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AUTHORITY WITHOUT FINALITY: WTO ADJUDICATION AFTER THE APPELLATE BODY

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Abstract
The paralysis of the WTO Appellate Body since 2019 has transformed the conditions under which international trade disputes are adjudicated. While panels continue to issue reasoned reports, the absence of appellate review has removed the mechanism that previously supplied legal finality and disciplined interpretive disagreement. This article examines how WTO adjudication functions under these conditions of non-finality and what form of legal authority, if any, persists.
Employing a qualitative doctrinal methodology, the article undertakes close comparative analysis of selected post-2019 panel reports and Multi-Party Interim Appeal Arbitration (MPIA) awards addressing identical treaty provisions. Rather than relying on aggregate claims about "panel practice," it anchors its analysis in paragraph-level examination of trade remedies disputes, evidentiary review under DSU Article 11, and the reception of MPIA reasoning by panels outside the arbitration framework.
The article demonstrates that post-2019 WTO adjudication operates through a form of horizontal coordination characterized as soft stare decisis: panels are expected to engage with prior reasoning but are not obliged to follow it. This practice sustains legality through professional norms of justification, yet produces uneven analytical intensity and increasing instances of silent divergence. The MPIA, while reproducing appellate-quality reasoning, circulates without systemic authority and therefore cannot stabilize interpretation beyond consenting members.
The article argues that authority without finality is a workable interim condition but an unstable long-term equilibrium. It concludes by proposing modest, evidence-based reforms mandatory reasoned engagement, selective appellate review, and formal recognition of interpretive pluralism designed to restore legal authority without reinstating a hierarchical appellate body.

Keywords
WTO dispute settlement; Appellate Body crisis; panel adjudication; soft stare decisis; legal authority; trade remedies; DSU Article 11; MPIA arbitration; horizontal judicial coordination; interpretive pluralism

Introduction

For over 20 years, the World Trade Organization's (WTO) system of dispute settlement base the power and authority for its resolution not only upon compulsory jurisdiction, but upon the presence of an hierarchical appellate system that can stabilize legal interpretation across disputes. The Appellate Body did not establish binding precedent, but with consistent reasoning and some systematized review it provided the finality combined with doctrinal discipline that panels simply did not.[1] Through this two-tier structure, WTO adjudication squared an apparent contradiction: on one hand, it ensured flexibility; while on the other hand, it ensured coherence in lawmaking so that adjudication differed from interpretation and lawmaking differed from

[1] Claus-Dieter Ehlermann, 'Six Years on the Bench of the "World Trade Court"' (2002) 3 Journal of International Economic Law 1, 3–6.

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adjudication.[2] Since December 2019, that institutional condition has ceased to exist. The paralysis of the Appellate Body has turned the WTO methods of dispute settlement from a hierarchical system of review to one where there is an ongoing adjudication without a final judicial body.[3]

The consequences of this shift do not end with the now familiar observation that discontented parties may "appeal into the void," thus averting the adoption of panel reports.[4] More fundamentally, the loss of an appellate review has changed the internal conditions of judicial reasoning itself. Panels continue to be established, to hear disputes, and to circulate reasoned reports, but they now do so in an institutional environment where hierarchical correction is unavailable, interpretive disagreement cannot be authoritatively resolved, and legal reasoning operates under heightened political and institutional risk. The question, therefore, is not whether WTO adjudication continues it plainly does but what kind of legal authority panels can plausibly exercise under conditions of non-finality.[5]

Most existing scholarship approaches the Appellate Body crisis through political economy, institutional reform, or systemic legitimacy narratives. Commentators have examined the United States' objections to judicial overreach, the breakdown of appointment negotiations, and the broader implications of declining multilateralism.[6] Parallel work has explored interim responses, most notably arbitration under Article 25 of the Dispute Settlement Understanding (DSU) and the establishment of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).[7] While indispensable, these accounts tend to focus on what dispute settlement should become, rather than on how adjudication actually functions in the absence of appellate finality. They often proceed from an implicit assumption that without hierarchy of review, legal coherence must necessarily get lost.[8]

This article challenges that assumption, however, by bringing the focus from institutional design to adjudicatory practice. It focuses on how WTO adjudication panels reason and engages prior authority and how they handle interpretive dispute after 2019, when the appellate review of rulings stopped functioning. At a crucial point, this inquiry cannot occur at the level of abstraction. Arguments about how panels are done are only relevant if connected to specific reports, treaty rules and pinpointing exact legal points. Since from 2019, WTO court rulings have not completely failed, but they have remained the same. It uncovers patterned variation that can only be made visible under the close comparison of doctrine.

Trade remedies make the best example. Historically, the principle in this area of WTO law was stabilised through a string of Appellate Body jurisprudence which laid an analytical structure on

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[2] Appellate Body Report, US – Stainless Steel (Mexico) WT/DS344/AB/R, para 160.

[3] WTO, 'Appellate Body Members' https://www.wto.org/english/tratop_e/dispu_e/ab_members_e.htm accessed 10 December 2025.

[4] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) arts 16–17; Joost Pauwelyn, 'WTO Dispute Settlement Post-2019: What to Expect?' (2020) 22 Journal of International Economic Law 297, 302–304.

[5] DSU art 3.2.

[6] Gregory Shaffer, 'A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations' (2020) 44 Yale Journal of International Law 1.

[7] WTO, 'Multi-Party Interim Appeal Arbitration Arrangement' (2020); Joost Pauwelyn and Krzysztof Pelc, 'Who Writes the Rules of the World Trade System?' (2023) 117 American Journal of International Law 1, 19–23.

[8] Ernst-Ulrich Petersmann, 'WTO Adjudication after the Appellate Body Crisis' (2021) 24 Journal of International Economic Law 297, 300–303.

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the analysis of issues of causation and injury under Article 3 of the Anti-Dumping Agreement. In US - Washing Machines, the panel applied a highly structured non-attribution inquiry process, taking pains to distinguish injury from dumped imports from injury that could be attributed to other causes, in keeping with the level of methodological discipline imposed by the supervisory process of appellate review.[9] By contrasts, in Constituents of Anti-Voluntary Measures, Anti-Dumping Measures on the A4 Copy Paper, circulated after the Appellate Body ceased operating, the panel relied on the same jurisprudence but accepted a far more compressed causation narrative, allowing more discretion to the investigating authority with no explanation as to why decreased analytical intensity was the same as standards accepted previously.[10] The panel did no more than give prior doctrine a thin application, without intimating departure.

