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(De)Legitimation at the WTO Dispute Settlement Mechanism

Cosette D. Creamer & Zuzanna Godzimirska*

ABSTRACT

International courts employ a variety of legitimation strategies in order to establish and maintain a sound basis of support among their constituents. Existing studies on the legitimating efforts and legitimacy of the World Trade Organization's (WTO) judicial bodies have relied largely on theoretical or normative priors about what makes them legitimate. In contrast, this Article directly connects the study of courts' legitimating efforts with their effects by empirically mapping the reception of the WTO Dispute Settlement Mechanism's (DSM) exercise of authority by the system's primary constituents—WTO Members. Using an original dataset of WTO Member statements within meetings of the Dispute Settlement Body from 1995–2013 and a series of interviews, this Article provides a descriptive analysis of expressed views on the DSM's exercise of authority over time and across subsets of Members. Through an in-depth examination of statements on focal reports, this Article sheds new light on the sources of the DSM's legitimacy by identifying practices that contribute to reducing or enhancing it in the eyes of the primary constituents of this international institution.

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TABLE OF CONTENTS

I.	INTRODUCTION	276
II.	LEGITIMATION AND LEGITIMACY	280
III.	DATA AND METHODS.....	285
IV.	GENERAL PATTERNS IN THE DSM'S PERCEIVED LEGITIMACY.....	289
V.	SOURCES OF THE DSM'S PERCEIVED LEGITIMACY	296
	A. <i>The Early Years: 1995–2002</i>	298
	B. <i>Ten Years On: 2003–2006</i>	308
	C. <i>The Recent Years: 2007–2013</i>	311
	D. <i>Summary of Focal Report Statements</i>	317
VI.	CONCLUSION.....	319

I. INTRODUCTION

Since the transition from the ad hoc dispute panels under the General Agreement on Tariffs and Trade (GATT) to the more institutionalized Dispute Settlement Mechanism (DSM) of the World Trade Organization (WTO), legal scholars and trade lawyers have focused extensive commentary on how the WTO's adjudicative bodies seek to gain or maintain legitimacy among various constituents.¹ Some argue that WTO dispute settlement panels exercise judicial economy in order to appease the wider membership when governments are ambivalent about a ruling's future consequences.² Others contend that the Organization's Appellate Body (AB) adopted an activist approach to procedural issues during its early years as a means to cultivate its legitimacy among WTO Members,³ while still

1. The WTO dispute settlement panels and the Appellate Body together comprise "the Dispute Settlement Mechanism" (DSM), "the adjudicative bodies," or "the quasi-judicial bodies" of the WTO. Panels consist of experts selected on an ad hoc basis to resolve disputes between WTO Members, while the Appellate Body is a permanent body responsible for reviewing the legal aspects of panel reports if and when those are appealed. See Understanding on the Rules and Procedures Governing the Settlement of Disputes, arts. 16, 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 365–67 (1999) [hereinafter DSU].

2. See Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 INT'L ORG. 257, 277 (2010) (arguing that judicial economy is a political choice that results when Members submit non-partisan briefs because such "mixed" testimony indicates to the adjudicative body that Members consider how resultant case law will affect their future interests as a defendant or complainant).

3. See James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2 WORLD TRADE REV. 65, 67 (2003) (proposing that the Appellate Body made procedural moves early on that improved the odds that the DSU would survive).

others emphasize the AB's use of "majoritarian activism" within rulings as a means to overcome government challenges to its exercise of authority.⁴

Relatedly, a few scholars have sought to understand the *effects* that various institutional practices have on the legitimacy of these bodies. Some argue that the DSM's legitimacy depends on balancing competing values, such as fair procedures, coherence and integrity in legal interpretation, and institutional sensitivity.⁵ Others argue that the dispute panels' and Appellate Body's ability to reconcile multilateral trade liberalization with other, sometimes conflicting, values is crucial for its maintenance of public support.⁶ Moreover, a significant number of proposals have been put forward regarding how the DSM's legitimacy may be strengthened.⁷

The vast majority of claims about the DSM's legitimacy and related proposals to strengthen it rely on theoretical priors about what makes international courts (ICs)—and the DSM specifically—

4. "Majoritarian activism" refers, in this context, to court rulings that reflect the majority of states, i.e., "outcomes that states might adopt under majoritarian, but not unanimity, decision rules." 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, 63–64 (2012); see also *id.* at 81–85.

5. See, e.g., Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 35, 41–68 (Joseph Weiler ed., 2000).

6. Jeffrey Lagomarsino, *WTO Dispute Settlement and Sustainable Development: Legitimacy Through Holistic Treaty Interpretation*, 28 PACE ENVTL. L. REV. 545, 545 (2011) ("[T]he WTO's ability to reconcile multilateral trade liberalization with other, sometimes conflicting, public values, is a central concern to the institution's legitimacy . . ."); see also Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 30–31 (1999) (suggesting that the Appellate Body's use of *in dubio mitius* reasoning in the EC–Hormones case, see Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/ARB (adopted July 12, 1999), enhanced its legitimacy).

7. 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, 813 (2005) (urging Members to make use of authoritative interpretations and warning that "if the legislative response . . . is not available or not working, the independent (quasi-)judiciary becomes an uncontrolled decision-maker and is weakened in its legitimacy"); Lagomarsino, *supra* note 6, at 565–66 (proposing that the judicial bodies of the WTO accord greater deference to Members by incorporating international law into WTO jurisprudence); Joshua Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26 J. INT'L ECON. L. 693, 733 (2005) (suggesting that the Appellate Body articulate justifications for its decisions that "take into account the sovereignty-enhancing role of WTO membership"); Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints* 98 AM. J. INT'L L. 247, 274–75 (2004) (proposing, *inter alia*, that the Appellate Body give greater consideration to the legislative history, context, and object and purpose of the WTO agreements, and make greater use of avoidance techniques).

legitimate. Very few, if any, are grounded in empirical evidence of what makes them legitimate in the eyes of various constituents. In contrast, studies on the legitimating efforts of panels and the Appellate Body—while empirical in nature—have neglected to evaluate the effects of these efforts on the actual or perceived legitimacy of the DSM. The aim of this Article is to bridge this gap between the legitimating efforts of the DSM and their effects by mapping how the DSM's practices have been received by its main constituents—the WTO Members—and by tracing how specific practices have differentially affected Members' views on the legitimacy of the WTO's adjudicative bodies.

To that end, this Article systematically maps WTO member states' expressed views on the DSM's exercise of its judicial authority, drawing on an original dataset of statements made by WTO Members within meetings of the WTO Dispute Settlement Body (DSB) from 1995–2013.⁸ The Article applies a mixed methods approach, combining individual text classification with in-depth analysis of statements of interest. The former provides an analysis of fluctuations over time and variation across governments in the perceived legitimacy of the DSM. Qualitative textual analysis is then used to uncover practices that have elicited substantial (dis)satisfaction among various subsets of Members over the years, thereby shedding light on the sources of the DSM's perceived legitimacy. In order to better understand the context, practices, and motivations of statements made within DSB meetings, this Article also draws from a series of interviews with Member representatives and WTO Secretariat officials.⁹

Political scientists and socio-legal scholars have long recognized that the legitimacy of judicial institutions—and courts in particular—proves central to the exercise of their authority, decisional outcomes, and second-order compliance.¹⁰ Despite the large number of

8. Authors' dataset available on request.

9. A total of twenty-nine interviews were conducted from January 13–17, 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, and 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. Interviewed Members 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.

10. See James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 460 (1995) (claiming that legitimacy is the most important attribute for a legal institution because it is the foundation for their authority and, therefore, effectiveness). See generally TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (examining the establishment and operation of judicial review in Taiwan, Korea, and Mongolia as

comparative studies (both theoretical and empirical) on the legitimacy of *domestic courts*, little systematic or empirical analysis has been conducted on the perceived legitimacy of international judicial bodies, such as the WTO DSM.¹¹ Yet this research is just as—if not more—important than studies on their domestic counterparts, particularly given that ICs cannot rely upon the same “presumption of legitimacy” typically enjoyed by national institutions. Moreover, such studies are critical given the fact that the perceived legitimacy of ICs may have intermediate effects on their independence, authority, and effectiveness.¹²

By identifying when the membership as a whole has expressed relative (dis)satisfaction with the DSM’s operation, this Article contributes to separating out the institution’s perceived legitimacy from regular complaining or griping by individual governments whose interests are directly affected by the DSM’s ruling (i.e., the parties to the dispute).¹³ Understanding when and why the DSM’s exercise of authority has been challenged provides important insights into which of the DSM’s practices are viewed as (de)legitimizing in the eyes of its primary constituents—WTO Members. In doing so, this Article lays important groundwork for future research dealing with issues related to the causes and consequences of the perceived legitimacy of the WTO’s adjudicative bodies.¹⁴

influenced by institutions and politics, not culture, and finding that the more diffuse the politics, the more active the court); RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008) (demonstrating that courts in less diffuse political regimes serve important governance functions such as establishing social control, bolstering the regime’s claim to legal legitimacy, strengthening administrative compliance, facilitating trade and investment, and implementing controversial policies); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (arguing that people obey the law if they believe it to be legitimate, not because they fear punishment, and that, therefore, judicial institutions should strive to make the system worthy of respect, not feared).

11. See Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 321, 321, 323, 329, 337 (Jeffrey Dunoff & Mark A. Pollack, eds., 2013) (noting the recent shift in interest from legality to legitimacy, but the continued lack of empirical study with regards to the standards of legitimacy).

12. See Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES IN L. 479, 483 (2013) (quoting Gibson & Caldeira, *supra* note 10, at 490) (“[L]egitimacy ‘provides courts authority; it allows them the latitude necessary to make decisions contrary to the perceived immediate interests of their constituents. Since courts typically have neither the power of the “purse or the sword,” this moral authority is essential to judicial effectiveness.”); see also MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 35 (Guenther Roth & Claus Wittich eds. 1968) (recognizing that the legitimacy of international law is undermined by the lack of a sufficiently powerful enforcement agency).

13. See Helfer & Alter, *supra* note 12, at 502 (noting that that a controversial court is not the same as one that lacks legitimacy).

14. Within existing literature, this type of legitimacy is interchangeably referred to as sociological, social, descriptive, empirical, or popular legitimacy. See, e.g.,

The Article proceeds as follows. Part II further unpacks the related concepts of legitimation and legitimacy and describes how we operationalize the latter in the context of the WTO DSM. Part III briefly outlines the data and methods employed to assess the DSM's perceived legitimacy, namely text classification and analysis of government statements within the primary political body responsible for the dispute settlement system, the Dispute Settlement Body. Part IV describes aggregate trends in these revealed views, or the perceived legitimacy of the DSM, focusing on statements issued in the context of report adoption as those most likely to express a view on the DSM's exercise of authority. Part V turns to an in-depth analysis of individual statements on "focal" reports—those that elicited widespread engagement by WTO Members—over the past twenty years. Part VI concludes with a discussion of the Article's implications for our understanding of the WTO's legitimacy and outlines directions for future research.

II. LEGITIMATION AND LEGITIMACY

International courts—like many other institutions—employ a wide variety of legitimation strategies in order to establish and maintain a sound basis of support among their constituents.¹⁵ Existing scholarship has focused on a court's selection of justiciable cases,¹⁶ interpretation techniques,¹⁷ and citation practices,¹⁸

Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 (1999); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 109–10 (2009).

15. See Rodney Barker, *Legitimacy, Legitimation, and the European Union: What Crisis?*, in LAW AND ADMINISTRATION IN EUROPE: ESSAYS IN HONOUR OF CAROL HARLOW 157, 163–64 (Paul Craig & Richard Rawlings eds., 2003); Dominik Zaum, *International Organizations, Legitimacy, and Legitimation*, in LEGITIMATING INTERNATIONAL ORGANIZATIONS 3, 10–12, 16–19 (Dominik Zaum ed., 2013) (arguing that international organizations need to consider their audience when deciding which legitimation strategy to employ because the expectations of different constituents are likely to conflict with regard to the desirability of the status quo, propriety of authority relationships, and suitability of new roles in light of social change).

16. See Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400 (2009) (seeking to define and delimit 'gravity' as it relates to the ICC's policy of justiciability in order to more clearly understand the jurisdictional limits of the Court).

17. See Lagomarsino, *supra* note 6; George Lestas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 106 (Andreas Føllesdal, Birgit Peters & Geir Ulfstein eds., 2013) (examining case law to demonstrate how judicial interpretation of the European Convention on Human Rights has evolved over time to accommodate "constant and drastic social changes" and finding that such evolutive interpretation is essential to the legitimacy of the European Court of Human Rights).

providing insights into how various ICs attempt to acquire or maintain legitimacy. Yet research on such legitimation efforts falls prey to the criticism that the underlying rationales of international judges are not directly observable.¹⁹ Scholars thus infer legitimating motivations from revealed behavior, which is classified as “legitimizing” in reference to some prior (normative) conception of legitimacy.

In contrast, assessment of the *effects* of various judicial practices on a court’s legitimacy has both a normative and an empirical dimension. In the normative sense, an IC is legitimate when it is considered *worthy* of support.²⁰ Evaluation of the normative legitimacy of the WTO’s DSM requires evaluation of the conditions under which it *should* be considered legitimate, drawing from moral, political, and legal theory.²¹ In the descriptive sense, on the other hand, legitimacy relates to whether an IC is “widely *believed* to have the right to rule,”²² a factual question susceptible to empirical evaluation of constituents’ views on the institution’s exercise of authority.²³ Such empirical evaluation in the context of the WTO requires addressing two relevant issues.

The first relates to the conceptual boundaries of the legitimacy of the DSM. While scholarly discussion about the legitimacy of institutions is wide-ranging, considerable disagreement remains over the concept’s definition and the methods employed to evaluate its presence empirically. At a very basic level, legitimacy relates to constituents’ beliefs about the right of an actor or institution to exercise authority, a concept that can be further disaggregated by drawing on David Easton’s distinction between specific and diffuse support of political authority.²⁴ In the context of the WTO, specific support for the DSM’s exercise of authority refers to Members’ satisfaction with particular dispute decisions or judgments.

