Can the WTO be Saved From Itself?

Not without a major crisis, and probably not even then.
When the World Trade Organization (WTO) came into existence in 1995, one of the interesting aspects of the new organization was the dispute settlement system which differed from the prior GATT system by both offering the opportunity of an appeal from a panel decision to a new entity, the Appellate Body, and by the automatic adoption of the Appellate Body report absent a negative consensus not to adopt. While losing parties could opt not to implement an adverse determination, the winning party could seek compensation or resort to retaliation to rebalance rights and obligations in such situations.

While the U.S. was a principal driver to a more effective dispute settlement system during the Uruguay Round negotiations that created the WTO, there were deep concerns as well in Congress that U.S. sovereignty be protected where the U.S. had not agreed to a particular obligation. The present crisis in the WTO dispute settlement system revolves around the question of whether the limitations that the U.S. understood were in the Dispute Settlement Understanding (DSU) to prevent activism by the Appellate Body have been honored in fact.

The WTO Appellate Body

The WTO Appellate Body consists of seven members appointed for four year terms with the possibility of one reappointment. While most countries, including the United States, have been pleased with many of the decisions, there have been significant problems that have been voiced by the United States and other WTO Members from almost the beginning of the WTO. The problems have been persistent and have led to a current impasse in the WTO’s Dispute Settlement Body (DSB) as the failure to address in a meaningful manner U.S. concerns has led to a blockage of selecting Appellate Body members with the result that the Appellate Body is down to four sitting members (though two former members continue to work on selected cases pursuant to Rule 15 of the Appellate Body Working Procedures).\(^2\) The number of Appellate Body members could be reduced to three this fall, threatening the continued operation of the Appellate Body (particularly with the requirement that three members hear an appeal). While there is a deep concern within many missions about the building crisis, there is little evidence that Members intend to actually address U.S. concerns in the near term. Some Members have claimed that what the U.S. concerns are is not known, a position which is peculiar in light of the

\(^2\) Alan Wolff, WTO Deputy Director-General, recently said:

Why is the U.S. blocking appointments? The U.S. has on numerous occasions over the last several administrations, Democratic and Republican, listed areas in which WTO dispute settlement system has, in its view, malfunctioned very seriously. The basic bargain of the Uruguay Round was nullified by the Appellate Body – that binding dispute settlement would be accepted by the United States in return for an iron-clad commitment that the dispute settlement system would neither add to nor subtract from the rights and obligations of the parties, particularly with respect to trade remedies. In the U.S. view, this cornerstone of the WTO was progressively eviscerated through a series of interpretations made by the WTO Appellate Body that narrowed the scope for use of trade remedies.

long history of U.S. statements within the DSB and the Trump Administration’s 2018 Trade Policy Agenda articulation of concerns with the WTO dispute settlement system.

**U.S. Concerns With WTO Dispute Settlement**

For more than fifteen years, the United States has raised concerns with the dispute settlement system of the World Trade Organization (WTO). In general, the U.S. has been concerned that some WTO dispute settlement panels and the Appellate Body (AB) have not followed the dispute settlement rules agreed to by Members. One primary instance of this has been the complaint voiced by the U.S., and other Members, that some panel and AB decisions have added to or diminished rights and obligations under the WTO Agreement. Indeed, in both in 2002 and 2015, the U.S. Congress noted this concern in its trade negotiating objectives, and also required the Executive Branch to develop strategies to address this concern. Although the Bush and Obama administrations pursued corrections and reforms in WTO dispute settlement, their efforts did not have significant results.

The DSU is the foundational document for the WTO dispute settlement system and, thus, it sets the institutional boundaries within which the panels and Appellate Body are to operate. DSU Article 3.2 recognizes 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.” 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

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4 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).
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. 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.”

In March 2018, the Office of the U.S. Trade Representative (USTR) issued the 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program. In the 2018 Trade Policy Agenda section of that document, USTR summarizes the U.S.’s concerns with WTO Dispute Settlement, and, particularly, with decisions of the Appellate Body. USTR cites a number of areas in which it believes that panel and AB reports have overreached, that is, where they have added to or diminished rights or obligations in a range of areas (e.g., subsidies, antidumping (AD) and countervailing duties (CVD), standards, and safeguards). The examples cited by USTR include the following subjects:

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5 DSU Article 3.2 states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

DSU Article 19.2 states:

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


• **SOEs** – Appellate Body interpretations have significantly restricted WTO Members’ ability to counteract trade-distorting subsidies provided through state-owned enterprises (SOEs) (e.g., its findings on “public body” and on simultaneous application of CVD and AD duties under a non-market economy methodology).

• **TBT** – Appellate Body interpretation of the non-discrimination obligation under the Agreement on Technical Barriers to Trade (TBT Agreement) which calls for reviewing factors unrelated to any difference in treatment due to national origin.

