



United States Trade Representative

Report on the Appellate Body of the World Trade Organization

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REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION



**Office of the United States Trade Representative
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INTRODUCTION

For more than 20 years, the United States has expressed concerns that the dispute settlement system of the World Trade Organization – and in particular its Appellate Body – has not functioned according to the rules agreed by the United States and other WTO Members. This Report details those concerns and assesses the repeated failure of the Appellate Body to apply the rules of the WTO agreements in a manner that adheres to the text of those agreements.

Specifically, the Appellate Body has added to U.S. obligations and diminished U.S. rights by failing to comply with WTO rules, addressing issues it has no authority to address, taking actions it has no authority to take, and interpreting WTO agreements in ways not envisioned by the WTO Members who entered into those agreements. This persistent overreaching is plainly contrary to the Appellate Body's limited mandate, as set out in WTO rules.

On a more fundamental level, this overreaching also violates the basic principles of the United States Government. There is no legitimacy under our democratic, constitutional system for the nation to submit to a rule imposed by three individuals sitting in Geneva, with neither agreement by the United States nor approval by the United States Congress. The Appellate Body has consistently acted to increase its own authority while decreasing the authority of the United States and other WTO Members, which, unlike the individuals on the Appellate Body, are accountable to the citizens in their countries – citizens whose lives and livelihoods are affected by the WTO's decisions.

The Report highlights several examples of how the Appellate Body has altered Members' rights and obligations through erroneous interpretations of WTO agreements. Several of these interpretations have directly harmed the ability of the United States to counteract economic distortions caused by non-market practices of countries like China that hurt our citizens, workers, and businesses.

The Appellate Body's failure to follow the agreed rules has undermined confidence in the World Trade Organization and a free and fair rules-based trading system. Given persistent overreaching by the Appellate Body, no WTO Member can trust that existing or new rules will be respected as written. Indeed, WTO Members have not agreed to any substantive new rules since the WTO came into existence. The conduct of the Appellate Body has converted the WTO from a forum for discussion and negotiation into a forum for litigation.

The United States has always been a strong supporter of a rules-based international trading system and remains so. The United States is publishing this Report – the first comprehensive study of the Appellate Body's failure to comply with WTO rules and interpret WTO agreements as written – to examine and explain the problem, not dictate solutions. WTO Members must come to terms with the failings of the Appellate Body set forth in this Report if we are to achieve lasting and effective reform of the WTO dispute settlement system.

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EXECUTIVE SUMMARY

The United States and other free-market nations established the World Trade Organization (“WTO”) in 1995 as a forum for negotiating and implementing trade agreements. The dispute settlement mechanism of the WTO was designed to help Members resolve trade disputes arising under those agreements, without adding to or diminishing the rights and obligations to which Members had agreed. When the WTO dispute settlement system functions according to the agreed rules, it provides a vital tool to enforce Members’ WTO rights and obligations. For more than 20 years, however, the United States and other WTO Members have expressed serious concerns with the Appellate Body’s disregard for those rules.

As detailed in this Report, the Appellate Body has repeatedly failed to apply the rules of the WTO agreements in a manner that adheres to the text of those agreements, as negotiated and agreed by WTO Members. The Appellate Body has strayed far from the limited role that WTO Members assigned to it, ignoring the text of the WTO agreements. Through this persistent overreaching, the Appellate Body has increased its own power and seized from sovereign nations and other WTO Members authority that it was not provided. For example:

- The Appellate Body consistently ignores the mandatory deadline for deciding appeals;
- The Appellate Body allows individuals who have ceased to serve on the Appellate Body to continue deciding appeals as if their term had been extended by WTO Members in the Dispute Settlement Body;
- The Appellate Body has made findings on issues of fact, including issues of fact relating to WTO Members’ domestic law, although Members authorized it to address only legal issues;
- The Appellate Body has issued advisory opinions and otherwise opined on issues not necessary to assist the WTO Dispute Settlement Body in resolving the dispute before it;
- The Appellate Body has insisted that dispute settlement panels treat prior Appellate Body interpretations as binding precedent;
- The Appellate Body has asserted that it may ignore WTO rules that explicitly mandate it recommend a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules; and
- The Appellate Body has overstepped its authority and opined on matters within the authority of WTO Members acting through the Ministerial Conference, General Council, and Dispute Settlement Body.

The Appellate Body’s persistent overreaching has also taken away rights and imposed new obligations through erroneous interpretations of WTO agreements. The Appellate Body has attempted to fill in “gaps” in those agreements, reading into them rights or obligations to which the United States and other WTO Members never agreed. These errors have favored non-market economies at the expense of market economies, rendered trade remedy laws ineffective, and infringed on Members’ legitimate policy space. For example:

- The Appellate Body’s erroneous interpretation of the term “public body” threatens the ability of Members to counteract trade-distorting subsidies provided through SOEs, undermining the interests of all market-oriented actors;
- The Appellate Body has intruded on Members’ legitimate policy space by essentially converting a non-discrimination obligation for regulations into a “detrimental impact” test;
- The Appellate Body has prevented WTO Members from fully addressing injurious dumping by prohibiting a common-sense method of calculating the extent of dumping that is injuring a domestic industry (“zeroing”);
- The Appellate Body’s stringent and unrealistic test for using out-of-country benchmarks to measure subsidies has weakened the effectiveness of trade remedy laws in addressing distortions caused by state-owned enterprises in non-market economies;
- The Appellate Body’s creation of an “unforeseen developments” test and severe causation analysis prevents the effective use of safeguards by WTO Members to protect their industries from import surges; and
- The Appellate Body has limited WTO Members’ ability to impose countervailing duties and antidumping duties calculated using a non-market economy methodology to address simultaneous dumping and trade-distorting subsidization by non-market economies like China.

For many years, successive Administrations and the U.S. Congress have voiced significant concerns about the Appellate Body’s disregard for the rules agreed to by WTO Members. As set forth in the Appendices to this Report, in multiple Congressional Sessions, up to and including the current Session, Senators and Representatives of both parties have voiced urgent concerns and the need for reform in numerous resolutions, reports, and statements.¹

¹ See Statements by Members of the United States Congress Expressing Concerns with Appellate Body Overreaching (Appendix A1); Congressional Legislation and Reports Expressing Concern with Appellate Body Overreaching (Appendix A2); Statements by U.S. Trade Representatives or Their Deputies on Appellate Body Overreach (Appendix B1); and Statements by the United States to the WTO Dispute Settlement Body Expressing Concerns with the Appellate Body’s Failure to Follow WTO Rules and Erroneous Interpretations of the WTO Agreements (Appendix B2).

Unfortunately, U.S. efforts were ignored, and the problem has worsened as too many WTO Members remain unwilling to do anything to rein in this conduct. The proper functioning of the WTO Appellate Body has a disproportionate impact on the United States because more than one-quarter of all disputes at the WTO have been challenges to U.S. laws or other measures. Specifically, 155 disputes have been filed against the United States, and no other Member has faced even a hundred disputes. According to some analyses, up to approximately 90 percent of the disputes pursued against the U.S. have led to a report finding that the U.S. law or other measure was inconsistent with WTO agreements. This means that, on average, over the past 25 years, the WTO has found a U.S. law or measure WTO-inconsistent between five and six times per year, every year.

But these failings have dire consequences for U.S. interests in the WTO, and for all WTO Members, as well. The negotiating function of the WTO has atrophied as the Appellate Body has facilitated efforts by some Members to obtain through litigation what they have not achieved through negotiation; the effectiveness of WTO tools designed to address distortions by non-market economies has been greatly diminished; and the WTO dispute settlement system continues to lose the credibility necessary to maintain public support for the system.

In short, the Appellate Body's failure to follow the agreed rules has undermined not only WTO dispute settlement, but the effectiveness and functioning of the WTO more generally. Furthermore, by encouraging behavior that distorts markets, the Appellate Body has helped to make the global economy less efficient. Lasting and effective reform of the WTO dispute settlement system requires all WTO Members to come to terms with the failings of the Appellate Body.

Background

To appreciate the degree to which the Appellate Body has strayed from the agreed upon rules, it is necessary to consider the context in which it was created. The WTO was established as a forum for Member governments to address issues affecting their international trade relations and to monitor the implementation of the trade agreements negotiated during the Uruguay Round trade negotiations. WTO Members agreed that the WTO would also function as a forum for further negotiations among WTO Members and serve as a framework for the implementation of the results of such negotiations.

To ensure that the United States enjoyed the full benefits it bargained for in the Uruguay Round negotiations, the United States insisted on the inclusion of a fair and effective mechanism to settle trade disputes arising under the WTO agreements. The WTO dispute settlement mechanism as agreed by WTO Members is reflected in the Dispute Settlement Understanding (or DSU), which is itself one of the WTO agreements. The United States and other WTO Members agreed that the aim of the WTO dispute settlement system would be the prompt resolution of trade disputes; the particular processes for achieving this aim were set out in the Dispute Settlement Understanding.

WTO Members also established the Dispute Settlement Body, consisting of the representatives of the entire WTO membership, to administer the WTO dispute settlement system in accordance with the Dispute Settlement Understanding. The Dispute Settlement Body was empowered by

WTO Members to establish dispute settlement panels, adopt panel and Appellate Body reports, oversee the implementation of adopted recommendations, and to authorize the suspension of concessions under the covered agreements.

The Dispute Settlement Understanding reflects WTO Members' agreement on the limited roles assigned to dispute settlement panels and the Appellate Body within that system. It provides that a panel's function is to assist the Dispute Settlement Body in discharging its responsibilities. WTO Members agreed that panels would be limited to making only those factual and legal findings that would assist the Dispute Settlement Body in making a recommendation for a WTO Member to bring a WTO-inconsistent measure into conformity with that Member's WTO obligations.

The United States and other WTO Members also agreed to the creation of an Appellate Body, comprised of seven individuals, selected by the Members, to hear cases in three-member panels. The WTO provided a specific and limited role to the Appellate Body: the expeditious review of a dispute settlement panel's legal findings and to "uphold, modify, or reverse the legal findings and conclusions of the panel." WTO Members agreed to a number of explicit limitations in the Dispute Settlement Understanding aimed at preventing the Appellate Body from exceeding this limited authority.

As set forth below and analyzed in detail in this Report, despite the rules set by WTO Members, the Appellate Body has ignored these constraints and has exceeded its limited role, thereby transferring authority over important issues of international trade from WTO Members to themselves.

Ultra Vires Actions and Failure to Follow WTO Rules

The Appellate Body has exceeded its authority and breached the limitations explicitly agreed and imposed by WTO Members. Individuals on the Appellate Body have repeatedly attempted to assume for themselves authority not granted to them by WTO Members – and certain WTO Members have allowed or even encouraged them to do so – thereby adding to Members' obligations, diminishing their rights, and ultimately undermining the WTO's authority and effectiveness.

1. Contrary to the principle of prompt settlement of disputes, the Appellate Body has consistently breached the mandatory deadline for the completion of appeals. The prompt settlement of disputes is a cornerstone of WTO dispute settlement. In Article 3 of the Dispute Settlement Understanding, WTO Members agreed that the prompt settlement of disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between rights and obligations." This principle of prompt settlement is also enshrined in numerous other provisions of the Dispute Settlement Understanding, including in Article 17.5, which limits the length of appellate proceedings.

The text of Article 17.5 is clear in its mandatory requirement that the Appellate Body complete appeals "as a general rule" within 60 days, and that "[i]n no case shall the proceedings exceed 90 days." The 90-day limit is categorical and without exception, and Article 17.5 therefore does not accord discretion to the Appellate Body to issue reports beyond the 90-day deadline. Since

2011, however, the Appellate Body has routinely violated Article 17.5 and ignored the deadline mandated by WTO Members, and it has done so without even consulting the parties to an appeal. This conduct has grown worse over time, with some appeals taking more than one year to complete.

The blatant violation of this clear, mandatory rule by the Appellate Body diminishes the rights of Members and undermines their confidence in the WTO's rules-based trading system. Unfair trade practices continue during the pendency of disputes, which now typically take several years to resolve. This delay is particularly harmful for a system like the WTO where the remedy is prospective only. The increasing delays in appeals lessen the benefit of the dispute settlement system for a complainant and decrease the deterrent effect for Members who do not respect their WTO obligations.

The Appellate Body's failure to comply with Article 17.5 leads to further systemic problems. For example, a short deadline for appeals encourages the Appellate Body to address only the issues presented and discourages overreaching. By not considering itself bound by any deadline, the Appellate Body has freed itself to address issues not necessary to resolve a dispute, resulting in impermissible advisory opinions. Indeed, long-delayed Appellate Body reports that address issues not necessary to assist the Dispute Settlement Body in resolving a dispute have been cited in subsequent disputes brought against the United States and other Members, including disputes challenging the imposition of antidumping and countervailing duties legitimately imposed to address dumped or subsidized imports that injure a Member's domestic industry. Thus, the Appellate Body's breach of this rule raises substantive, and not just procedural problems for Members.

2. *Contrary to WTO rules, the Appellate Body has unilaterally declared that it has the authority to allow individuals formerly serving on the Appellate Body, whose terms have expired, to continue to participate in and decide appeals.* Although the Appellate Body has inserted a provision in its Working Procedures ("Rule 15") that purportedly authorizes this conduct, the WTO rules agreed to by WTO Members do not give the Appellate Body any such authority. Rather, the Dispute Settlement Understanding is clear that only WTO Members, sitting as the Dispute Settlement Body, have the authority to appoint individuals to serve on the Appellate Body. The Dispute Settlement Understanding is also clear that an individual may be appointed by the Dispute Settlement Body to serve on the Appellate Body for a maximum of two, four-year terms. The Appellate Body acts contrary to this agreement text by arrogating to itself the authority to "deem" *former* Appellate Body Members as continuing Appellate Body Members for the purpose of issuing reports in appeals that began before their terms expired.

Through the Appellate Body's breach of the Dispute Settlement Understanding, persons formerly serving on the Appellate Body have continued to participate in appeals for more than a year after their terms have expired. These individuals continue to be paid hundreds of thousands of dollars, without any authorization by WTO Members, to continue working on an appeal long after the term set by WTO Members has ended. This practice presents a clear conflict of interest: a former Appellate Body member can continue to receive a monthly stipend and a daily fee (in addition to food and lodging) after his or her official term as set by WTO Members has ended, but only for so long as one of his or her appeals remains unresolved.

3. *The Appellate Body has exceeded its limited authority to review legal issues by reviewing panel findings of fact, including factual findings relating to the meaning of WTO Members' domestic law.* The Dispute Settlement Understanding provides that a function of panels is to make an objective assessment of the facts of a case and the relevant WTO law. By contrast, Article 17.6 of the Dispute Settlement Understanding, which applies to the Appellate Body, provides that appeals “shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Thus, WTO Members decided that panels would make factual findings and legal conclusions, but the Appellate Body would be limited to the latter.

In violation of this limitation, and contrary to Article 17.6, the Appellate Body routinely reviews panel findings of fact. The Appellate Body has also reviewed the meaning of a Member's domestic law *de novo* as a legal issue, even though WTO Members have agreed the meaning of domestic law is an issue of fact not subject to appellate review. The Appellate Body's flouting of Article 17.6 has adverse consequences for the WTO dispute settlement system and for Members. It demonstrates again the Appellate Body's disregard for WTO rules and its attempt to expand its authority and scope of review. Second-guessing panel fact-finding also adds to the length and complexity of appeals.

More fundamentally, Members simply have not authorized the Appellate Body to make “definitive” interpretations of a Member's laws. The Appellate Body's violation of the WTO rules in this regard could subject WTO Members to incorrect fact-finding by a body not authorized or even equipped to find facts at all, and in a context where the parties to a dispute are unable to submit new factual evidence. Indeed, Appellate Body reports misinterpreting U.S. domestic law (as well as the laws of other WTO Members) have resulted in erroneous WTO findings that pressure the United States and other WTO Members to repeal or modify their laws unnecessarily.

4. *The Appellate Body has overstepped its role under the Dispute Settlement Understanding by rendering advisory opinions on issues not necessary to assist the Dispute Settlement Body in resolving a dispute.* Issuing advisory opinions is contrary to the purpose of the dispute settlement system, which the Dispute Settlement Understanding defines as “to secure a positive solution to a dispute.” Through the issuance of advisory opinions, the Appellate Body has attempted to produce interpretations or “make law” in the abstract. The Appellate Body's proper role, in reviewing an appeal of a panel report, is limited to making only those legal determinations that would assist the Dispute Settlement Body in making a recommendation to a Member to bring a WTO-inconsistent measure into conformity with WTO rules, in order to help resolve the dispute between the parties. Neither the United States nor any other WTO Member has agreed to allow the Appellate Body to resolve abstract questions or make law.

The issuance of advisory opinions is another example of the Appellate Body's disregard for WTO rules intended to limit its role. The time and resources devoted to drafting advisory opinions contributes to delays in the appeals process, allowing WTO-inconsistent measures to persist and further delaying the ability of WTO Members to enforce their rights under the WTO Agreements. Advisory opinions can affect the rights of WTO Members without giving them an opportunity to participate in the proceeding, especially if those advisory opinions are then (impermissibly) treated as binding “precedent.”

5. *The Appellate Body wrongly claims that its reports are entitled to be treated as binding precedent and must be followed by panels, absent “cogent reasons.”* Fundamental to the decision of a WTO Member to join the WTO is the commitment that the dispute settlement process, including panels and the Appellate Body, “cannot add to or diminish the rights and obligations provided” in the WTO agreements. Rather, the WTO agreements reserve for WTO Members, through the Ministerial Conference and General Council, the “exclusive authority to adopt interpretations” of these agreements. Despite this clear text, the Appellate Body has asserted that to ensure “security and predictability,” dispute settlement panels must treat prior legal interpretations in Appellate Body reports as binding precedent, absent undefined “cogent reasons” for departing from them. The term “cogent reasons” appears in no WTO agreement; nor does any requirement that panels follow Appellate Body interpretations.

Allowing the Appellate Body to create binding precedent has profound implications for the WTO system and the rights of WTO Members. Panels and the Appellate Body increasingly resolve disputes not by reference to the carefully negotiated and agreed-upon texts, but by reference to interpretations found in prior Appellate Body reports. As such, WTO Members are increasingly constrained by prior Appellate Body reports, including reports in disputes in which they did not even participate. This practice leaves a WTO Member stuck with an erroneous interpretation of a WTO agreement, having had no opportunity to present arguments on the correct interpretation.

The Appellate Body’s insistence that panels follow its reports as binding precedent also has entrenched incorrect legal interpretations that contradict the text of the WTO agreements and intention of the parties. In effect, this approach changes WTO Members’ rights and obligations without their consent, with potentially important implications for WTO Members’ economies. Moreover, allowing the Appellate Body to create precedent takes away the incentive for Members to negotiate new trade agreements. Some Members seek to obtain through a “binding” Appellate Body interpretation what they could not achieve through negotiation; others may have no desire to negotiate new agreements without confidence that WTO adjudicators will respect what has actually been agreed to.

6. *The Appellate Body has asserted that it may ignore the text of the Dispute Settlement Understanding explicitly mandating it recommend a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules.* The Dispute Settlement Understanding states categorically that “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” Despite this unambiguous text, the Appellate Body has simply declared it has the authority to ignore this rule if it considers a recommendation unnecessary. For example, in *China – Raw Materials (AB)*, the Appellate Body stated that: “In general, in cases where the measure at issue consists of a law or regulation that has been repealed during the panel proceedings, it would seem there would be no need for a panel to make a recommendation in order to resolve the dispute.” But no such exception is provided for in the Dispute Settlement Understanding, and no such authority has been given to the Appellate Body.

The Appellate Body’s finding of “discretion” for panels or the Appellate Body to disregard the mandatory text agreed to by WTO Members is another example of the Appellate Body overreaching, and by overstepping its authority the Appellate Body creates negative systemic

consequences. The failure to make the recommendation mandated by the Dispute Settlement Understanding may leave a complaining WTO Member with no further recourse in a proceeding, as that recommendation is necessary to initiate subsequent compliance proceedings or request authorization from the Dispute Settlement Body to take countermeasures. The Appellate Body's breach also could encourage gamesmanship by WTO Members –withdrawing a measure during a proceeding to avoid a recommendation and later reinstating it – and thereby preventing WTO Members from using WTO rules effectively to resolve a dispute. WTO Members may also be forced to bring unnecessary, additional disputes in an attempt to obtain the recommendation to which they have a right under the Dispute Settlement Understanding.

7. *The Appellate Body has overstepped its authority and opined on matters within the authority of other WTO bodies, including the Ministerial Conference, the General Council, and the Dispute Settlement Body.* Appellate Body overreaching has extended to WTO institutional issues too, contrary to the limited role Members assigned to the Appellate Body. Whereas an Appellate Body panel is comprised of three unelected and unaccountable persons, the Dispute Settlement Body, General Council, and Ministerial Conference are comprised of all WTO Members. Members limited the role of the Appellate Body to helping determine if a WTO Member's measure is inconsistent with WTO rules so that the Dispute Settlement Body can make a recommendation to a Member to bring a WTO-inconsistent measure into conformity with WTO rules.

The Appellate Body has exceeded this limited role by seeking to direct how other WTO bodies should perform their responsibilities under the WTO agreements. For example, the Appellate Body has attempted to dictate how the Dispute Settlement Body is to administer its responsibilities under Annex V of the Subsidies Agreement. The Appellate Body has inappropriately expressed its views on the procedure to be followed by the Dispute Settlement Body to adopt a particular report. The Appellate Body also has intruded on the authority of the Dispute Settlement Body on the appointment of Appellate Body members. Exacerbating this problem, on occasions where the Appellate Body has opined on matters within the authority of other WTO bodies, it has made a number of legal errors and ignored the text of the provisions agreed to by WTO Members.

By opining on matters within the authority of other WTO bodies, the Appellate Body exhibits disregard for WTO Members acting through those WTO bodies and its disregard for the limits WTO Members assigned to it in the Dispute Settlement Understanding. Any disagreement among WTO Members on how the Dispute Settlement Body or any other WTO body should carry out its functions must be resolved by WTO Members acting in those other bodies, and it is not a matter for the Appellate Body to decide. Appellate Body interference can also lead to confusion, legal uncertainty, and contradictory positions between other WTO bodies and the Appellate Body.

Erroneous Interpretations of WTO Agreements

The Appellate Body's failure to respect the role assigned to it by WTO Members is only the beginning of U.S. concerns. In several issues of great importance to the United States and other Members, the Appellate Body has overreached on substantive issues, engaged in impermissible gap-filling, and read into the WTO agreements rules that are simply not there. Thus, the

Appellate Body has repeatedly taken an approach that expands its own authority while adding to or diminishing the rights and obligations of WTO Members, something that WTO Members expressly prohibited it from doing.

The Appellate Body's erroneous findings have harmed WTO Members, and in particular have prejudiced the ability of market economy countries to take measures to address economic distortions caused by non-market economies. The following examples, described in greater detail in this Report, are illustrative, not exhaustive.

1. *The Appellate Body's erroneous interpretation of "public body" favors non-market economies providing subsidies through state-owned enterprises over market economies.* The WTO agreements discipline certain subsidies provided "by a government or any public body," but the Appellate Body has effectively collapsed the two terms. The Appellate Body adopted an erroneous interpretation of "public body" so that an entity will not be deemed a public body unless it possesses, exercises or is vested with governmental authority. That requirement is not found in the agreed text; nor is it consistent with the ordinary meaning of the term "public body." As noted by a dissenting opinion in a recent appellate report, a definition more consistent with what Members agreed in the WTO agreements would entail an entity constituting a public body "when the government has the ability to control that entity and/or its conduct to convey financial value."

The narrow interpretation of public body fails to capture a potentially vast number of government-controlled entities, such as state-owned enterprises (SOEs), that are owned or controlled by foreign governments, and therefore undermines the ability of Members to effectively counteract subsidies that are injuring their workers and businesses. The WTO was created by and for market economies, but the Appellate Body's public body interpretation undermines WTO subsidy rules and favors non-market economies operating through SOEs at the expense of market economies. The Appellate Body's interpretation has also given rise to confusion among WTO panels and WTO Members, leading to additional disputes.

2. *The Appellate Body has undermined WTO Members' legitimate regulatory space by essentially converting non-discrimination obligations into a "detrimental impact" test.* One of the key principles of the WTO agreements is the requirement that Members not discriminate against trade from other Members. This fundamental principle, reflected in the national treatment and most-favored nation obligations, was not intended to prevent Members from pursuing their legitimate policy objectives. The Appellate Body, however, has found a measure to be discriminatory (and therefore not consistent with WTO rules) based solely on evidence that the measure may impact imports from one country more than imports from another country.

Converting a non-discrimination inquiry into a detrimental impact test renders almost any origin-neutral measure vulnerable to challenge in WTO dispute settlement. Under the Appellate Body's approach, any difference in the measure's market impact (such as a producer's financial situation or its choice of production method), no matter how unrelated to discrimination based on origin, could result in a WTO breach. WTO Members did not agree to refrain from taking otherwise legitimate measures simply because the measures could affect trade unevenly across the membership of the WTO.

The Appellate Body's detrimental impact approach improperly intrudes on Members' regulatory space. It is much more difficult for a nation to pursue legitimate public policy measures under the legal standard the Appellate Body has invented than under the standards to which Members actually agreed. In addition, the Appellate Body's approach would have WTO adjudicators second-guess Members' legislatures and serve as the ultimate arbiters of a range of important legislative questions. This is not a role that WTO Members assigned to the Appellate Body, and the Appellate Body is not equipped to conduct such an inquiry, or second-guess the myriad public policy decisions embedded in domestic regulations.

3. *The Appellate Body's prohibition of "zeroing" to determine margins of dumping has diminished the ability of WTO Members to address injurious dumped imports.* The WTO Antidumping Agreement provides that WTO Members may counteract injurious dumping by foreign producers and exporters by imposing duties up to the amount by which the "normal value" of a product (often its home market price) exceeds its "export price." In making this calculation, the United States and other WTO Members typically focus on those transactions in which dumping occurs (*i.e.*, only those transactions in which the normal value is higher than the export price). This approach has been described as "zeroing," because it assigns zero weight to non-dumped transactions (*i.e.*, where the export price exceeds the normal value).

This is a common-sense approach, and it is clear from the text of the Antidumping Agreement, its negotiating history, and the behavior of WTO Members, that WTO Members never agreed to prohibit zeroing. Despite this, the Appellate Body has created and continuously expanded a prohibition on zeroing, imposing an obligation on Members to calculate dumping by including non-dumped transactions, artificially reducing the margin of dumping. This prohibition has no basis in the text of the GATT 1994 or Antidumping Agreement. Further, the Appellate Body's reasoning in finding this prohibition has been shifting and inconsistent, and the Appellate Body has ignored that the Antidumping Agreement explicitly requires WTO adjudicators to determine whether a Member's interpretation is *permissible*, not whether the Appellate Body views that interpretation as the *best* interpretation. In fact, several provisions in the Antidumping Agreement were deliberately drafted to accommodate a variety of methodologies, but the Appellate Body's erroneous interpretative approach fails to recognize this.

In so doing, the Appellate Body has diminished the ability of WTO Members to address injurious dumping. Under the rules imposed by the Appellate Body, the determination of the amount of dumping will not be the true amount; the amount of antidumping duties that a WTO Member may collect necessarily would be lower than the accurate margin of dumping. By artificially reducing the margin of dumping, the Appellate Body's approach leads to antidumping duties being insufficient to offset the dumping that actually is taking place. As a result, workers and industries that are suffering or threatened with material injury due to dumped imports are unable to obtain the relief they are entitled to.

4. *The Appellate Body's flawed test for using out-of-country benchmarks weakens the ability of WTO Members to address trade distorting subsidies, particularly those in non-market economies.* The WTO Subsidies Agreement was agreed to by WTO Members to provide substantive and procedural rules aimed at effectively addressing the problems faced by companies confronting subsidized competition anywhere in the world, while enabling Members

to retain strong and effective legal remedies against subsidized imports that injure domestic industries.

To measure the subsidy when a government provides a good, the Subsidies Agreement contemplates the use of market-determined prices for an appropriate benchmark, and permits Members to use out-of-country prices as the benchmark where market-determined prices are not found within the subsidizing country. This could be the case, for example, where government intervention has distorted a market. The Appellate Body, however, has imposed an obligation on Members to consider government prices in establishing a benchmark, unless those prices are shown to be non-market prices. The Appellate Body has also effectively read the Subsidies Agreement as imposing an obligation on investigating authorities to justify recourse to out-of-country benchmarks through a quantitative analysis of in-country prices themselves, regardless of whether those prices have already been found by the investigating authority to be distorted.

By raising the bar higher and higher, beyond what Members agreed in the Subsidies Agreement, the Appellate Body has established a standard for measuring subsidies that may be impossible to meet. This is especially true when confronting subsidies in an economy dominated by state-owned enterprises; the greater the extent of government economic distortion, the harder it is to find a market-determined price. An impossible to meet standard favors non-market economies at the expense of market economies and makes it more difficult for WTO Members to counteract subsidies that are harming their workers and businesses.

5. *The Appellate Body has radically diminished the right of WTO Members to impose safeguard measures.* Safeguard measures provide a crucial means for WTO Members to protect their industries from import surges (including surges that would destroy domestic industry). WTO Members specifically reserved for themselves the right to impose such measures and established rules for the application of such measures in the WTO Safeguards Agreement. The Appellate Body, however, has dictated that prior to taking a safeguard action, a Member's competent authority must include in its report a demonstration of the existence of "unforeseen developments," despite the absence of any such requirement in the GATT 1994 and the Safeguards Agreement.

Through the imposition of these new obligations, the Appellate Body has rendered legitimate safeguard measures more difficult to defend. Requiring a demonstration of unforeseen developments before application of a safeguard measure essentially reverses the normal burden of proof. It requires the WTO Member maintaining a safeguard measure to bear the burden of demonstrating the existence of unforeseen developments before another WTO Member even challenges the safeguard measure.

The Appellate Body has also departed from the WTO agreements by creating a high threshold for serious injury determinations under the Safeguards Agreement. In particular, the Appellate Body has imposed on WTO Members an affirmative obligation to analyze not only the factors other than imports that are causing injury, but also to identify their "extent," and then "separate and distinguish" the effects of those other factors from the effects of increased imports. The Appellate Body could even be understood as suggesting that the extent of injury from other factors should be mathematically ascertained so as to precisely separate and distinguish the

injury. Such an approach would all but eliminate the rights of WTO Members to take safeguard actions.

6. *The Appellate Body’s erroneous interpretation of the Subsidies Agreement has limited the ability of WTO Members to simultaneously address dumped and subsidized imports from non-market economies like China.* The WTO agreements and their predecessors have always recognized that the dumping and subsidization of imports, where they cause injury, are distinct unfair trade practices, to which WTO Members are entitled to apply separate remedies. No provision of the Antidumping Agreement or Subsidies Agreement restricts a WTO Member’s ability to apply antidumping duties, including duties calculated using a non-market economy (NME) methodology, and countervailing duties concurrently. Rather, each agreement disciplines a different remedy, and neither agreement conditions or limits the ability of a Member to apply a countervailing duty on whether or not the antidumping duty is calculated using an NME approach.

The Appellate Body, based on an erroneous interpretation of the Subsidies Agreement, has invented an obligation to investigate and not to impose what it terms “double remedies” through the concurrent application of countervailing duties and antidumping duties calculated using an NME methodology. The Appellate Body’s interpretation imposes significant administrative burdens on Members’ trade remedy administrators in the situation of concurrent application of countervailing duties and NME antidumping duties. The difficulties associated with the Appellate Body’s approach are significant and raise serious questions about the ability of WTO Members to address trade-distorting subsidies by non-market economies.

Consequences of Appellate Body Errors and Overreach

The Appellate Body’s rule breaking and overreach have severely weakened the WTO dispute settlement system – and the WTO more generally – in numerous ways. The Appellate Body’s failure to respect the Dispute Settlement Understanding has led to appeals taking significantly longer, moving the WTO dispute settlement system further away from its aim of resolving disputes. As a result, WTO Members are unable to effectively enforce the benefits of the WTO agreements for which they negotiated. Also, the high rate at which the Appellate Body reverses or modifies panel findings has increased the likelihood of appeals and made parties less willing to resolve disputes early in the process.

The Appellate Body’s failure to follow the agreed rules has also diminished the ability of the WTO to serve as a forum for WTO Members to negotiate new trade agreements. The Appellate Body’s persistent overreaching has encouraged some WTO Members to seek to gain through litigation what they have not achieved through negotiation; other Members may be reluctant to undertake new commitments without confidence that the Appellate Body will respect what is agreed. Moreover, by imposing on Members new obligations in the area of trade remedies that Members never agreed to, the Appellate Body has weakened the ability of WTO Members to use the tools they negotiated for to counter injurious imports.

The Appellate Body’s failure to follow agreed rules has affected U.S. trade efforts in particular. The Appellate Body’s erroneous findings have hampered U.S. efforts to ensure U.S. businesses compete with state-owned enterprises on a level playing field. Appellate reports have also

declared numerous U.S. laws and regulations to be WTO-inconsistent, rendering policy choices made by U.S. elected officials increasingly subject to second-guessing by a trio of unaccountable individuals sitting in Geneva.

U.S. concerns with the functioning of the Appellate Body are longstanding and shared. The United States has raised systemic concerns about the functioning of the Appellate Body for more than 20 years. These concerns are bipartisan and shared by both the Legislative Branch and the Executive Branch. Democrats and Republicans, Members of Congress and Members of the Administration, have all expressed concerns about Appellate Body overreach. For example, the 2002 Senate Report for the Trade Act noted “concerns of Congress regarding whether dispute settlement panels and the Appellate Body of the World Trade Organization have added to obligations, or diminished rights, of the United States.” More recently, the 2015 Senate Report on the Bipartisan Congressional Trade Priorities and Accountability Act expressed a concern that the “WTO Appellate Body has made findings that appear to go beyond directly resolving the dispute before it, and at times making findings that appear to go beyond the text of the WTO Agreement.” And in 2016, a group of six former United States Trade Representatives noted that the Appellate Body’s failure to adhere to the mandate that it “cannot add to or diminish the rights and obligations provided in the covered agreements” has been a “serious and ongoing concern by Administrations of both political parties in the United States.”

Other WTO Members are also troubled by the failure of the Appellate Body to follow WTO rules and limit itself to its role. A number of WTO Members have stated in meetings of the Dispute Settlement Body and the General Council that they share many of the concerns expressed by the United States. For instance, a number of WTO Members have stated that the Appellate Body must complete appeals within 90 days, Appellate Body reports cannot create binding precedent, the Appellate Body should not issue advisory opinions, and the meaning of domestic law is a factual issue not subject to appellate review.

Despite the consensus among U.S. lawmakers and Administrations, and a growing number of WTO Members, the United States has been stymied in its efforts to have the Appellate Body respect the limited role that the United States and other WTO Members assigned to it. And, unfortunately, several major users of the WTO dispute settlement system seem unwilling even to admit there is a problem.

* * *

Although the failings of the Appellate Body are disappointing, they are not altogether surprising. Indeed, not long after the creation of the Appellate Body a group of former Directors-General of the GATT and WTO expressed concerns that seem prescient today:

Our concern is that the dispute settlement system is being used as a means of filling out gaps in the WTO system; first, where rules and disciplines have not been put in place by its member governments or, second, are the subject of differences of interpretation. In other words, there is an excessive resort to litigation as a substitute for negotiation. This trend is dangerous in itself. The obligations which WTO members assume are properly for the member governments themselves to negotiate. The issue is still more concerning given certain public perceptions that the process of dispute settlement in the WTO is over-secret and over-powerful.²

The conduct that concerned these WTO officials back in 2001 has worsened several-fold over the last 19 years, due primarily to the failure of the WTO membership to act and to rein in the Appellate Body. Recently, some WTO Members have made proposals purportedly in response to these concerns and other concerns expressed by the United States. But there has been little dialogue about the causes of the Appellate Body's failings. Band-aid solutions will not work; Members must grapple with the underlying problems. It would be futile to agree to new rules – rules that could, themselves, be undermined by adjudicatory overreach – until there is clear understanding on why the original rules failed to constrain the Appellate Body.

Honest and candid dialogue about how and why the WTO arrived at the current situation is necessary if any reform is to be meaningful and long lasting. This will require WTO Members to engage in a deeper discussion of why the Appellate Body has felt free to depart from the role Members assigned to it. Without this understanding, there is no reason to believe that simply adopting new or additional text, in whatever form, will solve these endemic problems.

If the WTO dispute settlement system is to remain viable, it must be returned to the role WTO Members assigned to it in the WTO agreements – to assist WTO Members in the resolution of trade disputes by applying the WTO agreements as written.

² Arthur Dunkel, Peter Sutherland, and Renato Ruggiero, Joint Statement on the Multilateral Trading System, (February 1, 2001) (available at https://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm); *see also* Peter Sutherland, *Is Free Trade Fair?* (2000) (“There are many gaps and ambiguities in the WTO rules. These frequently mask points of disagreement in the negotiations where “creative ambiguity” was the alternative to deadlock. In interpreting the rules, dispute panels should resist the temptation to substitute their insight for lack of precision in the text. They should not arrogate the rule-making responsibility which belongs to the member states.”).

REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

BACKGROUND

I. THE BACKGROUND AND THE CONTEXT OF THE WTO AGREEMENT MAKE CLEAR THE TYPE OF DISPUTE SETTLEMENT SYSTEM AGREED BY WTO MEMBERS

A. The Dispute Settlement System Structure Agreed by WTO Members

The dispute settlement system in the *Marrakesh Agreement Establishing the World Trade Agreement* (“WTO Agreement”) flowed from the dispute settlement system under the *General Agreement on Tariffs and Trade* (1947) (“GATT 1947”). The purpose of the GATT 1947 dispute settlement system was to assist parties to resolve disputes. The system was not designed to make law or add to or diminish rights or obligations under the GATT 1947.

As discussed in more detail in the following section, the dispute settlement system of the WTO was negotiated to build on and improve the dispute settlement system under the GATT 1947. It was never intended to replace that system with a system that would make new rules or fill in gaps that WTO Members had left open for future negotiations.

As one element of the new WTO system, WTO Members agreed to a standing “Appellate Body” (deliberately not named as a “court”) as a means to correct egregious mistakes by dispute settlement panels.³ While the Appellate Body had an important role in the system, WTO Members specifically agreed that its role was to be strictly defined and limited. WTO Members expressly provided that the Appellate Body is prohibited from adding to or diminishing the rights and obligations provided in the WTO agreements. Instead its work should be to help preserve those rights and obligations. WTO Members also agreed that the aim of the dispute settlement system is achieving a satisfactory settlement of the disputes presented to it. In short, Members created the dispute settlement system to help them resolve disputes, not to create jurisprudence or impose new rules on themselves.

Consistent with the focus on helping Members resolve disputes, WTO Members insisted on an expedited dispute settlement system. For the panel stage, they provided that a panel decision should be issued within a year of the commencement of a dispute. They directed that appeals should be resolved even more quickly, mandating that appeal decisions should be issued within 60 days and in no event more than 90 days. The WTO Members also limited the scope of review

³ If WTO Members had intended to create a “court”, they would have named it so. In this regard, it is notable that the Dispute Settlement Understanding refers to persons serving on the Appellate Body as “persons”, not “judges.” DSU Article 17.1 (“It shall be composed of seven persons.... Persons serving on the Appellate Body shall serve in rotation.”). Similarly, WTO Members did not provide for the seven individuals serving on the Appellate Body to sit together as one body for disputes (like a typical high or supreme court); rather the seven individuals are a roster to fill three-person panels. No WTO report is issued by the Appellate Body as a whole.

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to legal questions only, leaving fact-finding and analysis solely to the panel, and thereby enabling the Appellate Body to complete its limited, legal, review promptly.

Furthermore, WTO Members were clear that panel and Appellate Body reports did not provide for an authoritative interpretation of any provision of the WTO Agreement. The WTO Agreement explicitly provides that only WTO Members may issue an “interpretation.” WTO Members limited the Appellate Body to making a mandatory recommendation in the event a WTO Member’s measure was found to be inconsistent with a WTO agreement, but that recommendation is limited to “the Member concerned bring[ing] the measure into conformity with that agreement.”⁴ And WTO Members agreed that they, sitting as the Dispute Settlement Body, would determine who was an Appellate Body member and for what specific period of time.

WTO Members were explicit that the WTO dispute settlement system adhered to these goals of the GATT 1947 system.⁵ Negotiators agreed to include an Appellate Body to provide for correction of egregious mistakes; however, negotiators also agreed on specific limits to the authority of the Appellate Body and on the role it was to play. Unfortunately, experience has shown that the Appellate Body has not respected the limits agreed upon by WTO Members.

Fundamentally, the purpose of the WTO dispute settlement system is to resolve trade disputes between WTO Members. In Article 3.7 of the DSU, WTO Members agreed: “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”

To achieve this focused aim, WTO Members established in the DSU particular processes for resolving disputes promptly. Those processes include panels, and the Appellate Body where appropriate, assisting the Dispute Settlement Body for this purpose. WTO Members also agreed that the prompt settlement of disputes “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”⁶

Ultimately, any recommendations or rulings made by the DSB “shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations” under the DSU and the covered agreements.⁷

WTO Members also agreed, in Article 3.2 of the DSU, that: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” This was such an important limitation on dispute settlement that WTO Members agreed to reinforce it in Article 19.2 of the DSU: “In accordance with paragraph 2 of Article 3,

⁴ DSU Article 19.1.

⁵ *See*, DSU Article 3.1 (“Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947....”).

⁶ DSU Article 3.3.

⁷ DSU Article 3.4.

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in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”

The limits placed on the panel and the Appellate Body are consistent with the statement in the WTO Agreement that the “Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of” the WTO agreements.⁸ WTO Members consequently affirmed this principle in Article 3.9 of the DSU.⁹

When a WTO Member has not been able to resolve a dispute with another WTO Member through consultations, it may ask the DSB to establish a panel to examine a matter. Through the standard terms of reference for panels in Article 7 of the DSU, the DSB charges the panel with two tasks: to “examine ... the matter referred to the DSB” in a panel request and “to make such findings as will assist the DSB in making the recommendations” provided for in the DSU. Article 19.1 of the DSU is explicit in what the recommendation is: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” Thus, it is through such a finding of WTO-inconsistency and through such a recommendation “to bring the measure into conformity” that panels carry out the terms of reference “to make such findings as will assist the DSB in making the recommendations” provided for in the covered agreements.¹⁰

Of crucial significance, findings by either a panel or the Appellate Body do not trigger any consequences for a Member under the WTO dispute settlement system. Rather, procedural consequences can flow only from the adoption by the Dispute Settlement Body of a recommendation in a panel or Appellate Body report. Of equally crucial significance, however, although the WTO generally makes decisions by “positive consensus” (meaning that there is no agreement unless all WTO Members agree), the DSB adopts a panel or Appellate Body report by “negative consensus,” meaning that the report is adopted unless all Members agree **not** to adopt the report. Not surprisingly, the DSB has never declined to adopt a panel or Appellate Body report proposed for adoption by a WTO Member.

WTO Members reinforced in Article 11 that the “function of panels is to assist the DSB in discharging its responsibilities under [the DSU].” In exercising this function, DSU Article 11 states that a panel “should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” That objective assessment calls on the panel to weigh the evidence and make factual findings based on the totality of the evidence. That objective assessment also calls on the panel to interpret the relevant provisions of the covered agreements

⁸ WTO Agreement, Article IX:2.

⁹ “The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.”

¹⁰ DSU Articles 7 and 19.1.

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to determine how they apply to the measures at issue and whether those measures conform with a WTO Member's commitments.

Article 3.2 of the DSU further informs the function of a panel established by the DSB to assist it. Article 3.2 explains that "Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Thus, it is "the rights and obligations of Members under the covered agreements" that are fundamental. And for purposes of understanding the "existing provisions" of the covered agreements – that is, their text – the DSU directs WTO adjudicators to apply "customary rules of interpretation of public international law," which are reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.

Thus, a panel's task is straightforward but also limited to application of the text of the WTO agreements. The Appellate Body's task under the DSU is even more limited than that of panels. Under Article 17.6, an appeal is "limited to issues of law covered in the panel report and legal interpretations developed by the panel." Further, under Article 17.13, the Appellate Body is only authorized to "uphold, modify or reverse the legal findings and conclusions of the panel." Since a panel's function under DSU Article 11 is "to assist the DSB in discharging its responsibilities" under the DSU, the function of the Appellate Body, in reviewing a panel's legal conclusion or interpretation, is thus also to assist the DSB in discharging its responsibilities to find whether the responding WTO Member's measure is consistent with WTO rules. And the Appellate Body was to perform its function while observing the mandatory maximum time for an appeal of 90 days.

B. Negotiating History

The formal title of the DSU is the "*Understanding on Rules and Procedures Governing the Settlement of Disputes*." That title is significant. The key phrase is "settlement of disputes," not "making of rules" or "filling of gaps." The dispute settlement process is supposed to help WTO Members resolve their differences – not make rules for the membership as a whole. This fact explains why the Appellate Body is named Appellate "Body" rather than, for instance, "Appeals Court," "Appellate Court" or, as some have sought to portray it, the "Supreme Court of International Trade." It also explains why persons serving on the Appellate Body are "members" and not "judges," even if some Appellate Body members attempt to bestow that title upon themselves.¹¹

The dispute settlement system under the GATT 1947 was designed to help disputing parties achieve a "satisfactory adjustment" of the dispute,¹² and contracting parties had long reaffirmed

¹¹ Compare DSU Articles 17.1-17.3 (referring to "persons" on the Appellate Body and the "Appellate Body membership") with Farewell speech of Appellate Body member Peter Van den Bossche (May 28, 2019) ("My experience as a WTO appellate judge..."), available at https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

¹² See GATT 1947 Article XXIII:1.

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that the focus of the dispute settlement system was to help find a positive solution to a dispute. For instance, in 1979 they agreed that: “The aim of the CONTRACTING PARTIES has always been to secure a positive solution to a dispute.”¹³

In a 1982 decision taken to describe and set certain procedures for dispute settlement, the GATT 1947 contracting parties were clear that:

the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement¹⁴

and that decisions in the dispute settlement process:

cannot add to or diminish the rights and obligations provided in the General Agreement.¹⁵

In the *Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures* (or “Montreal Rules”), the GATT 1947 contracting parties reaffirmed that the aim of the system was “to ensure prompt and effective resolution of disputes to the benefit of all contracting parties.”¹⁶

Under that system, the GATT Council adopted panel reports by positive consensus; that is, a decision was adopted only if all Members agreed to adopt it. Nothing in the GATT 1947 provided for panel reports to serve as precedent for later panel reports or to be an authoritative interpretation of the GATT 1947.

The GATT 1947 dispute settlement system had proven helpful to the GATT 1947 contracting parties. For instance, there were 126 reports issued under that system. At the same time, the United States believed that there was room for improvement. Under the GATT 1947 mechanism, for instance, U.S. efforts to enforce its rights were often frustrated when other GATT parties delayed the dispute settlement process and blocked adoption of GATT panel reports.

¹³ Understanding on Notification, Consultation, Dispute Settlement and Surveillance, Annex Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2) (28 November 1979), L/4907, para. 4.

¹⁴ *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures* (12 April 1989), L/6489, para. A.1 (hereafter “Montreal Rules”).

¹⁵ Ministerial Declaration Decision on Dispute Settlement (29 November 1982), 29S/13, L/5424, p. 8 para. x.

¹⁶ Montreal Rules, L/6489, para. A.3.