18. See Yonatan Lupu & Eric Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POLIT. SCI. 413 (2011) (arguing that international courts, similarly to domestic courts, cite to their own previous case law to enhance the legitimacy of their judgments).

19. See Smith, *supra* note 3, at 74.

20. See Bodansky, *supra* note 14, at 602 (distinguishing between measurements of actual legitimacy versus perceived legitimacy to highlight the necessity of popular support to a regime’s legitimacy).

21. Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW 309, 313 (Rüdiger Wolfrum & Volker Röben eds., 2008).

22. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405 (2006).

23. See Bodansky, *supra* note 21; Birgit Peters & Johan Karlsson Schaffer, *The Turn to Authority Beyond States*, 4 TRANSNAT’L LEGAL THEORY 315, 334–35 (2013) (citing Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and Its Politicization*, 4 INT’L THEORY 69, 83–84 (2012)).

24. See David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435, 436–37 (1975).

Satisfaction or support derives from the extent to which Members perceive these rulings to fulfill an individual Member's or the collective Membership's objectives, needs or preferences.²⁵ In theory, a Member may convey specific support for a dispute ruling but have little broader trust in the system or believe that it is not exercising rightful authority more generally.

Diffuse support, in contrast, tends to be more durable and generalized and will typically continue even when a Member disagrees with a particular dispute ruling. Indeed, diffuse support often helps Members tolerate specific decisions to which they are opposed.²⁶ Because such support is not tied to any particular decisional output of the DSM—at least in terms of fulfilling Members' objectives, needs, or preferences at a given moment in time—it *tends* to fluctuate less than specific support, although it can still change within relatively short periods of time. Michael Zürn, Michael Binder, and Matthias Ecker-Ehrhardt further develop this distinction between specific and diffuse support in identifying two layers of recognition: one relating to authority and the other to legitimacy.²⁷ The first layer refers to constituents' "recognition that an authority is considered *per se* functionally necessary in order to achieve certain common goods." Such general acceptance of the necessity of an institution's authority is a precondition for the expression of specific and diffuse support, but does not otherwise impact the institution's legitimacy.²⁸ The second layer represents the "acknowledgement of the *rightful* exercise of authority" by an institution, and may be manifested through expressions of diffuse support.²⁹

Empirical evaluation of constituents' recognition of or support for an institution, such as the DSM, thus requires assessing: (1) acceptance of the general authority of the DSM (recognition of the first layer); (2) views on its *exercise* of authority more generally (recognition of the second layer and diffuse support); and (3) views on whether specific decisions fulfill a Member's objectives, needs, or

25. See *id.* at 437–39 (stating that if people are aware of a connection between their need and the behavior of the political authority, specific support is maintained by the satisfaction constituents "feel they obtain from the perceived outputs and performance of the political authorities"); see, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 1 November 2002*, WT/DSB/M/135 (Jan. 30, 2003), ¶ 3 (summarizing the US representative's mixed satisfaction with a Panel Report that allowed the United States to impose countervailing duties against softwood imports, but did not determine the amount).

26. See Easton, *supra* note 24, at 444–45 (defining diffuse support as "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed.").

27. See Zürn et al., *supra* note 23, at 83–85 (arguing that legitimacy and authority of governing bodies are independent concepts because constituents can recognize authority without bestowing legitimacy).

28. *Id.* at 83.

29. *Id.* (emphasis added).

preferences (specific support). An institution may be considered functionally necessary to achieve certain objectives (1), even in instances where governments disagree with particular outcomes (3), but still be perceived as illegitimate with respect to the way it exercises its authority more generally (2). In creating and continuing to accept the jurisdiction of the DSM, WTO Members recognize the necessity of a judicial institution to resolve disputes, in order to reduce barriers to free trade and clarify ambiguous WTO obligations (1).³⁰ A Member may express approval of particular dispute findings as satisfactorily settling the dispute, vindicating their position and/or claims, or furthering the trade interests of the collective membership (expression of specific support) (2). It could additionally indicate that a ruling helped to “set an important precedent to guide the future operation of the dispute settlement system”³¹ or reaffirm its commitment to the authority of the DSM in adjudicating disputes, despite voicing concerns with the manner in which it interpreted a particular provision or evaluated the evidence before it (expression of diffuse support) (3).³²

This Article focuses on Members’ support of panels’ and the Appellate Body’s *exercise* of authority—both within particular dispute rulings and more broadly ((2) and (3) above). Member statements within meetings of the DSB often contain elements of both specific and diffuse support or criticism, which makes entirely separating out one from the other when classifying statements in practice impossible. Although individual expressions of *specific* support tell us little about whether or to what extent a government, much less the collective Membership, perceives the DSM’s exercise of authority as legitimate more generally, *cumulative* expressions of specific support—over time by one government or across a broad subset of the Membership—may indicate, albeit indirectly, perceived legitimacy and more diffuse support.

30. This type of acceptance may also change over time and vary across actors. See, e.g., Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, LAW & CONTEMP. PROBS. (forthcoming 2015) (explaining the rapid success of the Appellate Body as a product of its extensive authority, procedural improvements on its predecessor GATT, and the lack of any meaningful alternative for the resolution of trade disputes); Karen J. Alter, Laurence R. Helfer & Mikael R. Madsen, *How Context Shapes the Authority of International Courts*, LAW & CONTEMP. PROBS. (forthcoming 2015) (proposing a five-level framework for assessing the strength of an international court’s authority).

31. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 22 April 1998*, WT/DSB/M/45 (June 10, 1998), at 9.

32. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 15 July 2011*, WT/DSB/M/299 (Sept. 1, 2011), ¶ 5 (summarizing the Thailand representative’s specific disagreements with the Appellate Body Report on customs and fiscal measure on cigarettes from the Philippines, but also noting that “Thailand was strongly supportive of the existence of a binding system of dispute settlement in the multilateral trading system”).

A second related challenge pertains to specifying how fluctuations in Members' expressed views on the DSM's exercise of authority relate to (de)legitimation of the institution. This entails identification of the DSM's practices that contribute to enhancing its general legitimacy and thus represent *sources* of diffuse support in the eyes of WTO Members. While there has been a tendency in recent years to warn about the legitimacy crises of various international institutions (and courts in particular), very few have clearly distinguished between or systematically identified expressions of specific and diffuse support.³³ To remedy this, this Article examines reports that elicited large proportions of third and non-party statements (so-called "focal" reports). Because dispute outcomes typically affect third and non-parties less directly than parties, third and non-parties to a dispute often devote their statements to procedural issues or issues implicating systemic interests.³⁴ For this reason, examining the content of statements issued in the context of such "focal" reports permits identification of the recurring issues raised by Members, which in the aggregate indicate sources of the DSM's legitimacy. Rather than relying on theoretical or normative priors about what makes the DSM legitimate, this Article instead identifies sources of the DSM's legitimacy through an analysis of the expressed views of a significant proportion of the Membership in the context of discussing a particular ruling.

Identifying sources of the DSM's legitimacy does not necessarily tell us whether and how higher or lower levels of diffuse support influence subsequent judicial practices. Some argue that criticism of a court's exercise of judicial authority may eventually contribute to strengthening its legitimacy in that such criticism usually precedes periods of judicial evolution in response to weak support.³⁵ While this Article does not directly speak to this issue, Part V identifies a number of practices that prompted higher or lower levels of aggregate support among the membership, which may provide the WTO with

33. See, e.g., Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 LEIDEN J. INT'L L. 491 (2012) (discussing the legitimacy crisis in terms of consent legitimacy, purposive legitimacy, universal values legitimacy, and performance legitimacy); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001) (addressing a crisis of legitimacy of the Committee on Trade and Environment without mentioning diffuse versus specific support); Steinberg, *supra* note 7.

34. Interview 1.3, Geneva, Switz. (Jan. 13, 2014); Interview 2.4, Geneva, Switz. (Jan. 14 2014); Interview 3.2, Geneva, Switz. (Jan. 15, 2014).

35. Mikael R. Madsen, *Explaining the Power of International Courts in their Contexts: From Legitimacy to Legitimation*, in 2012/07 RSCAS POLICY PAPER: COURTS, SOCIAL CHANGE AND JUDICIAL INDEPENDENCE 23, 24 (Adriana Silvia Dreyzin de Klor, Miguel Poiarses Maduro & Antoine Vauchez eds., 2012).

guidance on how to respond to sharp fluctuations in—or even a crisis of—its perceived legitimacy.

Before turning to an examination of trends in Member statements and identification of sources of the DSM's legitimacy, the following Part briefly describes the data and methods employed in this Article.

III. DATA AND METHODS

The General Council sitting as the Dispute Settlement Body (DSB), a political organ consisting of WTO Member representatives that is responsible for administering the WTO dispute settlement system, provides a critical public forum for government representatives to engage actively with the operation of the Dispute Settlement Mechanism.³⁶ The DSB meets for regular meetings about once a month, although special meetings may be—and often are—requested by Members in order to meet DSU-imposed deadlines.³⁷ One of the primary functions performed by the DSB is to “adopt” dispute reports, after which the ruling legally binds parties to the dispute.³⁸ All Members—regardless of whether they participated as a party or third party in the dispute—have the right to express a view on the report being considered for adoption, placing these “report statements” on the official and public record.³⁹ While the DSB meets behind closed doors, the Secretariat keeps meeting minutes (considered verbatim records and not summaries of Member

36. 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. See Marrakesh Agreement Establishing the World Trade Organization art. IV, Apr. 15, 1994, 1867 U.N.T.S. 154, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999) [hereinafter WTO Agreement]. The official function of the DSB is to “administer” the rules and procedures governing disputes between Members in that the DSB establishes panels, adopts panel and Appellate Body reports, monitors implementation of its recommendations, and authorizes compensation and the suspension of concessions. DSU, *supra* note 1, arts. 2.1, 6, 16, 21, 22.

37. PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 230 (2005).

38. 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 DSU provides that the DSB must adopt the decision unless there is a consensus against it. DSU, *supra* note 1, arts. 2, 6.1, 16.4, 17.5, 22.6. This decision-making procedure is referred to as negative or reverse consensus. See MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 143 (2006).

39. See DSU, *supra* note 1, art. 16.4 (for panel reports, setting forth that the “adoption procedure is without prejudice to the right of Members to express their views on a panel report”); *id.* art. 17.14 (for Appellate Body reports, setting forth that the “adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report”).

statements) that are subsequently made available to the public.⁴⁰ Statements made on the record within DSB meetings (as transcribed within meeting minutes) are considered the official view of the Member government.⁴¹

As part of a broader project on the WTO DSM, we collected official minutes of all DSB meetings held between February 1995 and December 2013.⁴² Over the course of the 340 DSB meetings held between 1995 and 2013, Members made 9,833 statements in total on a wide variety of issues, an average of 28.92 statements per meeting.⁴³ In order to classify the sentiment expressed within a statement and to differentiate between statements explicitly expressing a view on the DSM and those not directly related to the WTO's judicial bodies, a coding scheme consisting of six categories was developed: (1) Strongly Critical, (2) Predominantly Critical, (3) Neutral, (4) Predominantly Supportive, (5) Strongly Supportive, and (6) Other.

For the purposes of this Article, analysis was limited to statements issued in the context of report adoption (1,040 statements in total). As these statements typically comment on legal interpretations developed or procedural decisions issued by panels or the Appellate Body, they are most likely to reflect Members' views on the DSM's exercise of authority and thus provide a valid proxy for the Mechanism's legitimacy.⁴⁴ Starting with 100 randomly sampled report statements, two coders first manually assigned each statement to a sentiment category, with inter-coder disagreement discussed, resolved, and used to further clarify the coding scheme. The two coders then manually classified each remaining report statement, after which they resolved any remaining inter-coder discrepancies.⁴⁵

Statements that fall within the *Strongly Supportive* category express strong support for the dispute settlement system as a whole

40. Interview 2.3, Geneva, Switz. (Jan. 14, 2014).

41. *Id.*

42. Official minutes were obtained from *WTO Documents Online*, from which individual statements were manually extracted and coded for relevant meta-data. WTO DOCUMENTS ONLINE, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S005.aspx [<http://perma.cc/R422-LARG>] (archived Jan. 23, 2016).

43. Authors' dataset, available upon request.

44. See, e.g., Steinberg, *supra* note 7, at 266 (noting that these types of statements "tend to delegitimize reports of the Appellate Body and call its attention to members that disapprove of instances of judicial lawmaking, conferring a sense that it may be operating near or over the edge of its strategic space."). Statements regarding implementation of dispute reports by a government often do not express a view on the DSM, as they tend to address other Members' actions, while statements on reports, or on compliance and arbitration proceedings, explicitly relate to the DSM's exercise of authority. Panel requests, however, will only rarely convey a view on the perceived legitimacy of the DSM, as they are largely logistical in nature.

45. Following the initial round of coding, the inter-coder reliability measure calculated using Krippendorff's alpha coefficient was 0.859.

and panel and/or Appellate Body proceedings or reports. To fall within this category, the language employed in relation to the DSM must convey strong support, despite the inclusion of one or two indirectly critical comments. For example, Members may emphasize that a report is of a “high quality . . . setting a high standard for future panels,”⁴⁶ or that the “sound legal reasoning underlying the Appellate Body’s conclusions made a significant contribution to the dispute settlement system.”⁴⁷ This category also includes statements that exclusively express support for the DSM, even if the statement does not employ strongly supportive language.⁴⁸ Similarly, statements that fall within the *Strongly Critical* category include those that express strong criticism of the DSM despite the presence of indirectly supportive comments. They often include phrases by which a Member conveys that it is “seriously concerned about the Report” or “was extremely disappointed [with the findings].”⁴⁹ As with the *Strongly Supportive* category, this category also includes statements that are exclusively critical, even if the language is not strongly critical.