• **Tax** -- Panel and Appellate Body interpretations under which WTO rules do not treat different (worldwide vs. territorial) tax systems fairly (US – FSC).

• **Safeguards** -- The Appellate Body’s non-text-based interpretation of Article XIX of GATT 1994 and the Safeguards Agreement seriously undermines Members’ ability to use safeguards measures.

• **Subsidies** -- The Appellate Body’s creation of a new category of prohibited subsidies that was neither negotiated nor agreed to by WTO Members (US – CDSOA).  

Other examples of claimed overreaching abound. Both developed and developing-country WTO Members have criticized panels and/or the Appellate Body for overreaching their authority in some manner such as 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. Attachment 1 provides 48 particular case examples between 1997 and 2017 of critical statements by WTO Members who believed the Appellate Body (45 cases) or the panel (3 cases) overreached its authority. Of the 48 examples, the table below identifies the Members that raised overreaching by the AB or a panel, and the number of times they did so. The Appellate Body has issued 134 reports as a single document since 1996. Claims of overreaching have been raised with respect to at least 45 of these reports. This means that Members have asserted overreaching by the AB in some form in about 34% of its reports.

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<table>
<thead>
<tr>
<th>WTO Member</th>
<th>Number of times overreaching claimed</th>
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<tr>
<td>United States</td>
<td>30</td>
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<tr>
<td>Argentina</td>
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<td>Russian Federation</td>
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The United States believes that panels and the AB must strictly apply and adhere to the text of the WTO agreements as negotiated and agreed to by the WTO Members. Some Members have claimed that the U.S. has not clearly outlined its concerns about, and what corrections it wants for, the dispute settlement system. However, in the 2018 Trade Policy Agenda, USTR identifies five particular areas of concern regarding decisions of the Appellate Body where the U.S. believes the AB has disregarded the rules established by WTO Members. These areas include both substantive and structural issues. The five issues of concern identified by USTR are the following.

1. **Disregard for the 90-day Deadline for Appeals**

   Since at least 2011, the U.S. and other Members have been concerned about the AB’s increasing disregard of the mandatory 90-day deadline for deciding appeals. Article 17.5 of the
Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) requires the Appellate Body to circulate its report within 90 days of the notice of appeal. DSU, Article 17.5, states:

As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. {Emphasis added}

Instead, despite the 90-day deadline of DSU Article 17.5, the AB has assumed the authority to take whatever time it considers appropriate. Before 2011, the AB respected the 90-day deadline. Now, however, the AB no longer consults with the parties, but simply informs the Dispute Settlement Body (DSB) that it will not comply with the DSU deadline.

The U.S. is not the only Member to have expressed concern with the AB’s failure to satisfy the 90-day deadline. Canada, Japan, Australia, Norway, Guatemala, Costa Rica, European Union, Brazil, Turkey, and Chile also have criticized the Appellate Body at DSB meetings for not complying with the 90-day requirement.9

The problem has become particularly acute since 2011. Since 1996, the AB has issued 134 reports as a single document. Between 1996 and 2010, only 5 of 96 reports were issued more than 92 days after the notice of appeal – a 95% compliance rate. However, since 2011, the AB has issued 38 reports, 31 of which were issued more than 92 days after the date of appeal – an 18% compliance rate (or 82% failure rate).10

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9 See Attachment 2 (excerpts from DSB meetings).
10 See Attachment 3 (table showing the number of days between the notice of appeal and the date the appellate body report was circulated).
Members have noted that the AB’s departure from its pre-2011 approach raises various concerns, including (i) that the AB’s approach shows a lack of transparency, (ii) that the AB’s approach, and resulting delay, conflicts with Members’ agreement that the “prompt settlement” of disputes “is essential to the effective functioning” of the WTO dispute settlement system (DSU Article 3.3), and (iii) that the AB’s approach results in uncertainty as to whether a delayed report is deemed to be an AB report circulated pursuant to DSU Article 17.5.

2. **Continued Service by Persons Who Are No Longer AB Members**

The U.S. is concerned about recent AB actions to “authorize” a person who is no longer an AB member to continue hearing appeals. The U.S. contends that the AB does not have the authority to deem someone who is not an AB member to be a member.

The AB has claimed that Rule 15 of its Working Procedures authorizes it to “deem” as an AB member one of its own members whose term has expired.\(^\text{11}\) The AB even issued a background note concerning Rule 15.\(^\text{12}\) The AB noted that, since 1996, Rule 15 had been applied in 16 instances, and that, until recently, it had not been called into question.\(^\text{13}\) The United States, however, argues that Rule 15 is inconsistent with the requirements of the DSU. In a statement at the DSB meeting on January 22, 2018, the U.S. said: “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

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\(^{11}\) See Rule 15 of the Working Procedures for Appellate Review (WT/AB/WP/6)(“Rule 15”). 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.”


