

The Broken Multilateral Trade Dispute System

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Terence P. Stewart
Managing Partner
Law Offices of Stewart and Stewart

2100 M Street, N.W., Suite 200 Washington, DC 20037 (202) 785-4185 tstewart@stewartlaw.com

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INTRODUCTION

The World Trade Organization (WTO) came into existence on January 1, 1995, twenty-three years ago. One significant new feature of the global trading system was a WTO dispute settlement system that provided both the opportunity for appeals from panel decisions and made the final decisions (whether by a panel or the Appellate Body) “binding,” *i.e.*, the decision could not be blocked by the losing party. This was a major change from how disputes were handled and resolved under the General Agreement on Tariffs and Trade (GATT). Over time, many WTO Members have expressed strong support for the dispute settlement system and general approval with its overall performance. Even so, many countries have also pointed to procedural and systemic problems in the functioning of the dispute settlement system. The United States, under various administrations - Republican and Democratic alike - has been in the forefront of such criticism. The concerns that prior Administrations expressed from time to time are receiving increased attention under the current Administration. One of the serious concerns which has been identified by the United States and other WTO Members is the increasing tendency of the dispute settlement process to displace or erode the negotiation function of the WTO. U.S. Trade Representative Lighthizer highlighted this concern in December 2017 at the WTO ministerial (MC11) in Buenos Aires.

¹ An earlier version of this paper was presented at the Global Business Dialogue’s program entitled “Disputed Court: A Look at the Challenges to (and from) the WTO Dispute Settlement System” (December 20, 2017); <http://www.gbdinc.org/gbd-events/disputed-court-december-20-2017/>.

**Excerpt from Ambassador Lighthizer’s Opening Plenary Statement
to the WTO 11th Ministerial Conference,
Buenos Aires, Argentina, December 11, 2017**

First, the WTO is obviously an important institution. It does an enormous amount of good, and provides a helpful negotiating forum for Contracting Parties.

But, in our opinion, serious challenges exist.

* * *

Second, many are concerned that the WTO is losing its essential focus on negotiation and becoming a litigation-centered organization. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table. We have to ask ourselves whether this is good for the institution and whether the current litigation structure makes sense. (Emphasis added).

The WTO has struggled to maintain its relevance in developing updated rules and new agreements to expand global trade on a basis acceptable to the membership. While the WTO has succeeded with certain sectoral negotiations (*e.g.*, expansion of the Information Technology Agreement) and new agreements (*e.g.*, the Trade Facilitation Agreement), the negotiating function of the WTO has been in significant decline over much of the WTO’s existence. The 16-year journey of the Doha Development Agenda negotiations is the obvious exemplar of the Members’ inability to complete negotiations in a timely manner and reflects serious differences amongst WTO Members on the direction and relative responsibility of various Members. Similarly, WTO Members had committed to reviewing the Dispute Settlement Understanding and modifying it if necessary by the end of 1998 – a process that remains unfilled as of today, more than nineteen years later. The inability to conclude negotiations has frustrated Members’ (and the WTO’s) ability to update rules, cover new areas of trade, and further liberalize trade on a multilateral basis. It has also led many countries, including the United States, to put increased emphasis on negotiations among the willing (FTAs, sectorals, etc.). That was true under the Obama Administration and has been restyled/continued under the Trump Administration.

While there are various reasons for the reduced ability of the WTO to conclude multilateral negotiations, it is the view of many Members that a contributing factor to the reduced relevance of

multilateral negotiations has been the approach of the Appellate Body to deciding disputes. There is little doubt that the Appellate Body has, in various areas, created rights and obligations for sovereign states by filling gaps in agreements and interpreting silence or ambiguous language in ways that create obligations that were never agreed to by the WTO Members themselves. The Appellate Body's approach to decision-making has thus encouraged Members to seek through dispute settlement that which they historically would have sought through negotiations. Stated differently, the Appellate Body's approach has had the unintended consequence of undermining the need of Members to negotiate on unresolved matters, instead encouraging Members to seek to legislate through dispute settlement. This state of affairs is not conjecture or surmise but reflective of private conversations with many missions in Geneva over the last two decades. There are issues that governments have chosen not to raise in negotiations in the hope that they could obtain their goals through litigation at the WTO, even though they knew what they sought had never been agreed to by the other Members. While fundamental disagreement on relative responsibility in advancing trade liberalization amongst the major WTO Members properly can be viewed as the main hurdle to forward movement on multilateral negotiations, a perception that various important issues don't need to be negotiated because of a possible dispute approach certainly exacerbates the challenges.

One particular example of Members achieving through litigation that which could not be gained through negotiation is the issue of "zeroing" as applied in antidumping calculations. The United States made the following statement before the Dispute Settlement Body (DSB) on May 9, 2006:²

29. In conclusion, we would note the observation on the Appellate Body Report from a supporter of the outcome in the dispute: "This ruling is an important development in the WTO jurisprudence. In a sense, the AB made a huge contribution to free trade, *which could not be made by negotiation alone.*" (Emphasis added). 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

² The U.S. statement is also reflected in the DSB minutes of the May 9, 2006 meeting: "Based on what the United States had heard and had read thus far, the Appellate Body Report was being applauded in some quarters because it had gone beyond what negotiators could have achieved. However, that was just another way of saying that the Report had added to or diminished rights and obligations actually agreed to by Members, notwithstanding Articles 3.2 and 19.2 of the DSU. To the extent that this perception was widely held, the credibility of the WTO dispute settlement system was undermined." WT/DSB/M/211, ¶ 40 (June 26, 2006).

to add to or diminish rights and obligations actually agreed to by Members, notwithstanding DSU Articles 3.2 and 19.2, is highly corrosive to the credibility that the dispute settlement system has accumulated over the past 11 years.³

The WTO is frequently described as a Member-driven organization which operates on the basis of consensus. Efforts by any part of the WTO to usurp the rights of the WTO Members raise implications for the trading system that go beyond whether one is generally satisfied or not with the dispute settlement system. The WTO dispute settlement system is facing serious systemic issues – issues that are affecting its current operation and that threaten its future effectiveness. A key question for the future is whether the WTO will be a Member-driven organization in which obligations are assumed following negotiations or whether multilateral rules at the WTO are essentially created by the seven members of the Appellate Body? For democratically elected governments, at a minimum, the latter approach necessarily raises serious questions.

Before the DSB, the United States has, over a number of years and Administrations, identified a number of serious systemic issues affecting the dispute settlement system. The following briefly reviews some of the deficiencies and concerns raised by the United States and other Members with respect to the operation of the dispute settlement system and its consistency with its limited functions as set out in the Dispute Settlement Understanding (DSU). The following discussion is, of necessity, abbreviated. Failure to adhere to the structure of the DSU by panels and the AB is a matter of ongoing concern to the United States (and presumably others) on a wide range of issues – timeliness of reports, role of panels and the AB vs. Members in a given dispute are several of the issues not discussed in detail below but which fit into the same framework for analysis as the issues discussed.

³ *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), Communication from the United States*, WT/DS294/16, ¶ 29 (May 17, 2006) (citing International Economic Law & Policy Blog, Worldtradelaw.Net (visited 4 May 2006) <http://worldtradelaw.net.typepad.com/ielpblog/2006/04/a_farewell_to_z.html>).

A. Deviation by Panels and the Appellate Body From Their Authorized Roles under the DSU

1. Overreaching by Panels and the Appellate Body by Changing, Altering, or Establishing Rights and Obligations Not Negotiated by Members

The DSU is the foundational document for the WTO dispute settlement system. It sets the institutional boundaries within which the panels and Appellate Body are to operate. Article 3.2 of the DSU expresses WTO Members' recognition that the WTO 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." But, DSU Articles 3.2 and 19.2 explicitly prohibit panels, the Appellate Body and the Dispute Settlement Body (DSB) from making findings or recommendations that "add to or diminish the rights and obligations provided in the covered agreements." Thus, DSU Articles 3.2 and 19.2 are designed to prevent panels and the Appellate Body from, in effect, legislating from the bench. Moreover, consistent with the DSU's proscription against adding to or diminishing rights and obligations in dispute settlement, the WTO Charter provides that "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."⁴

Prior to the DSU, as a general matter, GATT panels did not construe silence or fill gaps in the covered agreements. However, relatively early on in the Appellate Body's existence, it decided that it could fill gaps or interpret silence in covered agreements.⁵ The AB also determined early on that review of the negotiating history to the covered agreements was not necessary to its understanding and interpretation of gaps or silence in the agreements.

The extent to which panels and/or the Appellate Body have overreached their authority by creating new obligations for Members has been a controversial issue at the WTO. Both developed and

⁴ See Marrakesh Agreement Establishing the World Trade Organization art. IX.2 (Apr. 15, 1994), 1867 U.N.T.S. 154.

⁵ See, e.g., *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996), p. 18.

developing-country Members (*e.g.*, United States, Mexico, India, Chile, Argentina, Pakistan, Costa Rica, Malaysia, and Turkey, among others) have criticized panels and/or the Appellate Body for overreaching their authority by filling gaps, construing silences, selectively choosing one of many dictionary definitions available to define terms in the texts of the agreements, and creating obligations never agreed to in negotiations among Members. These Members believe that, in certain cases, the Appellate Body has failed to respect the negotiated compromises reflected in the agreements and failed to exercise restraint when faced with textual gaps, ambiguity, or silence – which may have been intended by the negotiators. Rather, they believe that the meaning and filling of gaps or silences should properly be left to the Members themselves. For example, the table below provides a sampling of early criticisms (1997-2004 period) by WTO Members who believed that panels and/or the Appellate Body overreached their authority in particular cases.

Samples of WTO Members’ Criticism of Appellate Body Decisions Creating Rights or Obligations by Overreaching⁶

WTO Dispute	Examples of Critical Statements	Issue	Agreement
<i>US – Wool Shirts & Blouses</i> (DS33)	<i>Costa Rica</i> : “The observations of the panel and the Appellate Body had diverged from past practice and had modified the balance of rights and obligations which they claimed to be seeking to protect.” (<i>WT/DSB/M/33, p. 12 (June 25, 1997)</i>)	Burden of proof for transitional safeguard actions	ATC
<i>US – Shrimp</i> (DS58)	<i>Pakistan</i> : “[T]he Appellate Body had exceeded its authority. The Appellate Body, by giving a new interpretation to certain DSU provisions had overstepped the bounds of its authority by undermining the balance of rights and obligations of Members. . . . The Appellate Body had encroached upon the authority of both Members and negotiators of the WTO Agreement.” (<i>WT/DSB/M/50, p. 5 (Dec. 14, 1998)</i>) <i>India</i> : “The Appellate Body had an important role, but if it exceeded its mandate and authority under the DSU, like in this case, this would have the effect of adding to or diminishing the rights and obligations of Members under the various Agreements.” (<i>WT/DSB/M/50, p. 10 (Dec. 14, 1998)</i>)	Acceptance of <i>amicus curiae</i> briefs	DSU
<i>Guatemala – Cement</i> (DS60)	<i>Mexico</i> : “The Appellate Body had added new obligations on Members. . . . The Appellate Body had contravened the provisions of Article 19.2 of the DSU, because its findings had diminished and added to the rights and obligations provided in the covered agreements.” (<i>WT/DSB/M/51, pp. 17–18, (Jan. 22, 1999)</i>)	Proper identification of a measure in a panel request	DSU, AD
<i>Canada – Aircraft</i> (DS70)	<i>Canada</i> : “[T]he Appellate Body had disregarded the general practice of international tribunals, which had been extensively argued by both parties.” (<i>WT/DSB/M/67, p. 4 (Sept. 30, 1999)</i>)	Members’ obligation to provide information and documents requested by a panel	DSU

⁶ The table is derived from a table prepared for the following article: Terence P. Stewart, Patrick J. McDonough, Jennifer M. Smith & Sandra K. Jorgensen, *The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?*, *Global Trade and Customs Journal*, Volume 8, Issue 11&12 (2013) at 393-94.

WTO Dispute	Examples of Critical Statements	Issue	Agreement
India – Quantitative Restrictions (DS90)	<i>Malaysia</i> : “[T]he Appellate Body had gone beyond its jurisdiction. . . . [T]he Appellate Body had modified significantly the rights and obligations of Members contrary to Article 3.2 of the DSU. It had taken away the rights of developing country Members with regard to the provisions of the BOP Understanding. The Appellate Body’s decision had thus seriously affected the delicate balance of rights and obligations provided not only in the BOP Understanding but also within the entire package of the WTO Agreements, which had been agreed as a single undertaking.” (WT/DSB/M/68, p. 22 (Oct. 20, 1999))	Dispute settlement system’s competency to review the justification of balance-of-payment restrictions	BOP, GATT 1994 Arts. XVIII:B and XXIII, DSU
US – FSC (DS108)	<i>US</i> : “[T]he Appellate Body appeared to have unjustifiably expanded the scope of action that might be taken. . . . At a minimum, the Appellate Body had managed to confuse the distinction between an authoritative interpretation under Article IX and an amendment under Article X in a manner that was not helpful to the WTO system.” (WT/DSB/M/77, ¶ 56 (Apr. 17, 2000))	Financial contribution; countermeasures	SCM
Argentina – Footwear (EC) (DS121)	<i>Argentina</i> : “The Appellate Body’s interpretation . . . had altered the balance of rights and obligations resulting from the Uruguay Round Agreement. It had gone beyond the political agreement reached in this area during the Uruguay Round negotiations. . . . In other words, the Appellate Body would seem to be legislating rather than verifying the application of law in the case at hand.” (WT/DSB/M/73, p. 7 (Feb. 4, 2000))	Unforeseen developments	Safeguards
US – Lead and Bismuth II (DS138)	<i>Argentina</i> : “[T]he interpretation made by the Appellate Body exceeded its authority to establish working procedures for Appellate Review.” (WT/DSB/M/83, ¶ 14 (July 7, 2000))	Acceptance of <i>amicus curiae</i> briefs	DSU
US – Wheat Gluten (DS166)	<i>US</i> : “[P]anels and the Appellate Body had overstepped their bounds when they had arrogated to themselves the right to censure particular Members for any reason.” (WT/DSB/M/97, ¶ 5 (Feb. 27, 2001))	AB’s ability to censure Members	DSU
US – Section 211 Appropriations Act (DS176)	<i>US</i> : “[T]he Appellate Body Report had not sufficiently distinguished between these factual and legal findings of a panel and thus risked encroaching on a panel’s factfinding role.” (WT/DSB/M/119, ¶ 27 (March 6, 2002))	Scope of appellate review	TRIPS
US – Lamb (DS177/178)	<i>US</i> : “[T]he Appellate Body’s findings . . . verged on an interpretation of a WTO agreement, even though such interpretations could be made only by Members. . . . This was a new obligation, not found in the WTO Agreements.” (WT/DSB/M/105, ¶ 42 (June 19, 2001))	Unforeseen developments	Safeguards
US – Hot-Rolled Steel (Japan) (DS184)	<i>US</i> : “The United States was concerned that the Appellate Body’s discussion of Article 17.6 had given entirely insufficient emphasis to the distinct nature of the review provided for in the Anti-Dumping Agreement.” (WT/DSB/M/108, ¶ 69 (Oct. 2, 2001))	Standard of review	AD
US – Line Pipe (Korea) (DS202)	<i>US</i> : “There were many instances in which the Appellate Body Report had disregarded the language of the covered agreements and applied standards of its own devising to evaluate the claims against the United States. . . . The greatest concern . . . was the Appellate Body’s growing habit of creating its own rules.” (WT/DSB/M/121, ¶ 35 (Apr. 3, 2002))	Unforeseen developments; parallelism; non-attribution analysis; standard of review	Safeguards
Chile – PBS (DS207)	<i>Chile</i> : “[T]he Appellate Body was reconstructing the history in its conclusions. . . . Indeed, the conclusions of the Appellate Body and the Panel had rewritten the results of the negotiations and had altered the balance of rights and obligations. . . . [A]s a result of the Reports such as those at the present meeting, Members would be faced with new obligations which had never been negotiated and which would lead, as in this case, to a transformation of the bases and legal effects of the most fundamental rules of GATT 1994.” (WT/DSB/M/134, ¶¶ 13–14 (Jan. 29, 2003))	Similarity to variable import levies and minimum import prices	Agriculture
US – Countervailing Measures on Certain EC Products	<i>US</i> : “[T]he Appellate Body’s approach rested on certain general, unsupported assertions by the Appellate Body.” (WT/DSB/M/140, ¶ 9 (Feb. 6, 2003))	Privatization	SCM

WTO Dispute	Examples of Critical Statements	Issue	Agreement
(DS212)			
<i>US – CDSOA</i> (DS217/234)	<i>US</i> : “The Appellate Body had created a new category of prohibited subsidies that had neither been negotiated nor agreed to by WTO Members. . . . A finding that a Member had not acted in ‘good faith’ would clearly and unambiguously exceed the mandate of dispute settlement panels and the Appellate Body.” <i>(WT/DSB/M/142, ¶¶ 55–57 (March 6, 2003))</i>	Specific action; AB’s jurisdiction to determine if a Member has not acted in good faith	SCM
<i>EC – Sardines</i> (DS231)	<i>Chile</i> : “The Appellate Body’s decision created a new category of Members, giving them rights and obligations that had not been negotiated and, furthermore, had not been recognised in the WTO Agreements.” <i>(WT/DSB/M/134, ¶ 42 (Jan. 29, 2003))</i>	Acceptance of <i>amicus curiae</i> briefs	DSU
<i>Japan – Apples</i> (DS245)	<i>Japan</i> : “[T]he Panel had prematurely shifted the burden of proof to Japan, and the Appellate Body had upheld this ruling.” <i>(WT/DSB/M/160, ¶ 10 (Jan. 27, 2004))</i>	Burden of proof	SPS
<i>EC – Tariff Preferences</i> (DS246)	<i>India</i> : “[T]he findings of the Appellate Body had effectively transferred the prerogatives and powers of WTO Members to panels and the Appellate Body.” <i>(WT/DSB/M/167, ¶ 52 (May 27, 2004))</i>	Non-discriminatory tariff preferences under GSP schemes; burden of proof	GATT 1994 Art. I:1 and Enabling Clause
<i>US – Steel Safeguards</i> (DS248/249/251/252/253/254/258/259)	<i>US</i> : “Such an exaltation of form over substance should be of concern to all Members.” <i>(WT/DSB/M/160, ¶ 32 (Jan. 27, 2004))</i>	Explicit findings	Safeguards

The Addendum attached to this paper updates the foregoing table. The Addendum provides excerpts from the minutes of DSB meetings over the period 2004-2017. These excerpts demonstrate that WTO Members, including the United States and other countries (including Mexico, Korea, the European Union, Japan, Argentina, Australia, Chile, Turkey, Brazil, Costa Rica, Norway, Guatemala, Canada, Ukraine, and the Russian Federation), have continued, up to the present time, to criticize panels and the Appellate Body with respect to a variety of issues ranging from overreaching by panels and the AB by creating obligations never negotiated by the Members, the timeliness or lack thereof of AB reports (*i.e.*, reports issued past the 90-day requirement), and the failure of panels and the AB to adhere to the limited roles prescribed for them by the DSU. *See* Addendum.

The problem of overreaching by WTO dispute settlement panels and the Appellate Body has been recognized and criticized by Congress and various Administrations. In the Trade Act of 2002, Congress found that “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.”⁷ Congress explicitly called for correction of the problem of overreaching and required an Executive Branch strategy report in December 2002 to address the issue.⁸ The Bush Administration’s December 2002 strategy report recognized that support for future trade liberalization depends on a dispute settlement process that does not alter the negotiated balance of rights and obligations by overreaching:

[T]he United States does not agree with the approach that WTO panels and the Appellate Body have sometimes taken in disputes, and is concerned about the potential systemic implications. In particular, the executive branch views with concern the manner in which WTO panels and the Appellate Body have applied the applicable standard of review in disputes involving U.S. trade remedy and safeguard matters, and instances in which they have found obligations and restrictions on WTO Members concerning trade remedies and safeguards that are not supported by the texts of the WTO agreements

If the perception develops that WTO panels and the Appellate Body are substituting their own policy judgment for a negotiated balance of rights and obligations, then it will be difficult to maintain the support and confidence of Members and the public in the value of future negotiations. *It is essential, therefore, that WTO dispute settlement not alter the negotiated balance by creating limitations or obligations to which Members did not agree.*⁹

One sitting AB member, Thomas R. Graham, has recognized the danger of overreaching by the Appellate Body. He has cautioned that WTO Members may lose confidence in the WTO dispute settlement system if they continue to question Appellate Body rulings, noting that the Appellate Body might “risk that invaluable commodity of respect” if it fails to strike a proper balance in its decisions by “interpret[ing] the words too broadly or go[ing] too far in filling a gap or resolving an ambiguity that may have been intentional.”¹⁰ He also pointed out that overreaching by the AB may “make it harder for negotiators to come to agreement in the future, if they fear they must cross every “t” and dot every “i” to prevent unintended interpretations.”¹¹

⁷ 19 U.S.C. § 3801(b)(3).

⁸ See 19 U.S.C. § 3805(b)(3); Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body: Report to Congress Transmitted by the Secretary of Commerce (Dec. 30, 2002).

⁹ Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body: Report to Congress Transmitted by the Secretary of Commerce, at 7 (Dec. 30, 2002) (emphasis added).

¹⁰ Graham, Thomas R. Member of the Appellate Body, World Trade Organization (2013) “Present at the Creation,” J. Int’l Bus. & L., Vol. 12, Issue 2, Article 14, at 325; <http://scholarlycommons.law.hofstra.edu/jibl/vol12/iss2/14>.

¹¹ Graham, Thomas R. Member of the Appellate Body, World Trade Organization (2013) “Present at the Creation,” J. Int’l Bus. & L., Vol. 12, Issue 2, Article 14, at 325; <http://scholarlycommons.law.hofstra.edu/jibl/vol12/iss2/14>.

