4.68, WT/DSB/M/337 (13 January 2014). While not occurring within the context of report adoption, this discussion does demonstrate the existence of common interpretive preferences and Members’ willingness to express views even if to the detriment of one of the disputing parties.

105 For example, the delegations of Brazil, Paraguay and Uruguay decided to present a joint third-party statement in Argentina—Footwear. See Panel Report, Argentina—Safeguard Measures on Imports of Footwear, paras 6.1-6.12, WT/DS121/R (25 June 1999). In EC—Tariff Preferences, Bolivia, Colombia, Ecuador, Peru and Venezuela presented a joint third-party submission as the Andean Community, as did the Central American countries of El Salvador, Guatemala, Honduras and Nicaragua. See Panel Report, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, paras 5.1-5.42, 5.63-5.78, WT/DS246/R (1 December 2003). In EC—Sugar Subsidies, the African, Caribbean and Pacific (ACP) Sugar Supplying States (Barbados, Belize, Fiji, Guyana, Côte d’Ivoire, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts and Nevis, Swaziland, Tanzania and Trinidad and Tobago) presented both a joint written submission and a joint oral presentation. See Panel Report, European Communities—Export Subsidies on Sugar, paras 5.1-5.12, WT/DS265/R, WT/DS266/R, WT/DS283/R (15 October 2004).

106 Interview 5.6, Geneva, Switzerland (17 January 2014).
delegations indicated that this lack of interest stemmed largely from lack of expertise and knowledge about the jurisprudential implications of reports. The ability to actively express constructive views requires a level of expertise and resources that many Members do not possess currently, a limitation faced by both developing and smaller developed countries. Panel and AB reports often span several hundreds of pages and can address fairly complex and technical legal, economic and even scientific issues.

In order to address this obstacle, more resourced Members could take the lead in organizing working groups to explain and discuss interpretive issues raised by a report. Similar to how Members currently lobby for support on other issues within the DSB, one or more Members could hold informal meetings to help inform smaller, less-resourced Members about their views on particular interpretations, highlighting systemic implications. This would, at the very least, allow smaller Members to formulate slightly more informed positions regarding a report’s interpretations and implications. Even if these meetings did not lead to a lengthy or in-depth statement, they would facilitate the ability of many Members to put on the record support for or disagreement with clarifications or interpretations voiced by other Members. While having more active or resourced Members take the lead in organizing these working groups could lead to the same unrepresentative outcome—with DSB statements only representing these parties’ positions—other resourced Members with different interpretive preferences would be incentivized to convene their own working groups. Although there is a limited amount of time between the circulation and adoption of a report, Members could attend more than one working group and ultimately each Member retains the right to formulate its own position.

Another option, similar to U.S. state legislatures’ reliance on research agencies to monitor judicial interpretations of statutes, would be to establish neutral support bodies to provide jurisprudential overviews and analyses of reports for all Members. Such a support function could be provided by non-governmental organizations or law firms in Geneva with trade or WTO law expertise, many of which already hold workshops on particularly important dispute reports. Although such workshops play a critical role in improving Members’ understanding of the DSM’s jurisprudence, they typically occur after report adoption and are often restricted to selected Members. If convened prior to report adoption, these meetings could facilitate the expression of views by smaller or less-resourced Members within DSB meetings. Alternatively, Members could appoint a group of Secretariat officials within the Legal Affairs Division with the exclusive job of providing neutral summaries of key interpretive developments within reports, thereby fulfilling a role similar to that of legislative research agencies in the domestic context.

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107 Interview 4.8, Geneva, Switzerland (16 January 2014).
108 Interview 1.1, Geneva, Switzerland (13 January 2014); Interview 4.8, Geneva, Switzerland (16 January 2014).
110 Examples include the Advisory Centre on WTO Law (ACWL) or the International Centre for Trade and Sustainable Development (ICTSD), or law firms such as Sidley Austin LLP.
111 Interview 4.1, Geneva, Switzerland (16 January 2014).
Although the Legal Affairs Division is willing to provide legal research and analysis to individual Members, this is done only if so requested. For smaller delegations in particular, requesting information about interpretations contained within reports simply has lower priority than many other WTO responsibilities. However, if the Secretariat institutionalized the systematic provision of (necessarily brief) report overviews, this would provide less active Members with a critical resource to formulate their own interpretive preferences.