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Recognizing the need to build on and improve the GATT 1947 mechanism, Congress identified as a principal negotiating objective for the Uruguay Round that any dispute settlement system be more effective and expeditious and enable better enforcement of U.S. rights.¹⁷

Ministers agreed at Punta del Este on the objectives for the Uruguay Round negotiations involving dispute settlement:

Dispute settlement

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.¹⁸

1. Negotiating Members Wanted a Dispute Settlement System that Would Not Add to or Diminish Rights and Obligations

While the United States wanted to improve the dispute settlement system, U.S. officials were clear that they did *not* intend to empower that system to change the rules. Indeed, one important concern expressed by numerous participants in the Uruguay Round negotiations was to ensure that the new dispute settlement system would follow the approach of the GATT 1947 system in that it should not add to or diminish rights and obligations of the WTO Members. “Some delegations expressed the view that the GATT dispute settlement procedures should not be used to create, by constructive interpretation, obligations which were not established in the text of the General Agreement. Panels should merely interpret and apply existing GATT rules to the particular sets of circumstances in the disputes before them without purporting to create new obligations.”¹⁹

The final agreed text of the DSU responded to these concerns. Article 3.2 of the DSU explicitly provides that: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”²⁰ This concern was of such importance that the express limitation was repeated for emphasis in Article 19.2 of the DSU: “In accordance

¹⁷ 19 U.S.C. 2901(b)(1).

¹⁸ Ministerial Declaration on the Uruguay Round (September 20, 1986), MIN.DEC, p. 7.

¹⁹ Negotiating Group on Dispute Settlement, Note by the Secretariat on the Meeting of 25 June 1987, MTN.GNG/NG13/2, para. 7.

²⁰ DSU Article 3.2.

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with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”²¹

The United States Congress, when approving the Uruguay Round Agreements Act, was clear that the WTO would not infringe on U.S. sovereignty by making new rules to which the United States had not agreed.²²

2. *Negotiating Members Wanted the Dispute Settlement Process to Be Expeditious*

The length of the dispute settlement process was also an important concern. For example, the United States explained that:

The length of the dispute settlement process, including the myriad opportunities for delay, has at least three negative consequences: it discourages use of dispute settlement procedures for certain short-term issues; it means that considerable trade damage may be suffered in other cases while the process is pending; and it contributes to a pejorative public perception of the GATT.

Subject to mutual agreement of the disputing parties to any extension, there should be time limits for each phase of the dispute settlement process, as well as for the process as a whole. Further, recognizing that such time guidelines as now exist often have not been met, the time limits should be made enforceable.²³

²¹ DSU Article 19.2. The U.S. Statement of Administrative Action accompanying the Uruguay Round Agreements Act also highlighted this aspect of the new dispute settlement system: “Paragraph two emphasizes that while the dispute settlement system is meant to clarify the various Uruguay Round Agreements, the DSB cannot add to or diminish the rights and obligations provided in those Uruguay Round Agreements. Moreover, paragraph nine provides that the Understanding does not prejudice a government’s right to seek an authoritative interpretation of any Uruguay Round Agreement from the Ministerial Conference or General Council of the WTO.” Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. 103-316, at 341 (1994) *reprinted in* 1994 U.S.C.C.A.N. 4040 (hereafter “SAA”).

²² *See, e.g.,* Senator Grassley, Uruguay Round Agreements Act (H.R. 5110), *Congressional Record* 103 (1994) (“With regard to U.S. sovereignty, I can state without fear of contradiction that no Member of Congress is going to vote against the sovereignty of our Nation. This Senator certainly will not do that. But this argument is as false as all the others. Let me quote from the implementing legislation which states that ‘nothing in this act shall be construed to amend or modify any law of the United States, including any law relating to the protection of human, animal, or plant life or health, the protection of the environment, or worker safety.’ The legislation also provides in section 102 that ‘no provision of GATT * * * that is inconsistent with any law of the United States shall have any effect.’ So the implementing legislation emphasizes Congress’ commitment to ensuring that the United States and not the WTO will determine the primacy of U.S. laws.”) Available at: <https://webarchive.loc.gov/congressional-record/20160316141133/http://thomas.loc.gov/cgi-bin/query/C?r103:./temp/~r103K20mdb>. *See also* SAA, p. 363 (“If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.”).

²³ Negotiating Group on Dispute Settlement, Discussion Paper Prepared by the United States Delegation (25 June 1987); MTN.GNG/NG13/W/6, p. 2.

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In addition, many negotiating parties expressed a specific concern that having an appellate mechanism “could complicate and prolong the dispute settlement process.”²⁴ To address this concern, the Members agreed to impose a mandatory deadline for the Appellate Body to issue its report— normally 60 days and in “no case shall the proceedings exceed 90 days.”²⁵

This Report discusses in detail the Appellate Body’s repeated breach of this mandatory deadline for deciding appeals. It is worth noting, however, that the Appellate Body’s disregard for WTO rules and its erroneous interrelations have had significant consequences for the length of panel proceedings as well.

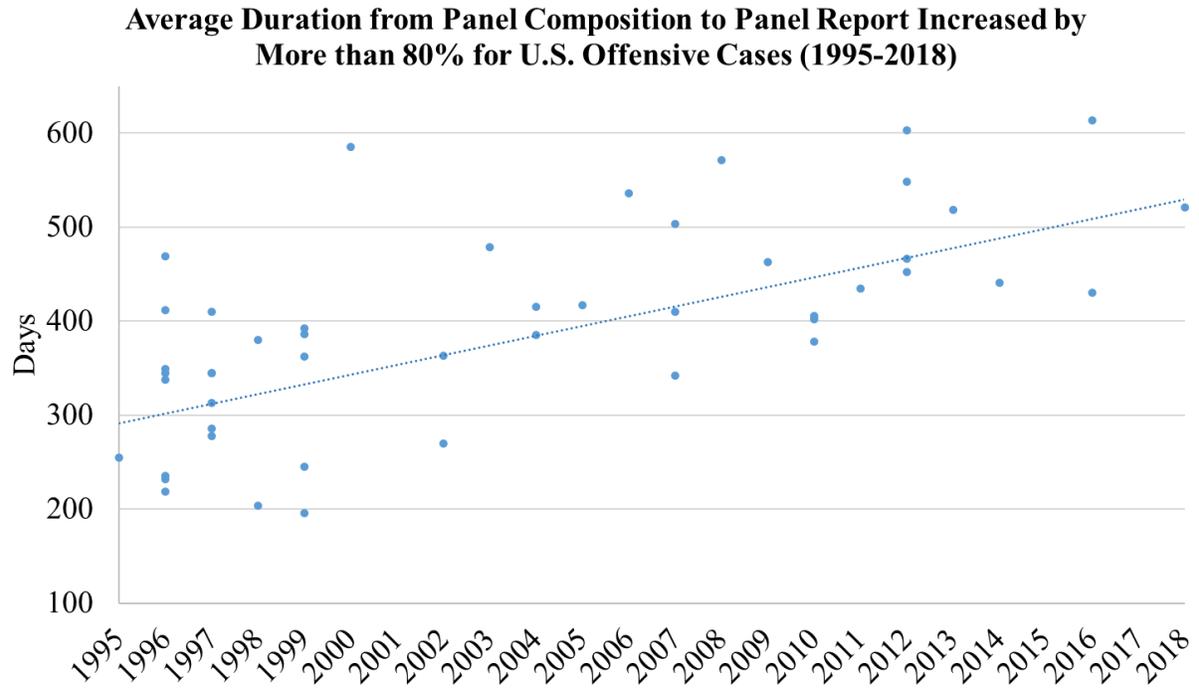
On average, panel proceedings in disputes initiated by the United States from 1995 to 2000 lasted 330 days, whereas panel proceedings in U.S. offensive disputes from 2015 to 2020 took 522 days.²⁶ The following graphic illustrates how the length of the panel proceedings has increased over time:

²⁴ Negotiating Group on Dispute Settlement, Note by the Secretariat (28 May 1990); MTN.GNG/NG13/19, para 12. The U.S. Statement of Administrative Action accompanying the Uruguay Round Agreements Act also highlighted that: “Among the most important changes effected by the DSU are imposition of stringent time limits for each stage of the dispute settlement process, including the time for implementation of panel recommendations.” SAA, at 339.

²⁵ DSU Article 17.5.

²⁶ These figures are calculated based on the number of days from panel composition to circulation of the panel report.

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- Days from Panel Composition to Circulation of Panel Report Linear (Best Fit Line)

Note: Excludes outliers (DS291 and DS316) and Article 21.5 panel requests.

The Appellate Body’s failure to follow agreed rules and its erroneous interpretations are responsible for some portion of this trend. For example, in a recent statement at the Dispute Settlement Body, the United States highlighted how the Appellate Body’s incorrect legal interpretation of Article 6.2 of the DSU has increased the workload of panelists and provoked more litigation.²⁷ Responding parties have used the Appellate Body’s “how or why” requirement for panel requests – a requirement not found in the text of the DSU – to raise challenges against a panel’s terms of reference in at least 16 proceedings. Over the past two years, over 30% of panel reports addressed Article 6.2 and the Appellate Body’s incorrect element of “how or why.”

²⁷ Statement by the United States Concerning Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Meeting of the Dispute Settlement Body on October 28, 2019, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct28.DSB_.Stmt_.as-deliv_fin_.public.pdf

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3. *Negotiating Members Wanted an Appellate Mechanism that Would Be Limited and Used Sparingly*

Even those countries in favor of an appellate mechanism made clear that the mechanism was to be limited in its role, that the mechanism would be used rarely, and that recourse to appeal would not be a common occurrence. As Canada explained:

*In rare cases, where a party to a dispute considered, despite the review by the panel, that a report was so fundamentally flawed that it should not be accepted, the GATT dispute settlement system should provide for a means of correcting errors. The addition of an appellate mechanism would serve that purpose. The intent would not be to have appellate review become a quasi-automatic step in the dispute settlement process. Rather, in those cases where a party to a dispute considered that the panel had made a fundamental error in interpretation of rights and obligations, that party could ask for appellate review. Decisions of the Appellate Body would be final.*²⁸

Once again, the Members agreed upon a rule that would achieve these objectives by explicitly limiting the appeal “to issues of law covered in the panel report and legal interpretations developed by the panel.”²⁹ Unfortunately, in practice, appeal of panel reports has been the norm, not the exception, with over 60 percent of panel reports appealed.

4. *Negotiating Members Wanted a Dispute Settlement System that Would Simply Help Resolve Disputes, Not Make Law*

Negotiating Members recognized that there would always be trade disputes, and that the purpose of the dispute settlement system was to help the parties to the agreement resolve those disputes.

Participants also recognized that the best way to resolve disputes was through voluntary action and mutually agreed solutions. WTO Members agreed, in Article 3.7 of the DSU, that: “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.” WTO Members further recognized that consultations were to be undertaken “with a view to reaching a mutually satisfactory solution.”³⁰ Even once a dispute had moved to a panel, WTO Members through DSU Article 11 called for panels to “consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”

²⁸ Negotiating Group on Dispute Settlement, Communication of Canada (28 June 1990); MTN.GNG/NG13/W/41, p. 4 (emphasis added).

²⁹ DSU Article 17.6.

³⁰ DSU Article 4.3.

ANALYSIS

The Appellate Body has strayed far from the limited role that WTO Members assigned to it. It has repeatedly exceeded its authority and breached the limitations explicitly agreed and imposed by WTO Members. The Appellate Body's persistent overreaching has also taken away rights and imposed new obligations through erroneous interpretations of WTO Agreements. U.S. concerns with the functioning of the Appellate Body are longstanding and shared.³¹ The following discussion is illustrative of these concerns, not exhaustive.

II. THE APPELLATE BODY CHRONICALLY VIOLATES THE RULES IMPOSED BY WTO MEMBERS, UNDERMINING THE DISPUTE SETTLEMENT SYSTEM AND THE WTO GENERALLY

The Appellate Body has departed from the dispute settlement system and rules agreed to by WTO Members in a number of ways. For example, disregarding the fact that the DSU plainly states that an appeal can *in no event* exceed 90 days, the Appellate Body has over time respected that deadline less and less until it now no longer even pretends to take it seriously. And even though the DSU provides that it is the DSB that decides whom to appoint to serve on the Appellate Body and for what period of time, the Appellate Body has asserted that it has the inherent authority to allow someone to serve on an appeal even if that person is not an Appellate Body member.

The Appellate Body has also ignored the rule that an appeal is limited to issues of law and legal interpretation. Instead, it has exceeded its authority and reviewed issues of fact and panel fact-finding, including issues of what a WTO Member's domestic law is or does.

The Appellate Body has gone beyond the role assigned to it by the DSU to help resolve disputes and has instead offered opinions on issues not needed or relevant to resolving the particular dispute it was reviewing. This overreach raises concerns both with respect to adding to or diminishing WTO Members' rights and obligations, and to the exclusive authority of WTO Members to make authoritative interpretations of the WTO agreements.

The Appellate Body has sought to enforce all of its new approaches by saying that Appellate Body reports are to be treated as precedent and panels are expected to follow prior appellate reports in the absence of undefined "cogent reasons," even though this concept is nowhere provided for in the DSU.

Although the DSU is clear that a panel or the Appellate Body is *required* to recommend only that a WTO Member bring into compliance a measure found to be inconsistent with a covered

³¹ See Statements by members of the United States Congress expressing concerns with Appellate Body overreaching (Appendix A1); Other Congressional statements of concern (Appendix A2); Statements by U.S. Trade Representatives or their Deputies on Appellate Body overreaching (Appendix B1); and Statements by the United States to the Dispute Settlement Body expressing concerns with the Appellate Body's failure to follow WTO rules and its erroneous interpretations of the WTO Agreements (Appendix B2).

II. Analysis: The Appellate Body’s Failure to Follow WTO Rules

agreement, the Appellate Body has opined that panels and the Appellate Body have discretion to decide whether to issue a recommendation and what that recommendation should be.

Despite the fact that an appeal is focused on helping the parties resolve their dispute, the Appellate Body has taken it upon itself to opine on how other organs of the WTO, in particular the Dispute Settlement Body, implement their responsibilities.

The following section of this Report discusses these issues in detail.

A. Persons Serving on the Appellate Body Have Repeatedly Violated Article 17.5 by Disregarding the Mandatory 90-Day Deadline for Issuing a Report

- The text of Article 17.5 of the DSU is clear in its mandatory requirement that the Appellate Body complete appeals “as a general rule” within 60 days, and “[i]n no case shall the proceedings exceed 90 days.”
- The Appellate Body has routinely violated Article 17.5 and ignored the deadline mandated by WTO Members, and this conduct has grown worse over time.
- The blatant violation of this clear, mandatory rule by the Appellate Body diminishes the rights of Members and undermines their confidence in the WTO’s rules-based trading system. The Appellate Body’s failure to comply with Article 17.5 also contributes to other systemic problems.

The text of Article 17.5 is clear in its mandatory requirement to complete appeals in no more than 90 days, with no exceptions. Before 2011, the Appellate Body generally respected this rule. On rare occasions in which it issued a ruling after 90 days, it did so only with the agreement of the parties. In 2011, however, the Appellate Body changed its practice and began routinely breaking Article 17.5. The Appellate Body never explained why it began disregarding the mandatory deadline and never provided a justification for violating the rule. Despite objections from the United States and other Members, for several years, the Appellate Body has continued to violate Article 17.5. The most obvious result of the violation is that it is taking longer and longer to resolve disputes. In addition, disregard of Article 17.5 has had other serious consequences for the WTO dispute settlement system, as discussed below.

1. The DSU is Designed to Promote Prompt Settlement of Disputes and Mandates that Appeals Be Completed in No More than 90 Days, with No Exceptions

The prompt settlement of disputes is a cornerstone of WTO dispute settlement. In Article 3 of the DSU, WTO Members agreed that “[t]he prompt settlement of situations in which a WTO Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another WTO Member is essential to the

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effective functioning of the WTO and the maintenance of a proper balance between rights and obligations.”

The principle of prompt settlement is enshrined in numerous provisions of the DSU, including Article 17.5 in particular. Article 17.5, which concerns appellate proceedings, provides that: “As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report.” It is worth noting that appeals are not supposed to take 90 days. They are supposed to be completed in 60 days “as a general rule.”

Recognizing that it might not be possible to provide a report within 60 days in extraordinary circumstances, the DSU provided for the possibility to extend the appeals period for a limited time, subject to certain conditions: “When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.” The next sentence of Article 17.5 provides a further, categorical limitation: “In no case shall the proceedings exceed 90 days.”

Article 17.5 therefore does not accord discretion to the Appellate Body to issue reports beyond the 90-day deadline. In this regard, this text stands in contrast to DSU Articles 12.8 and 12.9 relating to the length of panel proceedings. In the early years, the Appellate Body itself recognized this. For example, when the Appellate Body first issued its working procedures in 1996, it explained to the DSB that the timeframes for WTO Members’ submissions had to be short as a “consequence of Article 17(5) of the DSU, which states that ... in no case shall [the proceedings] go beyond 90 days.”³² The Appellate Body’s working procedures, at Rule 23*bis*, paragraph 3, also refer to “the requirement to circulate the appellate report within the time-period set out in Article 17.5.” Thus, over 20 years ago, the Appellate Body understood Article 17.5 to mean exactly what it says.

2. *The Appellate Body's Pre-2011 Practice Generally Complied with the 90-Day Deadline in Article 17.5 of the Dispute Settlement Understanding*

Until 2011, the Appellate Body made every effort to comply with the requirements of the DSU. From the first appeal in 1996, in *US – Gasoline*, up to the appeal in *US – Tyres (China)* in 2011 – a span of 15 years, covering 101 appeals – the Appellate Body either met the 90-day requirement

³² See, e.g., Communication from the Appellate Body, “Working Procedures for Appellate Review” WT/AB/WP/W/1 (7 February 1996), pp. 2-3 (“You will notice that the time limits set out in the Working Procedures for Appellate Review are short. This is the inevitable consequence of Article 17(5) of the DSU, which states that as a general rule, the proceedings shall not exceed 60 days, and in no case shall go beyond 90 days, from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. It is our view that the timeframes we have established for the filing of submissions and an oral hearing with the parties are reasonable within the constraints imposed by the DSU and afford due process to all parties concerned while at the same time providing the Appellate Body with the time it requires for careful study, deliberation, decision-making, report-writing by the division and subsequent translation of the Appellate Report.”).

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or, in a limited number of appeals, consulted and obtained the agreement of the parties to exceed the 90-day deadline. In 87 of those appeals, the Appellate Body issued its report within the 90-day deadline, including in complex appeals, such as *EC – Bananas*, *US – Steel Safeguards*, *EC – Tariff Preferences*, *US – Offset Act*, *Japan – DRAMs*, and others. In the other 14 appeals, the Appellate Body exceeded the deadline only after having consulted with the parties and obtaining their consent to do so.

In each of these 14 instances, the Appellate Body acted in a transparent manner and documented the reasons and process for the extension either in its report or in a communication to the DSB. For example, in *EC – Export Subsidies on Sugar*, in 2005, the Appellate Body report reflects that the parties, after consulting with the Appellate Body Secretariat, agreed in writing that it “would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time limit referred to in Article 17.5 of the DSU” and that therefore they “*would deem the Appellate Body Report in this proceeding, issued no later than 28 April 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.*”³³ This practice of WTO Members’ submitting so-called “deeming letters”, which was followed in at least ten appeals, recognized that issuing a report outside of the 90-day period was not consistent with Article 17.5 of the DSU.³⁴

3. *The Appellate Body Routinely Violates Article 17.5 of the Dispute Settlement Understanding*

The Appellate Body’s commitment to respecting the 90-day rule ended in 2011, starting with the appeal in *US – Tyres (China)*. In that appeal, the Appellate Body, without explanation, departed from the long-established practice of consulting and obtaining the parties’ consent where it considered it could not meet the 90-day requirement.³⁵

When the report in that case was adopted, the United States made clear that it viewed the Appellate Body’s action as inconsistent with its obligation under Article 17.5. In a statement to the Dispute Settlement Body on October 5, 2011, the United States expressed concerns that the Appellate Body had breached Article 17.5, and it had done so without even obtaining the consent

³³ *EC – Export Subsidies on Sugar (AB)*, para. 7 (2005) (“The European Communities and Australia, Brazil, and Thailand accordingly confirmed that they would deem the Appellate Body Report in this proceeding, issued no later than 28 April 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.”).

³⁴ See, e.g., *US – Upland Cotton (AB)*, para. 8 (2005); *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 7 (2005); *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 14 (2008); Joint Communication from the United States and China, *US – Antidumping and Countervailing Duties (China)*, WT/DS379/7; *EC – Fasteners (China)*, para. 11 (2011); *US – Continued Suspension (AB)* (2008), & *Canada – Continued Suspension (AB)* (2008), para. 29; Joint Communication from the United States and Mexico, *US – Tuna II*, WT/DS381/13 (19 April 2012), p. 1; and Joint Communication from the United States and China, *China – Raw Materials*, WT/DS394/14 (13 January 2012).

³⁵ The length of the appeal was 104 days. China submitted a notice of appeal on May 24, 2011, and the Appellate Body circulated its report on September 5, 2011.

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of the parties to the appeal.³⁶ At that same meeting, several other WTO Members, including Japan, Australia, Chile, Argentina, Costa Rica, and Guatemala, expressed similar concerns with the Appellate Body's approach in *US – Tyres (China)*.³⁷

Despite these protests, the Appellate Body continued to violate Article 17.5 and continued to do so without even consulting with the parties, compelling other WTO Members to complain about the practice of violating Article 17.5.³⁸

Unfortunately, other WTO Members have chosen to ignore a clear breach of the DSU. They refused to recognize the role of WTO Members to administer the rules of the DSU. They refused to support the parties to the dispute to address a serious procedural concern. And their refusal apparently emboldened the Appellate Body to disregard Article 17.5 altogether.

³⁶ Dispute Settlement Body, Minutes of the Meeting Held on October 5, 2011, WT/DSB/M/304, para. 4 (“Pursuant to Article 17.5 of the DSU, the Appellate Body had notified the DSB through a letter circulated on 27 July that it would not be able to complete its Report within 60 days. While the notice had informed the DSB of the expected circulation date, it had not noted that this date was beyond the 90-day deadline. Moreover, contrary to past practice, the notification had made no mention of whether the parties had been consulted on this issue or whether each party had agreed. Neither did the Appellate Body Report mention these issues. And in fact, both parties had not agreed that the Report could be provided beyond the 90-day deadline specified in Article 17.5 of the DSU.”). Ultimately, the Appellate Body Report was circulated 104 days after commencement of the appeal, a full two weeks after the 90-day deadline.

³⁷ See, e.g., Dispute Settlement Body, Minutes of the Meeting Held on October 5, 2011, WT/DSB/M/304, paras. 4-7, 11-20.

³⁸ See, e.g., Dispute Settlement Body, Minutes of the Meeting Held on February 22, 2012, (WT/DSB/M/312) (adoption of report in *China – Raw Materials*; statements by the United States, Canada, Japan, Costa Rica, Norway, Australia, and Guatemala); Minutes of the DSB Meeting (March 23, 2012) (WT/DSB/M/313) (adoption of report in *US – Large Civil Aircraft*; statements by the United States and Japan); Minutes of the DSB Meeting (June 13, 2012) (WT/DSB/M/317) (adoption of report in *US – Tuna II*; statements by the United States, Japan and Mexico); Minutes of the DSB Meeting (July 10, 2012) (WT/DSB/M/319) (in relation to the appeal in *US – COOL*; statements by the United States, Canada, and Mexico); Minutes of the DSB Meeting (July 23, 2012) (WT/DSB/M/320) (adoption of report in *US – COOL*; statements by the United States, Costa Rica, Japan, Australia, Guatemala, and Turkey); Minutes of the DSB Meeting (June 18, 2014) (WT/DSB/M/346) (adoption of report in *EC – Seals*; statements by the United States, Guatemala, Norway, and Japan); Minutes of the DSB Meeting (December 19, 2014) (WT/DSB/M/354) (adoption of report in *US – Carbon Steel (India)*; statement by the United States); Minutes of the DSB Meeting (January 16, 2015) (WT/DSB/M/355) (adoption of report in *US – CVD (China)*; statements by the United States, Australia, and Canada); Minutes of the DSB Meeting (January 26, 2015) (WT/DSB/M/356) (adoption of reports in *Argentina – Import Measures*; statements by the United States, Japan, Chinese Taipei, Australia, Canada, and Norway); Minutes of the DSB Meeting (May 29, 2015) (WT/DSB/M/362) (adoption of reports in *US – COOL 21.5*, statements by Canada and the United States); and Minutes of the DSB Meeting (June 19, 2015) (WT/DSB/M/364) (adoption of the report in *India – Agricultural Products*; statements by the United States, Norway, and Japan).

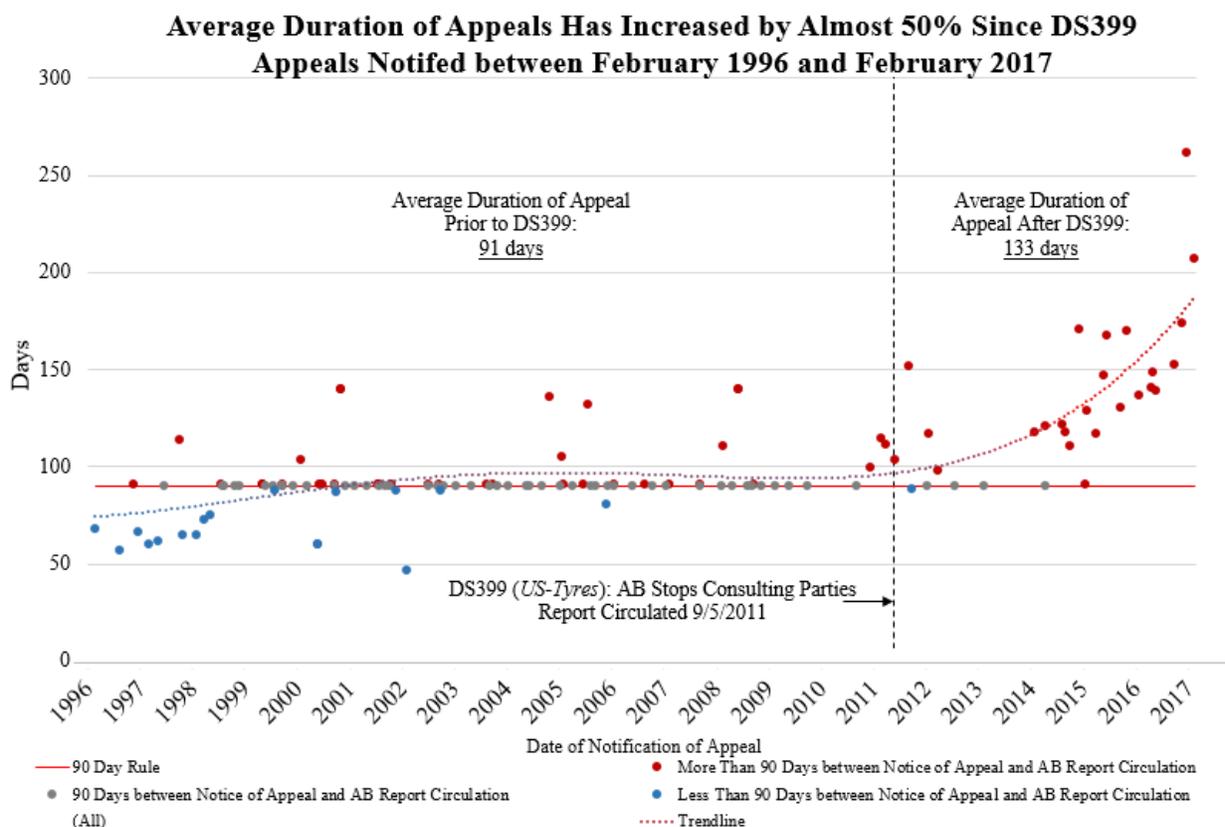
II. Analysis: The Appellate Body’s Failure to Follow WTO Rules

4. Analysis of WTO Disputes Shows the Appellate Body’s Increasing Non-Compliance

Prior to the appeal in *US – Tyres (China)* in 2011, excluding the EU and US large civil aircraft disputes, the average length of an appeal was approximately 90 days. As noted, in those rare instances where the Appellate Body exceeded 90 days, it did so with the agreement of the parties to the dispute.

Since the Appellate Body’s unexplained change of approach in 2011, however, the average length of appeals, again excluding the EU and US large civil aircraft disputes, is approximately 133 days. That is, an appeal has taken, on average, 43 more days, which is an increase of 48 percent. And this noncompliance has only increased over time. Since May 2014, not a single appeal has been completed within the 90-day deadline. The average for appeals filed from May 2014 to February 2017 is 149 days.

The graph below illustrates the increasing length of appeals.



Note: Data includes both Art. 17 and Art. 21.5 appeals, but excludes aircraft appeals, i.e. DS353, DS353 (21.5), DS316, DS316 (21.5), and all Appellate Body reports circulated after October 1, 2017.

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It is also worth noting that the Appellate Body has stopped observing the obligation in Article 17.5 of the DSU to provide the DSB with an estimate of the period within which it will submit its report. Recent communications from the Appellate Body simply inform WTO Members that the Appellate Body will not meet the 90-day deadline, without providing any estimated date for when the Appellate Body will circulate a report.

5. *The Appellate Body Creates Reasons for Breaching the Rule Rather than Changing Its Behavior to Ensure Compliance with the Rule*

To the extent the Appellate Body has attempted to justify its non-compliance, it appears to do so by claiming that it is not possible to issue reports within the 90-day deadline. No objective evidence supports such a contention and, even if there were such evidence, it is not within the Appellate Body's authority to disregard or amend the DSU.

On the first point, the Appellate Body seems to assert that under Article 17.12, it must "address each of the issues raised" in the appeal – as if this means that the report must write an interpretation and reach the merits on each issue.³⁹ This is simply not the case. The Appellate Body can exercise, and has exercised, judicial economy by not ruling on every issue raised in an appeal.⁴⁰ Such judicial economy is appropriate and is wholly consistent with Article 17.12 because to "address" an issue requires only consideration of and disposal of the issue; the Appellate Body is under no obligation to write an interpretation of every issue.⁴¹

Second, and more importantly, it is simply not the Appellate Body's place to disregard or amend the DSU. In the absence of a DSU amendment, or other appropriate DSB action, Article 17.5 sets out a rule. Because WTO Members have not amended Article 17.5 to provide for an exception, it is the responsibility of the Appellate Body to follow that rule.

³⁹ See, e.g., *Indonesia – Import Licensing (AB)*, paras. 5.62-5.64 (2017) (citing Article 17.2 as one of the reasons for addressing Indonesia's claim on appeal concerning Article XI:2(c) of the GATT, despite acknowledging that addressing the claim could have had no effect on the recommendations and rulings in the dispute). See also May 28, 2018 farewell speech of Appellate Body member Ricardo Ramírez-Hernández available at https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm ("In this regard, the Membership needs to solve the tension between the principle that the aim of the dispute settlement mechanism 'is to secure a positive solution' to a dispute and the obligation of the AB to 'address each of the issues raised' on appeal.").

⁴⁰ See, e.g., *US – Upland Cotton (AB)*, paras. 510-511, 762 (2005), where the Appellate Body refrained from interpreting provisions of the covered agreements where doing so was "unnecessary for the purposes of resolving [the] dispute." See also *India – Solar Cells (AB)*, paras. 5.156-5.163.

⁴¹ Oxford Dictionary online: "Address" (third definition of verb): "think about and begin to deal with (an issue or problem)."

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6. *The Appellate Body's Disregard for the Mandatory Deadline for Resolving Appeals Has Significant Implications for the Effectiveness of the WTO Dispute Settlement System*

The Appellate Body's disregard of Article 17.5 diminishes the rights of WTO Members and undermines confidence in the WTO as a whole. In addition, failure to comply with Article 17.5 contributes to other systemic problems. The breach of Article 17.5 has allowed the Appellate Body to increase its own authority. By not considering itself bound by any deadline, the Appellate Body frees itself to address issues not necessary to resolve the dispute, resulting in advisory opinions. The failure to consult with Members about deadlines or explain its reasoning contributes to the lack of transparency. The increasing delay in appeals lessens the benefit of the dispute settlement system to a complainant and decreases the deterrent effect upon Members who do not respect their obligations. For this reason, the WTO has made it clear that the "effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members" depends upon "prompt settlement of situations in which a WTO Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member."⁴² Finally, a Member subject to an Appellate Body report issued after the deadline for such a report has passed can credibly assert that it has no obligation to comply with the decision.

B. The Appellate Body Has Repeatedly Violated Article 17.2 of the DSU and Has Allowed Former Members to Decide Cases after Their Terms Have Ended

- WTO Members, acting as the Dispute Settlement Body, have the exclusive authority to appoint and reappoint persons to the Appellate Body.
- The Appellate Body has adopted a rule that purports to give itself the authority to allow persons whose terms as Appellate Body members have expired to participate in and rule on disputes.
- Through this breach of the Dispute Settlement Understanding, persons no longer members of the Appellate Body have continued to participate in appeals for more than a year after their terms have expired.

The DSU reflects WTO Members' agreement on the appointment of persons to the Appellate Body, and it makes it clear that only the Dispute Settlement Body has the authority to appoint and reappoint members of the Appellate Body and to determine when their term begins and ends. Specifically, Article 17.2 of the DSU provides that "[t]he DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once." The

⁴² DSU Article 3.3.

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appointment or reappointment of persons to the Appellate Body is a decision taken by WTO Members in the DSB by positive consensus.

Nevertheless, the Appellate Body has exceeded its authority and adopted a procedural rule that purports to give itself the authority to allow persons whose terms as Appellate Body members have expired to participate in and rule on disputes. Specifically, the Appellate Body adopted Rule 15 in its Working Procedures, which provides:

A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.⁴³

Pursuant to this rule, which was neither promulgated by nor approved by the WTO Members, the Appellate Body considers that it has the authority to appoint a person who “ceases to be a Member of the Appellate Body” to be an Appellate Body member for purposes of completing an appeal or multiple appeals.⁴⁴ This is clearly contrary to the WTO Agreement, however, as the DSB (which includes all Member countries), not the Appellate Body, has the authority and responsibility to appoint persons to the Appellate Body. It is also for the DSB to decide whether a person whose term of appointment has expired should continue serving.⁴⁵

Despite the clear text of the DSU, some WTO Members have excused the Appellate Body's conduct by asserting it represents a long-standing practice. But a subordinate employee cannot refuse to follow the law by pointing to a procedure it drafted that says it can refuse to follow the law. Nor does the fact that an illegal practice has been permitted for many years serve as justification for the illegal practice. The United States, among other Members, has long asserted the practice to be improper, and, in any event, an organization that claims to be rules-based cannot take the position that an employee in the organization can change the rule by ignoring it for a long enough period. Moreover, the DSU sets out agreed rules for WTO dispute settlement. If those rules are to be modified, this could occur only through agreement of all WTO Members. The Appellate Body cannot change the rules through a practice of violating the rules.

Some Members have sought to defend the Appellate Body's practice by noting that the DSU provides the Appellate Body with the authority to establish its own working procedures. Specifically, Article 17.9 of the DSU provides that “[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.” This is of no moment as the DSU does

⁴³ Working Procedures for Appellate Review, Rule 15 (WT/AB/WP/6).

⁴⁴ *Id.*

⁴⁵ The Appellate Body has even used Rule 15 to justify the continued service of a person after his term ended even though the Dispute Settlement Body had already explicitly declined to re-appoint that person to a second term on the Appellate Body. See May 31, 2016, and September 28, 2018 letters from the Appellate Body to the chairperson of the DSB regarding Mr. Chang and Mr. Servansing, respectively.

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not provide that the working procedures can violate the DSU. As the Appellate Body itself noted many years ago:

Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: "Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute". Yet that is *all* that it says. Nothing in the DSU gives a panel the authority to disregard or to modify other explicit provisions of the DSU.⁴⁶

Just as a panel may not disregard or modify the DSU through adoption of its working procedures, so too the Appellate Body may not disregard or modify the DSU through its working procedures, and that is what Rule 15 purports to do. Because the DSU provides the DSB with the authority to appoint persons to the Appellate Body, the Appellate Body cannot provide that same authority to itself simply by including a rule to that effect in its working procedures. Similarly, even if the application of Rule 15 were characterized as merely extending the term of a current Appellate Body member, such action would be inconsistent with the four-year term set by the DSU and the DSB.

One WTO Member (China) has asserted that the rotation required by the DSU provides the legal basis for Rule 15.⁴⁷ In particular, China has stated that "[b]y allowing the Appellate Body members, whose terms had expired, to finish the cases to which they had previously been assigned, Rule 15 clearly guaranteed the rotation required by the DSU, and should, thus, form part of the Working Procedures for Appellate Review."⁴⁸ This argument exhibits a misunderstanding of the DSU. Article 17.1 provides that the Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body." Article 17.1 gives the Appellate Body authority to come up with procedures for rotation of "[p]ersons serving on the Appellate Body"; it does not give the Appellate Body authority to resurrect a former Appellate Body member or extend his or her term.

The Appellate Body has also attempted to defend its own practice. On November 24, 2017, apparently in response to concerns expressed by the United States, the Appellate Body circulated to WTO Members an unsolicited Background Note on Rule 15.⁴⁹ That communication, however, raised more questions than it answers. As the United States has explained in detailed statements to the Dispute Settlement Body, the Background Note fails to provide a correct or

⁴⁶ *India – Patents (US) (AB)* (1998), para. 92.

⁴⁷ See, e.g., Dispute Settlement Body, Minutes of the Meeting Held on February 28, 2018, (WT/DSB/M/409), para. 7.21 and Minutes of the DSB meeting (April 27, 2018) (WT/DSB/M/412), para. 9.25.

⁴⁸ Dispute Settlement Body, Minutes of the Meeting Held on February 28, 2018, (WT/DSB/M/409), para. 7.21.

⁴⁹ Background Note on Rule 15 of the Working Procedures for Appellate Body Review: Communication from the Appellate Body (JOB/AB/3) (Nov. 24, 2017) (hereinafter "Background Note").

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complete presentation and therefore does not contribute to WTO Members' consideration of this issue.⁵⁰

First, the Background Note nowhere addresses the legal basis for including Rule 15 in working procedures that otherwise relate to the consideration of appeals by Appellate Body members – not persons who are *not* Appellate Body members. Nor does the document address how continued service by an ex-Appellate Body member relates to the DSB's appointment decision under Article 17 of the DSU. Instead, the Appellate Body appears to rely on policy considerations of efficient functioning.

Second, the Background Note asserts that “[u]ntil recently, the application of Rule 15 has *never been called into question* by any participant or third participant in any appeal, *nor has it been criticized by any Member in the DSB* when an Appellate Body report signed by an AB Member completing an appeal pursuant to Rule 15 was adopted by the DSB.”⁵¹ Unfortunately, the Appellate Body appears to have very carefully crafted this language in a manner to avoid mentioning that in fact Rule 15 *was* “criticized by [a WTO] Member in the DSB” and was “called into question” at the time of its adoption. In fact, in 1996, India had stated explicitly that Rule 15 did raise a “systemic concern” and provided the following explanation:

This was contrary to Article 17.1 of the DSU which, *inter alia*, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, [the Member] would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU.⁵²

The omission of this statement from the Background Note is misleading, and the statement makes clear that the validity of Rule 15 was questioned long ago.

Third, the Background Note states that Rule 15 “as initially conceived was intended to apply for relatively short periods of transition.”⁵³ As an initial matter, the argument that a relatively brief violation is of no concern is no more persuasive than the argument that persistent violation of a rule can effectuate the termination of the rule. In addition, there are many instances of former Appellate Body members serving on a panel and participating in a decision long after their terms

⁵⁰ See, e.g., U.S. Statement at the February 28, 2018, DSB Meeting, *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_Stmt_as-delivered.fin_public-1.pdf.

⁵¹ Background Note, para. 2 (italics added).

⁵² Dispute Settlement Body, Minutes of the Meeting Held on February 21, 1996, WT/DSB/M/11, p. 12.

⁵³ Background Note, para. 6.

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ended. In one case, the Appellate Body member was appointed to a division just three days before his term ended – meaning almost the entirety of the appeal was expected to occur after the individual had ceased to be a member.⁵⁴

Fourth, the Background Note contains misleading analogies to the rules of “some international tribunals” that remain unnamed.⁵⁵ The rules for those other tribunals are based on their constitutive texts. For example, the transition rule for the International Court of Justice is set out in its Statute, which is annexed to and an integral part of the United Nations Charter.⁵⁶ In sharp contrast, Rule 15 is *not* set out in the DSU and has *not* been agreed by WTO Members.

Through the Appellate Body's breach of the DSU, persons formerly serving on the Appellate Body have continued to participate in appeals for more than a year after their terms have expired. This means that these individuals continue to be paid hundreds of thousands of dollars, without any authorization by WTO Members, to continue working on an appeal long after the term set by WTO Members expired.⁵⁷

The Appellate Body's breach of DSU Article 17.2 has implications for the WTO system and WTO Members. It shows the Appellate Body's disregard for the rules that should govern its proceedings and is another example of how the Appellate Body has attempted to expand the limited authority Members provided to it. It also suggests that a growing body of reports – all

⁵⁴ See Communication from the AB Secretariat to the DSB Chair (May 29, 2008) (related to continued service by one person in *US – Continued Suspension (AB)* and *Canada – Continued Suspension (AB)*).

⁵⁵ Background Note, para. 3.

⁵⁶ Statute of the International Court of Justice, Article 13(3) (“The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.”); United Nations Charter, Article 92 (“The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”).

⁵⁷ U.S. Statement at the DSB Meeting on November 22, 2019. Although beyond the scope of this Report, the United States recently learned troubling information about compensation provided to current and former Appellate Body members. In its statement to the DSB on November 22, 2019, the United States explained to Members that it had sought from the WTO Secretariat a deeper understanding of the compensation arrangement and practices for Appellate Body members. An Appellate Body member's compensation consists of two primary elements. First, a person serving on the Appellate Body receives a monthly retainer fee plus a monthly administrative fee that totals approximately CHF 9,415 per month. The United States learned that, in practice, ex-Appellate Body members continuing to decide appeals past the end of their terms also received the retainer fee. The second element is a daily working fee, in addition to the retainer, based on the number of days worked. The United States learned that on average over the past four years Appellate Body members collected the daily fee for nearly every working day every month. Together with the monthly retainer fee, these two elements alone can result in annual compensation of approximately CHF 300,000 for an Appellate Body member. The same is true for ex-Appellate Body members, depending on their level of activity. The value of this compensation is even higher when tax benefits are considered. The United States questions whether this approach to compensation creates the appropriate incentive. Under this system, the longer an appeal remains undecided the greater the compensation for the Appellate Body members. An appeal that extends beyond the 90-day deadline benefits Appellate Body members in a way that strict adherence to that deadline does not. The benefit realized may be even more substantial for an ex-Appellate Body member who would not otherwise receive the monthly retainer for the duration of the appeal.

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those signed by fewer than three actual Appellate Body members – do not have the legal status of Appellate Body reports. This would mean that they were not properly adopted by the DSB. It also calls into question how WTO Members should treat these reports. The Appellate Body's disregard for the rules undermines the right of WTO Members to replace Appellate Body members, including those who may be failing in their obligations under the DSU. And it can diminish WTO Members' substantive rights, when former Appellate Body members sign reports that contravene the balance of rights and obligations the WTO agreements set out.

C. The Appellate Body Has Violated Article 17.6 and Exceeded Its Limited Authority to Review Legal Issues by Reviewing Panel Findings of Fact, including Factual Findings Relating to the Meaning of WTO Members' Domestic Law

- WTO Members authorized panels to make factual findings and legal conclusions, but they authorized the Appellate Body to review only the latter.
- Contrary to the clear text of the Dispute Settlement Understanding and the explicit limitation of appeals to legal issues, the Appellate Body routinely reviews panel findings of fact. The Appellate Body has also reviewed the meaning of a Member's domestic law *de novo* as a legal issue, even though WTO Members agree it is an issue of fact not subject to appellate review.
- This is an unauthorized attempt by the Appellate Body to expand its authority and scope of review. Second-guessing panel fact-finding also adds to the length and complexity of appeals, which exacerbates the significant and growing delays in the dispute settlement process.

The United States and WTO Members agreed to a dispute settlement system in which panels would make factual findings and legal conclusions, but the Appellate Body would review only the latter. Contrary to WTO rules, the Appellate Body has reviewed panel factual findings. The Appellate Body has compounded this error by treating panel findings concerning the meaning of domestic law – a clear issue of fact in WTO dispute settlement – as subject to review by the Appellate Body. The Appellate Body's expansion of its review authority has negatively impacted the dispute settlement system in several significant ways.

1. *Appellate Review of Facts is Contrary to the Appellate Body's Limited Authority under the Dispute Settlement Understanding*

The DSU reflects WTO Members' agreement on the functions assigned to panels and the Appellate Body. DSU Article 11, which describes the "function" of a panel, provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." In other words, "the matter" in a dispute consists of the facts and the legal claims, and panels are authorized to make both factual and legal findings.

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By contrast, WTO Members agreed in the DSU to expressly limit the authority of the Appellate Body to review a panel's legal findings, not its factual findings. Indeed, it is difficult to see how the language of Article 17.6 of the DSU could be clearer on this point: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

The Appellate Body itself has acknowledged this limitation on its authority. In a 1998 report, the Appellate Body stated, "Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body."⁵⁸ At the same time, however, the Appellate Body attempted to escape from this limitation by asserting that there was a standard of review applicable for panels in respect of the panel's "ascertainment of facts" under the relevant covered agreements.⁵⁹

The Appellate Body's approach erred by failing to address a critical threshold question: how, in light of the limitation of appeals in Article 17.6 of the DSU to "issues of law and legal interpretations," was the Appellate Body authorized to "review" a panel's "ascertainment of facts"? This question needed to be addressed and resolved before moving on to determine what would be the "standard" for any such review. But the Appellate Body did not engage on this threshold question. It did not explain the basis for its assumption that it could review a panel's findings of fact when the DSU expressly limits the Appellate Body's review to "issues of law and legal interpretations."⁶⁰

Furthermore, the review authority claimed by the Appellate Body raises critical questions. Not surprisingly, since the DSU does not provide for the Appellate Body to conduct a review of factual findings, no provision in the DSU refers to a "standard of review" for such an assessment. Faced with this lack of any agreed "standard of review," the Appellate Body asserted that Article 11 of the DSU provided such a standard. In so doing, however, the Appellate Body again ignored the text of the DSU and simply asserted that the DSU text said something different from what WTO Members agreed.

The Appellate Body has interpreted the phrase "should make an objective assessment" found in Article 11 as a "mandate" and a "requirement" for panels. This is plainly incorrect. The decision of WTO Members to use the word "should" makes clear that WTO Members did not

⁵⁸ *EC – Hormones (AB)* (1998), para. 132.

⁵⁹ *Id.* at para. 116.

⁶⁰ *Id.* at para. 61 (Canada's claims relating to the panel's alleged failure to make an objective assessment of the facts were, in reality, claims alleging errors of fact and "factual findings are, pursuant to Article 17.6 of the DSU, beyond review by the Appellate Body"); *Id.* at para. 44 (stating the United States "improperly requests" appellate review of panel fact-finding because "according to Article 17.6 of the DSU, factual findings are clearly beyond review by the Appellate Body").

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intend to create a legal obligation subject to review.⁶¹ This conclusion is directly reinforced by the fact that Article 17.6 limits appeals to issues of law.

From its assertion that “should make” sets out a “mandate” and a “requirement”, the Appellate Body proceeded to state: “Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.” This statement simply compounded the error described above. Over a year later, the Appellate Body flatly asserted that: “The word ‘should’ has, for instance, previously been interpreted by us as expressing a ‘duty’ of panels in the context of Article 11 of the DSU.” Again, the Appellate Body failed to explain why the word “should” supports this reading.

Just prior to this erroneous statement, the Appellate Body had correctly explained that: “The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.” This statement, however, does not eliminate the clear distinction between factual findings and legal findings – a distinction that is critical to understanding the proper role of the Appellate Body. A panel’s assessment of the facts does not become a “legal question” just because a party to the dispute disagreed with it.

In sum, the Appellate Body’s decision to undertake a review of panels’ findings of fact has no basis in the Dispute Settlement Understanding.

