

Study on the issue of stare decisis in the context of the reform of the WTO Appellate Body

Estudo sobre a questão do *stare decisis* no contexto da reforma do Órgão de
Apelação da OMC

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ABSTRACT

From a "selection dilemma" to a complete shutdown, the Appellate Body has not yet resumed its normal functioning. The United States, as the initiator, has issued several reports emphasizing the problems of the Appellate Body to justify its actions, including a critique of the practice of stare decisis, which points to the problem of judicial law-making. Although the Appellate Body vehemently denies it, the practice of following precedent does in fact exist. By exploring the institutional reasons behind the precedent-setting practices of the Appellate Body and examining the reform proposals put forward by various countries, corresponding reform recommendations are made.

Keywords: WTO; DSB; Appellate Body; Following Precedent; Reforms

RESUMO

De um "dilema de seleção" a uma paralisação completa, o Órgão de Apelação ainda não retomou seu funcionamento normal. Os Estados Unidos, como iniciadores, emitiram vários relatórios enfatizando os problemas do Órgão de Apelação para justificar suas ações, incluindo uma crítica à prática do stare decisis, que aponta para o problema da criação de leis judiciais. Embora o Órgão de Apelação negue veementemente, a prática de seguir o precedente existe de fato. Ao explorar as razões institucionais por trás das práticas de criação de precedentes do Órgão de Apelação e examinar as propostas de reforma apresentadas por vários países, são feitas recomendações de reforma correspondentes.

Palavras-chave: OMC; Órgão de Solução de Controvérsias; Órgão de Apelação; Seguimento de Precedentes; Reformas

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SUMMARY:

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1. INTRODUCTION

The WTO dispute settlement mechanism consists of two parts: the Panel and the Appellate Body. When a dispute arises, the disputing parties first engage in consultations, and if the consultations fail, the dispute is referred to the panel for a decision. If you are not satisfied with the panel's decision, you can appeal, and the Appellate Body will review the legal issues by considering written materials and holding hearings, and make a final decision. As the final adjudicative body for trade dispute settlement, the Appellate Body has been called the "crown jewel of the WTO" (Sutherland, 2000), and its importance is self-evident.

Unlike the ad hoc panels, the Appellate Body is a permanent body of seven justices. And when the number of judges is less than three, the Appellate Body will not be able to accept cases². According to DSU Article 2.4 and WTO Dispute Settlement Body Document WT/DSB/1, the selection of Appellate Body members should be adopted by consensus of all members. In other words, even if there is only one negative vote, the selection process cannot proceed normally³. Since 2016, the United States has taken advantage of the loopholes in this procedure by frequently raising objections and obstructing the selection and re-election of members on various grounds (Davey, 2022). Until December 2019, the Appellate Body was left with only one judge and was in fact at a standstill. To this day, the Appeals Body has yet to return to normalcy.

² In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: April 27, 2025.

³ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DSB/1.pdf&Open=True> Last access: April 27, 2025.

Following precedent is one of the reasons for the United States' dissatisfaction with the Appellate Body. In general, the reports of the dispute settlement structure can only bind the disputing parties, and do not bind cases that occur afterward. The United States has pointed out in several reports that the Appellate Body has violated the above consensus by not only following precedent in the hearing process, but also continuously reinforcing the binding effect of the Appellate Body's reports⁴. Long before the United States made these claims, there were discussions on the issue of precedent setting by dispute settlement bodies. This paper will start from the issue of precedent setting, briefly explain the institutional reasons behind it, analyze the reform proposals put forward by various countries, and finally put forward corresponding reform proposals.

2. RAISING THE ISSUE OF STARE DECISIS

"Stare decisis" is a fundamental principle of case law. In the context of the WTO system, "stare decisis" means that the Appellate Body is of the opinion that the adjudicating body should follow previous decisions unless there are compelling reasons to do so.