As noted previously, some Members use third party participation as a strategy for familiarizing themselves with WTO rules and jurisprudence and as a form of capacity building. Similarly, more active participation within DSB meetings would benefit both the DSM and those Members that have not been particularly active users of the system. More active DSB participation could potentially have the same type of capacity-building effect, particularly for developing countries, as “participation helps you understand certain dynamics…Attending the DSB meetings…is like being a third party.” By engaging in meaningful report discussions, Members that do not currently attend or express views will improve their experience and thus capacity to participate actively within DSB meetings and potentially future dispute proceedings.

Arguably, stepping outside the text of the WTO Agreement and formal mechanisms of legislative response could be considered overreaching or meddling with the Organization’s judicial bodies. However, the DSU does provide Members with the right to express views, which some Members already use to voice their interpretive preferences. Moreover, we are not arguing that report views should in any way bind future jurisprudence or that panels and the AB should always follow the interpretive preferences of a majority of Members—after all the DSM was delegated independent authority to interpret and clarify the WTO agreements. However, their delegated role is to do so in ways that help WTO Members achieve the goals of the Organization in the context of resolving a specific dispute. Interpretive views provide necessary information to the DSM in its independent development of jurisprudence, just as the ordinary meaning of text, the travaux preparatoires of Agreement provisions and other sources of law do.

V. CONCLUSION

Almost a decade ago, the Sutherland Report on the Future of the WTO suggested that the DSB could and should play a ‘more constructive role’ by establishing a special group of experts to analyze and report on particular dispute findings. The Report further proposed that the DSB could adopt these expert reports or use them to recommend an Article IX:2 authoritative interpretation. While the Sutherland proposal had the potential of overcoming many of the challenges addressed in this article, almost ten years later there have been no noticeable efforts to bring it to life.

112 Interview 3.4, Geneva, Switzerland (15 January 2014). One Member that has actively pursued this strategy claimed that its country now was “in a better position than 20 years ago where they needed someone from the outside to tell them that there was a problem…Through experience we have learned how to use the system.” Interview 5.3, Geneva, Switzerland (17 January 2014).
113 Interview 4.8, Geneva, Switzerland (16 January 2014).
114 Sutherland et al., supra note 18, para. 250.
Time has come for a renewed effort to address the growing institutional imbalance within the WTO and better enable the DSM to fulfill its fiduciary duties. To this end, this article has sought to develop a proposal that should prove useful to both WTO Members and the DSM. Drawing on the strengths of previous proposals but addressing their current shortcomings, we encourage more Members to adopt an active and forward-looking practice of expressing views in the context of report adoption within DSB meetings. This proposal has a real chance of succeeding due to the fact that it is rooted in individual practices of Members, a large number of which desire to make the DSB more useful in terms of providing constructive feedback to the panels and Appellate Body. Given that the Organization is comprised of 160 Members, with different and often conflicting interests, the ability to reach the requisite consensus for an authoritative interpretation is limited. Our proposal has the potential to circumvent this decision-making requirement in a way that improves the interpretive feedback available to the DSM.

Most Members and WTO officials proudly view the WTO’s dispute settlement system—and particularly the Dispute Settlement Body—as the most efficient of the WTO bodies. In a sense, however, the DSB has become a victim of its own success, resulting in an almost hyper-efficient body, wherein the ability to expedite disputes takes precedence over developing a broader understanding of interpretive developments within the WTO. By encouraging more Members to engage actively in dialogue with each other regarding jurisprudential developments, our proposal seeks to strengthen the deliberative role of the DSB without undermining its efficient administration of the DSU. In order to do so, Members need to move away from using report statements to simply reiterate legal positions pleaded during the dispute, and should instead use such statements to engage in a cooperative endeavor with the DSM to strengthen WTO jurisprudence for the future. The DSM obviously does not have to decide future disputes based on views expressed—whether a minority or a majority—but it should, particularly in light of its fiduciary duties, be aware of these interpretive preferences and take them into account as one of the many factors relevant to interpreting the WTO agreements.

More critically, the interpretive views available to the DSM should reflect those of the membership as a whole. The hyper-efficiency of the DSB has left a large number of Members that rarely use the system with little to no awareness or understanding of what goes on in the ‘black box’ of the DSM. Similar to the way that third-party participation has become a critical avenue for influencing the outcomes of disputes, we encourage Members that rarely participate in dispute settlement to reconsider the DSB as a useful platform that may have an “important effect on the thinking of the AB members and the panelists for future cases.”