The Appellate Body has become more aggressive about reviewing factual findings, and it has done so under varying standards. Initially, the Appellate Body explained that for an Article 11 appeal to succeed, the party appealing a panel finding needed to demonstrate that the panel had committed “egregious error that calls into question the good faith of the panel.”⁶²

Over time, however, the Appellate Body has lowered this threshold for review of factual findings. In 2011, in *EC – Large Civil Aircraft*, the Appellate Body explained that “for a claim under Article 11 to succeed, we must be satisfied that the panel has exceeded its authority as the trier of facts.” The Appellate Body went on to explain this means that “a panel must provide a ‘reasoned and adequate’ explanation for its findings and coherent reasoning. It has to base its findings on a sufficient evidentiary basis on the record, may not apply a double standard of proof, and its treatment of the evidence must not lack ‘even-handedness.’”⁶³

⁶¹ Ironically, then, the Appellate Body reads “should make an objective assessment” to mean “shall make” for purposes of DSU Article 11, but reads “In no case shall the proceedings exceed 90 days” as “In no case *should* the proceedings exceed 90 days” for purposes of DSU Article 17.5. The Appellate Body’s choice of whether “should” means “shall” or “shall” means “should” appears to be resolved by which word provides greater authority to the Appellate Body.

⁶² *Id.* at para. 133.

⁶³ *EC – Large Civil Aircraft (AB)* (2011), para. 881.

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By moving from a standard that required both “egregious” error and an apparent lack of good faith to justify reversal to a much lower threshold, the Appellate Body further empowered itself to second-guess a panel’s reasoning and findings and substitute its own assessment of the facts for the panel’s assessment.

The Appellate Body has also articulated other standards of review for Article 11 claims. In *US – Wheat Gluten (AB)* and *US – Carbon Steel (AB)*, the Appellate Body referred to affirmative findings that lack a basis in the evidence contained in the panel record.⁶⁴ In *US – Upland Cotton (AB) (Article 21.5 – Brazil)*, the Appellate Body articulated the standard as whether a panel has provided “reasoned and adequate explanations and coherent reasoning”⁶⁵ or displayed a lack of even-handedness and the application of a double-standard of proof.⁶⁶ More recently, in *Russia – Commercial Vehicles (AB)*, the Appellate Body articulated the standard as whether a panel’s findings and its treatment of competing evidence are internally incoherent and inconsistent.⁶⁷

There is no basis in the DSU for any of these standards. WTO Members never agreed that the Appellate Body would review a panel’s factual findings and therefore WTO Members never negotiated the basis or standard for such a review. Rather than trying to develop its own standard, the Appellate Body should have respected the limits on its authority imposed by Members.

2. *The Appellate Body Has Erroneously Treated the Meaning of a WTO Member’s Domestic Law as a Legal Issue Subject to Its Review*

The Appellate Body has also asserted that it has the authority to review panel findings on the meaning of a WTO Member’s challenged domestic (or “municipal”) law. This too is wrong. Although whether a given domestic law is consistent with WTO obligations is a question of law, in the WTO system the meaning of that municipal law is an issue of fact. The DSU reflects this straightforward division between issues of fact and law.⁶⁸

The determination that the meaning of municipal law is an issue of fact is not unique to the WTO dispute settlement system. This determination is well-recognized in international law generally.

⁶⁴ *US – Wheat Gluten (AB)* (2000), paras. 161-162; and *US – Carbon Steel (AB)* (2002), para. 142.

⁶⁵ *US – Upland Cotton (AB) (Article 21.5 – Brazil)* (2008), fn. 618.

⁶⁶ *Id.* at para. 293 (referring to *Korea – Alcoholic Beverages (AB)* (1999), para. 164).

⁶⁷ *Russia – Commercial Vehicles (AB)* (2018), para. 5. 76-5.77.

⁶⁸ For example, DSU Article 6.2 requires a complaining party to set out “the matter” in its panel request composed of “the specific measures at issue” – that is, the core issue of fact – and to “provide a brief summary of the legal basis of the complaint” – that is, the issue of law. Similarly, DSU Article 11 distinguishes between the panel’s “objective assessment of the facts of the case” and its assessment of “the applicability of and conformity with the covered agreements” – that is, the issue of law. DSU Article 12.7 makes the same distinction in relation to the findings of fact and law in a panel’s report.

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For example, a standard treatise on international law states that “*municipal laws are merely facts which express the will and constitute the activities of States.*”⁶⁹

Indeed, WTO panels have repeated this proposition in a number of reports.⁷⁰ The United States is aware of at least 10 times that WTO panels have disagreed with the Appellate Body and instead found that the meaning or operation of a WTO Member's domestic law is an issue of fact, and not an issue of WTO law. Given the clear text of the DSU, these statements are not surprising.

Nor is it surprising that numerous WTO Members have also come to the same conclusion in their disputes, including Canada, China, Colombia, the Dominican Republic, the European Union, Guatemala, Hong Kong, India, Mexico, Peru, and the Philippines.⁷¹ Thus, WTO Members have often made clear that a panel's findings on the meaning of a WTO Member's domestic law represent factual findings – not legal findings.

Nevertheless, the Appellate Body has repeatedly treated the meaning of municipal law as a matter of WTO law, to be decided by the Appellate Body *de novo* in an appeal under Article 17.6 of the DSU. The Appellate Body has given no interpretation of the text of the DSU for its assertion that the meaning of domestic law is an issue of law in the WTO dispute settlement system. Nor has it clearly identified any other source that would explain its departure from the approach followed generally in international dispute settlement. The only basis the Appellate Body has given for its proposition that the meaning of municipal law is an issue of law under

⁶⁹ Brownlie, “Principles of Public International Law” at 39 (5th ed. 1998) (italics added) (quoting *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 7, p. 19.).

⁷⁰ See, e.g., *US – Section 301 Trade Act (Panel)* (2000), paras. 7.18 and 7.19; *US – Section 129(c)(1) URAA (Panel)* (2002), para. III.89; Panel Report, *Mexico – Olive Oil* (2008), paras. 7.29 and 7.30; *Colombia – Ports of Entry* (2009), para. 7.93; *EC – Fasteners (China) (Panel)* (2011), para. 7.68; *US – Countervailing Measures on Certain EC Products (AB)* (2003), paras. 6.38 and 7.125; *EC – Bed Linen (Article 21.5 – India) (Panel)* (2003), n. 213; *US – Zeroing (EC) (Panel)* (2006), paras. 7.53, 7.64 (emphasis added); *US – Poultry (China)* (2010), paras. 7.104 and 7.381 (emphasis added); and *US – Countervailing and Anti-Dumping Measures (Panel)* (2014), para. 7.163 (emphasis added).

⁷¹ For Canada, see, e.g., Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, n. 306 (2009); for China, see, e.g., *EC – Fasteners (China) (AB)*, para. 74 (2011); and *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 7.142, 7.160, 7.228 (2011); for Colombia, see, e.g., *Colombia – Ports of Entry*, para. 4.14 (2009); for the Dominican Republic, see, e.g., *Dominican Republic – Import and Sale of Cigarettes (AB)*, paras. 45 and 46 (2005); for the European Union, see, e.g., *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU) (Panel)*, at Annex B-4, para. 2 (2019); *US – Tax Incentives (Panel)*, at Annex B-1, para. 45 (2017); *EC – Trademarks and Geographical Indications (US) (Panel)*, para. 7.43, Annex B-4, p. B-121, para. 3 (2005); and *EU – Fatty Alcohols (AB)*, at Annex B-3, para. 28 (2017); for Guatemala, see, e.g., *Guatemala – Cement I (Panel)*, para. 6.440 (2000); for Hong Kong, see, e.g., *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 62 (2001); for India, see, e.g., *India – Patents (US) (AB)*, para. 64 (2000); for Mexico, see, e.g., *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 80 (2005); for Peru, see, e.g., *EC – Sardines (AB)*, para. 75 (2002); and for the Philippines, see, e.g., *Thailand – Cigarettes (Philippines) (Panel)*, para. 6.155 (2011).

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Article 17.6 of the DSU is a citation to its own reports, most often the 1998 Appellate Body report in *India – Patents (US)*.⁷²

The appellate report in the *India Patents* dispute, however, provides no legitimate justification for this proposition. In that appeal, India had asserted that the panel erred in its treatment of India's municipal law.⁷³ Ironically, the Appellate Body began its examination of this issue by citing the very same international law treatise quoted above. As noted, that treatise states: "*Municipal laws are merely facts which express the will and constitute the activities of States.*" That is, the treatise states that municipal law is an issue of fact for the purpose of international dispute settlement.⁷⁴

In discussing the panel's examination of India's domestic law in that dispute, the Appellate Body noted that "[p]revious GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations."⁷⁵ But this statement refers to a detailed examination of domestic law by *panels*. Since panels "should" make factual findings, it is appropriate for panels to analyze domestic law. But from this reference to the detailed examination of domestic law by panels, the Appellate Body makes the following unjustified leap:

And, just as it was necessary for the Panel in this case to seek a detailed understanding of the operation of the Patents Act as it relates to the "administrative instructions" in order to assess whether India had complied with Article 70.8(a), *so, too, is it necessary for us in this appeal to review the Panel's examination of the same Indian domestic law.*⁷⁶

This reasoning is plainly incorrect. The need for a panel to undertake a detailed examination of the meaning of a domestic law (the factual issue) in order to determine whether that domestic law complied with the WTO Agreements (the legal issue), does not somehow empower the Appellate Body to review factual issues. Consistent with the DSU, in light of Article 17.6, the Appellate Body must take those factual findings as a given.

The Appellate Body has provided no explanation of how its "detailed examination" of domestic law is consistent with the limits of appellate review imposed by WTO Members in Article 17.6 of the DSU. The stated rationale – that a "detailed understanding" is important – says nothing about the proper role of the Appellate Body in reviewing a panel's findings. Indeed, many factual issues in WTO dispute settlement may require "detailed understanding." But that

⁷² See, e.g., *EU – Biodiesel (AB)*, para. 6.155 (2016) (citing *India – Patents (US) (AB)* (1998)).

⁷³ *India – Patents (US) (AB)*, para. 64 (1998).

⁷⁴ *Id.* at para. 65 and n. 52.

⁷⁵ *Id.* at paras. 66 and 67.

⁷⁶ *Id.* at para. 68.

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provides no basis for treating those factual issues as issues of law to be decided *de novo* by the Appellate Body on appeal.

In subsequent decisions the Appellate Body repeated and expanded on its flawed approach in *India – Patents (US)*. For example, in the 2002 report on *US – Section 211 Appropriations Act*, the Appellate Body quoted from its report in *India – Patents*, and then stated that “[t]o address the legal issues raised in this appeal, we must, therefore, necessarily examine the Panel’s interpretation of the meaning of Section 211 under United States law.” It also declared that “[t]he meaning given by the Panel to Section 211 is, thus, clearly within the scope of our review.”⁷⁷

At the DSB meeting on March 6, 2002, when this report was adopted the United States explained in detail the faults in the Appellate Body’s decision.⁷⁸ More than 16 years later, that analysis still applies, and no counter to it has been provided by the Appellate Body or any Member.

The Appellate Body continued to follow the same flawed approach in subsequent appeals.⁷⁹ For example, in the 2014 report in *US – Countervailing and Anti-Dumping Measures (China)*, the Appellate Body stated that “[a]lthough factual aspects may be involved in the individuation of the text and of some associated circumstances, an assessment of the meaning of a text of municipal law for purposes of determining whether it complies with a provision of the covered agreements is a legal characterization.”⁸⁰

⁷⁷ *US – Section 211 Appropriations Act (AB)*, para. 106 (2002).

⁷⁸ The United States argued, in part, that the Appellate Body had blurred the distinction between review of facts and review of law “by concluding that an examination of the meaning of municipal law . . . was within its mandate. The Appellate Body had reached this conclusion based on a logical misstep. In paragraph 105 of its Report, the Appellate Body had correctly noted that a panel’s assessment of whether a municipal law was consistent with WTO obligations was a legal characterization that was within the scope of appellate review. However, from this it had incorrectly concluded in the following paragraph that the Panel’s finding as to the meaning and operation of the municipal law was also within the scope of appellate review. This did not follow logically. It was one thing to determine what a municipal law meant and how it operated. It was an entirely different matter to determine whether – given a particular meaning and operation – the municipal law was consistent with WTO obligations.” Dispute Settlement Body, Minutes of the Meeting Held on February 1, 2002, WT/DSB/M/119, para. 27 (statement of the United States). The United States also raised questions about the Appellate Body’s approach in March 2005 (TN/DS/W/74) and submitted proposed guidance that: “The question of whether a measure does *x* is a factual question because at that point it is not a question of the interpretation of a provision of a covered agreement or of whether a provision applies to the measure.” (TN/DS/W/82/Add.2).

⁷⁹ See, e.g., *China – Auto Parts (AB)*, para. 225 (2009); *China – Publications and Audiovisuals Products (AB)*, para. 117 (2010); and *EC – Fasteners (China) (AB)*, paras. 295 and 297 (2010).

⁸⁰ *US – Countervailing and Anti-Dumping Measures (AB)*, para. 4.101 (2014). See also, *id.*, para. 4.99 (“In *India – Patents (US)* and *US – Section 211 Appropriations Act*, the Appellate Body stated that municipal law may constitute evidence of facts as well as evidence of compliance or non-compliance with international obligations, and that a panel’s examination of the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel subject to appellate review under Article 17.6 of the DSU.”).

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The United States highlighted again the Appellate Body's flawed approach in comments on the 2016 *EU – Biodiesel (Argentina)* report.⁸¹ In that dispute, the Appellate Body examined the meaning of the challenged EU law as a *de novo* issue and then proceeded to conduct a separate examination of whether the panel made an objective assessment of the EU measure.⁸²

3. *The Appellate Body's Breach of Article 17.6 Has Undermined the Functioning of the WTO Dispute Settlement System*

The Appellate Body lacks authority to review a panel's findings of facts, and the Appellate Body's invention of such authority has added complexity, duplication, and delay to WTO disputes. Moreover, the Appellate Body has compounded the error by asserting that it can review panel findings concerning the meaning of a WTO Member's municipal law, which is often the key fact at issue.

The decision of the Appellate Body to review fact findings by panels has harmed the dispute settlement system. By creating a category of "Article 11 appeals," the Appellate Body significantly increased its own workload. Ironically, the Appellate Body has complained about this increased workload.⁸³ The Appellate Body has complained that the number of such appeals has increased over time, and that Article 11 appeals have in turn increased the complexity of appeals, the length of submissions, and the need for the Appellate Body to devote time and resources to become familiar with the basis for a panel's factual findings.

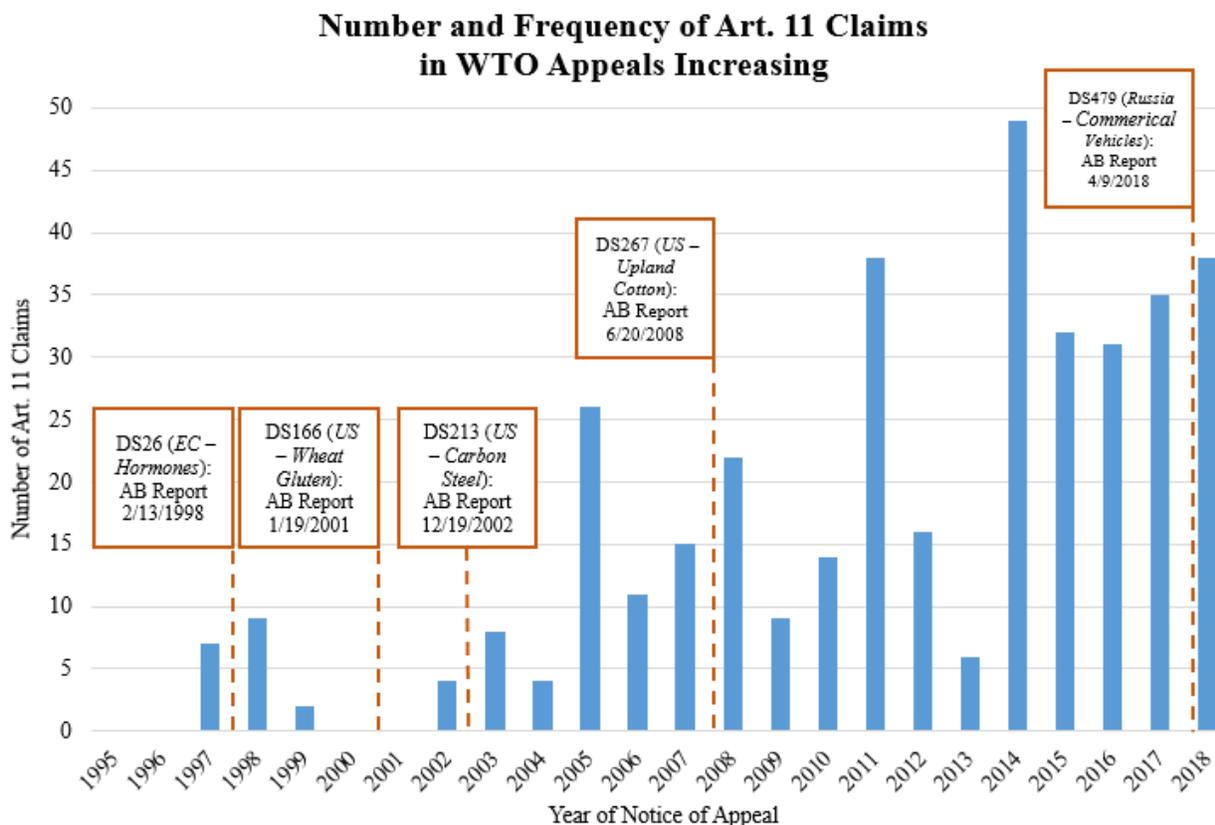
The graph below illustrates the increasing number of Article 11 claims raised on appeal:

⁸¹ *EU – Biodiesel (AB)* (2016). Argentina claimed that a provision of EU law, the Basic Regulation, was inconsistent "as such" with the AD Agreement. On appeal, Argentina claimed both that the panel's interpretation of EU law was wrong as a matter of law (relying on the text of the EU provision, legislative history, supposed EU practice in other investigations, and certain EU court decisions) and that the Panel failed to make an "objective assessment of the matter" under Article 11 of the DSU. The Appellate Body should have refused to consider these claims, both of which asked the Appellate Body to undertake an analysis of factual issues, but the Appellate Body went ahead and provided its own separate analysis of the EU measure at issue, discussing each element of the measure and comparing its reading of the measure with the panel's reading and Argentina's argument. *EU – Biodiesel (AB)*, paras. 6.166 *et seq.* (2016).

⁸² The United States explained to Members why this approach did not make sense and was inconsistent with the Appellate Body's frequent admonition that a party should present an issue as an error of law or an error under Article 11, but not both types of claims with respect to the same issue. *See, e.g., EC – Fasteners (China) (AB)*, para. 442 (2011); *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238 (2007). Furthermore, it raised the prospect that the Appellate Body might find that the Panel made an objective assessment of a complex factual record, and at the same time might find that precisely the same panel finding was incorrect simply because the Appellate Body made a different factual determination based on its own *de novo* review.

⁸³ *See, e.g.,* Appellate Body Report for 2013 (WT/AB/20), pp. 36 and 38, reproducing the May 30, 2018, communication from the Appellate Body to the DSB concerning the Workload of the Appellate Body.

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The varying standards of review articulated by the Appellate Body, as highlighted in the graphic, have contributed to the growing number of Article 11 claims by creating an even greater incentive for such claims to be raised on appeal. As explained above, these standards have included:

- *EC – Hormones (AB)*: For an Article 11 appeal to succeed the party appealing a panel finding needed to demonstrate that the panel had committed “egregious error that calls into question the good faith of the panel.”⁸⁴
- *US – Wheat Gluten (AB)* and *US – Carbon Steel (AB)*: The Appellate Body referred to affirmative findings that lack a basis in the evidence contained in the panel record.⁸⁵
- *US – Upland Cotton (AB) (Article 21.5 – Brazil)*: The Appellate Body articulated the standard as whether a panel has provided “reasoned and adequate explanations and

⁸⁴ *EC – Hormones (AB)* (1998), para. 133.

⁸⁵ *US – Wheat Gluten (AB)* (2000), paras. 161-162; and *US – Carbon Steel (AB)* (2002), para. 142.

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coherent reasoning”⁸⁶ or displayed a lack of even-handedness and the application of a double-standard of proof.⁸⁷

- *Russia – Commercial Vehicles (AB)*: The Appellate Body articulated the standard as whether a panel’s findings and its treatment of competing evidence are internally incoherent and inconsistent.⁸⁸

Each new standard articulated by the Appellate Body has provided litigants with additional avenues to seek review of panel findings of fact.

By expanding its power and giving itself authority to review factual determinations, and under varying standards of review, the Appellate Body has incentivized parties to re-litigate the entire case presented to the panel. Parties now often challenge panel findings, under Article 11, in addition to challenging all of the panel’s legal interpretations and legal conclusions under the relevant provisions of the covered agreements.

Ironically, commentators now point to the Appellate Body’s giving to itself authority to review panel findings of fact as a basis for why the Appellate Body cannot perform its job in the mandatory 90-day deadline. If the Appellate Body limited its work to what it is authorized to do, it would have no problem doing so in the time in which it is authorized to do so.

Appellate Body review of facts also makes the panel process less efficient. Knowing that the Appellate Body will likely review the facts, parties have an incentive to refrain from providing corrections or clarifications of the factual section of a panel’s interim report. Indeed, the party may be better off reserving its criticisms of a panel’s factual findings for an appeal that could result in reversing the panel’s determinations. Of course, such a course of action would mean that the panel’s final report does not present factual findings of as high quality as it otherwise could.

The Appellate Body’s approach in conducting its own *de novo* review of the meaning of domestic law is inconsistent with the appropriate functioning of the dispute settlement system. It departs from the basic division of responsibilities where panels determine issues of fact and law, and the Appellate Body may only review specific legal interpretations and issues of law. The Appellate Body’s expansion of its review authority has added complexity, duplication, and delay to almost every dispute, as a party to the dispute can now challenge on appeal every aspect of the panel’s findings. This outcome does not reflect the dispute settlement system as agreed by WTO Members in the text of the DSU.

⁸⁶ *US – Upland Cotton (AB) (Article 21.5 – Brazil)* (2008), fn. 618.

⁸⁷ *Id.* at para. 293 (referring to *Korea – Alcoholic Beverages (AB)* (1999), para. 164).

⁸⁸ *Russia – Commercial Vehicles (AB)* (2018), para. 5. 76-5.77.

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D. The Appellate Body Has Violated Article 3.7 and Article IX:2 by Rendering Advisory Opinions on Issues Not Necessary to Resolve a Dispute

- Issuing advisory opinions is contrary to the purpose of the dispute settlement system, which the WTO agreements make clear is not to produce interpretations or to “make law” in the abstract, but rather to help WTO Members secure a positive solution to a dispute.
- Neither the United States nor any other WTO Member has agreed to allow the Appellate Body to resolve abstract questions, make law, or establish binding precedent.
- The time and resources devoted to drafting advisory opinions contributes to delays in the appeals process, allowing WTO-inconsistent measures to persist and further delaying the ability of WTO Members to enforce their rights under the WTO Agreements. Advisory opinions can affect the rights of WTO Members without giving them an opportunity to participate in the proceeding, especially if those advisory opinions are then (impermissibly) treated as binding “precedent.”

The WTO Agreement and DSU make clear that the purpose of the dispute settlement system is not to produce interpretations or to “make law” in the abstract, but rather to help WTO Members resolve a specific dispute. The text of the DSU specifically empowers a WTO panel to make findings that will assist the DSB in making a recommendation to a WTO Member to bring a WTO-inconsistent measure into conformity with WTO rules – but not to make other findings, statements, interpretations, or recommendations. Despite these limitations, numerous Appellate Body panels have opined at great length and detail on issues that either have not been presented to the panel or that are not necessary to resolve the dispute before the panel.

1. The Purpose of WTO Dispute Settlement Is to Resolve Trade Disputes, Not Make Law

WTO Members established the DSB to administer the WTO dispute settlement system in accordance with the DSU. The dispute settlement system, which is but one component of the larger multilateral trading system, plays an important, but focused role. The DSU defines the purpose of the dispute settlement system. Article 3.7 of the DSU provides that the “aim of the dispute settlement mechanism is to secure a positive solution to a dispute.” Thus, the aim of the dispute settlement system is *not* to produce interpretations or “make law” in the abstract. The objective of helping sovereign nations and other Members resolve their disputes is, perhaps, a more modest goal than the objective of creating laws for the world to follow, but it is nonetheless the objective that those same nations and Members gave to panels and the appellate body. WTO panels and the men and women on the appellate body are there to serve the Members, not vice-versa.

Where a dispute between WTO Members arises, the dispute settlement process typically begins with a request for consultations submitted in accordance with Article 4 of the DSU. The request for consultations must include an “identification of the measures at issue and an indication of the

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legal basis for the complaint.”⁸⁹ In other words, even at this early stage, WTO Members are required to identify the specific measures at issue – and not simply request consultations concerning a hypothetical measure or an abstract interpretative legal issue.⁹⁰

If consultations fail to resolve a dispute, a WTO Member may then submit a request to the DSB asking the DSB to establish a panel.⁹¹ In that request, the WTO Member is required to “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”⁹² So here again, the DSU is not concerned with hypothetical measures or abstract legal questions. A complainant “shall ... identify” with specificity the measures at issue and “shall ... provide” the legal basis for the complaint. A panel request would not comply with the DSU if it merely asked the DSB to establish a panel to provide an interpretation of a covered agreement in the abstract or make a finding on a hypothetical measure.

The DSU establishes standard terms of reference for a panel in Article 7. The DSB charges the panel with two tasks: to “examine ... the matter referred to the DSB” in the panel request and “to make such findings as will assist the DSB in making the recommendations” provided for in the DSU.⁹³

Article 19.1 of the DSU is, again, explicit in what that recommendation is: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the WTO Member concerned bring the measure into conformity with that agreement.”

That the Appellate Body has no authority to issue advisory opinions is buttressed by provisions showing that panels do not have such authority either.⁹⁴ The same principles apply to the Appellate Body. The Appellate Body’s task under the DSU is limited to assisting the DSB in discharging its functions under the DSU. Article 17.6 provides that an appeal is “limited to issues of law covered in the panel report and legal interpretations developed by the panel.”

⁸⁹ DSU Article 4.4.

⁹⁰ This conclusion is reinforced by DSU Article 3.3, which makes clear that WTO dispute settlement involves “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.”

⁹¹ DSU Article 6.1.

⁹² DSU Article 6.2.

⁹³ DSU Article 7.1.

⁹⁴ DSU Article 11. Article 11 reinforces that the “function of panels is to assist the DSB in discharging its responsibilities under [the DSU].” WTO Members reinforced that a panel assists the DSB through the tasks set out in the panel’s terms of reference. In particular, DSU Article 11 states that “a panel should make an objective assessment of the matter... and such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Thus, the text of the DSU establishes that the DSB tasks a panel only with making those findings as would assist the DSB in making the recommendation provided for in the covered agreements – that is, to bring a measure found to be inconsistent with a WTO agreement into conformity with that agreement.

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Article 17.13 provides that the Appellate Body is only authorized to “uphold, modify or reverse the legal findings and conclusions of the panel.”

Since a panel's function under DSU Article 11 is “to assist the DSB in discharging its responsibilities” under the DSU, the Appellate Body, in reviewing a panel's legal conclusion or interpretation, is thus also assisting the DSB in discharging its responsibilities to find whether the responding WTO Member's measure is consistent with WTO rules.

Just as a panel may not ignore its terms of reference as established by the DSB to make findings that cannot “assist the DSB in making [its] recommendations”, so too the Appellate Body is not authorized to go beyond the panel's terms of reference to issue findings on issues unnecessary to resolve a dispute.

In addressing why the role of the Appellate Body is limited to resolving disputes and not defining interpretations of WTO agreements, it is helpful to keep in mind that WTO Members did create a separate and distinct mechanism to provide definitive interpretations of the WTO agreements. In Article IX:2 of the WTO Agreement, WTO Members reserved for themselves acting in the Ministerial Conference or General Council “the exclusive authority to adopt interpretations” of the WTO agreements. Indeed, the DSU expressly provides that the dispute settlement mechanism is “without prejudice to the rights of Members to seek authoritative interpretation” of the WTO agreements through that process under the WTO Agreement.⁹⁵ The presence of these routes to obtaining an “authoritative interpretation” of a WTO agreement does not entail pursuing a dispute all the way to the Appellate Body.

In the early years after the dispute settlement system was created and the members agreed to the DSU, the Appellate Body recognized the limits of its authority. In a 1997 report – *US – Wool Shirts and Blouses* – the Appellate Body framed the work of the Appellate Body and panels in the following manner:

Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to “make law” by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.⁹⁶

We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the “exclusive authority” to

⁹⁵ DSU Article 3.9 provides that “[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.”

⁹⁶ *US – Wool Shirts and Blouses (AB)* at p. 19 (1997).

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adopt interpretations of the *WTO Agreement* and the Multilateral Trade Agreements.⁹⁷

Similarly, in the 2001 report on *U.S. – Certain EC Products*, the Appellate Body observed that “it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations.”⁹⁸

Notwithstanding the clear language of the DSU on this point, nor the prior recognition by the Appellate Body on the limitations placed on it by that language, some have seized upon two provisions of the DSU to claim that panels and the Appellate Body may issue advisory opinions. As shown below, however, neither provision supports such a conclusion.

The first provision at issue consists of language in Article 3.2 of the DSU stating that the dispute settlement system serves to “clarify the existing provisions of [the covered] agreements.” Article 3.2 provides in relevant part:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

The quoted language above makes clear that “it” in the second sentence of Article 3.2 refers to the subject of the first sentence, “the dispute settlement system of the WTO.” The term “it” does not refer to a panel or the Appellate Body. In other words, WTO Members recognized that the dispute settlement system of the WTO – as set out in the DSU – serves to preserve the rights and obligations of WTO Members under the covered agreements, and the dispute settlement system of the WTO – as set out in the DSU – serves to clarify the existing provisions of those agreements.

As explained above, the dispute settlement system is plainly structured around the idea that panels and the Appellate Body *cannot* add to or detract from obligations undertaken by WTO Members.⁹⁹ The use of “clarify” in this text, therefore, does not and cannot authorize panels or the Appellate Body to provide interpretations in the abstract or on issues not necessary to resolve the particular dispute. Indeed, nothing in this language acts as a directive to panels or the Appellate Body nor an authorization for them. There is no “shall” or “may” in this text. Rather, it is simply a statement of what WTO Members agreed flowed from the dispute settlement system when it operated in accordance with the agreed provisions. Thus, any “clarification” resulting from the system cannot take the form of judicial activism by panels or the Appellate

⁹⁷ *Id.* at pp. 19-20.

⁹⁸ *US – Certain EC Products*, para. 92 (2001).

⁹⁹ The lack of authority for panels and the Appellate Body to issue advisory opinions in WTO dispute settlement is consistent with the lack of such authority under the GATT dispute settlement rules and procedures.

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Body. This limit stands in contrast to the authority explicitly provided to some other international tribunals in their respective legal texts.¹⁰⁰ When national governments intend for an international tribunal to issue advisory opinions, they can and have made this intention clear in the text that establishes the tribunal.

The second provision that is sometimes misread to justify judicial overreach is Article 17.12 of the DSU, which states that “[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.”

The ordinary meaning of “address” is to “[t]hink about and begin to deal with (an issue or problem).”¹⁰¹ In other words, to address an issue is not necessarily to resolve that issue. This term should also be construed in the context of Article 17.13, which refers to a panel’s “legal findings and conclusions.” By contrast, Article 17.12 does not direct the Appellate Body to “make legal findings and conclusions” on each of the issues raised in the appeal.

Panels and the Appellate Body have often “addressed” an issue through the exercise of judicial economy. As the Appellate Body stated more than 20 years ago in endorsing judicial economy: “Given the explicit aim of dispute settlement that permeates the DSU [to settle disputes], we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”¹⁰²

If a finding would not assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with a covered agreement, the only proper way to “address” such an issue would be to refrain from issuing a finding. Furthermore, as previously demonstrated, the remainder of the DSU makes clear that panels and the Appellate Body have no power to issue advisory opinions. Thus, it would certainly be incorrect to read the word “address” as permitting

¹⁰⁰ See United Nations Charter, Article 96(a) (“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”); Statute of the International Tribunal for the Law of the Sea, Art. 191 (“The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities.”); European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 (“The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.”); Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, Article 4(1) (“At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.”); American Convention on Human Rights, Art. 64; Statute of the Inter-American Court, Article 2.

¹⁰¹ Oxford Dictionaries, “address” (third definition) (<https://en.oxforddictionaries.com/definition/address>).

¹⁰² *US – Wool Shirts and Blouses (AB)*, p. 19 (1997).

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the Appellate Body or a panel to make findings on issues that would not assist the DSB in discharging its responsibilities.

2. *The Appellate Body Has Repeatedly Rendered Advisory Opinions on Issues Not Necessary to Resolve a Dispute*

The WTO dispute settlement system – as set out in the DSU – serves a limited purpose and charges panels and the Appellate Body with making such findings as will assist the DSB in making the recommendation set out in the DSU. When panels and the Appellate Body fulfil that charge, they help the dispute settlement system of the WTO preserve WTO Members' rights and obligations and to clarify existing provisions. The Appellate Body has strayed from its limited role and has opined on issues not necessary to resolve the complaint, as the following examples illustrate.

- *Canada – Continued Suspension and United States – Continued Suspension (2008)* related to an EU challenge of the ongoing application by Canada and the United States of DSB-authorized concession suspensions. The Appellate Body did not find that any of the measures challenged were inconsistent with a WTO agreement. That finding was sufficient to resolve the dispute, and should have been the end of the matter. Nevertheless, the Appellate Body report gratuitously added a “recommendation” to the parties to the disputes to initiate further dispute settlement proceedings. This so-called “recommendation” served no purpose in assisting the DSB to resolve the dispute before it and was directly contrary to Article 19.1 of the DSU. The United States and nine other WTO Members specifically criticized the Appellate Body's approach.¹⁰³ In the same report, the Appellate Body addressed the abstract question of how the DSU applies to a dispute after the DSB has granted a WTO Member authorization to suspend concessions or other obligations. Again, the United States and other WTO Members criticized the Appellate Body's overreach.¹⁰⁴
- *China – Publications and Audiovisual Products (2010)*¹⁰⁵ involved a conditional appeal filed by China arguing that if the Appellate Body reversed the panel's finding that certain measures were not “necessary” within the meaning of Article XX(a) of the GATT, then the Appellate Body should also find that Article XX(a) was available to China as a

¹⁰³ Those Members were Canada, Argentina, Chile, Australia, Costa Rica, Ecuador, Korea, Japan, and Mexico. See Dispute Settlement Body, Minutes of the Meeting Held on November 14, 2008, WT/DSB/M/258, para. 43; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 25; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 31; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 27; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 33; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 15; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 28; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, paras. 23-24; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 17.

¹⁰⁴ Dispute Settlement Body, Minutes of the Meeting Held on November 14, 2008, WT/DSB/M/258, para. 30; DSB Meeting Minutes (November 14, 2008) WT/DSB/M/258, para. 26.

¹⁰⁵ *China – Publications and Audiovisual Entertainment (AB)* (2010).

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defense. The Appellate Body agreed with the panel on the necessity question; accordingly, it was not necessary to address the scope of XX(a) – and no party asked it to do so. Nevertheless, the Appellate Body went on to make a finding on the applicability of Article XX(a) to a claim under China's Protocol of Accession. Such a finding by the Appellate Body plainly represented an inappropriate advisory opinion. Once again, Members raised concerns about the Appellate Body's actions in the DSB.¹⁰⁶

- *Argentina – Financial Services (2016)*¹⁰⁷ involved a number of issues under provisions of the General Agreement on Trade in Services (GATS) regarding national treatment, most-favored-nation treatment, and the prudential exception. The threshold issue before the Appellate Body was whether the panel correctly determined that services and service suppliers of certain countries were “like” within the meaning of the GATS. The Appellate Body disagreed with the panel's conclusion on this threshold issue, which should have concluded its analysis. Instead, the Appellate Body went on to state that: “[S]everal of the issues raised in Panama's appeal have implications for the interpretation of provisions of the GATS. With these considerations in mind, we turn to address the issues raised in Panama's appeals.”¹⁰⁸ The Appellate Body then undertook a 46-page analysis of those issues, every part of which was *obiter dicta*.

These examples are just a few of the instances in which the Appellate Body has taken it upon itself to offer interpretations not necessary to the resolution of a dispute. More examples could be given, including the 2019 report in *Morocco – Hot-Rolled Steel (Turkey)*,¹⁰⁹ the 2018 report in *EU – PET (Pakistan)*,¹¹⁰ the 2017 report in *Indonesia – Import Licensing Regimes*,¹¹¹ and the 2012 report in *U.S. – Large Civil Aircraft*.¹¹² In each instance, the Appellate Body made findings not necessary to resolve a dispute, but rather engaged in an exercise of making advisory opinions contrary to the text of the DSU and Article IX of the WTO Agreement.

3. Issuance of Advisory Opinions Harms the Dispute Settlement System

On the most fundamental level, whenever the Appellate Body issues an advisory opinion it breaks the rules set for it by Members, which undermines confidence in the dispute settlement system. Taking from the Members the authority to issue authoritative interpretations of WTO Agreements and adopt interpretations of agreements results in a transfer of power from the Members accountable to their citizens to unaccountable and anonymous individuals with no accountability to the WTO or to the Members. This power grab undermines democracy and

¹⁰⁶ Dispute Settlement Body, Minutes of the Meeting Held on January 19, 2010, WT/DSB/M/278, paras. 83-84.

¹⁰⁷ *Argentina – Financial Services (AB)* (2016).

¹⁰⁸ *Id.* at para. 6.84.

¹⁰⁹ *Morocco – Hot-Rolled Steel (Turkey) (AB)*, paras. 1.18-1.19.

¹¹⁰ *EU – PET (Pakistan) (AB)*, para. 5.31 (2018).

¹¹¹ *Indonesia – Import Licensing Regimes (AB)*, paras. 5.63, 5.102-103 (2017).

¹¹² *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 535 (2012).

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popular representation. If a citizen does not like how his or her country is operating at the WTO, that citizen can vote out the administration and vote in a new administration, which can change course. But citizens of the various nations that participate in the WTO can do nothing if they do not like how an Appellate Body member interprets an agreement.

Other adverse consequences also flow from the issuance of advisory opinions. To list a few:

- The additional work associated with drafting an advisory opinions adds time to a proceeding and moves the system further away from the principle of prompt settlement reflected in DSU Article 3;
- Advisory opinions make Appellate Body reports longer and more complex. This fact adds to the burdens of WTO Members who consider past reports in hopes of resolving future disputes;
- Advisory opinions risk adding to or diminishing a WTO Member's rights and obligations under the covered agreements, in a manner that contradicts DSU Articles 3.2 and 19.2; and
- By opining on issues that are not before it, and on which the parties may not have engaged fully, or for which relevant facts may not have been fully developed, an advisory opinion risks not taking into account all facets of an issue.

In sum, the Appellate Body's issuance of advisory opinions has significant negative consequences for the dispute settlement system and the WTO more generally.

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E. The Appellate Body Wrongly Claims that Its Reports Are Entitled to Be Treated as Binding Precedent and Must Be Followed by Panels, Absent "Cogent Reasons"

- The WTO agreements reserve for WTO Members, through the Ministerial Conference and General Council, the "exclusive authority to adopt interpretations" of these agreements.
- Despite this clear text, the Appellate Body has asserted that dispute settlement panels must treat the Appellate Body's legal interpretations as binding precedent, absent undefined "cogent reasons" for departing from them. The term "cogent reasons" appears in no WTO agreement; nor does the requirement for panels to follow prior Appellate Body interpretations.
- By purporting to create binding precedent, the Appellate Body has affected WTO Members' rights and obligations without their consent.
- Allowing the Appellate Body to create precedent removes the incentive for Members to negotiate new trade agreements. Some Members seek to obtain through a "binding" Appellate Body interpretation what they could not achieve through negotiation; others have no desire to negotiate new agreements without confidence that WTO adjudicators will follow those agreements.

Article 3.7 of the Dispute Settlement Understanding states that the dispute settlement system exists to "secure a positive solution to the dispute" between the parties. In that role, the dispute settlement system may "clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law." Article IX:2 of the WTO Agreement, however, reserves to Members "the exclusive authority to adopt interpretations" of the WTO agreements. The DSU, including the provisions for adopting Appellate Body reports, is "without prejudice" to this "exclusive authority."¹¹³

Early Appellate Body reports were consistent with – and even acknowledged – this allocation of responsibilities. Beginning in 2008, however, the Appellate Body has stated that panels must treat the legal interpretations in its reports as binding absent "cogent reasons" for departing from them. This position contravenes the DSU, which reserves the "exclusive authority" to issue "authoritative interpretations" to WTO Members; nor has it any basis in the customary rules of interpretation of public international law.

The Appellate Body's manufacture of precedent authority has profound implications for the WTO system and WTO Members. It demonstrates again the Appellate Body's disregard for the

¹¹³ DSU Article 3.9 ("The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.").

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rules that should direct its activities and its disregard for the place in the WTO system assigned to it by WTO Members. It deprives WTO Members of the opportunity, guaranteed by the DSU, to have disputes decided by a panel, and the Appellate Body if necessary, on the basis of the arguments and evidence in that particular dispute. Finally, it can entrench legal interpretations that contradict the text of the WTO agreements or intention of the parties, thereby affecting WTO Members' rights and obligations without their consent.

1. *The Dispute Settlement Understanding Does Not Permit a Panel to Treat a Prior Appellate Body Interpretation as Law or Controlling "Precedent"*

The Dispute Settlement Understanding does not assign precedential value to panel or Appellate Body reports adopted by the Dispute Settlement Body, or interpretations contained in those reports. Instead, it reserves such weight to authoritative interpretations adopted by WTO Members in a different body, the Ministerial Conference or General Council, acting not by negative consensus but under different procedures. The DSU explicitly notes that the dispute settlement system operates without prejudice to this interpretative authority.¹¹⁴

The Dispute Settlement Understanding states that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB in determining whether a measure is inconsistent with a Member's commitments under the covered agreements. The international law rules of interpretation do not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of agreement text. In this respect, the Dispute Settlement Understanding presented no change from the dispute settlement system under the GATT 1947, a point which the Appellate Body understood and expressed clearly in its early years. A panel is not permitted to ignore this task and instead treat prior panel or Appellate Body reports as binding "precedent." Indeed, were a panel to decide to simply apply the reasoning in prior Appellate Body reports alone, it would fail to carry out its function, as established by the DSB, under DSU Articles 7.1, 11, and 3.2, to make findings on the applicability of existing provisions of the covered agreements, as understood objectively through customary rules of interpretation. When a panel instead simply follows the reasoning of another panel or Appellate Body report, it risks creating additional obligations for WTO Members beyond what is provided for in the covered agreements – an act strictly prohibited under Articles 3.2 and 19.2 of the DSU.

To proclaim that an Appellate Body interpretation in one dispute is precedent or controlling for later disputes effectively converts that interpretation into an authoritative interpretation of the covered agreement. Doing so directly contradicts the agreed text of Article IX:2 of the WTO Agreement, which mandates as follows: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Thus, WTO Members reserved the "exclusive authority" to

¹¹⁴ DSU Articles 3.2 and 19.2.

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adopt interpretations to themselves, acting in the Ministerial Conference (or General Council), not the DSB.

WTO Members further set out a specific process for adopting such an interpretation. The Members decided that they would act on the basis of a recommendation from the relevant Council. This process would permit all WTO Members to become aware of the issue, to discuss the issue with other WTO Members, and to participate – first in the relevant Council and then at the Ministerial Conference or in the General Council – based on instructions from their government reflecting input from all relevant stakeholders. And, critically, in light of the relevant decision-making rules and practice in the WTO, the recommendation by the relevant Council and the subsequent adoption by the Ministerial Conference or General Council proceeds based on the consensus of WTO Members. This process ensures that no WTO Member would have its rights or obligations changed by an interpretation unless it affirmatively agreed with that interpretation.

The level of transparency, participation, and consent by WTO Members in the process of adopting an authoritative interpretation does not resemble the process for adopting reports under the DSU. One obvious difference concerns the participation by WTO Members. Whereas the process for adopting an authoritative interpretation would involve all WTO Members, a report adopted by the DSB reflects varying degrees of participation by only a handful of WTO Members.

Given the important implications that flow from an authoritative interpretation, it makes sense that WTO Members would have agreed to the strict process set out in Article IX:2, which envisions participation by the full WTO Membership and informed consent. At the same time, it makes little sense to suggest, given these provisions and the structure described, that a particular interpretation contained within a report that reflects input from only a limited subset of WTO Members, and that has been adopted by negative consensus, could similarly be regarded as setting out an authoritative interpretation for all disputes and all WTO Members.

The DSU also expressly confirms that panel and Appellate Body reports do not set out authoritative interpretations. Article 3.9 of the DSU states that “[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.” Thus, WTO Members made it clear that the adoption by negative consensus of a report containing an interpretation of a WTO agreement does not make that interpretation authoritative; an interpretation is authoritative only if it has been adopted by the Ministerial Conference (or General Council) acting according to different decision-making rules.

None of this is to say that a prior panel or Appellate Body interpretation is without any value. For example, to the extent that a panel finds the reasoning in a prior report persuasive, the panel may refer to that reasoning in conducting its own objective assessment of the matter. Such a use of prior reasoning would likely add to the persuasiveness of the panel’s own analysis, whether or not the panel agrees with the prior reasoning. But considering an interpretation in a prior Appellate Body report is a far cry from treating the interpretation as controlling or “precedent” in a later dispute.

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2. *The Stainless Steel Report Is Flawed and Does Not Support a “Cogent Reasons” Approach*

The Appellate Body’s own reports do not support its current “cogent reasons” approach. In 1996, in the *Japan – Alcoholic Beverages II* report,¹¹⁵ the Appellate Body set forth properly the value the Dispute Settlement Understanding assigns to prior reports. Twelve years later, and without any change in the relevant text of the DSU or the WTO Agreement, the Appellate Body asserted a very different approach in the 2008 report in *US – Stainless Steel (Mexico)*, without explaining why it had changed its approach.

In *Alcoholic Beverages II*, the Appellate Body stated that adoption of reports under the WTO does not create “precedent,” and it did not assign a special status for interpretations reached in reports. As *Alcoholic Beverages II* noted, the WTO agreements reserve the making of authoritative interpretations of WTO agreements to the Ministerial Conference. *Alcoholic Beverages II* addressed the status of panel reports adopted by the GATT Contracting Parties and the WTO DSB. Analyzing first the GATT 1947, the Appellate Body stated that the GATT Contracting Parties, in deciding to adopt a panel report, did not intend that their decision would constitute a definitive interpretation of the relevant provisions of the GATT 1947. The Appellate Body then added the following: “Nor do we believe that this is contemplated under GATT 1994.”¹¹⁶ The “specific cause for this conclusion” is Article IX:2 of the WTO Agreement:

The fact that such an “exclusive authority” in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or inadvertence elsewhere.¹¹⁷

The Appellate Body noted the distinction in GATT 1947 between the decision to adopt a panel report under Article XXIII and joint action of the Contracting Parties under Article XXV. That distinction continues, according to the Appellate Body in its report in *Alcoholic Beverages II*; adopting a panel report differs fundamentally from the Ministerial Conference or the General Council adopting an interpretation of a WTO Agreement. This conclusion, it stated, “is clear from a reading of Article 3.9 of the DSU.” *Alcoholic Beverages II* also made it clear that a panel report adopted by the DSB is “not binding” on a subsequent panel, although it may be considered when relevant.¹¹⁸

Thus, the Appellate Body, in an early report shortly after conclusion of the Uruguay Round, made clear that the negative consensus procedure for adoption of reports by the DSB cannot supplant the “exclusive authority” of the Ministerial Conference and the General Council to

¹¹⁵ *Japan – Alcoholic Beverages II (AB)* (1996).

¹¹⁶ *Id.* at p. 13.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at p. 14.