2. **Obiter Dicta – Comments or Opinions by the Appellate Body on Issues Not Raised by the Parties or Not Essential to a Resolution of the Dispute**

Over the twenty-three years of the WTO's existence, the United States and various other WTO Members have expressed concerns in the context of specific disputes about whether the Appellate Body was properly acting within its designated authority – whether, as discussed above, creating rights or obligations not found in various agreements, or addressing issues either not raised by the parties or unnecessary to a resolution of the dispute between the specific Members. A principal objective of the dispute settlement system as stated in DSU Article 3.3 is to permit a relatively “prompt settlement” of disputes between WTO Members. Because decisions of panels and the Appellate Body become adopted absent a negative consensus (*i.e.*, all WTO Members agree not to adopt a decision, including the winner), it is important that limitations on the powers of panels and the Appellate Body be part of the system and be respected. One of those limits is found in DSU Article 17.6, which limits the Appellate Body to appeals of “issues of law covered in the panel report and legal interpretations developed by the panel.” Thus, under the DSU, it is not the role of the dispute settlement system to provide advisory opinions on matters not in dispute or properly before the panel or Appellate Body. Doing so delays the resolution of the dispute and runs counter to the goal of a “prompt settlement.”

The United States has raised concerns about the Appellate Body advancing opinions on extraneous issues not raised by the parties or not necessary to the decision in various cases, including where the U.S. was simply a third party but believed that the actions of the Appellate Body raised institutional concerns about the proper role of the Appellate Body. The U.S. has characterized such unnecessary statements as in the nature of “obiter dicta.” The following are some recent examples of U.S. statements at DSB meetings:

**Statement by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, May 9, 2016**

The U.S. was a third party in the dispute *Argentina – Measures Relating To Trade In Goods And Services*, WT/DS453. The U.S. criticized the Appellate Body report because, after deciding the issues necessary to resolve the dispute, the AB continued on to address other unnecessary issues.

- Having resolved the appeal on the first, threshold issue of “likeness”, it would have been appropriate to stop the analysis at this point. Indeed, given the unusual circumstances, there were even greater reasons than usual to consider only those issues necessary to resolve the dispute.
- Regrettably, the Appellate Body report does not take the appropriately cautious approach. Rather, it goes on to consider issues on appeal that the Appellate Body itself considered not necessary to resolve the dispute. ...
- But after clarifying that all of the Panel’s findings other than “likeness” were rendered moot, the Appellate Body in paragraph 6.84 states that “[w]ith these considerations in mind, we turn to address the issues raised in Panama’s appeals.” That is, after clarifying that Panama’s appeals concern “moot” panel findings, the Appellate Body goes on to *address* those moot appeals.
- **The United States is concerned that this approach does not reflect the role of dispute settlement as set out in the DSU. It is not the role of this system to make legal findings or interpretations outside the context of resolving a dispute.**
- Indeed, as the Appellate Body itself noted in its report in *Wool Shirts and Blouses*: “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*.”
- It follows that if an issue on appeal is not necessary to resolve a particular dispute, because for example the panel findings have been rendered “moot” as a result of another legal error, then the Appellate Body should decline to make law by resolving that unnecessary issue.
- The DSU directs panels and the Appellate Body to make *findings* on those issues of law that are necessary to assist the DSB in helping resolve the dispute. [DSU 3.7, 7.1, 11] **Indeed, while the United States may consider certain of the Appellate Body’s statements in the remaining 46 pages of its report correct in substance, those statements are unfortunately not findings but more in the nature of *obiter dicta*.** Members may wish to reflect on the significant impact that the issuance of such advisory opinions would have on the functioning of the dispute settlement system.

(Emphasis added.)

**Statement by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, May 23, 2016**

The U.S. noted with respect to the Appellate Body report in *India – Measures Concerning The Importation Of Certain Agricultural Products*, WT/DS 430:

- ... , in DS430, a dispute in which the United States was the complaining party and prevailed, we noted **that the appellate report engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal**, and even expressed “concerns” in that discussion on findings of the panel that were not raised by either party in the appeal. Furthermore, during the hearing, **the Appellate Body devoted considerable time to an issue that the parties and the third parties agreed had not been raised on appeal, involving an item that was not on the record, that had not been raised by either party in its arguments, and had not been examined by the panel and was not the subject of any panel findings.** The

questioning was of such concern that the United States felt compelled to devote its entire closing statement to urging the Appellate Body not to opine on that non-appealed issue.

- **It is not the role of the Appellate Body to engage in abstract discussions or to divert an appeal away from the issues before it in order to employ resources on matters that are not presented in, and will not help resolve, a dispute.**

(Emphasis added).

Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 14, 2016

Regarding the Appellate Body Report in *India – Certain Measures Relating To Solar Cells And Solar Modules*, WT/DS456, the U.S. noted that, as the AB had upheld the panel’s findings on certain issues, “the Appellate Body properly did ‘not consider it necessary’ to examine India’s claims under other legal elements under those provisions as reaching those issues was not necessary to resolve the dispute.”

However, the U.S. further noted that a separate opinion was *obiter dicta*:

- The United States also notes that the report contains a separate opinion. In general, we consider it a positive step for the members of a Division to explore and explain where they have not been able to come to one view on a particular legal issue.
- In the case of this particular opinion, however, we do not see how it relates to an issue raised in this appeal. Accordingly, **it would appear to be another example of *obiter dicta*, a problem to which we have drawn the attention of the DSB in the recent past.**
- As we have also expressed in the past, particularly at a time when workload issues are increasingly affecting the timetable for the resolution of disputes, including appeals, **a focus on those legal issues necessary to resolve the dispute would enhance the efficient functioning of the dispute settlement system.**

(Emphasis added.)

Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, September 29, 2017

Regarding the Appellate Body report in *European Union – Anti-Dumping Measures On Imports Of Certain Fatty Alcohols From Indonesia*, WT/DS442, the U.S. criticized the AB because it acted beyond what was necessary to resolve the dispute by making a recommendation on a contested measure that had expired.

- The United States would like to comment on certain substantive and procedural aspects of this dispute. We focus in particular on the report issued in the appeal in this matter.
- First, on substance. While the United States considers the Division to have arrived at the correct outcome in this particular case, the United States would like to draw the DSB’s attention to an important systemic concern with the report’s interpretation of the DSU.
- The EU had claimed that, due to the expiration of the contested measure during panel proceedings, the Panel erred in making a recommendation with respect to that measure.
- The United States recalls that Article 19.1 of the DSU sets out, in mandatory terms, the requirement that a panel or the Appellate Body “shall recommend” that any measure found to be WTO-inconsistent be brought into conformity with WTO rules. The DSU states that this “shall” be done –

the requirement is not discretionary.

- The Division acknowledged this requirement, stating that it “*attach[ed] significance* to the fact that Article 19.1 is expressed in mandatory terms and linked directly to the findings made by a panel,” and finding that the language “*suggests* that it is not within a panel’s or the Appellate Body’s *discretion* to make a recommendation in the event that a finding of inconsistency has been made.”
- But the Division then goes on to note 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.”
- The Division does 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.**
- **Three paragraphs later, the Division applies to the facts before it, not the mandatory requirement found in Article 19.1, but the rule it apparently has derived from certain of its own prior reports, including the *dicta* just described.**
- Specifically, the report concludes that “[a]bsent any finding or acknowledgement by the Panel that the measure at issue is no longer in force, there was no basis for the Panel to have departed from the requirement in Article 19.1 of the DSU to make a recommendation after having found that measure to be inconsistent with the covered agreements.”
- The United States has grave concerns with such a statement. **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 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: “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”
- As Indonesia and the United States also pointed out in the course of this appeal, **it was unnecessary for the Division even to reach this legal issue.** The alleged evidence of the expiry of the measure was not timely submitted to the Panel, and the Panel made no findings on this issue. Therefore, the Division could simply have noted the absence of any factual finding, and it could have avoided reaching a legal issue not necessary to resolve this dispute.
- Instead, **the Division has made an erroneous statement, relying on previous erroneous statements and *obiter dicta*, and ignoring the clear text of DSU Article 19.1.** This is not an approach that is consistent with the DSU or that contributes to Members’ confidence in the WTO dispute settlement system.

(Emphasis added.)

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, October 23, 2017**

Regarding *Canada – Measures Concerning Trade In Commercial Aircraft*, the U.S. said the following:

Third Intervention

- We note that Brazil has referred to the Appellate Body’s report in *US – Large Civil Aircraft*

(DS353){citing para. 549}.

- The DSB, like any other political body of the WTO – such as the General Council or Ministerial Conference – should resolve disagreements on procedural matters through their own, internal rules and processes. It is not for the dispute settlement system to tell the DSB or the Ministerial Conference or any other WTO body how to operate under its own rules of procedure and whether and how a decision is to be taken.
- **Therefore, any statements relating to the DSB’s procedures in the US – Large Civil Aircraft dispute were unwarranted, and a regrettable choice by the Appellate Body.**
- **To compound the concern, any such statement was not necessary to resolve that appeal and would therefore be in the nature of *obiter dicta*.**
- The Appellate Body’s discussion of whether the initiation of Annex V was by positive consensus was **clearly unnecessary to resolve the dispute**. The Appellate Body itself declined to find that all of the conditions for the initiation of the Annex V procedure had been fulfilled. And the panel considering the same issue had found that, in fact, the DSB had initiated no procedure and that no procedure had been undertaken. On that basis, **the panel had declined to make findings on the legal issue, a judicious approach the Appellate Body failed to emulate.**

(Emphasis added.)

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, November 22, 2017**

Regarding the Appellate Body report in *Indonesia – Importation Of Horticultural Products, Animals And Animal Products*, WT/DS477 (New Zealand) and WT/DS478 (United States), the U.S. noted that the AB addressed issues not necessary to resolve the dispute.

- In finding that each of the challenged measures is inconsistent with Article XI:1, the reports in this dispute soundly rejected Indonesia’s argument. To the contrary, the reports confirm that Article 21.1 of the Agreement on Agriculture operates only to the extent of a conflict between the provisions of the Agreement on Agriculture and the provisions of another covered agreement. The reports also reject Indonesia’s argument that the principle of *lex specialis* is relevant in this context.
- Further, the reports confirm that, in considering claims under different provisions of the covered agreements, a panel may order its analysis as it sees fit unless the order would affect the substantive outcome under the provisions at issue.
- Overall, the United States is pleased with the outcome in this dispute, which we expect will contribute to achieving a solution to this matter.
- **We are disappointed, however, that the Division’s report addresses certain of Indonesia’s claims even as it rejects those claims.** We recognize that the report appears more succinct than some others, but even so, **the report reaches issues that were not necessary to resolve the dispute because the claims had no capacity to alter the DSB recommendations.**
- Under Article 3.3 of the DSU, the aim of the WTO dispute settlement system is “to secure a positive solution to the dispute.” Article 3.3 establishes that “[t]he prompt settlement of situations [of impairment of benefits] is essential” and Article 3.7 provides that “[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter”.
- To contribute to these goals, Articles 7.1, 11, and 19 of the DSU establish the key function of panels and the Appellate Body. Their responsibility is to make such findings as will assist the DSB in making the recommendation to the responding Member to bring any WTO-inconsistent challenged measures into compliance with the relevant provisions of the covered agreements.

- On these bases, the Appellate Body has, in the past, refrained from interpreting provisions of the covered agreements where doing so was “unnecessary for the purposes of resolving [the] dispute.” This is the case where the responding Member’s obligation regarding compliance would not change “irrespective of whether [the Appellate Body] were to uphold or reverse the panel’s finding” on the issue.
- In such situations, the Appellate Body has “addressed” the issues raised by a claim, within the meaning of Article 17.6 of the DSU, by explaining that the claim could have no effect on the DSB recommendations and rulings and, on that basis, declining to make substantive findings on it.
- As the United States explained in its submission and during the appellate hearing, and as several other Members agreed, **once the Division found that Article XI:1 continued to apply to agricultural products and upheld the Panel’s findings that each of the challenged measures was inconsistent with that provision, the Division could, and should, have refrained from substantively addressing the remainder of Indonesia’s claims.** None of Indonesia’s other claims had any potential to alter the DSB recommendations and rulings.
- Nothing in the report suggests that the Division did not agree that this was the case. Indeed, with respect to Indonesia’s claims under GATT 1994 Article XI:2(c) and Article XX, **the report acknowledged that substantively addressing the claims could have no effect on the recommendations and rulings in the dispute.** And with respect to the burden of proof under Article 4.2, while the report suggests that the issue was “intertwined” with Indonesia’s argument concerning the application of Article 21.1 of the Agreement on Agriculture, the report had already entirely rejected Indonesia’s argument that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture could conflict before reaching the issue of the burden of proof.
- Nevertheless, the report substantively addresses all three claims. Indeed, even with respect to Indonesia’s Article XX claim, where **the report expressly agrees with the U.S. argument that addressing the claim is not necessary,** the Division nonetheless discusses the legal standard under Article XX at some length and then, without analysis or further explanation, declares the Panel’s findings moot and of no legal effect.
- **The United States is concerned with the approach in this report. Substantive review of claims not necessary to resolve the dispute between the parties not only uses the Appellate Body’s scarce resources unnecessarily, but it is not consistent with the role of the dispute settlement system set out in the DSU.**

(Emphasis added.)

3. Addressing Measures Not Within the Dispute’s Terms of Reference

The United States has noted in a number of instances that panels or the Appellate Body have reviewed certain measures that were not in existence at the time that the panel was established and thus were not cited in the terms of reference. The U.S. has pointed out that such review is not authorized by the DSU. For example:

Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 22, 2017

Regarding the panel report in *Indonesia – Measures Concerning The Importation Of Chicken Meat And Chicken Products*, WT/DS484 (Brazil), the U.S. stated:

- The dispute is of particular interest to the United States because the United States, along with New Zealand, has raised similar claims with respect to Indonesia’s import licensing regime. Indeed, our claims were upheld in the reports considered under the next agenda item of today’s meeting.
- In general, the United States is pleased that the Panel has found that many of Indonesia’s measures

with respect to the importation of animals and animal products are inconsistent with Article XI:1 of the GATT 1994 and are not justified under Article XX of the GATT 1994.

- At today's meeting, however, **the United States would like to highlight a systemic concern with the Panel's approach regarding measures adopted after the DSB established the Panel's terms of reference.**
- As part of its defense, Indonesia relied on the contention that it had amended or replaced certain legal instruments after the time of panel establishment. In fact, Indonesia contends that it adopted two different sets of changes, and that one of those changes occurred after the first panel meeting.
- **As the United States noted in its third-party submission to the Panel, such post-establishment activity should not have altered the scope of the measures considered by the Panel.** Rather, pursuant to the Panel's terms of reference from the DSB under DSU Article 7.1, and its task to make an objective assessment of "the matter" referred to the DSB under DSU Article 11, the measures were only those that were set out in Brazil's panel request, as they existed at the time of the Panel's establishment.
- **The Panel, however, appeared to consider all of the alleged amendments and replacements throughout the proceeding.** The result was that instead of conducting a full and thorough examination of "the matter" within the Panel's terms of reference, including the specific measures at issue pursuant to DSU Article 6.2, the proceeding became an exercise in trying to analyze a moving target.
- By covering instruments adopted after panel establishment, the parties, the third parties, and the Panel were impeded from conducting a thorough review. Indeed, it appears that some of the instruments were changed after the time that third parties filed their written submissions. In these circumstances, third parties were denied an opportunity to present their views on at least some of the measures covered by the Panel's findings.
- **There is no basis under the DSU for a panel to make findings on new measures that are not within its terms of reference as set by the DSB**

(Emphasis added.)

B. Procedural Issues

WTO Members are sovereign states. Disputes can affect their rights and obligations and result in changes to national laws or regulations or practices or result in retaliation against their goods and services. Hence, the proper functioning of the Appellate Body is an important aspect of an effective dispute settlement system. The United States has been increasingly concerned about the proper functioning of the Appellate Body, in particular with the proper composition of AB membership and operation of the AB.

For example, in recent years, the following circumstances have occurred: an AB member resigned before his term expired and without providing the required notice, two AB members whose terms had expired continued to serve on cases to which they had been assigned before their terms expired,

and the U.S. blocked the reappointment of an AB member based on repeated actions by the AB member that the U.S. viewed as inconsistent with the proper functioning of an Appellate Body member. Each of these situations raised the question of the proper balance between the responsibilities of the DSB as established by the DSU and the actions of the Appellate Body that appear to have usurped or have impinged on the DSB's authority. As the U.S. has noted:

The DSB does not play the passive role of merely witnessing or commenting on dispute settlement. The DSU envisages an active role for the DSB in administering those rules and procedures. That role means that a procedural step charged to the authority of the DSB can take place only if that body has actually taken ("executed") the relevant step. Interpreting an authority of the DSB as occurring without DSB action would be fundamentally inconsistent with the active role envisaged by the DSU.

DSU Article 2.4 states unambiguously that "{w}here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus."

Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 23, 2017.

1. Resignation of an AB Member Without Providing 90 Days' Notice (*Hyun Chong Kim*)

One Appellate Body member, Hyun Chong Kim, resigned effective August 1, 2017. Mr. Kim's resignation was effective immediately, as he did not provide 90 days' notice of his leaving, as provided for by Rule 14(2) of the Working Procedures for Appellate Review. As the U.S. noted, Mr. Kim's resignation implicated the status of those appeals to which he was assigned at the time of his resignation.

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, August 31, 2017**

- The resignation of Mr. Kim from the Appellate Body raises important systemic questions for the DSB to consider and resolve.
- At the time of Mr. Kim's resignation, he was one of three members of the Appellate Body serving on the appeal in the dispute *EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (DS442).
- The Chair of the Appellate Body has informed the DSB that the Appellate Body expects to circulate its report in this dispute no later than Tuesday, September 5.
- However, Members have been informed that, on August 1, Mr. Kim "tender[ed] [his] resignation as an Appellate Body Member, effective 1 August 2017." A WTO press release dated 1 August 2017 reflects the view that "the resignation was with immediate effect."
- **In light of that information, Mr. Kim is no longer an Appellate Body member as of August 1. Therefore, the report to be circulated on September 5 would not appear to be on behalf of**

three Appellate Body members. This raises concerns under Article 17.1 of the DSU, which states that “three [members] shall serve on any one case.”

- Given Mr. Kim’s resignation to become Korea’s Trade Minister, the United States considers it necessary and appropriate for his resignation to have been effective immediately. However, the **WTO press release is in tension with Rule 14(2) of the Working Procedures for Appellate Review, which states that a “resignation shall take effect 90 days after the notification ... unless the DSB decides otherwise.”** We note that the Appellate Body’s rule as drafted would permit any appellate report on which the individual was working to be issued *before* that resignation became effective. This reinforces that a person must be a member of the Appellate Body when that report is circulated to the DSB.

(Emphasis added).

The U.S. again raised this issue at the September 29, 2016 DSB meeting.

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, September 29, 2017**

- Turning now to a procedural issue. The United States raised with Members at the last meeting of the DSB important systemic questions regarding the Division hearing this appeal. As we will note under the next item, Members met informally on this issue but, frankly, engaged in very little substantive discussion of the systemic issues.
- The United States noted that Mr. Kim was no longer an Appellate Body member as of August 1, and the report in this dispute was not circulated until September 5 – more than one month later.
- Members have been informed that Mr. Kim “signed” the report on July 31, one day before resigning and becoming Korea’s Trade Minister. But what is relevant under DSU Article 17.5 is when the report is circulated, not when it is signed. In these circumstances, we do not understand why Mr. Kim was not simply replaced on the Division, so as to permit a current Appellate Body member, fulfilling all the requirements of Article 17, to complete the appeal.

(Emphasis added).

2. AB Members, Whose Terms Have Expired, Continuing to Serve on Ongoing Disputes (example of Mr. Ramirez)

As noted, the United States has expressed the view that the DSB needs to assert the authority assigned it under the DSU. One example where this issue has been at the fore is the question of the continued service of former Appellate Body members after their terms expire.

The Appellate Body is a creation of the Dispute Settlement Body (DSB) pursuant to Article 17 of the Dispute Settlement Understanding. WTO Members, acting through the DSB and DSU Article 17.2, have limited the duration of membership on the Appellate Body to a four-year term with one possible reappointment. Should the WTO membership wish to authorize an individual who is no longer an Appellate Body member to continue to participate on an appeal, that is a question for the WTO

membership acting through the DSB to decide, but certainly it is not for the Appellate Body to determine on its own. The DSU does not confer on the Appellate Body the right to extend the term of an Appellate Body member or allow fewer than three sitting Appellate Body members to serve on an appeal.

The DSU provides the Appellate Body the right to develop working procedures (DSU Article 17.9), but such procedures cannot be used to contravene the structure of the DSU. It is possible that the WTO Members would agree to allow a former AB member to serve on a panel that began when he/she was an AB member or would allow a decision by three individuals who considered the dispute, whether all three were AB members at the time of decision, but that is a determination for the WTO membership to decide affirmatively through the DSB, not for the Appellate Body to determine internally.

At the DSB meeting on August 31, 2017, the U.S. presented statements in which it urged the DSB to address the propriety of Appellate Body actions that have given an Appellate Body member whose term had expired authorization to continue to serve on appeals to which he was assigned after his term expired and would permit the issuance of an Appellate Body report where only one of the three people who considered the Appeal were actually sitting Appellate Body members at the time of the release of the Appellate Body decision.

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, August 31, 2017**

- At the time of Mr. Kim’s resignation, he was one of three members of the Appellate Body serving on the appeal in the dispute *EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (DS442).
* * *
- We further note that Mr. Ramirez is serving on this same appeal, although his second term expired on June 30. This means that on the date the Appellate Body report is circulated to the DSB, only one signatory would appear to actually be an Appellate Body member.
- **These are unprecedented circumstances, and the United States considers that the DSB needs to consider the implications and decide how to handle this situation.**
- In addition to the *Alcohols* (DS442) dispute, Mr. Ramirez continues to serve on two other appeals. In a letter to the DSB Chair, the Chair of the Appellate Body has stated that Mr. Ramirez “has been authorized, pursuant to Rule 15, by the Appellate Body to complete the disposition of these appeals.” Rule 15 only applies to “[a] person who *ceases to be* a Member of the Appellate Body.”
- **Under DSU Article 17.2, it is the DSB that has the authority to appoint and reappoint members of the Appellate Body.** The DSB exercised that authority in reappointing Mr. Ramirez “for a second four-year term of office, starting on 1 July 2013.”