\(^{13}\) See id.
term of appointment has expired should continue serving.” ¹⁴ Thus, the AB may not, through its working procedures, unilaterally abrogate or neutralize the DSB’s authority.

Before 2017, Rule 15 was invoked sparingly and was used for relatively short extensions. Since 2017, however, the AB has invoked Rule 15 in a number of disputes, for indefinite and extended periods, and, USTR notes, “even on appeals where work had not begun before the member’s term expired.” ¹⁵

The U.S. believes that WTO Members need to resolve this issue before moving on to the issue of replacing former Appellate Body members.

3. Issuing Advisory Opinions on Issues Not Necessary to Resolve a Dispute

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. The U.S. is concerned about the tendency of WTO reports to make findings that are unnecessary to resolve a dispute or on issues not presented by the parties in the dispute. Such unnecessary statements have been described as in the nature of “obiter dicta.”

The DSU focuses on achieving settlement of particular disputes. ¹⁶ Thus, the purpose of the dispute settlement system is not to produce reports or to “make law,” but to help Members resolve trade disputes among them. 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). Thus, it is important that limitations on the powers of panels and the Appellate Body be

¹⁶ See, e.g., DSU Articles 3.4 (“Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.”) and 3.7 (“The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”)
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.” Under the DSU, it is not the role of a panel or the AB to provide “advisory opinions” (like some national or international tribunals) 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.”

Under the DSU and the WTO Agreement, the Ministerial Conference or General Council have the “exclusive authority” to render an authoritative interpretation of the WTO agreements. Yet there have been numerous occasions when a panel or the AB has made unnecessary findings or rendered “advisory opinions,” which have contributed to delays in concluding an appeal. For example, the United States has noted regarding certain AB reports:

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.18

***

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.19

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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. … The Appellate Body Report here, however, went

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17 See WTO Agreement Article IX:2; DSU Article 3.9.
19 Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 14, 2016, regarding the AB report in India – Certain Measures Relating to Solar Cells and Solar Modules (WT/DS456).
See also Attachment 4, which provides examples of disputes where the United States criticized the AB for advancing opinions on extraneous issues not raised or argued by the parties or not necessary to the decision, including where the U.S. was simply a third party but believed that the actions of the Appellate Body raised institutional concerns about its proper role.

4. **Appellate Body Review of Facts and Review of a Member’s Domestic Law De Novo**

The U.S. is concerned about the AB’s approach to reviewing facts. DSU Article 17.6 limits an appeal to “issues of law covered in the panel report and legal interpretations developed by the panel.” Yet the AB has consistently reviewed panel fact-finding under different legal standards, and has reached conclusions not based on a panel’s fact findings or on undisputed facts.

The U.S. is also concerned that the AB has undertaken to review, as a matter of law rather than fact, the meaning of a Member’s domestic (municipal) law. The key fact in a WTO dispute is what a Member’s challenged measure does (or means), and the law to be interpreted and applied are the provisions of the WTO agreements. However, the AB consistently reviews the meaning of a Member’s domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for AB review. Further, when the AB reviews the meaning of a Member’s domestic measure, it does not defer to a panel’s findings of fact.

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20 WT/DSB/M/385, ¶¶ 8.9-8.10 (Nov. 1, 2016), regarding the AB report in United States – Anti-dumping and countervailing measures on large residential washers from Korea (DS464).
5. **The Appellate Body Claims its Reports are Entitled to be Treated as Precedent**

The U.S. is concerned that the AB has asserted that its reports effectively serve as precedent and that panels must follow prior AB reports absent “cogent reasons.” This assertion has no basis in the DSU and is not consistent with WTO rules.

WTO Members established one and only one means for adopting binding interpretations of the obligations that they agreed to – WTO Agreement Article IX: 2. Although AB reports can provide valuable clarification of the covered agreements, the reports are not themselves agreed text nor a substitute for the text that was actually negotiated and agreed to by Members.

Under the AB’s approach of just following prior AB reports, panels would effectively abdicate their responsibility to conduct an objective assessment of the matters before them.

* * * * *

**Possible Approaches to Improving WTO Dispute Settlement**

The WTO is now in its 24th year and has not been able to achieve a completed review of most areas of its coverage, nor expand to cover important new areas of importance to international trade. In particular, the WTO has failed to complete a review of the DSU despite having the review underway for more than twenty years. Moreover, the WTO Secretariat and a number of WTO Members have opted to view the concerns repeatedly raised by the U.S. as not needing to be addressed, even where concerns are shared by other Members.