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adopt, by positive consensus, an “authoritative interpretation” of a covered agreement, as explicitly established in Article 3.9 of the DSU¹¹⁹ and Article IX:2 of the WTO Agreement.¹²⁰

Twelve years later, the Appellate Body departed from this correct approach in *US – Stainless Steel (Mexico)*, which contains the Appellate Body’s first effort to introduce the concept of “cogent reasons.” *Stainless Steel* relied primarily on Article 3.2 of the DSU in articulating its “cogent reasons” approach: “Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”¹²¹ As detailed below, the “cogent reasons” approach does not comport with WTO agreements and should not be followed. The United States and other Members expressed concern about the Appellate Body’s report at the time, and the flaws in the report have become only more pronounced over time.

As an initial matter, the *Stainless Steel* discussion of “cogent reasons” is *obiter dicta*.¹²² More fundamentally, however, the Appellate Body’s statement concerning “cogent reasons” in *US – Stainless Steel (Mexico)* is profoundly flawed for several reasons, including: (1) a failure to properly appreciate the functions of panels and the Appellate Body within the WTO dispute settlement system; (2) an erroneous interpretation of Article 3.2 of the DSU; (3) a misunderstanding (or misstatement) of why parties cite prior reports; (4) inappropriate (and incomplete) analogies to other international adjudicative fora; and (5) incorrect assumptions concerning the existence of a hierarchical structure that does not reflect the limited task assigned to the Appellate Body in the DSU. Each flaw is discussed below.

First, the Appellate Body’s statements concerning “cogent reasons” reflect a failure to properly appreciate the tasks assigned to panels and the Appellate Body by the relevant provisions of the DSU. Article 11 of the DSU stipulates that “[t]he function of panels is to assist the DSB in discharging its responsibilities” under the DSU and the covered agreements. In exercising this function, a panel is to conduct “an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the

¹¹⁹ DSU Article 3.9 (“The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.”).

¹²⁰ WTO Agreement, Article IX:2 (“The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”).

¹²¹ *US – Stainless Steel (Mexico) (AB)*, para. 160 (2008).

¹²² The discussion appears in the context of Mexico’s argument on appeal that the panel acted inconsistently with Article 11 of the DSU by failing to follow what it considered was “well-established Appellate Body jurisprudence.” *Id.* at para. 154. The Appellate Body did not, however, make a finding on Mexico’s Article 11 appeal, exercising judicial economy because resolution of the issue was not necessary for resolution of the dispute. *Id.* at para. 162. Because there was no legal finding on Mexico’s claim of error, the Appellate Body’s discussion is not reasoning “resolv[ing a] legal question.” The “cogent reasons” approach (as explained by the Appellate Body) would thus not even apply to the Appellate Body’s own statement on “cogent reasons.” Because the “cogent reasons” discussion was *obiter dicta*, or an “advisory opinion,” the discussion is not binding on panels, which are free to disregard it.

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relevant covered agreements.” An objective assessment requires that a panel properly weigh the evidence and make factual findings based on the totality of the evidence and within its bounds as trier of fact in the dispute. An objective assessment also requires that a panel interpret the relevant provisions of the covered agreements to determine how they apply to the measures at issue and whether those measures conform with a Member's commitments.

Neither Article 11 of the DSU nor any other provision links a panel's objective assessment to prior Appellate Body interpretations. Nor does the context of Article 3.2 of the DSU, or the structure of Article IX:2 of the WTO Agreement or Article 3.9 of the DSU, support reading into Article 11 a requirement for panels to establish “cogent reasons” to depart from findings by the Appellate Body in a separate dispute. The Appellate Body makes no real attempt to ground such a requirement in the text of Article 11 of the DSU.

Second, the plain reading of Article 3.2 of the DSU does not support the Appellate Body's interpretation of that provision. The *Stainless Steel* report states that “[e]nsuring ‘security and predictability’ in the dispute settlement system, as contemplated by Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”¹²³ This assertion is flawed, and the use of “implies” is telling, particularly after the Appellate Body correctly concluded in *Alcoholic Beverages II*, after examining Article 3.9 of the DSU and Article IX:2 of the WTO Agreement, that “[t]he fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist *by implication* or inadvertence elsewhere.”¹²⁴

Article 3.2 reflects the Members' understanding that the dispute settlement system serves to preserve the rights and obligations of Members under the covered agreements. The text of Article 3.2 is neither a directive to panels or the Appellate Body nor an authorization for them. There is no “shall” or “may” in this text. Instead, it is a statement of what Members have agreed flows from the system when it operates in accordance with the provisions agreed by Members in the DSU. Moreover, neither “precedent” nor “cogent reasons” can be found anywhere in the text of Article 3.2.

Third, *Stainless Steel* misunderstands or misrepresents why parties often cite to adopted panel and Appellate Body reports in dispute settlement proceedings.¹²⁵ There is nothing surprising about the fact that parties in WTO disputes cite to reports to the extent they may consider them persuasive. The United States expects this, does this itself, and anticipates panels will do the same. But there is no support for the proposition that parties cite to reports because they consider them binding on or precedential for subsequent panels and the Appellate Body, which is

¹²³ *Id.* at para. 160 (emphasis added).

¹²⁴ *Japan – Alcoholic Beverages II (AB)*, p. 13 (1996) (emphasis added).

¹²⁵ *See US – Stainless Steel (Mexico) (AB)*, para. 158 (2008).

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what the Appellate Body implies. There is a significant difference between citing a report for its persuasive value and arguing that the report is binding on or precedential for future panels.

The Appellate Body also asserts that “when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports.”¹²⁶ The report cites no evidence for this proposition.

Fourth, the Appellate Body report in *US – Stainless Steel (Mexico)* includes a lengthy footnote that attempts to draw significance from how other international fora regard dispute decision consistency.¹²⁷ In doing so, the Appellate Body provides no explanation as to whether or how the applicable rules and structures of these other fora are relevant for understanding the WTO dispute settlement system, or how their structure or constitutive statutes give any insight into the role or precedential value of WTO reports. To the extent the Appellate Body intended to suggest “precedent” is reflective of customary international law that can override clear treaty text as to the rights and obligations between the parties to a treaty, it would be wrong. Under international law, treaty text will prevail over customary law as between parties to the treaty.

Fifth, the Appellate Body's discussion of “cogent reasons” is based on an asserted “hierarchical structure contemplated in the DSU,” but the Appellate Body's assertion fails to accurately reflect the limited role assigned to the Appellate Body and is divorced from the text of the DSU. The Appellate Body suggests that it was created by Members and “vested with authority” pursuant to Articles 17.6 and 17.13 of the DSU so as to promote security and predictability in the dispute settlement system. And so, according to the Appellate Body, a panel's “failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predicable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated by the DSU.”¹²⁸

Articles 17.6 and 17.13 of the DSU do not “vest” the Appellate Body with broad authority to develop “a coherent and predictable body of jurisprudence.” The latter phrase does not appear in those provisions – nor is there any hint of them. In fact, those articles are *limitations* on the parameters of appellate review and on the permissible actions of the Appellate Body. For example, Article 17.6 provides that “[a]n appeal shall be *limited* to issues of law covered in the panel report and legal interpretations.”¹²⁹ And Article 17.13 limits the Appellate Body's functions by saying it “may uphold, modify or reverse the legal findings and conclusions of the panel.” This list of authorized actions does not include issuing authoritative interpretations that must be followed by subsequent panels. Indeed, the Members gave to panels the authority to

¹²⁶ *Id.* at para. 160.

¹²⁷ *Id.* at para. 161, n. 313 (discussing the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Tribunal).

¹²⁸ *Id.* at para. 161.

¹²⁹ DSU Article 17.6.

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make findings of fact and the authority to reach legal conclusions, but they gave only the latter to the Appellate Body.

The notion of a “hierarchical structure” in the dispute settlement system also fails to acknowledge the role of the DSB. It is the DSB that establishes a panel and charges it with making those findings necessary for the DSB to provide a recommendation to bring a WTO-inconsistent measure into conformity with the WTO agreements.¹³⁰ It is the DSB that panels and the Appellate Body assist by carrying out their functions as set out in the DSU. Moreover, panel findings and recommendations adopted by the DSB are of equal legal status as Appellate Body findings and recommendations adopted by the DSB. Since, as a hierarchical matter, the DSB is clearly above the Appellate Body, one could just as easily assert that the Appellate Body must follow interpretations in panel reports adopted by the DSB. Not surprisingly, the Appellate Body has not done so. The Appellate Body's reliance on its perceived hierarchical status is misguided, and is at the root of much of the damage it has wrought.

3. *The Appellate Body's “Cogent Reasons” Approach Usurps Authority Expressly Reserved to WTO Members*

As with most of the abuses by the Appellate Body, the effect of its creation of precedent is to shift power from WTO Members (and their governments and citizens) to the Appellate Body. The WTO Agreements provide that only WTO Members, acting in the Ministerial Conference or the General Council, can issue authoritative interpretations.

Under the DSU, the role of WTO adjudicators is different. Their job is to issue only those findings necessary to resolve a dispute, and specifically, findings that will assist the DSB in making a recommendation to bring a measure into conformity with a WTO agreement. Those findings are to be based on the text of the covered agreements, not the text of prior appellate reports.

By creating precedent, the Appellate Body has sought to expand its own power and has snatched from WTO Members the authority to determine the meaning of WTO agreements. With increasing frequency, panels have simply applied the Appellate Body's *dicta* on cogent

¹³⁰ DSU Article 7.1 (“Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).”).

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reasons.¹³¹ From 2008 to 2013, only four percent of panel reports invoked “cogent reasons.” From 2014 to 2019, however, 19 percent of panel reports did so. In those reports, the panels have failed to engage with the legal text of the DSU and WTO Agreement.

This development raises grave concerns for the dispute settlement system as it suggests that serious, systemic errors are increasingly being made without any consideration of the actual text that WTO Members have agreed to. Such errors accumulate over time, and when the Appellate Body in a subsequent appeal builds its interpretation on a flawed interpretation, the interpretations and resulting findings become more and more removed from what WTO Members agreed.

For example, in the dispute *US – Countervailing Measures (China) (21.5)*, the Appellate Body recently had an opportunity to correct its flawed approach with respect to the definition a “public body” under the Subsidies Agreement. It did not do so and, instead, stuck with an approach that has no basis in the text of the Subsidies Agreement. In the report, one dissenting member of the Appellate Body stated the following with regard to the Appellate Body’s failure to correct its flawed approach:

I believe the continuing lack of clarity as to what is a “public body” represents an instance of undue emphasis on “precedent”, which has locked in a flawed interpretation that has grown more confusing with each iteration, as litigants and Appellate Body Divisions repeated the original flaw while trying to navigate around it. That is what I believe the majority has done here.¹³²

In claiming the authority to issue authoritative interpretations through its “cogent reasons” approach, the Appellate Body upsets the careful balance of rights and obligations that exist within the WTO agreements. This is yet another example of a failure by the Appellate Body to

¹³¹ See, e.g., Panel Report, *European Union and its Member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add. 1, circulated 10 August 2018, para. 7.1350 (“We find no cogent reason to disagree with the legal interpretation of the panel in *India – Solar Cells*.”); Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add. 1, circulated 5 July 2018, para. 7.306 (“we do not see any ‘cogent reasons’ to depart from the Appellate Body’s approach to ‘ongoing conduct’ expressed in *US – Continued Zeroing*.”); Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add. 1, adopted 28 February 2018, para. 7.26 (“we see no basis to deviate from the findings by the panel in *EU – Biodiesel (Argentina)* in respect of Indonesia’s claim concerning Article 2.2.1.1 of the Anti-Dumping Agreement. Nor has the European Union identified any cogent reasons for us to do so.”); Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and WT/DS482/R/Add.1, adopted 25 January 2017, para. 7.37 (“For the reasons explained above, we find that Canada has failed to establish that there are cogent reasons for us to depart from those decisions.”); and Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add. 1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, para. 7.276 (“In the absence of cogent reasons for departing from the approach of the Appellate Body in prior cases, we adopt the same approach.”).

¹³² *US – Countervailing Measures (Article 21.5 – China) (AB)*, para. 5.244 (2019).

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follow the rules agreed by WTO Members, undermining support for a rules-based trading system.

F. The Appellate Body Has Violated Article 19.1 of the Dispute Settlement Understanding by Failing to Make the Recommendation Required in Instances Where a Measure Has Expired after Panel Establishment

- The Dispute Settlement Understanding is clear that “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”
- Despite this unambiguous text, the Appellate Body has asserted that it has the authority to decide when to issue a recommendation – for example, for measures that it considers have expired during the course of a proceeding. No such exception and no such authority is provided for in the Dispute Settlement Understanding.
- The Appellate Body’s finding of “discretion” to disregard the plain text agreed to by WTO Members is another example of the Appellate Body overstepping its authority, and it has negative systemic consequences, including that WTO Members may be forced to bring unnecessary, additional disputes in an attempt to obtain the recommendation to which they have a right under the WTO agreements.

WTO Members agreed in Article 19.1 of the DSU that “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” Although this text is clear and framed in mandatory language, the Appellate Body has asserted that panels and the Appellate Body have “discretion” in whether to make a recommendation for measures that expire during a dispute settlement proceeding. The Appellate Body’s unauthorized approach to DSU Article 19.1 has systemic and practical consequences and demonstrates again the Appellate Body’s disregard for the rules set by WTO Members that ought to govern the Appellate Body.

1. *The Dispute Settlement Understanding Mandates that Panels and the Appellate Body Issue Recommendations after Concluding a Measure Is Inconsistent with WTO Obligations*

Article 19.1 of the DSU states: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring the measure into conformity with that agreement.”¹³³ The requirement to make this specified recommendation is not discretionary.

¹³³ Footnotes omitted; emphasis added.

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The “measure” that is being reviewed by a panel or the Appellate Body is the measure identified in the panel request. Article 6.2 of the DSU requires a panel request to “identify the specific measures at issue,” and Article 7.1 of the DSU establishes the standard terms of reference for a panel as being to “examine” the “matter referred to the DSB” in that panel request and “and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in” the covered agreements cited by the parties to the dispute.

The measure identified in the panel request and referred to the panel by the DSB is fixed in time. The panel’s terms of reference do not change if a measure expires or is terminated or modified during the course of the panel proceedings. The panel is to make its findings with respect to the measure that the DSB referred to it, not with respect to some other (future or past) measure. It was that measure that formed the basis for the complaining WTO Member’s decision to initiate dispute settlement proceedings and that formed the basis for other Members’ decisions whether to participate in the panel proceedings as a third party.

Article 19.1 thus helps ensure that the WTO dispute settlement procedure fulfills its function of assisting Members in resolving disputes. A Member that brings a dispute to challenge a measure of another Member is assured that if a panel or appellate report finds that the measure is inconsistent with the responding Member’s obligations, there will be a recommendation that the responding Member bring that measure into compliance. The responding WTO Member cannot avoid a finding that a measure it chose to adopt is inconsistent with its WTO obligations by (temporarily) removing the measure during the course of the panel proceedings.

2. *The Appellate Body Has Treated Article 19.1 as Discretionary*

The Appellate Body has failed to adhere to the rule in Article 19.1. Specifically, although the Appellate Body has ostensibly recognized that the requirement in Article 19.1 is mandatory, it nonetheless has opined that “the fact that a measure has expired may affect what recommendation a panel may make.”¹³⁴ Further, the Appellate Body has stated that “where a measure expires in the course of the panel proceedings, the panel should, in the exercise of its jurisdiction, objectively assess whether the ‘matter’ before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined. Thus, we agree ... that a panel's considerations should go beyond a complainant’s continued request for findings and assess whether there still remains a ‘matter’ with respect to which a positive solution is required, notwithstanding the expiry of the measure at issue.”¹³⁵

The Appellate Body’s approach cannot be reconciled with the text of the DSU. Furthermore, it is internally contradictory.

¹³⁴ *U.S. – Upland Cotton (AB)*, para. 272 (2005).

¹³⁵ *EU – PET (Pakistan) (AB)*, para. 5.43 (2018).

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The Appellate Body acknowledges that Article 19.1 is mandatory and that the Appellate Body's remit is to review a measure in existence as of the date of panel establishment.¹³⁶ The rule directs that a panel or the Appellate Body "shall" recommend that a Member whose measure has been found WTO-inconsistent bring that measure into conformity. It is simply not possible to reconcile DSU text stating that issuance of a recommendation is mandatory with a statement by the Appellate Body that a panel or the Appellate Body have discretion to issue such a recommendation.¹³⁷

This attribution of a level of "discretion" to panels and the Appellate Body is an invention of the Appellate Body and is not based on the text of the DSU. In fact, it is contrary to that text. Article 19.1 *mandates* that, when a specified condition has been met ("concludes that a measure is inconsistent with a covered agreement"), the panel or Appellate Body "shall" make a specific recommendation ("that the Member concerned bring the measure into conformity with that agreement"). The text of Article 19.1 is not susceptible to an interpretation that allows the exercise of "discretion."¹³⁸

In attributing this level of "discretion" to panels and the Appellate Body, the Appellate Body relied on its own statement in *US – Certain EC Products* that there was "an inconsistency between the finding of the panel that the relevant measure was no longer in existence and the subsequent recommendation of the panel that the DSB request the United States bring that measure into conformity with its WTO obligations."¹³⁹ The Appellate Body did not explain the basis in the DSU for that statement, however. And it failed to engage with the fact, explained at length by the United States, that the statement in *US – Certain EC Products* was *obiter dicta* as it was not made in response to any issue appealed in that dispute, and therefore was not necessary to resolve that appeal.¹⁴⁰

This means that in the face of clear, mandatory language in the DSU, the Appellate Body considers that its own prior reports can support an exception to the clear text of the DSU. The DSU provides no such authority to the Appellate Body or to its reports. The DSU and the other

¹³⁶ See, e.g., *EU – Fatty Alcohols (Indonesia) (AB)*, para. 5.199 (2017). The Appellate Body has also stated that the relevant inquiry is whether the measure at issue is consistent with the relevant WTO obligations at the time of establishment of the panel. See, e.g., *EC – Selected Customs Matters (AB)*, paras. 187, 259.

¹³⁷ See, e.g., *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)*, para. 270 (2008) "We thus consider it to be within the discretion of the panel to decide how it takes into account subsequent modifications or a repeal of the measure at issue."

¹³⁸ The Appellate Body accordingly reads "shall recommend" as "should recommend" for purpose of DSU Article 19.1. As noted earlier, the Appellate Body also reads "In no case *shall* the proceedings exceed 90 days" as "In no case *should* the proceedings exceed 90 days" for purposes of DSU Article 17.5, but it reads "*should* make an objective assessment" to mean "*shall* make" for purposes of DSU Article 11. Again, the Appellate Body's choice of whether "should" means "shall" or "shall" means "should" appears to be resolved by which word provides greater authority to the Appellate Body.

¹³⁹ *EU – Fatty Alcohols (AB)*, para. 5.200 (2017).

¹⁴⁰ *EU – Fatty Alcohols (AB)*, U.S. Third Participant Submission, para. 39, available at: [https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Ptcpt.Sub fin.pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Ptcpt.Sub%20fin.pdf).

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covered agreements set out the agreed rules and commitments of WTO Members, and those rules cannot be changed through dispute settlement reports. DSU Articles 3.2 and 19.2 make this clear: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

The Appellate Body has departed even further from the requirements agreed by WTO Members and stated that: "In general, in cases where the measure at issue consists of a law or regulation that has been repealed during the panel proceedings, it would seem there would be no need for a panel to make a recommendation in order to resolve the dispute."¹⁴¹ The Appellate Body thus appeared to be setting a default rule that there would be no recommendation where a measure expires during the course of the panel proceedings.¹⁴²

The Appellate Body has identified factors to consider in deciding whether to make a recommendation. These factors include whether the complaining party has requested a recommendation, whether a panel considers that the matter referred to it has been resolved, whether the responding party might adopt a similar measure in the future, and whether there remains ongoing disagreements over the interpretation of the covered agreement.¹⁴³ These factors are subjective in nature and invite a panel or the Appellate Body to engage in speculation, for instance to speculate as to whether the responding party is likely to adopt similar measures in the future. But WTO Members set a clear rule – if a panel or the Appellate Body finds that the measure the DSB referred to the panel for review is inconsistent with a covered agreement, the panel or the Appellate Body "shall" recommend it be brought into conformity. WTO Members were not interested in the subjective judgments of, or speculations by, panels or the Appellate Body.

3. *The Appellate Body's Disregard for the Mandatory Text of Article 19.1 Undermines the Effectiveness of the Dispute Settlement System*

Criticism from the United States has noted not only that the Appellate Body is failing to follow the rules agreed by WTO Members,¹⁴⁴ but also that this failure has consequences. For instance, without such a recommendation, "trade measures imposed in part through annually recurring legal instruments could never be successfully challenged through WTO dispute settlement."¹⁴⁵

¹⁴¹ *China – Raw Materials (AB)*, para. 264 (2012). Ironically, in this paragraph of its report, the Appellate Body recognized the systemic problems arising from its approach, noting that in the situation presented the "absence of a recommendation in such a case would effectively mean that a finding of inconsistency involving such measures would not result in implementation obligations for a responding member, and in that sense would merely be declaratory."

¹⁴² The Appellate Body may have retreated from that default rule in subsequent reports. See, e.g., *EU – PET (Pakistan) (AB)*, n. 119 (2018); *EU – Fatty Alcohols (AB)*, para. 5.199 (2017).

¹⁴³ *EU – PET (Pakistan) (AB)*, paras. 5.45-5.50 (2018).

¹⁴⁴ See, e.g., Dispute Settlement Body, Minutes of the Meeting Held on September 29, 2017, WT/DSB/M/402, paras. 5.9 and 5.10.

¹⁴⁵ *China – Raw Materials (AB)*, para. 237 (2012), citing to the joint appellee submission of the United States and Mexico.

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The Appellate Body has itself acknowledged in a different context that the “absence of a recommendation” could “effectively mean that a finding of inconsistency” “would not result in implementation obligations for a responding member, and in that sense would merely be declaratory. This cannot be the case.”¹⁴⁶ Other WTO Members have expressed these concerns.¹⁴⁷

WTO Members did not provide for panels or the Appellate Body to depart from the requirement in Article 19.1 at their discretion, nor did WTO Members provide for panels or the Appellate Body to decide whether or not to issue a recommendation based on that panel's or the Appellate Body's views or speculation as to some unspecified factors. Members did not provide the Appellate Body with this authority.

The Appellate Body's approach violates the rule in favor of an approach that has adverse consequences for the dispute settlement system. Those adverse consequences include the possibility that WTO-inconsistent measures could escape a successful challenge or there might be no implementation obligation for a WTO Member with respect to a WTO-inconsistent measure. The Appellate Body's approach upsets the balance of the interests of complainants and respondents. Just as a complainant should not be able to obtain findings on substantively new measures introduced after the establishment of a panel, so too the respondent should not be able to avoid findings and recommendations by altering or revoking its measures after the date of panel establishment. Denying a complaining WTO Member a recommendation with respect to a measure that is within the terms of reference of the panel and found to be WTO-inconsistent prejudices that WTO Member's rights under the DSU.

¹⁴⁶ *Id.* at para. 264.

¹⁴⁷ *See, e.g.*, Dispute Settlement Body, Minutes of the Meeting Held on May 28, 2018, WT/DSB/M/413, para. 10.13 (statement by Japan). In *China – Raw Materials*, Mexico and the United States explained that once “the challenged measures have been found to be WTO-inconsistent, DSU Article 19.1 mandates that a panel or the Appellate Body ‘shall recommend’ that the measure be brought into conformity with a Member’s WTO obligations. If the complaining party considers that the challenged measure has not been withdrawn or brought into conformity – which the Appellate Body has explained involves fully removing the WTO-inconsistency – and if the responding party disagrees, then that disagreement can be the subject of a compliance proceeding. Thus, there is no need to challenge ‘replacement measures’ and obtain findings and recommendations against them for ‘future’ measures potentially to come within the scope of a Member’s implementation obligation. And as noted above, rather than promoting the prompt and orderly settlement of disputes, the facts of this dispute evidence that China’s approach would frustrate the aims of the dispute settlement system. China’s profusion of post-panel establishment measures, replacement and otherwise, would have created just the moving target situation the Appellate Body has cautioned against.” Joint Appellee Submission of the United States and Mexico, paras. 86 and 87, *available at*: https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/US%20Mex%20Jt%20Appellee%20Sub.pdf.

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G. The Appellate Body Has Overstepped Its Authority by Opining on Matters within the Authority of Other WTO Bodies, including the Ministerial Conference, the General Council, and the Dispute Settlement Body

- The Dispute Settlement Understanding limits the role of panels and the Appellate Body to helping determine if a WTO Member's measure is inconsistent with WTO rules.
- The Appellate Body has exceeded this limited role by seeking to direct how other WTO bodies should perform their responsibilities under the WTO agreements.
- Any disagreement among WTO Members on how the Dispute Settlement Body or any other WTO body should carry out its functions must be resolved by WTO Members acting through those other bodies, not by the Appellate Body. Appellate Body interference can only lead to confusion, legal uncertainty, and contradictory positions between other WTO bodies and the Appellate Body.

WTO Members assigned a specific role to the Appellate Body – to help WTO Members resolve a specific dispute. The Dispute Settlement Understanding limits the role of the Appellate Body to “issues of law covered in the panel report and legal interpretations developed by the panel.”¹⁴⁸ The panel findings reviewed by the Appellate Body are those that “will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”¹⁴⁹

In sum, the role of panels and the Appellate Body is limited to helping determine if a WTO Member's measure is inconsistent with a covered agreement. Nowhere is a panel or the Appellate Body granted authority to opine on how other WTO authorities are implementing their responsibilities.

1. *The Appellate Body Initially Recognized the Limit on Its Authority but Jettisoned that Limit in the 2012 US – Large Civil Aircraft Report*

In earlier years, the Appellate Body recognized this limit, noting in the 2001 *US – Certain EC Products* report that “[d]etermining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.”¹⁵⁰ A little over ten years later, in the 2012 *US – Large Civil Aircraft* report, the Appellate Body reached the opposite conclusion, claiming:

The DSU does not identify specific provisions of the covered agreements, or particular obligations thereunder, that are exempt from or not susceptible of

¹⁴⁸ DSU Article 17.6.

¹⁴⁹ DSU Article 11.

¹⁵⁰ *US – Certain EC Products (AB)*, para. 92 (2001).

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interpretation by panels or the Appellate Body. To the extent that they are at issue in a specific dispute, even provisions relating to the functioning of the DSB or the dispute settlement process itself are properly the subject of interpretation by panels and the Appellate Body, as the content of such provisions also affects the rights and obligations of WTO Members.¹⁵¹

Essentially, the Appellate Body formerly took the correct position that it had only those authorities granted to it by Members but shifted to the erroneous position that it has authority to opine on any issue (even the conduct of other WTO bodies) so long as the Members did not explicitly remove such authority.

This interpretive position is wrong. Of course, one other obvious, fundamental error in the Appellate Body's reasoning is that the DSU specifies what *is* referred to a panel and thus the Appellate Body for review. Accordingly, there is no reason for the DSU to also specify what is *not* referred to a panel or the Appellate Body for review.

In *US – Large Civil Aircraft*, the Appellate Body inappropriately made findings on a matter committed to another WTO organ and not subject to review by a panel or the Appellate Body. Specifically, the appellate report included findings on the procedures and the manner in which the DSB is to implement the information-gathering process provided under Annex V of the Subsidies Agreement.

Annex V provides for two decisions by the DSB. First, Annex V provides for the DSB, upon request, to initiate an information-gathering procedure.¹⁵² Second, Annex V provides for the DSB to “designate a representative to serve the function of facilitating the information-gathering process.”¹⁵³ In both instances, the text of the Subsidies Agreement is unambiguous. The DSB, which is composed of the WTO Members, makes the decision. Neither decision can be characterized as a “measure” of a WTO Member, and so neither decision can form part of the “matter” referred to a panel by the DSB.¹⁵⁴ Consequently, neither decision is subject to review by a panel or the Appellate Body.

Despite the plain text, the 2012 *US – Large Civil Aircraft* report made findings, in an advisory opinion, on how the DSB is to decide to initiate an Annex V procedure, and how the DSB is to designate a representative for purposes of an Annex V procedure. Both findings bypass the role of the DSB regarding an Annex V procedure and erroneously provide the Appellate Body with authority to step into the decision-making role explicitly reserved for WTO Members. Only

¹⁵¹ *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 502 (2012).

¹⁵² Paragraph 2 of Annex V: “In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.”

¹⁵³ Paragraph 4 of Annex V.

¹⁵⁴ See, e.g., DSU Articles 6.2 and 7.1, which provide for what constitutes the “matter” referred to a panel, and DSU Article 19.1 which provides for what recommendation, if any, a panel or the Appellate Body can make.

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WTO Members, not the Appellate Body, have authority to resolve questions or disagreements as to how the DSB is to make its decisions regarding an Annex V process.

2. *The Appellate Body Findings on Initiation of an Annex V Procedure are Contrary to the DSU and Not Justified by the Subsidies Agreement*

The Appellate Body compounded its error by incorrectly interpreting the agreement that it should not even have been interpreting in the first place. In particular, the appellate report found that the DSB's initiation of an Annex V procedure is an automatic action that occurs when there is a request for the initiation of an Annex V procedure and the DSB establishes a panel.¹⁵⁵

The appellate report went on to state that: "We are not asked to and need not, in this dispute, rule on the process to be followed by the DSB in appointing an Annex V facilitator."¹⁵⁶ And yet in that same paragraph the appellate report volunteered the following opinion:

The DSB is the body responsible for administering the dispute settlement rules and procedures, and the Chairman of the DSB serves as the representative of the DSB within the WTO. It seems to us that, as the representative of the DSB, the Chairman is in principle responsible for discharging the function of facilitating an Annex V procedure until such time as that function is delegated through the DSB's designation of another individual as a facilitator pursuant to paragraph 4 of Annex V.¹⁵⁷

The appellate report's statements are wrong. There is nothing in the covered agreements to support the position that the initiation of an Annex V procedure is a simple procedural "incident"¹⁵⁸ of "the DSB's decision to establish a panel when the initiation of an Annex V procedure has been requested."¹⁵⁹

The appellate report went on to state that "the obligation is both triggered by and discharged upon establishment of a panel, provided that a request for initiation of an Annex V procedure has been made by a Member."¹⁶⁰ Even aside from the fact that this statement cannot be reconciled with the earlier statement in that same report that "the DSB never took any action to initiate an Annex V procedure' in this dispute,"¹⁶¹ the statement that the DSB has initiated an Annex V procedure automatically means that the DSB would have taken a decision by other than positive

¹⁵⁵ *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 524 (2012).

¹⁵⁶ *Id.* at para. 521.

¹⁵⁷ *Id.*

¹⁵⁸ The appellate report does not explain what a procedural "incident" is, nor what its legal significance may be.

¹⁵⁹ *Id.* at para. 511.

¹⁶⁰ *Id.* at para. 512.

¹⁶¹ *Id.* at para. 502 (2012). If indeed the "obligation" to initiate an Annex V procedure is "discharged" by the DSB establishing the panel after a request for an Annex V procedure has been made, then the Annex V procedure would have been initiated.

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consensus. The appellate report identifies no basis in the covered agreements for this position. To the contrary, Article 2.4 of the DSU requires that “[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus,” and footnote 3 to the WTO Agreement states explicitly that “[d]ecisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.”

The DSU defines “consensus” as: “The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.”¹⁶² The approach advocated in the appellate report thus contravenes the text of the provisions agreed to by WTO Members. The appellate report, relying on Article 1.2 of the DSU, argued that, because “Annex V, together with, inter alia, Articles 6.6, 7.4, 7.5, and 7.6 of the SCM Agreement, are listed as special or additional rules and procedures under Appendix 2 to the DSU,” they would prevail over Article 2.4 of the DSU.¹⁶³ But nothing in Annex V or Articles 6.6, 7.4, 7.5, and 7.6 of the SCM Agreement states that the DSB is to take a decision in regard to those provisions by anything other than consensus.

The appellate report’s reliance on Article 1.2 of the DSU was misplaced. Article 1.2 provides that special or additional rules in another covered agreement shall prevail only to “the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2.” But because nothing in Annex V or Articles 6.6, 7.4, 7.5, and 7.6 of the SCM Agreement provide for a different decision-making process by the DSB, there was no “difference” in that regard, and therefore no basis to argue that the “different” rule would prevail over Article 2.4 of the DSU.¹⁶⁴

The appellate report attempts to support the approach of disregarding the consensus decision-making rule specified in the DSU by referring to the “vital role that the information gathering procedure plays in the context of a dispute involving an allegation of serious prejudice.”¹⁶⁵ From this depiction of the role of an Annex V procedure, the appellate report concludes that: “An interpretation of paragraph 2 of Annex V that would enable a responding Member to frustrate that role by preventing the DSB from initiating such a procedure would be at odds with WTO Members’ manifest intention to promote the early and targeted collection of information pertinent to the parties’ subsequent presentation of their cases to the panel, as well as with the duty of cooperation to which such a responding Member is subject.”¹⁶⁶

This argument is a policy argument, not a legal argument, and the Appellate Body has no authority to change WTO rules based on its policy preferences. It is an argument that the plain

¹⁶² Footnote 1 to the DSU.

¹⁶³ *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 509 (2012).

¹⁶⁴ It is also noteworthy that the appellate report did not attempt to engage on footnote 3 to the WTO Agreement.

¹⁶⁵ *Id.* at para. 520.

¹⁶⁶ *Id.*

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text of the DSU should be disregarded in order to promote the view of the appellate report that an Annex V procedure is “vital.” It is an argument that it would be more efficient for an Annex V procedure to be automatically initiated.¹⁶⁷ (The argument also overlooks the fact that the panel in that dispute employed alternative tools available to it to perform a function similar to an Annex V procedure.)

3. *The Appellate Body Intruded on the Authority of the Dispute Settlement Body Relating to the Procedures for Adoption of Panel and Appellate Body Reports*

The Appellate Body has intruded on the authority of the Dispute Settlement Body relating to the procedures for adoption of panel and Appellate Body reports. For example, in the dispute *Morocco – Hot-Rolled Steel (Turkey)*, Morocco informed the Appellate Body that it was withdrawing its appeal. As a result, and pursuant to the Appellate Body's own working procedures, all the Appellate Body needed to do was notify the Dispute Settlement Body of the withdrawal of the appeal. The Appellate Body instead issued a report expressing views on the procedures the Dispute Settlement Body was to employ for adoption of the panel and appellate reports.¹⁶⁸

The procedures for adoption were not part of any appeal that Morocco filed, nor were they an issue of law covered in the panel report or legal interpretation developed by the panel. As such, they were not within the scope of the dispute and not within the Appellate Body's authority to opine on. The views expressed by the Appellate Body on the adoption procedures therefore reflect an advisory opinion seeking to interfere with the conduct of another WTO body.¹⁶⁹ Compounding the error, the Appellate Body's comments were erroneous as they did not address whether the report was issued consistent with Article 17 of the DSU.¹⁷⁰

It is beyond the scope of the Appellate Body's limited authority to attempt to direct how the Dispute Settlement Body should perform its own responsibilities. That the Appellate Body should seek to do so through an advisory opinion – in an appeal that had been withdrawn – is particularly striking given the extensive discussion by Members of this issue over the last two years.

¹⁶⁷ The appellate report does not appear to acknowledge the irony of arguing that the need to expedite a dispute should be given priority even as that same report was not provided until 346 days after the notice of appeal instead of the 90 days prescribed in the DSU. This was almost 4 times the maximum length of time Members agreed in the DSU.

¹⁶⁸ *Morocco – Hot-Rolled Steel (Turkey) (AB)* (2019), paras. 1.18-1.19.

¹⁶⁹ As discussed, *supra* Part II.D., the Dispute Settlement Understanding does not assign the mandate or authority to the Appellate Body to render advisory opinions.

¹⁷⁰ In fact, as the report was not issued consistent with the requirements of Article 17 of the DSU – that is, within 90 days of Morocco's notification to the DSB of its intention to appeal – it is not an “Appellate Body report” under Article 17, and therefore it is not subject to the adoption procedures reflected in Article 17.14.

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4. *The Appellate Body Intruded on the Authority of the Dispute Settlement Body on the Appointment of Appellate Body Members*

The Appellate Body also has opined on matters within the authority of the DSB and not within the authority of the Appellate Body by criticizing the DSB's decision not to appoint an individual to serve a second term on the Appellate Body. When the United States exercised its right not to support reappointment of one Appellate Body member, the other Appellate Body members issued a public letter criticizing the basis for the U.S. action, as if they were entitled to opine on the appointment decision.¹⁷¹ In that letter the Appellate Body even stated: "We recognize that there is no right of reappointment. We understand that we do not have a role in decisions for reappointment." And yet the Appellate Body felt entitled to weigh in on the issue anyway.¹⁷² This interference by the Appellate Body in a core DSB function raises conflict of interest concerns.

H. The Appellate Body Has Departed from WTO Rules by Deeming Decisions Not Made under Article IX:2 to Be Authoritative Interpretations of Covered Agreements

- Under the WTO Agreement, only the Ministerial Conference and the General Council have the authority to adopt interpretations of the WTO agreements.
- The Appellate Body, however, has asserted that it can deem decisions not made under the procedures required in Article IX:2 of the WTO Agreement to be "subsequent agreements" that interpret the WTO agreements.
- The Appellate Body's interference creates confusion, causes wrongly decided panel decisions, and chills WTO members from reaching agreement on documents based on the reasonable concern that the Appellate Body will later treat the document as equivalent to an authoritative interpretation.

Article IX:2 of the WTO Agreement is clear. Only the Ministerial Conference and the General Council have the authority to adopt authoritative interpretations of the WTO agreements. No decision by any other entity and no decision that was not adopted pursuant to the required procedures can be deemed an authoritative interpretation of a WTO agreement.

¹⁷¹ May 18, 2016, letter from the Appellate Body to the DSB Chairperson.

¹⁷² See Dispute Settlement Body, Minutes of the Meeting Held on May 23, 2016, WT/DSB/M/379, paras. 6.7-6.10. See also May 28, 2018 farewell speech of Appellate Body member Ricardo Ramírez-Hernández, available at: https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm ("This is an issue in which I believe the text is crystal clear. Reappointment is an option not a right. Upon reflection, this is an issue that is within the realm of only the Membership.").

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Yet on several occasions the Appellate Body has found that certain decisions that do not meet the requirements specified by WTO Members nonetheless constitute “subsequent agreements” that interpret the WTO agreements.

The violation of Article IX:2 means that WTO Members can no longer have confidence that a document to which they have agreed will be given the legal effect that they intended. The violation also undermines the effective functioning of the WTO because Members may hesitate to agree to a document out of concern that the Appellate Body will inappropriately treat it as an authoritative interpretation of a covered agreement. And any decision that is not taken under Article IX:2 fails to receive the scrutiny WTO Members specified in order for a decision to meet the requirements of an authoritative interpretation. The Appellate Body's pattern of treating non-authoritative interpretations as equivalent to IX:2 authoritative interpretations adds to or diminishes WTO Members' rights and obligations.

1. *The WTO Agreement Text is Clear and Unambiguous*

The text and structure of Article IX of the WTO Agreement unequivocally demonstrate that Article IX:2 of the WTO Agreement provides the only authority and the only mechanism for adopting interpretations of the covered agreements.

Article IX:2 states that the “Ministerial Conference and the General Council shall have the *exclusive* authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”¹⁷³ WTO Members agreed to a specific mechanism for exercising that exclusive authority to adopt interpretations of the covered agreements. In the case of a covered agreement in Annex 1 of the WTO Agreement, WTO Members specified that the Ministerial Conference and the General Council “shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement.”¹⁷⁴ Accordingly, the Council overseeing the functioning of the relevant covered agreement must first recommend an interpretation of that agreement.¹⁷⁵ WTO Members may adopt an interpretation of the covered agreements if and only if this required mechanism has been satisfied. Article 3.9 of the Dispute Settlement Understanding confirms that Article IX:2 of the WTO Agreement provides the exclusive mechanism for interpretations of the covered agreements.¹⁷⁶

¹⁷³ Emphasis added.

¹⁷⁴ WTO Agreement, Article IX:2.

¹⁷⁵ WTO Agreement, Article IX:2, second sentence.

¹⁷⁶ DSU Article 3.9 provides that the DSU operates “without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement.” Article IX:2 of the WTO Agreement is the only provision of the WTO Agreement that provides a decision-making mechanism for Members to adopt an interpretation of the covered agreements.

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2. *The Appellate Body Departed from the Correct Framework for Adopting Interpretations of the Covered Agreements*

In its early years, the Appellate Body recognized that Article IX:2 of the WTO Agreement established the exclusive procedure for adopting an interpretation of the covered agreements. For example, the 2000 *Japan – Alcoholic Beverages II* report correctly observed that the specificity of the mechanism for adopting interpretations of the covered agreements in Article IX:2 was “reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.”¹⁷⁷

In a series of erroneous decisions starting in 2008, however, the Appellate Body switched course and erroneously determined that decisions by the Ministerial Conference made outside the procedures provided in Article IX:2 of the WTO Agreement, as well as Council and Committee decisions, may constitute “subsequent agreements” that interpret the covered agreements.

In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* in 2008, the Appellate Body laid the groundwork for its incorrect finding that non-Article IX:2 decisions could interpret the covered agreements. In that appeal, the Appellate Body analyzed whether a waiver adopted at the 2001 Doha Ministerial Conference (the Doha Article I Waiver), which permitted the European Communities to accord preferential treatment to products originating from African, Caribbean, and Pacific countries, constituted a “subsequent agreement” within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (the Vienna Convention). In turn, the Appellate Body considered whether such an agreement, if found, would modify the EC’s schedule of concessions.¹⁷⁸

In analyzing the panel’s finding that the Doha Article I Waiver modified the EC’s schedule of concessions, the Appellate Body opined that there are three methods in the WTO Agreement used to interpret or modify WTO law: waivers (Article IX:3), multilateral interpretations (Article IX:2), and amendments (Article X).¹⁷⁹ In this context, the Appellate Body first stated that: “We consider that a multilateral interpretation pursuant to Article IX:2 of the *WTO Agreement* can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31(3)(a) of the *Vienna Convention*, as far as the interpretation of the WTO agreements is concerned.”¹⁸⁰ In other words, the Appellate Body treated authoritative interpretations adopted under Article IX:2 of the WTO Agreement not as the *exclusive* means for WTO Members to interpret the covered agreements, but rather as only one of the possible means for WTO Members to interpret the covered agreements.

¹⁷⁷ See, e.g., *Japan – Alcoholic Beverages II (AB)*, p. 13 (2000).

¹⁷⁸ *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)*, para. 375 (2008).

¹⁷⁹ *Id.* at para. 378.

¹⁸⁰ *Id.* at para. 383.

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The Appellate Body also observed that the ILC commentary to the Vienna Convention described “subsequent agreements” in Article 31(3)(a) as referring to “an authentic element of interpretation” to be considered when interpreting a treaty under Article 31(3)(a).¹⁸¹

Later, in *US – Clove Cigarettes* in 2012, the Appellate Body drew on its findings in *EC – Bananas III* to conclude that the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns (the 2001 Doha Ministerial Decision) was a “subsequent agreement” that interpreted Article 2.12 of the TBT Agreement. Despite a determination that the 2001 Doha Ministerial Decision did not constitute a “multilateral interpretation” within the meaning of Article IX:2 of the WTO Agreement, the Appellate Body still continued its analysis based on an assumption that multilateral interpretations under Article IX:2 of the WTO Agreement “are not exhaustive of” subsequent agreements that may provide interpretations of the covered agreements.¹⁸²

The Appellate Body proclaimed that non-Article IX:2 decisions by WTO Members may qualify as subsequent agreements if they (1) occur after the relevant covered agreement is concluded and (2) “express an agreement on the *interpretation* or *application* of a provision of WTO law.”¹⁸³ The Appellate Body then cited itself in *EC – Bananas III* to find that an agreement between parties provides an authentic interpretation of a relevant treaty if the subsequent agreement “bears specifically” on the interpretation of the treaty.¹⁸⁴

Contemporaneously, the Appellate Body applied a similar approach in *US – Tuna II (Mexico)* to find that the TBT Committee Decision on Principles for the Development of International Standards provided an interpretation of the term “relevant international standard” found in the TBT Agreement. The Appellate Body did so by applying the same framework it used in *US – Clove Cigarettes*, finding that the TBT Committee Decision “bears specifically” on the TBT Agreement.¹⁸⁵

In 2015, in *Peru – Agricultural Products*, the Appellate Body then cited *US – Clove Cigarettes* and *US – Tuna II* for the proposition that agreements on the interpretation of the covered agreements are those that “bear specifically” on the interpretation of those agreements.¹⁸⁶

In this series of reports, the Appellate Body committed several serious analytical errors that undermined the carefully negotiated and exclusive mechanism in Article IX:2 of the WTO Agreement for adopting interpretations of the covered agreements.

¹⁸¹ *Id.* at para. 390.

¹⁸² *US – Clove Cigarettes (AB)*, paras. 256, 259 (2012).

¹⁸³ *Id.* at para. 262 (emphasis in original).

¹⁸⁴ *Id.* at para. 265.

¹⁸⁵ *US – Tuna II (Mexico) (AB)*, paras. 370-372 (2012). The Appellate Body circulated its report in *US – Clove Cigarettes* in April 2012 and its report in *US – Tuna II (Mexico)* in May 2012.

¹⁸⁶ *Peru – Agricultural Products (AB)*, para. 5.101 (2015).

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First, the Appellate Body ignored, misunderstood, or otherwise overlooked the fact that Article IX:2 of the WTO Agreement provides the exclusive process for adopting an interpretation of the covered agreements. In *US – Clove Cigarettes*, the Appellate Body's finding that non-Article IX:2 decisions can constitute "subsequent agreements" that provide interpretations of the covered agreements undermined its earlier, correct finding in that report that such decisions are not interpretations of the covered agreements within Article IX:2 of the WTO Agreement.¹⁸⁷ Its analysis seemed to distinguish between "multilateral interpretations" under Article IX:2 and "subsequent agreements" on interpretations of the covered agreements,¹⁸⁸ but this is a distinction without a difference. Article IX:2 establishes the exclusive procedure for agreeing to an "interpretation,"¹⁸⁹ without distinguishing between "types" of interpretations. Moreover, the Appellate Body's approach provides no method for distinguishing between the relative importance of interpretations of the covered agreements adopted under Article IX:2 and "subsequent agreements" on interpretations of the covered agreements.

More worrisome, in *US – Tuna II*, the Appellate Body did not refer to Article IX of the WTO Agreement at all before concluding that a TBT Committee decision was a subsequent agreement that interpreted the TBT Agreement. Likewise, the Appellate Body in *Peru – Agricultural Products* did not refer to Article IX in analyzing whether the FTA between Peru and Guatemala constituted a subsequent agreement interpreting the *Agreement on Agriculture* and the GATT 1994.

Second, the Appellate Body failed to give meaning to the differences among (i) the Ministerial Conference utilizing its authority under Article IX:1 of the WTO Agreement, (ii) the Ministerial Conference utilizing its authority under Article IX:2 of the WTO Agreement, and (iii) Agreement committees and councils acting according to their authority. Although the Appellate Body in *US – Clove Cigarettes* observed that the Ministerial Conference under Article IX:2 functions to interpret the covered agreements, the Appellate Body assigned the same legal effect to the Ministerial Conference acting under Article IX:1 in finding that Article IX:1 decisions would provide an interpretation of the TBT Agreement.

Third, the *US – Clove Cigarettes* report erroneously interpreted its finding in *EC – Bananas III* that interpretations of the covered agreements under Article IX:2 of the WTO Agreement resembled "subsequent agreements" under Article 31(3)(a) of the Vienna Convention. In *US – Clove Cigarettes*, the Appellate Body leapt from this finding to conclude that decisions reached by WTO Members outside the procedure prescribed by Article IX:2 were nevertheless "subsequent agreements" capable of providing interpretations of the covered agreements, because of their purported "resemblance" to Article IX:2 interpretations.

Fourth, the Appellate Body in *US – Tuna II* ventured beyond its erroneous finding in *US – Clove Cigarettes* that Ministerial Conference or General Council decisions or declarations under

¹⁸⁷ *US – Clove Cigarettes (AB)*, para. 255 (2012).