2.1. CRITICISMS OF PRECEDENT-FOLLOWING IN THE UNITED STATES

The United States believes that it would be wrong to follow precedent. First, the WTO Agreement does not provide that panels should follow prior decisions, let alone mention the "compelling reasons" criterion for exclusion. Second, the WTO Agreement reserved the power of interpretation for WTO members, which was vested in the Ministerial Conference and the General Council. The DSB does not have this power, and its legal interpretations are binding only on the disputing parties in individual cases. Finally, the Appellate Body's practice of following precedents without the consent of WTO members affects its rights and obligations⁵.

The United States cited the 2008 *US – Stainless Steel (Mexico)* to illustrate its point. This case was one of 12 cases brought by WTO members against the United States under the anti-dumping "zeroing law". These cases all involved the treaty interpretation of Article 4.2.4 of the ADA on the methodology for fair comparison of export prices with normal values in the course of anti-dumping investigations⁶, and the Appellate Body found that the United States' "zeroing approach" violated the obligation of fair comparison under this Article. In the *US – Stainless Steel (Mexico)* case, the Panel found that the "simple zeroing" used by the United States in the periodic review did not, in itself or in its application, violate the relevant provisions of the ADA. The Appellate Body reversed the Panel's decision on the basis of its earlier judgment, arguing for the first time that, in order to ensure the

⁴ In <https://ustr.gov/issue-areas/enforcement/us-views-functioning-wto-dispute-settlement-system>. Last access: April 27, 2025.

⁵ In <https://ustr.gov/sites/default/files/enforcement/DS/USTR.Appellate.Body.Rpt.Feb2020.pdf>. Last access: April 27, 2025.

⁶ In https://www.wto.org/english/docs_e/legal_e/adp_e.htm. Last access: April 27, 2025.

reliability and predictability of the dispute settlement system, adjudicating bodies should resolve the same legal issues in the same manner in subsequent cases in the absence of compelling reasons to do so⁷.

The United States accuses the Appellate Body of doing so in a way that effectively gives precedential value to the Appellate Body's report, in conflict with the 1996 decision in *Japan – Alcoholic Beverages II*. In the case, the Appellate Body made it clear that the DSB decision would not be a precedent, and that the interpretation therein did not have any special status⁸. The main reason is that the WTO Agreement provides that the power to interpret its provisions is vested exclusively in the Ministerial Conference and the General Council⁹, and interpreting the WTO Agreement through a DSB report is very different from interpreting the WTO Agreement through the Ministerial Conference and the General Council.

Twelve years later, with no changes in the WTO Agreement and related laws such as the DSU, the Appellate Body adopted a completely opposite approach in the *US – Stainless Steel (Mexico)* and ruled against the United States. In this regard, the United States emphasized that the "compelling reasons" introduced by the Appellate Body were seriously flawed and inconsistent with the WTO Agreement. Such an approach by the Appellate Body in essence unjustifiably expanded its own powers and deprived WTO members of their right to interpret the law.

2.2. DE FACTO PRECEDENT-FOLLOWING ISSUES

Although the dispute settlement bodies have vigorously denied the existence of a system of stare decisis, it is clear from practice that it is difficult for them to escape the accusation of stare decisis (Sun, 2022). In other words, there is de facto stare decisis in both the panels and the Appellate Body - when confronted with similar cases, DSB tend to adopt the reasoning in similar decisions. And, in practice, the Appellate Body has continued to reinforce the binding effect of Appellate Body reports. For example, in the *United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina*, the Appellate Body indicated that not only were its conclusions in the earlier dispute appropriate, but that members would expect a panel to reach the same conclusions when the matters were the same¹⁰.

The Appellate Body has used Article 3.2 of the DSU to justify its practice by emphasizing that concurrent jurisdiction can effectively preserve the reliability and predictability of the multilateral trading system¹¹. However, this argument does not support the legitimacy of stare decisis.

⁷ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:WT/DS/344ABR.pdf&Open=True>. Last access: April 27, 2025.

⁸ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:WT/DS/8ABR.pdf&Open=True>. Last access: April 27, 2025.