Not surprisingly, the pressures and tensions on the system caused by the inability of Members to resolve fundamental concerns about the proper role of the dispute settlement system and of panels and the Appellate Body have ratcheted up over time and, for the United States, appear to have reached a tipping point, such that the U.S. will use the rights it has to delay the selection of new Appellate Body members until its concerns are discussed and addressed. In an organization in which there are few leverage points for Members, the United States has found a leverage point and is insisting on the addressing of its concerns.
Because the negotiating function is so dysfunctional at the present time within the WTO, it is unlikely that Members will in the near term seriously address the U.S. concerns. Indeed, a number of understood proposals that have been floated among at least some delegations seem more intent on creating substitutes that wouldn’t require U.S. participation/engagement vs. seeking a resolution of deep-seated and long-held and expressed concerns of a major Member.

The following list presents for consideration a range of possible actions that could be taken to address apparent deficiencies, clarify the DSU rules, correct past erroneous interpretations, and prevent misuse of the dispute system.

- **Impose a time limit on appeals** – 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 could bring cases involving trade remedy proceedings that occurred many years prior to when the WTO dispute is raised. This possibility imposes a burden on Members to retain records in order to defend old cases and increases uncertainty for national administering authorities. The recent consultation request by Canada is an obvious example of this issue in that the request cites to some proceedings as long ago as 1998. *See United States - Certain Systemic Trade Remedies Measures (DS535).*

- **Require a complainant to have been an actual interested party** – To prevent misuse of the dispute settlement process, the complaining Member should actually have been a party in an administrative proceeding that involved the issue or measure that is the subject of the complaint. Canada’s consultation 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.

- **Clarify DSU Articles 3.2 and 19.2** – Members should clarify the text of DSU Articles 3.2 and 19.2 to expressly provide that panels and the AB may not add to or diminish the

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21 DSU Article 3.2 states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

DSU Article 19.2 states:

In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.
rights and obligations provided in the covered agreements by such actions as textual gap-filling and interpreting silences in the texts.

- **Allow re-review of prior misinterpreted appeals** – After clarification of DSU Articles 3.2 and 19.2, and in light of the clarified understanding, parties to prior appeals in which the panel or AB erroneously interpreted a covered agreement by adding to or diminishing rights and obligations should be able to have their appeals reviewed again under the clarified/corrected standard. Allowing re-review of erroneous decisions would permit correction of prior errors and address the problem raised by the AB’s refusal to re-examine its prior decisions.

- **Clarify Article 17.6 of the Antidumping Agreement** – ADA Article 17.6 sets out the standard of review in appeals of antidumping cases. That standard has been misinterpreted by the AB to make it practically ineffective.

- **The AB should address only those issues necessary to resolve the dispute** – The DSU should require the AB to address only those issues which need to be addressed in order to resolve the dispute. Stated differently, the DSU should aspire to the goal of judicial economy. To the extent that this goal conflicts with DSU Article 17.12 (AB must review every issue), that article should be changed if it results in retarding and delaying the AB from completing a timely review.

- **Parties may strike portions of reports that address issues not raised** – If either party to an appeal objects to the panel report or the AB report because it addresses issues not raised by the parties, it may move to strike those paragraphs of the report before circulation.

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22 ADA Article 17.6 states:

In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

23 DSU Article 17.12 states:

The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

DSU Article 17.6 states:

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.
- Deviation from the DSU must have express DSB approval – In order to achieve compliance with its rules, the DSU should provide that any deviation could be allowed only upon prior notification to and affirmative approval by the DSB to the deviation. This requirement would address the problems raised by the AB’s approach to extensions of the 90-day deadline for appeal proceedings and to its application of Rule 15 of its working procedures by which it allows an expired AB member to continue to hear appeals. It would also prevent disregard of the DSU rules by the AB and properly restore authority over the DSU to the Members through the DSB.

Other parties have made proposals for WTO dispute settlement reform. For instance, the Institute of International Economic Law has proposed several reforms to address the “vacant seat” and “carry-over” problems” concerning AB members.24 A recent paper by the Peterson Institute is another example of a review of the current crisis in WTO dispute settlement and suggestions for resolution.25

The challenge for any proposed modifications is whether WTO Members will be willing to address the core concerns and whether the proposals would achieve that result if adopted or simply add complexity without restoring the agreed upon balance. Many of the proposals circulated don’t resolve the underlying problems. The ones that would will almost certainly be opposed by some.

Unfortunately, one should expect a lot more drama and building crisis before any clarity is found or resolution achieved.