Statements that fall within the *Predominantly Supportive* category express both criticism and support for the DSM, but overall—both qualitatively and quantitatively—convey greater support. For example, Members often state that they are “in general very satisfied with the Report of the Appellate Body” or that “these reports were on the whole excellent,” but that they “wished to register its concern regarding one element of the Report” or “wished to address two concerns.”⁵⁰ Such statements signal weaker support for

46. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 17 February 1999*, WTO Doc. WT/DSB/M/55 (Apr. 29, 1999), at 11.

47. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 25 November 1998*, WTO Doc. WT/DSB/M/51 (Jan. 22, 1999), at 19.

48. For example, Members often stress that the report under adoption was “generally well-reasoned” or that the Member “support[s] the Appellate Body’s interpretation” on a specific question, and uses the rest of the statement to recap the findings, without expressing any further view on the issue. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 18 August 2003*, ¶ 40, WTO Doc. WT/DSB/M/154 (Oct. 22, 2003) (“The representative of the United States said that her country welcomed the opportunity to comment on what it considered a generally well-reasoned report.”); WT/DSB/M/51, *supra* note 47, at 19 (“The representative of Japan said that his country supported the Appellate Body’s interpretation . . .”).

49. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 April 2004*, ¶ 71, WTO Doc. WT/DSB/M/167 (May 27, 2004) (“The representative of Brazil said that his country, as a third party in this dispute, was seriously concerned about the report . . .”); Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 11 December 2008*, ¶¶ 16–17, WTO Doc. WT/DSB/M/260 (Mar. 3, 2009) (“Côte d’Ivoire was extremely disappointed mainly on two counts.”).

50. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 January 2007*, ¶ 81 WTO Doc. WT/DSB/M/225 (Jan. 23, 2007); Dispute

the DSM and represent qualitatively different views than Strongly Supportive statements. Statements made in the context of adoption of an Appellate Body report that also include comments on the panel report often fall into this category. A Member may be supportive of the Appellate Body rulings that overturned panel findings yet still express criticism of the panel's reasoning or findings. In such cases, the coding scheme provides that expressed views on the Appellate Body should be accorded more weight than expressed views on the panel report, because the Appellate Body is the standing judicial body of the WTO and its reports represent the final legal ruling for a particular dispute. In addition, Appellate Body reports tend to have more *de facto* precedential value than panel reports. These statements do not qualify as Strongly Supportive, however, given that the Member is also expressing dissatisfaction with the operation of the first tier of adjudication.

Similarly, statements that fall within the *Predominantly Critical* category express both criticism and support for the DSM, but overall convey greater criticism.⁵¹ Such statements include those that express criticism of the Appellate Body report but support for the panel's findings. This category also includes statements that are not primarily about the DSM or panel and/or Appellate Body proceedings, but nevertheless signal criticism of the effectiveness or operation of the system as whole. For example, Members may express frustration over the lack of implementation of DSB recommendations by another Member, which is not necessarily about the DSM itself and would be coded as *Other*. However, if the Member additionally highlights the systemic negative effects that long delays in implementation or continued noncompliance has for the operation of the DSM, the statement is coded as *Predominantly Critical*. Statements that express concern over the detrimental effects that continued noncompliance has for the interests of certain Members or groups of Members, such as developing countries, also fall within this category.

Statements classified as *Neutral* in some way reference the DSM by mentioning the dispute or the report at hand, without expressing criticism or support for it or the DSM.⁵² Finally, the *Other* category

Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 10 December 2003, ¶ 8, WTO Doc. WT/DSB/M/160 (Dec. 10, 2003).

51. See, e.g., Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 27 July 2000, ¶ 71, WTO Doc. WT/DSB/M/86 (July 27, 2000) (describing the representative of Hong Kong, China's overall acceptance of the report but high concern regarding third party filings).

52. See, e.g., Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 22 September 1998, ¶ 19, WTO Doc. WT/DSB/M/48 (Sept 22, 1998) ("The representative of the United States said that references had been made to the reports of the panel and the Appellate Body adopted on 16 January 1998 in the case of the US—India dispute on the same matter. The United States still awaited India's action to comply with the DSB's recommendations concerning this issue. He therefore wished to ask India whether it could provide any information on steps to be taken towards compliance.").

ensures that statements not about the operation of the DSM are excluded from the analysis. Few report statements fall within this category; those that do are typically about the actions of other Members and not the DSM as such.⁵³

It is worth noting that this approach is inductive in that it does not rely on theoretical or normative priors about what contributes to a court's legitimacy. In other words, the classification of statements does not depend on prespecification of the *content* of the statement (the referent of criticism/support), other than that it relates to the DSM as such. Individual classification of the *tone* or *sentiment* of statements permits us to obtain aggregate levels of Members' revealed beliefs regarding the DSM's exercise of authority. These aggregate levels provide an approximate evaluation of the DSM's perceived legitimacy as expressed by its core constituents—Member governments—in a public forum within which we would expect governments to signal their views on the DSM's exercise of authority. For ease of presentation, at times the six categories described above are collapsed into four: Critical, Supportive, Neutral, and Other. The following Part provides a descriptive analysis of the classification of these expressed views in order to explore patterns in the perceived legitimacy of the DSM over time and across subsets of Members.

IV. GENERAL PATTERNS IN THE DSM'S PERCEIVED LEGITIMACY

Between 1995 and 2013, the DSB considered, discussed, and adopted 172 dispute reports, with an average of 9.56 reports adopted per year.⁵⁴ Table 1 disaggregates report statements, which represent a little over 10 percent of all statements made within the DSB, by type of report and the relationship of the government making a statement to the dispute (i.e., whether it was a party, third party, or non-party). The majority of report statements express a view on regular (noncompliance proceeding) reports (873 statements in total), with statements on compliance reports (panel or Appellate Body) constituting a mere 1.8 percent of all DSB statements.⁵⁵

53. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 1 June 2011*, ¶ 27, WTO Doc. WT/DSB/M/297 (June 1, 2011) ("The representative of the European Union said that, with regard to the figure of US\$18 billion, the United States had cited one paragraph from the Panel Report. The EU would read it again carefully but was sure that it did not mention a figure of US \$18 billion. The EU could not prove the negative. To the extent Members had the time and resources, they should read the Report and see if those fantasy figures were there. Then Members would see for themselves that those were purely fantasy figures.").

54. Authors' dataset, available upon request.

55. On very rare occasions, parties to the dispute circulate written views on a report, in addition to their statement within the DSB. See, e.g., Communication from Mexico, *United States—Anti-Dumping Act of 1916*, WTO Doc. WT/DS162/8 (July 26, 2000). Due to the unique nature of these types of communications, and the fact that

Governments typically make fewer total statements on panel reports than either Appellate Body or Article 21.5 compliance reports, but views expressed on Appellate Body reports do often reference panel findings.

TABLE 1: STATEMENTS PRIOR TO REPORT ADOPTION

	PANEL	APPELLATE BODY	COMPLIANCE (PANEL)	COMPLIANCE (AB)	ALL REPORTS
REPORTS ADOPTED	51	93	9	19	172
TOTAL STATEMENTS	224	649	60	120	1053
AVERAGE/REPORT	4.39	6.98	6.67	6.32	6.12
PARTY STATEMENTS					
AVERAGE/REPORT	2.65	2.87	3.22	3.21	2.86
THIRD PARTY STATEMENTS					
AVERAGE/REPORT	1.26	2.40	2.00	2.84	1.99
NON-PARTY STATEMENTS					
AVERAGE/REPORT	0.49	1.71	1.44	0.26	1.17

The WTO Agreement permits all governments to express views prior to report adoption, yet only a select group of countries make use of this opportunity in practice, with 39 percent of the WTO Membership in 2013 (fifty-one Members in total) having expressed at least one view on an Appellate Body or panel report.⁵⁶ Not surprisingly, the majority of report statements have been made by the most active users of the system, with the United States and the European Union the most vocal in absolute terms and controlling for years of membership. 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 an empaneled dispute (either as a party or a third party) have expressed a view prior to report adoption.⁵⁷

they largely reiterate—albeit in more detail—the views expressed within DSB statements, written expression of views prior to report adoption are not included within the present analysis.

56. Percentage of Membership calculated excluding all European Union member states, as only the EU representative may express views or make statements within the DSB. Interview with 1.2, in Geneva, Switzerland (Jan. 13, 2014); Interview with 1.3, in Geneva, Switzerland (Jan. 13, 2014).

57. 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

Controlling for empaneled dispute participation reveals a different picture, 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.

The reasons for placing a report statement on the record and the substance of a statement vary according to whether the Member was a party to or had a direct economic interest in the dispute and whether the report addressed issues with potential implications for future disputes. Within interviews, most delegations indicated that the intended audience of report statements was the system as a whole (the Secretariat, panelists, and the Appellate Body), with the purpose being to place on the record a government's views on legal interpretations or procedural decisions.⁵⁸

Parties have extensive opportunities to develop their legal arguments during dispute proceedings, but it is still customary for them to make a statement prior to report adoption. To date all have done so, with one exception.⁵⁹ Parties to a dispute have made almost half of all report statements, although third parties also regularly express views (see Table 1). While third party report statements decreased slightly from the early years of the WTO, a trend that some representatives noted,⁶⁰ 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 that make a report statement has not declined significantly.⁶¹ Members

and supporting Cuba's position. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 1 February 2002*, ¶ 34, WTO Doc. WT/DSB/M/119 (Feb. 1, 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. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 October 2002*, ¶¶ 67–68, WTO Doc. WT/DSB/M/134 (Oct. 23, 2002).

58. Interview with 1.3, in Geneva, Switzerland (Jan. 13, 2014); Interview with 3.4, in Geneva, Switzerland (Jan. 15, 2014); Interview with 5.5, in Geneva, Switzerland (Jan. 15, 2014). Some smaller or less active delegations denied that the Secretariat or Appellate Body members were the intended audience of such statements, while a few emphasized that these statements were also meant to send a message to domestic constituencies. Others emphatically stated that such statements held “zero value” for domestic audiences. Interview with 2.4, in Geneva, Switzerland (Jan. 14, 2014).

59. Prior to adoption of the Appellate Body and panel Reports in *Mexico—Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/AB/R; WT/DS308/R), Mexico did not express a view. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 24 March 2006*, ¶¶ 1–11, WTO Doc. WT/DSB/M/208 (Mar. 24, 2006).

60. Interview with 5.5, in Geneva, Switzerland (Jan. 17, 2014).

61. Some representatives suggested that third parties may be more inclined to intervene in the case of panel report adoption, compared to Appellate Body report adoption, because third parties cannot appeal panel reports and thus adoption provides

not parties or third parties (the “non-parties”) to a dispute tend to express views primarily on Appellate Body reports and not panel or Article 21.5 compliance decisions.

Third parties and non-parties are much more cautious about expressing views on the record. Some worry that the statement may be “used against [them] at a later stage.”⁶² For this reason, many typically reserve report statements for procedural and systemic issues.⁶³ This may be partly due to the fact that the ability to express a substantive view on a report requires the legal capacity and resources necessary to analyze its systemic legal implications, which many developing country third and non-parties do not possess.⁶⁴

The substance of a report statement—and whether it relates to specific and/or diffuse support—understandably varies according to whether a government 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, though any one statement may include all three types of views: (1) those that focus on the merits of the findings of the panel or Appellate Body in that particular dispute;⁶⁵ (2) those that note findings, interpretations, or procedural decisions adopted within a report and highlight their implications for future disputes, the system as a whole, or broader interpretive consistency;⁶⁶ and (3) those that merely “take note” of an

an opportunity to express views (critical or supportive) on the report. However, this is not supported by third party statement practice, with third party interventions slightly higher for Appellate Body than for panel reports, and in line with the overall patterns with respect to interventions.

62. Interview with 1.1, in Geneva, Switzerland (Jan. 13, 2014); Interview with 1.3, in Geneva, Switzerland (Jan. 13, 2014).

63. Interview with 1.3, in Geneva, Switzerland (Jan. 13, 2014); Interview with 2.4, in Geneva, Switzerland (Jan. 14, 2014); Interview with 3.2, in Geneva, Switzerland (Jan. 15, 2014).

64. See Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POL. 1033, 1036–38 (2009) (evaluating the experiences of Pakistan, Costa Rica, and Botswana during litigation); Interview with 1.4, in Geneva, Switzerland (Jan. 13, 2014).

65. For instance, prior to adoption of the Appellate Body and panel Reports in *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines* (WT/DS371/AB/R; WT/DS371/R), the representative of the Philippines, a party to the dispute, expressed its deep satisfaction with the Reports, emphasizing that they had given clear guidance as to the contents of the disputed rules. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 15 July 2011*, ¶¶ 2–4, WTO Doc. WT/DSB/M/299 (July 15, 2011).

66. For instance, prior to adoption of the Appellate Body and panel Reports in *United States—Measures Affecting Trade in Large Civil Aircraft—Second Complaint* (WT/DS353/AB/R; WT/DS353/R), the representative of Canada, a third party to the dispute, expressed views 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 Article 2.1(a) of the SCM Agreement. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 March 2012*, ¶ 76, WTO Doc. WT/DSB/M/313 (Mar. 23, 2012).

interpretation or finding in order to flag it as an issue deserving further consideration without adopting a substantive view.⁶⁷

Parties to a dispute typically reiterate legal arguments made within their submissions and highlight report findings or procedural aspects with which they strongly agree or that they find problematic. On average, party statements reflect a government's degree of specific support for the DSM at a given moment in time. Third parties 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) and generally speak to diffuse support for the DSM. While there is a tendency for party statements to highlight specific report findings, and for third party and non-party statements to focus on more general DSM practices, this should not be overstated. Both groups often manifest both specific and diffuse support.