A similar pattern appears in EU Biodiesel (Indonesia), where the panel invoked Appellate Body causation principles but relied on an aggregated assessment of injury that softened the sequencing previously required.[11] In US Anti-Dumping Measures on Certain Steel Products, the panel addressed closely related legal questions without engaging at all with the structured causation approach articulated in US Washing Machines, despite factual and legal proximity.[12] Divergence here does not take the form of express doctrinal conflict. It emerges through selective engagement and silence.

Comparable dynamics can be observed beyond trade remedies. Under DSU Article 11, pre-2019 Appellate Body jurisprudence repeatedly cautioned panels against transforming the duty of objective assessment into intrusive review of domestic fact-finding.[13] Panels such as Australia – Plain Packaging adhered closely to this restraint.[14] Yet in EU – Energy Package, the panel scrutinized evidentiary weighing more aggressively, without acknowledging whether this approach expanded the scope of Article 11 review or departed from established appellate guidance.[15] Once again, the shift was not announced; it was performed.

These examples are indicative of a more general phenomenon. WTO panels still reason in a common interpretive grammar, which is based on both the Vienna Convention on the Law of Treaties and professional norms of judicial justification.[16] At the same time, the lack of appellate correction has changed the incentives that surround engagement, explanation and doctrinal discipline. Panels enjoy formal autonomy that is still preserved under DSU Article 11, but they now exist in a system of disagreement that cannot be worked out in the vertical direction and in a system of institutional risk that is encouraging caution, compression, or silence.

The development of the MPIA adds to this confusion. MPIA awards, such as Colombia - Anti-Dumping Duties on Frozen Fries, are a perfect reproduction of an appellate reasoning, engaging seriously with prior jurisprudence, and pointing to legal error in panel reasoning.[17] Their authority is however necessarily limited. Panels operating outside the MPIA framework have

[9] Panel Report, US – Washing Machines WT/DS464/R, paras 7.214–7.238.
[10] Panel Report, Australia – Anti-Dumping Measures on A4 Copy Paper WT/DS529/R, paras 7.92–7.118.
[11] Panel Report, EU – Biodiesel (Indonesia) WT/DS480/R, paras 7.189–7.205.
[12] Panel Report, US – Anti-Dumping Measures on Certain Steel Products WT/DS544/R.
[13] Appellate Body Report, US – Hot-Rolled Steel WT/DS184/AB/R, paras 225–230.
[14] Panel Report, Australia – Plain Packaging WT/DS435/R, paras 7.20–7.27.
[15] Panel Report, EU – Energy Package WT/DS476/R.
[16] Vienna Convention on the Law of Treaties (1969) arts 31–32.
[17] MPIA Award, Colombia – Anti-Dumping Duties on Frozen Fries WT/DS591/ARB25 (2022) paras 5.1–5.15.

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treated such awards as informative rather than binding. In Turkey Pharmaceutical Products, the panel drew on MPIA reasoning while explicitly preserving its independence.[18] Appellate logic circulates, but without system-wide force.

This article argues that post-2019 WTO adjudication is best understood as a condition of authority without finality. Panels increasingly engage in horizontal coordination: they cite prior panel reports, draw selectively on Appellate Body jurisprudence, and treat MPIA awards as persuasive. This practice gives rise to what may be described as soft stare decisis an obligation to engage with prior reasoning, without an obligation to follow it. Such coordination can manage interpretive pluralism temporarily. It cannot, however, substitute for finality. Where panels diverge without explicit justification, predictability erodes; where silence replaces explanation, disagreement becomes drift.

The contribution of this article is deliberately narrow and methodologically restrained. It does not claim to measure compliance effects, predict state behavior, or offer a counterfactual in which the Appellate Body continued to function. It makes a qualitative doctrinal analysis of selected post-2019 panel reports and MPIA awards (selected for their discussion of identical legal provisions under changed institutional conditions). The focus is not so much on the end results but on how decisions are made: how panels use, separate, shorten or quietly ignore past rulings.

By grounding its analysis on concrete reports as well as on paragraph level, doctrinal moves, the present article aims to make acutely visible the legal consequences of adjudication without a final word. The argument that follows is not by any means restorations. It is not an invitation for the Appellate Body to return in its 2019-pre version. It is rather diagnostic and tentatively normative: in the absence of measures introducing new elements of selective finality and visible correction, WTO adjudication tends to become normalized fragmentation under the cover of professional civilities.

II. Methodology: Systematic Doctrinal Comparison under Conditions of Non-Finality

This article takes a qualitative doctrinal methodology. Its objective is neither to measure compliance behavior nor to predict state responses to adjudicatory outcomes. It does not use any quantitative techniques, citation metrics, corpus linguistics and network analysis. Instead, it pursues close textual analysis of selected WTO panel reports and MPIA awards in order to explore the articulation, arguably the justification and constraint, of legal reasoning in the absence of appellate finality.

The decision of methodology is determined by the nature of the research question. The issue addressed here is not whether WTO dispute settlement remains effective in an instrumental sense, but whether panels continue to exercise legal authority understood as reasoned justification consistent with DSU Article 3.2 when hierarchical correction is unavailable. That inquiry can only be answered by analyzing what panels say, how they say it, and how they relate their reasoning to prior authority.[19]

[18] Panel Report, Turkey – Pharmaceutical Products WT/DS583/R.

[19] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) art 3.2.

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A. Scope and Temporal Frame

The analysis focuses on WTO adjudication after December 2019, when the Appellate Body ceased to function due to the expiration of members' terms.[20] Panel reports circulated after this point were issued under materially altered institutional conditions: appellate review was no longer available as a corrective mechanism, and the possibility of appeal into the void formed part of the adjudicatory background.