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ATTACHMENT 1

Critical Statements by WTO Members Regarding Panel and Appellate Body Overreaching
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<thead>
<tr>
<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
<th>Issue</th>
<th>Agreement</th>
</tr>
</thead>
</table>
| United States – Certain methodologies and their application to anti-dumping proceedings involving China (DS471) | **United States:**

“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 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. … The Panel here had adopted the same approach. …”

WT/DSB/M/397, ¶ 9.8 (Aug. 18, 2017). | Text interpretation | Anti-dumping |
| Russian Federation – Measures on the importation of live pigs, pork and other pig products from the European Union (DS475) | **Russian Federation:**

“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. …”

WT/DSB/M/394, ¶ 8.5 (May 17, 2017). | Text interpretation | SPS |
| European Union – Anti-dumping measures on biodiesel from Argentina (DS473) | **United States:**

“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.”

“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 ….”

| European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China: Recourse to Article 21.5 of the DSU by China (DS397) | **United States:**

“1.13. … 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", … It was difficult to reconcile the Appellate Body's finding with the clear text of Article 6.11. …”

WT/DSB/M/374, ¶ 1.13 (Mar. 23, 2016). | Text interpretation | Anti-dumping |
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<thead>
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<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
<th>Issue</th>
<th>Agreement</th>
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</table>
| **5** Ukraine – Definitive safeguard measures on certain passenger cars (DS468) | **Ukraine:**
“11.4. … 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.” | Causal link | SG |
| **6** United States – Countervailing and anti-dumping measures on certain products from China (DS449) | **United States:**
“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. … 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.”
“7.8. … [T]his 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". … 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. …” | Municipal law | GATT 1994 |
| **7** United States – Measures affecting the production and sale of clove cigarettes (DS406) | **United States:**
“75. … 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.”
“76. … 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.” | Role of the AB | DSU; TBT |
| **8** Thailand – Customs and fiscal measures on cigarettes from the Philippines (DS371) | **United States:**
“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. …” | Text interpretation | GATT 1994; DSU |
| **9** European Communities and certain member States – Measures affecting trade in | **Brazil:**
“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. …”
“20. … 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 | Text interpretation | SCM |
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<td><strong>large civil aircraft</strong>&lt;br&gt;(DS316)</td>
<td>WTO Dispute&lt;br&gt;Critical Statement Excerpt&lt;br&gt;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.”&lt;br&gt;WT/DSB/M/297, ¶¶ 19-20 (Jul. 11, 2011).</td>
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<td><strong>United States –&lt;br&gt;Definitive anti-dumping and countervailing duties on certain products from China</strong>&lt;br&gt;(DS379)</td>
<td>United States:&lt;br&gt;“98. … Ultimately, it appeared that the interpretation in the Appellate Body Report collapsed the terms &quot;government&quot; and &quot;public body&quot;, such that there was no purpose for the term &quot;public body&quot; 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. …”&lt;br&gt;WT/DSB/M/294, ¶ 98 (Jun. 9, 2011).&lt;br&gt;United States:&lt;br&gt;“100. … However, despite recognizing that, &quot;in the case of domestic subsidies, an express prohibition is absent&quot; from the text of the covered agreements, the Appellate Body Report had nevertheless created a prohibition on the imposition of a so-called &quot;double remedy&quot; through the concurrent application of CVs and NME ADs. … 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 &quot;appropriate&quot; amount, derived from a wide variety of unrelated provisions, for example, the &quot;desirability&quot; 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. … 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.”&lt;br&gt;WT/DSB/M/294, ¶ 100 (Jun. 9, 2011).&lt;br&gt;Turkey:&lt;br&gt;“106. … The ruling of the Appellate Body equated the term &quot;public body&quot; to &quot;government&quot; and annulled the difference between them. However, the SCM Agreement stated that a subsidy should be provided by a &quot;government&quot; or a &quot;public body&quot;. It was an undisputed fact that the definition of a &quot;public body&quot; should not be same as the definition of a &quot;government&quot;. The drafters of the SCM Agreement had made a clear distinction between the terms &quot;government&quot; and &quot;public body&quot;. 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. …”&lt;br&gt;WT/DSB/M/294, ¶ 106 (Jun. 9, 2011).</td>
<td>Public body;&lt;br&gt;double remedy</td>
<td>SCM</td>
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<td><strong>Australia –&lt;br&gt;Measures affecting the importation of apples from New Zealand</strong>&lt;br&gt;(DS367)</td>
<td>Australia:&lt;br&gt;“63. … [T]he Appellate Body had indicated that, while it was appropriate not to conduct a de novo review in the context of Article 5.1, the &quot;situation is different&quot; in relation to an Article 5.6 claim. The Appellate Body appeared to have suggested that a panel could conduct a de novo 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.&lt;br&gt;WT/DSB/M/290, ¶ 63 (Feb. 11, 2011).</td>
<td>De novo review</td>
<td>SPS</td>
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<td><strong>United States –&lt;br&gt;Measures relating to zeroing and</strong></td>
<td>United States:&lt;br&gt;“73. … [T]he 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. … Members had</td>
<td>Treaty interpretation;&lt;br&gt;prospective</td>
<td>DSU</td>
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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. …”

“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; …

“75. … The Appellate Body was not empowered to fashion exceptions to the text of the DSU. … 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.”