- As decided by the DSB, his appointment as an Appellate Body member expired on June 30, 2017. It is only by virtue of that DSB decision that WTO Members have been considering the issue of a selection process to replace him. But **Members have not discussed how any continued service on appeals might affect that process.**
- **We appreciate that the approach of Rule 15 could contribute to efficient completion of appeals.** As a party in two pending appeals, the United States would welcome Mr. Ramirez’s continued service on the appeals to which he had been assigned as of June 30.
- **Under the DSU, however, the DSB has a responsibility to decide whether a person whose term of appointment has expired should continue serving, as if a member of the Appellate Body, on any pending appeals. We consider the DSB should also discuss this issue so it can take appropriate decisions.**

(Emphasis added).

The U.S. continued to express its concerns in the September 29, 2017 DSB meeting.

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, September 29, 2017**

- As WTO Members also well know, the term of Mr. Ramirez, another member of the Division hearing this appeal, expired on June 30. The DSB has taken no action to permit him to continue to serve as an Appellate Body member. Therefore, Mr. Ramirez too would appear not to have been an Appellate Body member on the date of circulation of this report.
- In these circumstances, the report has not been provided and circulated on behalf of three Appellate Body members, as required under DSU Articles 17.1 and 17.5. And because the report has not been issued consistent with the requirements of Article 17, it cannot be an “Appellate Body report” subject to the adoption procedures reflected in Article 17.14. Rather, the DSB would consider the report’s adoption subject to the positive consensus rule applicable to DSB decisions, pursuant to DSU Article 2.4 and WTO Agreement Article IX:1, note 3.
- Given the serious concerns the United States has described with respect to the Division’s statements regarding Article 19.1 of the DSU, we do not endorse the findings set out in the Division’s report. **Nor can we support an Appellate Body member’s continuation of service without authorization by the DSB.**

- As is clear from the previous item, the issuance of a report on appeal that does not adhere to the requirements set out in the DSU raises yet more concerns.
- **For the United States, the issues are clear. Under the DSU, the DSB has a responsibility to decide whether a person who has ceased to be a member of the Appellate Body should continue serving.**
- **If the DSB agrees that such a person should continue to serve on an appeal, it would be the DSB’s responsibility to provide an appropriate legal basis to permit this to occur.**

(Emphasis added).

In November 2017, the Appellate Body prepared a background note concerning Rule 15 of the AB’s working procedures. Rule 15 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.” The background note states that Rule 15 has been applied by the AB in 16 instances since 1996, and that, until recently, it had not been called into question.¹² The objection put forward by the United States is that Rule 15 is inconsistent with the requirements of the DSU in that the authority to determine whether an AB member may continue to serve after his or her term has expired is the DSB’s, not the AB’s, and that working procedures issued by the AB may not abrogate or neutralize the DSB’s authority.

At the January 22, 2018 DSB meeting, the U.S. succinctly stated its position: “The Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving.” The U.S. particularly noted that two former AB members whose terms have expired (Mr. Ramirez and Mr. Van Den Bossche) continue to serve on appeals without appropriate authorization from the DSB. Indeed, as the U.S. states, one former AB member is actually serving on more appeals than any current AB member.

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, January 22, 2018**

- As noted in the past, **Mr. Ramirez continues to serve on an appeal, despite ceasing to be a member of the Appellate Body nearly 7 months ago.** Now, a new situation has arisen: **Mr. Van Den Bossche continues to serve on 5 appeals, despite ceasing to be a member of the Appellate Body in December of last year.**
- Mr. Chairman, the latest decision by the Appellate Body to, in its words, “authorize” a person who is no longer a member of the Appellate Body to continue hearing appeals creates a number of very serious concerns.
- First, and foremost, as stated at past meetings, **the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving.** The United States is resolute in its view that Members need to resolve that issue first before moving on to the issue of replacing such a person.
- Second, consider that in one current appeal, only one member of the Division hearing that appeal continues to be a member of the Appellate Body pursuant to DSB appointment decisions.
- Third, we note that, **with the most recent Appellate Body “authorization”, one person who is no**

¹² See *Background Note on Rule 15 of the Working Procedures for Appellate Body Review, Communication from the Appellate Body, JOB/AB/3* (November 24, 2017).

longer a member of the Appellate Body is serving on more appeals -- at least five -- than anyone who is a member of the Appellate Body.

- And so, in addition to our concern that all of this is contrary to the DSU and without any DSB authorization, we have to ask: **is this reasonable or appropriate?**

(Emphasis added).

3. Objection to Reappointment of an AB Member

In May 2016, the United States stated that it would oppose the reappointment of an AB member (Mr. Chang) because it considered that he had not properly executed the functions of the AB in light of a number of decisions on which Mr. Chang had been one of the AB members. At the DSB meeting of May 23, 2016, the U.S. presented a lengthy and cogent defense of its decision to oppose the reappointment of Mr. Chang.

The essential reason for the U.S. position was that it did not believe that Mr. Chang's "service reflects the role assigned to the Appellate Body by WTO Members in the WTO agreements," and the U.S. believes that "failure to follow scrupulously the role {that} Members have assigned through these agreements undermines the integrity of, and support for, the WTO dispute settlement system." U.S. Statement, page 1. At the DSB meeting, the U.S. reviewed four AB decisions on which Mr. Chang was a panelist. These decisions ranged from one where the U.S. was a third party, one where the U.S. was the complainant (and won), and two where the U.S. was the defendant (and lost). For each decision, the U.S. highlighted the action by the AB which it considered inappropriate -- devoting two-thirds of a decision to issues that were not necessary to the decision (DS453), addressing issues that were not part of the appeal (DS430), deciding cases on the basis of arguments not made by any party (DS437), and deciding what is lawful under a Member's domestic law (DS449). Six Appellate Body members took the unprecedented step of submitting a letter in response to the U.S. position.¹³ The U.S. addressed this letter and other objections from members in its DSB statement on May 23, 2016, excerpts of which follow:

¹³ See *Appellate Body Annual Report for 2016* (March 2017), WT/AB/27 (16 May 2017) at p. 102 (Annex 3).

**Statement by the United States at the Meeting of the WTO Dispute Settlement Body,
Geneva, May 23, 2016**

The U.S. objected to the reappointment of an AB member, Mr. Chang.

The Issue of Possible Reappointment of One Appellate Body Member

- ... we do not consider that his service reflects the role assigned to the Appellate Body by WTO Members in the WTO agreements. Any failure to follow scrupulously the role we Members have assigned through these agreements undermines the integrity of, and support for, the WTO dispute settlement system.

- As an initial matter, it is important to underscore that reappointment is not automatic. Article 17.2 of the DSU provides that each member of the Appellate Body “may be reappointed once.” Action by the DSB to reappoint requires a consensus of WTO Members.
- Numerous WTO Members, from the very early years of the WTO, and prior DSB Chairs, have made the point that reappointment is not automatic. Rather, it is a decision entrusted to Members, and it is an important responsibility.

- The role of the Appellate Body as part of the WTO’s dispute settlement system is to decide appeals of panel reports to help achieve “[t]he aim of the dispute settlement mechanism[. . .] to secure a positive solution to a dispute,” as set out in DSU Article 3.7. And the DSU reminds panels and the Appellate Body not once, but twice, that “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”
- Yet the reports on which this member participated do not accord with the role of the Appellate Body. The United States has previously explained at DSB meetings our concerns with the adjudicative approach in a number of appellate reports with which he was involved. That is, setting aside the substance of the reports, we have been troubled and raised systemic concerns about the disregard for the proper role of the Appellate Body and the WTO dispute settlement system in these reports. And these concerns have arisen in disputes in which the United States was a party and in those in which it was not.
- Although the representatives of Members are no doubt aware of those systemic concerns raised by the United States in past DSB meetings, we consider it would be useful to summarize briefly the comments we have made in the DSB in relation to four of those reports.
- First, in the recent DS453 appellate report in the financial services dispute between Panama and Argentina, more than two-thirds of the Appellate Body’s analysis – *46 pages* – is in the nature of *obiter dicta*. The Appellate Body reversed the panel’s findings on likeness and said that this reversal rendered moot all the panel’s findings on all other issues, including treatment no less favorable, an affirmative defense, and the prudential exception under the GATS. Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS. These interpretations served no purpose in resolving the dispute – they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body’s analysis is comprised simply of advisory opinions on legal issues.
- **The Appellate Body is not an academic body that may pursue issues simply because they are of interest to them or may be to certain Members in the abstract.** Indeed, as the Appellate Body itself had said many years ago, it is not the role of panels or the Appellate Body to “make law” outside of the context of resolving a dispute – in effect, to use an appeal as an occasion to write a

treatise on a WTO agreement.

- But that is what the report did in this appeal.
- Second, in DS430, a dispute in which the United States was the complaining party and prevailed, we noted that **the appellate report engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal**, and even expressed “concerns” in that discussion on findings of the panel that were not raised by either party in the appeal. Furthermore, during the hearing, the Appellate Body devoted considerable time to an issue that the parties and the third parties agreed had not been raised on appeal, involving an item that was not on the record, that had not been raised by either party in its arguments, and had not been examined by the panel and was not the subject of any panel findings. The questioning was of such concern that the United States felt compelled to devote its entire closing statement to urging the Appellate Body not to opine on that non-appealed issue.
- **It is not the role of the Appellate Body to engage in abstract discussions or to divert an appeal away from the issues before it in order to employ resources on matters that are not presented in, and will not help resolve, a dispute.**
- A third example occurred in DS437. The United States explained its concerns that the Appellate Body report suggests a view of dispute settlement that departs markedly from that set out in the DSU and reflected in numerous prior reports.
- There, the Appellate Body report rejected a party’s appeal, but then went on to reverse the Panel report and to find a breach on the basis of an argument and approach entirely of the Appellate Body’s creation. This approach suggests that panels and the Appellate Body are to conduct independent investigations and apply new legal standards, regardless of what either party actually argues to the panel or Appellate Body. But that is not right. Under the DSU, panels and the Appellate Body are to consider the evidence and arguments put forward by the parties to make an objective assessment of the matter before it.
- **The Appellate Body is not there to make the case for either party or to act as an independent investigator or prosecutor.**
- Fourth, in DS449, the Appellate Body report took a very problematic and erroneous approach to reviewing a Member’s domestic law, risking turning the WTO dispute settlement system into one that would substitute the judgment of WTO adjudicators for that of a Member’s domestic legal system as to what is lawful under that Member’s domestic law.
- **It is inappropriate for a WTO adjudicator to say it would decide the “right” result under a Member’s law, in the abstract, while ignoring key constitutional principles of that Member’s domestic legal system, but that is what the Appellate Body did.** And it is notable that the panel had used a correct approach of examining the constitutional principles of the domestic legal system – but the Appellate Body report ignored that analysis and instead spent 60 pages making its own analysis of domestic law.
- These U.S. DSB statements conveyed our deep concern with the adjudicative approach used in those reports. We also are concerned about the manner in which this member has served at oral hearings, including that the questions posed spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties. As mentioned, the U.S. closing statement in the hearing in DS430 was addressed precisely to this concern. And it is not difficult to ascertain from the questions posed by a member of a division at an oral hearing that the member is associated with the views expressed in an Appellate Body report related to those questions.
- **Together, the appeals in which the member participated indicate that he has not been willing to adhere to the proper role of the Appellate Body.**
- This is something that should be of concern to all WTO Members. And many delegates have recognized in recent conversations, as well as others over the years, that WTO adjudicators should

be focused on addressing those issues necessary to resolve the dispute. It is important to keep in mind that **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.**

- It is also important to consider whether these types of actions have contributed to the complexity of the disputes and thereby exacerbated the workload problems facing the Appellate Body that have made it difficult for Members to get their trade disputes resolved in a timely manner.
- In conversations with delegations, we have heard a suggestion that WTO Members should not consider the reports signed by a particular Appellate Body member in considering whether that individual should be reappointed. The letter faxed to delegations by other Appellate Body members also raises this issue.
- There is something quite ironic about the idea that WTO Members should not be able to even consider the reports signed by an Appellate Body member in forming a view on the quality of that member's service. The only function of the Appellate Body, as set out in Article 17 of the DSU, is to consider an appeal and issue a report.
- As to the suggestion that an individual Appellate Body member's service should not be linked to the specific appeals in which that member participated, we would ask – what better basis for forming views on that service could there be? Is it really being suggested that WTO Members should ignore the actual, most relevant evidence of how someone is conducting themselves as an Appellate Body member?
- We have also heard an argument that it is inaccurate to hold an individual Appellate Body member accountable for the reports that he signs because others have also signed the same report. The suggestion appears to be that because *more than one* person expresses the same views, *none* of the members should be held responsible for endorsing those views.
- This is not how the system works and does a disservice to each Appellate Body member who has worked hard to be sure that a report accurately reflects their views. In fact, in a number of instances an Appellate Body member has provided separate, individual views in a report.
- We do not see how holding a member accountable for the views they have endorsed and their actual service carries a risk for the trust WTO Members place in the independence and impartiality of the Appellate Body. To the contrary, WTO Members' trust is not built on a vacuum. It is based on the actual performance of the Appellate Body.
- It would help build and maintain trust if each WTO Member has confidence that each member of the Appellate Body is adhering to the mandate that WTO Members have given to the Appellate Body.
- Furthermore, **we have heard a few delegations suggest that reappointment should be treated as though it were automatic in order to avoid interfering with the “independence” of the Appellate Body.**
- As we already explained, from the very first time an Appellate Body member was being considered for reappointment, WTO Members have been clear that **reappointment is not automatic**. And prior DSB Chairs have reiterated this.
- The United States is disappointed at the suggestion that the DSU should now be re-interpreted to reduce the role of DSB and WTO Members in the WTO dispute settlement system. This is not a suggestion the United States can support or a way to sustain confidence in the WTO or its dispute settlement system.
- Article 17.3 of the DSU provides that an Appellate Body member is to be “unaffiliated with any government” and is not to participate in any disputes that would create a direct or indirect conflict of interest. If this is what is meant when referring to the “independence” of the Appellate Body, then it is difficult to see how the authority of the DSB to decline to reappoint a member would cause that member to become affiliated with any government or to develop a conflict of interest in a dispute.

- Moreover, WTO Members have charged WTO adjudicators to be “independent and impartial” through the Rules of Conduct we have adopted. Thus, to be independent is a *responsibility* of each Appellate Body member, and that obligation is compatible with and, in the words of the Rules, “strengthen[s]” the “operation of the DSU” and “in no way modif[ies]” the DSU.
- Thus, Appellate Body members fulfill their responsibility to act independently by serving in their individual capacity, unaffiliated with a government, and by avoiding any conflicts of interest. These values are not and cannot be affected by WTO Members fulfilling *their* responsibility under the DSU to decide whether to reappoint an Appellate Body member by assessing that member’s service in terms of the role assigned to the Appellate Body in the WTO agreements.
- It is also worth noting that the type of assessment for a reappointment is not unique. An assessment of an individual who may serve on the Appellate Body for an additional four years at the reappointment stage is similar to the type of interaction and assessment that occurs whenever a candidate for the Appellate Body is first considered for appointment.
- Carrying out this responsibility with respect to reappointment does not affect the independence and impartiality of that individual any more at this stage than it does with an appointment to the Appellate Body in the first instance.
- And, Mr. Chairman, let me be very clear on one point – the U.S. position on this issue is not one based on the results of those appeals in terms of whether a measure was found to be inconsistent or not. The United States is a frequent user of the WTO dispute settlement system and recognizes that there can always be legitimate disagreement over the results. Instead, **the concerns raised are important, systemic issues that go to the adjudicative approach and proper role of the Appellate Body and the dispute settlement system.**
- The U.S. position is based on the approach chosen by the Appellate Body in each appeal on which this member served and whether that approach accords with the role that WTO Members assigned to the Appellate Body in agreeing to the DSU.
- **To put this issue in perspective, the United States would ask each DSB Member this question. If a candidate for appointment to the Appellate Body were to say openly that he or she would issue Appellate Body reports that do what the reports we have discussed did – that is, the candidate would issue reports where more than 2/3 of the report were *obiter dicta* on issues not necessary to resolve the dispute, the candidate would issue reports engaging in abstract interpretation and raise concerns on matters not under appeal, the candidate would reject an appeal by a party but then reverse a panel and find a breach on a basis not argued by that party, and the candidate would issue reports substituting the Appellate Body’s judgment for what is lawful under a Member’s domestic law for the view of that legal system itself – would your government support that candidate for appointment?**
- We would think most WTO Members would say no. But if such a candidate is not suitable for appointment in the WTO dispute settlement system, we do not think the candidate is any more suitable for reappointment.
- It is for this reason that we would not be able to accept this reappointment.

- ... The DSU assigns the decision on the appointment or reappointment to WTO Members in the DSB, not to the Appellate Body.
- The **Appellate Body members’ letter** acknowledges this in its final paragraph, yet they sent this letter directly to WTO Members and in advance of this discussion anyway. We can well understand that these Appellate Body members wished to show their appreciation for a colleague. However, the fact that these Appellate Body members are seeking to provide views on this issue is, regrettably, **another instance in which Appellate Body members are acting outside the role assigned to them by WTO Members in the DSU.**
- In closing, the United States wishes to thank all Members for their careful attention to these

remarks. As mentioned, the United States has been raising with Members these concerns with the operation of the WTO dispute settlement system, and in particular with the adjudicative approach of certain Appellate Body reports over several years. We appreciate the engagement we have had with delegations already and look forward to engaging further with all Members on these critical issues of how to reinforce the aim and proper adjudicative approach of the dispute settlement system.

(Emphasis added; footnotes omitted).

C. **Canada's Case Against U.S. Trade Remedy Practices – An Example of How WTO Members Misuse the Dispute Settlement System**

In December 2017, at the WTO, Canada requested consultations with the United States concerning a number of U.S. trade remedy practices. *See United States - Certain Systemic Trade Remedies Measures* (DS535). Canada's request is essentially a broad based attack on U.S. trade remedy practices and reflects much of what can be wrong with Members' use of the WTO dispute settlement system. Canada identifies dozens of cases allegedly affected by the U.S. law, regulation or practice of concern, the vast majority of which involve countries other than Canada (and in which Canada's industries were not involved), many of which go back in time as much as nineteen years and some involving practices that date back to the late 1950s and that have not been pursued by trading partners in the Uruguay Round negotiations (or in earlier negotiations) and hence clearly represent an effort to obtain through litigation that which is not contained in the underlying agreement and has not even been raised in the most recent completed negotiations. U.S. Trade Representative Lighthizer properly characterized the Canadian filing as ill-advised:

“Canada's new request for consultations at the WTO is a broad and ill-advised attack on the U.S. trade remedies system. U.S. trade remedies ensure that trade is fair by counteracting dumping or subsidies that are injuring U.S. workers, farmers, and manufacturers. Canada's claims are unfounded and could only lower U.S. confidence that Canada is committed to mutually beneficial trade.

“Canada is acting against its own workers' and businesses' interests. Even if Canada succeeded on these groundless claims, other countries would primarily benefit, not Canada. For example, if the U.S. removed the orders listed in Canada's complaint, the flood of imports from China and other countries would negatively impact billions of dollars in Canadian exports to the United States, including nearly \$9 billion in exports of steel and aluminum products and more than \$2.5 billion in exports of wood and paper products. Canada's claims threaten the ability

of all countries to defend their workers against unfair trade. Canada's complaint is bad for Canada."¹⁴

WTO dispute settlement doesn't require actual adverse effect on a Member to be able to challenge a trading partner's actions, doesn't provide a limitation period within which a challenge to administrative proceedings must be filed or foregone (hence requiring Members who are challenged on old matters to deal with records that may be difficult to retrieve or nonexistent and where parties who participated may no longer be available to provide input), and, as we have seen, has resulted in Appellate Body members viewing it as their right to decide what silence in an agreement means or what can be added to an agreement under the guise of "filling gaps" and pretending that such action doesn't change the balance of rights and obligations for its Members.

As identified by Canada, the request challenges the following six U.S. practices:

1. The Liquidation of Final Anti-Dumping and Countervailing Duties in Excess of WTO-Consistent Rates and Failure to Refund Cash Deposits Collected in Excess of WTO-Consistent Rates.
2. Retroactive Provisional Anti-Dumping and Countervailing Duties Following Preliminary Affirmative Critical Circumstances Determinations.
3. The US Treatment of Export Controls in Countervailing Duty Proceedings.
4. The Improper Calculation of Benefit in Countervailing Duty Proceedings involving the Provision of Goods for Less than Adequate Remuneration.
5. The United States' Effective Closure of the Evidentiary Record before the Preliminary Determination.
6. The US International Trade Commission Tie Vote Provision.¹⁵

In large part, Canada's allegations rely on trade remedy cases in which Canada is not a party (and hence should not logically be able to rely in making claims against a fellow trading partner), claim problems with actions by the U.S. that were taken as long as 19 years ago, and are a thinly disguised effort to obtain through litigation what has never been agreed to in negotiations. Take the first and the sixth claims as examples.

¹⁴ USTR Press Release, *USTR Robert Lighthizer Statement on the Canadian WTO Challenge to Trade Remedies* (January 10, 2018); <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/ustr-robert-lighthizer-statement-0>

¹⁵ See *United States - Certain Systemic Trade Remedies Measures, Request for Consultations by Canada*, WT/DS535/1, G/L/1207, G/ADP/D121/1, G/SCM/D117/1 (January 10, 2018).

The first claim is basically an effort to require retroactivity in the trade remedy arena where all aspects of the WTO dispute settlement system have a prospective effect only. While some countries have raised the question of whether the dispute settlement system should be modified to obtain earlier relief, that is not what is required by the WTO agreements or case law. As stated by the Appellate Body Chairman Ujal Singh Bhatia (8 June 2017) on the release of the Appellate Body Annual Report 2016, “Let us bear in mind the prospective nature of WTO remedies.” The only plausible construction of the Canadian claim is that it is a bald-faced effort to obtain a right in litigation that everyone understands does not exist within the terms of the WTO and its various agreements.

The sixth, and last, claim, on the USITC tie-vote provision, is a clear effort to usurp national sovereignty. The U.S. has a perfect right to establish in its implementing laws how decisions will be construed. Since 1958, U.S. laws have provided that tie votes at the U.S. International Trade Commission (previously U.S. Tariff Commission) constitute an affirmative determination in antidumping and countervailing duty cases. This issue was not raised or discussed at the Uruguay Round,¹⁶ and a WTO panel has already rejected a similar claim brought by Indonesia.¹⁷

In sum, Canada’s request for consultation is an unfortunate example of how the problems within the dispute settlement system can be used by a WTO Member even when there is no question that much of the request reflects a deliberate effort to obtain rights that are plainly not part of the existing agreements.¹⁸

¹⁶ See, e.g., *Checklist of issues Raised in the Negotiating Group on MTN Agreements and Arrangements, Note by the Secretariat, Revision*, MTN.GNG/NG8/W/26/Rev.2 (October 6, 1989).