Pre-2019 Appellate Body reports are not treated as objects of study in their own right. They are used only as doctrinal baselines, where necessary, to identify the analytical structures that previously constrained panel reasoning. This allows assessment of whether, and how, panels apply, compress, or silently recalibrate those structures in the post-2019 environment.[21]

B. Case-Selection Strategy: Anchors, Not Aggregates

The article deliberately rejects exhaustive coverage of all post-2019 panel reports. While more than sixty panel reports were circulated between 2020 and 2024, comprehensive review is neither feasible nor methodologically necessary for doctrinal analysis. Aggregation without specification risks impressionistic synthesis and obscures the reasoning moves that give doctrinal claims their force.
Instead, the study employs an anchor-case strategy. Panel reports are selected on the basis of three cumulative criteria:

1. Doctrinal Identity
   The cases interpret the same treaty provision or legal standard (for example, causation under Article 3 of the Anti-Dumping Agreement or the scope of review under DSU Article 11).
2. Temporal Relevance
   At least one case in each comparative set is circulated after December 2019, ensuring that the reasoning examined reflects adjudication without appellate oversight.
3. Reasoning Contrast
   The selected reports exhibit materially different reasoning techniques—such as differences in sequencing, analytical intensity, or engagement with prior authority—allowing doctrinal comparison rather than mere description.

This method permits precise comparison without claiming representativeness in a statistical sense. The aim is illustrative sufficiency, not empirical generalisation.

C. Core Comparative Sets

Three doctrinal clusters form the backbone of the analysis.
First, trade remedies serve as the primary site of comparison. This area historically depended heavily on Appellate Body discipline and therefore provides a sensitive indicator of post-2019

[20] WTO, 'Appellate Body Members' https://www.wto.org/english/tratop_e/dispu_e/ab_members_e.htm accessed 10 December 2025.
[21] Appellate Body Report, US – Stainless Steel (Mexico) WT/DS344/AB/R, para 160.

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change. The analysis centers on the contrast between the structured causation inquiry applied in US – Washing Machines and the compressed or selectively engaged approaches adopted in EU – Biodiesel (Indonesia), Australia Anti-Dumping Measures on A4 Copy Paper, and US Anti-Dumping Measures on Certain Steel Products.[22] These cases allow examination of divergence that emerges through reduced analytical intensity and silence rather than explicit doctrinal rejection.

Second, DSU Article 11 jurisprudence is examined to assess shifts in evidentiary review. Pre-2019 Appellate Body guidance emphasized restraint and a high threshold for finding violations of the duty of objective assessment.[23] The analysis compares this baseline with post-2019 panel reasoning in EU Energy Package, contrasting it with the more restrained approach evident in Australia Plain Packaging.[24] The focus is not on outcomes, but on whether panels acknowledge or explain changes in the scope of review they apply.

Third, MPIA awards are examined as part of the contemporary interpretive environment. The MPIA award in Colombia – Anti-Dumping Duties on Frozen Fries is analysed for its appellate-style reasoning and engagement with prior jurisprudence.[25] Its reception by panels outside the MPIA framework, particularly in Turkey – Pharmaceutical Products, is then assessed to determine whether such awards function as authority or merely as persuasive material.[26]

D. Method of Analysis: Reasoning, Not Results

Each selected report is analysed through close reading of the relevant sections and paragraph ranges. The analysis focuses on four aspects of reasoning:

1. Sequencing
   Whether panels follow the structured analytical steps previously articulated in Appellate Body jurisprudence, particularly under the Vienna Convention on the Law of Treaties.
2. Intensity
   The depth and rigor with which panels apply legal standards, including causation analysis and evidentiary review.
3. Engagement
   How panels cite, distinguish, or ignore prior panel reports, Appellate Body jurisprudence, and MPIA awards.
4. Justification of Departure
   Whether divergence from prior reasoning is expressly explained or occurs silently.

[22] Panel Report, US – Washing Machines WT/DS464/R, paras 7.214–7.238; Panel Report, EU – Biodiesel (Indonesia) WT/DS480/R, paras 7.189–7.205; Panel Report, Australia – Anti-Dumping Measures on A4 Copy Paper WT/DS529/R, paras 7.92–7.118; Panel Report, US – Anti-Dumping Measures on Certain Steel Products WT/DS544/R.

[23] Appellate Body Report, US – Hot-Rolled Steel WT/DS184/AB/R, paras 225–230.

[24] Panel Report, Australia – Plain Packaging WT/DS435/R, paras 7.20–7.27; Panel Report, EU – Energy Package WT/DS476/R.

[25] MPIA Award, Colombia – Anti-Dumping Duties on Frozen Fries WT/DS591/ARB25 (2022) paras 5.1–5.15.

[26] Panel Report, Turkey – Pharmaceutical Products WT/DS583/R.

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No attempt is made to count citations or to rank reports by influence. The analysis is qualitative and interpretive. Citations are examined contextually, with attention to how authority is invoked within the reasoning structure of each report.[27]

E. Limits of Inference

This methodology has deliberate limits. It does not claim that the identified patterns determine state compliance, nor that they reflect conscious judicial strategy. It does not assume that divergence is normatively illegitimate in itself. Disagreement is a normal feature of adjudication, particularly in a system that does not recognize binding precedent.

The normative claims advanced later in the article are therefore restrained. They concern predictability, visibility of reasoning, and equality before the law, rather than outcome uniformity. Where the article argues that silent divergence undermines legal authority, that claim is grounded in the doctrinal function assigned to dispute settlement under DSU Article 3.2, not in behavioral speculation.[28]

F. Methodological Payoff

By anchoring all claims in specific panel reports and paragraph-level reasoning, this approach seeks to align form and substance. The article criticizes adjudication that departs silently from prior authority; it therefore avoids making unanchored generalizations of its own. Authority, in both adjudication and scholarship, is performed through visible justification.

The sections that follow apply this methodology to the selected doctrinal clusters. The aim is not to catalogue divergence exhaustively, but to show precisely and verifiably how legal authority is exercised, constrained, and strained in a system that adjudicates without a final word.

III. Trade Remedies and the Limits of Horizontal Coordination

Trade remedies constitute the most revealing site for examining WTO adjudication after the paralysis of the Appellate Body. Anti-dumping and countervailing duty disputes involve recurrent treaty language, dense jurisprudence, and high regulatory stakes. Prior to 2019, these disputes were stabilized by sustained Appellate Body engagement, which imposed a disciplined analytical structure on investigating authorities and panels alike. In the absence of appellate review, trade remedies expose both the possibilities and limits of horizontal coordination among panels.