¹⁸⁸ *Id.* at para. 260.

¹⁸⁹ WTO Agreement, Article IX:2, second sentence.

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Article IX:1 may constitute interpretations of the covered agreements. In the *Tuna II* report, the Appellate Body found that even *Committee* decisions may constitute interpretations of the covered agreements. This was the precise concern that the United States raised in its statement at the April 24, 2012 DSB meeting, when the Members adopted the *US – Clove Cigarettes* Appellate Body report.¹⁹⁰

3. *The Appellate Body’s “Subsequent Agreement” Reasoning Has Adverse Consequences for the WTO and Its Dispute Settlement System*

The Appellate Body’s erroneous “subsequent agreement” reasoning has led to a number of undesirable consequences for the WTO and its dispute settlement system.

First, the Appellate Body’s findings have led panels, citing the Appellate Body’s reports, to conclude erroneously that decisions reached outside the Article IX:2 procedure may constitute “subsequent agreements” on interpretations of the covered Agreements. For instance, in *Brazil – Taxation* in 2017, the panel found that General Council decisions on transparency for preferential trade agreements and regional trade agreements constituted subsequent agreements to be taken into account in interpreting the Enabling Clause.¹⁹¹ In *Russia – Pigs (EU)*, also in 2017, the panel found that the Doha Ministerial Conference Decision on Implementation-Related Issues and Concerns constituted a subsequent agreement that provided an interpretation of the SPS Agreement.¹⁹² In *Australia – Plain Packaging* in 2018, the panel ventured further to find that a Ministerial Declaration constituted a subsequent agreement on interpretation of each provision of the TRIPS Agreement.¹⁹³ Each of these reports leads the WTO further away from the text of Article IX:2 and the intent of WTO Members to provide an exclusive mechanism for adopting interpretations of the covered agreements.

Second, these reports mean that WTO Members can no longer have confidence that a document to which they have agreed will be given the legal effect that they intended. The expansion of the significance of such documents creates a chilling effect whereby WTO Members may hesitate to agree to a document, either in the WTO context or in another forum, out of concern that the document may be wrongly treated as an authoritative interpretation of a covered agreement. Indeed, if every committee or council decision could be interpreted as a “subsequent agreement” that could provide an interpretation of the relevant covered agreements, committees and councils overseeing the covered agreements could become significantly less functional.

¹⁹⁰ U.S. Statement, Minutes of the DSB Meeting (April 24, 2012) WT/DSB/M/315 para. 78 (“Furthermore, there appeared to be nothing in the Appellate Body’s approach to limit such a “subsequent agreement” to one by the Ministerial Conference or the General Council.”).

¹⁹¹ *Brazil – Taxation (Panel)*, para. 7.1080 and n. 1443 (2019).

¹⁹² *Russia – Pigs (EU) (Panel)*, paras. 7.1424-7.1425 (2017).

¹⁹³ *Australia – Tobacco Plain Packaging (Honduras, DR) (Panel)*, para. 7.2410 (finding that the Doha Declaration constituted a subsequent agreement on interpreting *each* provision of the TRIPS Agreement) (2018).

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Third, the Appellate Body's reasoning allows decisions made with little scrutiny to bind WTO Members. Article IX:2, by establishing an exacting two-step process for adopting interpretations of the covered agreements, ensures that proposed interpretations are given full transparency to WTO Members and appropriately scrutinized. Consequently, Article IX:2 ensures that interpretations of the covered agreements accord with WTO Members' collective understanding of the provisions. Decisions that are not taken under Article IX:2 receive no such scrutiny.

The text of Article IX:2 of the WTO Agreement is clear: WTO Members can adopt interpretations of the covered agreements only by following the procedures provided in that paragraph. Indeed, if the Members had intended for any "subsequent agreement" "bearing specifically" on the terms of the covered agreements to constitute interpretations of the covered agreements, there would have been no need to establish the strict voting mechanism provided in Article IX:2 to adopt interpretations of the covered agreements. Accordingly, as the United States has noted before, when the Appellate Body or panels interpret non-Article IX:2 decisions or declarations as subsequent agreements that provide interpretations of the covered agreements, they perform "some form of 'stealth' interpretation that circumvent[s] the requirements of Article IX and [binds] Members without their knowledge or intent."¹⁹⁴

¹⁹⁴ U.S. Appellant Submission in *US – Clove Cigarettes*, para. 125 (2012) available at: https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/US.Appellant.Sub_fin_pdf.

III. APPELLATE BODY ERRORS IN INTERPRETING WTO AGREEMENTS RAISE SUBSTANTIVE CONCERNS AND UNDERMINE THE WTO

In addition to failing to follow the rules that WTO Members have adopted, the Appellate Body has erroneously interpreted and applied numerous important WTO agreements. The Appellate Body has overreached on substantive issues, engaged in impermissible gap-filling, and read into the WTO agreements rights or obligations that are not there.

The texts of the covered agreements result from extensive negotiations among sovereign nations and autonomous customs territories, and reflect differing negotiating objectives and positions. It is often possible to reach agreement on only one particular obligation or discipline while being unable to reach agreement on any obligation or discipline even in a related area. As such, “gaps” in the text of a covered agreement may simply reflect a situation where there was a limit upon what negotiators could agree. WTO Members have not agreed to delegate to WTO adjudicative bodies the task of filling in gaps in the covered agreements, and it is critical for WTO adjudicators to respect these limits.

Despite this, the Appellate Body has expanded its own power and attempted to substitute for negotiators to re-write, reduce or supplement the agreed text. Among other interpretive errors, the Appellate Body has engaged in impermissible gap-filling and read into the text of the covered agreements obligations or rights that are not present in the text. This conduct is inconsistent with the Appellate Body’s role and adds to or diminishes Members’ rights and obligations, contrary to Articles 3.2 and 19.2 of the DSU.

Examples of Appellate Body errors in interpreting the WTO Agreements include the following:

- The Appellate Body has interpreted agreements in ways that significantly restrict the ability of WTO Members to counteract trade-distorting subsidies provided through SOEs, posing a threat to the interests of all market-oriented actors.
- The Appellate Body has interpreted the non-discrimination obligation under the TBT Agreement and the GATT 1994 in a manner that calls for reviewing factors unrelated to any difference in treatment due to national origin.
- The Appellate Body has taken an approach that undermines the ability of Members to respond to imports of unfairly dumped goods.
- The Appellate Body’s non-text-based interpretation of Article XIX of the GATT 1994 and the Safeguards Agreement has seriously undermined the ability of WTO Members to use safeguards measures.
- The Appellate Body has invented and imposed on WTO Members certain obligations for the concurrent imposition of antidumping duties calculated under a non-market economy methodology and countervailing duties.

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The following section of this Report discusses these examples in detail. These examples are illustrative of the Appellate Body's errors in interpreting the WTO Agreements, not exhaustive.¹⁹⁵

A. The Appellate Body's Erroneous Interpretation of "Public Body" Threatens the Ability of WTO Members to Counteract Trade-Distorting Subsidies Provided through SOEs, Undermining the Interests of All Market-Oriented Actors

- The Appellate Body has adopted an erroneous interpretation of the term "public body" that is not found in the agreed text and is not consistent with the ordinary meaning of that term.
- The Appellate Body's narrow interpretation favors non-market economies operating through SOEs over market economies and undermines the ability of WTO Members to counteract subsidies by non-market economies.

The WTO agreements discipline certain subsidies provided "by a government or any public body," but the Appellate Body has adopted a narrow interpretation of public body that requires an entity to possess, exercise or be vested with government authority, in order for it to constitute a public body. That requirement is not found in the agreed text, nor is it consistent with the ordinary meaning of the term "public body." The Appellate Body's narrow interpretation of public body fails to capture a potentially vast number of government-controlled entities, such as state-owned enterprises (SOEs), that are owned or controlled by foreign governments, and therefore undermines the ability of Members to counteract subsidies that are injuring their workers and businesses. The WTO was created by and for market economies, but the Appellate Body's public body interpretation favors non-market economies at the expense of market economies and has given rise to confusion among WTO panels and WTO Members.

1. *Interpreted Correctly, the Term "Public Body" Means Any Entity Controlled by the Government*

Article 1.1(a)(1) of the SCM Agreement provides, in relevant part, that "a subsidy shall be deemed to exist if ... there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government')."

The Subsidies Agreement does not define the term "public body," but definitions of the words "public" and "body" shed light on the ordinary meaning of the term "public body" in Article 1.1(a)(1). By definition, the noun "body" refers to a group of persons or an entity (as opposed to,

¹⁹⁵ For example, this Report does not discuss the dispute *US – Continued Dumping and Subsidy Offset Act Of 2000*, in which the Appellate Body's interpretation of the Subsidies Agreement in effect created a new category of prohibited subsidies that was neither negotiated nor agreed to by WTO Members; or other examples, such as *US – Gambling*, *US – Cotton*, *US – FSC*.

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for example, the “material frame” of persons). This definition in the sense of “an aggregate of individuals” is: “an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society.”¹⁹⁶ Turning to the adjective “public,” the relevant definition that pertains to a “body” as a group of individuals is the first: “of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation.”¹⁹⁷

Thus, the ordinary meaning of the composite term “public body” according to dictionary definitions would be “an artificial person created by legal authority; a corporation; an officially constituted organization” that is “of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation.” These definitions point towards ownership by the community as one meaning of the term “public body.” If an entity “belongs to” or is “of” the community, it also follows that the community can make decisions for, or control, that entity.

Contrary to the Appellate Body's interpretation, nothing in these dictionary definitions restricts the meaning of the term “public body” to an entity vested with, or exercising, government authority. Had the drafters of the SCM Agreement intended to convey that meaning, they might have chosen any number of other terms. For example, the drafters might have used “governmental body,” “public agency,” “governmental agency,” or “governmental authority.” These terms would have, through their ordinary meaning, more clearly conveyed the sense of exercising governmental authority. That they were not chosen sheds light on the different concept captured by the term that *was* chosen, “public body.”

The ordinary meaning of the terms of a treaty must be understood “in their context.”¹⁹⁸ Reading the term “public body” in context supports the conclusion that a “public body” is an entity controlled by the government such that the government can use that entity's resources as its own.

In Article 1.1(a)(1) of the SCM Agreement, the term “public body” is part of the disjunctive phrase “by a government or any public body within the territory of a Member.” The SCM Agreement thus uses two different terms – “a government” on the one hand and “any public body” on the other hand – to identify the two types of entities that can provide a financial contribution. As a contextual matter, the use of the distinct terms “a government” and “any public body” together this way indicates that the terms have distinct and different meanings. Treaty interpretation should give meaning and effect to all terms of a treaty. As the Appellate Body has recognized, provisions of the WTO Agreement should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility.¹⁹⁹ Accordingly, the term “public body” should not be interpreted in a manner that would render it redundant with the word “government.”

¹⁹⁶ *The New Shorter Oxford English Dictionary* at 253 (1993).

¹⁹⁷ *Id.* at 253.

¹⁹⁸ Vienna Convention on the Law of Treaties, Article 31.

¹⁹⁹ *US – Offset Act (Byrd Amendment) (AB)*, para. 271 (2003). *See also US – Gasoline (AB)* at p. 23 (1996).

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The term “government,” as the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, means, among other things: “The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry.”²⁰⁰ In *Canada – Dairy*, the Appellate Body explained that “[t]he essence of ‘government’ is . . . that it enjoys the effective power to ‘regulate’, ‘control’ or ‘supervise’ individuals, or otherwise ‘restrain’ their conduct, through the exercise of lawful authority.”²⁰¹ The Appellate Body further explained that a “‘government agency’ is, in our view, an entity which exercises powers vested in it by a ‘government’ for the purpose of performing functions of a ‘governmental’ character, that is, to ‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens.”²⁰²

The term “public body,” therefore, should be interpreted as meaning something other than an entity that performs “functions of a ‘governmental’ character, that is, to ‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens.”²⁰³ Otherwise, a “public body” is “a government,” or a part of “a government,” and there is no reason for the term “public body” to have been included in Article 1.1(a)(1) of the SCM Agreement.

In seeking to understand the term “public body” in its context, it is also important to recall that the SCM Agreement is identifying those entities that may make “financial contributions.” Those financial contributions are one part of a definition of “subsidy,” and those subsidies are granted or maintained by WTO Members. A WTO Member can make the financial contribution underlying the subsidy directly through its “government” (narrowly understood). However, it also can make that financial contribution through entities that it controls.

Article 1.1(a)(1) of the SCM Agreement identifies a variety of actions that constitute financial contributions, including “a direct transfer of funds (*e.g.* grants, loans, and equity infusion), potential direct transfers of funds or liabilities (*e.g.* loan guarantees),” foregoing or not collecting “government revenue,” “provid[ing] goods or services other than general infrastructure, or purchas[ing] goods,” and “mak[ing] payments to a funding mechanism.” The ordinary meaning of a “financial contribution” suggested by this list of actions is to convey value. In this ordinary sense, entities controlled by the government can convey value just as the government can, and the value conveyed can be precisely the same as that conveyed by the government.

Consider, for example, a “direct transfer of funds” by a government to a recipient in the form of a grant. Conveying value in this way is plainly a “financial contribution” within the meaning of the SCM Agreement. If the government formed and controlled a legal entity (for example, a corporation whose shares are all owned by the government), and the entity provided the same grant to a recipient, the same financial contribution has occurred: the government has conveyed value. Whether the funds are provided directly by the government or by an entity controlled by

²⁰⁰ *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (citing Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1123) (2011).

²⁰¹ *Canada – Dairy (AB)*, para. 97 (1999).

²⁰² *Id.*

²⁰³ *Id.*

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the community through its government, it is a Member's funds that are being used to make the financial contribution.

There is no evident reason for the first transaction to fall within the scope of Article 1.1(a)(1) of the SCM Agreement and the second to fall outside the scope. Nor would the term "financial contribution" suggest that a distinction should be drawn between those transactions based on whether the entity or corporation is "vested with or exercising governmental authority." Rather, the context supplied by "financial contribution" suggests a different common concept between "government" and "public body" than that discerned by the Appellate Body. If a "financial contribution" means to convey something of value, the concept sought to be captured by the SCM Agreement term is the use by a government of its resources, or resources it controls, to convey value to economic actors.

2. *The Appellate Body Has Interpreted the Term "Public Body" Incorrectly*

In *US – Anti-Dumping and Countervailing Duties (China)* in 2011 and *US – Carbon Steel (India)* in 2014, the Appellate Body interpreted the term "public body" in Article 1.1(a)(1) of the SCM Agreement incorrectly. The key issue before the Appellate Body in these disputes was whether a wholly or majority government-owned SOE is a "public body," such that WTO Members can take action to counteract any unfair subsidies the SOEs provide. The Appellate Body recognized that, based on its ordinary meaning, the term "public body" encompassed a "rather broad range of potential meanings." Nonetheless, the Appellate Body set out a very limited interpretation of the term, concluding that a "public body" "must be an entity that possesses, exercises or is vested with *governmental authority*," including because the entity has "the effective power to regulate, control or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."²⁰⁴ Under the Appellate Body's interpretation, even where a government owns or controls an entity, that would not be sufficient to hold the government responsible for any injurious subsidies it provides.

The Appellate Body's "government authority" test significantly limits the ability of governments to effectively combat unfairly subsidized imports and is nowhere reflected in the text of the SCM Agreement. If an entity has no regulatory or supervisory authority, but is nonetheless controlled by the government such that the government can use the entity's resources as its own – making any transfer of economic resources by that entity a conveyance of the government's own resources – it would be anomalous to conclude that the financial contribution cannot be deemed a subsidy under Article 1.1(a)(1). On the other hand, if an entity has the power to "regulate" individuals or "otherwise restrain their conduct," but not the power to provide financial contributions of government resources, its regulatory powers are not relevant to the SCM Agreement. The Appellate Body's interpretation therefore does not reflect the structure of either Article 1.1(a)(1) or of the SCM Agreement, and the failure of this interpretation to capture a

²⁰⁴ *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 290 (2011) (citing *Canada – Dairy* (AB), para. 97).

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potentially vast number of government-controlled entities undermines the disciplines of the SCM Agreement.

The Appellate Body's interpretation stands in contrast to the approach taken by several WTO panels that interpreted the term "public body" to be an entity controlled by the government. In *Korea – Commercial Vessels*, for example, the panel concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)."²⁰⁵ In reaching this conclusion, that panel rejected some of the very same arguments China advanced before the panel and the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

In *EC and certain member States – Large Civil Aircraft*, the panel, addressing the status of a government-owned financial institution, explained that, "at the time of its 1992 investment in Aerospatiale, Credit Lyonnais was controlled by the French government and was a 'public body' for purposes of Article 1.1(a)(1) of the SCM Agreement."²⁰⁶ Accordingly, the capital contribution made by Credit Lyonnais to Aerospatiale constituted a financial contribution by a public body.²⁰⁷

In *US – Anti-Dumping and Countervailing Duties (China)*, the panel concluded that "a 'public body', as that term is used in Article 1.1 of the SCM Agreement, is any entity controlled by a government." As noted above, however, in reversing the Panel, the Appellate Body adopted a narrow definition of a "public body."

During the meeting of the WTO Dispute Settlement Body at which the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)* were adopted, seven WTO Members (Mexico, Turkey, the European Union, Canada, Australia, Japan and Argentina) joined the United States in raising concerns about the Appellate Body's interpretation.²⁰⁸

Commentators have also criticized the Appellate Body's interpretation. For example, in an article in the *Journal of World Trade*, Michael Cartland, Gérard Depayre, and Jan Woznowski – each of whom participated in the Negotiating Group on subsidies and countervailing measures in the Uruguay Round – present a detailed discussion of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* and raise a host of concerns with the Appellate

²⁰⁵ *Korea – Commercial Vessels (Panel)*, para. 7.50 (2005). See also *id.*, paras. 7.172, 7.353, and 7.356 (2005) (finding that the Korean Development Bank and the Industrial Bank of Korea were public bodies because they were totally, or near totally, owned by the Government of Korea).

²⁰⁶ *EC – Large Civil Aircraft (Panel)*, para. 7.1359 (2011).

²⁰⁷ *Id.*

²⁰⁸ See Dispute Settlement Body, Minutes of the Meeting Held on March 25 2011, WT/DSB/M/294, paras. 103-127. See also Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, para. 6 (January 14, 2020) ("The Ministers observed that many subsidies are granted through State Enterprises and discussed the importance of ensuring that these subsidizing entities are captured by the term "public body." The Ministers agreed that the interpretation of "public body" by the WTO Appellate Body in several reports undermines the effectiveness of WTO subsidy rules. To determine that an entity is a public body, it is not necessary to find that the entity "possesses, exercises or is vested with governmental authority.").

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Body's interpretation of the term "public body," calling the analysis "internally contradictory" and "disingenuous."²⁰⁹

3. *The Appellate Body's Non-Textual Interpretation Has Created Significant Uncertainty and Led Panels to Reach Absurd Results*

In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body left open the possibility that "meaningful control" over an entity could be sufficient to show that the entity "possesses, exercises or is vested with governmental authority," and in *US – Carbon Steel (India)*, the Appellate Body appeared to confirm that an SOE's authority over government resources could support a public body finding. However, the Appellate Body's non-textual interpretation has created significant uncertainty as to the precise scope of Article 1.1(a)(1), and recent attempts by panels to apply the so-called "government authority" test have only exacerbated the problem, confirming the fundamental errors in the Appellate Body's approach.

The panel's findings in *US – Pipes & Tubes CVD (Turkey)*, for example, illustrate the hazard introduced by the Appellate Body's approach to public body in *US – Carbon Steel (India)*, and in particular a suggestion in that report that there must be a demonstration that the government "in fact exercised control over the [entity] and its conduct."²¹⁰ Citing to this report, the panel in *Pipes & Tubes* found that the *ability* of the government to intervene in an entity's critical operations and key decisions was not relevant to a public body determination, and required evidence that the government *had actually exercised* that control with respect to the subsidization in question. Similarly, the panel found that the existence of commercial conduct could preclude a finding that an entity is a "public body," because it could reflect the absence of a governmental function on the part of the entity and therefore a lack of governmental authority.

As the United States has explained, properly interpreted, the issue under Article 1.1(a)(1) is not whether the nature of the behavior or the *conduct* of the entity is governmental. Rather, the question is whether the *entity* engaging in the conduct is governmental or pertaining or belonging to the people, *i.e.*, whether the entity is "*a government or any public body.*" If the entity is governmental, or public, all of its activities are attributable to the government in question. Were this not the case, a government could shield its activities from the disciplines of the SCM Agreement simply by setting up an SOE and allowing it to engage in some commercial conduct, even where there is evidence that the government has the *ability* to intervene and control the entity *whenever it chooses*. This cannot be the case.

If a government undertakes the activities described in Article 1.1(a)(1), there is a conveyance of value from a WTO Member to a recipient. There is an equivalent conveyance when there is an entity whose resources the WTO Member can control and use, and the entity engages in the same activities. The interpretation set out by the Appellate Body, however, allows WTO Members to evade their obligations under the SCM Agreement simply by establishing an entity that is private

²⁰⁹ Cartland, Michael, Depayre, Gérard & Woznowski, Jan. "Is Something Going Wrong in the WTO Dispute Settlement?" *Journal of World Trade* 46, no. 5 (2012): 979–1016, at 996.

²¹⁰ *US – Carbon Steel (India) (AB)*, para. 4.37 (2014) (first emphasis in original, second emphasis added).

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in form, but not in substance. The interpretation therefore significantly restricts the ability of WTO Members to counteract trade-distorting subsidies provided through SOEs, posing a significant threat to the interests of all market-oriented actors.

The interpretation also fails to maintain the textual distinction in Article 1.1(a)(1) between a “public body” and a “private body.” Contrary to the panel’s application of the Appellate Body’s standard in *US – Pipes & Tubes CVD (Turkey)*, focus on the specific *conduct* of an entity would be relevant when examining whether there was government entrustment or direction of a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement. That is, a private body may provide a subsidy if the government entrusts or direct the private body “to carry out one or more of the functions illustrated in (i) to (iii).” The panel’s approach demonstrates the uncertainty introduced by the Appellate Body’s interpretation, which risks conflating the public body analysis with that of government entrustment and direction of a *private* entity, and renders the term “public body” effectively meaningless.

4. *The Appellate Body Has Continued Its Incorrect Approach to “Public Body” in a Recent Appellate Report concerning the Imposition by the United States of Countervailing Duties on Subsidized Imports from China*

Although the Appellate Body recently had an opportunity to correct its flawed approach, it did not do so and, instead, stuck with an approach that has no basis in the text of the Subsidies Agreement. In *US – Countervailing Measures (China) (21.5)*, all three members of the Division on appeal rejected China’s extremely narrow definition of “public body.” However, two members of the Division reiterated the Appellate Body’s flawed approach. The third member dissented on this point, stating that “the majority has repeated an unclear and inaccurate statement of the criteria for determining whether an entity is a public body, and [the dissenting member] disagree[d] with the majority’s implication that a clearer articulation of the criteria is neither warranted nor necessary.”²¹¹

The dissent continued that “the continuing lack of clarity as to what is a ‘public body’ represents an undue emphasis on ‘precedent’, which has locked in a flawed interpretation that has grown more confusing with each iteration, as litigants and Appellate Body Divisions repeated the original flaw while trying to navigate around it.”²¹²

The “original mistake”, as the dissent put it,²¹³ was the Appellate Body’s attempt, in *US – Anti-Dumping and Countervailing Duties (China) (DS379)*, to define the term “public body” as “an entity that possesses, exercises or is vested with governmental authority,” including because the entity has “the effective power to regulate, control or supervise individuals, or otherwise restrain

²¹¹ *US – Countervailing Measures (China) (Article 21.5) (AB)*, para. 5.243 (2015) (separate opinion of one Division member).

²¹² *Id.* at para. 5.244.

²¹³ *Id.* at para. 5.245.

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their conduct, through the exercise of lawful authority.”²¹⁴ Under the Appellate Body's interpretation, even where a government owns or controls an entity, that would not be sufficient to hold the government responsible for any injurious subsidies the entity provides.

5. *The Appellate Body's Interpretation Limits the Ability of Investigating Authorities to Address Unfairly Subsidized Imports*

The Appellate Body's “governmental authority” test significantly limits the ability of governments to combat unfairly subsidized imports. The Appellate Body's approach is nowhere reflected in the text of the Subsidies Agreement. If an entity has no regulatory or supervisory authority, but is nonetheless controlled by the government – making any transfer of economic resources by that entity a conveyance of the government's own resources – it would make no sense to conclude that this transfer of public resources is not a financial contribution under Article 1.1(a)(1).

On the other hand, if an entity has the power to “regulate” individuals or “otherwise restrain their conduct,” but not the power to provide financial contributions of government resources, its regulatory powers are not relevant to the Subsidies Agreement. The Appellate Body's interpretation therefore does not reflect the structure of either Article 1.1(a)(1) or of the Subsidies Agreement.

The failure of the Appellate Body's interpretation to capture a potentially vast number of SOEs and other entities that are owned or controlled by foreign governments undermines the ability of Members to effectively counteract subsidies that are injuring their workers and businesses. The WTO was created by and for market economies, but the Appellate Body's public body interpretation favors non-market economies at the expense of market economies.

²¹⁴ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 2.90 (2015) (citing *Canada – Dairy (AB)*, para. 97).

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B. The Appellate Body's Interpretation of the Non-Discrimination Obligation under the TBT Agreement and the GATT 1994 Calls for Reviewing Factors Unrelated to Any Difference in Treatment Due to National Origin

- One of the key principles of the WTO agreements is the requirement that Members not discriminate against trade from other Members. This fundamental principle, reflected in the national treatment and most-favored nation obligations, was not intended to prevent Members from pursuing their legitimate policy objectives.
- The Appellate Body, however, has found a measure to be discriminatory (and therefore not consistent with WTO rules) based solely on evidence that the measure may impact imports from one Member more than those of another, even though converting a non-discrimination inquiry into a detrimental impact test renders almost any origin-neutral measure vulnerable to challenge in WTO dispute settlement.
- It is much more difficult to pursue legitimate public policy measures under the legal standard the Appellate Body has invented than under the standards to which Members actually agreed. In addition, the Appellate Body's approach would have WTO adjudicators second-guess Members' legislatures and serve as the ultimate arbiters of a range of important legislative questions, which is not a role that WTO Members assigned to them under the WTO agreements.

Articles I:1 and III:4 of the GATT 1994 and 2.1 of the TBT Agreement set out Members' national treatment and most-favored-nation ("MFN") obligations. These provisions are concerned with origin-based discrimination.

The Appellate Body's recent approach under both Article 2.1 and Articles I:1 and III:4 is to first look to see if a measure has a "detrimental impact" on imported products of a Member compared to the like products of the importing Member or imported products of any other Member. Where there is a detrimental impact, then the Appellate Body's approach with respect to Article 2.1 is to conduct a further analysis to determine if any such detrimental impact stems exclusively from a legitimate regulatory distinction. With respect to Articles I:1 and III:4, however, there is no further analysis. The existence of a detrimental impact is alone sufficient to demonstrate a breach of those articles under the Appellate Body's approach. The only recourse for a Member maintaining such a measure is to attempt to invoke an affirmative defense, such as Article XX of the GATT 1994. The Appellate Body's approach does not find support in the text of the relevant provisions, nor in the manner in which they were applied under the GATT 1947 nor in prior panel or Appellate Body reports.

1. The Appellate Body's "Detrimental Impact" Standard Does Not Reflect the Concept of Discrimination to Which WTO Members Agreed

The "detrimental impact" standard is problematic and should be of serious concern for WTO Members. First and foremost, it would appear to be a standard that could easily result in a

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finding of a WTO violation even where there is no difference in treatment due to national origin. Under the Appellate Body's approach, if any producer in any other WTO Member satisfies the requirements under the measure, while a producer in the exporting WTO Member does not, that would appear to suffice to find that the measure has a detrimental impact on the exporting WTO Member's products.

Similarly, under the Appellate Body's approach, there would appear to be a "detrimental impact" on imports even where the exporting producer chooses to meet the importing Member's requirements, but it is more costly to do so. This could result simply because of differences in production methods between producers in different WTO Members.

Another problem with this approach is that a measure that may not have a detrimental impact on imports in the present could very well have a detrimental impact in the future, depending on whether an exporting producer decides to change its product characteristics or production method. Thus, even where a WTO Member makes a significant effort to ensure that a measure is non-discriminatory, the WTO Member has no assurance when adopting a measure that the measure will withstand a challenge in the future based on changes in the market or changes by exporting producers.

This low and unpredictable threshold is not the concept of discrimination to which WTO Members agreed. It is difficult to imagine that WTO Members would have agreed to an obligation under which *any* measure that had a disparate impact on the goods from another WTO Member – even if the impact was entirely accidental – would be in breach of GATT Articles I:1 and III:4.

In fact, the Appellate Body's approach is contrary to the fact that the phrase "treatment no less favourable" in Article III:4 was, in the past, always interpreted as providing regulatory space for WTO Members to take otherwise legitimate measures that may restrict trade unevenly across the membership of the WTO.²¹⁵

The general principle of Article III:1 of the GATT 1994,²¹⁶ which informs the meaning of Article III:4,²¹⁷ makes it clear that considerations of discrimination and "protection" are inherent in

²¹⁵ See, e.g., *EC – Asbestos (AB)*, para. 100 (2001) ("[A] Member may draw distinctions between products which have been found to be 'like,' without, for this reason alone, according to the group of 'like' imported products, 'less favourable treatment' than that accorded to the group of 'like' domestic products.").

²¹⁶ GATT 1994 Article III:1 states:

Members recognize that internal taxes and other internal charges, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production.

²¹⁷ See *Japan – Alcoholic Beverages (AB)*, pp. 17-18 (1996) (stating that the "general principle" of Article III:1 "informs the rest of Article III"); *EC – Asbestos (AB)*, para. 93 (2001) (stating: "[I]n our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets for the 'general principle' pursued by that provision.").

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Article III:4.²¹⁸ The second sentence of Article III:4 conveys a similar concept. It states: “The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport *and not on the nationality of the product.*” Thus, Article III:4 itself embraces the concept that the reason behind a measure is important for purposes of the Article III:4 analysis, and that “nationality of the product” is a key concept.

However, the Appellate Body’s “detrimental impact” approach says that a measure will be found to have a detrimental impact on imports even where the measure makes no distinctions at all, either in law or in fact, based on the nationality of the imported product.

Further, prior to 2012,²¹⁹ the Appellate Body had never interpreted Article III to mean that *any* detrimental impact on like imports is *per se* sufficient to support a finding of inconsistency. Rather, in every past dispute finding an Article III:4 inconsistency, the measure at issue either explicitly discriminated against imported products, or established a system that, though facially neutral, discriminated against imported products *de facto*.

2. ***Because the GATT 1994 Provides for an Affirmative Defense for Only a Limited List of Objectives, Some Measures that Pursue Legitimate Policy Objectives May Never Satisfy the Appellate Body's Approach***

Under the Appellate Body’s approach, any measure that has a detrimental impact on imports – no matter how small or accidental, or whether it is due to the conscious choice of exporting producers or the result of market changes – will be deemed in breach of Article I:1 of III:4 of the GATT 1994.

Accordingly, no WTO Member could maintain any such measure, no matter how legitimate or compelling the policy objective of the measure, unless the measure pursues one of the policies eligible for an affirmative defense identified in Article XX. But this is a very limited list of policy objectives. For instance, country of origin labeling is not listed as an objective under Article XX of the GATT 1994, even though it is recognized as a legitimate objective under Article IX of the GATT 1994. It is not difficult to think of other legitimate objectives (such as labeling for geographic indications) that may not be covered by Article XX.

²¹⁸ See *EC – Asbestos (AB)*, para. 100 (2001) (“The term ‘less favourable treatment’ expresses the general principle, in Article III:1, that internal regulations ‘should not be applied . . . so as to afford protection to domestic production.’”); see also *Chile – Alcoholic Beverages (AB)*, paras. 69-71 (2000) (concluding that the absence of a clear relationship between the stated objectives of a measure and the structure of the Chilean tax measures confirmed its conclusion that, based on the architecture, structure and design of the measures, the measures were applied so as to afford protection).

²¹⁹ See, e.g., *US – Tuna II (Mexico) (AB)* (2012); *US – COOL (AB)* (2012); and *US – Clove Cigarettes (AB)* (2012).

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3. *The Appellate Body's Approach Interprets Identically Worded Provisions Differently*

Articles III:4 of the GATT 1994 and 2.1 of the TBT Agreement set out Members' national treatment obligations and use identical language: products of other Members "shall be accorded treatment no less favourable than that accorded to like products of national origin."

Under the customary rules of interpretation of public international law reflected in Article 31 of the Vienna Convention on the Law of Treaties, the text of these provisions should be interpreted using the ordinary meaning of the terms, in context, and in light of the object and purpose of the agreement.²²⁰ The identical terms would have the same ordinary meaning. Furthermore, nothing in the provisions' context nor in the object and purpose of either agreement indicates that the terms should have different meanings. Indeed, the preamble to the TBT Agreement states it is "to further the objectives of GATT 1994."²²¹ The Appellate Body's approach, however, interprets these two identically worded provisions differently.

There is something inherently inconsistent about an interpretative approach that would find that a measure does not "accord[] treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country" for purposes of Article 2.1 of the TBT Agreement, while at the same time finding that the exact same measure does "accord[] treatment ... less favourable than that accorded to like products of national origin" for purposes of Article III:4 of the GATT 1994. A similar inconsistency exists with respect to Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994.

4. *The Appellate Body's Approach Raises the Very Real Possibility that Article 2.1 of the TBT Agreement Will Become Superfluous*

If the standards of Article 2.1 and Articles I:1 and III:4 are different, it is unclear why a Member would ever bring a claim under Article 2.1, when Articles I:1 and III:4 of the GATT 1994 have a lower legal standard for a complainant to establish a breach, and Article XX of the GATT 1994 provides only a limited list of defenses and places the burden of proof on the respondent.²²²

The Appellate Body has sought to respond to this concern in part by stating that WTO Members have not identified "concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the

²²⁰ See Vienna Convention on the Law of Treaties, Article 31(1), stating: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Note also that Article 31(4) provides: "A special meaning shall be given to a term if it is established that the parties so intended." No special meaning is assigned to the relevant terms in either the GATT 1994 or the TBT Agreement.

²²¹ TBT Agreement, preamble, 2nd recital.

²²² See, e.g., Dispute Settlement Body, Minutes of the Meeting Held on June 18, 2014, WT/DSB/M/346, para. 7.7 (statement of the United States concerning the Appellate Body report in *EC – Seal Products (AB)*).

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GATT 1994.”²²³ This is wrong; such examples have been provided to the Appellate Body.²²⁴ One such example is provided by the TBT Agreement text itself. There the preamble refers to “measures necessary to ensure the quality of” a Member’s exports. There is no parallel provision in Article XX of the GATT 1994.

5. *It Is Extremely Difficult to Justify Legitimate and Important Public Policy Measures under the Legal Standard the Appellate Body Has Invented*

It is far more difficult to justify public policy measures under the legal standard the Appellate Body has invented than under the standards to which Members agreed. Therefore, the Appellate Body’s standard significantly restricts the regulatory space afforded to Members to pursue legitimate public policy objectives consistent with their WTO obligations.

The very high level of scrutiny that has been applied under this legal standard goes far beyond an inquiry into whether a measure discriminates based on origin. For instance, in the *COOL* dispute, the Appellate Body added an additional step to the Panel’s analysis and ultimately concluded that the U.S. measure was inconsistent with Article 2.1 of the TBT Agreement because the amount of information the labels conveyed was out of proportion to the administrative requirements imposed on upstream producers.²²⁵

This issue was far attenuated from a national treatment analysis under Article 2.1 of the TBT Agreement. Whether or not the *COOL* measure’s administrative requirements were commensurate with the level of information ultimately provided to consumers is irrelevant to the question the Appellate Body had been called to examine – whether the measure reflected discrimination. Rather, the Appellate Body’s approach to Article 2.1 of the TBT Agreement

²²³ *EC – Seal Products (AB)*, para. 5.128 (2014).

²²⁴ See, e.g., U.S. third participant submission in *EC – Seal Products (AB)*, para. 26, available at: https://ustr.gov/sites/default/files/DS400.AB_US3rdPtySub.Public.pdf (“Second, Norway and Canada both argue that the theoretical difference between the “closed” list of objectives reflected in Article XX and the ‘open’ list reflected in the Appellate Body’s interpretation of TBT Article 2.1 is insufficient to demonstrate ‘any material imbalance between the legitimate policy interests that may be pursued under the TBT Agreement and the GATT 1994,’ as interpreted by the Panel. This argument also fails because, in fact, the difference between the closed list of legitimate objectives under Article XX and the open list under TBT Article 2.1 would have real world implications for Members’ ability to regulate. A few examples of ‘legitimate regulatory objectives’ that potentially fall outside the scope of Article XX are: providing consumer information, preventing deceptive, misleading, and fraudulent practices, and ensuring the compatibility and efficiency of telecommunication goods as well as the objective explicitly recognized in the preamble to the TBT Agreement of ensuring the quality of exports. Under the Panel’s interpretation, the balance between Members rights’ and trade liberalization, with respect to these objectives, would be completely different under TBT Article 2.1 and GATT 1994 Articles III:4 and XX. Under TBT Article 2.1, technical regulations serving these objectives could be justified; under the Panel’s interpretation of GATT Article III:4, measures serving these objectives could not be justified, as the objectives do not come under the specific Article XX exceptions.”). The Appellate Body did not reference this in its report.

²²⁵ *US – COOL (AB)* at para. 347 (2012).

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asked adjudicators to review the calibration of a measure to risk, cost, and benefit, even if in the end the difference in treatment was not related to origin.

Article 2.1 of the TBT Agreement did not create the need or the authority to conduct such an analysis. But the Appellate Body's interpretation designates panels and the Appellate Body as the ultimate arbiters of a range of important regulatory questions. WTO Members did not agree to provide such authority to panels and the Appellate Body. Further, panels and the Appellate Body are not equipped to conduct such an inquiry and to second-guess the myriad policy determinations involved in many regulations.

A measure does not discriminate based on origin simply because an adjudicator considers he or she could have done a better job of balancing costs and benefits or could have designed a more effective measure. The approach invented by the Appellate Body regarding discrimination diminishes WTO Members' rights to pursue legitimate and important public policy measures. Members did not agree in the GATT 1994 or the TBT Agreement to an obligation to avoid a "detrimental impact" even where there is no discrimination.²²⁶

C. The Appellate Body's Invention of a Prohibition on the Use of "Zeroing" to Determine Dumping Margins Has Diminished the Ability of WTO Members to Address Dumped Imports that Cause or Threaten Injury to a Domestic Industry

- It is clear from the terms of the Antidumping Agreement, its negotiating history, and the behavior of WTO Members, that WTO Members never agreed to a prohibition on the use of zeroing.
- Despite this, the Appellate Body has created and expanded a prohibition on its use, imposing an obligation on Members to calculate margins of dumping by offsetting the calculation of dumping by non-dumped transactions (*i.e.*, transactions where the export price exceeds normal value.)
- Under the rules imposed by the Appellate Body, the determination of the amount of dumping will not be the true amount, and the amount of duties that a WTO Member may collect necessarily will be lower than the accurate margin of dumping. In other words, industries that are suffering or threatened with material injury due to dumped imports are unable to obtain the relief WTO Members bargained for.

²²⁶ DSU Article 19.2 ("In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."); DSU Article 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

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WTO Members recognized that dumping – *i.e.*, the introduction of products of one country into the commerce of another country at less than the normal value of the products – that causes or threatens material injury to the domestic industry of an importing country “is to be condemned.”²²⁷ The GATT 1994 and the Antidumping Agreement permit WTO Members to counteract such injurious dumping through the imposition of antidumping duties. In numerous reports, however, the Appellate Body has undermined the right of WTO Members to take action to address dumped imports, thereby adding to or diminishing the rights and obligations of the United States and other WTO Members contrary to WTO rules.

One way in which the Appellate Body has undermined the right of WTO Members to address injurious dumping is through the creation and expansion of a prohibition on the use of “zeroing” in determining whether and to what extent dumping has occurred. The Appellate Body’s approach is deeply flawed, as such a prohibition has no basis in the text of the GATT 1994 or the Antidumping Agreement. Further, the Appellate Body’s reasoning in finding this prohibition has been shifting and inconsistent, and the Appellate Body has disregarded the special standard of review to be applied by WTO adjudicators in resolving antidumping disputes. No fewer than five WTO panels, comprised of governmental and subject matter experts, have disagreed with the Appellate Body’s interpretations on zeroing.²²⁸

The Appellate Body’s overreaching has greatly diminished the ability of WTO Members under the GATT 1994 and the Antidumping Agreement to obtain meaningful relief from dumped imports that are injuring their domestic industries has been greatly diminished.

1. The Antidumping Agreement Does Not Prohibit Zeroing

The Antidumping Agreement provides substantive and procedural rules for the conduct of antidumping investigations.²²⁹ Specific rules for determining whether and to what extent dumping exists were negotiated and set out in Article 2 of the Antidumping Agreement. Article 2 provides that dumping occurs when the products of one WTO Member are sold in another WTO Member at a price (the “export price”) that is less than the “normal value” of the products.²³⁰ The Antidumping Agreement specifies that a duty may be imposed to counteract

²²⁷ GATT 1994 Article VI:1.

²²⁸ *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)* (2005); *US – Zeroing (EC) (Panel)* (2006); *US – Zeroing (Japan) (Panel)* (2007); *US – Stainless Steel (Mexico) (Panel)* (2008); and *US – Lumber AD (Canada) (Panel)* (2019).

²²⁹ Substantively, the Antidumping Agreement was understood by U.S. negotiators as preserving the ability of U.S. industries to obtain meaningful relief from imports dumped into the U.S. market and ensuring U.S. exporters fair treatment in foreign antidumping investigations. Procedurally, the Antidumping Agreement was understood to closely parallel U.S. law and practice. SAA, p. 137.

²³⁰ The “normal value”, for the purpose of a dumping analysis, is the price of the product in the home market of the exporting WTO Member or a third-country market. Normal value can also be determined based on costs in the home market.

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injurious dumping up to the amount by which the “normal value” of the product exceeds its “export price.” This difference is referred to as the margin of dumping.

When the U.S. Department of Commerce calculates a dumping margin, it typically takes into account numerous comparisons between sales in the United States (the export price) and sales in the home market or third-country market (or costs in the home market) (the normal value). In making these comparisons, it is not uncommon for Commerce to find that some comparisons reveal dumping (*i.e.*, the price in the United States, or “export price,” is lower than the price in the home market, or “normal value”), while others reveal no dumping (*i.e.*, the U.S. price is equal to or higher than the home market price). Where a comparison reveals dumping, Commerce assigns to that comparison a positive value equal to the amount by which the normal value exceeds the export price. Where a comparison reveals no dumping, Commerce assigns a zero to that comparison, rather than a negative value equal to the amount by which the export price exceeds the normal value. This approach has been referred to as zeroing.

The WTO Agreements do not preclude or prohibit this approach of treating non-dumped transactions neutrally. The logic of such an approach is reflected in Article VI of the GATT 1994 and the Antidumping Agreement, which recognize that WTO Members may calculate a margin of dumping on a transaction-by-transaction basis, and, thus, collect duties only on dumped imports, while collecting no duties on non-dumped imports. There is no requirement to offset dumped transactions with transactions in which dumping did not occur.

Far from agreeing to prohibit zeroing in the Uruguay Round negotiations, the reality is that certain WTO Members, including the European Union and the United States, used zeroing both before and following the conclusion of those negotiations, each taking the view that doing so was permissible. The European Union changed its position only after the Appellate Body declared in the *EC – Bed Linen* dispute that the use of zeroing is prohibited. Japan did not challenge the U.S. use of zeroing until the end of 2004, indicating that, for the first decade under the WTO Antidumping Agreement, Japan apparently also considered that the use of zeroing was permissible under the agreement reached in the Uruguay Round. Japan changed its position only after the Appellate Body had applied its prohibition on the use of zeroing to the United States in the *US – Softwood Lumber V* dispute.

2. *The Appellate Body Has Invented a Prohibition on Zeroing*

The terms of the Antidumping Agreement, the negotiating history of that agreement, and the behavior of WTO Members, both under the GATT 1947 and under the Antidumping Agreement, show that WTO Members never agreed in any negotiation to a prohibition on the use of zeroing. Nevertheless, the Appellate Body has created and expanded such a prohibition.

In finding a prohibition on zeroing, the Appellate Body has not based its findings on a reasoned analysis of the terms of the applicable agreements. Faced with agreement language that does not address zeroing at all, let alone include a broad prohibition on zeroing, the Appellate Body has attempted to infer from the text what it is that WTO Members intended with respect to zeroing. The difficulties and problems of such an inferential approach are illustrated by the Appellate Body reports on the issue. Over several reports, the Appellate Body modified its analysis in contradictory ways. The Appellate Body has largely assumed its conclusion, relying not on the

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text of the Antidumping Agreement but on language from its previous reports removed from its context.

In brief, the Appellate Body has erroneously concluded that WTO Members must provide offsets for non-dumped transactions whenever “multiple comparisons” are made. That is, if the comparison of “export price” to “normal value” results in negative values for certain transactions (*i.e.*, because the “export price” is higher than the “normal value”), the Appellate Body has determined that the positive values resulting from comparing “export price” to “normal value” for other transactions (*i.e.*, dumped transactions) must be reduced by the negative amounts when aggregating the results of the multiple comparisons to determine a margin of dumping for the “product as a whole.” However, the term “product as a whole” is not found anywhere in the Antidumping Agreement nor in Article VI of the GATT 1994. It is a concept that the Appellate Body simply created.

3. *The Appellate Body's Shifting and Inconsistent Rationales for Prohibiting Zeroing Highlight Its Flawed Interpretation of the Antidumping Agreement*

The Appellate Body's reasoning in finding a prohibition on the use of zeroing has shifted over time, including in contradictory ways. In *US – Softwood Lumber V*, the Appellate Body interpreted the term “margins of dumping” together with the phrase “all comparable export transactions” in the first sentence of Article 2.4.2 of the Antidumping Agreement to derive a concept of “product as a whole,” as distinguished from sub-groups or models of a product. On the basis of this concept, the Appellate Body concluded that zeroing was not permitted when using “multiple averaging” in the context of the W-W comparison methodology.²³¹ However, because the phrase “all comparable export transactions” – a basis for the “product as a whole” concept – appears only in connection with the W-W comparison methodology, the Appellate Body specifically refrained from making a finding concerning the other two comparison methodologies (*i.e.*, the T-T or W-T methodologies).

In contrast to *US – Softwood Lumber V*, in *US – Zeroing (EC)* the Appellate Body appeared to embrace a new interpretation, such that the concept of the “product as a whole” led to the conclusion that zeroing is prohibited whenever “multiple comparisons” are made – *i.e.*, zeroing is also prohibited when using the T-T comparison methodology. Again, this phrase – “product as a whole” – does not appear in the Antidumping Agreement, but was derived by the Appellate Body from interpretations based on the phrase “all comparable export transactions”, which

²³¹ The Antidumping Agreement sets forth three different methodologies for comparing normal value and export price to calculate margins of dumping. The first sentence of Article 2.4.2 describes the two normal comparison methodologies available to an investigating authority: comparison of a weighted average normal value with a weighted average export price (W-W methodology); or comparison of normal value and export price on a transaction-to-transaction basis (T-T methodology). The second sentence of Article 2.4.2 describes a third, alternative comparison methodology – comparison of a weighted average normal value with individual export sales – that may be used when certain conditions are met (W-T methodology).

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appears only in connection with the W-W comparison methodology. In considering this flawed interpretation, the panel in *US – Zeroing (Japan)* found that the Appellate Body had provided:

no explanation of this shift from the use of the “product as a whole” concept as context to interpret the term “margins of dumping” in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other.²³²

After the panel report in *US – Zeroing (Japan)*, the Appellate Body's report in *US – Softwood Lumber V (Article 21.5 – Canada)* relied on a similar leap of logic to find a zeroing prohibition relating to “multiple comparisons.” Specifically, the Appellate Body does not rely on the phrase “product as a whole,” but instead finds the term “product,” in effect, cannot have a meaning other than “product as a whole.”