¹⁷ See Report of the Panel, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R (December 6, 2017). This is also an example of an unnecessary and superfluous claim because, as the U.S. noted: “The Panel also rejected Indonesia’s ‘as such’ claim concerning the U.S. statute governing USITC voting procedures. There was no reason for Indonesia to bring this claim as the statutory provision was not even applied in the coated paper investigation.” Statement by the United States at the January 22, 2018 DSB meeting (p. 11).

¹⁸ Some press reports have also noted that Canada’s motives in bringing this case against the U.S. may be political. See, e.g., Chad P. Bown, *Canada turned to the WTO because Trump has threatened NAFTA*, Washington Post, January 30, 2018; https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/30/canada-turned-to-the-wto-because-trump-has-threatened-nafta/?utm_term=.d639e09afe8e

D. Possible Reforms to Improve Functioning of the WTO Dispute Settlement System

Given the criticism of the operation of the dispute settlement system, what reforms could be made to improve its functioning? Several reforms that would address apparent deficiencies in the dispute settlement system come to mind and would address some of the abuses flagged in the Canadian request reviewed above. For example, the dispute settlement system has no time limit on the cases that may be brought where one is challenging an administrative proceeding (such as trade remedies). This leaves open the possibility that countries can bring cases involving trade remedy proceedings that occurred many years prior to when the WTO dispute is raised. This possibility imposes a burden on the Members to retain records in order to defend old cases and increases uncertainty for national administering authorities. The recent request by Canada for consultations is an obvious example of this issue in that the request cites to some proceedings that were conducted as long ago as 1998.

Another possible reform would be to require the complaining Member to actually have been a party in an administrative proceeding that involved the issue complained of in the request. Again, Canada's request is an example of a Member raising issues and citing to AD/CVD proceedings in which neither it nor Canadian companies were a party.

More fundamentally, WTO Members need to resolve the proper role of panels and the Appellate Body in some critical areas and determine how to correct erroneous decisions. The following questions are critical to be resolved, but unlikely to be resolved in the near term. These questions have been answered by the Appellate Body in ways that have created the underlying crisis. There is nothing in the Appellate Body's history that suggests the AB will voluntarily back away from practices or constructions that have caused the major concerns. The pressing questions for the WTO Members include:

- (1) Is filling gaps and construing silences really not the creation of rights and obligations through disputes vs. leaving such function to negotiations by the Members?
- (2) What is the proper role of the Appellate Body vis-à-vis the Dispute Settlement Body? Is it proper for the Appellate Body through working procedures to exceed the authority on the face of the DSU without affirmative action by the DSB?

- (3) How can the AB limit its actions to those actually necessary to assist the DSB to resolve the matter and how can extraneous matter in reports be limited or, after the fact, deleted where not pertaining to any issues raised by the parties?
- (4) How do WTO Members modify the current dispute settlement system so that decisions of panels or the Appellate Body which are inconsistent with the underlying agreements can in fact be corrected by the WTO membership? The DSU was a bold initiative that occurred at a point in time when there was no experience with binding dispute settlement under the GATT. In a consensus based system like the WTO, erroneous decisions by a panel or the Appellate Body are effectively not correctible as the winning party does not join a consensus to reverse its win. So there is no effective check and balance on the panels and AB when error occurs (such errors obviously occur for panels and the AB just as they do for other review tribunals).

CONCLUSION

The nature and extent of concerns for the United States in the operation of the dispute settlement system in the WTO are neither new, nor surprising. The concerns have been growing over time even if many panel and AB decisions are not themselves controversial. And the concerns are not limited to the United States, as a review of statements from many governments over the first twenty-three years of the WTO demonstrates similar concerns. Such statements have been made by a wide range of countries, including Mexico, Korea, the European Union, Japan, Argentina, Australia, Chile, Turkey, Brazil, Costa Rica, Norway, Guatemala, Canada, Ukraine, the Russian Federation, Pakistan, India, and Malaysia. The inability to resolve these fundamental issues about the proper role of the dispute settlement system and of panels and the Appellate Body and the practical inability to legislatively fix erroneous panel and Appellate Body decisions have created the environment in which a crisis has now crystallized. The critical issue is whether the Members will take collective action, whether the Appellate Body will take

self-correcting actions or whether the crisis simply deepens and threatens the functioning of the system going forward.

Stated differently, it should not be surprising that a tipping point would be reached after which the United States would insist that Members come to grips with the challenges posed by the system as it has developed and seek a dialogue on the road forward and a correction to the perceived imbalances created. That tipping point has occurred. The current vacancies at the Appellate Body provide the occasion for gathering focus on the need for review and likely reform. Sadly, review and reform will not happen in fact without a serious crisis. The crisis is now here and is growing. While some are happy to delegate setting the rules to panels and the Appellate Body and to obtain rights never agreed to or impose on others obligations never accepted in negotiations, it has always seemed obvious that a day of reckoning would come when WTO Members would have to face these issues and articulate clearly the justification for the choices made. 2018 may be that year. The United States is likely to continue its efforts to try to get the WTO dispute settlement function refocused on what the U.S. believes is its proper role in fact. At a point in time in which there is little consensus on a wide array of issues before the WTO, let's hope the WTO Members have the capacity to deal with these systemic issues on dispute settlement in a timely and comprehensive manner.

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ADDENDUM

WTO Members' Criticism of Panel and Appellate Body Decisions 2004-2017

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2004-2017

WTO Dispute	Examples of Critical Statements in Minutes to DSB Meetings ¹	Issue	Agreement
<p><i>Mexico – Measures affecting telecommunications services</i> (DS204)</p>	<p><i>Mexico:</i> “10. With regard to the interpretation of Section 1 of the Reference Paper, Mexico said that the Panel's interpretation of the obligations in Section 1 of Mexico's Reference Paper represented an unprecedented effort to apply competition law to government measures in a manner never contemplated by the GATS negotiators. ... This was certainly not the outcome that had been expected by Mexico or any other WTO Member that had undertaken commitments under Section 1 of the Reference Paper. ... Finally, the Panel had acted as though it were an authority on competition, without having conducted the type of detailed economic analysis of the pertinent market, and of the effects of the measures at issue that would normally be expected of an authority on competition. In Mexico's view, the Reference Paper did not authorize a WTO panel to play such a role, nor did WTO panels have the means or the authority to conduct the type of investigation and analysis needed for a proper analysis of competition.” WT/DSB/M/170, ¶ 10 (Jul. 6, 2004)</p> <p><i>Mexico:</i> “11. ... In finding that the limitations at issue had no such effect, the Panel imposed on Mexico obligations that Mexico had not undertaken during the negotiations. ... It must be worrying for other Members that any panel should interpret in a Member's Schedule commitments that had not been offered. ...” WT/DSB/M/170, ¶ 11 (Jul. 6, 2004)</p>	Text interpretation	Services
<p><i>United States – Final dumping determination on softwood lumber from Canada</i> (DS264)</p>	<p><i>United States:</i> “36. While the United States was pleased with virtually all of the Panel and Appellate Body findings in this dispute, it regretted the finding on whether Article 2.4.2 of the Anti-Dumping Agreement required an investigating authority to offset non-dumped transactions against dumped transactions in determining an aggregate margin of dumping for a producer or exporter. There was a widespread view among the GATT Contracting Parties – including Canada – that such offsetting had not been required in the years and decades before the WTO Agreement, and they had continued in this view as WTO Members after 1995. Thus, it was surprising to find now that the Anti-Dumping Agreement required it. The United States noted that one member of the original panel had disagreed with this conclusion, finding that Article 2.4.2 contained no such requirement. It was silent on the question of how an aggregate margin of dumping was to be determined. The dissenting panel member stated, "If Members consider that the issue of how to aggregate the results of multiple comparisons is a lacuna that needs to be filled, then they should negotiate such rules in the appropriate forum." The United States agreed, and regretted both that Canada had chosen to litigate this issue despite its own on-going use of "zeroing," and that the Panel and the Appellate Body had agreed with Canada. ...” WT/DSB/M/175, ¶ 36 (Sept. 24, 2004)</p>	Zeroing	AD
<p><i>United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina</i> (DS268)</p>	<p><i>United States:</i> “46. Another systemic concern related to the Panel's statement that it based its finding on what US authorities allegedly "perceive" the Sunset Policy Bulletin as requiring – rather than on what the Sunset Policy Bulletin actually required. This was a very dangerous approach. The credibility of the dispute settlement system depended on accurate and objective descriptions of the measures at issue. A finding based merely on a panel's conclusion on how a Member "perceives" a measure was the opposite of that. Panels must not apply artificial and subjective interpretive tools to determine what a measure did – they needed to look at what the Member's own legal system stated the measure did</p>	Sunset reviews	AD

¹ Bold emphasis is added.

WTO Dispute	Examples of Critical Statements in Minutes to DSB Meetings ¹	Issue	Agreement
	<p>....”</p> <p>WT/DSB/M/180, ¶ 46 (Feb. 1, 2005)</p>		
<p><i>United States – Subsidies on upland cotton</i></p> <p>(DS267)</p>	<p>United States:</p> <p>“50. With respect to export credit guarantees, the United States encouraged Members to read the dissenting views of one Appellate Body member found at paragraphs 631 – 641 of the Appellate Body Report. That member had succinctly explained that the text of Article 10.2 of the Agreement on Agriculture reflected a deferral of export subsidy disciplines on export credit guarantees until such time as "international disciplines" were agreed by WTO Members. Consider the following: had Members agreed that export credit guarantees were export subsidies and had included them within the list of measures subject to reduction under the Agreement on Agriculture, the United States would have scheduled its extensive export credit guarantee activity during the base period. The United States would then have been able to operate its current program within substantial volume reduction commitments. Instead, the United States had been precluded from scheduling such program activity because export credit guarantees were not included in the list of export subsidy measures. And now, under the Appellate Body's majority interpretation, the United States found that it was also immediately subject to a zero export subsidy commitment for most products using the program. The United States had failed to see how the WTO Agreements could fairly be read to prohibit US export credit guarantees for most products while Members' direct export subsidies were subject only to reduction.”</p> <p>WT/DSB/M/186, ¶ 50 (Apr. 14, 2005)</p>	<p>Export credit guarantees</p>	<p>Agriculture</p>
<p><i>Korea – Measures affecting trade in commercial vessels</i></p> <p>(DS273)</p>	<p>United States:</p> <p>“10. Another problem with the Panel Report in "Korea - Vessels" was the Panel's articulation and application of a "probative and compelling" evidentiary standard with respect to issues of "entrustment or direction". The Panel had first set forth this standard at paragraph 7.372 of its Report. The United States had no problem with the use of the word "probative." Indeed, the statement that evidence must be "probative" was tautological in that "evidence" was not "evidence" unless it was "probative" of some fact or conclusion. However, the use of the word "compelling" was a totally different matter. The Panel had not explained what it thought this word meant, but – notwithstanding that this phrase was nowhere to be found in the SCM Agreement – dictionaries defined "compelling" as meaning "irrefutable" or "overwhelming". Thus, the Panel had appeared to be asserting that in order to prove a claim of government entrustment or direction of a private body, a complaining party must present "irrefutable" or "overwhelming" evidence of entrustment or direction. The Panel had never explained the source of the evidentiary standard that it proclaimed. There was no basis for such a standard in the SCM Agreement, the DSU or any other covered agreement. ...”</p> <p>WT/DSB/M/187, ¶ 10 (Apr. 25, 2005)</p>	<p>Evidentiary standard</p>	<p>SCM</p>
<p><i>United States – Countervailing duty investigation on dynamic random access memory semiconductors (DRAMs) from Korea</i></p> <p>(DS296)</p>	<p>United States:</p> <p>“80. ... First, there was the Appellate Body's finding that the Panel had failed to comply with its obligations under Article 11 of the DSU by engaging in a <i>de novo</i> review. According to the Appellate Body, at paragraph 190 of the Report, the Panel had erred when it "went beyond its role as the reviewer of the investigating authority's decision, and, instead, conducted its own assessment, relying on its own judgment, of much of the evidence before the USDOC." The Appellate Body's analysis should serve as an important reminder to future panels in trade remedy disputes that their task was a limited one. They were not to redo the work of domestic authorities, but instead they were to ask simply whether the determination made by domestic authorities was one that an objective and impartial decision maker could have made – not would have or should have made – based on the evidence before it.”</p> <p>WT/DSB/M/194, ¶ 80 (Aug. 26, 2005)</p> <p>Korea:</p> <p>“87. ... With regard to the Appellate Body's <i>de novo</i> fact-finding, he said that first of all, the Appellate Body had carried out <i>de novo</i> review</p>	<p><i>De novo</i> fact-finding</p>	<p>DSU</p>

WTO Dispute	Examples of Critical Statements in Minutes to DSB Meetings ¹	Issue	Agreement
	<p>of the facts in a manner inconsistent with Article 17.6 of the DSU. ... Unfortunately, the Appellate Body had also ignored the plain language of the Panel Report and had reversed the Panel's factual findings.”</p> <p>WT/DSB/M/194, ¶ 87 (Aug. 26, 2005)</p> <p><i>Korea:</i></p> <p>“89. ... This was raw fact-finding by the Appellate Body that had not only ignored the thrust of the Panel's factual weighing and analysis, but had flatly misstated a critical fact.”</p> <p>WT/DSB/M/194, ¶ 89 (Aug. 26, 2005)</p> <p><i>Korea:</i></p> <p>“92. ... Because it violated the basic principles of appellate review to construe disputed facts in favour of the prevailing party, one could only conclude that the Appellate Body had engaged in its own <i>de novo</i> fact-finding. On critical issues such as the question of whether there was evidence of mediation, the Appellate Body had gone directly into the case record and had reversed the Panel's conclusions.”</p> <p>WT/DSB/M/194, ¶ 92 (Aug. 26, 2005)</p>		
<p><i>European Communities – Customs classification of frozen boneless chicken cuts</i> <i>(DS269), (DS286)</i></p>	<p><i>European Communities:</i></p> <p>“73. Unfortunately, the Appellate Body had immediately undermined its own approach on subsequent practice through an application of supplementary means of interpretation under Article 32 of the Vienna Convention that made it impossible for negotiators to be sure of their scope of the commitments they were taking, and in this case certainly to a nonsensical result: a last minute Act of the European Commission published after the verification period in the Uruguay Round had been found to have influenced the minds of Uruguay Round negotiators, while long-standing practice and jurisprudence throughout the Uruguay Round, both in the EC and the United States, had not. Moreover, the EC could not, but repeat again that such finding bore little connection with reality. Had the negotiators indeed considered that salted meat covered any poultry with any amount of added salt, why had Brazil engaged in the EC – Poultry dispute and why had it only started exporting this product in 1998, two years after Thailand, and four years after the conclusion of the Uruguay Round. The EC wished to voice its strong disagreement with the Appellate Body's finding on deemed knowledge as developed in the context of the analysis under Article 32 of the Vienna Convention on the Law of the Treaties. For a demanding and detailed multilateral Agreement, such as the WTO and the GATT 1994, it was at least risky to infer the common intention of the parties simply based on the notion of "constructive knowledge". That might lead to the distortion or misrepresentation of the common intention of the parties through the arbitrary and possibly manipulated use of unilateral acts. For treaties such as the WTO and the GATT 1994, the threshold must be set higher. The "circumstance of conclusion" must be of an objective character clearly evident to all negotiators at the time of the conclusion of the treaty. Deemed knowledge and especially asserted <i>ex post</i> was not sufficient and could not substitute the need to demonstrate a direct link between a circumstance and the common intentions of the parties.”</p> <p>WT/DSB/M/198, ¶ 73 (Oct. 26, 2005)</p> <p><i>United States:</i></p> <p>“79. ... However, it would appear to the United States that, under the approach suggested by the Appellate Body, a treaty interpreter could first identify some supposed "purpose" of a particular provision; then use that "purpose" to determine the object and purpose of the treaty as a whole; and then, as a final step, interpret the provision on the basis of that "object and purpose." It was not clear how this approach could avoid simply being circular.”</p> <p>“80. That approach would also seem to leave open the possibility of adding to or diminishing rights and obligations under the covered agreement at issue. It should not be left to parties to a dispute (or to panels) to divine "purposes" of a provision, since a party was often simply using this as an invitation to re-write the provision. It was perhaps for that reason that the Appellate Body had gone on to express a</p>	Treaty interpretation	DSU

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	<p>note of warning against using that approach. And so, while the United States questioned the approach for the reasons just expressed, it could certainly agree with the Appellate Body when it "caution[s] against interpreting WTO law in the light of the purported 'object and purpose' of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty on the whole."</p> <p>"81. ... Neither the Panel nor the Appellate Body cited language in the text of the WTO or the GATT 1994 referring to this as an object and purpose of those agreements. Instead, the only authority cited in the Reports were past Appellate Body reports. But the Appellate Body could not create or assign an object or purpose that was not there."</p> <p>"82. ... Considering amorphous objects and purposes not found in the text of a covered agreement was a recipe for adding to or diminishing the rights and obligations actually found in that text; in other words, this was an approach that undermined security and predictability."</p> <p>WT/DSB/M/198, ¶¶ 79-82 (Oct. 26, 2005)</p>		
<p><i>United States – Anti-dumping measures on oil country tubular goods (OCTG) from Mexico</i> (DS282)</p>	<p><i>Mexico:</i></p> <p>"62. As all Members were aware, WTO dispute settlement was a major undertaking, requiring a significant commitment of resources both from the litigating governments as well as the affected private industries. An aggrieved Member would be willing to commit such resources where its rights were violated, and where it was confident that the WTO would provide a remedy. Unfortunately, in at least some cases – those involving the key disciplines of the sunset review provision of the Anti-Dumping Agreement – it was now by no means clear that the WTO could or would provide a remedy. All Members should be seriously concerned that their rights were being denied because of the conduct of Panels. For that reason, all WTO Members – not just Mexico – had lost as a result of this Appellate Body's decision. Article 3.2 of the DSU provided that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements". Unfortunately, the Appellate Body decision in the present case fell far short of that standard, as Mexico's rights under Article 11.3 of the Anti-Dumping Agreement had been denied, not preserved. Mexico invited Members to reflect on the serious implications of the Appellate Body's Report. Mexico hoped that such profound systemic defects would not be repeated by the Appellate Body in future cases."</p> <p>WT/DSB/M/200, ¶ 62 (Jan. 26, 2006)</p> <p><i>Mexico:</i></p> <p>"65. Second, the Appellate Body had also dismissed Mexico's claim that the Panel had erred in failing to make a specific finding that the United States had no legal basis to continue its anti-dumping measure beyond the five-year period established by Article 11.3. Mexico wished to point out that in "US – Corrosion-Resistant Steel Sunset Review", the Appellate Body had ruled that: "Members are required to terminate an anti-dumping duty within five years of its imposition 'unless' ... in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping..." But, under the Appellate Body's new interpretation in this case, what used to be an obligation to determine likelihood of dumping "in the review" had been changed to a right to "cure" a WTO-inconsistent likelihood determination during a reasonable time for implementation. If the violation of time-bound obligations could be cured ex-post, then WTO Members should wonder what was the value of this type of obligations. Again, Mexico feared that the Appellate Body's ruling on this issue may be used to diminish the rights and obligations negotiated by Members. The Appellate Body's ruling could be misinterpreted to negate one of the fundamental principles of the Agreement: any dumping order that failed to meet the limited exceptions of Article 11.3 simply could not be extended beyond five years, and it must be terminated. ... This was the substantive obligation and the corresponding right agreed by the Members, and Mexico was committed to ensuring that that right was in no way diminished through the dispute settlement process. ..."</p> <p>WT/DSB/M/200, ¶ 65 (Jan. 26, 2006)</p>	Sunset reviews	AD
<p><i>United States – Laws, regulations and methodology</i></p>	<p><i>United States:</i></p>	Zeroing	AD

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<p><i>for calculating dumping margins ("Zeroing")</i> <i>(DS294)</i></p>	<p>“39. Third, there was the Appellate Body's treatment of the Panel's "as such" finding regarding "zeroing" as a "methodology". The United States did not disagree with the analytical framework set out by the Appellate Body regarding written or unwritten measures. The problem was that instead of examining whether the Panel had properly applied this framework, the Appellate Body had embarked upon its own <i>de novo</i> analysis regarding the so-called "norm of zeroing". The Appellate Body had made its own findings based upon its own consideration of evidence concerning which the Panel had made no factual findings or that the parties contested. In so doing, the Appellate Body had departed from its own "rigorous" standard for "as such" claims, and the United States still did not know the identity of the measure of general and prospective application that allegedly caused the US Department of Commerce to zero.”</p> <p>“40. Finally, the Appellate Body had failed to address the US legal arguments regarding the mandatory/discretionary distinction. Inexplicably, the Appellate Body had repackaged the US legal arguments as ones relating to the Panel's handling of the facts under Article 11 of the DSU. As a result, in a break from previous GATT and WTO reports, there was a finding of an "as such" breach without a corresponding finding that the so-called "measure" actually caused the Member in question to breach its obligations. Based on what the United States had heard and had read thus far, the Appellate Body Report was being applauded in some quarters because it had gone beyond what negotiators could have achieved. However, that was just another way of saying that the Report had added to or diminished rights and obligations actually agreed to by Members, notwithstanding Articles 3.2 and 19.2 of the DSU. To the extent that this perception was widely held, the credibility of the WTO dispute settlement system was undermined. ...”</p> <p>WT/DSB/M/211, ¶¶ 39-40 (Jun. 26, 2006)</p>		
<p><i>United States – Measures relating to zeroing and sunset reviews</i> <i>(DS322)</i></p>	<p><i>United States:</i></p> <p>“76. ... Finally, the United States noted that the sum total of the Appellate Body's findings on the zeroing issue over the past several years called into question whether the major users of the anti-dumping remedy began breaching that Agreement the very day it had gone into effect in 1995. This was a surprising result. Presumably the Members who had negotiated the Agreement understood its meaning. ...”</p> <p>WT/DSB/M/225, ¶ 76 (Mar. 8, 2007)</p>	Zeroing	AD
<p><i>Brazil – Measures affecting imports of retreaded tyres</i> <i>(DS332)</i></p>	<p><i>United States:</i></p> <p>“66. On reflection, however, the United States would like to express its reservations about certain aspects of the Appellate Body's Report. First, the United States wished to express its concern that certain parts of the Report could be read to suggest that Members must rank various measures according to their relative degree of "trade-restrictiveness" (see, for example, paragraph 179 of the Report). As the United States had stated on previous occasions, it did not see any textual support for a construction of the word "necessary" in GATT Article XX(b) that would give rise to such an analysis. There was nothing in the ordinary meaning of "necessary" that would support a "trade restrictiveness" analysis. Nothing in Article XX(b) used the term "trade" or "restrictive”.</p> <p>“67. At the same time, the analysis used in these parts of the Report was remarkably similar to that called for under Article 5.6, including footnote 3, of the SPS Agreement. As a result, these parts of the Report could be misunderstood as incorporating into Article XX(b) a "least trade restrictive" obligation similar to that specifically negotiated as part of the SPS Agreement. The United States recalled that those SPS negotiations had been complicated and sensitive. Yet no such obligation had been negotiated or agreed to in the context of Article XX(b). Indeed, it was difficult to see what role would be left for the language in the chapeau to Article XX concerning "disguised restriction on trade" if "necessary" were to have the meaning ascribed to it in certain parts of the Report. The United States could not see how it was appropriate to read into Article XX(b) a requirement that did not appear there. ...”</p> <p>WT/DSB/M/243, ¶¶ 66-67 (Feb. 15, 2008)</p>	Text interpretation	GATT 1994, Article XX; SPS
<p><i>United States – Final anti-dumping measures on</i></p>	<p><i>United States:</i></p>	Zeroing	AD