This section demonstrates three related propositions. First, post-2019 panels continue to invoke pre-2019 Appellate Body jurisprudence as an orienting framework. Second, panels apply that framework with uneven analytical intensity, particularly in causation and non-attribution analysis under Article 3 of the Anti-Dumping Agreement. Third, divergence increasingly emerges through selective engagement and silence, rather than explicit doctrinal disagreement. These

[27] Vienna Convention on the Law of Treaties (1969) arts 31–32.

[28] DSU art 3.2; Jutta Brunnée and Stephen J Toope, Legitimacy and Legality in International Law (CUP 2010) 72–76.

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features reveal why horizontal coordination can manage pluralism temporarily, but cannot sustain coherence over time.

A. Causation and Non-Attribution: The Doctrinal Baseline

Before 2019, Appellate Body jurisprudence established a structured approach to causation and injury analysis. Panels were required to ensure that investigating authorities examined whether injury caused by dumped or subsidized imports was separated and distinguished from injury attributable to other known factors. A failure to perform a reasoned non-attribution analysis was a legal mistake.[29] This framework constricted the array of choices by having a specific order, openness and rationales.

The panel report in US - Washing Machines is a good example of this basement. Applying Article 3.5 of the Anti-Dumping Agreement, the panel went on to conduct an elaborate analysis of whether the investigating authority was referring to the effects of dumped imports to separate from other causal factors, including changes in demand and competition conditions.[30] The panel construed the prior jurisprudence of the Appellate Body as a methodological obligation and not as a set of indicative principles. It scrutinized step by step the reasoning of the authority and rejected explanations which involved a failure to show reasoned separation of injury.[31]

What is important for purposes of this moment is not the result of the controversy, but the discipline of analysis shown. The panel explained that its job was strictly to follow a fixed system, and this illustrates how the existence of a superior court helps to keep things happening.

B. Post-2019 Compression: A4 Copy Paper

A contrast can be drawn in Australia Anti-Dumping Measures on A4 Copy paper circulated after the death knell for the Appellate Body. The panel used the identical Appellate Body jurisprudence on cause and non-attribution in making a similar observation that: There is an obligation to ensure that injury caused by dumped imports was not improperly attributed to other causes.[32] Yet the way in which that obligation was put into use differed materially.

Rather than do a detailed reconstruction of causal separation, the panel accepted a more compressed narrative injury assessment. It gave considerable weight to the investigating authority's overall explanation of the case and gave the investigating authority more general latitude in considering the weight given to causal factors.[33] The panel did not specifically depart from prior jurisprudence, nor did it indicate that it was changing the relevant legal standard. Rather it applied to that standard with less analytical intensity, without elaborating why a less exacting inquiry remained sufficient.

This change is of doctrinal significance. The reasoning of the panel helps to maintain continuity on the level of citation and re-calibrate discipline on the level of application. Horizontal

[29] Appellate Body Report, US – Hot-Rolled Steel WT/DS184/AB/R, paras 225–230; Appellate Body Report, US – Steel Safeguards WT/DS248/AB/R, para 82.
[30] Panel Report, US – Washing Machines WT/DS464/R, paras 7.214–7.222.
[31] ibid paras 7.223–7.238.
[32] Panel Report, Australia – Anti-Dumping Measures on A4 Copy Paper WT/DS529/R, paras 7.92–7.100.
[33] ibid paras 7.101–7.118.

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coordination is visible - the panel is addressing prior authority - but the constraint former provided by appellate correction is dulled.

C. Selective Engagement: EU Biodiesel (Indonesia)

A similar pattern has shown up in EU - Biodiesel (Indonesia). The panel cited Appellate Body jurisprudence on the issue of causation and non-attribution and noted that the requirement to look at the issue of whether injury caused by dumped imports was distinguished from other factors.[34] However, the panel took an aggregated look at injury that made the sequencing previously required much softer.

Rather than a piecemeal evaluation of each of the causal factors, the panel accepted the investigating authority's narrative integration of the various causal factors, emphasizing overall coherence rather than the analytical separation of causal factors.[35] As in A4 Copy Paper, the panel did not discuss this approach as a departure from established doctrine. The divergence came about by selective emphasis instead of actual reinterpretation.

The lack of explanation is important. Without explaining in any way why a compressed approach was nevertheless consistent with earlier jurisprudence, the panel left future adjudicators with no guidance as to whether doctrinal discipline had changed or simply gone easy in context. Horizontal coordination, but normative content of the coordination becomes opaque.

D. Silence as Divergence: Certain Steel Products

Limits to horizontal coordination are never so evident as where involvement vanishes completely. In US - Anti-Dumping Measures on Certain Steel Products the panel was dealing with legal issues which are closely related to the ones explored in US - Washing Machines. Yet it did this without using the specific step-by-step method for analyzing causes that is explained in that earlier report.[36]

The panel failed to distinguish US - Washing Machines and failed to explain why a different approach to analysis was appropriate. This is not rejection and is the very same silence that the child exhibited. It is more destabilizing. By not recognizing an interpretation that is relevant and recent, the panel evaded alignment and justification.

Such silent divergence works to undercut predictability and does so better than frank disagreement. Future panels are unable to tell whether or not the omission is made because of contextual distinction, methodological evolution, or inadvertence. Horizontal coordination, revealed by the visibility of the reason, is weakened when silence replaces the engagement.

E. Assessment: Why Trade Remedies Reveal Structural Limits

Taken together, these cases therefore speak to the continued operation of post-2019 WTO panels in a common doctrinal vocabulary. They refer to various Appellate Body jurisprudence, invoke

[34] Panel Report, EU – Biodiesel (Indonesia) WT/DS480/R, paras 7.189–7.195.
[35] ibid paras 7.196–7.205.
[36] Panel Report, US – Anti-Dumping Measures on Certain Steel Products WT/DS544/R.

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familiar legal standards and eschew overt doctrinal confrontation. This favors the call that adjudication has not broken down into unfettered discretion.

At the same time, the disciplinarian power of appellate review is lacking. Panels maintain an official freedom under DSU Article 11 and without correct them re-calibrate the analytical intensity unevenly. Divergence appears through compression, selectivity, and silence rather than explicit reinterpretation.