FIGURE 1

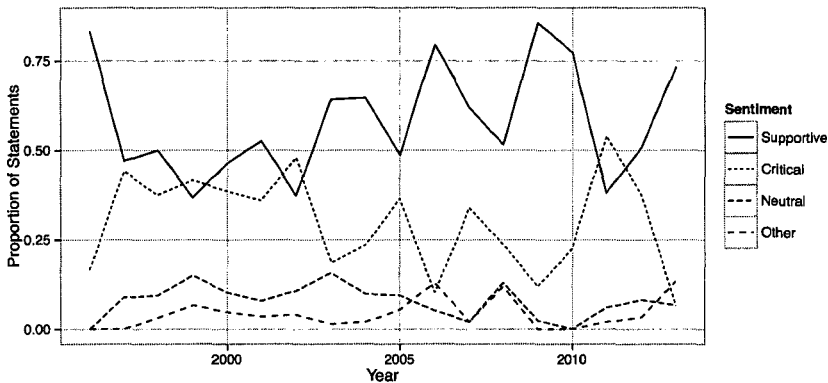


FIGURE 1: Yearly estimates for proportion of DSB report statements, categorized by statement sentiment (Critical, Neutral, Supportive, and Other). Total report statements classified (includes compliance proceeding reports) = 1,040. The six original categories employed for classification are collapsed to four for simplicity of presentation. Source: Authors' dataset.

67. For instance, prior to adoption of the Appellate Body and panel Reports in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R; WT/DS58/R), the representative of Australia, a third party to the dispute, noted that “[t]he Appellate Body’s finding had pointed to some important aspects of these tests which deserved further consideration.” Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 6 November 1998*, ¶ 13, WTO Doc. WT/DSB/M/50 (Nov. 6, 1998).

FIGURE 2

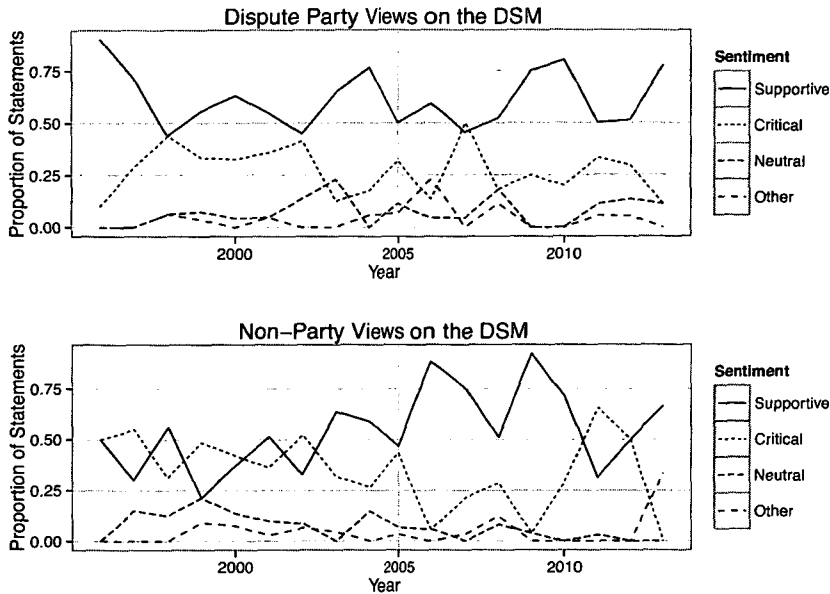


Figure 2: Yearly estimates for proportion of DSB report statements, categorized by statement sentiment (Critical, Neutral, Supportive, and Other), made by dispute parties, and third parties and non-parties, respectively. Total report statements by dispute parties classified (includes compliance proceeding reports) = 561; total report statements by third parties and non-parties classified (includes compliance proceeding reports) = 492. The six original categories employed for classification are collapsed to four for simplicity of presentation. Source: Authors' dataset.

Figure 1 displays changes in aggregate revealed views in the context of report adoption over time. Since the first reports were adopted in 1996, Members have consistently—with the exceptions of 1999, 2002, and 2011—made proportionally more supportive statements than those expressing other sentiments. The exceptions to this pattern are largely driven by third parties and non-parties to a dispute, as parties consistently have been more supportive than critical within their report statements, save for in 1998, 2002, and 2007, when they were roughly as critical as supportive (see Figure 2). This in and of itself is telling, as we might have expected the “losing” party to always criticize adverse decisions and the “winning” party to similarly express support for findings on which it prevailed. If this were the case, party statements would reflect roughly equal sentiment proportions (as the majority of disputes involve two parties), largely related to the degree of specific support enjoyed by the DSM among the parties. But that is not what we observe. Instead, parties—including many “losing” parties—will express

diffuse support for the exercise of authority by the DSM in spite of or in addition to voicing specific concerns about adverse findings related to their interests or objectives. In this way, generalized support for the DSM's exercise of authority has facilitated acceptance of adverse decisions—to the point of still voicing positive views—in some periods, although less so in 1998, 2002, and 2007.

It is also interesting that for the membership as a whole (Figure 1), the proportions of supportive and critical statements vary together after 2002, representing clear highs and lows in the perceived legitimacy of the DSM.⁶⁸ The directions and relative size of these changes are similar for both party and third/non-party statements, with the conspicuous exceptions of 2007 and 2011 (Figure 2). In 2007, there is a much sharper increase in critical party statements than in those made by third/non-parties. This might be due to the fact that there are relatively low levels of engagement by a broader subset of the membership that year compared to other years. Additionally, the United States made nearly half of the critical party statements in that year. In contrast, the proportion of critical views expressed by third/non-parties during 2011 increased dramatically compared to the much smaller uptick observed within party statements. As discussed in the following Part, this is attributable to a number of Members voicing concern over the nontransparent way in which the Appellate Body was dealing with its increased workload.

Figure 3 shows the proportion of report statements falling into the full six-category classification by usage rate of the DSM. DSM usage was calculated according to a Member's participation as a party within empaneled disputes and thus reflects engagement with the DSM specifically (as opposed to the dispute settlement system as a whole). The high usage category includes the United States and the European Union, while the medium category includes the next ten most active users: Canada, the Republic of Korea, China, Japan, Mexico, Brazil, India, Argentina, Thailand, and Australia. The low category includes all other Members that have participated as a party within at least one empaneled dispute (twenty-six Members in total), while non-use includes Members that have never directly participated in an empaneled dispute (though they may have participated as a third party).

Notably, a government's experience with the dispute settlement system does not appear to be strongly related to how much support a country is willing to voice, with the United States and the European Union (High Usage Rate) expressing approximately the same degree of support as low, medium, and non-users of the system. In contrast, statements devoted to criticism of the DSM's exercise of authority steadily increase in tandem with declining usage of the system,

68. These fluctuations represent changes corresponding to roughly six or seven individual statements per year.

suggesting that higher levels of engagement with the system may contribute to higher levels of diffuse support for its authority that mitigate the impulse to criticize reports. Alternatively, it could be that the DSM tends to cater its exercise of authority to those Members that use the system more regularly, perhaps alienating non-users in the process. In order to further unpack these trends, the following Part examines why certain focal reports elicit engagement across the wider membership and third parties and non-parties in particular. In doing so, this Part sheds new light on the sources of the DSM's perceived legitimacy.

FIGURE 3

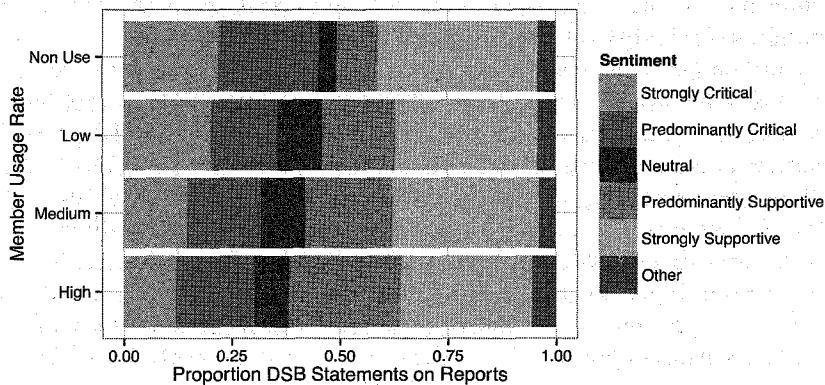


Figure 3: Estimates for proportion of DSB statements made prior to Report Adoption (including reports on compliance or arbitration proceedings), by DSM Usage Rate, categorized by statement sentiment (Strongly Critical, Predominantly Critical, Neutral, Predominantly Supportive, Strongly Supportive, and Other). DSM Usage Rate grouped according to High Use (324 report statements), Medium Use (443 report statements), Low Use (213 report statements), and Non-Use (73 report statements). Source: Authors' dataset.

V. SOURCES OF THE DSM'S PERCEIVED LEGITIMACY

As Lawrence Helfer and Karen Alter recognize, a court's legitimacy is not challenged merely because a decision is controversial among those actors whose interests are or were directly at stake in the dispute.⁶⁹ Such criticism may reflect changes in the

69. See Helfer & Alter, *supra* note 12, at 502. In 2008, the representative of the European Union expressed a similar perspective, in noting that "one could not help but have the impression that the overall objective of the US statement and its

DSM's level of specific support, but its perceived legitimacy is very much tied to expressions of diffuse support that do not always relate to how a discrete ruling affects a Member's specific objectives or interests. In order to address this, the following Part identifies the sources of the DSM's legitimacy through a substantive analysis of views on focal reports. Focal reports represent those that prompt extensive engagement across a broader subset of the membership and relatively greater engagement by countries not directly affected by a dispute ruling.

The tone and content of report statements understandably vary according to the identity of the speaker, a government's interest in the outcome, and the substance of the report under adoption. However, the following analysis demonstrates that reports prompting widespread engagement across the membership tend to address a select number of recurring issues or themes. As discussed below, rulings that governments view as developing expansive interpretations often give rise to concerns over upsetting the treaty-specified balance between the WTO's political and judicial bodies.⁷⁰ Other recurring issues include procedural practices that affect the fair balance between parties within dispute proceedings or findings that governments believe disproportionately and detrimentally affect certain groups of Members. Governments also tend to speak up when they are particularly satisfied with how the DSM exercised its authority. When panels or the Appellate Body make findings in line with what many believe to be appropriate interpretations of WTO law, third parties and non-parties often will make a statement supporting the DSM's exercise of authority. In sum, the following discussion reveals four broad topics referenced on a recurring basis: (1) the balance of authority between the political and judicial bodies of the WTO, (2) the fairness and transparency of dispute proceedings, (3) "minority activism" by the DSM, (4) and "majoritarian activism" by the DSM.

As mentioned in Part IV, the year 2002 appears to mark a turning point in terms of government engagement with the DSM and expressed views on its operation (see Figures 1 and 2). Similarly,

communication seemed to prove that the Appellate Body was right, wherever it had agreed with the United States, and utterly and scandalously wrong wherever the Appellate Body had chosen not to follow the US view." Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 14 November 2008, ¶ 35, WTO Doc. WT/DSB/M/258 (Nov. 14, 2008).

70. On the relationship between the political and adjudicative bodies of the WTO, see generally Armin von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. U.N. L. 609 (2001); Claus-Dieter Ehlermann, *Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO*, 1 WORLD TRADE REV. 301 (2002) (describing the clashing WTO policies of dispute settlement and treaty-making activities); John H. Jackson, *The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited*, 4 J. INT'L ECON. L. 67 (2001) (suggesting that systemic constitutional issues of the WTO need deeper consideration and open discussion).

there is a noticeable divergence of expressed views between dispute parties and third/non-parties in 2007 and 2011. For these reasons, the following discussion first analyzes statements on focal reports within the early years of the WTO as the DSM was slowly finding its footing, before turning to focal reports immediately following the critical juncture of 2002 (between 2003 and 2006) and finally to the years spanning seeming dissensus in the DSM's perceived legitimacy (2007–2011).

A. *The Early Years: 1995–2002*

Members expressed widespread support for the operation of the system in its initial years, particularly when the first reports were adopted in 1996. This could be due to general optimism about the newly established system, similarly reflected in all DSB statements (and not merely report statements). Or, it could simply be attributable to a “collective cease-fire against all public criticism of Appellate Body decisions during its start-up years,” as Robert Hudec has suggested.⁷¹

By 1997, Members did not shy away from expressing explicitly critical views on reports adopted that year. Aggregate revealed views on the DSM were roughly balanced in terms of criticism and support, and notably not all critiques were levied by countries party to a dispute or with a direct interest in its outcome.⁷² In 1997, the Appellate Body and panel reports in *European Communities—Regime for the Importation, Sale and Distribution of Bananas (EC—Bananas III)* elicited fairly widespread engagement,⁷³ as one of the three intransigent disputes that have triggered extensive interest and dissatisfaction across the membership over the years.⁷⁴ However,

71. Hudec, *supra* note 6, at 28. The two exceptions to this moratorium on public criticism include the United States, which issued one strongly critical statement on the panel report in *United States—Gasoline*, and Japan, which made an ambiguously critical statement prior to the adoption of the panel and Appellate Body reports in the same dispute, not expressing any objections but not necessarily agreeing with “every point in the two reports.” Dispute Settlement Body, *Minutes of the Meeting Held in the Centre William Rappard on 20 May 1996*, at 3, WTO Doc. WT/DSB/M/17 (May 20, 1996).

72. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 March 1997*, WTO Doc. WT/DSB/M/30 (Mar. 20, 1997), at 10–11 (noting the statements by the representatives of third parties (Indonesia, Malaysia, and Sri Lanka) and a non-party (Mexico) expressing criticism prior to the adoption of the Appellate Body and panel reports in *Brazil—Measures Affecting Desiccated Coconut* (WT/DS22/AB/R; WT/DS22/R)).

73. See Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997); Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard 25 September 1997*, WTO Doc. WT/DSB/M/37 (Sept. 25, 1997), at 14–25.

74. The two other long-standing disputes triggering extensive Member engagement are: Appellate Body Report, *United States—Section 211 Omnibus*

non-parties made only eight of the seventy-five report statements related to the various phases of this dispute.⁷⁵ Although we define reports as “focal” if they trigger relatively greater non- and third-party statements, *EC—Bananas III* is somewhat of an outlier, in that many of the third parties were directly affected by both the dispute outcomes and the significant economic consequences of ongoing trade discrimination by the European Communities (EC).⁷⁶ While the fact that the dispute remained unresolved for sixteen years certainly (and negatively) affected the overall legitimacy of the international trade regime, the reports themselves do not seem to be as controversial among the wider membership compared to the focal reports discussed below.