The Appellate Body's rationales shift on occasion to the point of contradicting earlier rationales. As explained above, in *US – Softwood Lumber V*, the Appellate Body interpreted “margins of dumping” and “all comparable export transactions” in an integrated manner such that in calculating the margin of dumping the results of all model-specific comparisons must be accounted for. Thus, the phrase “all comparable export transactions” necessarily refers to all transactions across all models of the product under investigation. In contrast, in the interpretation offered in *US – Zeroing (Japan)*, the Appellate Body reinterpreted “all comparable export transactions” to relate solely to all transactions within a model, and not across models of the product under investigation.²³³

Similarly, prior to *US – Zeroing (Japan)*, the Appellate Body relied on the word “all” in “all comparable export transactions” as the textual basis for requiring the results of all model-average-to-model-average comparisons to be included in the margin of dumping in the W-W context. In *US – Zeroing (Japan)*, however, with regard to T-T comparisons, the Appellate Body insisted that the word “all” is not necessary to its finding that a single overall margin of dumping must be calculated and must include the results of all T-T comparisons. Because the Appellate Body has concluded that there is a single permissible interpretation of these provisions of the Antidumping Agreement, then the term “all” is either relevant, or it is not. These examples of contradictory interpretations rendered by the Appellate Body with regard to the same issue highlight the Appellate Body's failure to properly interpret the Antidumping Agreement.

²³² *US – Zeroing (Japan) (Panel)*, para. 7.101 (2008) (italics in original) (also noting “that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms ‘dumping’ and ‘margins of dumping’ cannot apply to a sub-group of a product logically leads to the broader conclusion that Members may not distinguish between transactions in which export prices are less than normal value and transactions in which export prices exceed normal value.”).

²³³ *US – Zeroing (Japan) (AB)*, para. 124 (2009).

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4. *The Context of the Antidumping Agreement and the GATT 1994 Demonstrate the Appellate Body's Prohibition on Zeroing Is Erroneous*

The Appellate Body has purported to find in the use of the word “product” in Article VI:1 of the GATT 1994 and Article 2.1 of the Antidumping Agreement support for its conclusion that a margin of dumping must be calculated for all export transactions, and not on a transaction basis. However, an individual entry is no less a “product” than all entries aggregated. As the panel in *US – Zeroing (Japan)* reasoned, the “ordinary meaning of the words ‘product’ and ‘products’ ... provide[] no support for the view that these words ... requir[e] an examination of export transactions at an aggregate level. We note, in this respect, that the record of past discussions in the framework of the GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions.”²³⁴

The use of the terms “product” and “products” in various provisions of Article VI likewise does not support the Appellate Body's conclusion.²³⁵ Taken together, these provisions suggest that “to levy a duty on a product” has the same meaning as “to levy a duty on the importation of that product.” Yet the Appellate Body's reasoning, if applied to these provisions, would mean that the phrase “importation of a product” cannot refer to a single import transaction. In many places where the words “product” and “products” are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.²³⁶

Furthermore, a reading of the term “product” in Article VI of the GATT 1994 as requiring the aggregation of multiple transactions does not reflect the ordinary meaning of the term as it is used in other contexts in the GATT 1994. For example, that reading does not work in the

²³⁴ *US – Zeroing (Japan) (Panel)*, para. 7.107 (2009).

²³⁵ In Article VI of the GATT 1994, for instance, Article VI:2 states that a contracting party “may levy on any dumped product” an antidumping duty. Article VI:3 provides that “no countervailing duty shall be levied on any product.” Article VI:6(a) provides that “no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product ...” Similarly, Article VI:6(b) provides that a contracting party may be authorized “to levy an anti-dumping or countervailing duty on the importation of any product.”

²³⁶ See, e.g., *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, paras. 5.21, n. 32 (2004) (explaining that “there is nothing inherent in the word ‘product[]’ (as used in Article VI:1 of the GATT 1994 and Article 2.1 of the *AD Agreement*) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis”).

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context of Article VII of the GATT 1994.²³⁷ Similarly, the Appellate Body's reading does not work in the context of Article II of the GATT 1994.²³⁸

The result would be even more striking for the tariff treatment of a "product." Again, since the Appellate Body has found that "product" means "product as a whole", and if "product as a whole" requires consideration of multiple transactions, then in determining if a Member has abided by its tariff bindings, it would be necessary to consider the "product as a whole." Extending the Appellate Body's reasoning to this example, it would be permissible to impose a tariff in excess of the bound rate of duty on particular entries so long as it was "offset" by the tariff on other entries such that the tariff for the "product as a whole" does not exceed the bound rate. As these examples make clear, the Appellate Body's reading of "product" cannot be correct.

The Appellate Body's erroneous approach is also highlighted by the negative implications it would entail for prospective normal value antidumping duty systems, which are expressly contemplated by Article 9.4(ii) of the Antidumping Agreement. In a prospective normal value system, authorities assess antidumping duties on a transaction-specific basis, as imports occur, through a comparison between the export price and the prospective normal value. If the export price is lower than the prospective normal value – *i.e.*, if the transaction is made at a dumped price – the authorities assess duties. If the export price equals or exceeds the prospective normal value – *i.e.*, if the transaction is made at a non-dumped price – the authorities do not assess duties.

Prospective normal value systems thus calculate the amount of dumping duties owed in a manner which will yield similar, and in some cases identical, results as the approach taken by U.S.

²³⁷ The panel in *US – Softwood Lumber V (Article 21.5 – Canada)* observed that "[a]n analysis of the use of the words product and products throughout the GATT 1994, indicates that there is no basis to equate product with 'product as a whole' in the sense in which Canada uses that term in this proceeding. Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction." *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, paras. 5.23, n. 36 (2004).

²³⁸ Article II:2(b) specifically uses the term "product" in relation to "any anti-dumping or countervailing duty applied consistently with the provisions of Article VI." If, as the Appellate Body found, the term "product" for purposes of Article VI "clearly" means "product as a whole", then the term "product" for purposes of Article II would also mean "product as a whole." Yet that reading, if product as a whole in fact requires an examination of multiple transactions, simply does not work. "Product" is used in several places in Article II. The Appellate Body's reading would mean, for example, that for purposes of the other two items listed in paragraph 2 of Article II – "a charge equivalent to an internal tax" and "fees or other charges commensurate with the cost of services rendered" – each WTO Member would need to consider the "product as a whole." In other words, a WTO Member would average the charges or fees applied to all the entries of a product to determine if the charge was equivalent to an internal tax or commensurate with the cost of services rendered.

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authorities in assessment reviews.²³⁹ The authorities do not make offsets to the margins of dumping calculated with respect to the dumped transactions to account for so-called negative margins of dumping calculated with respect to the non-dumped transactions. If, as the Appellate Body posits, margins of dumping must be calculated for “the product as a whole,” it would appear to be impossible for an authority to legitimately assess antidumping duties on a transaction-specific basis using a prospective normal value.²⁴⁰ Members that use prospective normal value systems surely did not contemplate that such a result would flow from the Appellate Body's interpretation when they negotiated the Antidumping Agreement.

The Appellate Body has refused to consider contextual arguments like those discussed above, which demonstrate that the approach the Appellate Body ultimately chose would create severe problems of interpretation, not only with respect to the Antidumping Agreement, but also with respect to the GATT 1994. The United States and panel reports have discussed such contextual arguments at length during the course of numerous disputes. The meager analysis found in Appellate Body reports that have addressed the zeroing issue stands in stark contrast to panel reports that have addressed the issue in much greater depth. A number of panel reports, which were drafted by panelists with extensive experience in the trade remedies area, came to the conclusion that, with the exception of the average-to-average comparison methodology in investigations, the GATT 1994 and the AD Agreement do not preclude zeroing.²⁴¹ In reaching a different conclusion, the Appellate Body simply erred, both as a matter of interpretation and as a matter of the applicable standard of review.

5. *The Appellate Body Has Ignored that the Antidumping Agreement Expressly Contemplates the Possibility of Multiple Permissible Interpretations*

The Appellate Body's overreach in creating and expanding a prohibition on zeroing has been exacerbated by its failure to give meaning to Article 17.6(ii) of the Antidumping Agreement. Article 17.6(ii) sets forth a special standard of review to be applied by WTO panels in resolving antidumping disputes. The standard was understood by U.S. negotiators as precluding panels and the Appellate Body from second-guessing U.S. antidumping determinations and from rewriting the terms of the Antidumping Agreement under the guise of legal interpretation.²⁴²

²³⁹ Indeed, as noted by Canada – a Member that uses a prospective normal value system – “a prospective normal value system does not employ the practice of zeroing. ... An investigating authority assesses antidumping duties when the export price is lower than the weighted-average normal value, but applies no anti-dumping duties to non-dumped transactions when the opposite is true.” *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.55 (2004).

²⁴⁰ See, e.g., *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)*, para. 5.57 (2006).

²⁴¹ See *US – Zeroing (EC) (Panel)* (2006); *US – Softwood Lumber V (Article 21.5 – Canada) (Panel)* (2005); *US – Zeroing (Japan) (Panel)* (2007); *US – Stainless Steel (Mexico) (Panel)* (2008); *US – Differential Pricing Methodology (Panel)* (2019).

²⁴² SAA, p. 137.

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Indeed, it is critical to recall that Article 17.6(ii) of the Antidumping Agreement provides that where a “relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.” Thus, Article 17.6(ii) requires a panel, and the Appellate Body, to determine whether the interpretation proposed by a Member is permissible.

The Appellate Body, however, consistently has failed to take that approach. Instead of examining the U.S. interpretation, the Appellate Body has begun by reiterating its own analysis of the Antidumping Agreement. The Appellate Body has then found that the U.S. interpretation of the Antidumping Agreement would lead to a result that contradicts the result of the Appellate Body’s analysis – and on that basis alone, the Appellate Body has said that the U.S. interpretation could not be permissible.

This is a simple *non sequitur*. If Article 17.6(ii) sanctioned only interpretations that all yield the same result, Article 17.6(ii) would have no function. The article makes clear that a national authority’s measure is to be upheld if it rests on “one” – not “all” – of the permissible interpretations of the Antidumping Agreement. Thus, the very premise underlying Article 17.6(ii) is that two interpretations can be permissible simultaneously: one that would render the measure at issue consistent with the Agreement, and another that would render the measure at issue inconsistent with the Agreement. By definition, the existence of the second interpretation cannot be a basis for finding the first one impermissible.

At the end of the Uruguay Round negotiations, Article 17.6(ii) of the Antidumping Agreement was key to the acceptance of the other provisions of the Antidumping Agreement.²⁴³ The existence of such a provision confirms that Members were aware that the text would pose particular interpretive challenges, at least in part because it was drafted to cover varying and complex antidumping systems around the world and long-standing differences concerning methodology. The negotiators therefore indicated that it would be a legal error not to respect a permissible interpretation of the Antidumping Agreement. The Appellate Body’s disregard for the meaning and importance of Article 17.6(ii) – effectively rendering the provision useless – is particularly troubling.

²⁴³ *Id.* at p. 137 (“The Antidumping Agreement also contains a special standard of review to be applied by WTO panels in resolving antidumping disputes. This standard will preclude panels from second-guessing U.S. antidumping determinations and from rewriting the terms of the Antidumping Agreement under the guise of legal interpretation.”) and p. 148 (“Article 17.6 contains a special standard of review, which is analogous to the deferential standard applied by U.S. courts in reviewing actions by Commerce and the Commission... Article 17.6 ensures that WTO panels will not second-guess the factual conclusions of the agencies, even in situations where the panel might have reached a conclusion different from that of the agency. In addition, Article 17.6 ensures that panels will not be able to rewrite, under the guise of legal interpretation, the provisions of the Agreement, many of which were deliberately drafted to accommodate a variety of methodologies.”).

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6. *The Appellate Body's Invention of a Prohibition on Zeroing Diminishes Members' Rights and Obligations*

The United States has explained to the Dispute Settlement Body on a number of occasions, at length and in detail, why all WTO Members should have serious concerns about the many errors in these Appellate Body reports.²⁴⁴ The Appellate Body, in imposing this additional obligation on WTO Members, has far exceeded its authority, and it has acted contrary to the express terms of Articles 3.2 and 19.2 of the DSU, which strictly prohibit panels, the Appellate Body, and even the Dispute Settlement Body itself, from adding to or diminishing the rights and obligations provided in the covered agreements.

The Appellate Body's overreaching on zeroing has troubling practical effects. Under the rules imposed by the Appellate Body, the determination of the amount of dumping will not be the true amount; the amount of antidumping duties that a WTO Member may collect necessarily is lower than the accurate margin of dumping; and the remedy will be insufficient to offset the dumping that actually is taking place. In certain situations, because the Antidumping Agreement requires terminating an antidumping investigation if the amount of dumping found is below a *de minimis* level, WTO Members may even be prevented from counteracting injurious dumping at all. The result is that WTO Members' industries that are suffering or being threatened with material injury are prevented from getting the remedy to which WTO Members have agreed. Thus, with its findings on zeroing, the Appellate Body has undermined the effectiveness of the Antidumping Agreement and contradicted the agreement reached by WTO Members.

²⁴⁴ See WT/DS294/16; WT/DS294/18; WT/DS322/16; WT/DS344/11. See also WT/DSB/M/211, paras. 37-40; WT/DSB/M/225, paras. 73-76; WT/DSB/M/250, paras. 47-55; WT/DSB/265, paras. 75-81; WT/DSB/M/385, paras. 8.8-8.19.

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D. The Appellate Body's Stringent and Unrealistic Test for Using Out-of-Country Benchmarks Weakens the Ability of WTO Members to Address Subsidies by SOEs in Non-Market Economies

- To measure the subsidy when a government provides a good, the Subsidies Agreement contemplates the use of market-determined prices for an appropriate benchmark, and permits Members to use out-of-country prices as the benchmark when market-determined prices are not found within the country of provision.
- The Appellate Body, however, has imposed an obligation on Members to consider government prices in establishing a benchmark, unless those prices are shown to be non-market prices.
- The Appellate Body has also effectively read the Subsidies Agreement as imposing an obligation on investigating authorities to always justify recourse to out-of-country benchmarks through a quantitative analysis of in-country prices themselves, regardless of whether those prices have already been found by the investigating authority to be distorted.
- The Appellate Body's approach, which imposes additional obligations not found in the text of the Subsidies Agreement, diminishes the ability of WTO Members to counteract subsidies that are harming their workers and businesses.

The Subsidies Agreement was agreed to by WTO Members in part to provide substantive and procedural rules aimed at effectively addressing the problems faced by companies confronting subsidized competition anywhere in the world, while enabling Members to retain strong and effective legal remedies against subsidized imports that injure domestic industries. The Appellate Body's erroneous interpretation of this agreement has greatly reduced its effectiveness.

I. The Subsidies Agreement Permits the Use of Out-of-Country Benchmarks When In-Country Prices Are Distorted

To measure the subsidy when a government provides a good, the Subsidies Agreement contemplates the use of market-determined prices for an appropriate benchmark. Specifically, Article 14 of the SCM Agreement provides guidelines for how to measure the benefit of subsidies. In the case of goods provided by the government, Article 14(d) provides that a benefit is conferred where the provision is made for less than adequate remuneration. Article 14(d) further provides that adequate remuneration shall be determined in relation to prevailing market conditions in the country of provision. It is therefore necessary to identify a market-determined price or a market-based proxy to serve as a benchmark to compare to the government price of the good. This approach comports with the references to a "market" in the text of Article 14 and ensures that any benchmark used to measure the adequacy of remuneration reflects a market price resulting from arm's-length transactions between independent buyers and sellers.

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Article 14 contemplates the use of market-determined prices as the appropriate benchmark for measuring the adequacy of remuneration. Accordingly, when prices are distorted in the subsidy country (due to, for example, government intervention), being able to use out-of-country benchmarks is critical to the proper functioning of the agreed disciplines on subsidies.

2. *The Appellate Body Has Imposed Additional Obligations on WTO Members to Use Out-of-Country Benchmarks*

In *US – Softwood Lumber IV*, the Appellate Body reasoned that the private prices from arms-length transactions in the country of provision are the “primary” benchmark. The Appellate Body recognized, however, that it may be necessary to use a market-determined price from outside the country of provision when no market-determined price is available in the country of provision. When doing so, an investigating authority must ensure that such an out-of-country benchmark relates to the prevailing market conditions for the good or service in question in the country of provision.

In later disputes, such as the 2014 reports in *US – Carbon Steel (India)* and *US – Countervailing Measures (China)*, the Appellate Body reversed course. The Appellate Body imposed on investigating authorities an obligation to consider not only evidence of private market prices, but also government prices in establishing a benchmark, unless those prices are shown to be non-market prices. But where private prices from an arms-length transaction exist, there would not be a need to also examine government prices to determine the “market” price. Furthermore, including government prices presents a risk of introducing distortions into the benchmark. Comparing a government entity’s price to its own price is circular and uninformative, and it is not clear why an investigating authority should be required to explain that proposition any further. Yet, the Appellate Body has determined that such further explanation is necessary. Specifically, the reports would require the application of quantitative analysis to government prices to establish distortion. The Appellate Body has never explained how such a quantitative analysis might be undertaken.

An appellate report issued within the last year demonstrates that the Appellate Body’s erroneous approach to benchmarks may make it all but impossible for Members to use WTO tools to counteract subsidies provided by China and other non-market economies that damage U.S. workers and businesses. Specifically, in *US – Countervailing Measures (China) (21.5)*, the appellate report found that – notwithstanding that China uses SOEs to subsidize and distort its economy – the investigating authority must use distorted Chinese prices to measure subsidies, unless the authority provides even more analysis than the hundreds of pages in these investigations. This conclusion ignores the findings of the World Bank, OECD working papers, economic surveys, and other objective evidence, all cited by the U.S. investigating authority in the determinations at issue.²⁴⁵

²⁴⁵ *US – Countervailing Measures (Article 21.5 – China) (AB)*, para. 5.252 (“The Benchmark Memorandum and Supporting Benchmark Memorandum, together with the underlying evidence in support of the USDOC’s conclusions, ran to hundreds of pages.”).

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Notably, one of the three Appellate Body members serving on the division that issued this report took the unusual step of issuing a public dissenting opinion. Addressing the use of out-of-country benchmarks under Article 14(d) of the Subsidies Agreement, the dissent stated that “[t]his should have been a relatively simple issue for the Appellate Body to decide on appeal, for the Panel did not do its job in reviewing the USDOC record, and applied the wrong legal standard.”²⁴⁶ But “[r]ather than reviewing the Panel’s findings to determine whether the Panel had erred in its interpretation and application of Article 14(d), it seems . . . that the majority instead engaged in its own review of the USDOC’s determinations and, based on that review, upheld the Panel’s findings that were based on the wrong legal standard and reflected virtually no engagement with the USDOC’s determinations.”²⁴⁷ Instead of undertaking “an analysis of the reasoning provided by the Panel,” the majority “effectively acted as a panel in the first instance, and, having done that, articulat[ed] an incoherent legal standard.”²⁴⁸

As an initial matter, the compliance panel first considered and correctly rejected China’s argument that out-of-country benchmarks could be used only if domestic prices were effectively determined by the government.²⁴⁹ The compliance panel report, like the appellate report, correctly found that Article 14(d) does not support such an interpretation – and there is no dissent on that point.²⁵⁰

The compliance panel, however, then proceeded to find that Commerce had failed to “explain how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price.”²⁵¹ The compliance panel never questioned the extensive evidence Commerce relied on, but rather faulted Commerce because it did not rely upon a quantitative price analysis. By limiting itself to such an approach, the compliance panel set aside, without examining Commerce’s comprehensive analysis of the evidence, that these prices in China cannot be considered market-determined.²⁵²

²⁴⁶ *Id.* at para. 5.268.

²⁴⁷ *Id.* at para. 5.256.

²⁴⁸ *Id.* at paras. 5.256, 5.268.

²⁴⁹ *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.174 (2018).

²⁵⁰ *See id.* at para. 7.174; *US – Countervailing Measures (Article 21.5) (AB)*, para. 5.148 (2019). *See also, id.* at para. 5.249 (“I concur with the majority in rejecting China’s interpretation of Article 14(d) of the Subsidies Agreement, including China’s claim that circumstances justifying recourse to out-of-country prices are limited to those in which the government ‘effectively determines’ the price at which a good is sold.”).

²⁵¹ *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.204-206 (2018). *See also, id.* at para. 7.223.

²⁵² The dissent in the appellate report explains that “only a meaningful examination by the Panel of the USDOC’s analysis, reasoning, and underlying evidence could allow for a conclusion as to whether or not the USDOC provided in this case a sufficient explanation for its decision to have recourse to out-of-country prices. Yet, the Panel did not carry out any such review of the USDOC’s analysis.” *US – Countervailing Measures (Article 21.5 – China) (AB)*, para. 5.255 (italics in original) (citation omitted) (2019).

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As the United States explained during the appeal, “[i]t appears that the compliance Panel understood its approach to be based on the approach that the Appellate Body has articulated, particularly in *US – Carbon Steel (India)*. However . . . the compliance panel misconstrued the Appellate Body’s approach in that report.”²⁵³ In doing so, the compliance Panel examined the USDOC’s determinations by looking only for a single kind of price analysis, specifically, one that would demonstrate the “deviat[ion]” from “in-country prices” and “a market-determined price.”²⁵⁴ Effectively, the compliance panel considered that the only way to show whether price is a valid benchmark price is to compare it to a valid benchmark price.

Of course, when there is no valid benchmark price, that approach makes no sense. And such a nonsensical interpretation of Article 14(d) cannot be the correct interpretation. Yet the compliance panel believed it was following what the Appellate Body had said in prior reports. The United States highlighted this misapprehension in the appeal and explained that “[t]he compliance panel’s confusion suggests . . . that the Appellate Body should take this opportunity to clarify its articulation of the proper approach under Article 14(d) and, if necessary, modify that approach” to ensure that panels can apply it in a manner that reflects the correct interpretation of that provision. Yet instead of clarifying the matter, the two individuals comprising the majority committed the same error as the compliance panel. Both findings purport not to require a quantitative price analysis; but in effect both require exactly that.

The dissent sets out how the compliance panel and the majority erred by “effectively reading Article 14(d) as imposing an obligation on investigating authorities to always justify recourse to out-of-country prices through a quantitative analysis of in-country prices themselves, regardless of whether those prices have already been found to be distorted, including in cases where they have not even been placed on the record.”²⁵⁵ The dissent also illustrates how both the compliance Panel and the majority dismissed the “extensive qualitative analysis” as inadequate while they never engaged with or questioned the validity of the evidence.²⁵⁶

Ultimately, the compliance panel in this dispute sought to avoid error by simply reciting what prior appellate reports have said about benchmarks. But in doing so the compliance panel failed to interpret the text of Article 14(d) and to consider whether it was applying an interpretation that made any sense under the facts of this case. And it is that kind of approach that leads panels to confusion and error when they simply attempt to apply what the Appellate Body has said in prior

²⁵³ See U.S. Appellant Submission, para. 81.

²⁵⁴ See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.204 (2018).

²⁵⁵ *US – Countervailing Measures (Article 21.5 – China) (AB)*, para. 5.250 (2019).

²⁵⁶ *Id.* at para. 5.252. The dissent explained that “somehow, the Panel discarded the entire reasoning and supporting evidence in the Benchmark Memorandum and Supporting Benchmark Memorandum in a single paragraph, characterizing the USDOC’s determinations as ‘not even [an] attempt’ to provide an explanation as to why in-country steel prices are not market-determined. And the majority, writing more extensively, upheld the Panel.” *Id.* at para. 5.253.

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reports as if those words constitute “precedent” that must be followed absent “cogent reasons.”²⁵⁷ Taking this approach led the compliance panel to forego engaging with the question at issue and thus appeared to encourage the Appellate Body to step in the shoes of the panel at the appellate stage and, “[i]n this way . . . assume[] the role of a panel in drawing conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the Panel.”²⁵⁸ As the dissent points out, “that would appear to exceed the Appellate Body's mandate.”²⁵⁹

3. *The Appellate Body's Approach to Out-of-country Benchmarks Has Made It Very Difficult for Market Economies to Combat Subsidies Provided by Non-Market Economies*

The effectiveness of WTO subsidies disciplines are seriously undermined by the Appellate Body's erroneous approach to Article 14(d). By raising the bar higher and higher, the Appellate Body is establishing a standard for measuring subsidies that may be impossible to meet. This would especially be the case in an economy dominated by state-owned enterprises; the greater the extent of government economic distortion, the harder it will be to find a market-determined price. The Appellate Body's approach diminishes the rights of WTO Members to counteract subsidies that are resulting in harm to their workers and businesses and imposes additional obligations that are not found in the text of the SCM Agreement.

²⁵⁷ See *Id.* at para. 5.244 (“I believe the continuing lack of clarity as to what is a ‘public body’ represents an instance of undue emphasis on “precedent”, which has locked in a flawed interpretation that has grown more confusing with each iteration, as litigants and Appellate Body Divisions repeated the original flaw while trying to navigate around it. That is what I believe the majority has done here.”) (citations omitted).

²⁵⁸ *Id.* at para. 5.256.

²⁵⁹ *Id.*

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E. The Appellate Body's Non-Text-Based Interpretation of Article XIX of the GATT 1994 and the Safeguards Agreement Undermines the Ability of WTO Members to Use Safeguards Measures

- WTO Members specifically reserved for themselves the right to impose safeguard measures to protect their industries from import surges that cause or threaten to cause serious injury.
- The Appellate Body has diminished this right by inventing additional requirements for the imposition of safeguards that Members never agreed to.
- For example, the Appellate Body has found that prior to taking a safeguard action, a Member's competent authority must include in its report a demonstration of the existence of "unforeseen developments," despite the absence of any such requirement in the GATT 1994 or the Safeguards Agreement.
- The Appellate Body has also departed from the WTO agreements in creating a high threshold for serious injury determinations under the Safeguards Agreement.
- Through the imposition of new obligations, the Appellate Body has rendered legitimate safeguard measures significantly more difficult to defend.

Safeguard measures provide a crucial means for WTO Members to protect their industries from import surges (including surges that would destroy domestic industry). WTO Members specifically reserved for themselves the right to impose such measures and established rules for the application of such measures in the WTO Agreement on Safeguards ("Safeguards Agreement").

1. *The GATT and the Safeguards Agreement Reflect the Agreed Rules for Safeguard Measures*

Article XIX:1(a) of the GATT 1947 provides as follows:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

As with most obligations in GATT 1947, panels evaluated compliance with Article XIX by examining, after the fact, whether the conditions justified a contracting party's decision to

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suspend an obligation or withdraw or modify a concession. Parties to the proceeding could rely on information and findings from their domestic proceedings, or introduce new evidence and make new arguments to defend their actions.

The WTO Agreement incorporated Article XIX of the GATT 1947 substantively unchanged into the GATT 1994, but added the Safeguards Agreement to “establish[] rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.”²⁶⁰ The Safeguards Agreement set out standards for determining when serious injury existed. The Safeguards Agreement also set forth a requirement that a Member apply a safeguard measure only after an investigation by the competent authorities of that Member “to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under terms of the Agreement.”²⁶¹ Article 3.1 provides that “[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.” The Safeguards Agreement does not mention “unforeseen developments” or require the competent authorities to evaluate whether serious injury is “as a result of unforeseen developments” for purposes of Article XIX of the GATT 1994.

2. *The Appellate Body Has Created Additional Obligations for Imposing Safeguard Measures*

In 2001, in *US – Lamb Meat*, the Appellate Body proclaimed (1) that the WTO Member taking safeguard action must publicly demonstrate unforeseen developments as a matter of fact before applying a safeguard measure and (2) that the demonstration must have appeared in the report of the competent authorities.²⁶² Neither of these determinations is based on the text of Article XIX. Indeed, the Appellate Body admitted that “Article XIX provides no express guidance” on the issue of “when, where or how this demonstration should occur.”²⁶³ Undaunted, the Appellate Body based its new determination on “instructive guidance” that it drew from its own findings in earlier safeguard disputes. The Appellate Body’s approach was erroneous. The Appellate Body took a statement from one of its earlier reports, that unforeseen developments are circumstances that “must be demonstrated as a matter of fact,” and used this phrase in a different context to create an entirely new and additional obligation that is not in Article XIX or the Safeguards Agreement.

The lack of “guidance” on this issue in Article XIX and the absence of any reference to “unforeseen developments” in the Safeguards Agreement demonstrates that WTO Members have not consented to be bound by any particular approach. The United States and other Members

²⁶⁰ Agreement on Safeguards, Article 1.

²⁶¹ Agreement on Safeguards, Articles 3.1 and 4.2(a).

²⁶² *US – Lamb (AB)*, para. 72 (2001).

²⁶³ *Id.*

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have given the Appellate Body no authority to use its own prior reports to create obligations that do not appear in the text that Members agreed to.

First, Article XIX does not require a “demonstration.” As with other trade remedies covered by the GATT 1994, Article XIX merely specifies the conditions that justify an action. Thus, a need to “demonstrate” that the conditions exist could arise only if and when another WTO Member challenges the action’s consistency with the relevant condition in Article XIX. By requiring a “demonstration” before application of a safeguard measure, the Appellate Body’s approach appears to reverse the normal burden of proof in dispute settlement proceedings – that the complaining WTO Member bears the burden to show that serious injury was not “a result of unforeseen developments.” The Appellate Body ignored this, and instead required that the WTO Member maintaining a safeguard measure bear the burden of demonstrating the existence of unforeseen developments before another WTO Member even challenged the safeguard measure.

Second, the Appellate Body states that the “demonstration” must be made by a WTO Member’s competent authorities, and in their published report, and not by any other official of the WTO Member or in any other manner. But Article XIX makes reference neither to competent authorities nor to published reports, two concepts that originate in the Safeguards Agreement, not in Article XIX. And, the Safeguards Agreement charges the competent authorities with the investigation of serious injury – not the other elements of Article XIX. For example, in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, the Appellate Body correctly found that there is no obligation for the competent authorities to make findings justifying the type and extent of a safeguard measure. There is simply no textual basis for the Appellate Body’s conclusion in *US – Lamb Meat* that Article XIX requires the competent authorities to make any finding on unforeseen developments in their report.

The Appellate Body supports its interpretation by claiming that any other approach would leave the means for complying with Article XIX “vague and uncertain. This is simply not true. WTO Members take most measures without providing an advance demonstration of consistency with the WTO. A WTO Member challenging a safeguard measure must prove that a measure fails to meet one of the relevant requirements, and the Member applying that measure needs to demonstrate consistency only to the extent that the complaining WTO Member has proven its case. The same approach should apply to those elements of Article XIX, like unforeseen developments, that the Safeguards Agreement requires to be subject to the investigation and determination of the competent authorities. In any event, it is outside the mandate of the Appellate Body to elaborate on the text to satisfy the Appellate Body’s own sense of what is “clear” or “certain.” That is a task that WTO members reserved for themselves. Article 3.2 of the DSU is quite clear on this point.

Other Members also have criticized the Appellate Body’s reasoning as well. As Korea explained in statements to the General Council, the Appellate Body’s reasoning left Members with “an ambiguous requirement to demonstrate the existence of ‘unforeseen developments’ [that was] not in line with the drafters’ intention.” Korea also noted that the drafting history of the Safeguards Agreement demonstrated that “it would be unreasonable to conclude that the negotiators had left an essential requirement in Article XIX of GATT 1994 and had not included

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it in the new Agreement, which was meant to be the final embodiment of the rules on safeguards.”²⁶⁴

The Appellate Body also strayed from the text of Article XIX and the Safeguards Agreement in *US – Wheat Gluten* in 2000, and *US – Line Pipe* in 2002. In these proceedings, the Appellate Body imposed a heightened threshold on the serious injury determinations by the competent authorities.

Article 4.2(a) of the Safeguards Agreement provides for the competent authorities to conduct “an investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement.” It instructs them to “evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry,” and lists several of these. Article 4.2(b) of the Safeguards Agreement then provides:

The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

Relying on a negative obligation not to attribute injury from other causes to imports, the Appellate Body fashioned an affirmative requirement to analyze not only the nature of other factors, but to identify their “extent” and then “separate and distinguish” the effects of other factors from the effects of increased imports. The Appellate Body could even be understood to have suggested that the extent of injury from other factors should be mathematically ascertained so as to precisely separate and distinguish the injury.²⁶⁵ None of these additional requirements appear in the treaty text. The Appellate Body’s erroneous approach could also be understood to prevent an investigating authority from evaluating the injury caused by other factors and then examining whether that injury attenuates the causal link between the increased imports and serious injury. This would diminish the rights of WTO Members to take safeguard action in the circumstances set out in GATT 1994 Article XIX and the Safeguards Agreement.

²⁶⁴ Dispute Settlement Body, Minutes of the Meeting Held on January 12, 2000, WT/DSB/M/73 (4 February 2000); accord T. Raychaudhuri, *The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance*, 11 Estey Ctr. J. Int’l Law and Trade Pol’y 302, 314 (“The addition of such a requirement does not appear to be at all consistent with the intent of the negotiators in the Uruguay Round. In fact, a perusal of the negotiating history reveals that the draft version of the AS did contain the unforeseen developments clause. By mid-1990, however, the clause was omitted from the draft, while other conditions of Article XIX were repeated almost verbatim.”).

²⁶⁵ See *US – Lamb (AB)* (2001), para. 130 (“[t]he words ‘factors of an objective and quantifiable nature’ imply, therefore, an evaluation of objective data which enables the measurement and quantification of these factors.”).

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3. *The Appellate Body Has Made It All But Impossible for WTO Members to Impose Safeguard Measures*

A number of safeguard measures have been challenged at the WTO and, with one exception, all have been found to be WTO-inconsistent.²⁶⁶ This is not surprising given the Appellate Body's erroneous interpretations. The additional requirements invented by the Appellate Body raise the threshold for an affirmative finding that increased imports cause serious injury to a height that makes it all but impossible to impose safeguards. Under the Appellate Body's erroneous approach, even if the imports are the most important cause of serious injury, a WTO Member may not apply a safeguard measure if its authorities did not mathematically determine and isolate the effects of other factors. These invented requirements seriously detract from WTO Members' ability to protect themselves from unforeseen surges in imports, a right clearly reserved to them in Article XIX and the Safeguards Agreement.

F. **The Appellate Body's Erroneous Interpretation of the Subsidies Agreement Limits WTO Members' Ability to Address Simultaneous Dumping and Trade-Distorting Subsidization by Non-Market Economies like China**

- The Appellate Body has invented obligations nowhere found in WTO rules when a WTO Member applies antidumping duties calculated under a non-market economy methodology and countervailing duties.
- These additional requirements, which were not agreed to by the United States and other WTO Members, impose a significant burden on WTO Members and undermine their ability to address trade-distorting subsidies by non-market economies.

WTO rules governing the imposition of antidumping and countervailing duty measures contemplate two separate remedies to address the harms of dumped imports and subsidized imports. Where the criteria for each remedy have been satisfied, a WTO Member is permitted to impose antidumping duties up to the level of dumping and to impose countervailing duties up to the level of subsidization, as explicitly set out in the text of the respective WTO agreements. The sole limitation on the simultaneous application of antidumping and countervailing duty measures applies in certain circumstances of export subsidization.

Although the United States and other WTO Members did not agree to further rules specifically limiting the concurrent application of these remedies, the Appellate Body has invented additional obligations through an erroneous interpretation of Article 19.3 of the Subsidies Agreement. Specifically, the Appellate Body has found that a WTO Member may not concurrently impose countervailing duties and antidumping duties calculated using a non-market economy (NME)

²⁶⁶ The one exception is that China did not prevail in its challenge to a U.S. safeguard applied under a provision of China's Protocol of Accession to the WTO in the dispute *US – Tyres (China)*.

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methodology without taking affirmative steps to ensure that concurrent application does not result in what it termed “double remedies.”

The Appellate Body's approach is not consistent with the text of the WTO agreements and has significant real-world consequences for the ability of WTO Members to address subsidized imports from non-market economies.

1. WTO Rules Permit the Concurrent Application of Antidumping and Countervailing Duty Measures

The WTO agreements and their predecessors have always recognized that the dumping and subsidization of imports, where they cause injury, are distinct unfair trade practices, to which WTO Members are entitled to apply separate remedies.

Beginning with the GATT 1947, separate rules have generally governed antidumping and countervailing duty proceedings conducted by GATT Contracting Parties and WTO Members. Article VI:1 and VI:2 of the GATT 1994 permit the imposition of antidumping duties on an imported product up to the amount by which the export price is less than the “normal value” of the product. Nowhere in Article VI:1 or VI:2 is there any reference to subsidies or countervailing duties, much less any indication that they are relevant to the calculation of antidumping duties.

Similarly, Article VI:3 of the GATT 1994 permits the imposition of countervailing duties on an imported product, not in excess of the amount of the subsidy found to exist, in order to offset that subsidy. Nowhere in Article VI:3 is there any reference to dumping, nor any suggestion that the effect of the subsidies on costs or prices is relevant to the amount of countervailing duties that may be imposed.

The separate nature of the two remedies is also reflected in the Antidumping Agreement and Subsidies Agreement. No provision of either agreement restricts a WTO Member's ability to apply antidumping duties, including duties calculated using an NME methodology, and countervailing duties concurrently. Rather, each agreement disciplines a different remedy, and neither agreement conditions or limits the ability of a Member to apply a countervailing duty on whether or not the antidumping duty is calculated using an NME approach.²⁶⁷ Thus, the WTO agreements reflect the agreement of WTO Members that antidumping and countervailing duty measures are separate remedies designed to address different kinds of harmful practices, and that those remedies may be applied to the fullest extent of the dumping margin or subsidy, regardless of the existence of parallel antidumping or countervailing duty investigations.

The sole limitation on a WTO Member's concurrent application of antidumping and countervailing duty measures is found in Article VI:5 of the GATT 1994, which provides that no

²⁶⁷ Article 9.1 of the Antidumping Agreement reiterates the discretion of the importing Member to impose an AD duty at any level up to the dumping margin. Article 19.2 of the Subsidies Agreement similarly provides for an importing Member to impose a CVD at any level up to the full amount of the subsidy.

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product “shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or *export subsidization*” (emphasis added). This provision reflects, first, the understanding of WTO Members that, as a general matter, antidumping and countervailing duty measures could be applied concurrently to the same product. It is only because of this general understanding that this text, setting out an exception to that understanding, becomes necessary. Second, by its terms, Article VI:5 applies only to the circumstance in which a Member conducting concurrent antidumping and countervailing duty proceedings on the same product finds “the same situation of dumping or export subsidization.” The term “export subsidization” refers only to subsidies provided in respect of the exportation of a product; it does not encompass subsidies provided in respect of the manufacture or production of a product.²⁶⁸

As the only provision linking the remedy in an antidumping proceeding with the remedy in a countervailing duty proceeding, Article VI:5 reveals that WTO Members considered when it would be appropriate to constrain Members’ resort to the concurrent application of antidumping and countervailing duty remedies, and agreed that it would be appropriate only where imposing antidumping duties together with countervailing duties would compensate “for the same situation of dumping and export subsidization.” The United States and WTO Members did not agree that any other circumstances warranted a restriction on the concurrent application of these remedies. If they had, they would have provided so explicitly in the text of the WTO agreements, as they did in the case of Article VI:5.

The Tokyo Round Subsidies Code, a predecessor agreement to the Subsidies Agreement, is further evidence that WTO Members never agreed to additional restrictions on the concurrent imposition of antidumping and countervailing duty measures. Article 15 of the Code did expressly limit the ability of parties to that agreement to apply a countervailing duty concurrently with an antidumping duty calculated using an NME methodology, but WTO Members did not agree to carry that provision forward and include such a limitation in the WTO agreements. The existence of a provision in the Tokyo Round Subsidies Code specifically prohibiting the concurrent application of antidumping and countervailing duty measure in particular circumstances, followed by the absence of that provision in the Subsidies Agreement, demonstrates that such a prohibition no longer exists and confirms WTO Members never agreed to such a prohibition in the WTO agreements.

2. *The Appellate Body Has Invented Additional Requirements for the Concurrent Imposition of Antidumping and Countervailing Duty Measures*

In the dispute *US – Anti-Dumping and Countervailing Duties (China)*, China challenged the U.S. Department of Commerce’s use of an NME methodology for antidumping determinations concurrently with its determination of subsidization and imposition of countervailing duties on the same products. The panel properly rejected China’s claims, finding that China had failed to

²⁶⁸ See, e.g., GATT Article VI:3, in which Members recognize that subsidies can be provided in respect of the manufacture, production, or export of a product.

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demonstrate any inconsistency with Articles 10, 19.3, 19.4, or 32.1 of the SCM Agreement or with Article VI:3 of the GATT 1994.

The Appellate Body, however, reversed the panel's correct conclusion and instead invented an obligation to investigate and not to impose what it termed "double remedies" through the concurrent application of countervailing duties and antidumping duties calculated using an NME methodology. The Appellate Body's conclusion is based on an erroneous interpretation of Article 19.3 of the Subsidies Agreement.

Article 19.3 of the Subsidies Agreement provides that, where countervailing duties are imposed, they shall be levied in the "appropriate amounts in each case." The relevant inquiry under this provision is whether there is a correspondence between the amount of the subsidy found to exist for a producer or exporter and the amount of countervailing duties actually levied. The panel had correctly interpreted the relevant language of Article 19.3 as meaning that countervailing duties are collected "in the appropriate amounts insofar as the amount collected does not exceed the amount of the subsidy found to exist."²⁶⁹ And the panel correctly concluded that "the imposition of *anti-dumping duties* calculated under an NME methodology has no impact on whether the amount of the concurrent *countervailing duty* collected is 'appropriate' or not."²⁷⁰

The Appellate Body's report, however, turns this clause in Article 19.3 into an obligation concerning the investigation and calculation of the countervailing duty. The report creates a subjective standard for what is an "appropriate" amount, derived from a wide variety of unrelated provisions. None of these provisions, though, addresses the concurrent application of antidumping and countervailing duties. The Appellate Body's expansive interpretation of the term "appropriate amounts" ignores the fact that Article 19 is not concerned with the definition or calculation of countervailing duties, still less with the existence of concurrent antidumping proceedings, but rather is concerned with the "[i]mposition and [c]ollection" of countervailing duties.

The Appellate Body's interpretative approach is flawed in several other respects as well. For example, with regard to Article VI:5 of the GATT 1994, the panel had correctly noted that the provision prohibits the application of antidumping and countervailing duties to compensate for the same situation of dumping or *export* subsidization and found it significant that no similar prohibition exists in the covered agreements with respect to *domestic* subsidization.²⁷¹ The Appellate Body, by contrast, conceded that, "in the case of domestic subsidies, an express prohibition is absent" from the text of the covered agreements – but nevertheless read such a prohibition into the WTO agreements.²⁷² And with regard to the Tokyo Round Subsidies Code – and the fact that the prohibition in Article 15 of that Code was not carried forward into the Subsidies Agreement – the Appellate Body report found this irrelevant, even though in other

²⁶⁹ *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 14.128 (2010).

²⁷⁰ *Id.* at para. 14.128 (italics added).

²⁷¹ *Id.* at paras. 14.117-118.

²⁷² *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 567 (2011).

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contexts it has stated that omission of language or silence on an issue must be given some meaning.²⁷³

Commentators have also publicly criticized the Appellate Body's interpretation. For example, the Chair, lead EU negotiator, and lead Secretariat official for the Uruguay Round subsidies negotiations, expressed the concern that the Appellate Body's interpretation as attempting to "resolv[e] a problem which had never been resolved in the negotiations" and "creating a new obligation."²⁷⁴ They further criticized the interpretation as seeming to "overly rely on the term 'appropriate' in Article 19.3, read independently of its common-sense meaning in its context, giving rise to an interpretation far removed from what this provision was intended to address."²⁷⁵

3. *The Appellate Body's Flawed Interpretation of Article 19.3 of the Subsidies Agreement Adds to WTO Members' Obligations and Diminishes Their Rights by Limiting the Ability of WTO Members to Address Dumped and Subsidized Imports from NMEs like China*

The Appellate Body's flawed interpretation of Article 19.3 of the Subsidies Agreement raises significant concerns for several reasons. One is that it has been followed in subsequent disputes. In the dispute, *US – Countervailing and Anti-Dumping Measures (China)*, China alleged that the Department of Commerce failed to investigate whether a possible overlap may have resulted from the simultaneous application of antidumping duties determined using an NME methodology and countervailing duties on the same products. China's argument was based entirely on the findings of the WTO Appellate Body in the dispute *US – Anti-Dumping and Countervailing Duties (China)*. In March 2014, the panel found that the United States breached Article 19.3 of the Subsidies Agreement in 25 proceedings initiated between November 2006 and March 2012 because the United States did not affirmatively investigate the alleged overlap. The panel's findings did not reflect a correct legal analysis of Article 19.3; rather, the panel invoked "cogent reasons" as a basis to simply follow the Appellate Body's erroneous interpretation.²⁷⁶

The Appellate Body's approach also has real-world consequences for WTO Members. As a result of the Appellate Body's broad reading of "appropriate amounts", the report introduces unpredictability for a Member's ability to use WTO subsidy rules to counteract subsidies that are harming its workers and businesses. Members have no certainty in determining what a future WTO panel or the Appellate Body will consider constitutes an "appropriate" amount of a countervailing duty in any given situation.

²⁷³ *Id.* at para. 579-581.

²⁷⁴ Cartland, Michael, Depayre, Gérard & Woznowski, Jan. "Is Something Going Wrong in the WTO Dispute Settlement?" *Journal of World Trade* 46, no. 5 (2012): 979–1016, at 995.

²⁷⁵ *Id.* at at 996.

²⁷⁶ *US – Countervailing and Anti-Dumping Measures (China) (Panel)*, para. 7.326 ("In the light of the foregoing, the Panel considers that the United States has not presented 'cogent reasons' to depart from the Appellate Body's prior interpretation that the imposition of double remedies is inconsistent with the obligation in Article 19.3 to levy CVDs "in the appropriate amounts in each case.") (2014). *See supra* Part II.E.

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To compound the problem, the Appellate Body's report appears to impose the burden of proving that there is no "double remedy" on the importing Member. Contrary to other situations, the exporting Member seemingly does not need to demonstrate that the countervailing duty is in excess of the "appropriate" amount in order to bring a WTO claim. The Appellate Body appears to consider that it would be enough for the exporting NME Member simply to demonstrate that both countervailing duties and antidumping duties based on an NME methodology are applied concurrently.²⁷⁷

Moreover, the Appellate Body interpretation imposes significant administrative burdens on Members' trade remedy administrators in the situation of concurrent application of countervailing duties and NME antidumping duties. Measuring the effect of a subsidy on the export price of a good and other components of the dumping margin may involve highly complex economic and econometric analysis. The difficulties associated with such measurement raise serious questions about whether Members will be able to address trade-distorting subsidies by NME Members under the approach of the Appellate Body.

As the Appellate Body's interpretation imposes new obligations that are not set out in the text of the Subsidies Agreement, this interpretation is another example of Appellate Body overreaching inconsistent with Articles 3.2 and 19.2 of the Dispute Settlement Understanding.

²⁷⁷ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 602, 605-606 (2011).

CONCLUSION

The Appellate Body's failure to comply with WTO rules and its numerous erroneous interpretations of WTO agreements have undermined the WTO dispute settlement system in several respects.

- Because the Appellate Body frequently overturns panel findings on issues large and small and increased the “precedential” significance of its decisions, most panel reports are appealed, extending the number and duration of disputes.
- The Appellate Body's claims that panels are to treat its reports as precedent, and its willingness to issue advisory opinions, have increased the complexity of appeals, delayed resolution of disputes, and encouraged additional litigation.
- By purporting to create precedent that will bind all WTO Members and by engaging in “gap-filling” on issues not directly addressed by WTO agreements, the Appellate Body has added to or diminished rights and obligations of WTO Members.
- By holding itself out as an ersatz “Supreme Court of International Trade” that creates “WTO law,” the Appellate Body has diminished the stature of dispute panelists and diminished the impact of the WTO agreements as written.