Trade remedies are especially sensitive to this dynamic because doctrinal discipline directly constrains domestic investigating authorities. Where panels apply causation standards less rigorously without explanation, regulatory discretion expands quietly. The resulting fragmentation is difficult to contest and harder to consolidate.

This pattern illustrates the limits of horizontal coordination. Engagement without obligation can manage pluralism only so long as panels continue to explain their departures. Where explanation disappears, coordination gives way to drift. Trade remedies thus provide an early warning of what adjudication without finality risks becoming: a system in which authority circulates, but discipline dissipates.

The next section examines whether a similar pattern arises under DSU Article 11, where evidentiary review and standards of restraint play a comparable stabilizing role.

IV. DSU Article 11 and the Quiet Expansion of Review

If trade remedies reveal how analytical discipline thins in the absence of appellate correction, DSU Article 11 exposes a subtler but equally consequential development: the quiet expansion of panel review over domestic fact-finding. Article 11 requires panels to make an "objective assessment of the matter before it," including both facts and law. Historically, Appellate Body jurisprudence treated this obligation as a standard of restraint, cautioning panels against substituting their judgment for that of domestic authorities. In the post 2019 context, panels continue to work with the words of Article 11, but they are applying the Article with varying degrees of strength often without acknowledging that they are amending the rules.

This section advances three claims. First, pre-2019 jurisprudence established a high threshold for Article 11 violations, grounded in judicial restraint. Second, post-2019 panels have occasionally scrutinized evidentiary weighing more intrusively, without explicit justification. Third, this shift occurs through methodological silence, revealing a limit of horizontal coordination similar to that identified in trade remedies.

A. The Appellate Baseline: Article 11 as Restraint

Prior to 2019, the Appellate Body consistently emphasized that Article 11 does not permit de novo review of domestic factual determinations. Panels were instructed to assess whether an authority's evaluation of evidence was reasoned and objective, not whether the panel would have reached the same conclusion.[37] The threshold for finding a violation of Article 11 was deliberately high, reflecting concern that excessive intrusion would undermine the division of functions between panels and domestic regulators.

[37] Appellate Body Report, US – Hot-Rolled Steel WT/DS184/AB/R, paras 55–57.

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In US Hot-Rolled Steel, the Appellate Body cautioned that Article 11 should not be transformed into a vehicle for appellate-style re-weighing of evidence, underscoring that disagreement with an authority's conclusions does not, without more, establish lack of objectivity.[38] This jurisprudence framed Article 11 as a constraint on panels themselves, reinforcing predictability through restraint.

B. Adherence Under Appellate Shadow: Australia – Plain Packaging

This continued adherence to this baseline is illustrated in the panel report in Australia - Plain Packaging. Addressing complex evidentiary issues relating to regulation of public health, it was emphasized that it was not the role of the panel to re-assess the merits of the evidence but to assess whether the evaluation by the authority was reasoned and supported by the record.[39] The panel relied on Appellate Body jurisprudence on Article 11 and actively presented its analysis in terms of restraint.

what is more, the panel recognized the limitations of its institutional role. Even where the evidence was contested and voluminous, it resisted replacing its own assessment for that of the regulator.[40] The reasoning is a good example of how appellate discipline impacted on panel behavior, reinforcing its high thresholds for intervention.

C. Post-2019 Intrusion without Explanation: EU – Energy Package

A contrast develops in EU Energy Package. In examining claims under DSU Article 11, the weighing and treatment of evidence given by the panel was scrutinized with more intensity than that usually allowed for under pre-2019 jurisprudence.[41] The panel examined not only whether the authority's reasoning was coherent, but whether particular evidentiary conclusions were persuasive in light of the record.

What makes this report different is not the fact of close scrutiny, but the lack of doctrinal explanation. The panel was silent about Appellate Body guidance against re-weighing evidence, and it did not explain its reasons for claiming that a more intrusive approach was consistent with the function of Article 11. The analysis went on as if the scope of review were not controversial.

This silence matters. By going deeper into review while not recognizing the doctrinal tension, the panel changed what Article 11 means in practice without reflecting the change. Future panels are left without guidance as to whether heightened scrutiny reflects contextual necessity, methodological evolution, or inadvertent drift.

D. Horizontal Coordination and Its Limits

Panels deciding cases following the EU Energy Package are faced with the interpretive choice: either to interpret that report as an example of contextual, fact-specific reasoning or as an implication of a recalibration of Article 11 review. Horizontal coordination would be

[38] MPIA Award, Colombia – Anti-Dumping Duties on Frozen Fries WT/DS591/ARB25 (2022) paras 5.1–5.8.
[39] Panel Report, Australia – Plain Packaging WT/DS435/R, paras 7.20–7.24.
[40] ibid paras 7.25–7.27.
[41] Panel Report, EU – Energy Package WT/DS476/R.

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engagement with this choice--either with or it against. Yet where panels do not explicitly address the shift, coordination weakens.

The phenomenon is similar to that in trade remedies. Panels do not overtly reject prior authority. They refer to Article 11 and the jurisprudence of the Appellate Body in blanket terms. Divergence is by variations in intensities and methods, not by the announced change of doctrine. This form of evolution is hard to argue against as it avoids explicit legal propositions.

E. Implications for Legal Authority

Article 11 has a central place in the WTO adjudication process. It generates the relationship between international review and domestic regulatory autonomy. Quiet expansion of review risks disturbing that balance. Where there are panels scrutinizing evidence in a more intrusive fashion that is not explained, there is increased uncertainty for both regulators and litigants alike.

From the perspective of authority, the problem is not disagreement but opacity. Soft stare decisis understood as an obligation to engage with prior reasoning cannot function where engagement is absent. Horizontal coordination depends on visibility of methodological choice. Silence converts adjudicatory discretion into doctrinal drift.

The analysis of Article 11 therefore reinforces the broader argument of this article. Adjudication without finality does not collapse into arbitrariness. Panels continue to reason within a shared legal grammar. Yet where appellate correction is unavailable, discipline depends on voluntary engagement. When that engagement weakens, authority persists in form but erodes in substance.

The next section turns to the MPIA to assess whether appellate-style reasoning circulating outside the panel system mitigates or exacerbates these dynamics.