Supportive statements increased relatively in 1998 even though the DSB adopted three Appellate Body reports that contained relatively controversial interpretations.⁷⁷ Nearly half of the critical views were expressed in the context of the Appellate Body report in *United States—Import Prohibition of Certain Shrimp and Shrimp Products (US—Shrimp)*,⁷⁸ relating to two findings on which governments held especially divergent views: the right of panels to consider *amicus curiae* briefs submitted by non-governmental organizations and its “evolutionary interpretation” that “‘exhaustible natural resources’ within the meaning of GATT Article XX(g) included living species threatened with extinction.”⁷⁹ Interestingly, the statement by the representative of the United States is classified

Appropriations Act of 1998, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002); and Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/AB/R (Jan. 16, 2003). Together, statements related to these two disputes and *EC—Bananas III* comprise 33.9 percent of all statements made within the DSB between 1995 and 2013, and almost half (45.3 percent) of statements made after 2005 alone. Much of this engagement relates to continued non-implementation of DSB recommendations, and the significant economic consequences of ongoing trade discrimination. Authors’ dataset.

75. The non-party statements were made by: Australia, Argentina, Chile, Hong Kong, Panama, Saint Lucia, and Turkey. Authors’ dataset.

76. Almost half (thirty-one statements over the years) of statements relating to the *EC—Bananas III* were in fact made by third parties.

77. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R-WT/DS48/AB/R (Jan. 16, 1998); Appellate Body Report, *Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/AB/R (Nov. 25, 1998); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

78. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

79. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 6 November 1998*, WTO Doc. WT/DSB/M/50 (Nov. 6, 1998), at 13 (noting that all eight critical statements, save for one by the Philippines, conveyed concern with the ruling on *amicus* briefs, and six conveyed concern with the GATT Article XX(g) interpretation).

as predominantly supportive, even though it “lost” the dispute.⁸⁰ Despite this unsatisfactory outcome, the United States used its report statement to express appreciation for the Appellate Body’s consideration of environmental concerns within WTO law and the Appellate Body’s interpretation of panels’ right to consider *amicus* submissions, intimating more diffuse sources of support for the DSM’s exercise of authority.⁸¹

In contrast to the divergent views on the *US—Shrimp* report, the Appellate Body’s report in *European Communities—Measures Concerning Meat and Meat Products (EC—Hormones)* stands out in terms of predominantly and strongly supportive comments.⁸² All Members issuing a statement prior to report adoption expressed strong satisfaction with its findings and interpretations, with one exception (Argentina, which was neither a party nor a third party to the dispute).⁸³ Representatives, including the European Communities, welcomed “the important contribution made by the Appellate Body Report to the WTO jurisprudence and to the quality and soundness of the legal reasoning adopted in the dispute settlement system”⁸⁴ and emphasized that the report was “helpful in clarifying the general approach towards interpreting rights and obligations of Members.”⁸⁵

While the reports in *EC—Hormones* and *US—Shrimp* generated mostly supportive and critical statements, respectively, the Appellate Body report in *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico (Guatemala—Cement I)* elicited a combination of both.⁸⁶ The report represented the first time the Appellate Body considered issues under the Anti-Dumping Agreement (ADA) and prompted engagement over the finding that the ADA’s special dispute settlement rules *and* the DSU provisions together create a “integrated and comprehensive dispute settlement

80. The Appellate Body ultimately found that the US measure, while provisionally justified under GATT Article XX(g), failed to meet the GATT XX chapeau requirements.

81. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 6 November 1998*, WTO Doc. WT/DSB/M/50 (Nov. 6, 1998), at 11.

82. See generally Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R-WT/DS48/AB/R (Jan. 16, 1998).

83. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 13 February 1998*, WTO Doc. WT/DSB/M/42, at 13–14.

84. *Id.* at 12–13.

85. *Id.* at 9–11. Almost all Members commenting on the report—with the exception of Argentina and Switzerland—were either parties (United States and European Union) or third parties to the disputes (Australia, Canada, New Zealand and Norway).

86. See Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/AB/R (Nov. 2, 1998). Out of the nine statements issued one statement was made by a third party to the dispute (the United States), and six were made by non-parties.

system.”⁸⁷ The Appellate Body also provided important clarification on the term “measure” and the requisite specificity within panel requests in finding that the dispute was not properly before the panel and dismissing the case.⁸⁸ Overall, although these three reports generated considerable disagreement among Members, governments were more supportive than challenging of the DSM, in line with general aggregate revealed views for this year.

Following this brief period of relative satisfaction with the DSM, expressed support declined noticeably in 1999. This year also witnessed a slight relative increase in critical statements, many of which emanated from the reports adopted for *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India—Quantitative Restrictions)*.⁸⁹ This dispute represented the first time the WTO addressed balance of payment issues in the context of an adjudicated dispute, with the report addressing two controversial issues: the institutional relationship between the WTO’s judicial and political bodies (in the form of the Balance of Payments Committee) and developed–developing country dynamics within the WTO.⁹⁰

The relative increase in neutral statements during this period arose largely from statements on the first compliance panel report adopted within the DSB (*EC—Bananas III (Article 21.5)*). Many representatives, instead of expressing a view on the DSM’s exercise of authority, used adoption of the *EC—Bananas III (Article 21.5)* report to signal diplomatic support for other Members within the context of the dispute.⁹¹ In addition, a number of governments took advantage of the opportunity to put on the official record their view on the

87. *Id.* ¶ 66.

88. *Id.* ¶ 72. While some stressed the importance of the report in “shed[ding] light and precision on the rights and obligations under the Anti-Dumping Agreement in relation with the DSU,” others considered that the Appellate Body’s interpretation of measure “did not promote the preservation of the substantive rights and obligations of Members” and rendered the DSU and the Anti-Dumping Agreement (AD Agreement) “a meaningless and ineffective mode of redress.” Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 25 November 1998*, WTO Doc. WT/DSB/M/51, at 20–21.

89. Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS90/AB/R (Aug. 23, 1999).

90. Nine of eleven statements made prior to report adoption expressed a strongly critical view on the reports, all of which referred the view that the reports “upset the balance of rights and obligations negotiated within the WTO” and “had not fully appreciated development concerns and imperatives of developing countries.” Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 22 and 24 September 1999*, WTO Doc. WT/DSB/M/68 (Sept. 24, 1999), at 14–23. In contrast, the only two strongly supportive statements were made by two developed country Members: the EC and the United States.

91. *See, e.g.*, Dispute Settlement Body Meeting, *Minutes of Meeting Held in the Centre William Rappard on 6 May 2000*, WTO Doc. WT/DSB/M/61 (May 6, 2000), at 4.

appropriate relationship between Article 22 and Article 21.5 of the DSU (the “sequencing issue”), at the time a subject of negotiations under the DSU Review.⁹² While referencing the DSM or the dispute settlement system generally, these statements are classified as neutral because they do not convey an evaluative judgment on its exercise of authority.

In 2000, the DSB adopted two particularly focal reports.⁹³ The panel’s report in *United States—Sections 301–310 of the Trade Act 1974 (US—Section 301 Trade Act)*⁹⁴ generated considerable interest across the broader membership because it ruled on U.S. legislation that authorized the Office of the United States Trade Representative (USTR) to unilaterally suspend concessions or impose import restrictions in response to trade barriers imposed by other countries.⁹⁵ The panel ruled that the U.S. measure permitted the USTR to exercise discretion in a way that constituted a prima facie violation of Article 23 of the DSU, but that the United States had already lawfully removed this prima facie violation through its Statement by Administrative Action (SAA).⁹⁶ Aside from reviewing

92. See *id.* at 6. On DSU review negotiations regarding the sequencing issue, see THOMAS A. ZIMMERMANN, *NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING* 150–55 (2006).

93. These two reports—for the disputes in *US—Section 301 Trade Act* and *US—Lead and Bismuth II*—were focal in the sense that both received the second highest number of report statements in the history of the DSM (twenty-one total statements), and one elicited the highest number of Members to express a view prior to report adoption (twenty Members expressed a view on the panel’s report in *US—Section 301 Trade Act*).

94. Panel Report, *United States—Sections 301–310 of the Trade Act 1974*, WTO Doc. WT/DS152/R (Dec. 22, 1999).

95. Prior to the establishment of the WTO, the USTR frequently relied on Section 301 of the Trade Act in lieu of (and due to general dissatisfaction with the effectiveness of) the dispute resolution procedures of the GATT system. The strengthened dispute settlement mechanism of the WTO resulted, in part, from the efforts of governments to restrain the “aggressive unilateralism” of the United States, as it required all Members to resolve trade disputes through the procedures outlined within the Dispute Settlement Understanding. See DSU, *supra* note 1, Article 23; Hudec, *supra* note 6, at 13–14 (noting the compromises between the United States and other nations in regards to the use of Section 301 trade restrictions). On the use of Section 301 prior to the Uruguay Rounds, see generally JAGDISH BHAGWATI & HUGH T. PATRICK, *AGGRESSIVE UNILATERALISM: AMERICA’S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 1–45 (1991). Under the WTO, the USTR continued to rely on Section 301 investigations, including to threaten unilateral retaliation in response to non-implementation of DSB recommendations, which it did against the EC in the context of the *EC—Bananas III* dispute. The EC challenged the WTO consistency of Sections 301–310 of the U.S. Trade Act, a dispute that attracted a relatively high level of third party participation. Sixteen third parties in total, the seventh highest dispute in terms of level of third party participation. On the background of this dispute, see generally Seung Wha Chang, *Taming Unilateralism Under the Trading System: Unfinished Job in the WTO Panel Ruling of United States Sections 301–310 of the Trade Act of 1974*, 31 L. & POL’Y INT’L BUS. 1151 (2000).

96. The SAA was a document submitted by the President and approved by Congress that accompanied the US implementation of the Uruguay Round results. See

the historically controversial practices of the U.S. trade authority, the panel report in this dispute also provoked considerable interest because it purportedly disregarded preexisting GATT jurisprudence on the mandatory/discretionary law doctrine by ruling that discretionary legislation could violate WTO rules.⁹⁷ Overall, more than half of the report statements expressed either strong or predominantly strong support for the panel decision. Only five statements voiced minimal criticism, largely directed towards the panel's reliance on U.S. statements to cure the measure's prima facie violation of WTO law.⁹⁸ One reason for this ruling eliciting such widespread support, including by the United States,⁹⁹ may be that the decision, while including new interpretations of WTO obligations and DSU provisions, engaged in a form of "majoritarian activism" in that it simply reaffirmed both current practice and what a majority of governments had effectively tried to achieve through Article 23 of the DSU.¹⁰⁰

In contrast, the Appellate Body's report in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US—Lead and Bismuth II)* generated overwhelmingly critical

statement by Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994), reprinted in 1994 U.S.C.C.A.N. The SAA, in conjunction with statements made by the United States before the panel, effectively limited the discretion afforded the USTR to impose retaliatory measures in a way that brought the Trade Act into conformity with WTO obligations. See Panel Report, *US—Section 301-310 of the Trade Act of 1974*, ¶¶ 7.109-125, WTO Doc. WT/DS152/R (Dec. 22, 1999).

97. WTO Doc. WT/DS152/R, *supra* note 96, ¶¶ 7.53-4.

98. One of the more critical statements was issued by Hong Kong, China, a third party, in which it welcomed many aspects of the panel report, but elaborated on a fairly lengthy list of "serious reservations on the Panel's analysis and its conclusion." Namely, Hong Kong's reservations included: (1) the panel's development of a concept of "overall WTO conformity" that seemed to be at odds with Article XVI:4 of the Marrakesh Agreement, in that it might imply that "as long as all aspects of a regulatory framework taken together were WTO-consistent in the so-called 'overall' terms, one could turn a blind eye to possible inconsistency in specific aspects"; (2) that the panel "had not been more clear in justifying the weight it had accorded to the Statement by Administrative Action and the US statements before the Panel"; and (3) the panel's legal analysis of the bindingness under WTO and international law of the statements made by the United States before the panel regarding its administration of the challenged sections of the U.S. Trade Act. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 27 January 2000*, WTO Doc. WT/DSB/M/74 (Jan. 27, 2000), at 14-16.

99. Prior to the report's adoption, the U.S. representative expressed support for the panel's findings, though it did note that it "did not agree with all of the reasonings of the Panel." Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 27 January 2000*, WTO Doc. WT/DSB/M/74, at 10. Surprisingly, the EC expressed even greater support for the panel report, in that it saw the decision as representing "an important outcome for the preservation and the proper functioning of the WTO multilateral system." *Id.* at 10-12.

100. See Sweet & Brunell, *supra* note 4 (describing the concerted action of a majority of the nations involved in the two reports disseminated by the DSB).

statements by parties, third parties, and non-parties alike.¹⁰¹ The substantive focus of the dispute was relatively uncontroversial, though it did address the unsettled question of the appropriate standard of review for panels to apply to a government's imposition of countervailing duties (Article 11 of the DSU or Article 17.6 of the ADA).¹⁰² Instead, statements focused on the two amicus submissions received by the Appellate Body, one from the American Iron and Steel Institute and one from the Specialty Steel Industry of North America. While the Appellate Body found that non-Member individuals and organizations do not have a legal *right* to make submissions, and the Appellate Body does not have a legal *duty* to accept or consider unsolicited briefs, the Appellate Body did find that it has the legal *authority* to accept and consider amicus submissions when it is "pertinent and useful" to do so, without further elaborating on how that determination would be made.¹⁰³ All report statements, save that by the representative of the United States, voiced serious concerns over the Appellate Body's *approach* to resolving the question of such submissions, regardless of the government's underlying view on the desirability of permitting amicus briefs.¹⁰⁴

One month later, the issue of amicus briefs was again up for discussion during adoption of the panel report in *United States—Section 110(5) Copyright Act*.¹⁰⁵ While some Members expressed support for the panel's findings under the TRIPS Agreement, most issued strongly critical statements on its preliminary decision to accept, albeit not take into account, a letter from a law firm

101. See generally Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS/138/AB/R; see also Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS/138/R (June 7, 2000) (stating that, in fact, sixteen of the twenty-one report statements were made by non-party Members).