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<p><i>stainless steel from Mexico</i> (DS344)</p>	<p>“48. In light of the Panel's careful examination and obvious struggle in attempting to reconcile the agreed text of the WTO Agreements with statements made by the Appellate Body in its prior reports, it would have seemed that this Appellate Body division would have felt called upon to address most carefully the issues raised and the Panel's concerns. Thus, it was even more troubling that the Appellate Body division on this appeal had not only summarily rejected the Panel's points, but had also taken the Panel to task simply for taking the Panel's duties to heart and trying to ensure that the Panel's findings were consistent with the agreed text of the WTO Agreements. The United States was deeply troubled by the Appellate Body division's response on two levels, each of them posing serious systemic problems for Members. First, once again, the division had devised a new basis to justify findings against zeroing in reviews – this time that the margin of dumping was exporter based and that somehow this precluded finding a margin of dumping with respect to an individual transaction. The reasoning under this approach continued to be deeply flawed and failed to comport with the actual, agreed treaty text. Second, the division had significantly departed from the established understanding of the relationship between panel and Appellate Body reports and the role of the Appellate Body and that of Members. This Report purported to create a new legal effect for Appellate Body reports, one that would appear to grant to the Appellate Body the very authority to issue authoritative interpretations of the covered agreements that was reserved by the WTO Agreement exclusively to Members.”</p> <p>“49. With respect to the first systemic level of concern, the United States simply noted that there were numerous flaws in the Appellate Body's reasoning in this latest report, including in particular its rejection of the fact that the Uruguay Round negotiators had not agreed to prohibit zeroing in assessment reviews. No common understanding had been reached on zeroing in the Uruguay Round because, despite extensive efforts by many participants, proposals to prohibit zeroing had been firmly opposed by many others, including several users of anti-dumping measures. However, if Members of the WTO had never agreed to ban zeroing, then the DSU did not empower the Appellate Body to create new obligations that imposed such a ban. The Appellate Body's approach ought to be of concern to every single WTO Member, any one of which may someday be called upon to defend its own laws and regulations, and every one of which would want to rely on the negotiated outcome of the Uruguay Round, the Doha Round, or other WTO negotiations – and not be held to rules found nowhere in those outcomes. ...”</p> <p>WT/DSB/M/250, ¶¶ 48–49 (Jul. 1, 2008)</p> <p><i>United States:</i></p> <p>“51. ... The discussion had also asserted that the Panel's "failure to follow previously adopted Appellate Body reports ... undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements". The division closed by expressing its concern about "the Panel's decision to depart from" the Appellate Body's prior rulings on these issues, stating that the Panel's approach had "serious implications for the proper functioning of the WTO dispute settlement system".”</p> <p>“52. The Appellate Body division was mistaken. This second part of the Appellate Body's discussion misperceived the WTO Agreement and this Member-driven organization. It was WTO Members that had negotiated and had agreed to obligations, and they had done so by consensus. Members had also established one and only one means for adopting binding interpretations of the obligations that they agreed to: Article IX:2 of the WTO Agreement provided that the Ministerial Conference and the General Council had the exclusive authority to adopt such interpretations. Yet the approach in this Appellate Body Report would appear to mean that Appellate Body reports should be treated as authoritative interpretations of the covered agreements – they were to be followed by panels regardless of whether a panel in a particular dispute agreed with those prior reports. In other words, panels were simply to abdicate their responsibility to conduct an objective assessment of the matters before them and should simply follow prior Appellate Body reports. This did a disservice to panels and the serious responsibility that the DSB assigned to them.”</p> <p>“53. What was more, WTO Members had made it clear – in fact, the DSU said it twice – that the findings of panels and the Appellate Body could not add to, or diminish the rights and obligations in the covered agreements. Perhaps unlike some other institutions, the WTO did not rely on adjudication to advance its objectives. However, this Appellate Body Report's approach, including its references to a "coherent and predictable body of jurisprudence", would appear to transform the WTO dispute settlement system into a common law system. But that was nowhere agreed among Members. ...”</p>		

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	WT/DSB/M/250, ¶¶ 51-53 (Jul. 1, 2008)		
<p><i>United States – Subsidies on upland cotton: Recourse to Article 21.5 of the DSU by Brazil</i></p> <p>(DS267)</p>	<p><i>United States:</i></p> <p>“15. The Appellate Body had worried that “the approach advocated by the United States would have serious implications for a complaining Member’s ability to obtain relief against adverse effects of actionable subsidies”. However, the question was not what was the Appellate Body’s view of what relief was desirable, but what was the relief that had been negotiated and agreed by Members in the WTO Agreements. Article 7.8 could not be re-written to apply to additional measures just because that was what a panel or the Appellate Body believed would be a better approach. For example, relief under the DSU was prospective, as the Appellate Body had recognized in this Report. This meant that there may be no relief in some disputes that involved challenges to past actions. However, the fact that there would be no relief unless it was retroactive would not authorize the Appellate Body to declare in such cases that relief would be retroactive. ...”</p> <p>WT/DSB/M/252, ¶ 15 (Jul. 24, 2008)</p>	Subsidies	SCM
<p><i>United States – Continued suspension of obligations in the EC - Hormones dispute</i></p> <p>(DS320)</p>	<p><i>United States:</i></p> <p>“9. First, on the process for resolving post-suspension disputes, it was widely acknowledged by Members that the DSU lacked specificity on the process by which an implementing Member subject to the DSB-authorized suspension of concessions that claimed it had achieved compliance might obtain relief from that suspension. Members had spent several years negotiating a process for such a situation, but had not yet achieved consensus. In its Report, however, the Appellate Body had made a number of statements that were to be found nowhere in the DSU. For example, the Appellate Body had stated that Article 21.5 compliance panel proceedings were the only procedure to be followed for resolving post-suspension disputes – ignoring the fact that this very appeal was from a regular panel proceeding considering a claim under Article 22.8 of the DSU. In addition, the Appellate Body had said that either an original respondent or an original complainant must initiate compliance panel proceedings without delay once a claim of compliance was made, which should be of tremendous concern to any Member that might consider its resources could be limited at any point in the future. As a further example, the Appellate Body had also said that an original responding party and an original complainant might each bring its own, separate compliance panel proceedings and the two proceedings could be harmonized and would somehow result in a review of all the issues. The Appellate Body had also set forth fairly intricate rules on how the burden of proof would be allocated and shifted in such a situation. None of this could be found anywhere in what Members negotiated during the Uruguay Round. Nor, for that matter, had any Member proposed that approach during the negotiations over clarifying and improving the DSU. It was difficult to understand the Appellate Body’s findings on this matter to be anything other than rule-making. That role, however, belonged to Members – not to panels or the Appellate Body. ...”</p> <p>WT/DSB/M/258, ¶ 9 (Feb. 4, 2009)</p> <p><i>United States:</i></p> <p>“12. Finally, on the “recommendation” in the Report, the United States said that another troubling aspect of the Appellate Body Report was the fact that the Appellate Body had concluded its Report by apparently making a recommendation that was addressed to both the United States and the EC. Members had authorized panels and the Appellate Body to make recommendations in only one place: Article 19.1 of the DSU. That Article provided that a panel or the Appellate Body was authorized to issue a recommendation in one circumstance: where it had concluded that a measure within the terms of reference of the proceeding was inconsistent with a covered agreement. In this appeal, the Appellate Body had not concluded that there was any measure that was inconsistent with a covered agreement. The Appellate Body had no authority, therefore, to make any Article 19.1 recommendation in this appeal. A further difficulty with reading the Appellate Body’s “recommendation” as intending to have the legal status of a recommendation under Article 19.1 was that it was addressed not only to the responding party, but also to the EC, the complaining party. There was no basis in the DSU for addressing a recommendation to a complaining party. The use of the term “recommend” by the Appellate Body must, therefore, be interpreted as an ill-considered word choice, as any other reading would be contrary to the DSU. ...”</p>	Recommendations	DSU

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	<p>WT/DSB/M/258, ¶ 12 (Feb. 4, 2009)</p> <p><i>Japan:</i></p> <p>“23. Finally, at the very end of the Report, the Appellate Body had recommended, “[i]n the light of the obligations arising under Article 22.8 of the DSU”, that the DSB request both parties to this dispute to initiate dispute settlement proceedings under Article 21.5 “without delay”. A couple of points were worth mentioning. As expressed by previous speakers, Japan was not certain as to whether the Appellate Body had the authority to make "recommendations", i.e. to direct Members to take a certain course of action, let alone with a specific temporal limit, other than to recommend that the Member concerned bring the measure found to be WTO-inconsistent into conformity with that WTO Agreement, as provided for in Article 19.1 of the DSU. More fundamentally, as a matter of Members' rights and obligations under the DSU, on what legal or textual basis were the parties to the dispute compelled to take certain action in this case to have recourse to the dispute settlement procedures, within a specified time period? ...”</p> <p>WT/DSB/M/258, ¶ 23 (Feb. 4, 2009)</p> <p><i>Argentina:</i></p> <p>“25. ... [Argentina] wished to make some comments in view of the systemic interest of all Members in the correct interpretation of the DSU provisions. In this regard, Argentina wished to underline two issues. First issue related to the last paragraph contained in the Appellate Body Report in which the Appellate Body had referred to a "recommendation". The way that paragraph was worded raised more doubts than certainty. The use of the term "recommendation" in spite of the fact that the legal provisions of Article 19.1 of the DSU were not met could not be neutral or without consequences. Did the Appellate Body intend to make a recommendation as to how to settle the case, or was it merely a suggestion in keeping with the analysis made, particularly in Section IV of the Report? The distinction was not trivial – it had its importance. Article 19.1 of the DSU used both expressions: "recommendation" and "suggestion", each with its own distinct meaning, but not one without the other. The authority to make recommendations in Article 19.1 was contingent on the prior conclusion that a measure was inconsistent with a covered agreement. The possibility to "suggest" ways to implement the DSB's recommendations was, in its turn, contingent on the existence of such recommendations. In the case at issue, there was no finding of inconsistency, so on what grounds could the Appellate Body recommend, let alone suggest, to the parties what action they should take with respect to their dispute?”</p> <p>WT/DSB/M/258, ¶ 25 (Feb. 4, 2009)</p> <p><i>Australia:</i></p> <p>“27. ... Australia agreed with the Appellate Body's observation that the parties should have recourse to an Article 21.5 panel proceeding to resolve their disagreement as to whether the EC had removed the measure found to be inconsistent in the " EC - Hormones " dispute. However, Australia was also mindful of the provisions of Articles 3.2 and 19.2 of the DSU that the recommendations and rulings of panels, the Appellate Body and the DSB could not add to or diminish the rights and obligations provided in the covered agreements. In the absence of a finding of inconsistency with a provision of a covered agreement, Australia did not consider the Appellate Body's observation, in para. 737, to be a "recommendation" within the meaning of Article 19.1 of the DSU. ...”</p> <p>WT/DSB/M/258, ¶ 27 (Feb. 4, 2009)</p> <p><i>Chile:</i></p> <p>“30. ... In the DSU negotiations, various proposals had been discussed with a view to establishing an effective mechanism for determining the existence or consistency of compliance measures following retaliation against the Member in question. Those discussions had touched on a great number of different aspects, both technical and practical, and had impinged on political sensitivities. With its analysis and the conclusions it had reached, the Appellate Body had expanded its mandate in a manner which Chile regretted. Moreover, the Appellate Body was imposing its own authority over and above the work which was being carried out by Members, and which was solely their responsibility, and by determining which procedures should, in its opinion, be followed in such circumstances, the Appellate Body was creating new rights and obligations for all the WTO Members. ...”</p>		

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	<p>WT/DSB/M/258, ¶ 30 (Feb. 4, 2009)</p> <p><i>United States:</i></p> <p>“37. The representative of the United States said that, for the reasons already discussed, it would not make sense to read the word "recommends" at the end of the Appellate Body Report as being intended to be a recommendation within the meaning of Article 19.1. As a number of other Members had also noted at the present meeting, that would be a departure from the Appellate Body's authority. The Appellate Body only existed pursuant to the agreement of Members, and Members should not presume that the Appellate Body intended to depart from the authority granted to it by Members. ...”</p> <p>WT/DSB/M/258, ¶ 37 (Feb. 4, 2009)</p>		
<p><i>United States – Continued existence and application of zeroing methodology</i></p> <p>(DS350)</p>	<p><i>United States:</i></p> <p>“75. ... The Panel, like previous panels, had properly understood that the Anti-Dumping Agreement could be permissibly interpreted as allowing the use of zeroing in reviews. As the Panel had explained, it "generally found the reasoning of earlier panels on these issues to be persuasive". In the end, however, the Panel had disregarded the standard of review set out in the Anti-Dumping Agreement and had found against the United States. ... [T]he United States was deeply disappointed in the Appellate Body's findings, which both incorrectly expanded the scope of the proceedings and disregarded the careful bargain struck as part of the Uruguay Round Agreements. The United States regretted that the Appellate Body, once again, had failed to accept the permissibility of zeroing under the covered agreements, and had imposed obligations on Members where there were none.”</p> <p>“76. First, in reaching its finding on the inconsistency of zeroing in reviews, the Appellate Body had relied on the same flawed interpretation that it had offered in previous reports. According to the Appellate Body, the concepts of "dumping" and "margin of dumping" were exporter-based and precluded a finding that dumping could exist with respect to an individual transaction. However, the Appellate Body had manufactured a conflict where there was none – dumping may be an exporter-related concept, but dumping could still exist on a transaction-by-transaction basis. He said that the United States had previously explained in detail the flaws in the reasoning on which the Appellate Body primarily relied on in this Report, and invited Members to consider the previous US communications on this topic. In that regard, the United States noted the opinion of one Appellate Body member who had written that "[w]hile aggregation is an unavoidable requirement of the Anti-Dumping Agreement, these provisions are not clear as to what it is that must be aggregated" and "[t]here are arguments of substance made on both sides". The United States respectfully suggested that, as a consequence, under Article 17.6(ii) of the Anti-Dumping Agreement, the Appellate Body should not have found the use of zeroing in reviews to be inconsistent with the Anti-Dumping Agreement.”</p> <p>“77. Second, the United States was very disturbed by the Appellate Body's approach to Article 17.6(ii) of the Anti-Dumping Agreement. That provision stated that where a panel found that a relevant provision of the Agreement admitted of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Anti-Dumping Agreement if it rested on one of those permissible interpretations. Thus, Article 17.6(ii) required a panel, and the Appellate Body, to determine whether the interpretation proposed by a Member was permissible. The Appellate Body had, however, failed to take that approach. Instead of examining the US interpretation, the Appellate Body had begun by reiterating its analysis of the Anti-Dumping Agreement. It had then found that the US interpretation of the Anti-Dumping Agreement had led to a result that contradicted the result of the Appellate Body's analysis – and on that basis alone, said that the US interpretation could not be permissible. That was a simple non sequitur. If Article 17.6(ii) only sanctioned interpretations that all yield the same result, Article 17.6(ii) would have had no function. The Article made clear that a national authority's measure was to be upheld if it rested on "one" – not "all" – of the permissible interpretations of the Anti-Dumping Agreement. Thus, the very premise underlying Article 17.6(ii) was that two interpretations could 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 could not be a basis for finding the first one not to be "permissible”.”</p>	Zeroing	AD

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	<p>“78. In a related vein, the Appellate Body had never actually examined the meaning of "permissible". Instead, it simply asserted "the rules and principles of the Vienna Convention cannot contemplate interpretations with mutually contradictory results". That assertion was unsupported. The ordinary meaning of "permissible" was "allowable" or "permitted" – that was, an interpretation that could be reached under customary rules of interpretation. Nothing in customary rules of interpretation (reflected in Articles 31 and 32 of the Vienna Convention) said an interpretation was not "allowable" simply because another interpretation could also result from application of those rules. In fact, the Appellate Body's approach was particularly surprising in light of the provisions reflecting the customary rules of interpretation in the Vienna Convention. Article 32 made clear that the application of the rules of interpretation in Article 31 could lead to a meaning that was "ambiguous". In light of that provision as well, the United States failed to see how the Appellate Body could have reached the view that Article 17.6(ii) could not contemplate interpretations with mutually contradictory results. The United States noted in that connection that the Appellate Body had been clear to say that its analysis of zeroing rested entirely on an analysis pursuant to Article 31 of the Vienna Convention.”</p> <p>“79. At the end of the Uruguay Round negotiations, Article 17.6(ii) was key to the acceptance of the other provisions of the Anti-Dumping Agreement. The existence of such a provision confirmed 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 anti-dumping systems around the world and long-standing differences concerning methodology. The negotiators, therefore, had indicated that it would have been a legal error not to respect a permissible interpretation of the Anti-Dumping Agreement. The United States, therefore, deeply regretted the Appellate Body's disregard for the meaning and importance of Article 17.6(ii).”</p> <p>WT/DSB/M/265, ¶¶ 75-79 (Apr. 29, 2009)</p> <p><i>United States:</i></p> <p>“81. ... [T]he United States was concerned by the Appellate Body's statement that the Panel in this dispute "appear[s] to have acceded to the hierarchical structure contemplated in the DSU", a statement that was neither explained nor supported. While expressed in terms of a supposed hierarchy found in the DSU, the thrust of the statement was that panels must follow Appellate Body reports even where their own objective assessment of the "applicability of and conformity with the covered agreements" under Article 11 of the DSU led them to a different conclusion. It was easy to understand the attraction to, and convenience for, Appellate Body members of that approach, but that approach was not what had been agreed by Members and was not the legal effect of Appellate Body reports. As the US had explained before, the DSU did not establish a common-law system, in which Appellate Body findings on legal issues became binding precedents. To the contrary, the only thing in the DSU that resembled a hierarchical structure was the role assigned to the Ministerial Conference and the General Council by Article IX:2 of the WTO Agreement: those bodies had the exclusive authority to adopt binding interpretations of the covered agreements.”</p> <p>WT/DSB/M/265, ¶ 81 (Apr. 29, 2009)</p>		
<p><i>United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing"): Recourse to Article 21.5 of the DSU by the European Communities</i></p> <p>(DS294)</p>	<p><i>United States:</i></p> <p>“6. ... The Appellate Body had found that "the recommendations and rulings of the DSB did not extend" to certain administrative reviews, because those recommendations and rulings concerned only investigations and not reviews. Nonetheless, the Appellate Body had found that these reviews fell within the jurisdiction of the compliance Panel. The Appellate Body's finding was very troubling in light of the fact that, as a factual matter, it had not been disputed that these reviews did not alter in any way the effect of the US measures taken to comply, which had been to re-do the investigations in accordance with the DSB's recommendations and rulings, and to revoke the anti-dumping duties on entries going forward.”</p> <p>“7. By extending the scope of the compliance Panel's jurisdiction to cover measures like these, the Appellate Body Report had expanded the scope of Article 21.5 of the DSU to cover measures that did not, in fact, have an identifiable link to the DSB's recommendations and rulings in the original dispute. In this regard, the United States noted the separate and dissenting opinion of one member of the Division</p>	Zeroing	AD