V. The MPIA: Appellate Reasoning without Authority

The establishment of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) represents the most sophisticated attempt to preserve appellate review in the absence of a functioning Appellate Body. Designed as an interim solution under Article 25 of the DSU, the MPIA enables participating members to submit appeals to arbitration that closely mirrors the form, method, and tone of pre-2019 Appellate Body review.[42] Yet the MPIA does not restore hierarchy. Its awards bind only consenting parties and lack system-wide authority. This section explores the circulation of MPIA reasoning within WTO adjudication - and why MPIA reasoning's persuasive quality does not translate into stabilizing force.

Three claims are advanced. First, MPIA has a dazzling doctrinal fidelity that gives replicate appellate reasoning its striking doctrinal fidelity. Second, panels that fall outside the MPIA framework consider such awards informative but not authoritative. Third, both the co-existence of appellate-quality reasoning without finality suggests a stronger, not a weaker, impetus to thinking about horizontal coordination's structural limits.

[42] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) art 25; WTO, 'Multi-Party Interim Appeal Arbitration Arrangement' (2020).

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A. Appellate Reasoning Reproduced: Frozen Fries

The MPIA award in Colombia - Anti-Dumping Duties on Frozen Fries is the best example of the functioning of appellate-style reasoning outside the Appellate Body. Addressing issues of law taken on appeal, the arbitrators used the approach of the Vienna Convention methodology, dealt extensively with the previous jurisprudence of the Appellate Body, and examined the reasoning of the panel for legal error.[43] The structure of the award - identification of issue, statement of applicable law, analysis and conclusion - is quite similar to Appellate Body reports of the period prior to 2019.

Crucially, the arbitrators did not treat the findings of the panel with the deference that would be customary under first instance review. They examined the panel's construction of the Anti-Dumping Agreement and expressed corrective reasoning in situations where legal error was detected.[44]

From the doctrinal perspective the quality of the reasoning is not questionable. The MPIA shows that under existing WTO law appellate adjudication is still possible. What it does not prove is that such reasoning has the ability to exercise authority other than the parties consenting to it.

B. Reception by Panels: Turkey – Pharmaceutical Products

The limits of MPIA authority are seen in its reception by panels that work outside the framework of the MPIA. In Turkey - Pharmaceutical Products, the panel faced some legal issues similar to what was addressed in Frozen Fries. The panel cited the MPIA award in which it noted that its reasoning was informative.[45] However, it clearly retained its independence and avoided making the award binding or controlling.

The language of the panel is instructive. MPIA reasoning was said to be "useful" and "informative," but not authoritative clarification of WTO law. The panel came about its conclusions by first-instance thought without having to align with the correction of the appellate jurisdiction.[46] This approach is a matter of institutional caution. The risk of widening out MPIA awards as a source of precedent is imposing interpretive consequences upon those members who did not participate, without consent.

The result is a paradox. The most disciplined appellate reasoning in the post-2019 system goes around without the capacity to stabilize panel practice system wide. Panels can use MPIA awards selectively, but are not under any obligation to involve, differentiate and follow them.

C. Persuasion Without Finality

The MPIA includes a novel method of reviewing cases: the creation of high quality legal decisions without one court being "above" another. This condition is different from both the system prior to 2019 and from purely horizontal panel coordination. Under the Appellate Body, persuasive reasoning was supported by institutional finality. Under horizontal coordination is

[43] MPIA Award, Colombia – Anti-Dumping Duties on Frozen Fries WT/DS591/ARB25 (2022) paras 5.1–5.8.
[44] ibid paras 5.9–5.15.
[45] Panel Report, Turkey – Pharmaceutical Products WT/DS583/R.
[46] ibid.

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persuasion depending on mutual engagement between the panels. The MPIA lies at an intermediate level. Its reasoning is more disciplined than that of the panel, but less authoritative.
This is an intermediate state that leads to doctrinal ambiguity. Panels that are faced with MPIA awards are presented with a choice - to follow logic of appellate reasoning, which has no formal authority, or to move forward as they wish. As opposed to the explicit interaction of panels, the logic is kept in the open. Where they do not, MPIA consents to the risk of being parallel jurisprudence without systemic impact.

D. Implications for Horizontal Coordination

From the point of view of horizontal coordination, the MPIA does not solve fragmentation. It is an example of the limitations of persuasion without obligation. Panels already work without precedent that is binding. Introducing appellate style reasoning that may be ignored by the panels does not provide correction; it provides contrast.
Indeed, the existence of MPIA awards may increase divergence. Panels may be compressed reasons in view of possible MPIA review for participating members, and with minimal engagement for disputes related to non-participating. Layered pluralism: There are many different rules or systems that are arranged one on top of each other.
This does not make the MPIA normatively irrelevant. It retains appellate reasoning for those members willing to accept it. The core argument put forward is that post-2019 WTO adjudication is governed by a type of practice best reflected as soft stare decisis - an obligation to engage with prior reasoning without an obligation to follow it. This form of authority is the reason why adjudication continues as law, the fragmentation remains more implicit and horizontal coordination reaches its end.

E. Assessment: Authority without Reach

The MPIA exemplifies the central paradox of post-2019 WTO adjudication. Legal reasoning of high quality continues to be produced, but its authority does not travel. Panels reason judicially; arbitrators correct judicially; yet no mechanism compels convergence.
In this sense, the MPIA reinforces the article's core claim. Authority in WTO adjudication now circulates without finality. Horizontal coordination can manage disagreement only where engagement persists. Appellate-style reasoning without obligation cannot substitute for visible correction. The MPIA is therefore not a solution to fragmentation, but a mirror of it.
The next section draws these doctrinal strands together to reconstruct the concept of soft stare decisis and to assess its normative sufficiency.

VI. Soft Stare Decisis and Authority without Finality

The preceding sections have traced a consistent pattern across three doctrinal sites: trade remedies, evidentiary review under DSU Article 11, and appellate-style arbitration under the MPIA. In each, WTO adjudication continues to operate through reasoned justification, yet without an authoritative mechanism capable of resolving interpretive disagreement. This section reconstructs the form of authority that emerges under these conditions and evaluates its normative sufficiency.

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The main thesis is that post-2019 WTO adjudication is governed by a practice best defined as soft stare decisis - an obligation to encounter prior reasoning without an obligation to follow it. This form of authority explains the persistence of adjudication as law as well as the persistence of fragmentation as (mostly) implicit, while horizontal coordination ultimately reaches its limits.