102. The dispute centered on a challenge by the EC to the U.S. Department of Commerce's use of a "change-in-ownership methodology" to calculate the amount of subsidies when determining a countervailing duty rate.

103. WT/DS/138/AB/R, *supra* note 101; WT/DS/138/R, *supra* note 101, at 14–16.

104. Only five statements additionally touched on the Appellate Body's substantive findings under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). While the EC largely expressed support for the report, it also "considered that the way the Appellate Body had dealt with the issue of amicus curiae briefs was not entirely satisfactory." Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 7 June 2000*, WTO Doc. WT/DSB/M/83 (July 7, 2000), at 2. In contrast, the United States primarily criticized the substantive findings, but also indicated that it was pleased that by "allowing affected private parties to present their views in WTO appeals, the Appellate Body had taken a positive step towards making the WTO more open and enhancing public confidence in the dispute settlement process." Dispute Settlement Body, *Minutes of Meeting, Held in the Centre William Rappard on 7 June 2000*, WTO Doc. WT/DSB/M/83 (July 7, 2000), at 3.

105. See Panel Report, *United States—Section 110(5) of US Copyright Act*, WTO Doc. WT/DS160/R (June 15, 2000).

addressed to the USTR and copied to the panel. Governments voiced concern that this decision might “create serious implications for future panels in terms of workload and efficiency”¹⁰⁶ and effectively treated other actors more favorably than actual WTO Members.¹⁰⁷

The compliance report in *Australia—Subsidies Provided to Producers and Exporters of Automotive Leathers (Article 21.5) (Australia—Automotive Leathers II (Article 21.5))* similarly generated concern from a number of governments.¹⁰⁸ The panel in this case was faced with the difficult issue of finding a remedy in the Agreement on Subsidies and Countervailing Measures (SCM Agreement) for prohibited subsidies offered on a one-time, or non-recurring, basis when interpreting the phrase “withdraw the subsidy.”¹⁰⁹ Its solution was to require that the one-time subsidy be paid back in full, effectively providing a form of retrospective or punitive remedy, which deeply troubled a number of governments as going against the DSU and previous GATT practice.¹¹⁰ Only the United States and Hong Kong, China expressed support for this interpretation as providing an effective remedy that would serve to deter future WTO violations.¹¹¹

Support for the DSM’s exercise of authority increased slightly in 2001, with a number of reports eliciting engagement across the wider membership.¹¹² Adoption of the panel and Appellate Body reports in *United States—Import Measures on Certain Products from the European Communities (US—Certain EC Products)* generated significant interest among the membership because the reports addressed an issue central to ongoing DSU review negotiations: the

106. Dispute Settlement Body, *Minutes of Meeting, Held in the Centre William Rappard on 27 July 2000*, WTO Doc. WT/DSB/M/86 (September 20, 2000), at 15.

107. See Dispute Settlement Body, *Minutes of Meeting, Held in the Centre William Rappard on 27 July 2000*, WTO Doc. WT/DSB/M/86 (September 20, 2000), at 14–16 (outlining the general complaints of Hong Kong, India, Mexico, Malaysia and Australia of the panel accepting the letter from a law firm addressed to the USTR).

108. See generally Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WTO Doc. WT/DS126/RW (January 21, 2000) (providing the complaints of one third and five non party statements (66.7 percent of all report statements)).

109. *Id.* at 12.

110. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 11 February 2000*, WTO Doc. WT/DSB/M/75 (March 7, 2000), at 8.

111. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 11 February 2000*, WTO Doc. WT/DSB/M/75 (March 7, 2000), at 8–9; *id.* at 5.

112. See generally Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (December 11, 2000); see also WTO Doc. WT/DS165/R (December 11, 2000); Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO Doc. WT/DS166/AB/R; Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO Doc. WT/DS166/R (December 22, 2000).

appropriate sequencing between Articles 21.5 and 22.6 of the DSU, particularly whether states could resort to authorization of countermeasures before completing compliance panel proceedings.¹¹³ The Appellate Body had concluded that it was up to Members to resolve the sequencing issue, as “[d]etermining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.”¹¹⁴ Every single statement made prior to the reports’ adoption approved of the Appellate Body’s exercise of judicial restraint on this issue.¹¹⁵

In contrast, both parties and non-parties alike challenged considerably the Appellate Body report in *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US—Wheat Gluten)*.¹¹⁶ In this dispute, which involved U.S. definitive safeguard measures on imports of wheat gluten from the European Communities, Members commented primarily on four aspects of the reports: (1) the Appellate Body’s interpretation of the causality requirement,¹¹⁷ (2) the panel’s use of judicial economy, (3) the issue of parallelism and Free Trade Agreements, and (4) issues regarding business confidential information.¹¹⁸ Among the supportive views, New Zealand (a third party) expressed considerable appreciation for the quality of the DSM’s reasoning but, like a number of other Members, voiced dissatisfaction with the lack of clarity provided by the Appellate Body on how an investigating authority was supposed to conduct its causation analysis in conformity with the agreement.¹¹⁹ The majority of Members adopted

113. WT/DS165/AB/R *supra* note 112; see WT/DS165/R *supra* note 112; see also ZIMMERMAN, *supra* note 92, at 101 (detailing DSU review negotiations regarding the sequencing issue).

114. WT/DS165/AB/R, *supra* note 112, at 27.

115. The only expressed criticism focused on the panel’s interpretation that Article 22 arbitration panels could determine whether the DSB’s recommendations had been complied with (the task of Article 21.5 panels), and not the Appellate Body’s ruling that effectively kicked resolution of the issue to Member governments. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 10 January 2001*, WTO Doc. WT/DSB/M/96 (February 22, 2001), at 10–11; *id.* at 9.

116. Over half of the statements expressed critical views (eight statements, five of which were strongly critical) while only four expressed supportive views (statements by the EC, Japan, Mexico, New Zealand). WT/DS166/AB/R, *supra* note 112; WT/DS166/R, *supra* note 112.

117. See Agreement on Safeguards Art. 4.2(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154, https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm [https://perma.cc/QHS9-MUWM] (archived Feb. 23, 2016).

118. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 19 January 2001*, WTO Doc. WT/DSB/M/97 (Feb. 27, 2001), at 1–8.

119. *Id.* at 4–5. In terms of primarily supportive statements, Japan merely briefly affirmed that it viewed the Appellate Body’s interpretation of causality as not

the same view, deploring the lack of clarity and inconsistency with precedent contained within the Appellate Body's ruling on causality in safeguard investigations. Two governments (Chile and Uruguay) stated that this issue should be further clarified by the Members themselves, within the Committee on Safeguards or the General Council, and *not* by the Appellate Body.

By 2002, governments were the most critical in relative terms, with nearly half of the report statements revealing express dissatisfaction with the DSM. This trend was largely driven by the overwhelming concern with the Appellate Body report in *European Communities—Trade Description of Sardines (EC—Sardines)*,¹²⁰ a focal dispute that generated the third highest number of statements prior to report adoption across a wide subset of the membership.¹²¹ A few statements voiced disagreement with or support for the Appellate Body's ruling on the allocation of the burden of proof with respect to international standards under the Agreement on Technical Barriers to Trade.¹²² The overwhelming majority of statements, however, expressed concern over the Appellate Body's decision to accept—albeit not take into account—unsolicited amicus curiae briefs by one private individual and Morocco (at the time a WTO Member but not a third party to the dispute).¹²³ The Appellate Body's decision to allow an amicus submission by Morocco added another layer to the already complex debate over amicus submissions in WTO dispute proceedings, given that many viewed this decision as giving Morocco—a non-party in the dispute—greater participation rights than some passive third-parties.¹²⁴ In addition, many expressed concern that the Appellate Body's decision was “prejudicial to the position held by some Members regarding the on-going DSU negotiations over the acceptance of amicus briefs,”¹²⁵ chiding the Appellate Body for ignoring the “overwhelming view of WTO

departing from precedent, while Mexico supported the reports' conclusion that it didn't affect the rights of members of FTAs. *Id.* at 5.

120. WT/DS231/AB/R, *supra* note 57; WT/DS231/R, *supra* note 57.

121. Nineteen statements, by eighteen different Members (the second highest number of Members expressing views) were made in total. The dispute concerned an EC Regulation establishing common marketing standards for preserved fish, which Peru claimed constituted an unjustifiable barrier to trade under the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade (GATT) 1994.

122. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 October 2002*, WTO Doc. WT/DSB/M/134 (January 29, 2003), at 12 (stating Chile's position that the burden of proof rested with Peru as the responsible party); see also *id.* at 18 (noting that Ecuador “did not share the Appellate Body's view on reversal of the burden of proof.”).

123. See *id.* at 11–21.

124. For Chile, the decision created “a new category of Members, giving them rights and obligations that had not been negotiated and, furthermore, had not been recognized in the WTO Agreements.” *Id.* at 12.

125. *Id.* at 14–18.

Members expressed at the meeting of the General Council on 22 November 2000.”¹²⁶

B. Ten Years On: 2003–2006

Following this comparatively low point in diffuse support for the DSM's exercise of authority, its perceived legitimacy increased after the DSB adopted reports in the *US—Offset Act (Byrd Amendment)* dispute.¹²⁷ While these reports generated considerable engagement by the membership, they once more represented a form of “majoritarian activism” on the part of the DSM, as there existed a relatively broad consensus among Members that the Byrd Amendment violated WTO rules.¹²⁸ The overwhelming majority of statements made within the DSB thus affirmed the DSM's conclusion in this regard, rather than evaluating its exercise of authority or the quality of its reasoning.¹²⁹

In 2004, two disputes stand out as focal within the DSB. The first, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (US—Corrosion-Resistant Steel Sunset Review)*,¹³⁰ addressed the question of whether previous Appellate Body rulings against zeroing practices in anti-dumping investigations also affected the use of those investigations within sunset reviews, with the Appellate Body overturning some quite controversial panel findings.¹³¹ Because a

126. See *id.* at 18 (documenting Malaysia's acknowledgement that although “it might not have been a decision of the General Council, it was the overwhelming view of Members and the Appellate Body should have been more politically sensitive to this issue.”).

127. See generally WT/DS217/AB/R, *supra* note 74; see also WT/DS234/AB/R, *supra* note 74.

128. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 27 January 2003*, WTO Doc. WT/DSB/M/142 (Mar. 6, 2003), at 8–12.

129. In addition, almost every government that spoke (60 percent of the speaking Members) made two statements, with the second one discussing the procedural issue of how to adopt reports with two separate WTO Dispute System numbers, even though only one party had requested adoption. Of the statements that revealed an evaluative view on the reports, all except one (by the United States) expressed support.

130. See generally Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, 14 August 2003, WTO Doc. WT/DS244/AB/R (Dec. 15, 2003) (eliciting a total of twelve of twelve statements from eleven different Members); see also Appellate Body Report, *United States—Sunset Review of Anti-Dumping on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc. WT/DS244/R (Aug. 14, 2003).

131. Anti-dumping authorities calculate the margin of dumping for a product by computing the difference between normal value and export price for each model or type of a particular product, and aggregate the results. “Zeroing” refers to the practice of omitting the calculations where export price was higher than normal value, thus inflating dumping margins.

number of Members were affected by the USTR's use of the zeroing methodology within investigations and sunset reviews, this case would have significant implications for other (potential) disputes and consultations, which largely explains broad engagement and specific support by third and non-parties. While some governments voiced concern that the Appellate Body could not complete its analysis regarding the panel findings that it had reversed, due to insufficient development of the factual record,¹³² an overwhelming majority praised the report.¹³³

Three months later, the Appellate Body report in *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries (EC—Tariff Preferences)* was put up for adoption.¹³⁴ The dispute was the first to consider the Generalized System of Preferences (GSP) Program, specifically the 1979 Enabling Clause, which provides the legal basis for the exception to the most-favored nation principle.¹³⁵ In this dispute, India challenged one aspect of the EC's GSP plan of January 2002 as discriminatory in the granting of preferences.¹³⁶ The Appellate Body found that developed countries could differentiate among GSP beneficiaries under certain conditions, so long as the procedure for doing so was

132. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 9 January 2004*, WTO Doc. WT/DSB/M/162 (Feb. 16, 2004), at 4, 9.

133. *Id.* at 4–9.

134. See Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (Apr. 7, 2004); see also Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, 20 April 2004, WTO Doc. WT/DS246/R (Dec. 1, 2003) (eliciting thirteen total statements, including statements from thirteen third parties (El Salvador made a statement on behalf of itself, Guatemala, Honduras, and Nicaragua; Ecuador made a statement on behalf of the Andean Community, which also includes Bolivia, Colombia, Peru, and Venezuela) and five non-parties); see, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 April 2004*, WTO Doc. WT/DSB/M/167 (May 27, 2004), at 16–17.

135. Under the GSP program, developed countries are permitted and encouraged to give preferential market access by lowering tariffs for developing countries below the level of tariffs for developed countries. However, many developed countries began to make the preferences conditional on various factors. GATT Contracting Parties, *Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries* 1980, GATT B.I.S.D. 203 (Nov. 28).

136. Under the EC's Drug Arrangement preferences program, the EC gave additional preferences to countries certified as having programs to combat drug production and drug trafficking. Countries did not apply for special preferences and the EC did not state what standards country would have to meet to qualify for the drug incentives. The EC itself identified the countries it would grant these preferences, which included the Andean Community, Central American States and Pakistan (12 countries total). Applying a Scheme of Generalized Tariff Preferences for the Period from 1 January 2002 until 31 December 2004, EC Council Regulation 2501/2001 (Dec. 10, 2001).

nondiscriminatory, which the EC had failed to do within its program.¹³⁷ Revealed aggregate views on this report were pretty evenly split between support and criticism, with the majority focusing on three issues in particular.