⁹ In https://www.wto.org/english/docs_e/legal_e/marag_e.htm. Last access: April 27, 2025.

¹⁰ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:WT/DS/268ABR.pdf&Open=True>. Last access: April 27, 2025.

¹¹ In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: April 27, 2025.

Given the many ambiguities in international law itself and the lack of enforceability of the dispute settlement mechanism, it is inconclusive whether joinder can truly guarantee reliability and predictability (Cho, 2022).

The United States accusation of stare decisis goes directly to the issue of the administration of justice. Judicial law-making is divided into "functional law-making" and "normative law-making". The former refers to the use of legal methods by the judiciary to make creative decisions in individual cases in order to carry out judicial functions; the latter is based on the former to achieve "normalization", that is, to become universally binding law (Zhang, 2019). Functional judicial law-making is prevalent in domestic and international judicial proceedings, and dispute settlement bodies are no exception. However, the de facto precedent-following behavior of DSB has contributed to the gradual transformation of functional law-making into normative law-making, i.e., its reports have acquired precedent value. Therefore, the United States accuses the Appellate Body of violating the sovereignty of the State by making inappropriate legal interpretations in individual cases and continuously reinforcing the said interpretations by following precedents, which ultimately leads to judicial lawmaking. It is undeniable that judicial law-making makes up for the defects of ambiguity and lag in the WTO Agreement to a certain extent, but DSB should not assume the function of creating laws. Decisions made by DSB can only be applied to individual cases, and can only be applied to subsequent disputes after they have been elevated to general legislation through specific procedures.

3. INSTITUTIONAL REASONS FOR THE PROBLEM OF STARE DECISIS

In order to resolve disputes, the judiciary inevitably engages in functional law-making. However, in order to prevent judicial creation from breaking the boundaries of case-by-case application, it is generally necessary to restrict it through the relevant system. However, within the framework of the WTO system, DSB is unable to refuse to adjudicate, while the institutional design of the judicial interpretation of the limitations is insufficient. In order to maintain the stability and predictability of the law, DSB tends to follow the previous rulings in order to realize the same case and the same judgment.

3.1. THE INABILITY OF DSB TO REFUSE A TRIAL

DSB is not a judicial body in the strict sense of the word, and lacks a "remand" mechanism; its fundamental purpose is to maintain the security and predictability of the multilateral trading system. In order to achieve this goal, through the DSU set up this platform specialized in resolving trade disputes, all members can submit complaints to it. And as the main components of the DSU, the Panel and the Appellate Body do not have the right to refuse to accept a case¹². That is to say, after the Appellate Body accepts a case, it must respond to every point of contention in the case, even

¹² In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: April 27, 2025.

if there are ambiguities or gaps in the law. In this regard, the phenomenon of exhaustive or even creative interpretation of the law is unavoidable (Hu, 2021). In the long run, it is inevitable that the appellate body will follow the previous interpretation when faced with a subsequent case that is identical or similar to the previous case.

3.2. INADEQUATE LIMITATIONS OF LEGAL DISCOURSE

Methods of treaty interpretation limit the legal discourse of the appellate bodies. Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* constitute (VCLT) "practice in the interpretation of public international law" under Article 3.2 of the DSU¹³, but different methods of interpretation have an impact on rights and obligations, and the dispute over centers on how to apply them. In addition, the rules of treaty interpretation merely provide a means of interpretation and cannot be used directly to ascertain the specific meaning of a legal provision. In practice, it is still necessary for judges to use their interpretative skills in conjunction with the facts, and the VCLT's rules of treaty interpretation and the socialization practices of the parties may provide a "common discipline" for treaty interpretation and draw factual boundaries, but it is difficult to truly limit the discursive space available to the Appellate Body to create legal doctrine through interpretation. To the extent permitted by the "practice of interpreting public international law", the Appellate Body is well placed to create law judicially (Peng, 2019).