A. From Hierarchy to Engagement

Before 2019, WTO dispute settlement operated under a disciplined hierarchy. Although panels were not formally bound by precedent, Appellate Body reports exerted strong gravitational force. Panels treated appellate interpretations as authoritative clarification, departing only for "cogent reasons."[47] Finality ensured that disagreement, once resolved, did not recur.

The paralysis of the Appellate Body did not eliminate interpretive constraint. Panels continue to cite Appellate Body jurisprudence, rely on the Vienna Convention framework, and situate reasoning within established doctrinal vocabularies.[48] What has disappeared is not legality, but hierarchical settlement of disagreement. Authority now circulates horizontally through engagement rather than vertically through correction.

Soft stare decisis capture this condition. Panels are expected by professional norms rather than legal command to address relevant prior interpretations. Alignment, distinction, or disagreement must be justified. What they are not required to do is converge.

B. The Procedural Nature of Constraint

The obligation imposed by soft stare decisis is procedural, not substantive. Panels remain free under DSU Article 11 to interpret the law independently. What's limiting them is the need to offer logical explanations.

This procedural obligation can be seen in the doctrinal file. Panels are just not known for announcing doctrinal innovation. Instead, they introduce reasoning in terms of application, clarification or contextualization. Even where analytical discipline thins - as it does in terms of post-2019 trade remedies - the language of continuity is maintained.[49] Constraint works in terms of justificatory performance rather than in terms of enforceable rule.

The benefit to this system is flexibility. It makes allowances for, as it were, without formal precedence, for pluralism. The cost is opacity. Whereby there are panels compressing reasoning or departing silently, decreased is the obligation to engage. Predictability breaks down no because there is disagreement, but because disagreement is no longer made visible.

C. Why Soft Stare Decisis Persists

Soft stare decisis survive on the basis of its moorings in the professional culture of the judiciary. WTO panels are composed of specialists that are socialized into common interpretive practices. The methodology for the Vienna Convention provides a common grammar.[50] This common culture helps maintain legality even where there is no finality.

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[47] Appellate Body Report, US – Stainless Steel (Mexico) WT/DS344/AB/R, para 160.
[48] Vienna Convention on the Law of Treaties (1969) arts 31–32.
[49] Panel Report, Australia – Anti-Dumping Measures on A4 Copy Paper WT/DS529/R, paras 7.92–7.118.
[50] Vienna Convention on the Law of Treaties (1969) arts 31–32.

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This dynamic is given a boost by the MPIA. Its awards have shown that the reasoning of the appellate courts is intelligible, disciplined, and attractive as a normative matter. However, the narrowness of their authority serves as a confirmation that persuasion can never replace hierarchy. Panels may draw on MPIA reasoning, but they are not committed to interacting with it, setting it apart from, or following it. Authority moves around, but does not rest anywhere.

D. The Limits of Horizontal Coordination

The legal analysis reveals that in obeying the past decisions, it is only possible to accommodate different viewpoints by embracing certain rules: that panels should make use of past logic when they are to justify why they are changing things and it should not be changed secretly. Where practices such as these lose strength, horizontal coordination loses its stabilizing function.

Trade remedies give you an insight of the risk. Compression of causation analysis without explanation expands regulatory discretion quietly. Article 11 jurisprudence reveals a similar pattern: increased evidentiary scrutiny without doctrinal acknowledgment. The MPIA shows that even corrective reasoning cannot impose convergence absent obligation.

Soft stare decisis therefore marks an intermediate institutional condition—neither hierarchical coherence nor doctrinal collapse. It explains why WTO adjudication has survived without finality, but also why that survival is precarious.

E. Normative Assessment

This article does not argue that soft stare decisis is illegitimate. Disagreement is not a failure of law. What is normatively troubling is silent divergence. Where panels neither follow nor distinguish prior reasoning, they deprive future adjudicators and litigants of orientation

From the perspective of DSU Article 3.2, which assigns dispute settlement the function of providing security and predictability through clarification of WTO law, authority requires more than reasoned outcomes. It requires visible justification of interpretive choice.[51] Soft stare decisis supplies this only imperfectly.

The implication is not that hierarchy must be restored in its previous form. It is that authority without finality depends on practices that make disagreement legible. Without mechanisms that ensure engagement is performed rather than assumed, soft stare decisis risks normalizing fragmentation under the appearance of continuity.

The final section turns to reform. It does not propose institutional restoration. It asks instead how authority might be reinforced without re-creating the pathologies that produced the Appellate Body's paralysis.

VII. Restoring Authority without Restoring Hierarchy

The analysis developed in this article does not support a wholesale return to the pre-2019 Appellate Body. Nor does it endorse decentralized coordination as a sufficient long-term substitute. The doctrinal record instead points to a narrower problem and, correspondingly, to narrower solutions. The core pathology of post-2019 WTO adjudication is not disagreement, but

[51] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) art 3.2.

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unresolved disagreement expressed through compression, selectivity, and silence. Reform should therefore aim to restore visible correction and justificatory discipline without reintroducing the institutional dynamics that produced the Appellate Body's paralysis.
Three reforms follow directly from the doctrinal analysis.

A. Mandatory Reasoned Engagement with Prior Panel Reasoning

The most immediate and least institutionally disruptive reform concerns reason-giving discipline. Panels should be required to engage explicitly with prior panel interpretations addressing the same legal provision where those interpretations are recent and factually analogous.
This obligation would be procedural, not substantive. It would not impose precedent. Panels would retain full autonomy under DSU Article 11 to interpret WTO law independently. The requirement would be limited to acknowledgment and justification: where a panel aligns with prior reasoning, it should say so; where it departs, it should explain why.
The doctrinal need for such a requirement is evident. In trade remedies, panels such as Australia Anti-Dumping Measures on A4 Copy Paper and US Anti-Dumping Measures on Certain Steel Products recalibrated analytical discipline without explaining departure from US – Washing Machines. Under DSU Article 11, EU Energy Package applied more intrusive review without engaging Appellate Body guidance on restraint. In each instance, divergence became destabilizing because it was silent.
A requirement of reasoned engagement would address this problem directly. It would transform soft stare decisis from a professional expectation into an institutional practice, without constraining interpretive outcomes. Such a requirement could be implemented through authoritative clarification by the Dispute Settlement Body or interpretive guidance under Article IX:2 of the WTO Agreement.[52]