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	<p>that cautioned panels not to "overly broaden[] the scope of proceedings under Article 21.5" to include "measures that share only a limited link to the DSB's recommendations and rulings, and to the measures that a Member takes to implement these rulings". It was unfortunate that the majority of the Division had not heeded this useful warning."</p> <p>"8. Second, the Appellate Body expressly had not made any finding with respect to "zeroing" in administrative reviews "as such" in the original proceeding in this dispute. Nonetheless, the Appellate Body Report had stated – without any supporting reasoning – that the recommendations and rulings in this dispute meant that "the United States was required to ensure that the use of the zeroing methodology in the 31 Cases at issue in the original proceedings ceased by the end of the reasonable period of time". The idea of "cases" as challenged measures was not involved in this dispute and there were no findings against "cases". Rather, the idea of "cases" appeared to be similar to the Appellate Body's approach in a subsequent "zeroing" dispute. In effect, the Appellate Body Report had replaced the DSB's recommendations and rulings in the original dispute with recommendations and rulings from a subsequent dispute. The Appellate Body Report raised serious systemic concerns by importing into this dispute – with all the potential consequences that resulted from a finding of non-compliance under Article 21.5 – findings derived from later rulings made in another dispute."</p> <p>"9. ... Although the compliance Panel had found that "the European Communities did not identify any specific duty assessment determination after the end of the reasonable period of time", the Appellate Body's uncorrected Report nonetheless had deduced the existence of such an assessment determination by the United States. The Appellate Body's reasoning, however, had relied on the assumption that the relevant exporter did not request an administrative review in May 2007. However, the uncontested facts on the record demonstrated that the exporter in question had, in fact, requested a review. Therefore, this supposed determination – which had never been mentioned by the EC or anyone else during the Panel or Appellate proceedings – had not, in fact, occurred. The United States was grateful that when it had brought this error to the Appellate Body's attention, the Appellate Body had issued a corrigendum removing the reference to this supposed determination. ... Nonetheless, the fact that this error had occurred in the first place was of profound concern to the United States, and should be to all Members. Here, the Appellate Body had made factual findings, apparently on its own initiative, and based on its own assumptions about the relevant facts. The Appellate Body was not an investigating body and did not have authority to make factual findings. Nor should the Appellate Body be researching and developing supposed facts that no party had submitted or argued. This incident illustrated quite starkly some of the potential problems that arose when panels or the Appellate Body took a more expansive view of their role than was provided for under the WTO Agreements. ..."</p> <p>WT/DSB/M/269, ¶¶ 6-9 (Jul. 23, 2009)</p>		
<p><i>United States – Measures relating to zeroing and sunset reviews: Recourse to Article 21.5 of the DSU by Japan</i> (DS322)</p>	<p><i>United States:</i></p> <p>"73. The United States was very concerned that the Appellate Body had, once again, rejected the argument that implementation of the DSB's recommendations and rulings with respect to administrative reviews should be determined by reference to the date of entry. In doing so, the Appellate Body had ignored the well-established principle that the Appellate Body itself had recognized in prior disputes – implementation in the WTO dispute settlement system was prospective in nature. The Appellate Body's interpretation of compliance would have the United States reach back in time to redo determinations that had been made with respect to entries that had occurred many years before the end of the reasonable period of time, in some cases as long ago as six to seven years before the deadline for compliance. And yet somehow the Appellate Body had not found this to be retroactive or otherwise contrary to the prospective nature of compliance. The United States asked Members to reflect on the implications of the Appellate Body's finding. Members should be concerned with the systemic consequences that could flow from those findings. For example, in future compliance proceedings, a similar approach could be taken with respect to border measures, such as ordinary tariffs, special agricultural safeguards, tariff preferences and customs valuation. Members had never agreed to a dispute settlement system in which implementation was retrospective in nature and in which they could be required to take actions after the end of the reasonable period of time with respect to past entries of merchandise. Only in subsequent disputes would all Members know more fully what consequences would follow from the Appellate Body's reasoning, but in the meantime Members would be left with questions and uncertainty. ..."</p>	<p>Treaty interpretation; prospective implementation</p>	<p>DSU</p>

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	<p>“74. ... Lastly, the United States turned to a troublesome procedural finding by the Appellate Body, which had potential implications far beyond anti-dumping disputes. The Appellate Body had affirmed the compliance panel's finding that a particular administrative review, Review 9, which had not been in existence at the time of Japan's panel request, was properly within the scope of the compliance proceeding. The DSU, however, was clear – a measure not in existence at the time of a panel request could not fall within the scope of a dispute settlement proceeding. The Appellate Body had viewed the fact that "we are dealing here with Article 21.5 proceedings" as a reason to depart from the text of the DSU. It had reached this conclusion without ever addressing US arguments based on the language of Article 21.5 itself; ...</p> <p>“75. The United States considered that all Members should share those concerns. The Appellate Body was not empowered to fashion exceptions to the text of the DSU. In the past, the Appellate Body had recognized the rule that "the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel". Only where a subsequent measure was in essence the same measure as the one identified in the panel request had it been included in the scope of the panel proceeding. That was not the case with separate and distinct administrative reviews. The Appellate Body, apparently influenced by the circumstances surrounding this dispute, had relied on an "objective" of the DSU to contradict its express terms. This was not an appropriate approach to treaty interpretation, could raise serious concerns in any further negotiations, and should be of concern to all Members.”</p> <p>WT/DSB/M/273, ¶¶ 73-75 (Nov. 6, 2009)</p>		
<p><i>Australia – Measures affecting the importation of apples from New Zealand</i> (DS367)</p>	<p>Australia:</p> <p>“63. Australia recalled that in the "EC - Hormones" dispute, the Appellate Body had clarified that Article 11 of the DSU "bears directly" on the standard of review to be applied by panels in the assessment of facts in proceedings under the SPS Agreement. The Appellate Body had stated that: "So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither <i>de novo</i> review as such, nor 'total deference', but rather the 'objective assessment of the facts'." The Appellate Body had recalled its statement in relation to Article 11 of the DSU in subsequent reports, including "US/Canada -Continued Suspension". In doing so, the Appellate Body had not suggested that its guidance was limited to particular provisions of the SPS Agreement, such as Article 5.1. However, in its Report on "Australia - Apples", the Appellate Body had now stated: "Caution not to conduct a <i>de novo</i> review is appropriate where a panel reviews a risk assessment conducted by the importing Member's authorities in the context of Article 5.1. However, the situation is different in the context of an Article 5.6 claim. The legal question under Article 5.6 is not whether the authorities of the importing Member have, in conducting the risk assessment, acted in accordance with the obligations of the SPS Agreement. Rather, the legal question is whether the importing Member could have adopted a less trade-restrictive measure. This requires the panel itself to objectively assess, inter alia, whether the alternative measure proposed by the complainant would achieve the importing Member's appropriate level of protection." In this statement, the Appellate Body had indicated that, while it was appropriate not to conduct a <i>de novo</i> review in the context of Article 5.1, the "situation is different" in relation to an Article 5.6 claim. The Appellate Body appeared to have suggested that a panel could conduct a <i>de novo</i> review in relation to an Article 5.6 claim. This would constitute a significant departure from the Appellate Body's long-standing guidance that Article 11 of the DSU precluded such a review.</p> <p>“64. Australia was concerned that the reasoning of the Appellate Body in this part of its Report would create difficulty for a panel in applying Articles 5.1 and 5.6 where a complainant brings claims under both provisions. ... In sum, Australia was concerned that the Appellate Body had introduced a significant element of uncertainty on standard of review which would make the task of panels more difficult in reviewing Members' compliance with key provisions of the SPS Agreement. ...”</p> <p>WT/DSB/M/290, ¶¶ 63-64 (Feb. 11, 2011)</p>	<p><i>De novo</i> review</p>	<p>SPS</p>
<p><i>United States – Definitive anti-dumping and</i></p>	<p>United States:</p> <p>“98. The United States noted that, in addition, the Report had reasoned that, because a particular action listed in the definition of a subsidy – "a</p>	<p>Public body; double remedy</p>	<p>SCM</p>

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<p><i>countervailing duties on certain products from China</i> (DS379)</p>	<p>decision to forego or not collect government revenue that is otherwise due" – "appears to constitute conduct inherently involving the exercise of governmental authority", then a public body must be an entity vested with certain governmental responsibilities, or exercising certain governmental authority. That, once again, was a non-sequitor, and the Report had offered no explanation for why the functions other than foregoing government revenue that were identified in Article 1 of the SCM Agreement should be considered "governmental functions". The United States also noted that the Appellate Body Report had rejected the Panel Report's conclusion that the term "or" in the definition of a subsidy indicated that the terms "government" and "public body" were separate concepts with distinct meanings. Ultimately, it appeared that the interpretation in the Appellate Body Report collapsed the terms "government" and "public body", such that there was no purpose for the term "public body" to have been included by Members in the SCM Agreement at all. Reading terms out of an agreement was contrary to the customary rules of treaty interpretation. In moving away from an objective "control" standard, as adopted by this Panel and previous panels, the Appellate Body Report adopted an undefined "governmental authority" standard. ..."</p> <p>WT/DSB/M/294, ¶ 98 (Jun. 9, 2011)</p> <p><i>United States:</i></p> <p>"100. Third, the Panel had correctly noted that Article VI:5 of the GATT 1994 prohibited the application of anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization and had found it significant that no similar prohibition existed in the covered agreements with respect to domestic subsidization. However, despite recognizing that, "in the case of domestic subsidies, an express prohibition is absent" from the text of the covered agreements, the Appellate Body Report had nevertheless created a prohibition on the imposition of a so-called "double remedy" through the concurrent application of CVDs and NME ADs. The conclusion in the Appellate Body Report was based entirely on Article 19.3 of the SCM Agreement. That Article provided that, where CVDs were imposed, they shall be levied in the "appropriate amounts in each case". The Appellate Body Report's expansive interpretation of the term "appropriate amounts" ignored the fact that Article 19 of the SCM Agreement was not concerned with the definition or calculation of CVDs, still less with the existence of concurrent anti-dumping proceedings, but rather was concerned with the "[i]mposition and [c]ollection" of CVDs. Article 19.3 of the SCM Agreement directed importing Members to impose CVDs on imports from "all sources found to be subsidized and causing injury" except producers who had renounced subsidies or entered into undertakings. The reference to assessing CVDs in "appropriate amounts" referred simply to the fact that the CVD on particular imports may vary, even though a CVD should be imposed in a nondiscriminatory manner. The Report turned this clause in Article 19.3 of the SCM Agreement into an obligation concerning the amount of the CVD. In the process, the Report created a subjective standard for what was an "appropriate" amount, derived from a wide variety of unrelated provisions, for example, the "desirab[ility]" of a lesser duty rule. None of these provisions, though, addressed the concurrent application of ADs and CVDs. As a result, the Report introduced unpredictability into the SCM Agreement. Members had no certainty in determining what would constitute an "appropriate" amount of a CVD in any given situation. To compound the problem, the Report appeared to impose the entire burden of proving that there was no "double remedy" on the importing Member. Contrary to other situations, the exporting Member seemingly did not need to demonstrate that the CVD was in excess of the "appropriate" amount. It would appear to be enough that the exporting NME Member simply demonstrated that both CVDs and NME ADs were applied concurrently. Because the Report imposed new obligations that did not appear to derive from the text of the covered agreements, its findings in this regard appeared to be inconsistent with Article 19.2 of the DSU."</p> <p>WT/DSB/M/294, ¶ 100 (Jun. 9, 2011)</p> <p><i>Turkey:</i></p> <p>"106. ... Turkey had submitted its views on two issues: "public body" and "external benchmark". In that regard, Turkey wished to limit its comments only with regard to the determination of a "public body" in the Appellate Body's decision. Turkey had serious concerns about the latest decision of the Appellate Body regarding the determination of a "public body". The Appellate Body had concluded that government ownership and control were not sufficient to make an entity a "public body," but that the entity must possess, exercise, or be vested with governmental authority in order to be deemed as public under the SCM Agreement. The ruling of the Appellate Body equated the term "public body" to "government" and annulled the difference between them. However, the SCM Agreement stated that a subsidy should</p>		

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	<p>be provided by a "government" or a "public body". It was an undisputed fact that the definition of a "public body" should not be same as the definition of a "government". The drafters of the SCM Agreement had made a clear distinction between the terms "government" and "public body". However, the Appellate Body's decision on this issue had overreaching results that were not intended by the drafters of the SCM Agreement. If the aim of the drafters had been the same, it was obvious that there would have been no need to have two separate terms. Since the drafters had used two distinct terms, there should also have been a clear distinction between the definitions and functions of these two terms. Therefore, institutions falling under the definition of the term "government" could not be classified under the term "public body".</p> <p>"107. ... Consequently, Turkey fully agreed with the US conclusion that the Appellate Body had effectively transformed the "public body" test into a "government action" test without any substantial basis in the SCM Agreement. It would be more difficult than ever and almost impossible to remedy those kinds of subsidies. Turkey considered that the Appellate Body's ruling on this issue struck a blow to fair trade and promoted unfair trade."</p> <p>WT/DSB/M/294, ¶¶ 106-107 (Jun. 9, 2011)</p>		
<p><i>European Communities and certain member States – Measures affecting trade in large civil aircraft</i> <i>(DS316)</i></p>	<p>Brazil:</p> <p>"19. ... In sum, it was Brazil's view that the standard articulated by the Appellate Body in this dispute departed significantly from the text of the SCM Agreement and this was not without serious consequences. The comparison called for by the Appellate Body potentially involved the assessment of hypothetical scenarios on both sides of the equation. This had the potential not only to increase the room for exercises of a speculative nature but it may also make it impossible to undertake a demonstration that otherwise could find direct support in the text of the SCM Agreement."</p> <p>"20. Finally, Brazil wished to address the Appellate Body's findings with respect to the US allegations of serious prejudice. Brazil considered problematic the Appellate Body's conclusion that the term "market" in the context of a serious prejudice analysis referred to both a geographic and a product market. The Appellate Body had found that "a panel is required to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets for purposes of an analysis of displacement under Article 6.3(a) and 6.3(b)". It had further found that "the notion of 'subsidized product' and 'like product' is, in each case, to be analysed as an integral part of a panel's duty objectively to assess a particular claim of serious prejudice and its obligation to assess the relevant market". Brazil was of the view that the text of Article 6.3 of the SCM Agreement clearly referred to a geographic market only. Furthermore, there was no textual guidance regarding the definition of the "subsidized product" in the SCM Agreement, and the definition of a "like product" was focused on the "essential characteristics" of the product in comparison with the subsidized product. There did not appear to be a textual basis to require panels to examine the appropriateness of a complainant's definition of the "subsidized" and the "like" product "under the discipline of the product market" as required by the Appellate Body. Brazil considered that the introduction of concepts and approaches that appeared to be derived from competition law in a trade agreement like the SCM Agreement was unwarranted and imposed an undue burden on complainants as well as panels, ill-suited to conduct such a competition-like analysis."</p> <p>WT/DSB/M/297, ¶¶ 19-20 (Jul. 11, 2011)</p>	Text interpretation	SCM
<p><i>Thailand – Customs and fiscal measures on cigarettes from the Philippines</i> <i>(DS371)</i></p>	<p>United States:</p> <p>"10. In its analysis of Thailand's defence under Article XX(d) of the GATT 1994, the Appellate Body had stated that it was the differential treatment that must be "necessary" to secure compliance. However, this seemed at odds with the Appellate Body's prior reports in which it had found that it was the "measure" that must be "necessary". Like Australia, the United States was concerned with respect to this different approach, which appeared to depart from the text of Article XX(d) of the GATT 1994. Members would also benefit from a better explanation of how the discussion of, and focus on, "due process" in connection with Thailand's appeal under Article 11 of the DSU related to</p>	Text interpretation; 90-day period for AB report	GATT 1994; DSU

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	<p>the text of Article 11, in particular the provision for an "objective assessment of the matter before it". The discussion did not seem to indicate why views as to what constituted "due process" in a panel proceeding were necessarily part of an analysis of whether a panel had conducted an "objective assessment" of the matter."</p> <p>"11. Finally, the United States noted that, although the communication from the Appellate Body to the DSB Chair transmitting the Report stated that the Report "will be circulated to Members ... in accordance with paragraph 5 of Article 17" of the DSU7, in fact the Report of the Appellate Body had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. The United States understood from the parties to the dispute that the Appellate Body had consulted with the parties on this issue and that each party had agreed to accept a report circulated outside the 90-day period. The United States further understood that the parties had provided a letter to the Appellate Body to that effect. However, contrary to past practice, this agreement by the parties had not been mentioned in the Appellate Body's Article 17.5 notification to the DSB that it could not provide its report within 60 days. Further, this agreement by the parties was not reflected in the Report of the Appellate Body, as had been the practice of the Appellate Body in prior disputes. The approach followed in this dispute resulted in less transparency for Members on the circumstances leading to the consideration by the DSB of a report circulated outside the 90-day period in Article 17.5 of the DSU. The United States did not see how less transparency for the DSB was desirable. In future disputes, Members should be provided with the level of transparency provided by the Appellate Body in the past."</p> <p>WT/DSB/M/299, ¶¶ 10-11 (Sept. 1, 2011)</p>		
<p><i>European Communities – Definitive anti-dumping measures on certain iron or steelfasteners from China</i> <i>(DS397)</i></p>	<p>United States:</p> <p>"11. Finally, turning to a procedural matter, the United States noted that the Report of the Appellate Body had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. Unfortunately, this proceeding raised the same concerns regarding lack of transparency on this issue as the United States had noted during the DSB's consideration of the last Appellate Body Report. In this dispute, the Appellate Body's Article 17.5 notification to the DSB that it could not provide its report within 60 days had been submitted on 24 May but was not circulated until 5 July.7 ..."</p> <p>WT/DSB/M/301, ¶ 11 (Sept. 23, 2011)</p> <p>Costa Rica:</p> <p>"12. ... Costa Rica wished to be associated with the statement made by the United States regarding the circulation of the Appellate Body Report outside the 90-day period stipulated in the DSU. Article 17.5 of the DSU clearly stated that in no case shall the appeal proceedings exceed this 90-day time-limit. When, in exceptional and very specific circumstances, after consultations with the parties to the dispute, and in view of the complexity of the case, it would not be possible to comply with this 90-day time-limit, then in accordance with the DSU, the DSB must be informed of the reasons for the delay in order to ensure due transparency for all WTO Members. However, the approach taken by the Appellate Body in this dispute – not to mention the agreement between the parties – resulted in less transparency for other WTO Members than in the past."</p> <p>WT/DSB/M/301, ¶ 12 (Sept. 23, 2011)</p> <p>Australia:</p> <p>"13. The representative of Australia said that her country shared the concerns expressed by the United States and Costa Rica concerning the procedural aspects of the Report, including circulation of the Appellate Body Report outside the normal appellate time-frames and the apparent lack of transparency on this issue in the Report. ..."</p> <p>WT/DSB/M/301, ¶ 13 (Sept. 23, 2011)</p> <p>Japan:</p> <p>"14. The representative of Japan said that her country also shared the concerns expressed by the United States about the lack of transparency. It</p>	<p>90-day period for AB report</p>	<p>DSU</p>

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	<p>appeared that the Appellate Body had departed from the practice it had established. Less transparency was undesirable, to say the least because Article 17.5 of the DSU was drafted in categorical terms.”</p> <p>WT/DSB/M/301, ¶ 14 (Sept. 23, 2011)</p> <p><i>Norway:</i></p> <p>“15. ... Norway noted that the Report had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. As pointed out by previous speakers, this proceeding raised concerns about the lack of transparency with regard to this issue. Norway agreed with the United States, Costa Rica, Australia and Japan that in future disputes, Members should be provided transparency in line with what the Appellate Body had provided in previous disputes.”</p> <p>WT/DSB/M/301, ¶ 15 (Sept. 23, 2011)</p>		
<p><i>United States – Measures affecting imports of certain passenger vehicle and light truck tyres from China</i> <i>(DS399)</i></p>	<p><i>United States:</i></p> <p>“4. While the United States was obviously very pleased with the substantive content of the Panel and Appellate Body Reports, and would welcome their adoption by the DSB at the present meeting, the United States nonetheless believed that it was important to draw Members' attention to certain systemic issues related to the delay in the issuance of the Appellate Body Report beyond the 90 days specified in the DSU. ...”</p> <p>WT/DSB/M/304, ¶ 4 (Dec. 2, 2011)</p> <p><i>Japan:</i></p> <p>“12. ... Japan certainly appreciated that the heavy workload was posing a difficult challenge that may require additional time for the Appellate Body to produce a high-quality report. However, Article 3.3 of the DSU set out the general principle of "prompt settlement" of disputes in WTO dispute settlement, and time-limits in the process provided for throughout the DSU, including the time-period in Article 17.5 of the DSU, were specific expressions of this general principle of "prompt settlement". Furthermore, Japan noted that the 90-day time-limit, imposed on both the Appellate Body and parties to the dispute, was written in categorical terms. Because of this categorical language and the general principle of "prompt settlement", and given the adjudicatory function assumed by the Appellate Body to decide the consistency or inconsistency of WTO Members' actions with a covered agreement, any departure from the clear text of the DSU must be of temporal or emergency nature to be limited to address very exceptional circumstances. In other words, exceeding the 90-day period should not become a norm or general rule, it must remain an exception.”</p> <p>WT/DSB/M/304, ¶ 12 (Dec. 2, 2011)</p> <p><i>Australia:</i></p> <p>“15. ... Australia believed that departure from the normal appellate time-frames should occur only in exceptional circumstances and with full transparency. ...”</p> <p>WT/DSB/M/304, ¶ 15 (Dec. 2, 2011)</p> <p><i>Chile:</i></p> <p>“16. ... Chile shared the systemic concern expressed by other delegations with regard to the delay in the circulation of the Appellate Body Report. ...”</p> <p>WT/DSB/M/304, ¶ 16 (Dec. 2, 2011)</p> <p><i>Argentina:</i></p> <p>“17 ... Argentina noted that the United States had referred to the lack of agreement by the parties to this dispute to extend the deadline stipulated in Article 17.5 of the DSU, and that in its communication (WT/DS399/8) the Appellate Body did not make any reference to the</p>	<p>90-day period for AB report</p>	<p>DSU</p>