WT/DSB/M/273, ¶¶ 73-75 (Nov. 6, 2009).

13 United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing"): Recourse to Article 21.5 of the DSU by the European Communities (DS294)

United States: United States:

“7. … [T]he 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 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.”

“8. … [T]he 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.”

“9. … 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. …”

WT/DSB/M/269, ¶¶ 6-9 (Jul. 23, 2009).

14 United States – Continued existence and application of zeroing methodology (DS350)

United States: United States:

“75. … [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.”

“77. … Article 17.6(ii) required a panel, and the Appellate Body, to determine whether the interpretation proposed by
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<td>United States – Continued suspension of obligations in the EC - Hormones dispute (DS320)</td>
<td>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. …”</td>
<td>Text interpretation; Recommendations</td>
<td>DSU</td>
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<td>United States:</td>
<td>“9. … In its Report, however, the Appellate Body had made a number of statements that were to be found nowhere in the DSU. … 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. …”</td>
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<td>WT/DSB/M/258, ¶ 9 (Feb. 4, 2009).</td>
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<td>United States:</td>
<td>“12. … 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 &quot;recommendation&quot; 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. …”</td>
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<td>WT/DSB/M/258, ¶ 12 (Feb. 4, 2009).</td>
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<td>Japan:</td>
<td>“23. … As expressed by previous speakers, Japan was not certain as to whether the Appellate Body had the authority to</td>
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| **United States**  
**– Subsidies on upland cotton: Recourse to Article 21.5 of the DSU by Brazil (DS267)** | 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. …”  
WT/DSB/M/258, ¶ 23 (Feb. 4, 2009).  
Argentina:  
“25. … 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. … 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?”  
WT/DSB/M/258, ¶ 25 (Feb. 4, 2009).  
Australia:  
“27. … 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. …”  
WT/DSB/M/258, ¶ 27 (Feb. 4, 2009).  
Chile:  
“30. … 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. …”  
WT/DSB/M/258, ¶ 30 (Feb. 4, 2009).  
United States:  
“37. [I]t 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. …”  
WT/DSB/M/258, ¶ 37 (Feb. 4, 2009). | Subsidies | SCM |
| **United States**  
**– Final anti-dumping measures on stainless steel from Mexico (DS344)** | United States:  
“48. … [O]nce 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 zeroing as precedent.”  
WT/DSB/M/258, ¶ 48 (Feb. 4, 2009). | Zeroing; AB reports as precedent | Anti-dumping |
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<th>Agreement</th>
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<td>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.”</td>
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<td>“49. … 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. …”</td>
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<td>WT/DSB/M/250, ¶¶ 48-49 (Jul. 1, 2008).</td>
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<td>United States:</td>
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<td>“52. … 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. …”</td>
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<td>“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 &quot;coherent and predictable body of jurisprudence&quot;, would appear to transform the WTO dispute settlement system into a common law system. But that was nowhere agreed among Members. …”</td>
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<td>WT/DSB/M/250, ¶¶ 52-53 (Jul. 1, 2008).</td>
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<td>18</td>
<td>Brazil – Measures affecting imports of retreaded tyres (DS332)</td>
<td>Text interpretation</td>
<td>GATT 1994, Article XX; SPS</td>
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<td>United States:</td>
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<td>“66. … As the United States had stated on previous occasions, it did not see any textual support for a construction of the word &quot;necessary&quot; in GATT Article XX(b) that would give rise to such an analysis. There was nothing in the ordinary meaning of &quot;necessary&quot; that would support a &quot;trade restrictiveness&quot; analysis. Nothing in Article XX(b) used the term &quot;trade&quot; or &quot;restrictive&quot;.&quot;</td>
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<td>“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 &quot;least trade restrictive&quot; 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 &quot;disguised restriction on trade&quot; if &quot;necessary&quot; 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. …”</td>
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<td>WT/DSB/M/243, ¶¶ 66-67 (Feb. 15, 2008).</td>
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<td>United States – Measures relating to zeroing and sunset reviews (DS322)</td>
<td>Zeroing</td>
<td>Anti-dumping</td>
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<td>United States:</td>
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<td>“76. … [T]he 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. …”</td>
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<td>WT/DSB/M/225, ¶ 76 (Mar. 8, 2007).</td>
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<td>20 United States – Laws, regulations and methodology for calculating dumping margins (&quot;Zeroing&quot;) (DS294)</td>
<td>United States: “40. … 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. …” WT/DSB/M/211, ¶¶ 39-40 (Jun. 26, 2006).</td>
<td>Zeroing</td>
<td>Anti-dumping</td>
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<td>21 United States – Anti-dumping measures on oil country tubular goods (OCTG) from Mexico (DS282)</td>
<td>Mexico: “62. … 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 &quot;serves to preserve the rights and obligations of Members under the covered agreements&quot;. 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. …” WT/DSB/M/200, ¶ 62 (Jan. 26, 2006).</td>
<td>Sunset reviews</td>
<td>Anti-dumping</td>
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<td>22 European Communities – Customs classification of frozen boneless chicken cuts (DS269), (DS286)</td>
<td>European Communities: “73. … 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 &quot;constructive knowledge&quot;. 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 &quot;circumstance of conclusion&quot; 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 ex post was not sufficient and could not substitute the need to demonstrate a direct link between a circumstance and the common intentions of the parties.” WT/DSB/M/198, ¶ 73 (Oct. 26, 2005).</td>
<td>Treaty interpretation</td>
<td>DSU</td>
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<td>United States – Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea (DS296)</td>
<td>“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.”</td>
<td>De novo fact-finding</td>
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<td>Korea:</td>
<td>“87. … With regard to the Appellate Body's <em>de novo</em> fact-finding, … the Appellate Body had carried out <em>de novo</em> review 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.”</td>
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<td>Korea:</td>
<td>“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.”</td>
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<td>Korea:</td>