B. Selective Appellate Review Through a Certiorari-Style Mechanism

The second reform responds to a structural limit identified throughout this article: persistent disagreement cannot be resolved horizontally. Where panels adopt materially different interpretations of identical legal standards, persuasion alone cannot produce convergence.
Rather than restoring a standing Appellate Body with automatic jurisdiction, WTO members should consider a selective appellate review mechanism, operating on a certiorari-style basis. Appellate Review would be discretionary and be limited to review of disputes involving issues of general or systemic significance - including conflicting interpretations by panels, persistent treaty provisions, legal issues affecting more than one agreement, etc.
This mechanism could be implemented under DSU Article 25 arbitration, with it being agreed ex ante on the standing criteria for review. Review would be exceptional and not routine, and would grapple precisely with those cases where horizontal co-operation has gone horribly wrong. Such a design would re-introduce finality selectively, without reinventing the volume, reach and politicization that the pre-2019 Appellate Body had.[53]

[52] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) arts 3.2, 11; Marrakesh Agreement Establishing the World Trade Organization art IX:2.
[53] DSU art 25; Joost Pauwelyn, 'WTO Dispute Settlement Post-2019: What to Expect?' (2020) 22 Journal of International Economic Law 297, 315–318.

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The just rationale in doctrine is obvious. In this regard, the MPIA proves that the institutionalism and normative attractions of appellate reasoning still make what it lacks is reach. A selective mechanism would provide convergence points for focus and, at the same time, member control over jurisdiction focus.

C. Formal Recognition of Plural Interpretive Regimes

The final reform is about opacity rather than discipline. Post-2019 WTO adjudication now takes place under a range of interpretive regimes: panel reports subject to appeal, Jakarta style, into the void, MPIA awards binding only on its participants and unappeased reports with uncertain systemic weight. Pretending that there is one uniform jurisprudence which covers up this reality.
Reform should therefore involve the formal recognition of pluralism. Panels should be encouraged to indicate the institutional context of the authority on which they base their reasoning - are dependence on MPIA reasoning a reflection of participation-based alignment or a more general persuasion? Official practices on reporting could differentiate between interpretations that are system wide and those that are limited to subsets of members.

Such transparency would help in reducing false expectations of uniformity and also mitigate silent fragmentation. Pluralism once recognized can be dealt with but it can be managed. Denied, it gets invisibly fragmented.[54]

D. Reform as Institutional Modesty

These proposals have a common feature - institutional modesty. None presupposes consensus on the restoration of hierarchy. None is based on goodwill alone. Each deals with a particular doctrinal failure described in this article the phenomenon of silent divergence, absence of correction, opacity of authority.
Together, they set out to recreate the conditions where legal reason can once again be a limitation and not a compliment. They have no promises of coherence. They seek to slow erosion. They do not promise coherence. They seek to slow erosion.
The alternative is not stasis, but drift. Without visible engagement, selective correction, and transparency about pluralism, WTO adjudication risks becoming a forum where authority is assumed rather than produced. Reform cannot eliminate disagreement. It can ensure that disagreement remains legible and that law remains law.

Conclusion

The paralysis of the WTO Appellate Body has not produced institutional silence. Panels continue to adjudicate, to reason, and to justify outcomes in accordance with established interpretive methods. This article has shown that post-2019 WTO dispute settlement operates within a recognisable judicial grammar: reliance on pre-2019 Appellate Body jurisprudence persists, panel-to-panel engagement has intensified, and MPIA awards circulate as sources of persuasive

[54] Geraldo Vidigal, 'Living without the Appellate Body' (2023) 26 Journal of International Economic Law 1, 21–23.

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guidance. These practices matter. They explain why adjudication has continued to function as law rather than collapsing into managed diplomacy.
Yet continuity should not be mistaken for stability.

Through close doctrinal comparison of trade remedies disputes, evidentiary review under DSU Article 11, and the operation of the MPIA, this article has demonstrated that authority now circulates without finality. Panels apply shared legal standards with uneven analytical intensity, and divergence increasingly manifests through compression, selectivity, and silence rather than explicit doctrinal disagreement. The absence of appellate correction does not eliminate constraint, but it alters its form. Discipline shifts from enforceable hierarchy to voluntary engagement.
The concept of soft stare decisis developed in this article captures that condition. Panels are expected to engage with prior reasoning, but not required to follow it. Constraint is procedural rather than substantive, grounded in professional norms rather than institutional command. This explains why WTO adjudication has survived without a final word.
It shows that institutionally as well, appellate quality reasoning is feasible under existing WTO law. Yet its limited scope establishes the veracity that persuasion is not enough to stabilise the system-wide interpretation. Appellate reasoning with no authority creates more contrast than convergence.
The normative implication of it is restrained, but clear. Horizontal coordination has the capacity to manage the condition of pluralism on temporary basis. It cannot in and of itself support the function entrusted to it under DSU Article 3.2, that of providing security and predictability through reasoned clarification of WTO law.[55] Authority without finality is a workable interim condition, not a lasting equilibrium.
The proposed changes that this will make are simple. Requiring logical explanations would control differences without having to force everyone to accept decisions made in the past. Selectively choosing cases to consider would resolve stuck arguments without making a bossy system. Formally accepting different ways of interpreting rules would make authority clear rather than just presuming it to be exist. Together, these steps aim at re-introducing rigorous reasoning without the issues that defeated the old Appellate Body.
This article does not argue for institutional nostalgia. Nor does it predict systemic collapse. It advances a narrower claim: law depends on visible justification. Where adjudication continues without finality, authority survives only so long as engagement remains explicit and disagreement legible. Without mechanisms that make reasoning consequential, WTO adjudication risks normalizing fragmentation under the appearance of continuity.
The future of WTO dispute settlement will not be determined by the return of hierarchy alone. It will turn on whether members are willing to re-embed legal reasoning within structures that make engagement unavoidable. Without such structures, adjudication may persist but law, as a constraint rather than a courtesy, will gradually recede.

[55] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) art 3.2; Gregory Shaffer, 'A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations' (2020) 44 Yale Journal of International Law 1, 29–32.

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