It is important to reiterate that our proposal is not to encourage Members to

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115 Interviews 1.1 & 1.3, Geneva, Switzerland (13 January 2014); Interviews 2.1 and 2.2, Geneva, Switzerland (14 January 2014); Interview 4.5, Geneva, Switzerland (16 January 2014).
116 Interview 5.1, Geneva, Switzerland (17 January 2014).
117 See Marc L. Busch & Eric Reinhardt, Three’s a Crowd: Third Parties and WTO Dispute Settlement, 58 WORLD POL. 446 (2006).
118 Sutherland et al., supra note 18, para. 250.
overreach, meddle or interfere with the judicial bodies of the Organization. The DSM was delegated independent authority to interpret and clarify WTO rules, and views expressed in DSB meetings should not in any way be seen to bind panels or the AB. Any political interference or direct interaction with the panelists or Appellate Body members outside of dispute settlement proceedings would seriously undermine the credibility of the system. This does not mean, however, that indirect deliberative engagement cannot or should not occur via the official minutes of DSB meetings, with the sole expectation being that the Members and the DSM listen to one another. To this end, it is crucial that Members understand how more active DSB participation and expression of views in the context of report adoption might benefit them now and in the future. If Members see the value in changing their current practices, either individually or jointly, and perhaps with the institutional support of the Secretariat, this proposal has a real chance of succeeding.
Table 1: WTO Dispute Reports Adopted, 1995-2012

<table>
<thead>
<tr>
<th>Agreement Type</th>
<th>Reports Adopted</th>
<th>Total Report Statements</th>
<th>Average Statements per Report</th>
<th>% Members Represented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panel Reports</td>
<td>49</td>
<td>221</td>
<td>4.43</td>
<td>27% (36 Members)</td>
</tr>
<tr>
<td>Appellate Body &amp; Panel Reports</td>
<td>92</td>
<td>641</td>
<td>6.97</td>
<td>39% (51 Members)</td>
</tr>
<tr>
<td>Article 21.5 Reports</td>
<td>28</td>
<td>180</td>
<td>6.43</td>
<td>24% (31 Members)</td>
</tr>
<tr>
<td>GATT, GATS</td>
<td>32</td>
<td>210</td>
<td>6.56</td>
<td>27% (36 Members)</td>
</tr>
<tr>
<td>ADA, SCM, TBT</td>
<td>61</td>
<td>350</td>
<td>5.74</td>
<td>25% (33 Members)</td>
</tr>
<tr>
<td>All other Agreements</td>
<td>48</td>
<td>298</td>
<td>6.21</td>
<td>33% (43 Members)</td>
</tr>
</tbody>
</table>

**Source:** Author’s dataset of all statements made within the WTO Dispute Settlement Body from 1995-2012. Minutes of DSB meetings obtained from the WTO’s *Documents Online* system.

**Note:** Percent of Members Represented calculated excluding all European Union member states. Figures on agreement type calculated only for panel and Appellate Body reports (excluding Article 21.5 reports).
Table 2 – Member Participation within the Dispute Settlement Body