3.3. INADEQUATE CONSTITUTIONAL STRUCTURAL CONSTRAINTS

The constitutional structural space determines the boundaries of the exercise of the Appellate Body's legal discourse, which involves three main sets of relations in the distribution of competences: DSB with the WTO members, the Appellate Body with the panels, and the Appellate Body with the Ministerial Conference and the General Council (Peng, 2019).

Between DSB and WTO members, the principle of reverse consensus confers greater jurisdiction on DSB. Under this principle, panel and Appellate Body reports can be adopted unless all members unanimously object. In a specific case, the winning party will naturally not object to the adoption of the report. On this basis, the Appellate Body can achieve law-making by bypassing States (Zhang, 2023). It must be admitted that the principle of reverse consensus in the WTO was established, did play a role in promoting the judicialization of dispute settlement, in line with the trend of trade multilateralism at the time. However, with the increase in the number of cases, the principle of reverse consensus to a certain extent deprived members of the right to raise objections, but also makes DSB to obtain more law-making opportunities (Sun, 2022).

Between the Appellate Body and the Panel, the Appellate Body, which is a standing body, has a higher hierarchy (Sun, 2022). There is a hierarchical relationship between the Appellate Body

¹³ In <https://www.un.org/zh/documents/treaty/ILC-1969-3>. Last access: April 27, 2025.

and the panels, and the Appellate Body is responsible for reviewing "the legal issues addressed in the Panel's report and the legal interpretations made by the Panel"¹⁴. In contrast to the panels, the members of the appellate body are generally recognized as authoritative experts in the field of international trade law, and the decisions of the appellate body are generally more authoritative. A comprehensive examination of the various conditions reveals a number of similarities between the appellate body and the body of second instance under domestic law (Peng, 2019). This creates the conditions for the reports of the appellate body to gain precedent value.

Between the Appellate Body and the Ministerial and General Councils, legislative force is not sufficient to restrain judicial law-making. In the context of international law, the creation or modification of an international treaty would have an impact on all members and should therefore be adopted with the participation of all members. However, the current obstruction of the Doha negotiations does not allow for the revision of outdated rules in the WTO agreements, let alone the formulation of new rules to solve real problems. In addition, WTO legislation is difficult to interpret. Although the Ministerial Conference and the General Council have the exclusive power to adopt interpretations of WTO agreements and multilateral trade agreements, there is no precedent for this in practice. Under existing provisions, panels and the Appellate Body are required to submit the interpretations at issue to the General Council or the Ministerial Conference for consideration and approval before DSB adopts its rulings and recommendations. In practice, however, this model does not have the conditions for realization. In the first place, it contravenes the requirement of confidential hearings. Secondly, there are procedural flaws. The interpretation should be adopted by more than three-fourths of the members, and the whole process is time-consuming, slow in decision-making and inefficient, which fails to meet the need for efficient and rapid dispute settlement (Hu, 2021). In today's world of increasing trade friction, it may aggravate the backlog of cases and jeopardize the authority of DSB. As a result, WTO legislative interpretation exists in name only and is unable to respond in a timely and effective manner to emerging issues and to review the interpretations made by panels and the Appellate Body.

Theoretically, legal discourse and constitutional structures can place limits on the judicial law-making behavior of appellate bodies in cases where DSB must try the case. However, in practice, the system does not work well. On the one hand, at the level of legal discourse, the method of treaty interpretation is unable to restrict the creative interpretation of legal provisions by the dispute settlement bodies; on the other hand, at the level of constitutional structure, it is relatively difficult to formulate, amend or carry out legislative interpretation compared with judicial interpretation, and it is not possible to effectively supervise the law-making behavior of the dispute settlement bodies (Peng, 2019). Thus, panels and appellate bodies are more likely to engage in creative interpretation. And in order to achieve equality of arms, they will refer to earlier decisions when considering subsequent cases. In this cyclical process, what the United States calls "stare decisis" evolves.

¹⁴ In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: April 27, 2025.

4. WTO MEMBERS' RESPONSE TO THE ISSUE OF STARE DECISIS

Many WTO members still consider the binding dispute settlement mechanism as the foundation of the multilateral trading system (Cottier, 2021). In order to move the Appellate Body out of the suspension crisis, some members have proposed corresponding reforms, which include a response to the issue of adherence to precedent.