The Appellate Body was intended by negotiators as a check in the rare event a panel report contained an egregious error, and it was one element underlying Members' willingness to accept adoption of panel reports by negative consensus (unlike under the GATT 1947). Clearly, the Appellate Body, enabled by far too many Members unwilling to stand up for their rights, has moved far away from that role. By continuously expanding the scope of issues that it will review on appeal, whether factual or legal, the Appellate Body has essentially become analogous to a second panel (albeit with more staff and longer hearings). As detailed in this Report, there is no basis to conclude that Appellate Body reports will not themselves contain serious errors. Indeed, the Appellate Body's warning to panels to follow prior Appellate Body reports means that, where the Appellate Body has erred, the incorrect interpretation of the WTO agreements will persist and compound over time.

Further, there is no basis to assume that individuals appointed to the Appellate Body will be more qualified than those serving on panels. Indeed, individuals appointed to panels often have had more experience in the WTO system, including with disputes, and with the types of issues involved in disputes, than those appointed to the Appellate Body. And the WTO Secretariat supporting the work of the panelists generally is deeply engaged in the activities of the WTO, including the work in WTO Committees monitoring WTO Members' trade regimes and the negotiations for new WTO rules, whereas the Appellate Body Secretariat does not engage in those functions and has more limited experience. As a result, the WTO dispute settlement system has been weakened. Disputes are taking longer, WTO rights and obligations are not respected, and there is diminished confidence in the results of a dispute.

If the WTO dispute settlement system is to remain viable, it must be returned to the role WTO Members assigned to it in the WTO agreements. The Appellate Body was created to serve

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Members and their interests, and to do so by assisting WTO Members in the resolution of trade disputes and applying the WTO agreements as written. It has strayed far from that role.

Some WTO Members have issued proposals to revise certain Appellate Body procedures. Several of these proposals would take the form of additional guidelines reiterating that panels and the Appellate Body should follow the rules established by Members. But concerns with the functioning of the Appellate Body cannot be effectively addressed if Members fail to grapple with the underlying problems. Honest and candid dialogue about how and why the WTO arrived at the current situation is necessary if any reform is to be meaningful and long lasting. This will require WTO Members to engage in a deeper discussion of why the Appellate Body has felt free to depart from what Members agreed to. Without this understanding, there is no reason to believe that simply adopting new or additional text, in whatever form, will solve these endemic problems.

* * *

As noted, the purpose of this Report is not to propose solutions to the problems facing the WTO dispute settlement system. Rather, its purpose is to provide a thorough examination of the Appellate Body's failure to comply with the WTO Agreements. To this end, this Report has detailed the repeated failure of the Appellate Body to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements. It has also highlighted several examples of how the Appellate Body has altered Members' rights and obligations through erroneous interpretations of WTO agreements.

The United States has raised concerns with the functioning of the Appellate Body for more than 20 years. For too long, these concerns have been ignored, the problems have grown worse, and the WTO dispute settlement system has suffered as a result. WTO Members must come to terms with the failings of the Appellate Body if we are to achieve lasting and effective reform of the WTO dispute settlement system. The United States will engage with any WTO Member committed to restoring the WTO dispute settlement system to the role given to it by WTO Members and ensuring that the dispute settlement system supports, rather than weakens, the WTO as a forum for discussion, monitoring, and negotiation.

Appendix A1

Appendix A1: Statements by Members of the United States Congress Expressing Concerns with Appellate Body Overreaching

Examples of public statements of concern by current or former members of the United States Congress include:

- (1) Senator Chuck Grassley (R-Iowa) (2019):

There have been bipartisan concerns raised by numerous American administrations about systemic issues with the WTO Appellate Body. ... I wish U.S. concerns would have been resolved before today, but that didn't happen. I hope this provides the impetus for WTO members to seriously address the issues raised by the United States. I have said before that the WTO's success depends on members acknowledging its shortcomings and working together to address our goals to strengthen the institution.¹

- (2) Senator Chuck Grassley (R-Iowa) and Senator Ron Wyden (D-Oregon) (2019):

[W]hile the WTO serves as a forum to settle disputes among its members, we have serious concerns about the degree to which the system is working. The Appellate Body -- the quasi-judicial review forum used to take a second look into dispute decisions -- has long strayed off course from its original form and function. Our concerns about systemic and procedural problems with the Appellate Body are not new, nor are they partisan. US presidents on both sides of the aisle have taken issue with Appellate Body members addressing issues that were not raised by the parties to involved in the dispute, taking longer than 90 days to decide appeals, and creating new rights and obligations for WTO members -- all against the terms of the Dispute Settlement Understanding.²

- (3) Representative Kevin Brady (R-Texas) (2019):

We must also reform the World Trade Organization to address non-market economies in meaningful ways, fix Appellate Body overreach, and move ambitious negotiations on e-commerce with those countries that are ready.³

I strongly support the WTO because it serves our interests to lead in setting and enforcing high-standard trade rules. But it's been clear for many years that reform is way overdue to modernize the organization, increase transparency, and address how it has strayed from its mandate, particularly with respect to the Appellate Body. The United States has been

¹ Senator Grassley, Statement on WTO Appellate Body Losing Quorum, December 10, 2019, available at <https://www.grassley.senate.gov/news/news-releases/grassley-statement-wto-appellate-body-losing-quorum>.

² Senator Grassley and Senator Wyden, "The World Trade Organization is faltering. The US can't fix it alone", October 10, 2019, available at <https://www.grassley.senate.gov/news/commentary/grassley-wyden-op-ed-world-trade-organization-faltering-us-can-t-fix-it-alone>.

³ Brady Opening Statement at Full Committee Hearing on The 2019 Trade Policy Agenda, available at <https://kevinbrady.house.gov/news/documentsingle.aspx?DocumentID=404606>

raising these issues through multiple Administrations, and far too often other WTO members have been unwilling to address these concerns. And even while insisting that these concerns be addressed, the United States appropriately remains fully engaged in all aspects of the WTO's work, including negotiations, transparency, and dispute settlement.⁴

(4) Senator Sherrod Brown (D-Ohio) (2017):

As this report shows, in decision after decision, the WTO has ruled against the U.S. and weakened our laws designed to fight back against subsidies and illegal dumping.... Rather than providing American steel companies with a way to crack down on Chinese cheating, the WTO has undermined the tools our businesses need to defend themselves and their workers. We need a reset of our trade relationship with China, starting with a reset at the WTO. This is something I've called for, and I'm encouraged by the news from the White House this week that they're preparing a plan to bypass the WTO and take direct action against China and other countries where we have trade disputes.⁵

(5) Senator Ron Wyden (D-Oregon) and Representative Sander Levin (D-Michigan) (2016):

Closer cooperation on issues of interpretation of the WTO Agreements is critical not only to ensuring strong trade enforcement but also to ensuring that WTO panels and the Appellate Body do not add to or diminish our respective rights and obligations under the agreements. The concerns that resulted in the recent U.S. action to exercise its rights under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") to oppose the reappointment of a member of the Appellate Body are in many respects the same concerns that have been expressed repeatedly by Congress. Since the early years of the WTO, Congress has urged U.S. representatives to ensure that the Appellate Body applies the WTO Agreement as written, without adding to or diminishing rights and obligations under the Agreement. This bedrock principle is the foundation on which U.S. participation in the WTO is based, and must be respected for Congress to continue to have confidence in the system.

The integrity and viability of the WTO depend critically on a healthy, well-functioning dispute settlement system that applies the pertinent WTO agreement as written to help Members resolve a particular dispute. We note that Administrations of both political parties in the United States have raised this concern over a substantial period of time and in relation to a significant number of reports. These concerns relate to both the

⁴ Brady Opening Statement at Full Committee Markup of WTO Resolution and USMCA Implementing Legislation, available at <https://gop-waysandmeans.house.gov/brady-opening-statement-at-full-committee-markup-of-wto-resolution-and-usmca-implementing-legislation/>

⁵ Brown Unveils New Report Highlighting How WTO Undermines U.S. Trade Enforcement, Hurts American Workers, Senator Sherrod Brown Press Release, March 1, 2017.

interpretations reached and the adjudicative approach employed by the Appellate Body and some panels.⁶

- (6) Senator Charles Schumer (D-New York), Senator Sherrod Brown (D-Ohio), Representative Sander Levin (D-Michigan), and Representative Jim McDermott (D-Washington) (2011):

[W]e disagree fundamentally with the “zeroing” Appellate Body decisions. They impose obligations on the United States that are not found anywhere in the WTO Antidumping Agreement. The WTO Appellate Body has no authority to create and impose new rules on WTO Members. As Article 19 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) states unequivocally “the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.” The only role of the WTO dispute settlement system is to “*clarify existing provisions* of those agreements. . . .” (DSU Article 3, emphasis added)

The Obama Administration must engage in vigorous efforts to reestablish the appropriate boundaries of Appellate Body review, consistent with the mandate set down by WTO Members in the DSU. The critical need for such a correction is becoming increasingly apparent. Indeed, even this year, the Appellate Body imposed restrictions that have no basis in the WTO agreements with respect to: (1) the simultaneous application of subsidy and antidumping disciplines to non-market economy (NME) producers and (2) the identification of a “public body” for purposes of the WTO subsidy disciplines. These decisions raise serious concerns that the WTO Appellate Body is undercutting U.S. ability to address unfair and anti-competitive practices by countries such as China, and undermine confidence in WTO dispute settlement. We cannot afford further such decisions in the future.⁷

- (7) Senators Bob Casey (D-Pennsylvania), Sherrod Brown (D-Ohio), Olympia Snowe (R-Maine), Tom Harkin (D-Iowa), Carl Levin (D-Michigan), Rob Portman (R-Ohio), Debbie Stabenow (D-Michigan), Ron Wyden (D-Oregon), Jay Rockefeller (D-West Virginia), Kirsten Gillibrand (D-New York), Ben Cardin (D-Maryland), Amy Klobuchar (D-Minnesota), Al Franken (D-Minnesota), Jeanne Shaheen (D-New Hampshire), Claire McCaskill (D-Missouri), Susan Collins (R-Maine), Joe Manchin (D-West Virginia), Mark Pryor (D-Arkansas), Lindsey Graham (R-South Carolina), Dan Coats (R-Indiana), Richard Blumenthal (D-Connecticut), and Jeff Merkley (D-Oregon) (2011):

⁶Letter to Cecilia Malstrom and Rep. Michael Froman, 114th Congress, July 21, 2016, available at <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/July%2021%20Letter.pdf>.

⁷ Letter to USTR Ronald Kirk and Commerce Secretary John Bryson, “Levin, McDermott, Schumer, Brown Express Concerns Regarding Elimination of ‘Zeroing’ in Administrative Reviews,” Press Release by The Committee on Ways and Means, United States House of Representatives, 112th Congress, First Session, November 29, 2011, available at <https://waysandmeans.house.gov/media-center/press-releases/levin-mcdermott-schumer-brown-express-concerns-regarding-elimination>.

We are writing to express our great concern with the World Trade Organization Appellate Body's recent decision regarding application of our anti-subsidy law to China, and to urge that the Administration take all steps necessary to rectify this ruling, including through negotiations in the Doha Round, and to ensure that our countervailing duty law remains fully and effectively applicable to China. We agree with you that this decision "appears to be a clear case of overreaching by the Appellate Body."

....

This recent Appellate decision reversed the key aspects of a WTO panel decision that had strongly upheld U.S. trade remedy laws and their applications.

....

This is not the first instance of WTO overreach, and allowing other countries to obtain benefits via litigation that they could not secure through negotiations. The WTO's action in this case, if implemented, would have a direct and adverse effect on U.S. trade laws without the U.S. government ever having accepted these rules. During prior WTO negotiations, the U.S. government made clear that settlement panels should defer to national authorities such as the Department of Commerce and the U.S. International Trade Commission, bodies that have been explicitly dismissed in this WTO decision.

U.S. trade remedy laws provide critical support to U.S. manufacturers, farmers, and producers. However, this most recent WTO decision is a grave threat to efforts to restore long-term growth and job creation in U.S. manufacturing. Massive Chinese government subsidies are making it very difficult for U.S. manufacturing to compete... We need to work together to defend American jobs and ensure that our trade laws are not dismissed by the WTO.

(8) Representative Sander Levin (D-Michigan) (2011):

We will need to study the Appellate Body's reasoning before reaching any conclusions, but the Appellate Body's findings are deeply disappointing. The earlier panel report was well-reasoned. The Appellate Body's findings will make it more difficult for market economy countries to confront the trade distortions inherent in the troubling trend toward 'state capitalism.'⁸

(9) Representative Jim McDermott (D-Washington) (2011):

Unfortunately, this is not the first time the Appellate Body has appeared to ignore the text of an agreement reached between WTO Members on issues related to trade remedies. I've only seen the preview of this decision, but I fear this is the same movie we saw in the zeroing cases. The WTO is an extremely important international institution. But Appellate Body overreach will only undermine confidence in the WTO

⁸ "Levin, McDermott React to WTO Decision on Countervailing Duty Dispute," Press Release by The Committee on Ways and Means, United States House of Representatives, 112th Congress, First Session, March 11, 2011, available at <https://waysandmeans.house.gov/media-center/press-releases/levin-mcdermott-react-wto-decision-countervailing-duty-dispute>.

as an institution – and will only make it more difficult to reach new agreements to liberalize trade.⁹

- (10) Rep. Sander M. Levin (D-Michigan), Sen. Sherrod Brown (D-Ohio), Rep. John Dingell (D-Michigan), Sen. Carl Levin (D-Michigan), Rep. Dale E. Kildee (R-Michigan), Sen. Charles E. Schumer (D-New York), Rep. Marcy Kaptur (D-Ohio), Sen. Debbie Stabenow (D-Michigan), Rep. Peter Defazio (D-Ohio), Sen. Benjamin L. Cardin (D-Maryland), Rep. Louise M. Slaughter (D-New York), Sen. Amy Klobuchar (D-Minnesota), Rep. Dennis Kucinich (D-Ohio), Sen. Al Franken (D-Minnesota), Rep. Tim Ryan (D-Ohio), and Sen. Jay Rockefeller (D-West Virginia) (2011):

Both the Obama and George W. Bush Administrations repeatedly expressed disagreement with a series of decisions by the WTO Appellate Body on the practice of “zeroing” which, if implemented, would weaken the ability of U.S. companies and their workers to obtain redress for illegal, injurious dumping of foreign product into the U.S. market. Members of Congress from both parties joined with these Administrations in criticizing those decisions, which read new obligations into the text of existing agreements, are devoid of legal merit, and represent clear overreaching by the WTO’s Appellate Body.

....

At all times, but certainly at this critical time in our economy, we must ensure that our trade laws provide effective remedies against foreign unfair trade practices. We must ensure that the WTO dispute settlement system operates within the limitations that were established for it in 1994 by our negotiators and approved by Congress in implementing legislation. With the zeroing decisions, the WTO’s Appellate Body overreached its mandate, jeopardizing U.S. interests and undermining confidence in the system.¹⁰

- (11) Representatives Charles Rangel (D-New York) and Sander Levin (D-Michigan) (2009):

The Appellate Body mistakenly asserts the authority to resolve disagreements that the WTO Members were unable to resolve through negotiation. It has rejected the notion that the WTO Members could agree to disagree and move forward on areas of agreement and leave areas of disagreement for future negotiations.

In fact, there are times when the text of an agreement simply does not address an issue. In those cases, the Appellate Body must recognize that sovereign nations simply have not bound themselves. Indeed, they expressly agreed that the recommendations and rulings

⁹ “Levin, McDermott, React to WTO Decision on Countervailing Duty Dispute,” Press Release by The Committee on Ways and Means, United States House of Representatives, 112th Congress, First Session, March 11, 2011, available at <https://waysandmeans.house.gov/media-center/press-releases/levin-mcdermott-react-wto-decision-countervailing-duty-dispute>.

¹⁰ Letter from Members of Congress (Sander M. Levin, Sherrod Brown, John Dingell, Carl Levin, Dale E. Kildee, Charles E. Schumer, Marcy Kaptur, Debbie Stabenow, Peter Defazio, Benjamin L. Cardin, Louise M. Slaughter, Amy Klobuchar, Dennis Kucinich, Al Franken, Tim Ryan, and Jay Rockefeller) to USTR Ron Kirk and Commerce Secretary Gary Locke, February 17, 2011.

of the WTO's Dispute Settlement Body cannot add to, or diminish, the rights and obligations provided in the WTO agreements.

Reading new obligations into the text of existing agreements will only undermine confidence in the Appellate Body and the WTO. Ultimately, this will make it more difficult to reach new agreements to liberalize trade.¹¹

- (12) Representatives Charles Rangel (D-New York) and Sander Levin (D-Michigan) (2007):

Today, for a third time, a WTO panel has confirmed what the text of the WTO Antidumping Agreement readily shows – that WTO Members never negotiated and adopted any requirement to “offset” dumped sales with non-dumped sales in administrative reviews. This is now the second WTO panel to reject the attempts by the Appellate Body impermissibly to impose such a requirement on Members.

The sole mandate of WTO dispute settlement bodies is to apply the WTO agreements as written – not to impose new rights and obligations to which Members have not agreed. The WTO panel corrects significant overreaching by the Appellate Body in this regard.

However, the WTO panel does not go far enough. The panel does not correct the equally flawed determination by the Appellate Body that an “offsetting” requirement applies in antidumping investigations. No such requirement exists in the Antidumping Agreement....¹²

- (13) Senators Jay Rockefeller (D-West Virginia), Max Baucus (D-Montana), Evan Bayh (D-Indiana), Jeff Bingaman (D-New Mexico), Sherrod Brown (D-Ohio), Robert C. Byrd (D-West Virginia), Robert P. Casey, Jr. (D-Pennsylvania), Kent Conrad (D-North Dakota), Elizabeth Dole (R-North Carolina), Blanche L. Lincoln (D-Arkansas), Mark Pryor (D-Arkansas), Harry Reid (D-Nevada), Charles Schumer (D-New York), Olympia Snowe (R-Maine), and Arlen Specter (D-Pennsylvania) (2007):

The issue of “zeroing,” the antidumping methodology used to capture the full margin of dumping and avoid the masking of unfair trade, is particularly critical. The Appellate Body's decisions on this issue have given rise to more criticism – and, indeed, ridicule – than perhaps any other area of jurisprudence in the body's history. With no change in the relevant wording of the agreements, with a long history (both before and after the adoption of the Uruguay Round agreements) of major countries employing this antidumping methodology - including 86 years of its use by the United States - and with

¹¹ “Chairmen Rangel and Levin Comment on WTO ‘Offset’ Decision,” Press Release by The Committee on Ways and Means, United States House of Representatives, 111th Congress, First Session, February 23, 2009, available at <https://waysandmeans.house.gov/media-center/press-releases/chairmen-rangel-and-levin-comment-wto-offset-decision>.

¹² “Rangel, Levin Statement Regarding WTO “Offset” Decision,” House Ways and Means Committee, Press Releases, December 20, 2007, available at <https://waysandmeans.house.gov/media-center/press-releases/rangel-levin-statement-regarding-wto-offset-decision>.

absolutely no agreement among negotiators to make any change in this area, the Appellate Body simply invented a new prohibition on the use of zeroing. This is exactly the type of action that threatens to undermine respect for the dispute settlement mechanism – and indeed for the global trading system generally. The Administration was correct in protesting that these decisions are not supported by the WTO agreements, and we urge you to restore the rights that existed at the time of the creation of the WTO.

Certain parties to the talks reportedly have suggested that negotiators should not be permitted to revisit or, in effect, reverse the Appellate Body decisions on zeroing. The faulty logic of that argument is astonishing. The Appellate Body has created new obligations to which the United States and others never agreed, and now – when negotiators are actually assembled and in a position to speak as to their intent – defenders of unfair trade would suggest that those negotiators are barred from achieving the result that was all along intended. This argument must be rejected out of hand.¹³

- (14) Representatives Charles B. Rangel (D-New York), Sander M. Levin (D-Michigan), Jim McDermott (D-Washington), John Lewis (D-Georgia), Richard E. Neal (D-Massachusetts), Stephanie Tubbs Jones (D-Ohio), John B. Larson (D-Connecticut), Bill Pascrell Jr. (D-New Jersey), Shelley Berkley (D-Nevada), Chris Van Hollen (D-Maryland), Kendrick B. Meek (D-Florida), and Lois Capps (D-California) (2007):

[W]e ask you to support legislation to be introduced next month that strengthens the enforcement of trade agreements and the preservation of U.S. rights under those agreements. The legislation will seek to pry open foreign markets to U.S. goods and services by ensuring that our trading partners play by the rules. It also will address a number of problems with the WTO dispute settlement system. A growing number of trade experts – including trade officials in your Administration – are expressing serious concerns that the WTO Appellate Body is imposing obligations on WTO Members, including the United States, that were not agreed to by those Members in the negotiations. According to a former Deputy USTR from the Reagan Administration, “the WTO dispute settlement system is veering off course and is increasingly a threat to the legitimacy of the entire body.” We would like to work with your Administration to re-establish the legitimacy and integrity of that system – a linchpin in the multilateral trading system.¹⁴

¹³ Letter from Members of Congress to USTR Susan Schwab and Commerce Secretary Carlos Gutierrez, October 11, 2007.

¹⁴ Letter from Members of Congress to President Bush, March 29, 2007, available at <https://waysandmeans.house.gov/media-center/press-releases/senior-democrats-renew-call-enforcement-trade-laws>.

- (15) Representatives Nancy Pelosi (D-California), Charles Rangel (D-New York), John B. Lewis (D-Georgia), Michael R. McNulty (D-New York), Stephanie Tubbs Jones (D-Ohio), Rahm Emanuel (D-Illinois), Kendrick Meek (D-Florida), Steny H. Hoyer (D-Maryland), Sander M. Levin (D-Michigan), Richard E. Neal (D-Massachusetts), Xavier Becerra (D-California), John B. Larson (D-Connecticut), Chris Van Hollen (D-Maryland), and Allyson Y. Schwartz (D-Pennsylvania) (2007):

[W]e must act without any further delay against the following specific barriers and practices, including... [e]nforcing U.S. trade remedy laws vigorously, including by maintaining the ability of the United States to address strategic dumping through the continued use of the zeroing methodology, as provided for under the WTO rules as written....

Let us be clear. Congress is prepared to approve a strong and ambitious WTO agreement that achieves core U.S. objectives... and preserves (and ensures that WTO dispute settlement does not undermine) strong U.S. fair trade laws.¹⁵

- (16) Senator Max Baucus (D-Montana) and Representative Charles Rangel (D-New York) (2007):

The administration itself has called into question the validity of the Appellate Body's decision that forms the basis of your proposed modification. It circulated the following written statement on May 17, 2006:

It is troubling that even supporters of the outcome in this dispute thus perceive that it did not result from the negotiated text of the agreement, nor could it be expected to result from subsequent negotiation among the Members. The perception that the dispute settlement system is operating so as to add to or diminish rights and obligations actually agreed to by Members...is highly corrosive to the credibility [of the WTO dispute settlement system].

We agree with this assessment and are highly concerned that the Appellate Body decision at issue involves an attempt to impose unilaterally obligations on a WTO Member – in this case, the United States – without its prior consent.¹⁶

- (17) Senators Jay Rockefeller (D-West Virginia), Max Baucus (D-Montana), Larry Craig (R-Idaho), Dick Durbin (D-Illinois), Mike Crapo (R-Idaho), Robert C. Byrd (D-West Virginia), George Voinovich (R-Ohio), Kent Conrad (D-North Dakota), Lindsey Graham (R-South Carolina), Evan Bayh (D-Indiana), and Elizabeth Dole (R-North Carolina) (2006):

¹⁵ “Congressional Leaders Urge Bush to Act as 2006 Annual Trade Deficit Breaks All Time Record”, February 13, 2007, available at <https://www.speaker.gov/newsroom/congressional-leaders-urge-bush-act-2006-annual-trade-deficit-breaks-time-record>.

¹⁶ “Baucus, Rangel on WTO Rulings,” January 22, 2007, available at <https://www.finance.senate.gov/chairmans-news/baucus-rangel-on-wto-trade-rulings>.

We applaud the strong statements the U.S. put on the record in the “zeroing” dispute brought by the European Communities (EC), *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* (WT/DS294), which fully and clearly explained the logical errors in the Appellate Body report. As the first U.S. communication pointedly stated, “[t]he brevity of the [Appellate Body’s] analysis of this issue is ... difficult to reconcile with its duty to conduct a critical and searching analysis.”

....

We note that five dispute settlement panels, two under the GATT and three under the WTO, have disagreed with the Appellate Body’s conclusions on the “zeroing” issue. It is time for the Appellate Body to recognize its error and correct it. It is time for the Appellate Body to abandon the ideological approach it has taken on this issue and return to making decisions on the merits, based on WTO obligations agreed to by all parties. . . .

The Administration must continue to focus on ensuring that the effectiveness of U.S. trade remedy laws is preserved, and that misguided and overreaching WTO panel and Appellate Body decisions are reversed in the WTO Doha Round Rules negotiations, if the suspended talks resume. Unilaterally disarming in the face of Appellate Body overreaching does not serve the interests of the United States.¹⁷

- (18) Representatives Benjamin L. Cardin (D-Maryland) and Sander M. Levin (D-Michigan) (2006):

The AB decision in *United States - Laws, Regulations and Methodology for Calculating Dumping Margins: (Zeroing)* represents another example of gross overreaching by the AB and is inconsistent with the WTO Agreement on Antidumping as well as U.S. law. The decision, which is contrary to the express legal text of the Antidumping Agreement, should be fixed through an explicit re-affirmation of the previously-negotiated right to employ the critical practice of zeroing in antidumping cases....

The WTO panel and AB decisions on zeroing represent yet another example of the WTO failing to enforce one of its most fundamental requirements: namely, that neither panels nor the AB may “add to or diminish the rights and obligations” of the United States and other countries. These unjustified decisions, with the partial exception of the most recent panel decision in this area, need to be explicitly rejected, and previously negotiated rights need to be re-affirmed.¹⁸

¹⁷ Letter from Members of Congress (Jay Rockefeller, Max Baucus, Larry Craig, Dick Durbin, Mike Crapo, Robert C. Byrd, George Voinovich, Kent Conrad, Lindsey Graham, Evan Bayh, and Elizabeth Dole) to USTR Susan Schwab and Commerce Secretary Carlos Gutierrez, November 1, 2007.

¹⁸ Letter from members of Congress (Benjamin L. Cardin and Sander M. Levin) to USTR Susan C. Schwab, November 27, 2006.

- (19) Representatives Robert Aderholt (R-Alabama), Xavier Becerra (D-California), Marion Berry (D-Arkansas), Benjamin Cardin (D-Maryland), Phil English (R-Pennsylvania), Melissa Hart (R-Pennsylvania), Nancy Johnson (R-Connecticut), John Larson (D-Connecticut), Sander Levin (D-Michigan), John Lewis (D-Georgia), Jim McDermott (D-Washington), Michael McNulty (D-New York), Alan Mollohan (D-West Virginia), Richard Neal (D-Massachusetts), Robert Ney (R-Ohio), Charles Rangel (D-New York), Ralph Regula (R-Ohio), Thomas Reynolds (R-New York), Stephanie Tubbs Jones (D-Ohio), Peter Visclosky (D-Indiana), and Jerry Weller (R-Illinois) (2005):

These disciplines have already been weakened by a number of WTO dispute resolution decisions, in which panels or the Appellate Body overreached. In more than 20 decisions involving U.S. antidumping, countervailing duty and safeguard laws, panels or the Appellate Body have ignored the express terms of the pertinent WTO agreement and, in some cases, the express standard of review.¹⁹

- (20) Senators Rick Santorum (R-Pennsylvania), Max Baucus (D-Montana), Larry Craig (R-Idaho), Orrin Hatch (R-Utah), John Rockefeller (D-West Virginia), Arlen Specter (D-Pennsylvania), Blanche Lincoln (D-Arkansas), Robert Byrd (D-West Virginia), Mike DeWine (R-Ohio), Mike Crapo (R-Idaho), and Richard Durbin (D-Illinois) (2005):

Finally, Congress in 2002 was deeply troubled by the large number of disputes challenging U.S. trade remedy laws and regulations and the consistent pattern of the WTO panels and Appellate Body to create obligations not included in the agreements and never accepted by the United States. The Administration has committed to reversing that problem but the list of troubling decisions continues to mount. This problem must be effectively addressed in the ongoing negotiations.

The United States can achieve its key affirmative priorities in the WTO without trading away our trade remedy laws. At the same time, the United States should, reject changes that would, either individually or collectively, lessen the effectiveness of these critical provisions.²⁰

- (21) Rep. Charles B. Rangel (D-New York), Sen. Max Baucus (D-Montana), Rep. Amo Houghton (R-New York), Sen. Larry E. Craig (R-Idaho), Rep. Sander M. Levin (D-Michigan), and Sen. John D. Rockefeller (D-West Virginia) (2004):

¹⁹ Letter from members of Congress (Robert Aderholt, Xavier Becerra, Marion Berry, Benjamin Cardin, Phil English, Melissa Hart, Nancy Johnson, John Larson, Sander Levin, John Lewis, Jim McDermott, Michael McNulty, Alan Mollohan, Richard Neal, Robert Ney, Charles Rangel, Ralph Regula, Thomas Reynolds, Stephanie Tubbs Jones, Peter Visclosky, and Jerry Weller) to USTR Rob Portman and Commerce Secretary Carlos M. Gutierrez, May 27, 2005.

²⁰ Letter from members of Congress (Rick Santorum, Max Baucus, Larry Craig, Orrin Hatch, John Rockefeller, Arlen Specter, Blanche Lincoln, Robert Byrd, Mike DeWine, Mike Crapo, and Richard Durbin) to USTR Robert J. Portman and Commerce Secretary Carols M. Gutierrez, May 23, 2005.

We write to urge your personal attention and involvement with an important case currently before the Appellate Body of the World Trade Organization (WTO). The case offers the opportunity to overrule one of the latest and most egregious examples of a WTO panel overreaching and gap-filling in direct contravention of WTO rules.

The purpose of this letter is to convey in no uncertain terms the seriousness with which we regard the appalling record of overreach by WTO panels and the Appellate Body. We urge you in the strongest terms to ensure that this case is litigated successfully before the Appellate Body so that the practice of overreaching can be turned back and the damage done by a series of decisions – including, but by no means limited to, the area of trade remedies – can begin to be undone. Without these steps, the already significant risk will grow that such decisions will erode significantly the integrity and credibility of the WTO dispute settlement process and undermine confidence in the process in the United States and other countries.

The case at issue involves a U.S. antidumping determination on imports of softwood lumber from Canada and the methodology at issue in the case is known as “zeroing.” The simple fact is that nothing in the WTO agreement addresses, let alone prohibits, zeroing.

Remarkably, this fact was recognized by one of the panelists in the case. That panelist took the highly unusual step of writing an extensive and carefully reasoned dissent, which acknowledged that the panel had substituted its personal views for the terms of the Antidumping Agreement. The dissenter wrote that if the WTO Members wanted to negotiate more specific or different rules for this practice, “they should negotiate such rules in the appropriate forum. Dispute settlement involves the interpretation of rules agreed by Members. It cannot and must not be used as substitute for rule-making through negotiation.”

The words of this dissent are sobering. They provide both an unusual opportunity and a jurisprudentially sound roadmap for the United States to challenge this ultra vires panel decision – and for the Appellate Body to reestablish in this case the primacy of the WTO rules as written by overturning the panel this point.

The failure of the WTO panels and the Appellate Body to respect the standards of review set out in the Dispute Understanding and the Antidumping Agreement has been a persistent and growing problem. We reiterate: the problem of WTO overreaching and WTO panelists and Appellate Body members substituting their personal views for the express terms of negotiated agreements has been most clearly manifested in the context of trade remedies, but extends to a number of other areas such as introducing substantive elements of public international law.

The problem of overreaching undermines the integrity of the world trading system and threatens to jeopardize the willingness of WTO Members to enter future agreements – given the complete lack of certainty as to how those agreements will be “reinterpreted” according to the personal views of WTO panels. The fact that many of the most egregious

decisions relate to U.S. laws make this an even more appalling and unacceptable situation for the United States.

The consequences of losing the appeal are grave. We cannot afford to see another rogue decision undermining our trade remedy laws.... Conversely, a decision by the Appellate Body to reject the panel's decision on this point would provide at least a small indication that the Appellate Body is prepared to begin to change course and adhere carefully to the negotiated terms of the WTO agreements.

In sum, we strongly urge your vigorous and successful challenge to this decision. The decision adds to WTO Members' rights and responsibilities in clear violation of express WTO rules.²¹

- (22) Senator Max Baucus (D-Montana) and Representatives Charles B. Rangel (D-New York) and Sander M. Levin (D-Michigan) (2003):

We are writing to express our deep disappointment at the recent acquiescence of the United States in the reappointment of three Members of the Appellate Body of the World Trade Organization (WTO). Each of these Members has authored key decisions, and joined in many others, in which the Appellate Body has disregarded the negotiated balance of rights and responsibilities within the WTO, demonstrated improper judicial activism, and invented new obligations never accepted by the United States (or other countries) in negotiations.

In light of this fact, it is deeply dismaying to us – and somewhat puzzling – that the Office of the U.S. Trade Representative did not use this important opportunity to call for a careful and systematic examination of the decisions of the Appellate Body, including decisions authored by the three Members whose reappointments were under consideration. Further, the fact that the Office of the U.S. Trade Representative took its decision to allow the reappointment of these three Members without congressional consultation is disappointing.

This issue has particular relevance in light of the recent decision by the Appellate Body finding that U.S. steel safeguard measures are WTO-inconsistent. This decision maintains the Appellate Body's perfect record to date of not affirming a single safeguard action by a single WTO Member in almost nine years. The decision – co-authored by one of the individuals that the United States acquiesced in reappointing only last week – comes as little surprise. In the decision, the Appellate Body once again used expansive powers of interpretation to create new obligations for the United States and other countries, and thereby diminished the rights of the United States and other countries, seeking to apply safeguard measures that are expressly authorized by the negotiated agreements of the WTO.

²¹ Letter from members of Congress (Charles B. Rangel, Max Baucus, Amo Houghton, Larry E. Craig, Sander M. Levin, and John D. Rockefeller) to USTR Robert B. Zoellick, June 16, 2004.

The records of the three individuals whose reappointment the United States accepted last week – Yasuhei Taniguchi, A.V. Ganesan, and Georges Abi-Saab – raise serious questions as to the wisdom and appropriateness of their being offered the privilege to serve a second four-year term on this critically important tribunal. Repeatedly and consistently, all three have joined in decisions that, as noted, disregarded the negotiated balance of rights and responsibilities within the WTO.

The list of decisions signed by one or more of these Members covers most areas of WTO jurisprudence and includes the U.S. Cotton Yarn decision, which created new obligations in injury investigations under a judicial concept known as “substantive public international law” that is not found in a single WTO Agreement; the Japan Hot-Rolled Steel decision, which invented new requirements for antidumping cases; the Lamb Meat, Wheat Gluten, and Line Pipe cases, which imposed new and severely limiting rules for safeguard measures; and the CVD Privatization decision, which dramatically undercut the Subsidies Agreement. The three re-appointed Members have, in short, established a clear pattern of disregarding their obligation not to “add to or diminish the rights and obligations” agreed to by WTO Members.

It is difficult to understand why the Administration would approve these candidates so eagerly given that both the Congress and the Administration – most recently, in the December 30, 2002 Strategy Paper on systemic WTO dispute settlement problems – have criticized Appellate Body decisions, including the ones noted above, for improperly creating new obligations. The overreaching reflected in their decisions has already begun to erode confidence in the WTO dispute settlement system - not just by the United States but, increasingly, by other countries around the world. The failure of the Administration to question their reappointment is therefore harmful not only to our country, but performs an equal disservice to the WTO multilateral trading system.

We urge, therefore, that the United States request a special meeting of the Dispute Settlement Body (DSB) of the WTO to consider specific and concrete actions the WTO can take to address the serious problem of the WTO Appellate Body’s continuing disregard for the negotiated rights and responsibilities of WTO members. This meeting should include a particular focus on decisions that were co-authored by Messrs. Abi-Saab and Ganesan, whose current terms do not expire until June 2004. This period should provide an appropriate opportunity for a consideration of the Appellate Body’s jurisprudence, including the particular decisions noted above.²²

(23) Senator Max Baucus (D-Montana) (2003):

I am deeply disappointed that the World Trade Organization (WTO) Appellate Body today affirmed the panel decision against the United States on its steel safeguard measures. I was a primary supporter of instituting the safeguard action, and I continue to believe that American steel companies need the breathing space the safeguard allows. I

²² Letter from members Congress (Max Baucus, Charles B. Rangel, and Sander M. Levin) to USTR Robert Zoellick, November 19, 2003.

also feel strongly that the U.S. law and process in this case were entirely consistent with our WTO obligations, but the WTO's review of the case failed to accord U.S. actions sufficient deference.

The WTO's repeated failure to apply the proper standard of review undermines both the integrity of domestic trade laws and the WTO as an institution. Further, the EU's insistence on imposing retaliatory measures without observing established rules of dispute resolution compliance is unfair and counterproductive. These should be matters of concern for anyone who cares about the future of the global trading system. The safeguard remedy serves an important role as a safety valve against the flow of excessive imports. Without it, the consensus in favor of liberalization in the United States and in other countries might be seriously weakened.

This decision shows once again that the Administration needs to do something about the badly flawed WTO dispute settlement process. As a first step, the Administration should support my proposal for a WTO Dispute Settlement Review Commission. The Commission would increase the transparency of the WTO dispute settlement system by examining whether WTO decisions apply the proper standard of review and avoid creating obligations that were never negotiated.²³

(24) Senator Max Baucus (D-Montana) (2003):

Today, the General Accounting Office is releasing a report prepared at my request on the World Trade Organization's handling of trade remedy disputes. This report confirms my concern that the WTO dispute settlement process has gone badly wrong and that changes are needed to bring it back on course.

In the report, GAO finds that trade remedies imposed by the United States are two or three times more likely to be challenged – and found in violation of WTO rules – than those of other major trade remedy users. Between 1995 and 2002, U.S. trade remedy measures were challenged 30 times. India imposed almost as many measures, but never faced a single challenge. Argentina and the European Union, also significant users, were challenged in far fewer cases than the United States.

The report makes clear that the WTO is a plaintiff's court. Complaining parties almost always win. But the decisions against the United States have had significantly more far-reaching effects than those against other countries. In 30 cases brought against the United States, panels have called for the revision or removal of two U.S. laws, one regulation, three agency practices, and 21 trade measures. By contrast, in 34 cases brought against trade remedy measures imposed by countries other than the United States, no laws or regulations have been found inconsistent with WTO rules, and only one practice and 7 measures are subject to revision or removal.

²³ “Baucus Statement on World Trade Organization Steel Safeguard Ruling,” November 10, 2003, available at <https://www.finance.senate.gov/ranking-members-news/baucus-statement-on-world-trade-organization-steel-safeguard-ruling>.

Why is the United States losing so many cases, with such devastating effects? The agencies that enforce our trade laws – the Commerce Department and the International Trade Commission – told GAO they have no doubt that WTO panels and the Appellate Body are failing to apply the deferential standard of review for which the United States bargained in the Uruguay Round. The agencies, together with a number of respected trade laws experts consulted by GAO, pinpoint a number of instances where panels have created obligations that do not exist in the text of any WTO agreements. Even experts who did not see problems with the standard of review agreed that many WTO trade remedy decisions are unadministrable and could impede the United States’ ability to impose trade remedies in the future. In sum, the report makes clear that other countries are using an aggressive litigation strategy to change the outcome of the WTO Uruguay Round negotiations.

We can’t stop other countries from targeting our trade laws. Our transparent laws and large market make the United States a target of choice. But we can and should be doing more to defend our trade laws, to reform the WTO dispute resolution process, and to use that process to our advantage.²⁴

(25) Senator Max Baucus (D-Montana) (2003):

Our negotiators must also work to rectify past panel and Appellate Body decisions that undermine our trade laws. Only then will the United States be assured the viable safeguard remedy for which it bargained in the Uruguay Round.²⁵

(26) 70 Senators (Byrd (D-West Virginia), DeWine (R-Ohio), Baucus (D-Montana), Santorum (R-Pennsylvania), Dayton (R-Utah), Craig (R-Idaho), Daschle (D-South Dakota), Lott, Rockefeller (D-West Virginia), Bunning (R-Kentucky), Breaux (D-Louisiana), L. Graham (R-South Carolina), Conrad (D-North Dakota), Snowe (R-Maine), Kerry (D-Massachusetts), Voinovich (R-Ohio), Bingaman (D-New Mexico), Specter (D-Pennsylvania), Feinstein (D-California), Coleman (R-Minnesota), Durbin (D-Illinois), Chambliss (R-Georgia), Lincoln (D-Arkansas), Collins (R-Maine), Edwards (D-North Carolina), Enzi (R-Wyoming), Bayh (D-Indiana), Burns (R-Montana), Hollings (D-South Carolina), Bennett (D-Colorado), Biden (D-Delaware), Thomas (D-New York), Clinton (D-New York), Domenici (R-New Mexico), Corzine (D-New Jersey), Cochran (R-Mississippi), Dorgan (D-North Dakota), Shelby (R-Alabama), Feingold (D-Wisconsin), Crapo (R-Idaho), Wyden (D-Oregon), Warner (D-Virginia), Harkin (D-Iowa), Reid (D-Nevada), Stabenow (D-Michigan), Sessions (R-Alabama), Inouye (D-Hawaii), Nighthorse Campbell (R-Colorado), Lautenberg (D-New Jersey), J. Reed (D-Rhode

²⁴ “Baucus Comments on Release of GAO Report on Trade Remedies Rulings in WTO,” July 30, 2003, available at <https://www.finance.senate.gov/ranking-members-news/baucus-comments-on-release-of-gao-report-on-trade-remedies-rulings-in-wto>.

²⁵ “Statement of Senator U.S. Max Baucus WTO Steel Ruling,” July 11, 2003, available at <https://www.finance.senate.gov/ranking-members-news/statement-of-senator-us-max-baucus-wto-steel-ruling>.

Island), Pryor (D-Arkansas), B. Nelson (D-Florida), Johnson (D-South Dakota), Mikulski (D-Maryland), Miller (D-Georgia), Schumer (D-New York), Sarbanes (D-Maryland), T. Kennedy (D-Massachusetts), Leahy (D-Vermont), Levin (D-Michigan), Jeffords (I-Vermont), Boxer (D-California), Kohl (D-Wisconsin), B. Nelson (D-Florida), Lieberman (D-Connecticut), Landrieu (D-Louisiana), Dodd (D-Connecticut), Akaka (D-Hawaii), Carper (D-Delaware), Gregg (R-New Hampshire)) (2003):

We write to express our strong interest regarding the approach that may be taken by the U.S. Government in response to the WTO Appellate Body's January 16, 2003, ruling that the United States violated its WTO obligations when it enacted the Continued Dumping and Subsidy Offset Act (CDSOA) in 2000. In our view, the WTO has acted beyond the scope of its mandate by finding violations where none exists and where no obligations were negotiated.

CDSOA is a payment program established by Congress to address policy objectives that can enable our domestic producers to continue to invest in their facilities and workers. Its continued operation is critical to preserve jobs that will otherwise be lost as the result of illegal dumping or unfair subsidies and to maintain the competitiveness of American industry.

In its November 2002 statement to the Appellate Body defending this law, the Administration stated that, "[T]he Panel in this case has created obligations that do not exist in the WTO Agreements cited. The errors committed are serious and many about a statute which, in the end, creates a payment program that is not challenged as a subsidy." We concur with this statement and consequently believe that America's trading partners must be pressed into negotiations on CDSOA prior to any attempt to change our laws...²⁶

(27) Senator Max Baucus (D-Montana) (2002):

One of the most important issues addressed in the Trade Act is the provision directing the Secretary of Commerce to draft a report on recent WTO decisions. A growing number of WTO panels have inappropriately ruled against U.S. trade laws – so the legislation requires the Secretary to prepare a strategy for countering those rulings.

Why is this study so important? Because U.S. trade laws are a critical part of the foundation of U.S. trade policy. And these laws have been under aggressive attack in WTO dispute settlement proceedings. Depending on how you count, the U.S. has lost as many as fifteen decisions regarding the operation of U.S. trade laws in the last several years.

²⁶ Letter to President Bush by 70 Senators, "Text: Senate Letter on Byrd Law," Inside U.S. Trade, February 4, 2003, published February 7, 2003, available at <https://insidetrade.com/inside-us-trade/text-senate-letter-byrd-law-0>.

I am deeply troubled about what has been going on in the WTO dispute settlement process. These proceedings are looking more and more like a kangaroo court against U.S. trade laws. This trend must stop. And I am here today to suggest some steps to stop it.

While the trade law provisions in the Trade Act are critical, it is not new negotiations or new trade agreements that put U.S. trade laws most at risk. Instead, it is the WTO's binding dispute settlement system that casts the darkest shadow over our trade laws.

During the Uruguay Round negotiations, the U.S. fought for and achieved a system of binding dispute resolution. We also fought for and won a deferential standard of review for trade remedy cases. This standard requires dispute settlement panels to defer to national authorities when they make reasonable interpretations of fact and WTO provisions. It was supposed to apply to all trade remedy cases, but it has been improperly narrowed. And even where notionally applied, it has been disrespected.

....

So, why have we lost all these cases? What is going on here? The answer is straightforward. WTO dispute settlement panels are legislating. They are ignoring the deferential standard of review. They are exceeding their powers to add to the obligations and diminish the rights of the United States. In sum, they are making up rules out of whole cloth – substituting their judgment for the negotiated agreement. They are making up rules that the United States never negotiated, that Congress never approved, and, I suspect, that Congress would not approve.

....

Second, WTO dispute settlement rules and procedures have proved inadequate to guard against bias and overreaching by panels. Maybe the standard of review is not clear enough. I think it is, but I am open to considering how to strengthen it. Certainly, the rules under which dispute settlement panels and the Appellate Body operate allow them flout the standard of review with impunity...²⁷

(28) Senator Max Baucus (D-Montana) (2002):

In April of this year, I wrote to Ambassador Zoellick concerning the ongoing review of the WTO Dispute Settlement Understanding. At that time, I pointed out that the current trend toward the use of the WTO dispute settlement system by foreign governments to add to the obligations or diminish the rights of the United States in the area of trade remedies is eroding support within the United States for the WTO and more generally for an open trading system. I urged you to make every effort to end this practice.

²⁷ “Baucus Remarks on U.S. Trade Laws and the WTO,” September 27, 2002, available at <https://www.finance.senate.gov/chairmans-news/baucus-remarks-on-us-trade-laws-and-the-wto>.

In the intervening months a number of countries, as well as the European Union, have tabled detailed proposals for DSU reform. None of these proposals acknowledges or addresses the United States' legitimate concern with the way that panels and the Appellate Body have disregarded the negotiated standard of review in trade remedy cases...²⁸

(29) Senator Max Baucus (D-Montana) (2002):

[R]ectifying the current trend toward use of the dispute settlement system by foreign governments to add to the obligations or diminish the rights of the United States is so critical to the effective functioning of and support within the United States for the WTO and an open trading system that it should be the single most important goal for U.S. negotiators....

During the Uruguay Round, the United States negotiated and our trading partners agreed to a deferential standard of review for dispute settlement proceedings. It is my view and, I believe, a view shared by a growing number of close observers of the WTO dispute resolution process, that WTO panels and the Appellate Body are not infrequently exceeding the permitted scope of review, and that the effect of this phenomenon is to impose on the United States obligations that do not derive from the Uruguay Round texts to which the Congress gave its consent in 1994.

Accordingly, I believe that the United States should insist first and foremost upon proper implementation of the previously negotiated standard of review. In this regard, I believe it is critical that our negotiators assess each proposed revision to the DSU in light of whether that revision is likely to enhance or detract from compliance with the previously negotiated standard of review. I am concerned, for example, that the proposal by the European Union to move to a system of permanent panelists might make WTO panelists even less accountable to Member governments than they currently are for failures to adhere to the standard of review...