The first issue concerned the allocation of the burden of proof with respect to consistency of a GSP program with the Enabling Clause.¹³⁸ The second issue concerned the Appellate Body's finding that preference-giving countries *could* differentiate among GSP beneficiaries.¹³⁹ While Ecuador, speaking on behalf of the Andean Community, expressed support for this ruling,¹⁴⁰ other Members criticized this finding as effectively "legitimizing the GSP as a tool of foreign policy of developed countries, something developing countries had tried to avert when negotiating the Enabling Clause in order to overcome the fragmented scheme of special preferences in the past."¹⁴¹ The third related issue concerned the Appellate Body's interpretation of the term "non-discriminatory."¹⁴² Even governments that generally supported the report, such as Thailand, expressed discomfort over how developed countries would identify the criteria for "similarly-situated beneficiaries," such that the granting of preferences would not result in discrimination.¹⁴³ Many of these statements noted the Appellate Body's non-reliance on the Enabling Clause's negotiating history in interpreting the term "non-discriminatory."¹⁴⁴

Despite the seemingly strong dissatisfaction with the operation of the DSM in 2005, and the conversely strong support for the panels' and Appellate Body's exercise of authority in 2006,¹⁴⁵ no disputes elicited more than ten statements by Members within these years.

137. WT/DS246/AB/R, *supra* note 134, at 72–76.

138. For example, the United States and Mexico expressed concern over the ruling that the EC bore the burden of proving that the Drug Arrangements were consistent with the Enabling Clause, even though it was incumbent upon India to raise it in the proceedings. The United States stressed that there was no legal foundation for "this hybrid approach" that could lead to "confusion in future disputes where there was an issue about the burden of proof." WT/DSB/M/167, *supra* note 49, at 15–16; *see also id.* at 8–13, 16–17, 22.

139. WT/DS246/AB/R, *supra* note 134.

140. WT/DSB/M/167, *supra* note 49, at 5.

141. *Id.* at 21.

142. *See, e.g., id.* at 16–17.

143. *Id.* at 22.

144. *Id.* at 20. Canada emphasized that the negotiating history was only a supplementary means of interpretation, and that the Appellate Body's approach should rather be welcomed for "paying particular attention to the words of the treaty," instead of being criticized for not delving into the negotiating history of the provision. *Id.* at 22.

145. Remarkably, in 2006 only four statements are classified as either predominantly or strongly critical, three of which are issued by the United States. Two were issued in the context of Article 21.5 reports for *US—FSC* and *US—Softwood Lumber*, and one in context of the Appellate Body report in *US—Zeroing (EC)*.

C. The Recent Years: 2007–2013

Of the ten reports put up for adoption in 2007, only *United States—Measures Relating to Zeroing and Sunset Reviews (US—Zeroing)*¹⁴⁶ elicited engagement, albeit moderate, from a broader subset of the membership.¹⁴⁷ Few of the statements discussed the findings in depth, with the exception of the one exclusively critical statement by the United States that voiced both specific and diffuse concerns over the fact that the Appellate Body continued to go against how numerous panelists had analyzed the issue of zeroing.¹⁴⁸ The majority of statements briefly expressed satisfaction with the Appellate Body’s findings, though a few also voiced frustration that the Appellate Body had not gone *far* enough in that it had declined to rule that the practice of zeroing as such violated Article 2 of the Anti-Dumping Agreement.¹⁴⁹

Members generally expressed relatively greater satisfaction with dispute reports between 2008 and 2010, with slight fluctuations in expressed criticism. The issue of zeroing and appellate reversal of panel interpretations arose again in 2008, with the report in *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico (US—Stainless Steel (Mexico))*¹⁵⁰ once more raising the systemic issue of panels declining to follow prior legal interpretations of the Appellate Body. On appeal, the Appellate Body strongly criticized the panel’s decision to depart from its prior rulings and engaged in an extended discussion of the precedential role of previous report findings. Despite the fact that this report also implicated ongoing negotiations over trade remedies in the Doha Round and

146. *US—Zeroing (Japan)* was one dispute in a long line of cases ruling against the Department of Commerce’s practice of “zeroing” in anti-dumping investigations. Because many Members had been adversely affected by and brought a number of cases against the US practice of zeroing, it is rather unsurprising that these disputes elicit engagement by more than just the parties to the dispute. Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WTO Doc. WT/DS322/AB/R (Jan. 9, 2007); Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, 23 January 2007, WTO Doc. WT/DS322/R (Sept. 20, 2006).

147. As one representative noted, zeroing represented “one of the most contentious and frequently raised issues in anti-dumping disputes.” Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 January 2007*, WTO Doc. WT/DSB/M/225 (Mar. 8, 2007), at 19.

148. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 January 2007*, ¶¶ 73–76, WTO Doc. WT/DSB/M/225 (Mar. 8, 2007).

149. *Id.* at ¶¶ 77–83, 93–94 (reporting on statements made by the Representatives of Japan, Norway, and Korea, respectively, regarding the adoption of the Appellate Report concerning zeroing).

150. Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc. WT/DS344/AB/R (Apr. 30, 2008); Panel Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc. WT/DS344/R (Dec. 20, 2007).

disagreement among Members therein about whether and when to explicitly prohibit zeroing practices, only the United States issued a critical statement on the Appellate Body's reversal of the panel's zeroing analysis.¹⁵¹ However, even within the remainder of the statements, all classified as supportive, a number of governments voiced diffuse reservations about whether and when panels should follow prior Appellate Body jurisprudence, as doing so unconditionally could undermine the requirement in DSU Article 3.2 that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."¹⁵²

In contrast to the general support for the Appellate Body's reasoning within its *US—Zeroing (Japan)* report, Members expressed relatively more criticism of the Appellate Body's findings regarding another long-standing issue, in the context of reports in *US—Continued Suspension* and *Canada—Continued Suspension*.¹⁵³ Nearly all governments (with the exception of the European Communities) voiced diffuse concerns over the Appellate Body's findings on the sequence of use of DSU procedures, particularly the fact that it issued a "recommendation," despite having been unable to complete the analysis as to whether the EC was in substantive compliance with the original *EC—Hormones* rulings.¹⁵⁴ For most Members, this represented the DSM stepping outside the boundaries of its authority by indicating its "stated preference for Article 21.5

151. The United States strongly criticized the Appellate Body's approach, including its references to a "coherent and predictable body of jurisprudence," as "appear[ing] to transform the WTO dispute settlement system into a common law system." Dispute Settlement Body, *Minutes of Meeting Held in Centre William Rappard on 20 May 2008*, ¶ 53, WTO Doc. WT/DSB/M/250 (July 1, 2008) (summarizing statement by the representative of the United States).

152. For example, Chile agreed that the Appellate Body's reports create "legitimate expectations among Members and should, therefore, be taken into consideration, although they were not—he reiterated not—binding", but then expressed concern about some of the language used by the Appellate Body that "could lead to unfortunate conclusions regarding the nature of the dispute settlement system." *Id.* ¶¶ 67–68. Australia similarly emphasized that it was "necessary for panels and the Appellate Body to strike a balance between security and predictability, on the one hand, and maintaining the parties' rights and obligations under the covered agreements, on the other." *Id.* ¶ 64.

153. Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WTO Doc. WT/DS320/AB/R (Oct. 16, 2008); Panel Report, *United States—Continued Suspension of Obligation in the EC—Hormones Dispute*, WTO Doc. WT/DS320/R (Mar. 31, 2008); Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WTO Doc. WT/DS321/AB/R (Oct. 16, 2008); Panel Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WTO Doc. WT/DS321/R (Mar. 31, 2008).

154. The Appellate Body recommended that the DSB request the parties to initiate Article 21.5 proceedings. See WT/DS320/AB/R, *supra* note 153, at 309, ¶ 737.

procedures to the detriment of the other procedures provided for in the DSU.”¹⁵⁵

The Appellate Body also reaffirmed its previous findings that a due process requirement was “inherent in the WTO dispute settlement system”¹⁵⁶ and “fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings”¹⁵⁷ in the context of finding that the Panel had infringed the EC’s due process rights by appointing experts with questionable institutional affiliations.¹⁵⁸ Some governments, while agreeing with the general rulings on the independence and impartiality of appointed experts, expressed concern that “due process” was not treaty language and that the DSU did not define the “content and scope of this ‘inherent’ right.”¹⁵⁹ Finally, the decision to hold public hearings elicited comments by most representatives, with no overwhelming consensus on the desirability or legitimacy of open hearings. Some viewed the decision as one that all Members must make by consensus,¹⁶⁰ while others fully supported the decision as contributing to the “transparency” and “demystification” of the dispute settlement system for all WTO Members and those outside of the WTO.¹⁶¹

The year 2009 stands out in terms of relatively greater support. The DSB adopted one Appellate Body and two compliance proceeding reports related to U.S. zeroing practices, which largely prompted approving statements for the consistent line of cases finding such practices in violation of WTO rules. The United States understandably expressed its serious concern with aspects of the DSM’s legal analysis and interpretation, not just about the inconsistency of zeroing but also regarding, for example, the interpretation of Article 17.6(ii) of the Anti-Dumping Agreement and

155. “The evaluation of the appropriateness of the different options offered by the DSU was not only the responsibility of Members, but required the type of analysis which, in particular circumstances, nobody could perform better than Members.” Dispute Settlement Body, *Minutes of Meeting Held in Centre William Rappard on 14 November 2008*, ¶ 26, WTO Doc. WT/DSB/M/258 (Feb. 4, 2009).

156. Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶ 176, WTO Doc. WT/DS207/AB/R (Sept. 23, 2002); Panel Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WTO Doc. WT/DS207/R (May 3, 2002); see also Appellate Body Report, *Mexico—Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, ¶ 107, WTO Doc. WT/DS132/AB/RW (Oct. 22, 2001).

157. Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 88, WTO Doc. WT/DS122/AB/R (Mar. 12, 2001); see also WT/DS122/R, 12 March 2001, ¶ 88.

158. See WT/DS320/AB/R, *supra* note 153, ¶ 736(b); WT/DS320/R, 14 November 2008, ¶ 436; see also WTO Doc. WT/DS321/AB/R, *supra* note 153, ¶ 481; WT/DS321/R, 14 November 2008, ¶ 436.

159. WT/DSB/M/258, *supra* note 155, ¶ 21.

160. See *id.* ¶ 46.

161. *Id.* ¶¶ 6, 48.

the Appellate Body's assertion of the jurisprudential value of its reports, concerns shared by a few other Members.¹⁶²

While relative support is also high in 2010, this year is slightly anomalous in terms of the ability of DSB statements to signal aggregate revealed views on the DSM's legitimacy, in that this period represented the lowest point of DSM use and activity.¹⁶³ Perhaps Members were thus signaling dissatisfaction through refusal to empanel disputes, preferring instead to continue to attempt to resolve them bilaterally. Or perhaps the supply of international trade disputes was simply lower during that period. Regardless of the reason for the low use of the DSM, the fact that only five reports were adopted and thus only twenty-two statements made prior to report adoption makes this year somewhat of an outlier.¹⁶⁴ Only five statements are classified as predominantly or exclusively critical; the remainder expressed overwhelming or conditional support for the activity of the DSM.¹⁶⁵

By 2011, the DSM—and the Appellate Body in particular—was facing a heavy workload affecting its ability to circulate reports within the time frames specified within the DSU. The lack of transparency with which the DSM dealt with delayed circulation of reports—particularly whether it had consulted with or obtained the consent of the disputing parties—in addition to a number of new, controversial interpretations, prompted relatively greater criticism by Members during this year and the following year.¹⁶⁶ In terms of substantive issues, the adoption of the panel and Appellate Body reports in *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US—Anti-Dumping and Countervailing Duties (China))*¹⁶⁷ elicited a number of

162. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 19 February 2009*, ¶ 91, WTO Doc. WT/DSB/M/265 (Apr. 29, 2009).

163. Authors' dataset.

164. *Id.*

165. For example, the panel reports in *EC—IT Products* prompted two statements—by the EC and China—that express concern over the panel's expansive and "evolutionary" interpretation of agreement commitments made by Members. Panel Report, *European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products*, WTO Docs. WT/DS375/R, WT/DS376/R, WT/DS377/R (Aug. 16, 2010).

166. See, e.g., Appellate Body Report, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO Doc. WT/DS399/AB/R (Sept. 5, 2011), at 4, n. 24 (noting that the United States submitted a letter expressing concern over why the Report would not be submitted within the normal ninety-day period); Panel Report, *United States—Measures Affecting Imports of Certain Passenger Vehicles and Light Truck Tyres from China*, WTO Doc. WT/DS399/R (Dec. 13, 2010).

167. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (Mar. 11, 2011); Panel Report, *United States—Definitive Anti-Dumping and*

statements about the Appellate Body's allegedly new interpretation of "public body" in the context of Article 1.1(a)(1) of the SCM agreement, with some Members devoting their entire statement to the issue.¹⁶⁸ The majority of governments expressed serious concern over the Appellate Body's interpretation, emphasizing that the "drafters of the SCM Agreement had made a clear distinction between the terms 'government' and 'public body'" and that the Appellate Body's decision to equate those terms had "overreaching results[,] . . . render[ing] the term 'public body' meaningless."¹⁶⁹ In response to these detailed disagreements with the Appellate Body's reasoning, the representative of the European Union noted that these views seemed to be "questioning the legitimacy of the Appellate Body Report," and while the EU representative did not agree with all of the report's findings, it considered that the threshold for questioning its legitimacy was "very high . . . and certainly not the case with regard to the Reports which were being considered."¹⁷⁰

Compared to the year before, Members expressed slightly more support for the DSM in 2012, although concern with the lack of transparency in delayed circulation of Appellate Body reports continued. For example, prior to adoption of the report in *China—Measures Related to the Exportation of Various Raw Materials (China—Raw Materials)*,¹⁷¹ some Members commended the report's findings, despite the complex legal and factual issues raised,¹⁷² but most expressed concern that the Appellate Body had not noted the parties' agreement to circulation of the report outside of the ninety-day deadline, in line with pre-2011 practice, which would have provided greater transparency for the DSB and other Members.¹⁷³ Similarly, in *United States—Certain Country of Origin Labelling*

Countervailing Duties on Certain Products from China, WTO Doc. WT/DS379/R (Oct. 22, 2010).