4.1. REJECTION OF THE PRECEDENTIAL VALUE OF AN APPELLATE BODY'S INTERPRETATION

Japan, Australia and Chile suggested that the interpretation of any provision by the Appellate Body would not constitute a precedent for ex post facto interpretation and that a panel could depart from an interpretation in a previous Appellate Body decision¹⁵.

4.2. INTERPRETATIONS BY APPELLATE BODIES ARE NOT AUTHORITATIVE, BUT CAN INFORM THE CONDUCT OF SUBSEQUENT CASES

It indicated that panel and Appellate Body reports were not binding precedents, but that, in order to preserve the security and predictability of the multilateral trading system and to protect the legitimate expectations of members, Appellate Body members could, after due and independent consideration, take into account the reasoning and interpretations made by the panels and Appellate Bodies in previous disputes¹⁶. Brazil, Paraguay and Uruguay have argued that the interpretations contained in adopted panel or Appellate Body reports are not final interpretations of the relevant provisions, and therefore the reasoning and conclusions contained in the earlier reports are not legally binding. However, given that previous reports created reasonable expectations for members, they could be taken into account in the assessment in cases related to disputes, especially if the adjudicator found the reasoning in such reports sufficiently persuasive¹⁷.

However, the above response does not really solve the problem. Both "consider" and "sufficiently persuasive" are vague terms, and the corresponding standard of judgment is unclear. In addition, it would be difficult to convince the Appellate Body to determine whether its own decisions are sufficiently persuasive, and this may undermine the authority of the Appellate Body (Liu, 2021). In short, the above proposal is not so much a response to the problem of the Appellate Body's adherence to precedent as a repetition of an existing problem that cannot be truly solved.

¹⁵ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W768R1.pdf&Open=True>. Last access: April 27, 2025.

¹⁶ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W763R1.pdf&Open=True>. Last access: April 27, 2025.

¹⁷ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W767R1.pdf&Open=True>. Last access: April 27, 2025.

4.3 USE OF THE "DUPLICATION RULE" TO LIMIT PRECEDENT-SETTING BY THE APPELLATE BODY

Honduras discussed the possibility of utilizing the "duplication rule" of civil law countries to establish a WTO precedent system. In common-law countries, each case has the potential to generate a new rule and become a new precedent. In civil law countries, on the other hand, according to the principle of consistency of jurisprudence, stable jurisprudence is generally formed after repeated practice in the judicial process. Accordingly, Honduras proposes to establish a precondition for an appellate body's report to constitute a precedent, namely, that the interpretation given by the appellate body will acquire precedent value only if it has been applied many times in the same type of case and if it has formed a uniform standard¹⁸. The Honduran proposal essentially recognizes the precedential value of the reports of the appellate bodies and limits it through the principle of jurisprudential consistency (Peng, 2019). To a certain extent, it would discourage judicial creativity on the part of the appellate bodies.

4.4. ESTABLISHMENT OF MECHANISMS FOR COMMUNICATION AND DIALOGUE

The EU, China, India, Canada and others suggested organizing annual meetings to provide an opportunity for members of the Appellate Body to interact with WTO members. Members could express their views on certain practices, systemic issues or trends in the Appellate Body. In order to avoid putting pressure on Appellate Body members, appropriate transparency requirements and specific rules should be set¹⁹. The system is better suited to address the issue of ultra vires adjudication than it is to address the issue of stare decisis. Unless there is a dispute as to whether to follow and whether the grounds for doing so are strong, there is less to communicate in the practice of stare decisis. It is more worthwhile to communicate whether decisions in individual cases add to or subtract from the rights and obligations of members (Yang, 2019).

In addition to this, China has stated that a speedy resumption of negotiations would be conducive to responding to the concerns of all parties on the issue of adherence to precedent²⁰. Japan has proposed the establishment of a subsidiary committee to review previous rulings of DSB, which could also issue recommendations²¹. All of the above proposals reflect the concerns of WTO members about the suspension of the Appellate Body and could provide a new direction for Appellate Body reform.