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	<p>parties' agreement. Like previous speakers, Argentina was concerned about this precedent and its impact on the functioning of the dispute settlement system. ...”</p> <p>WT/DSB/M/304, ¶ 17 (Dec. 2, 2011)</p> <p><i>Costa Rica:</i></p> <p>“18. ... Costa Rica wished to be associated with the statement made by the United States and other delegations regarding the circulation of the Appellate Body Report outside the 90-day time-limit. Costa Rica underlined that Article 17.5 of the DSU clearly stated that in no case shall the appeal proceedings exceed this 90-day time-limit. ...”</p> <p>WT/DSB/M/304, ¶ 18 (Dec. 2, 2011)</p>		
<p><i>China – Measures related to the exportation of various raw materials</i></p> <p><i>(DS394), (DS395), (DS398)</i></p>	<p><i>United States:</i></p> <p>“105. The United States said that it did note two areas of concern with the Appellate Body Report. First, the Appellate Body had concluded that one part of the panel requests, covering a number of other types of Chinese export restraints, had not drawn sufficiently "clear connections" for purposes of Article 6.2 of the DSU between legal instruments (that were set out in the requests) and claims (that were also set out in the requests). The United States believed this approach amounted to a new standard, which was not reflected in the text of the DSU, nor had been applied in prior reports or followed in other Members' panel requests. Unfortunately, as a result of adopting and applying the new standard in this dispute, a number of potentially distortive trade problems that had been identified in the Panel Report remained unaddressed.”</p> <p>“106. Finally, as for several Appellate Body Reports that had been considered by the DSB in 2011, the United States wished to draw the DSB's attention to a procedural issue in relation to Article 17.5 of the DSU. In the Appellate Body's 60-day notice pursuant to Article 17.5 of the DSU, the Appellate Body had provided an estimated circulation date of 31 January 2012, or, if the US representative had counted correctly, 153 days after initiation of the appeal. However, contrary to past practice, the Appellate Body had not mentioned in its notification that the parties had agreed at the outset that the appeal would exceed 90 days. Further, the agreement by the parties had not been reflected in the Report of the Appellate Body, as had also been the practice of the Appellate Body in prior disputes. ...”</p> <p>WT/DSB/M/312, ¶ 105-106 (May 22, 2012)</p> <p><i>Japan:</i></p> <p>“120. ... Finally, with respect to the issue relating to Article 17.5 of the DSU which the United States had referred to, Japan agreed that, for the purpose of full transparency, parties' consents should have been mentioned in the Appellate Body Report, as had been the customary practice of the Appellate Body in the past.”</p> <p>WT/DSB/M/312, ¶ 120 (May 22, 2012)</p> <p><i>Costa Rica:</i></p> <p>“121. ... Costa Rica supported the concerns raised by Canada, the United States and Japan regarding the circulation of the Appellate Body Report outside of the 90-day period and the need for transparency for all Members when such delays were to take place.”</p> <p>WT/DSB/M/312, ¶ 121 (May 22, 2012)</p> <p><i>Norway:</i></p> <p>“122. ... Norway ... noted that the Report had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. In Norway's view, it was of systemic importance that the Appellate Body ensured transparency regarding this issue. As had been pointed out by previous speakers, the proceedings in this case had raised some concerns about the lack of such transparency.”</p>	<p>90-day period for AB report</p>	<p>DSU</p>

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	<p>WT/DSB/M/312, ¶ 122 (May 22, 2012)</p> <p><i>Australia:</i></p> <p>“123. ... Australia supported the statements made by the United States, Japan, Canada, Norway and Costa Rica on the issue of transparency. Australia had made interventions in the past on this issue, in particular where a report was circulated outside the normal 60 or 90-day time period provided for appeals. It was of fundamental importance that Members were made aware of the circumstances, including that the consent of the parties had been provided for the circulation of the report outside the normal timeframes. Australia urged the Appellate Body to reconsider its more recent practice of not providing the necessary level of transparency. That level of transparency was in the interest of not only the Members but the Appellate Body and the Secretariat as a whole.”</p> <p>WT/DSB/M/312, ¶ 123 (May 22, 2012)</p> <p><i>Guatemala:</i></p> <p>“124. ... Guatemala wished to comment on the procedural issues regarding Article 17.5 of the DSU. First, for the well-known reasons, the Appellate Body required more time than the 90-day period provided for in Article 17.5 of the DSU in order to complete its reports. Second, the Appellate Body had changed its practice regarding transparency in cases where it was necessary to go beyond that 90-day period. In Guatemala's view, this matter should be discussed by Members so as to ensure that the Appellate Body had sufficient time to produce high-quality reports and that disputes were resolved promptly. Finally, Guatemala did not understand why the Appellate Body had changed its practice on transparency. Guatemala hoped that, in future cases, the Appellate Body would be able to ensure full transparency in matters related to the procedural issues under Article 17.5 of the DSU.”</p> <p>WT/DSB/M/312, ¶ 124 (May 22, 2012)</p>		
<p><i>United States – Measures affecting trade in large civil aircraft (second complaint)</i> <i>(DS353)</i></p>	<p><i>United States:</i></p> <p>“73. The United States said that there was one aspect of the Appellate Body Report that it found puzzling. The discussion of Annex V in the Appellate Body Report did not appear to be necessary. The Appellate Body had criticized the Panel for failing to make a finding on the legal issue of whether initiation of Annex V was by positive consensus because that issue was necessary to resolve the dispute. But by the end of the Appellate Body Report's discussion, it appeared that such a legal interpretation was not necessary to resolve this dispute. It would appear to have been directed instead at future disputes, but that was not the role of the Appellate Body. In addition, the decision-making rule by which the DSB would or would not initiate the Annex V process was a matter of DSB procedure, and, therefore, was for the DSB to resolve. The United States believed that the DSB, like any other political body of the WTO, should resolve these sorts of procedural matters through their own rules, and it was not the role of the dispute settlement system to write or re-write those rules. The approach of the Panel on the issue of Annex V was, in the view of the United States, more sensitive to the proper roles of the DSB and the dispute settlement system. The United States also did not understand the basis for the Appellate Body's view that the DSB Chair was some sort of "default" or "interim" facilitator for the Annex V process. If Members had wished that to be the case, they could and would have so specified in the agreement itself.”</p> <p>“74. Finally, with respect to Article 17.5 of the DSU, the United States noted that both parties had agreed from the outset of the appeal that it would not be possible for the Appellate Body to complete its work within the 90-day deadline set out in the DSU. However, neither the Appellate Body Report nor the 60-day notice recorded the agreement of the parties. As it had remarked in relation to several of the Appellate Body's reports since the beginning of 2011, the United States believed that the Appellate Body should provide to Members the same degree of transparency on the circumstances under which a report was presented for adoption outside the 90-day period in Article 17.5 of the DSU as the Appellate Body formerly had provided to Members prior to 2011.”</p> <p>WT/DSB/M/313, ¶¶ 73-74 (May 29, 2012)</p> <p><i>Japan:</i></p>	<p>Unnecessary review; 90-day period for AB report</p>	<p>DSU</p>

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	<p>“77. ... Japan wished to briefly comment on the issue relating to Article 17.5 of the DSU which the United States had referred to. Japan was of the view that, for the purpose of full transparency, the parties consent should have been recorded, as had been the customary practice of the Appellate Body in the past.”</p> <p>WT/DSB/M/313, ¶ 77 (May 29, 2012)</p>		
<p><i>United States – Measures affecting the production and sale of clove cigarettes</i></p> <p>(DS406)</p>	<p>United States:</p> <p>“75. Instead, the Appellate Body had based its conclusion regarding this critical public health matter on speculation. In particular, the Appellate Body had stated that "it is not clear" that the potential risks associated with banning menthol cigarettes "would materialize ... insofar as regular cigarettes would remain in the market". Thus, on the most critical public health rationale for drawing a distinction between clove and menthol cigarettes, the Appellate Body did not point to any facts on the record to support its dismissal of that distinction. Indeed, all the Appellate Body could say was that "it is not clear" the risks would materialize. The United States did not think that this was an adequate basis for finding that a Member's public health measure breaches its WTO obligations. In essence, the Appellate Body was stating that it had a different approach than US regulators for weighing the potential risks and benefits from including additional types of cigarettes in the ban. In adopting this approach, the Appellate Body appeared to have placed itself in the position of the regulator. But that was not the function of a panel or the Appellate Body, and they were not well suited for that role.”</p> <p>“76. To return to the passage previously cited, the Appellate Body said that "it is not clear" that the public health risks would arise "insofar as regular cigarettes would remain in the market", but what factual or scientific basis was there to say that smokers addicted to menthol cigarettes would readily switch to regular cigarettes? There was none in the Panel record and if the Appellate Body was wrong in that assumption, the consequences for public health would be severe. The United States said that "it is the role of public health authorities, not only in the United States but worldwide, to engage in the complex process of managing products that are harmful, addictive, and widely used". In doing so, public health authorities must consider the types of harms that may result from wide-reaching regulatory actions. Thus, the Appellate Body had erred in substituting its own judgment – instead of that of the regulator – with regard to whether additional regulations should be adopted in the face of potential harms.”</p> <p>WT/DSB/M/315, ¶¶ 75-76 (Jun. 27, 2012)</p>	<p>Role of the AB</p>	<p>DSU; TBT</p>
<p><i>United States – Measures concerning the importation, marketing and sale of tuna and tuna products</i></p> <p>(DS381)</p>	<p>United States:</p> <p>“17. On a procedural matter related to Article 17.5 of the DSU, the United States noted that this Report had been issued 116 days after the notice of appeal was filed. While the United States and Mexico had agreed that the appeal would exceed the 90-day period set out in the DSU, the United States remained disappointed that the Appellate Body had not provided transparency about the parties' agreement in its 60-day notice to Members and in its report. ...”</p> <p>WT/DSB/M/317, ¶ 17 (Jul. 31, 2012)</p> <p>Australia:</p> <p>“23. Australia also noted that the Appellate Body Report had been circulated outside the maximum 90-day time-frame set down in Article 17.5 of the DSU. ... Nevertheless, now that the workload of the Appellate Body had eased, Australia hoped that future Appellate Body reports could be issued within the mandated 90-day time-frame. ...”</p> <p>WT/DSB/M/317, ¶ 23 (Jul. 31, 2012)</p> <p>Japan:</p> <p>“30. Finally, with respect to Article 17.5 of the DSU to which the United States and Australia had referred, Japan agreed that, for the purpose of full transparency, the parties' consent should have been recorded in the Appellate Body Report, as had been the customary practice of the</p>	<p>90-day period for AB report</p>	<p>DSU</p>

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	<p>Appellate Body in the past.”</p> <p>WT/DSB/M/317, ¶ 23 (Jul. 31, 2012)</p>		
<p><i>United States – Certain country of origin labelling (COOL) requirements</i> <i>(DS384), (DS386)</i></p>	<p>United States:</p> <p>“97. Finally, in relation to the circulation of these reports beyond the 90-day time-limit set out in Article 17.5 of the DSU, the United States said that it would like to recall for Members the communications that had been circulated by Canada, Mexico, and the United States in which they had confirmed that they, like the Appellate Body, each considered the Appellate Body Report in their respective dispute to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU. In those communications, the three parties had jointly stated as follows: “The parties note that the Division hearing this appeal did not consult with them on its need to exceed the 90-day time-limit. We consider that, consistent with the practice of Members and the Appellate Body until 2011, the Appellate Body should consult with the parties and obtain their agreement to receive reports that are to be circulated after the deadline provided for in the DSU. We particularly regret the lack of consultation with the Division hearing this appeal given that the parties would have been willing to positively consider a communication from the Division of its need for additional time. While we note our understanding that further delays will not be required in upcoming disputes given the anticipated workload of the Appellate Body in the immediate future, should delays in the circulation of reports beyond the 90-day deadline be again considered necessary, we would expect a return to the Appellate Body’s pre-2011 practice”. . . .”</p> <p>WT/DSB/M/320, ¶ 97 (Sept. 28, 2012)</p> <p>Costa Rica:</p> <p>“98. . . . Costa Rica wished to be associated with the statements made by the parties to the disputes regarding the circulation of the Appellate Body Reports outside the 90-day time-limit. In that regard, Costa Rica underlined that Article 17.5 of the DSU clearly stated that in no case shall appeal proceedings exceed 90 days. . . .”</p> <p>WT/DSB/M/320, ¶ 98 (Sept. 28, 2012)</p> <p>European Union:</p> <p>“101. The United States and Costa Rica had just mentioned how important it was to respect Article 17.5 of the DSU regarding the 90-day deadline and the need to ensure appropriate transparency. The EU also considered that deadlines set out in the DSU relating to the time-limits for Panel and the Appellate Body reports were important and should be respected as far as objectively possible. . . .”</p> <p>WT/DSB/M/320, ¶ 101 (Sept. 28, 2012)</p> <p>Japan:</p> <p>“103. Second, with respect to the issue relating to Article 17.5 of the DSU which previous speakers had just referred to, Japan appreciated that the heavy workload and complexities of appeals had been posing a difficult challenge that may require additional time for the Appellate Body to produce a high-quality report. Japan valued the high quality of the Appellate Body reports, and commended the tireless efforts to seek excellence of their work by the Appellate Body and its Secretariat. However, it should also be recalled that Article 3.3 of the DSU set out the general principle of the "prompt settlement" of disputes in WTO dispute settlement, and the time-limits in the process provided for in the DSU provisions, including the time-period in Article 17.5 of the DSU, were specific expressions of this general principle of "prompt settlement". Parties’ interests in "prompt settlement" of disputes reflected in the DSU were also recognized by the Appellate Body as a legitimate due process interest. Furthermore, the 90-day time-limit imposed on the Appellate Body and also on parties to the dispute was written in categorical terms. . . .”</p> <p>WT/DSB/M/320, ¶ 103 (Sept. 28, 2012)</p> <p>Australia:</p> <p>“104. . . . Australia also noted that the Appellate Body had on some occasions not been able to circulate its reports within the 90-day time-frame</p>	<p>90-day period for AB report</p>	<p>DSU</p>

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	<p>set out in Article 17.5 of the DSU, in particular in times of heavy workloads, and this again was the case in the COOL disputes. The higher than usual workload had been compounded by the increasing legal and factual complexity of recent cases. While, in Australia's view, ensuring that Appellate Body reports were of the highest possible quality remained critical, Australia continued to hope that the Appellate Body would do all it could to meet the 90-day time-frame. ...”</p> <p>WT/DSB/M/320, ¶ 104 (Sept. 28, 2012)</p> <p>Guatemala:</p> <p>“105. ... Like other delegations, Guatemala wished to express its concern regarding the way the 90-day time-period, provided for in Article 17.5 of the DSU, had been extended. ...”</p> <p>WT/DSB/M/320, ¶ 105 (Sept. 28, 2012)</p> <p>Brazil:</p> <p>“106. The representative of Brazil said that her country wished to be associated with the statement made by the EU regarding the 90-day deadline. ...”</p> <p>WT/DSB/M/320, ¶ 106 (Sept. 28, 2012)</p> <p>Turkey:</p> <p>“109. ... Turkey noted that some Members had mentioned that the Appellate Body had not been able to meet the 90-day time-limit in 18 cases. In Turkey's view, this showed that the Appellate Body had violated Article 17.5 of the DSU 18 times. ... In Turkey's view, Article 17.5 of the DSU was clear and should be respected. Turkey noted that the Appellate Body could not make rules, but Members could and, therefore, Turkey was ready to engage in further discussions with other Members to review Article 17.5 of the DSU in order to take into account the reality and needs of the current situation.”</p> <p>WT/DSB/M/320, ¶ 109 (Sept. 28, 2012)</p>		
<p><i>European Communities – Measures prohibiting the importation and marketing of seal products</i></p> <p><i>(DS400), (DS401)</i></p>	<p>United States:</p> <p>“7.8. ... Finally, the United States said it would like to comment on an important systemic issue that had been raised in the context of this appeal and something that Canada had also raised. This had been raised not by the Report itself, but by the Appellate Body's 24 March 2014 letter to the DSB Chair, in which it indicated that it "will not be able to circulate its reports within the 90-day timeframe provided for in the last sentence of Article 17.5 of the DSU". While the 90-day deadline in the DSU text was categorical, Members had an understanding of the workload challenges faced by the Appellate Body, and had been willing to agree to receive a report after this deadline and provided in writing their commitment to treat the report as if it had been circulated within the 90-day deadline when they had been meaningfully consulted with by the Division handling a particular appeal. Equally important, such consultation and agreement, when noted in the Appellate Body's communication and by the parties, provided transparency to the DSB in relation to the observance of the rules in the DSU. For those reasons, the Appellate Body had regularly consulted with and obtained the agreement of Members to issue reports after 90 days between 1997 and 2011. The United States had been taking a close look at the facts earlier that week and had found that during those years, the Appellate Body had obtained the parties agreement in 14 consecutive disputes – the first 14 disputes where the circulation of the report had exceeded 90 days from the date of appeal. Unfortunately, it was the US understanding that the Division hearing this appeal had deviated from this well-established practice. It was regrettable that the agreement of the parties to circulate its reports after the 90-day deadline had not been obtained and that transparency to the DSB had not been provided. ... This deviation from past practice was extremely troubling, and the United States was concerned that it may repeat itself in the near future, in particular in light of the fact that the Appellate Body may face a higher than normal workload in the year to come. The United States hoped that the Appellate Body and Members could engage in a dialogue on this issue in the weeks ahead to come to a solution that respected the mandatory deadline set out in the text of the DSU and provided the DSB with transparency with respect to the agreement of the parties and timing of the issuance of Appellate Body reports while at the same time ensuring</p>	<p>90-day period for AB report</p>	<p>DSU</p>

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	<p>that the Appellate Body had the time to produce high-quality reports. In that regard, the United States believed that the well-established practice until 2011 had served WTO Members and the Appellate Body well.”</p> <p>WT/DSB/M/346, ¶ 7.8 (Aug. 28, 2014)</p> <p><i>Guatemala:</i></p> <p>“7.9. ... Guatemala wished to comment on the fact that the Appellate Body Report had been circulated outside the 90-day time-frame. As Guatemala had stated on previous occasions, it was clear that Article 17.5 of the DSU did not allow for exceptions. This was a mandatory provision that needed to be complied with. ...”</p> <p>WT/DSB/M/346, ¶ 7.9 (Aug. 28, 2014)</p>		
<p><i>United States – Countervailing and anti-dumping measures on certain products from China</i></p> <p>(DS449)</p>	<p><i>United States:</i></p> <p>“7.7. On appeal, the Appellate Body had reversed the Panel's legal interpretation of Article X:2 and its approach to how a Member's municipal law should be understood for purposes of the comparison under Article X:2. ... [A]s the United States and third participants had noted in this appeal, when a WTO adjudicative body examined a Member's municipal law, the meaning must be that which would be given by the municipal law system using the interpretive tools of that system – not the generalized tools described by the Appellate Body without reference to the US legal system itself. It was striking that in 61 paragraphs of analysis of the meaning of the 2012 US legislation and the pre-existing countervailing duty law, the Appellate Body did not once refer to US constitutional law principles applicable to statutory interpretation, despite the extensive reference to those principles in the Panel Report. This was a critical omission because, as the Panel had found, under principles of US constitutional law, an agency interpretation of legislation was lawful and governed unless it was overturned in a binding court decision applying the standard of review articulated by the US Supreme Court. Therefore, the Panel had also concluded objectively that, under US municipal law, the administering agency's interpretation and application of the US countervailing duty law was valid US law as "nothing in the record indicates, that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law". Regrettably, the Appellate Body's interpretative approach under Article X:2 had ignored a key facet of the municipal legal system of the Member whose domestic law was being examined. This could not produce a valid comparison under Article X:2.”</p> <p>“7.8. A second difficulty with the Appellate Body's approach was that it could lead to the negative consequence of allowing and encouraging WTO Members to bring disputed domestic law issues for resolution in the WTO rather than in another Member's domestic courts. In other words, this approach would seem to charge the WTO dispute settlement system with determining what was to be deemed "lawful" under a Member's domestic legal system using the interpretive tools endorsed by the Appellate Body in "US - Carbon Steel". Such a determination could presumably be made in advance of, and perhaps even contrary to, a municipal court decision on the same issue. If the WTO dispute system could be used to resolve contested issues of municipal law contrary to that Member's understanding and application of its own law, this could raise unsettling questions on when a Member could be deemed to breach its obligations and would be difficult to reconcile with GATT 1994 Article X:3(b), which requires a Member to establish domestic procedures for the prompt review and correction of administrative actions. For this reason, previous panels and the Panel in this dispute had found that "it is the role of domestic 'judicial, arbitral or administrative tribunals', and not WTO panels, to determine whether agency practices relating to customs matters are unlawful under domestic law". ...”</p> <p>WT/DSB/M/348, ¶¶ 7.7-7.8 (Sept. 28, 2014)</p>	Municipal law	GATT 1994
<p><i>United States – Countervailing measures on certain hot-rolled carbon steel flat products from India</i></p>	<p><i>United States:</i></p> <p>“1.12. ... The task that they [panel and AB] performed here was particularly difficult in light of the number of claims that India had brought before the Panel and the number of issues it had appealed. India's panel request contained hundreds of claims under 25 separate WTO provisions. The overwhelming majority of India's claims had been rejected as baseless. Unfortunately, India then essentially appealed the Panel's</p>	Excessive appeal claims	DSU

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(DS436)	<p>findings in their entirety. This attempt to re-do the Panel proceedings had led to over 90 claims on appeal, including 24 different claims under Article 11 of the DSU. While a party of course had the right to appeal a panel report it considered erroneous, India's approach to the appeal was difficult to reconcile with the WTO dispute settlement system as designed by Members. In particular, a WTO appeal was not a chance for a Member to re-air its grievances wholesale in front of a new audience in the hopes of receiving a different outcome, but instead was an opportunity to correct legal interpretations and legal conclusions that were relevant to securing a positive solution to the dispute. Undisciplined appeals served to exacerbate the workload problems facing the system as a whole. The United States hoped other Members would show greater restraint in future appeals.”</p> <p>“1.13. It was also worth noting that such tactics make it very difficult for the Appellate Body to comply with the 90-day deadline set out in Article 17.5 of the DSU. The Appellate Body, of course, had good reason to go beyond 90 days in this dispute. This made it disappointing that the Appellate Body, once again, had failed to follow the pre-2011 practice of exceeding this mandatory time-limit following consultations with the parties and with their agreement. When consulted, WTO Members had continuously demonstrated their flexibility and cooperation by agreeing to such extensions. And in this case, despite the lack of consultations, the United States and India had signed a letter confirming that the Report issued by 8 December 2014, would be considered consistent with Article 17.5 despite the fact that the date of circulation actually occurred 122 days after India had filed its appeal. The United States would like to make clear that it viewed this as an important systemic matter because it involved mandatory language under the DSU. ...”</p> <p>WT/DSB/M/354, ¶¶ 1.12-1.13 (Feb. 16, 2015)</p>		
<p><i>United States – Countervailing duty measures on certain products from China</i></p> <p>(DS437)</p>	<p><i>United States:</i></p> <p>“1.10. ... [T]he Appellate Body Report that would be adopted at the present meeting contained two categories of findings that should be of wide concern to Members: (i) the proper role of panels and the Appellate Body under the WTO dispute settlement system; ...”</p> <p>“1.11. With respect to the first issue, the United States said that the Appellate Body Report suggested a view of dispute settlement that departed markedly from that set out in the DSU and reflected in numerous prior reports. As the United States understood it, the fundamental role of a panel was to consider the evidence and arguments put forward by the complaining party and the responses by the responding party, to make an objective assessment of the matter before it, and to issue a report explaining the basis of its findings. The Appellate Body Report had suggested that panels and the Appellate Body had a different role: namely, to conduct independent investigations and apply new legal standards, regardless of what either party actually argues to the panel. This approach would represent a fundamental departure from prior adopted reports. ... In this dispute, however, the Appellate Body Report had assumed the role of the complaining party by making China's <i>prima facie</i> case – for the first time – on appeal with respect to a number of different claims. The Appellate Body had then gone on to find in China's favor by upholding arguments that the Appellate Body had developed itself.”</p> <p>“1.12. Equally remarkable, the Appellate Body had found that the Panel breached its responsibilities under Article 11 of the DSU by failing to examine arguments never presented by China. ... China relied on sweeping factual and legal generalizations. The United States had responded to China's arguments in the manner that China presented them. The United States rebutted all of China's incorrect legal positions and all of China's sweeping factual characterizations. The Panel had agreed that the United States had rebutted China's arguments, and had found – with respect to the vast majority of China's claims – that China had failed to establish any breach of the SCM Agreement. In short, the Panel had done exactly what it was supposed to do under the WTO dispute settlement system – it had examined the evidence and arguments before it, had made an objective assessment, and had then issued its Report.”</p> <p>“1.13. Regrettably, the Appellate Body had taken a very different approach. Namely, it had developed legal interpretations of the SCM Agreement, and had then sought to apply those interpretations to the US measures – without regard to the case made by China through the evidence and arguments it had actually submitted to the Panel. In doing so, the Appellate Body had assumed a role more like an investigative authority. This was not a role provided for in the DSU. ...”</p>	<p>Role of the AB; 90-day period for AB report</p>	<p>SCM; DSU</p>