<table>
<thead>
<tr>
<th>Rank</th>
<th>Member (Total Report Statements)</th>
<th>Member (Report Statements by Years Member)</th>
<th>Member (Report Statements by Dispute Participation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>USA (169)</td>
<td>USA (8.90)</td>
<td>Malaysia (6.5)</td>
</tr>
<tr>
<td>2</td>
<td>European Union (150)</td>
<td>European Union (7.90)</td>
<td>Hong Kong, China (3.33)</td>
</tr>
<tr>
<td>3</td>
<td>Canada (69)</td>
<td>Canada (3.63)</td>
<td>Antigua and Barbuda (2)</td>
</tr>
<tr>
<td>4</td>
<td>Japan (57)</td>
<td>Japan (3)</td>
<td>Philippines (1.64)</td>
</tr>
<tr>
<td>5</td>
<td>India (53)</td>
<td>India (2.79)</td>
<td>Egypt (1.25)</td>
</tr>
<tr>
<td>6</td>
<td>Brazil (49)</td>
<td>Brazil (2.58)</td>
<td>Panama (1.14)</td>
</tr>
<tr>
<td>7</td>
<td>Australia (46)</td>
<td>Australia (2.42)</td>
<td>Costa Rica (1.13)</td>
</tr>
<tr>
<td>8</td>
<td>Mexico (44)</td>
<td>Mexico (2.32)</td>
<td>Indonesia (1)</td>
</tr>
<tr>
<td>9</td>
<td>Hong Kong, China (40)</td>
<td>Hong Kong, China (2.11)</td>
<td>Cameroon (1)</td>
</tr>
<tr>
<td>10</td>
<td>Republic of Korea (36)</td>
<td>China (1.92)</td>
<td>Hungary (1)</td>
</tr>
<tr>
<td>11</td>
<td>Argentina (34)</td>
<td>Republic of Korea (1.90)</td>
<td>Poland (1)</td>
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<tr>
<td>12</td>
<td>China (25)</td>
<td>Argentina (1.79)</td>
<td>Switzerland (1)</td>
</tr>
<tr>
<td>13</td>
<td>Chile (24)</td>
<td>Chile (1.26)</td>
<td>Saint Lucia (1)</td>
</tr>
<tr>
<td>14</td>
<td>Thailand (20)</td>
<td>Thailand (1.05)</td>
<td>Ecuador (0.94)</td>
</tr>
<tr>
<td>15</td>
<td>Norway (19)</td>
<td>Norway (1)</td>
<td>USA (0.93)</td>
</tr>
<tr>
<td>16</td>
<td>Philippines (18)</td>
<td>Philippines (0.95)</td>
<td>European Union (0.90)</td>
</tr>
<tr>
<td>17</td>
<td>Costa Rica (17)</td>
<td>Costa Rica (0.90)</td>
<td>Argentina (0.85)</td>
</tr>
<tr>
<td>18</td>
<td>Ecuador (16)</td>
<td>Ecuador (0.89)</td>
<td>Chile (0.83)</td>
</tr>
<tr>
<td>19</td>
<td>Malaysia (13)</td>
<td>Malaysia (0.68)</td>
<td>Canada (0.78)</td>
</tr>
<tr>
<td>20</td>
<td>Guatemala (12)</td>
<td>Guatemala (0.63)</td>
<td>Cote d’Ivoire (0.75)</td>
</tr>
</tbody>
</table>

Source: Author’s dataset of all statements made within the WTO Dispute Settlement Body from 1995-2012. Minutes of DSB meetings obtained from the WTO’s Documents Online system.

Note: Rankings for Report Statements by Dispute Participation calculated by normalizing total report statements with the number of individual empaneled disputes in which a Member participated as a party or third-party.
Table 3 – Representativeness of Members that Express Report Views

<table>
<thead>
<tr>
<th></th>
<th>Members that have made &gt; 1 report statement</th>
<th>Entire WTO Membership</th>
<th>Difference in Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDP per capita (current USD)</td>
<td>26,864.60</td>
<td>13,259.88</td>
<td>+13,604.72</td>
</tr>
<tr>
<td>Share of International Trade in GDP (%)</td>
<td>79.56</td>
<td>86.88</td>
<td>-7.32</td>
</tr>
<tr>
<td>Total Population</td>
<td>115,310,578.3</td>
<td>46,251,507.6</td>
<td>+69,059,070.7</td>
</tr>
<tr>
<td>Urban Population (% of total)</td>
<td>62.46</td>
<td>51.66</td>
<td>+10.8</td>
</tr>
<tr>
<td>Military Expenditure (thousands of current USD)</td>
<td>19,630,728.4</td>
<td>7,355,902.92</td>
<td>+12,274,825.48</td>
</tr>
<tr>
<td>Military Personnel (thousands)</td>
<td>262.76</td>
<td>112.00</td>
<td>150.76</td>
</tr>
<tr>
<td>Polity IV score</td>
<td>6.199</td>
<td>3.350</td>
<td>+2.849</td>
</tr>
</tbody>
</table>


**Note:** Averages calculated for all Members during years as a WTO Member only (where data available). Averages calculated excluding all European Union member states. For the European Union, averages for GDP per capita, Total Population, Military Expenditure and Military Personnel calculated by summing EU member state averages; EU averages for Share of International Trade in GDP, Urban Population and Polity IV score calculated by averaging EU members states averages.
Figure 1 – Third Party Expression of Report Views

Source: Author’s dataset of all statements made within the WTO Dispute Settlement Body from 1995-2012. Minutes of DSB meetings obtained from the WTO’s Documents Online system.