Overall, it is simply unacceptable that WTO panels and the Appellate Body decisions continue to flout the negotiated standard of review with impunity and create new legal obligations out of whole cloth.²⁹

(30) Representatives Charles Rangel (D-New York), Pete Stark (D-California), Sander Levin (D-Michigan), Bob Matsui (D-California), Jim McDermott (D-Washington), Richard Neal (D-Massachusetts), Michael McNulty (D-New York), Xavier Becerra (D-California), and Lloyd Doggett (D-Texas) (2001):

²⁸ Letter to USTR Zoellick and Secretary of Commerce Evans, "Baucus Letter on DSU Negotiations," Inside U.S. Trade, September 4, 2002, published September 6, 2002 available at <https://insidetrade.com/inside-us-trade/text-baucus-letter-dsu-negotiations>.

²⁹ Letter to USTR Zoellick, "Text: Baucus Letter on WTO DSU Changes," Inside U.S. Trade, April 15, 2002, published April 19, 2002 available at <https://insidetrade.com/inside-us-trade/text-baucus-letter-wto-dsu-changes>.

We are deeply concerned that the most recent draft ministerial documents being circulated by the Chairman of the WTO General Council includes proposals to open the door to a weakening of U.S. trade remedy laws. We urge you to maintain the U.S. position of strong opposition to any attempt to weaken the WTO agreements relating to trade remedies. This includes engaging in negotiations purportedly aimed at "clarifying and improving" the existing Antidumping Agreement and Agreement on Subsidies and Countervailing Measures...

Moreover, the Chairman's drafts would allow other countries to continue through negotiation the assault on U.S. trade laws those countries have been pursuing through litigation. As you know, over the past year, the United States has lost a number of key disputes challenging our antidumping, countervailing duty and safeguards laws. These decisions -- including safeguards cases involving imports of wheat gluten and lamb meat from Australia and New Zealand, and an antidumping case involving imports of hot-rolled steel from Japan -- suffer from a number of serious flaws. For example, articles 3.2 and 19.2 of the WTO's Dispute Settlement Understanding make clear that rulings of the Dispute Settlement Body and the Appellate Body "cannot add to or diminish rights and obligations provided in the [WTO] Agreements." Yet, in the cases noted, panels or the Appellate Body have read into several existing provisions of the Safeguards Agreement requirements nowhere specified in the text of the agreement (thus adding to rights and obligations). The logic from at least one of these erroneous decisions has since been extended to add a new obligation under the Antidumping Agreement. Further, the Appellate Body's recent restrictive interpretation of Article 17.6 of the Antidumping Agreement pertaining to the so-called "standard of review" diminishes rights under that agreement. If anything, our focus should be on correcting the erroneous dispute settlement decisions in these areas, not exacerbating the problems they engendered.³⁰

³⁰ Letter to USTR Zoellick, "House Democrats Letter on WTO Draft," Inside U.S. Trade, October 31, 2001, published November 2, 2001 available at <https://insidetrade.com/inside-us-trade/text-house-democrats-letter-wto-draft>.

Appendix A2

Appendix A2: Congressional Legislation and Reports Expressing Concern with Appellate Body Overreaching

Examples of other Congressional documents, including the text of legislation and Congressional reports, containing statements of concern include:

- (1) H.Res.746 (introduced by Representatives Kind (D-Wisconsin) and Schweikert (R-Arizona)) (2019 – ordered to be reported), Expressing the sense of the House of Representatives that the United States should reaffirm its commitment as a member of the World Trade Organization (WTO) and work with other WTO members to achieve reforms at the WTO that improve the speed and predictability of dispute settlement, address longstanding concerns with the WTO's Appellate Body, increase transparency at the WTO, ensure that WTO members invoke special and differential treatment reserved for developing countries only in fair and appropriate circumstances, and update the WTO rules to address the needs of the United States and other free and open economies in the 21st century:

Whereas the United States has consistently supported having a functional, efficient dispute settlement mechanism at the WTO that strictly follows the Dispute Settlement Understanding as agreed by all WTO members and remains accountable to WTO members;

Whereas the United States, for decades, has sought to strengthen the WTO dispute settlement system by advocating for necessary, thoughtful, and prudent reforms;

Whereas the United States has expressed longstanding concerns that WTO Appellate Body, through its findings and procedural liberties, is improperly adding to or diminishing the rights or obligations of WTO members...

Resolved, That it is the sense of the House of Representatives that—

- (1) the United States should continue to lead reform efforts to ensure that the World Trade Organization (WTO) functions as agreed by the membership and is updated appropriately for the 21st century; and

- (2) the United States should continue to urge other WTO members to work with the United States to achieve needed reforms so that the WTO and its members can address unjustified barriers to trade and promote economic norms that improve the standard of living across the world; and

- (3) the United States Trade Representative should continue to lead and work with other countries to pursue reforms at the WTO that—

- (A) address concerns with the WTO's Appellate Body;

(B) improve the efficiency and transparency of dispute settlement proceedings;³¹

- (2) Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Public Law 114-26) (2015):

Section 102(b)(16)(C)

Dispute settlement and enforcement.--The principal negotiating objectives of the United States with respect to dispute settlement and enforcement of trade agreements are—

...

(C) to seek adherence by panels convened under the Dispute Settlement Understanding and by the Appellate Body to—

(i) the mandate of those panels and the Appellate Body to apply the WTO Agreement as written, without adding to or diminishing rights and obligations under the Agreement; and

(ii) the standard of review applicable under the Uruguay Round Agreement involved in the dispute, including greater deference, where appropriate, to the fact finding and technical expertise of national investigating authorities;

Section 106(b)(5)

(5) For failure to meet other requirements.--Not later than December 15, 2015, the Secretary of Commerce, in consultation with the Secretary of State, the Secretary of the Treasury, the Attorney General, and the United States Trade Representative, shall transmit to Congress a report setting forth the strategy of the executive branch to address concerns of Congress regarding whether dispute settlement panels and the Appellate Body of the World Trade Organization have added to obligations, or diminished rights, of the United States, as described in section 102(b)(15)(C). Trade authorities procedures shall not apply to any implementing bill with respect to an agreement negotiated under the auspices of the World Trade Organization unless the Secretary of Commerce has issued such report by the deadline specified in this paragraph.

- (3) Senate report on the Bipartisan Congressional Trade Priorities and Accountability Act of 2015:

Fair and efficient dispute settlement mechanisms are essential to well-functioning trade agreements. An effective dispute settlement mechanism must be capable of interpreting the rights and obligations of disputing parties and rendering determinations that the parties treat as binding, including with respect to bringing national measures into compliance with trade agreements when a measure of a party is found to be inconsistent with its commitments under an international trade agreement.

³¹ H. Res. 746 (December 6, 2019), available at <https://www.congress.gov/116/bills/hres746/BILLS-116hres746ih.pdf>.

In order to be effective, a dispute settlement mechanism must maintain the trust of the parties that it is faithfully adhering to--and not adding to or diminishing--the rights and obligations of the parties to the agreement. A dispute settlement mechanism must therefore render equitable and reasoned decisions, based on the facts of cases presented and a faithful interpretation of agreements.

The Committee has previously expressed concern with the standard of review that dispute settlement panels and the WTO Appellate Body have applied in cases involving measures taken by administrative agencies of the United States, in particular, the U.S. International Trade Commission and the Department of Commerce. Those concerns remain. The Committee is also concerned that WTO Appellate Body has made findings that appear to go beyond directly resolving the dispute before it, and at times making findings that appear to go beyond the text of the WTO Agreement by giving meaning to text that, interpreted properly, reflects the decision by WTO Members to not create an obligation with respect to certain measures.

The Committee considers that the long-term effectiveness of the WTO dispute settlement mechanism depends on WTO dispute settlement panels and the Appellate Body faithfully adhering to Articles 3.2 and 19.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, which state that the recommendations and rulings of the WTO Dispute Settlement Body "cannot add to or diminish the rights and obligations provided in the [WTO] agreements." The negotiating objective directs U.S. negotiators to ensure that the WTO dispute settlement mechanism meets this standard, and to negotiators should address any systemic failure to do so.³²

(4) Bipartisan Trade Promotion Authority Act of 2002 (Public Law 107-210)

Section 2101(b)(3)

Support for continued trade expansion requires that dispute settlement procedures under international trade agreements not add to or diminish the rights and obligations provided in such agreements. Therefore—

(A) the recent pattern of decisions by dispute settlement panels of the WTO and the Appellate Body to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures by WTO members under the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards has raised concerns; and

(B) the Congress is concerned that dispute settlement panels of the WTO and the Appellate Body appropriately apply the standard of review contained in Article 17.6 of the Antidumping Agreement, to provide deference to a permissible interpretation by a WTO member of provisions of that Agreement, and to the evaluation by a WTO member

³² United States Senate Committee on Finance Committee Report on the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (S. Rept. 114-42), available at <https://www.congress.gov/congressional-report/114th-congress/senate-report/42/1?overview=closed>.

of the facts where that evaluation is unbiased and objective and the establishment of the facts is proper.

...

Section 2102(b)(12): Dispute Settlement and Enforcement

The principal negotiating objectives of the United States with respect to dispute settlement and enforcement of trade agreements are—

(A) to seek provisions in trade agreements providing for resolution of disputes between governments under those trade agreements in an effective, timely, transparent, equitable, and reasoned manner, requiring determinations based on facts and the principles of the agreements, with the goal of increasing compliance with the agreements;

...

(C) to seek adherence by panels convened under the Dispute Settlement Understanding and by the Appellate Body to the standard of review applicable under the Uruguay Round Agreement involved in the dispute, including greater deference, where appropriate, to the fact-finding and technical expertise of national investigating authorities;

Section 2102(b)(14): Trade Remedy Laws

The principal negotiating objectives of the United States with respect to trade remedy laws are—

(A) to preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, or that lessen the effectiveness of domestic and international safeguard provisions, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions; and

(B) to address and remedy market distortions that lead to dumping and subsidization, including overcapacity, cartelization, and market-access barriers.

(5) Senate Report on the Bipartisan Trade Promotion Authority Act of 2002:

The third set of findings, set forth in section 1(b)(3), expresses the view that continued support for trade expansion requires a preservation of the balance of rights and obligations negotiated in trade agreements. It identifies a growing concern that this balance may be upset by decisions of dispute settlement panels convened in the World Trade Organization (“WTO”) and the WTO Appellate Body. This concern is prompted by recent decisions placing new obligations on the United States, and identifying

restrictions on the use of antidumping, countervailing duty and safeguard measures, which are not found anywhere in the negotiated texts of the relevant WTO agreements.

Congress finds that WTO panels and the Appellate Body have ignored their obligation to afford an appropriate level of deference to the technical expertise, factual findings, and permissible legal interpretations of national investigating authorities—particularly the U.S. Department of Commerce and the U.S. International Trade Commission (“ITC”). The record compiled so far in reviews of antidumping duty, countervailing duty, and safeguard measures reflects a bias against import relief.

First, WTO panels and the Appellate Body have, through interpretation, substantially rewritten the WTO Antidumping Agreement in ways disadvantageous to the United States. For example, in *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Appellate Body held that investigating authorities, in order to justify antidumping measures, must separate and distinguish the amount of injury caused by each potential factor relating to a domestic industry’s material injury, rather than simply finding that material injury exists and that dumped imports are among the causes of material injury. This decision has no basis in the text of the Antidumping Agreement and is inconsistent with previously adopted decisions of panels under the General Agreement on Tariffs and Trade (“GATT”) concerning the causation analysis required in material injury investigations in antidumping cases. Moreover, it is contrary to the expectations of the Committee based on the Statement of Administrative Action that accompanied the Uruguay Round Agreements Act. See *Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements*, H. Doc. No. 316, 103d Cong., 2d Sess. At 851 (1994) (“Article 3.5 of the Antidumping Agreement and 15.5 of the Subsidies Agreement do not change the causation standard from that provided in the 1979 Tokyo Round Codes. * * * The GATT 1947 Panel Report in the Norwegian Salmon case approved U.S. practice as consistent with the 1979 Codes. The panel noted that the [U.S. International Trade] Commission need not isolate the injury caused by other factors from injury caused by unfair imports.”).

In the same case, the Appellate Body further held that investigating authorities may not include, among the company-specific dumping margins averaged together to establish an antidumping duty deposit rate for companies not individually investigated, any company-specific margin based even in part on “facts available”—a decision with no basis in the text of the Antidumping Agreement. In this and other respects, the *Hot-Rolled Steel* case resulted in the announcement of obligations concerning the use of facts available that are different from the obligations set forth in the Antidumping Agreement.

In this case and in others, the panels and Appellate Body have avoided or misapplied the standard of review in Article 17.6 of the Antidumping Agreement, which is supposed to ensure deference to reasonable factual determinations and legal interpretations rendered by national investigating authorities.¹

¹ Other examples of WTO panels and the Appellate Body wrongly narrowing the discretion of national investigating authorities, and thereby upsetting the carefully negotiated balance of the Antidumping Agreement, include: United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea; United States— Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea; Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or NonAlloy Steel H-Beams from Poland; European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India; and Guatemala— Definitive Anti-dumping Measure regarding Grey Portland Cement from Mexico.

Second, WTO panels and the Appellate Body have, through interpretation, substantially rewritten Part V of the Agreement on Subsidies and Countervailing Measures, which applies to WTO Members' countervailing duty actions, in ways disadvantageous to the United States. For example, the Appellate Body in United States— Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom refused to apply a deferential standard of review which the United States had sought and negotiated and which is applicable, under a 1994 WTO Ministerial Declaration, to countervailing duty disputes. The Appellate Body also invented new limits, with no basis in the text of the Agreement on Subsidies and Countervailing Measures, on the use of countervailing duties to offset nonrecurring subsidies whose benefits are allocated over time. The substantive rules announced by the Appellate Body created a loophole in the existing WTO anti-subsidy regime and undermined negotiated disciplines which the United States worked for decades to achieve.

Third, WTO panels and the Appellate Body have, through interpretation, substantially rewritten the WTO's rules on safeguard measures, including the Agreement on Safeguards, in ways disadvantageous to the United States. In United States—Safeguard Measures on Wheat Gluten from the EU and United States—Safeguard Measures on Lamb from Australia and New Zealand, WTO tribunals faulted the ITC's longstanding method for assessing the role played by imports when multiple factors are contributing to a domestic industry's serious injury—decisions with no basis in the text of the Agreement on Safeguards. These two recent decisions against the United States continued a pattern in which no challenged safeguard measure has ever been upheld in WTO dispute settlement, and they have invited additional challenges to valid U.S. safeguard measures on other products.

This record in WTO dispute settlement proceedings is particularly troubling, because the right to act against dumped, subsidized, and surging imports is a fundamental part of the multilateral trade regime, having been codified in Articles VI and XIX of the original General Agreement on Tariffs and Trade 1947. Foreign governments' successful use of dispute settlement procedures to erode bargained-for trade remedy protections negatively affects American firms, workers, and farmers and may jeopardize public support for a liberal trading system.

Because of the Committee's concerns about the trend in WTO dispute settlement involving U.S. trade remedy laws and its potential damage to support for the WTO, a later provision of the bill (section 5(b)(2)) requires the Secretary of Commerce to submit a report to Congress outlining a strategy for correcting instances in which dispute settlement panels and the Appellate Body have added to obligations or diminished rights of the United States, as described in section 1(b)(3).³³

³³ United States Senate Committee on Finance Report on the Bipartisan Trade Promotion Authority Act of 2002 (S. Rept. 107-139), available at <https://www.congress.gov/107/crpt/srpt139/CRPT-107srpt139.pdf>.

Appendix B1

Appendix B1: Statements by U.S. Trade Representatives or their Deputies on Appellate Body Overreach

Examples of public statements of concern by U.S. Trade Representatives or their Deputies on Appellate Body overreaching include:

- (1) U.S. Trade Representative Robert Lighthizer (2019):

The WTO rules do not prohibit “zeroing” The United States never agreed to any such rule in the WTO negotiations, and never would. WTO Appellate Body reports to the contrary are wrong, and reflect overreaching by that body. The United States commends this panel for doing its own interpretive analysis, and for having the courage to stand up to the undue pressure that the Appellate Body has been putting on panels for many years. Appellate Body reports are not binding precedent, and where the Appellate Body’s reasoning is erroneous and unpersuasive, a WTO panel has an obligation not to follow such flawed reasoning.¹

- (2) U.S. Trade Representative Carla Hills (2018):

I think there has been overreach. Under the rules of the WTO, the appellate body is to apply the law. The panels below are to find the facts. And when the appellate body begins to move around in the factual area or to decide on rules that haven’t been agreed to, that could be called and no one disagrees, I think, overreach.²

- (3) U.S. Trade Representative Susan Schwab (2018):

I agree that there’s been overreach by the appellate body....

There are a couple trading partners that, as I understand it, are trying to work with the U.S. to get this addressed, because this is not just a U.S. concern. But it is one that needs to be addressed short term in terms of the appellate body. Long term, in terms of updating the rules. Again, this goes back to the point that we stopped writing the rules in 1993-94, and you’ve got an appellate body that’s trying to extrapolate, that has no business extrapolating.³

¹ “United States Prevails on ‘Zeroing’ Again: WTO Panel Rejects Flawed Appellate Body Findings”, April 9, 2019, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/united-states-prevails-%E2%80%9Czeroing%E2%80%9D>.

² “A Conversation with Six Former USTRs,” Center for Strategic and International Studies, September 17, 2018, available at https://csis-prod.s3.amazonaws.com/s3fs-public/event/180917_Conversation_Former_USTRs.pdf.

³ “A Conversation with Six Former USTRs,” Center for Strategic and International Studies, September 17, 2018, available at https://csis-prod.s3.amazonaws.com/s3fs-public/event/180917_Conversation_Former_USTRs.pdf.

(4) Deputy U.S. Trade Representative Michael Punke (2016):

[O]ver several years, the United States has raised with Members a number of concerns with the operation of the WTO dispute settlement system, and in particular with the adjudicative approach reflected in certain Appellate Body Reports. And to be clear, these concerns have arisen in disputes in which the United States was a party and in those in which it was not

The concerns raised by the United States should be of concern to all WTO Members. WTO adjudicators should be focused on addressing those issues necessary to resolve the dispute. WTO Members cannot have confidence in a system where WTO adjudicators overstep the boundaries agreed by WTO Members in the DSU and the WTO Agreement. And if Members do not have confidence that the WTO dispute settlement system will not add to or diminish their existing rights and obligations under agreements they have approved domestically, they will not have confidence that they can conclude new agreements and credibly say domestically what those new agreements mean. The dispute settlement system should reinforce the WTO and not undermine our efforts to advance our interests together through new agreements.⁴

(5) Deputy U.S. Trade Representative Michael Punke and USTR General Counsel Timothy Reif (2016):

WTO members created a system of rules according to which reappointment of AB members is not automatic, but rather subject to approval by all WTO members. The right and responsibility to consider reappointments is one way that members ensure the integrity of the dispute resolution system. The US respects and supports the independence of AB members. But the AB is not independent from the rules established by WTO members themselves. Indeed, a core tenet that gives WTO members faith in the integrity of the AB is that it will not add to the obligations nor diminish the rights created through WTO agreements.

To maintain the credibility of the dispute settlement system, the US in evaluating candidates for the AB has made clear the importance of such candidates adhering to the rules of the WTO, not inventing law that goes beyond the contours of agreements negotiated by WTO members, not substituting their own judgment of facts beyond those established by the record, nor inventing their own claims and arguments not presented by the parties

⁴ “Statement of the United States by Ambassador Michael Punke at the 13th WTO Trade Policy Review of the United States of America,” USTR Archives, Speeches/Transcripts, December 19, 2016, available at <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/december/Statement-US-13-WTO-TPR-USA>.

In fact, the problem of over-reach by AB decisions has grown more serious and widespread in recent years. It is one of the factors that has made the negotiation of multilateral trade agreements more difficult. WTO members are less likely to conclude agreements if they worry that the AB will later rewrite agreements to change their terms.⁵

- (6) U.S. Trade Representatives Ronald Kirk, Susan Schwab, Mickey Kantor, Carla Hills, Clayton Yeutter, and William Brock (2016):

[I]t has been the longstanding position of the United States that panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements, as negotiated and agreed by its Members. This position is grounded in the express text of the DSU, which states that panels and the Appellate Body “cannot add to or diminish the rights and obligations provided in the covered agreements.”

The continued integrity and credibility of the WTO dispute settlement system depend on panels and the Appellate Body following this fundamental rule. Adherence to this rule by the Appellate Body has been a serious and ongoing concern expressed by Administrations of both political parties in the United States. Congress, the U.S. public and stakeholders must be confident that the WTO dispute settlement system is focused solely on assisting WTO Members to resolve the particular legal dispute at hand, and applying the WTO agreements strictly as written. Following the text of the WTO agreements in this manner is essential to maintaining public and congressional confidence in the WTO system, as well as to maintaining the ability of trade negotiators for the U.S. and other countries to conclude new trade agreements going forward.⁶

- (7) U.S. Trade Representative Ronald Kirk and Secretary of Commerce John E. Bryson (2012):

While we have taken steps in order to comply with the WTO's determinations, we continue to share your serious concerns about the reasoning and methodology that led the WTO Appellate Body to reach its findings against "zeroing" in these disputes. Among other things, we remain convinced that the WTO Appellate Body went far beyond its mandate in creating new obligations that do not appear in the text of the WTO Antidumping Agreement. It is critical that WTO Members have confidence that the bargains they strike in trade negotiations are honored and that WTO Appellate Body findings respect the negotiated agreements without altering those agreements. This issue is at the heart of maintaining the legacy of legally enforceable multilateral rules as well as

⁵ “Problem of over-reach by Appellate Body decisions has become more serious,” Letter from Michael Punke and Tim Reif, *Financial Times*, June 5, 2016.

⁶ Letter to Ambassador Froman, Kirk, Schwab, Kantor, Hills, Yeutter, and Brock, Inside U.S. Trade, World Trade Online, June 2016, available at, https://insidetrade.com/sites/insidetrade.com/files/documents/jun2016/wto2016_1433a.pdf.

the WTO dispute settlement system. Legitimate multilateral rules must be agreed upon by WTO Members multilaterally. The United States will continue to press this critical issue in the WTO Rules negotiations and advocate confirmation that “zeroing” is a permissible calculation methodology.⁷

- (8) U.S. Trade Representative Ambassador Ronald Kirk (2011):

I am deeply troubled by this report. It appears to be a clear case of overreaching by the Appellate Body. We are reviewing the findings closely in order to understand fully their implications.⁸

- (9) USTR General Counsel Warren Maruyama (2008):

[W]e have publicly stated that the WTO’s Appellate Body overreached in its “zeroing” line of decisions, which in our view represent a misplaced case of judicial activism with no basis in the Uruguay Round Antidumping Agreement.⁹

- (10) U.S. Trade Representative Susan Schwab (2007):

This is further proof of what the United States has been saying all along – that WTO rules do not prohibit ‘zeroing’ and that WTO Appellate Body reports to the contrary have overreached. We commend the WTO panel for conducting a very thorough analysis and applying the WTO agreements as written.¹⁰

- (11) U.S. Trade Representative Susan Schwab and Secretary of Commerce Carlos M. Gutierrez (2007):

[T]he Bush Administration has made clear its strong disagreement with recent dispute settlement findings by the WTO Appellate Body regarding zeroing. We have emphasized that the Appellate Body used a flawed interpretive approach not based on the text of the WTO Antidumping Agreement. We have also made it clear that zeroing must

⁷ Letter from U.S. Trade Representative Ronald Kirk and Secretary of Commerce John E. Bryson to Representative Sander M. Levin, February 28, 2012.

⁸ “USTR Statement Regarding WTO Appellate Body Report in Countervailing Duty Dispute with China,” USTR Archives, Press Releases, March 11, 2011, available at, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/march/ustr-statement-regarding-wto-appellate-body-report-c>.

⁹ Senate Finance Committee, May 22, 2008, available at, <https://www.finance.senate.gov/imo/media/doc/052208wmttest.pdf>.

¹⁰ “United States Wins WTO ‘Zeroing’ Dispute with Mexico,” USTR Archives, Press Releases, December 12, 2007, available at, https://ustr.gov/archive/Document_Library/Press_Releases/2007/December/United_States_Wins_WTO_Zeroing_Dispute_with_Mexico.html.

be addressed in the WTO Rules negotiations, so that the issue is resolved by rules actually agreed to by WTO Members.¹¹

(12) Deputy U.S. Trade Representative Peter Allgeier (2005):

There are also are instances in which we believe that members of appellate bodies or panels overreached their authority in determining the outcome of those disputes, and that is why we have put forward proposals in the Doha negotiations to try to improve that so that they stick to the standard of review, for example, in antidumping; that they don't go off and start-pardon the expression and this is the House-legislating. That isn't the role of the panels.¹²

(13) U.S. Trade Representative Robert Portman (2005):

I recognize that WTO dispute results have not been perfect. I believe we should work both within the current dispute settlement system and through the dispute settlement negotiations to improve the process and ensure that panels and the Appellate Body stick to the deal agreed to by WTO Members.

A critically important component of maintaining confidence in a rules-based trading system like the WTO is an effective dispute settlement system. The United States has emphasized in the WTO Rules negotiations that it is essential that WTO dispute settlement bodies follow the appropriate standard of review in trade remedy cases and not impose obligations that are not contained in the WTO Agreements.¹³

¹¹ Letter from U.S. Trade Representative Susan Schwab and Secretary of Commerce Carlos M. Gutierrez to Senator Max Baucus, November 1, 2007.

¹² United States House of Representatives, "the Future of the World Trade Organization," Hearing before the Subcommittee on Trade of the Committee on Finance, 109th Congress, First Session, May 17, 2005.

¹³ Hearing on the Nomination of Robert J. Portman to be the U.S. Trade Representative, April 21, 2005, pp. 79, 85.

Appendix B2

Appendix B2: Statements by the United States to the WTO Dispute Settlement Body Expressing Concerns with the Appellate Body's Failure to Follow WTO Rules and Erroneous Interpretations of the WTO Agreements

Over more than two years, the United States has made several statements in the Dispute Settlement Body reiterating and outlining in detail U.S. concerns with the Appellate Body's failure to follow the rules in the WTO's Dispute Settlement Understanding. These include the following:

- Statement by the United States expressing concerns that the Appellate Body has violated Article 17.2 of the DSU and has allowed former members to decide appeals after their terms have ended.¹⁴
- Statement by the United States expressing concerns that persons serving on the Appellate Body have repeatedly violated Article 17.5 of the Dispute Settlement Understanding by disregarding the mandatory 90-day deadline for issuing a report.¹⁵
- Statement by the United States expressing concerns that the Appellate Body has violated Article 17.6 and exceeded its limited authority to review legal issues by reviewing panel findings of fact, including factual findings relating to the meaning of WTO Members' domestic law.¹⁶
- Statement by the United States expressing concerns that the Appellate Body has violated Article 3.7 and Article IX:2 by rendering advisory opinions on issues not necessary to resolve a dispute.¹⁷

¹⁴ Statements by the United States Concerning Appellate Body Matters, Meeting of the Dispute Settlement Body on August 31, 2017, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf; and Statement by the United States Concerning Appellate Body Matters, Meeting of the Dispute Settlement Body on February 28, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_.Stmt_.as-delivered.fin_.public-1.pdf

¹⁵ Statement by the United States Concerning Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Meeting of the Dispute Settlement Body on June 22, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf

¹⁶ Statement by the United States Concerning Article 17.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Appellate Review of Panel Findings of Fact, Including Domestic Law, Meeting of the Dispute Settlement Body on August 27, 2018, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf

¹⁷ Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the Dispute Settlement Body on October 29, 2018, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf

- Statement by the United States expressing concerns that the Appellate Body wrongly claims that its reports are entitled to be treated as binding precedent and must be followed by panels, absent “cogent reasons.”¹⁸
- Statement by the United States expressing concerns with the Appellate Body’s incorrect legal interpretation of Article 6.2 of the Dispute Settlement Understanding adding a requirement for the legal basis of a panel request that does not appear in the text.¹⁹

* * *

For more than 20 years, the United States has expressed concerns in the Dispute Settlement Body with the Appellate Body’s failure to follow WTO rules and its erroneous interpretations of the WTO Agreements. Some illustrative examples include:²⁰

2000 to 2005

- *Argentina – Footwear (EC)* (DS121): Statement by the United States at the Meeting of the Dispute Settlement Body on January 12, 2000 (WT/DSB/M/73) (expressing concerns with the Appellate Body’s interpretation of the Safeguards Agreement).
- *US – FSC* (DS108): Statement by the United States at the Meeting of the Dispute Settlement Body on March 20, 2000 (WT/DSB/M/77) (expressing concerns that the Appellate Body confused the distinction between an authoritative interpretation under Article IX and an amendment under Article X of the WTO Agreement).
- *Korea – Various Measures on Beef (United States, Australia)* (DS161, DS169): Statement by the United States at the Meeting of the Dispute Settlement Body on January 10, 2001 (WT/DSB/M/96) (expressing concerns with *dicta* in the Appellate Body report).
- *EC – Bed Linen (India)* (DS141): Statement by the United States at the Meeting of the Dispute Settlement Body on March 12, 2001 (WT/DSB/M/101) (expressing concerns that the Appellate Body had not properly applied the special standard of review under Article 17.6(ii) of the Anti-Dumping Agreement).

¹⁸ Statement by the United States on the Precedential Value of Panel or Appellate Body Reports under the WTO Agreement and DSU, Meeting of the Dispute Settlement Body on December 18, 2018, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv_fin_.public.pdf

¹⁹ Statement by the United States Concerning Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Meeting of the Dispute Settlement Body on October 28, 2019, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct28.DSB_.Stmt_.as-deliv_fin_.public.pdf

²⁰ All U.S. statements in the Dispute Settlement Body (DSB) are available through the WTO website in the minutes of the DSB (document series WT/DSB/M/...) or on the website of the U.S. Mission to the WTO (Geneva.usmission.gov).

- *US – Lamb* (DS177, DS178): Statement by the United States at the Meeting of the Dispute Settlement Body on May 16, 2001 (WT/DSB/M/105) (expressing concerns with the Appellate Body’s interpretation of Article XIX of the GATT 1994 relating to the existence of unforeseen developments).
- *US – Hot-Rolled Steel* (DS184): Statement by the United States at the Meeting of the Dispute Settlement Body on August 23, 2001 (WT/DSB/M/108) (expressing concerns with the Appellate Body’s findings regarding Article 17.6(ii) of the Anti-Dumping Agreement and causation findings in antidumping investigations).
- *Canada – Dairy (Article 21.5 – New Zealand, United States)* (DS103, DS113): Statement by the United States at the Meeting of the Dispute Settlement Body on December 18, 2001 (WT/DSB/M/116) (expressing concerns with the Appellate Body’s interpretation of the Agreement on Agriculture).
- *US – Section 211 Appropriations Act* (DS176): Statement by the United States at the Meeting of the Dispute Settlement Body on February 1, 2002 (WT/DSB/M/119) (expressing concerns that the Appellate Body violated Article 17.6 of the DSU and exceeded its limited authority to review legal issues by reviewing panel findings of fact, including factual findings relating to the meaning of a WTO Member’s domestic law).
- *US – Line Pipe* (DS202): Statement by the United States at the Meeting of the Dispute Settlement Body on March 8, 2002 (WT/DSB/M/121) (expressing concerns that the Appellate Body report had disregarded the language of the covered agreements and applied standards of its own devising to evaluate claims).
- *US – Countervailing Measures on Certain EC Products* (DS212): Statement by the United States at the Meeting of the Dispute Settlement Body on January 8, 2003 (WT/DSB/M/140) (expressing concerns with the Appellate Body’s interpretation of the Subsidies Agreement).
- *US – Offset Act (Byrd Amendment)* (DS217, DS234): Statement by the United States at the Meeting of the Dispute Settlement Body on January 27, 2003 (WT/DSB/M/142) (expressing concerns that the Appellate Body created a new category of prohibited subsidies that had neither been negotiated nor agreed by WTO Members).
- *US – Steel Safeguards* (DS248, DS249, DS251, DS252, DS253, DS254, DS258, DS259): Statement by the United States at the Meeting of the Dispute Settlement Body on December 10, 2003 (WT/DSB/M/160) (expressing concerns that the Appellate Body had created additional obligations for imposing safeguard measures).
- *EC – Tariff Preferences (India)* (DS246): Statement by the United States at the Meeting of the Dispute Settlement Body on April 20, 2004 (WT/DSB/M/167) (expressing concerns with the Appellate Body’s allocation of the burden of proof).

- *US – Softwood Lumber V* (DS264): Statement by the United States at the Meeting of the Dispute Settlement Body on August 31, 2004 (WT/DSB/M/175) (expressing concerns with the finding that Article 2.4.2 of the Antidumping Agreement required an investigating authority to offset non-dumped transactions against dumped transactions in determining an aggregate margin of dumping).
- *EC – Chicken Cuts (Brazil, Thailand)* (DS269, DS296): Statement by the United States at the Meeting of the Dispute Settlement Body on September 27, 2005 (WT/DSB/M/198) (expressing concern with the Appellate Body’s discussion of the “object and purpose” of an isolated provision of a WTO agreement).

2006 to 2010

- *US – Zeroing* (DS294): Statement by the United States at the Meeting of the Dispute Settlement Body on May 9, 2006 (WT/DSB/M/211) (expressing concerns with the Appellate Body’s interpretation of Article 2.4.2 of the Antidumping Agreement).
- *US – Softwood Lumber V (Article 21.5)* (DS264): Statement by the United States at the Meeting of the Dispute Settlement Body on September 1, 2006 (WT/DSB/M/219) (expressing concerns with the Appellate Body’s interpretation of Article 2.4.2 of the Antidumping Agreement).
- *US – Zeroing* (DS322): Statement by the United States at the Meeting of the Dispute Settlement Body on January 23, 2007 (WT/DSB/M/225) (expressing concerns with the Appellate Body’s interpretation of the Antidumping Agreement with regard to zeroing).
- *US – Stainless Steel* (DS344): Statement by the United States at the Meeting of the Dispute Settlement Body on May 20, 2008 (WT/DSB/250) (expressing concerns that the Appellate Body wrongly claims that its reports are entitled to be treated as precedent and must be followed by panels absent “cogent reasons”).
- *US – Upland Cotton (Article 21.5)* (DS267): Statement by the United States at the Meeting of the Dispute Settlement Body on June 20, 2008 (WT/DSB/M/252) (expressing concerns with the Appellate Body’s findings relating to Article 21.5 of the DSU, export credit guarantees, and serious prejudice).
- *US – Continued Suspension* (DS320) and *Canada – Continued Suspension (EC)* (DS321): Statement by the United States at the Meeting of the Dispute Settlement Body on November 14, 2008 (WT/DSB/M/258) (expressing concerns that the Appellate Body had undertaken unnecessary analyses of provisions of the Dispute Settlement Understanding (DSU) and invented rules, procedures, and even obligations that were simply not present in the DSU).
- *China – Auto Parts (United States, EC, Canada)* (DS339, DS340, DS342): Statement by the United States at the Meeting of the Dispute Settlement Body on January 12, 2009

(WT/DSB/M/262) (expressing concern with the Appellate Body's statement that it has authority to review the meaning of a municipal law on its face as an issue of law).

- *US – Continued Zeroing* (DS350): Statement by the United States at the Meeting of the Dispute Settlement Body on February 19, 2009 (WT/DSB/M/265) (expressing concern that the Appellate Body's findings incorrectly expanded the scope of the proceedings, concern with the Appellate Body's interpretation of the Antidumping Agreement with regard to zeroing, and concern that the Appellate Body had failed to apply the special standard of review under the Anti-Dumping Agreement).

US – Zeroing (Article 21.5) (DS294): Statement by the United States at the Meeting of the Dispute Settlement Body on June 11, 2009 (WT/DSB/M/269) (expressing concerns that the Appellate Body's findings raised a number of problems, questions, and uncertainties, with respect to compliance in WTO dispute settlement proceedings).

2011 to 2015

- *China – Publications and Audiovisual Products (United States)* (DS363): Statement by the United States at the Meeting of the Dispute Settlement Body on January 19, 2010 (WT/DSB/M/278) (expressing concerns with the Appellate Body's unnecessary and advisory discussion of the "necessity" analysis under Article XX(a) of the GATT 1994).
- *US – Anti-Dumping and Countervailing Duties* (DS379): Statement by the United States at the Meeting of the Dispute Settlement Body on March 25, 2011 (WT/DSB/M/294), available at <https://geneva.usmission.gov/2011/03/28/mar-25-2011-dsb-meeting/> (expressing grave concerns with the Appellate Body's findings relating to "public body" and the concurrent imposition of antidumping and countervailing duties).
- *Thailand – Cigarettes (Philippines)* (DS371): Statement by the United States at the Meeting of the Dispute Settlement Body on July 15, 2011 (WT/DSB/M/299) (expressing concerns with the Appellate Body's discussion of the "object and purpose" of the GATT 1994 and with the violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).
- *EC – Fasteners (China)* (DS397): Statement by the United States at the Meeting of the Dispute Settlement Body on July 28, 2011 (WT/DSB/M/301), available at <https://geneva.usmission.gov/2011/07/28/statement-by-the-united-states-at-the-july-28-2011-dsb-meeting/> (expressing concerns with the Appellate Body's violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).
- *US – Tyres* (DS399): Statement by the United States at the Meeting of the Dispute Settlement Body on October 5, 2011 (WT/DSB/M/304), available at <https://geneva.usmission.gov/2011/10/06/dsb-meeting-3/> (expressing concerns with the Appellate Body's violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).

- *China – Raw Materials (United States, EC, Mexico)* (DS394, DS395, DS398): Statement by the United States at the Meeting of the Dispute Settlement Body on February 22, 2012 (WT/DSB/M/312) (expressing concerns with the Appellate Body’s violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).
- *US – Large Civil Aircraft* (DS353): Statement by the United States at the Meeting of the Dispute Settlement Body on March 23, 2012 (WT/DSB/M/313) (expressing concerns with the Appellate Body overstepping its authority by opining on matters within the authority of other WTO bodies).
- *US – Tuna II* (DS381): Statement by the United States at the Meeting of the Dispute Settlement Body on June 13, 2012 (WT/DSB/M/317), available at <https://geneva.usmission.gov/2012/06/14/statement-by-the-united-states-at-the-june-13-2012-dsb-meeting/> (expressing concerns with the Appellate Body’s interpretation of the TBT Agreement and with the Appellate Body’s violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).
- *US – COOL* (DS384, DS386): Statement by the United States at the Meeting of the Dispute Settlement Body on July 23, 2012 (WT/DSB/M/320), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jul23.ins_for-dels.as-delivered.fin_.pdf (expressing concerns with the Appellate Body’s interpretation of the TBT Agreement and with the Appellate Body’s violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).
- *Canada – Renewable Energy (EU, Japan)* (DS412, DS426): Statement by the United States at the Meeting of the Dispute Settlement Body on May 24, 2013 (WT/DSB/M/322) (expressing concerns with the Appellate Body’s analysis of “benefit” under Article 1.1(b) of the Subsidies Agreement).
- *EC – Seal Products (Canada, Norway)* (DS400, DS401): Statement by the United States at the Meeting of the Dispute Settlement Body on June 18, 2014 (WT/DSB/M/346) (expressing concerns with the Appellate Body’s interpretation of the national treatment provisions of the GATT 1994 and TBT Agreement, and with the Appellate Body’s violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).
- *US – Countervailing and Antidumping Measures* (DS449): Statement by the United States at the Meeting of the Dispute Settlement Body on July 22, 2014 (WT/DSB/M/348), available at <https://geneva.usmission.gov/wp-content/uploads/sites/290/July22-DSB-Stmt-as-delivered.pdf> (expressing concerns that the Appellate Body violated Article 17.6 of the DSU and exceeded its authority to review legal issues by reviewing panel findings of fact, including factual findings relating to the meaning of U.S. domestic law).

- *US – Carbon Steel* (DS436): Statement by the United States at the Meeting of the Dispute Settlement Body on December 19, 2014 (WT/DSB/M/354), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec19.DSB_.Stmt_.as-delivered.Public.pdf (expressing concerns with the Appellate Body’s interpretations of the Subsidies Agreement (*e.g.*, relating to benchmarks and public body) and with the Appellate Body’s violation of Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report).
- *US – Countervailing Duty Measures* (DS437): Statement by the United States at the Meeting of the Dispute Settlement Body on January 16, 2015 (WT/DSB/M/355) (expressing concerns with findings of the Appellate Body that made out a claim not advanced by a party (and whose appeal had already been rejected)the Appellate Body’s interpretation of the Subsidies Agreement for purposes of use of SOE prices for determining market benchmarks, and with the Appellate Body’s failure to comply with the mandatory 90-day deadline for issuing a report).
- *Argentina – Import Measures* (DS438, DS444, DS445): Statement by the United States at the Meeting of the Dispute Settlement Body on January 26, 2015 (WT/DSB/M/356), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan26.DSB_.Stmt_.as-delivered.Fin_.Public.pdf (expressing concerns with the Appellate Body’s failure to comply with the mandatory 90-day deadline for issuing a report).
- *US – COOL (Article 21.5)* (DS384, DS386): Statement by the United States at the Meeting of the Dispute Settlement Body on May 29, 2015 (WT/DSB/M/362), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/May29.DSB_.Stmt_.as-delivered.Public.pdf (expressing concerns with the Appellate Body’s findings concerning Article 2.1 of the TBT Agreement and the Appellate Body’s failure to comply with the mandatory 90-day deadline for issuing a report).
- *India – Agricultural Products (United States)* (DS430): Statement by the United States at the Meeting of the Dispute Settlement Body on June 19, 2015 (WT/DSB/M/364), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun19.DSB_.Stmt_.as-delivered.Public.pdf (expressing concerns with the Appellate Body’s consideration of issues not raised on appeal and with the Appellate Body’s failure to comply with the mandatory 90-day deadline for issuing a report).
- *US – Tuna II (Article 21.5)* (DS381): Statement by the United States at the Meeting of the Dispute Settlement Body on December 3, 2015 (WT/DSB/M/371), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec3.DSB_.Stmt_.as-delivered.Public.pdf (expressing concerns with the Appellate Body’s analysis of discrimination and its findings that the measure breached WTO rules for reasons that could have been but were not raised in the original proceeding).

2016-2020

- *Argentina – Financial Services (Panama)* (DS453): Statement by the United States at the Meeting of the Dispute Settlement Body on May 9, 2016 (WT/DSB/M/378), available at <https://geneva.usmission.gov/wp-content/uploads/sites/290/May-9-DSB.pdf> (expressing concerns with the Appellate Body lengthy advisory opinion on issues not necessary to resolve the dispute).
- *US – Washing Machines* (DS464): Statement by the United States at the Meeting of the Dispute Settlement Body on September 26, 2016 (WT/DSB/M/385), available at <https://geneva.usmission.gov/wp-content/uploads/sites/290/DSB26sept16.pdf> (expressing concerns with the Appellate Body’s approach to substantive claims under the Antidumping Agreement and Subsidies Agreement as well as the proper role of the Appellate Body reviewing claims by a party and findings by a panel).
- *India – Solar Cells* (DS456): Statement by the United States at the Meeting of the Dispute Settlement Body on October 14, 2016 (WT/DSB/M/386) (expressing concerns that a separate opinion was another example of an advisory opinion on an issue not necessary to resolve the dispute).
- *EU – Biodiesel (Argentina)* (DS473): Statement by the United States at the Meeting of the Dispute Settlement Body on October 26, 2016 (WT/DSB/M/387), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct26.DSB_.Stmt_.pdf (expressing concerns that the Appellate Body violated Article 17.6 of the DSU and exceeded its limited authority to review legal issues by reviewing panel findings of fact, including factual findings relating to the meaning of the EU’s domestic law).
- *EU – Fatty Alcohol (Indonesia)* (DS442): Statement by the United States at the Meeting of the Dispute Settlement Body on September 29, 2017 (WT/DSB/M/402), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Sept29.DSB_.Stmt_.as-delivered.fin_.public.pdf (expressing concerns with the Appellate Body’s treatment of Article 19.1 as discretionary and that the Appellate Body violated Article 17.2 of the DSU by allowing former members to consider an appeal after their terms have ended).
- *Indonesia – Import Licensing Regime (United States, New Zealand)* (DS477/DS478): Statement by the United States at the Meeting of the Dispute Settlement Body on November 22, 2017 (WT/DSB/M/404), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf (expressing concerns that the Appellate Body addressed issues not necessary to resolve the dispute and that the Appellate Body violated Article 17.2 of the DSU by allowing a former member to consider an appeal after his term had expired).
- *EU – PET (Pakistan)* (DS486): Statement by the United States at the Meeting of the Dispute Settlement Body on May 28, 2018 (WT/DSB/M/413) (expressing concerns that the Appellate Body rendered an advisory opinion on issues not necessary to resolve the

dispute and breached Article 17.2 of the DSU by allowing a former member to consider an appeal after his term had expired).

- *EC – Large Civil Aircraft (Article 21.5– US)* (DS316): Statement by the United States at the Meeting of the Dispute Settlement Body on May 28, 2018 (WT/DSB/M/413) (expressing concerns that the Appellate Body breached Article 17.2 of the DSU by allowing former members to consider an appeal after their terms had expired).
- *US – Tuna II (Article 21.5 – US)* (DS381): Statement by the United States at the Meeting of the Dispute Settlement Body on January 11, 2019 (WT/DSB/M/417), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan11.DSB_.Stmt_.as-deliv.fin_.pdf (expressing concerns that the Appellate Body’s interpretation of the non-discrimination obligation under the TBT Agreement and GATT 1994 calls for reviewing factors unrelated to any difference in treatment due to national origin).
- *Korea – Radionuclides (Japan)* (DS495): Statement by the United States at the Meeting of the Dispute Settlement Body on May 28, 2019 (WT/DSB/M/429), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB_.Stmt_.as-deliv.fin_.public-1.pdf (expressing concerns in relation to the reversal of certain panel findings that raised concerns of Appellate Body overreaching).
- *US – Countervailing Measures (Article 21.5)* (DS437): Statement by the United States at the Meeting of the Dispute Settlement Body on August 15, 2019 (WT/DSB/M/433), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug15.DSB_.Stmt_.as-deliv.fin_.public.pdf (expressing concerns that the appellate report’s erroneous findings relating to public body, third-country benchmarks, and de facto specificity would weaken the ability of WTO Members to use WTO tools to discipline injurious subsidies and that the Appellate Body breached Article 17.2 of the DSU by allowing a former member to consider an appeal after their term had expired).
- *Ukraine – Ammonium Nitrate (Russia)* (DS493): Statement by the United States at the Meeting of the Dispute Settlement Body on September 30, 2019 (WT/DSB/M/434), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Sept30.DSB_.Stmt_.as-deliv.fin_.public.pdf (expressing concerns with the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU and that the Appellate Body breached Article 17.2 of the DSU by allowing a former member to consider an appeal after their terms had expired).
- *Korea – Pneumatic Valves (Japan)* (DS504): Statement by the United States at the Meeting of the Dispute Settlement Body on September 30, 2019 (WT/DSB/M/434), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Sept30.DSB_.Stmt_.as-deliv.fin_.public.pdf (expressing concerns with the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU and that the Appellate Body breached Article 17.2 of the DSU

by allowing a former member to consider an appeal after their term had expired). See also Statement by the United States at the Meeting of the Dispute Settlement Body on October 28, 2019 (expressing concerns with the Appellate Body's incorrect legal interpretation of Article 6.2 of the Dispute Settlement Understanding adding a requirement for the legal basis of a panel request that does not appear in the text).

- *Morocco – Hot-Rolled Steel (Turkey)* (DS513): Statement by the United States at the Meeting of the Dispute Settlement Body on January 8, 2020, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan8.DSB_.Stmt_.as-deliv.fin_public-1.pdf (expressing concerns with the failure of the Appellate body to following the mandatory 90-day deadline in Article 17.5 of the DSU and with the issuance of an advisory opinion , even after the appellant had withdrawn its appeal, opining on how another WTO body (the DSB) should carry out its procedures).