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	<p>WT/DSB/M/355, ¶¶ 1.10-1.13 (Feb. 17, 2015)</p> <p><i>United States:</i></p> <p>“1.16. In closing, the United States said it would like to address an important issue regarding the 90-day time-limit under Article 17.5 of the DSU. In this dispute, the Appellate Body took 118 days to circulate its Report. This marked the fourth time in the last five appeals that the Appellate Body had missed the 90-day deadline. Given the size and complexity of this dispute, as well as many other ongoing appeals, the United States of course would have been willing to positively consider a request from the Appellate Body to exceed the time-limit. However, the Appellate Body had failed to consult with the parties and simply sent out what appeared to be a form letter notifying the DSB that it would yet again breach this clear provision of the DSU. Such action regrettably did not contribute to the strengthening of the WTO as a rules-based organization. The United States urged the Appellate Body to return to its pre-2011 practice of consulting with the parties, and seeking their agreement before exceeding the 90-day time limit. ...”</p> <p>WT/DSB/M/355, ¶ 1.16 (Feb. 17, 2015)</p>		
<p><i>Argentina – Measures affecting the importation of goods</i> <i>(DS438), (DS444), (DS445)</i></p>	<p><i>United States:</i></p> <p>“5.6. The United States also wished to touch briefly on a regrettably familiar procedural matter. The United States noted that, for the fifth time in the last six disputes, the Appellate Body had not circulated its reports within 90 days as mandated in Article 17.5 of the DSU. The Appellate Body had also continued its recent deviation from its pre-2011 practice and had failed to consult with the parties or seek their agreement when it became clear that it would be unable to meet the DSU deadline. Instead, the Appellate Body had yet again merely informed the parties via form letter that it would not circulate its Report within the prescribed time-limit. It would also appear that a step had been taken backwards with respect to transparency, as compared with other reports, in that this report did not even mention this issue in its introductory section. ...”</p> <p>WT/DSB/M/356, ¶ 5.6 (Mar. 6, 2015)</p> <p><i>Japan:</i></p> <p>“5.9. With regard to exceeding the 90-day time-limit in these procedures, as expressed in the joint communication, dated 5 December 2014, from Argentina, the United States and Japan (WT/DS445/17), Japan, once again, expressed its regret about the lack of consultations given the prior practice between Members and the Appellate Body until 2011, in which the Appellate Body had consulted with the participants and had obtained their agreement before circulating reports after the deadline provided for in the DSU. In this regard, Japan believed that providing an opportunity for consultations was an important due process, in particular, in the current circumstances under which the Appellate Body was required to deal with a high amount of work. ...”</p> <p>WT/DSB/M/356, ¶ 5.9 (Mar. 6, 2015)</p> <p><i>Australia:</i></p> <p>“5.16. ... Australia was fully aware of the current heavy workload of the Appellate Body and the ever-increasing complexity in some appeals under consideration. Australia, therefore, understood that it may not always be possible to adhere to the time-frames provided for in Article 17.5 of the DSU. In Australia's view, the accuracy and high quality of reports remained paramount in the WTO dispute settlement process. However, adherence to time-frames underpinned the predictability of the system and was critical in government and commercial decision-making. Australia would, therefore, encourage as few departures from normal appellate time-frames as possible, and consultation with the parties in the event that delay was likely. ...”</p> <p>WT/DSB/M/356, ¶ 5.16 (Mar. 6, 2015)</p> <p><i>Canada:</i></p> <p>“5.18. With respect to the time the Appellate Body had taken to circulate its Report, Canada shared the concern expressed by others that once</p>	<p>90-day period for AB report</p>	<p>DSU</p>

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	<p>again it was circulated beyond the 90-day deadline provided for in the DSU. ... Some might like to believe that since the 90 days originally set aside for appeals had become increasingly unrealistic, Members could simply wave away a strict provision of the DSU. Canada did not share that view. On the contrary, Canada considered it even slightly troubling that the DSB, the very body charged with overseeing compliance with the WTO Agreement, and with administering the rules and procedures, had proven to be unwilling or unable to discharge this responsibility in these specific circumstances. ...”</p> <p>WT/DSB/M/356, ¶ 5.18 (Mar. 6, 2015)</p> <p><i>Norway:</i></p> <p>“5.19. ... Norway agreed with others that transparency was important where the Appellate Body could not circulate a report within the 90-day time-frame set out in Article 17.5 of the DSU. Furthermore, Norway also saw the importance of safeguarding predictability and legal certainty in this context. Any uncertainty connected to whether a report was deemed to be an Appellate Body report circulated pursuant to Article 17.5 of the DSU, and hence the adoption procedure for that report, was indeed unfortunate from a systemic point of view. ...”</p> <p>WT/DSB/M/356, ¶ 5.19 (Mar. 6, 2015)</p>		
<p><i>United States – Certain country of origin labelling (COOL) requirements: Recourse to Article 21.5 of the DSU by Canada and Mexico</i></p> <p><i>(DS384), (DS386)</i></p>	<p><i>Canada:</i></p> <p>“1.3. Finally, Canada wished to comment briefly on some of the institutional implications of the progression of this dispute through the system. As had already been indicated, it had taken five and a half years to get to this point. Canada had faced delays at almost every stage. For example, the compliance review alone had taken 13 months, instead of the 90 days provided for in the DSU, and the appeal of the compliance report took 172 days, instead of the 90 days provided for in the DSU. ...”</p> <p>WT/DSB/M/362, ¶ 1.3 (Jul. 14, 2015)</p> <p><i>United States:</i></p> <p>“1.19. The United States said that it would like to conclude its statement by touching on a familiar systemic issue that had been raised by the Panel and Appellate Body Reports, the length of the proceedings. Article 21.5 of the DSU stated that a "panel shall circulate its report within 90 days after the date of referral of the matter to it". However, this provision also provided a panel with the flexibility to go beyond 90 days "when the panel considers that it cannot provide its report within this time-frame", although the United States could appreciate Mexico and Canada's frustration that the Panel proceedings had taken 13 months in light of the specific circumstances of this proceeding. As Members were aware, Article 17.5 of the DSU also included a deadline, and this provision explicitly stated that "in no case shall [Appellate Body] proceedings exceed 90 days". However, this provision had no clause equivalent to that in Article 21.5 of the DSU permitting the report to be circulated beyond the mandatory time frame "when the [Division] considers that it cannot provide its report within this time-frame". As a result, the fact that the Appellate Body had not circulated its Report for 172 days was not consistent with the text of this provision. ...”</p> <p>WT/DSB/M/362, ¶ 1.19 (Jul. 14, 2015)</p>	<p>Length of litigation; 90-day period for AB report</p>	<p>DSU</p>
<p><i>Ukraine – Definitive safeguard measures on certain passenger cars</i></p> <p><i>(DS468)</i></p>	<p><i>Ukraine:</i></p> <p>“11.4. ... This dispute did not only confirm the existing jurisprudence, it also raised a number of complex issues from a systemic point of view. Although Ukraine accepted that some of the disputed issues in this dispute were appropriately ruled upon, some of the findings made by the Panel raised certain concerns to Ukraine. In particular, Ukraine believed that the conclusions reached by the Panel with regard to the existence of the causal link were not properly substantiated and posed a systemic risk to Members. First, the Panel's interpretation of the requirement to establish a coincidence between increase in imports and threat of serious injury under Article 4.2(b), first sentence, of the Agreement on Safeguards involved an additional non-attribution obligation for the national investigating authority in the process of establishing the causal link. Second, the Panel seemed to add unnecessarily a requirement to prove a forward-looking aspect of causality analysis into these obligations in a case that involved a threat of serious injury.”</p>	<p>Causal linkk</p>	<p>SG</p>

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<p><i>European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China: Recourse to Article 21.5 of the DSU by China</i></p> <p>(DS397)</p>	<p>WT/DSB/M/365, ¶ 11.4 (Sept. 25, 2015)</p> <p><i>United States:</i></p> <p>“1.13. Other findings in the Appellate Body Report raised concerns. First, the United States had concerns with the Appellate Body's interpretation and application of Article 2.4 of the Anti-Dumping Agreement. The United States recalled that Article 2.4 of the Anti-Dumping Agreement, by its plain text, concerned the authority's comparisons "between the export price and the normal value". In this dispute, China had disagreed with the authority's determination of normal value. China had chosen to raise these issues in the form of a claim under Article 2.4. The Panel had appropriately rejected China's claim. The Appellate Body, however, had reversed the Panel's finding. The United States had difficulty seeing how the Appellate Body's finding comported with the plain meaning of Article 2.4. Instead of applying Article 2.4 to issues of price comparability between the export price and normal value, the Appellate Body's analysis focused on, and ultimately found merit in, China's complaints regarding the normal value determined by the authority. Particularly given that the Anti-Dumping Agreement contained other provisions directly addressed to the methodology for determining normal value, the United States saw no basis in the text of the Anti-Dumping Agreement for a finding that Article 2.4 applied to the issues raised by China in this dispute. Second, the United States had concerns with the Appellate Body's interpretation of the term "interested party", as specifically defined in Article 6.11 of the Anti-Dumping Agreement. In this dispute, the Appellate Body had found that the authority was required to treat an entity that provided certain information to the authority, but was not a producer of the product subject to investigation, as an "interested party". It was difficult to reconcile the Appellate Body's finding with the clear text of Article 6.11. As the United States had explained in its third-party submissions, an entity that simply provided information to an authority did not fall under any of the "interested party" categories listed in Article 6.11. In that regard, the United States considered that the Appellate Body's finding may best be understood as relating to the special facts of this dispute, in particular, the uniquely active role that the entity at issue had played in the investigation. ...”</p> <p>WT/DSB/M/374, ¶ 1.13 (Mar. 23, 2016)</p>	Text interpretation	AD
<p><i>Argentina – Measures relating to trade in goods and services</i></p> <p>(DS453)</p>	<p><i>United States:</i></p> <p>“2.6. ... Having resolved the appeal on the first, threshold issue of "likeness", it would have been appropriate to stop the analysis at that point. Indeed, given the unusual circumstances, there were even greater reasons than usual to consider only those issues necessary to resolve the dispute. Regrettably, the Appellate Body Report did not take the appropriately cautious approach. Rather, it went on to consider issues on appeal that the Appellate Body itself had considered not necessary to resolve the dispute. As the Report stated at paragraph 6.83: "Our reversal of these findings [on likeness] means that the Panel's findings on 'treatment no less favourable' are moot because they were based on the Panel's findings that the relevant services and service suppliers are 'like'. Moreover, as a consequence of our reversal of the Panel's 'likeness' findings, there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel's analysis ... pursuant to Article XIV(c) of the GATS and ... paragraph 2(a) of the GATS Annex on Financial Services". But after clarifying that all of the Panel's findings other than "likeness" were rendered moot, the Appellate Body in paragraph 6.84 stated that "[w]ith these considerations in mind, we turn to address the issues raised in Panama's appeals". That is, after clarifying that Panama's appeals concerned "moot" panel findings, the Appellate Body went on to address those moot appeals. The United States was concerned that this approach did not reflect the role of dispute settlement as set out in the DSU. It was not the role of this system to make legal findings or interpretations outside the context of resolving a dispute. Indeed, as the Appellate Body itself had noted in its Report in the dispute "Wool Shirts and Blouses": "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". It followed that if an issue on appeal was not necessary to resolve a particular dispute, because for example the panel findings had been rendered "moot" as a result of another legal error, then the Appellate Body should decline to make law by resolving that unnecessary issue. The DSU directed panels and the Appellate Body to make findings on those issues of law that were necessary to assist the DSB in helping resolve the dispute. Indeed, while the United States may consider certain of the Appellate Body's statements in the remaining 46 pages of its</p>	Review of unnecessary issues	Services

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	<p>Report correct in substance, those statements were unfortunately not findings but more in the nature of <i>obiter dicta</i>. Members may wish to reflect on the significant impact that the issuance of such advisory opinions would have on the functioning of the dispute settlement system.”</p> <p>WT/DSB/M/378, ¶ 2.6 (Jun. 20, 2016)</p>		
<p><i>United States – Anti-dumping and countervailing measures on large residential washers from Korea</i></p> <p>(DS464)</p>	<p><i>United States:</i></p> <p>“8.9. Important aspects of the Appellate Body Report appeared to be at odds with the basic purpose of dispute settlement, as had been set out in the DSU and as had been understood by the Appellate Body in prior reports. As contemplated by Article 3.7 of the DSU, “[t]he aim of the dispute settlement system is to secure a positive solution to a dispute”. Findings on claims or issues not raised by the parties to the dispute were, by necessity, not necessary to secure a positive solution to their dispute. Indeed, in “US – Wool Shirts and Blouses”, the Appellate Body had stated that it “do[es] 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.”</p> <p>“8.10. The Appellate Body Report here, however, went beyond the resolution of the issues raised by the disputing parties to prescribe particular methodological approaches to the application of the Anti-Dumping Agreement. The Appellate Body Report also adopted an interpretive approach that was not – as required under Articles 3.2, 11, and 19.2 of the DSU – based on the text of the covered agreements, but rather was focused on the application of language from prior Appellate Body reports addressing different legal issues. Regrettably, a majority of the Appellate Body Division hearing this appeal had effectively read the methodology in the second sentence of Article 2.4.2 out of the Anti-Dumping Agreement, a result which a dissenting Appellate Body member could not join.”</p> <p>“8.11. This was the first dispute involving a Member’s application of the alternative comparison methodology that was set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, the so-called “targeted dumping” provision. The Appellate Body’s finding had little basis in the plain text of Article 2.4.2, and essentially rewrote the provision by prescribing a wholly new methodology for addressing “targeted dumping”. The methodology created by the Appellate Body had never been contemplated at the time the Anti-Dumping Agreement had been negotiated and adopted. That methodology had never, to US knowledge, been used by any Member at any time in the 20-plus years since. And no party in the dispute had advocated the methodology ultimately prescribed by the Appellate Body.”</p> <p>WT/DSB/M/385, ¶¶ 8.9-8.11 (Nov. 1, 2016)</p>	<p>Finding on claims not raised;</p> <p>Text interpretation</p>	<p>AD</p>
<p><i>European Union – Anti-dumping measures on biodiesel from Argentina</i></p> <p>(DS473)</p>	<p><i>United States:</i></p> <p>“8.9. The Reports of the Panel and Appellate Body in this dispute made findings on a number of matters regarding the interpretation and application of the Agreement on the Implementation of Article VI of the GATT 1994. ... The United States, however, said it would like to draw the DSB’s attention to an important systemic issue which had implications for the operation of the dispute settlement system. The issue was how the Appellate Body should approach appeals from panel findings on the meaning of municipal law, as well as how the Appellate Body had approached Argentina’s particular appeal in this dispute on the meaning of the EU law being challenged.”</p> <p>“8.10. In the WTO system, or in any international law dispute settlement system, the meaning of municipal law was an issue of fact. In contrast, the interpretation of the WTO Agreement, or other relevant international law, was the issue of law for that system. This proposition was not controversial. ... The Appellate Body, however, had treated panel findings on 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 had given no rationale – based in the text of the DSU or in any other source – for this fundamental departure from the principle that the meaning of municipal law was an issue of fact in international dispute settlement.”</p> <p>“8.11. In its Report in this dispute, the Appellate Body’s explanation for the proposition that the meaning of municipal law was an issue of law under Article 17.6 of the DSU was a single sentence”</p> <p>“8.12. Further, the Appellate Body’s stated rationale – that a “detailed understanding” was important – said nothing about the proper role of the</p>	<p>Municipal law</p>	<p>DSU</p>

WTO Dispute	Examples of Critical Statements in Minutes to DSB Meetings ¹	Issue	Agreement
	<p>Appellate Body in reviewing a Panel's findings. Indeed, many factual issues in WTO dispute settlement required "detailed understanding". But that provided no basis for treating those factual issues as issues of law to be decided de novo by the Appellate Body on appeal. The relevant provisions of the DSU reflected this straightforward division between issues of fact and law. As Members knew, Article 6.2 of the DSU required a complaining party to set out "the matter" in its panel request comprised 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. Article 11 of the DSU similarly distinguished 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. And Article 12.7 of the DSU made the same distinction in relation to the findings of fact and law in the Panel's Report. Thus, the DSU made clear that the measure at issue was the core fact to be established by a complaining party, and the WTO-consistency of that measure was the issue of law."</p> <p>"8.13. The lack of coherence in the Appellate Body's approach had been noted by other commentators. ..."</p> <p>"8.14. ... The Appellate Body, however, had examined the meaning of the EU law both as a de novo legal issue, and then proceeded to conduct a separate examination of whether the Panel had made an objective assessment. The United States said that, frankly, this approach did not make sense. It departed from 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.¹² Furthermore, it raised the prospect that the Appellate Body might find that the Panel had made an objective assessment of a complex factual record, and at the same time might find that precisely the same panel finding had been incorrect simply because the Appellate Body had made a different factual determination based on its own <i>de novo</i> review."</p> <p>"8.15. This type of outcome – which followed from the Appellate Body's finding that it could conduct its own de novo review of the meaning of domestic law – was inconsistent with the appropriate functioning of the dispute settlement system. ..."</p> <p>WT/DSB/M/387, ¶¶ 8.9-8.15 (Dec. 5, 2016)</p>		
<p><i>Russian Federation – Measures on the importation of live pigs, pork and other pig products from the European Union</i></p> <p>(DS475)</p>	<p>Russian Federation:</p> <p>"8.5. ... Despite important clarifications to the jurisprudence under Article 6 of the SPS Agreement, the Russian Federation was concerned that the Appellate Body's interpretation of Article 6.3 appeared to have reduced its scope to a means of collecting information from exporting Members without any additional substantive implications. The Russian Federation said that it continued to believe that such an interpretation was contrary to the ordinary meaning of Article 6.3 of the SPS Agreement. Finally, the Russian Federation said that it regretted that the Appellate Body had not given the appropriate meaning and deference to its Accession Protocol vis-à-vis its obligations under the covered agreements. Paragraph 893 of the Russian Federation's Accession Protocol established the validity of the EU-Russia bilateral veterinary certificates. In Russia's view, the Appellate Body had not struck a balance between the rights and obligations set out in a Member's Accession Protocol and the rights and obligations set out in the covered agreements. This lack of balance resulting from the respective conclusions of the Appellate Body and of the Panel gave priority to Members' obligations under the covered agreements over commitments in Members' Accession Protocols. ..."</p> <p>WT/DSB/M/394, ¶ 8.5 (May 17, 2017)</p>	Text interpretation	SPS
<p><i>United States – Certain methodologies and their application to anti-dumping proceedings involving China</i></p> <p>(DS471)</p>	<p>United States:</p> <p>"9.7. ... A number of the Panel's findings were similar to or followed recent Appellate Body findings. In particular, these findings involved two important systemic issues – targeted dumping, and the use of a single anti-dumping rate for those exporters controlled by the government of China. The United States said that it had serious concerns with the Panel and underlying Appellate Body findings on both issues."</p> <p>"9.8. First, with respect to targeted dumping, the Appellate Body in "US – Washing Machines" (DS464) had prescribed a particular methodological approach to the application of the AD Agreement that was not based on the text of the covered agreements, but rather was focused on the application of language from prior Appellate Body reports addressing different legal issues. The Appellate Body had</p>	Text interpretation	AD

WTO Dispute	Examples of Critical Statements in Minutes to DSB Meetings ¹	Issue	Agreement
	<p>essentially rewritten Article 2.4.2 of the AD Agreement by prescribing a wholly new methodology for addressing "targeted dumping". That methodology had never been contemplated at the time the AD Agreement was negotiated and adopted. Nor, to the United States' knowledge, had the Appellate Body's methodology been used by any Member at any time in the more than 20 years since the WTO Agreement had entered into force. Indeed, no party in the dispute had advocated the methodology ultimately articulated by the Appellate Body. The Panel here had adopted the same approach. In rewriting the second sentence of Article 2.4.2, the Appellate Body had incorrectly found that the use of "zeroing" in connection with the application of the average-to-transaction comparison methodology to so-called "pattern transactions" was inconsistent with the AD Agreement. As one Appellate Body member explained in dissent in "US – Washing Machines" (DS464), this finding could not be supported under the rules of interpretation provided for under the DSU. Regrettably, the Panel here had come to the same unsupportable conclusion. The Panel had also found that the use of a rebuttable presumption that Chinese firms were under state control, and the consequent application of a single AD rate, was inconsistent with obligations under the AD Agreement. This finding to a large extent had been based on prior Appellate Body findings in "EC – Fasteners" (DS397). As the United States had explained, the finding was not grounded in the AD Agreement, and failed to take account of the real-world difficulties that investigating authorities encountered when determining anti-dumping margins for large numbers of government-controlled exporters. ..."</p> <p>WT/DSB/M/397, ¶¶ 9.7-9.8 (Aug. 18, 2017)</p>		