<td>“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 <em>de novo</em> 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.”</td>
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<td>Korea – Measures affecting trade in commercial vessels (DS273)</td>
<td>United States: “10. … [T]he 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 &quot;irrefutable&quot; or &quot;overwhelming&quot; 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. …”</td>
<td>Evidentiary standard</td>
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<td>25</td>
<td>United States – Subsidies on upland cotton (DS267)</td>
<td>United States: “50. … 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.”</td>
<td>Export credit guarantees</td>
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<td>WTO Dispute</td>
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<td>United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina (DS268)</td>
<td>United States: “46. Another systemic concern related to the Panel's statement that it based its finding on what US authorities allegedly &quot;perceive&quot; 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 &quot;perceives&quot; 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 ….”</td>
<td>Sunset reviews</td>
<td>Anti-dumping</td>
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<td>United States – Final dumping determination on softwood lumber from Canada (DS264)</td>
<td>United States: “36. … 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. …”</td>
<td>Zeroing</td>
<td>Anti-dumping</td>
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<td>Mexico – Measures affecting telecommunications services (DS204)</td>
<td>Mexico: “10. … [T]he 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. …”</td>
<td>Text interpretation</td>
<td>Services</td>
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<td>United States: “Such an exaltation of form over substance should be of concern to all Members.”</td>
<td>Explicit findings</td>
<td>Safeguards</td>
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<td>EC – Tariff Preferences (DS246)</td>
<td>India: “[T]he findings of the Appellate Body had effectively transferred the prerogatives and powers of WTO Members to panels and the Appellate Body.”</td>
<td>Non-discriminatory tariff preferences under GSP schemes; burden of proof</td>
<td>GATT 1994 Art. I:1 and Enabling Clause</td>
</tr>
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<td>Japan – Apples (DS245)</td>
<td>Japan: “[T]he Panel had prematurely shifted the burden of proof to Japan, and the Appellate Body had upheld this ruling.”</td>
<td>Burden of proof</td>
<td>SPS</td>
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<td>WTO Dispute</td>
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<td>32  EC – Sardines</td>
<td>Chile: “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.”&lt;br&gt;WT/DSB/M/134, ¶ 42 (Jan. 29, 2003).</td>
<td>Acceptance of amicus curiae briefs</td>
<td>DSU</td>
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<tr>
<td>33  US – CDSOA</td>
<td>United States: “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.”&lt;br&gt;WT/DSB/M/142, ¶¶ 55–57 (March 6, 2003).</td>
<td>Specific action; AB’s jurisdiction to determine if a Member has not acted in good faith</td>
<td>SCM</td>
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<td>34  US – Countervailing Measures on Certain EC Products</td>
<td>United States: “[T]he Appellate Body’s approach rested on certain general, unsupported assertions by the Appellate Body.”&lt;br&gt;WT/DSB/M/140, ¶ 9 (Feb. 6, 2003).</td>
<td>Privatization</td>
<td>SCM</td>
</tr>
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<td>35  Chile – PBS</td>
<td>Chile: “[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.”&lt;br&gt;WT/DSB/M/134, ¶¶ 13–14 (Jan. 29, 2003).</td>
<td>Similarity to variable import levies and minimum import prices</td>
<td>Agriculture</td>
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<td>36  US – Line Pipe (Korea)</td>
<td>United States: “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.”&lt;br&gt;WT/DSB/M/121, ¶ 35 (Apr. 3, 2002).</td>
<td>Unforeseen developments; parallelism; non-attribution analysis; standard of review</td>
<td>Safeguards</td>
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<td>37  US – Hot-Rolled Steel (Japan)</td>
<td>United States: “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.”&lt;br&gt;WT/DSB/M/108, ¶ 69 (Oct. 2, 2001).</td>
<td>Standard of review</td>
<td>Anti-dumping</td>
</tr>
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<td>38  US – Lamb</td>
<td>United States: “[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.”&lt;br&gt;WT/DSB/M/105, ¶ 42 (June 19, 2001).</td>
<td>Unforeseen developments</td>
<td>Safeguards</td>
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<td>39  US – Section 211 Appropriations Act</td>
<td>United States: “[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.”&lt;br&gt;WT/DSB/M/119, ¶ 27 (March 6, 2002).</td>
<td>Scope of appellate review</td>
<td>TRIPS</td>
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<td><strong>40</strong> US – Wheat Gluten (DS166)</td>
<td>United States: “[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).</td>
<td>AB’s ability to censure Members</td>
<td>DSU</td>
</tr>
<tr>
<td><strong>41</strong> US – Lead and Bismuth II (DS138)</td>
<td>Argentina: “[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).</td>
<td>Acceptance of amicus curiae briefs</td>
<td>DSU</td>
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<td><strong>42</strong> Argentina – Footwear (EC) (DS121)</td>
<td>Argentina: “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).</td>
<td>Unforeseen developments</td>
<td>Safeguards</td>
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<td><strong>43</strong> US – FSC (DS108)</td>
<td>United States: “[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).</td>
<td>Financial contribution; countermeasures</td>
<td>SCM</td>
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<td><strong>44</strong> India – Quantitative Restrictions (DS90)</td>
<td>Malaysia: “[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).</td>
<td>Dispute settlement system’s competency to review the justification of balance-of-payment restrictions</td>
<td>BOP, GATT 1994 Arts. XVIII:B and XXIII, DSU</td>
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<td><strong>45</strong> Canada – Aircraft (DS70)</td>
<td>Canada: “[T]he Appellate Body had disregarded the general practice of international tribunals, which had been extensively argued by both parties.” WT/DSB/M/67, p. 4 (Sept. 30, 1999).</td>
<td>Members’ obligation to provide information and documents requested by panel</td>
<td>DSU</td>
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<td><strong>46</strong> Guatemala – Cement (DS60)</td>
<td>Mexico: “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.” WT/DSB/M/51, pp. 17–18. (Jan. 22, 1999).</td>
<td>Proper identification of a measure in a panel request</td>
<td>DSU, AD</td>
</tr>
<tr>
<td><strong>47</strong> US – Shrimp (DS58)</td>
<td>Pakistan: “[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</td>
<td>Acceptance of amicus curiae briefs</td>
<td>DSU</td>
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<td>Members. ... The Appellate Body had encroached upon the authority of both Members and negotiators of the WTO Agreement.” WT/DSB/M/50, p. 5 (Dec. 14, 1998).</td>
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<td><strong>India:</strong></td>
<td>“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.” WT/DSB/M/50, p. 10 (Dec. 14, 1998).</td>
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| **US – Wool Shirts & Blouses (DS33)** | **Costa Rica:**  
“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.”  
WT/DSB/M/33, p. 12 (June 25, 1997). | Burden of proof for transitional safeguard actions | ATC       |
ATTACHMENT 2