¹⁸ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W761.pdf&Open=True>. Last access: April 27, 2025.

¹⁹ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W752.pdf&Open=True>. Last access: April 27, 2025.

²⁰ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DSB/M423.pdf&Open=True>. Last access: April 27, 2025.

²¹ In <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DSB/M423.pdf&Open=True>. Last access: April 27, 2025.

5. REFORM PROPOSALS TO FOLLOW PRECEDENT ISSUES

While there is merit in the above proposals, reform does not necessarily necessitate the development of new rules and the creation of new institutional mechanisms, especially in the field of international law. In view of the current difficulty of establishing new rules by means of treaties or agreements, it is more important to respond to the question of following precedents by making full use of existing norms.

5.1. INTRODUCTION OF THE PRINCIPLE OF JURIDICAL CONSISTENCY

The United States' accusation that the Appellate Body followed precedent is based primarily on the common-law principle of stare decisis. In fact, the practice of the Appellate Body is more in line with the principle of consistency of jurisprudence of the civil law system. And DSU Article 17.9 stipulates that "the working procedures shall be established by the Appellate Body in consultation with the Chairperson of DSB and the Director General and shall be communicated to the Members for information". This article leaves institutional space for the introduction of the principle of jurisprudential consistency. The introduction of the principle of consistency of jurisprudence can make it clear that the decision has precedent value only in the sense of the civil law system, and can effectively respond to the accusations and concerns of the United States (Peng, 2019).

5.2 ACTIVATION OF LEGISLATIVE INTERPRETATION MECHANISMS

In the absence of legislative interpretation, the panels and the Appellate Body are given more opportunities for interpretation. In order to safeguard the reliability and predictability of trade, the Appellate Body maintains the stability of its reasoning by referring to previous judgments, thus creating a de facto precedent to follow. Only by activating the mechanism of legislative interpretation and returning the power of interpretation to the WTO members, with the Ministerial Conference and the General Council interpreting the provisions of the law, can the Appellate Body be subjected to the necessary constraints. When legislative interpretation is sufficient, the room for judicial interpretation by the Appellate Body will be reduced and the use of its reports as precedents will be prevented (Villalta et al., 2023). In order to activate the system, would have to respond to the issues mentioned above, including how to deal with confidentiality and openness in the hearing of cases, how to effectively increase efficiency, and how to provide for recommendations for interpretation by the Councils and procedures for approval by the Ministerial Conference and the General Council (Zhang, 2019).

6. CONCLUSION

The United States obstruction of the selection of members of the Appellate Body is essentially to take the Appellate Body as a "hostage", forcing the WTO to shift to a system that is more in line with its interests, while reserving space for unilateral action. This strategy is the embodiment of the United States priority policy and trade protectionism, reflecting the intention of the United States to reshape the dominance of the rules in the competition among major powers. Admittedly, the U.S. accusations against the Appellate Body are motivated by its own interests, but they also point out to a certain extent the problems that exist in the Appellate Body. Among them, the issue of following precedents relates to the core dilemma of the Appellate Body - judicial law-making. In the absence of legislative interpretation, panels and appellate bodies need to interpret the law in order to resolve disputes; in order to maintain security and predictability, they try to ensure that the same case is decided in the same way. In the repeated cycle of "interpretation of the law - the same judgment" process, DSB is accused of judicial creation of the law, in fact, the practice of following precedents is both the premise and the result of judicial creation of the law. It is important to note that the problem of precedent-setting is not confined to the Appellate Body, but is a common dilemma faced by all international tribunals. Against the backdrop of a five-year suspension of the Appellate Body, the question of how to strike a balance between refusing to follow precedent and maintaining the stability of decisions remains to be explored further. However, it must be recognized that a speedy return to an effective DSB is essential for the prosperity of the WTO and the multilateral trading system (Suarez, 2024).

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