168. China and Norway both expressed satisfaction with the Appellate Body's interpretations, while Mexico disagreed but considered that the "Appellate Body's reasoning . . . had its own merits and showed adequate reasoning." Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 25 March 2011*, ¶¶ 93–95, 103–105, 113, WTO Doc. WT/DSB/M/294 (June 9, 2011) (reporting on the statements of the Representatives of China, Norway, and Mexico, respectively).

169. See, e.g., *id.* ¶¶ 106–107 (quoting the representative of Turkey). See also the lengthy statement devoted entirely to this issue made by the representative of Japan. *Id.* ¶¶ 119–126.

170. *Id.* ¶¶ 108–112.

171. Appellate Body Reports, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012); Panel Reports, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Docs. WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011).

172. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 22 February 2012*, ¶¶ 117–120, WTO Doc. WT/DSB/M/312 (May 22, 2012) (reproducing the statements of the Japanese representative).

173. See, e.g., *id.* ¶¶ 102–106 (reproducing the U.S. representative's statements during the DSB meeting).

(COOL) Requirements (US—COOL),¹⁷⁴ some governments commented on the significant findings contained within the reports,¹⁷⁵ but most again focused attention on the systemic concerns raised by the inability of the Appellate Body to meet the DSU-stipulated deadline for the circulation of reports.¹⁷⁶ While many expressed understanding given the complexity of the dispute, they also stressed that when the Appellate Body faced exceptional circumstances preventing it from meeting its deadlines, it should seek consent from the parties and inform the DSB thereof.¹⁷⁷ Members agreed that this issue needed to be addressed through government negotiations within the DSU Review process, in order to explore “ways to ensure that the dispute settlement system was best able to meet the fundamental objective of the prompt settlement of disputes.”¹⁷⁸

Finally, while relative support is remarkably high in 2013, this year again is slightly anomalous in terms of the ability of DSB statements to signal aggregate revealed views on the DSM’s legitimacy, in that the DSB only adopted three reports, eliciting a total of fifteen statements by Members.¹⁷⁹

174. This dispute concerned the United States’ mandatory country of origin labeling (COOL) provisions, including the obligation to inform consumers of the country of origin of covered commodities. The Appellate Body found that the Panel did not err in finding that “the COOL measure did not fulfill the identified objective” of providing consumer information on the origin of meat products. The report elicited eleven statements by eleven different Members, including the three parties, six of the fourteen third parties and two non-parties. See Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, CDA-220, ¶ 496(b)(v), WTO Doc. WT/DS384/AB/R (June 29, 2012); see also Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, MEX-220, ¶ 496(b)(iv), WTO Doc. WT/DS386/AB/R (June 29, 2012).

175. In addition to statements by the parties to the dispute, see also Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 July 2012*, ¶ 98, WTO Doc. WT/DSB/M/320 (Sept. 28, 2012).

176. See, e.g., *id.* ¶¶ 107–108 (noting the Chinese representative “wished to express systemic concerns about the understanding of Article 17.5 of DSU.”).

177. This would “ensure the legal certainty of the reports and transparency.” *Id.* ¶ 98 (quoting statement made by the representative of Costa Rica); see also *id.* ¶ 105 (quoting the reaction of the Guatemalan representative). Others, however, stressed that there was no need for revising the existing practice and suggested that because of the increased complexity of disputes, the Appellate Body should rather be permitted more flexibility or have the deadline extended, and that “the need to comply with the 90-day time-period should not affect the high-quality of the Appellate Body reports.” *Id.* ¶ 106.

178. *Id.* ¶ 104; see also *id.* ¶¶ 102–103 (noting the Japanese representative’s desire to find a solution to the issue of prompt settlement).

179. Eleven of the statements expressed support for the reports, with the remaining statements (save one critical statement China on the panel report in *China—Broiler Products*) either not expressing a view on the DSM or not being directly about the DSM.

D. Summary of Focal Report Statements

This analysis of statements on focal reports highlights a number of issues that WTO Members believe lie at the heart of the legitimacy of the Dispute Settlement Mechanism. One recurring issue, with adverse effects on the DSM's perceived legitimacy, arises from governments' views that the DSM engaged in expansive interpretations of WTO rules, thereby *adding to* instead of *clarifying* Members' existing rights and obligations. Such expansive lawmaking, in the view of many governments, contributes to an "unsettling" of the balance established within the WTO agreements between the Organization's judicial and political bodies. For many Members, the separation of powers within the WTO is reflected in DSU Article 3(2), more importantly in Article IX:2 of the WTO Agreement, which establishes Members' *exclusive* right to issue authoritative interpretations on WTO law.¹⁸⁰ Only governments may create new rights and obligations, while the purpose of the DSM is merely to *clarify* existing provisions in the course of facilitating the settlement of disputes. This view on the institutional relationship between the WTO's political and judicial bodies also explains why a number of the focal reports concern DSM findings on issues subject to ongoing negotiations, both within and outside the framework of DSU review. The DSM's interpretations regarding "sequencing" and its practices with regard to amicus briefs are but two examples.

Notably, the DSM's practices on the acceptance of unsolicited amicus curiae briefs prompt more than concern with the balance between the political and judicial branches of the WTO. Disputes for which the DSM has accepted amicus briefs from external parties, such as private individuals or law firms—for example, in *United States—Section 110(5) Copyright Act*—spur engagement for two additional reasons. First, governments worry that their acceptance will create a "floodgate to non-requested submissions,"¹⁸¹ with potentially detrimental effects for the system's effectiveness. Second, and more importantly, accepting such briefs might effectively grant greater de facto rights and input to non-WTO Members. As observed in *EC—Sardines*, this set of issues becomes more complicated when the DSM accepts such briefs from WTO Members not party to the

180. See DSU, *supra* note 1, art. 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."); see also WTO Agreement, *supra* note 36, art. IX:2 (declaring that only the Ministerial Conference and General Council have the exclusive authority to adopt interpretations of the Agreement).

181. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 27 July 2000*, ¶ 71, WTO Doc. WT/DSB/M/86 (Sept. 20, 2000).

dispute.¹⁸² Because parties and third parties to the proceedings must follow the stringent Working Procedures for Appellate Review, allowing briefs from non-parties gives these governments more extensive opportunities to advance their legal arguments. Such practices elicit engagement because they are perceived to upset the fair balance between Members within dispute proceedings, a balance that is central to the maintenance of procedural due process.¹⁸³

Concern over the fairness of dispute proceedings and the “inherent” rights of parties to procedural due process arises not merely in relation to amicus submissions. It also emerges frequently in the context of (i) panels’ consultations with or appointment of experts¹⁸⁴ or other international organizations,¹⁸⁵ (ii) panels’ objective assessment and consideration of evidence and arguments before it in line with Article 11 of the Dispute Settlement Understanding,¹⁸⁶ (iii) the reluctance of the Appellate Body to complete the legal analysis when the panel has exercised judicial economy,¹⁸⁷ and (iv) delayed circulation of Appellate Body reports in the absence of consultation with or agreement of the parties.¹⁸⁸ Although the language of “procedural fairness and due process” is not found within the DSU, the Appellate Body increasingly incorporates these phrases within its reports. While a number of governments recognize that “it would be difficult to imagine any delegation, relying on a wholly literal interpretation of the DSU to suggest that these principles did not apply to panel proceedings,”¹⁸⁹ others express concern with the incorporation of this language within reports, while still supporting the underlying principles.¹⁹⁰ What is clear is that the fair and balanced treatment of parties by the DSM within dispute

182. See generally Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 October 2002*, WTO Doc. WT/DSB/M/134 (Jan. 29, 2003).

183. *Id.*

184. In the context of the Appellate Body's reports in *US—Continued Suspension and Canada—Continued Suspension*, see WT/DSB/M/258, *supra* note 155, ¶ 27; see also *id.* ¶ 21.

185. In the context of the Appellate Body report in *Argentina—Textiles and Apparel*, see Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 22 April 1998*, WTO Doc. WT/DSB/M/45 (June 10, 1998), at 6.

186. In the context of the Appellate Body report in *Thailand—Cigarettes (Philippines)*, see Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 15 July 2011*, ¶ 10, WTO Doc. WT/DSB/M/299 (Sept. 1, 2011).

187. In the context of *United States—Tuna II*, see Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 13 June 2012*, ¶ 28, WTO Doc. WT/DSB/M/317 (July 31, 2012).

188. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 5 October 2011*, ¶ 14, WTO Doc. WT/DSB/M/305 (Dec. 2, 2011).

189. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 19 May 2004*, ¶ 53, WTO Doc. WT/DSB/M/169 (June 30, 2004).

190. See WT/DSB/M/258, *supra* note 155, ¶ 21; see also DSB Meeting Minutes 15 July 2011, *supra* note 186, ¶ 10.

proceedings constitutes a central source of its legitimacy for some Members.

Members are also prompted to speak up when they are satisfied with the DSM's exercise of authority. For example, as statements in the context of *US—Section 301 Trade Act* demonstrated,¹⁹¹ interpretations that reflect a high degree of consensus among the membership and represent the DSM's engagement in so-called "majoritarian activism" positively influence aggregate measures of the DSM's legitimacy. This finding indirectly supports the argument made by Alec Stone Sweet and Thomas Brunell that "majoritarian activism" helps the DSM to "mitigate . . . legitimacy problems."¹⁹² Conversely, when the DSM adopts interpretations governments believe adversely affect the majority of the membership (particularly developing countries, as was the case in *India—Quantitative Restrictions*), the DSM engages in what could be called "minority activism." In these instances, representatives do not shy away from voicing active criticism resulting in a weakening of the DSM's perceived legitimacy.¹⁹³

VI. CONCLUSION

This Article provides the first systematic mapping of support for the World Trade Organization's judicial bodies through an examination of Members' expressed views on the Dispute Settlement Mechanism's exercise of its adjudicative authority. By analyzing aggregate revealed views over time and between different users of the system and substantively examining focal reports, the preceding Parts identified a number of practices that contribute to strengthening or weakening the DSM's legitimacy in the eyes of its main constituents: the Members. Additionally, this Article's analysis is the first to reveal that the sources of a court's legitimacy *do* vary across actors and that WTO Members often apply different standards in evaluating the appropriateness of the DSM's exercise of authority.¹⁹⁴

The Membership has overall expressed proportionally more support than criticism for the DSM's exercise of authority. The exceptions to this in 1999, 2002, and 2011 were largely attributable to

191. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 27 January 2000*, WTO Doc. WT/DSB/M/74 (Feb. 22, 2000), at 10–20.

192. Stone Sweet & Brunell, *supra* note 4, at 64.

193. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 24 September 1999*, WTO Doc. WT/DSB/M/68 (Oct. 20, 1999), at 14–23.

194. Until now, this has only been assumed in the literature. See, e.g., Bodansky, *supra* note 11, at 322–23.

third parties' and non-parties' expressed dissatisfaction with the DSM's practices. Most interestingly, criticism of the DSM's exercise of authority steadily increases in tandem with declining usage of the DSM. Given that the United States and the European Union are much more active users of the system, it is not surprising that their perceptions on the DSM's exercise of authority differ significantly from other Members. Yet despite the fact that these two largest traders are often "dragged before" the WTO's judicial bodies and subject to repeated rulings against their trade measures, the United States and the European Union are actually relatively less critical of the DSM than other Members.¹⁹⁵ This may suggest either that higher engagement with the system contributes to higher levels of diffuse support that mitigate the impulse to exclusively voice criticism within a report statement, or that the DSM tends to cater its practices to Members that use the system more regularly, while alienating non-users in the process.

To further unpack the relationship between expressed support or criticism of the DSM and the sources of its legitimacy, this Article also examined why certain reports elicit engagement across the wider membership, third parties and non-parties in particular. The in-depth analysis of statements in the context of so-called "focal" reports revealed that certain practices *do* affect aggregate revealed views on the legitimacy of—or diffuse support for—the DSM. This analysis highlighted not only that perceptions on the legitimacy of international courts vary across actors but also that the *sources* of a court's legitimacy do as well. The issues that have given rise to widespread engagement do not always elicit consensus, but in many instances, result in *divergent* views on how these practices affect the DSM's legitimacy. Dissensus on the desirability or legitimacy of various issues and practices, such as increased due process in WTO proceedings or greater openness in panel or Appellate Body hearings, suggests that governments hold different beliefs about what lies at the core—or the sources—of the DSM's legitimacy.

These findings suggest a number of important questions for future study. The most pressing line of inquiry relates to what, if any, effects these expressed views have on the actual operation of the DSM. How do panels and the Appellate Body respond to crises or fluctuations in their perceived legitimacy? What practices do they adopt to maintain their legitimacy? A second line of inquiry, related to the finding that the sources of the DSM's legitimacy vary across governments, relates to regional, cultural, or other differences in the standards governments apply to evaluate an international court's exercise of authority. What characteristics of a government or its

195. There are notable exceptions, such as the continued and vocal criticism by the United States on the DSM's approach to reviewing zeroing practices in the context of imposing anti-dumping duties.

legal system explain differences in expressed views on the DSM's legitimacy? Do states apply the same sets of evaluative factors across different international courts? Finally, future research should explore how the DSM's descriptive or perceived legitimacy relates to normative theories on the legitimacy of international courts. This research would have important institutional design implications, given that a number of proposals on how the WTO *can* and *should* increase the legitimacy of its judicial bodies draw from such normative theories. If the sources of the DSM's perceived legitimacy differ in critical ways from the presumed normative sources of legitimacy underpinning these proposals, implementation of these proposals may not serve to enhance support for the DSM's exercise of authority among the broader membership.