Critical Statements by WTO Members Regarding the Appellate Body’s Failure to Meet the 90-Day Deadline
<table>
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<tr>
<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
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| **1** United States – Certain country of origin labelling (COOL) requirements: Recourse to Article 21.5 of the DSU by Canada and Mexico (DS384), (DS386) | **Canada:**  
“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. …”  
WT/DSB/M/362, ¶ 1.3 (Jul. 14, 2015).  
**United States:**  
“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. …”  
| **2** Argentina – Measures affecting the importation of goods (DS438), (DS444), (DS445) | **United States:**  
“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. …”  
WT/DSB/M/356, ¶ 5.6 (Mar. 6, 2015).  
**Japan:**  
“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. …”  
WT/DSB/M/356, ¶ 5.9 (Mar. 6, 2015).  
**Australia:**  
“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. …”  
WT/DSB/M/356, ¶ 5.16 (Mar. 6, 2015). |
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<th>WTO Dispute</th>
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<td><strong>Canada:</strong></td>
<td>“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 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. …”</td>
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<td>WT/DSB/M/356, ¶ 5.18 (Mar. 6, 2015).</td>
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<td><strong>Norway:</strong></td>
<td>“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. …”</td>
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<td>WT/DSB/M/356, ¶ 5.19 (Mar. 6, 2015).</td>
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<td><strong>European Communities – Measures prohibiting the importation and marketing of seal products (DS400), (DS401)</strong></td>
<td><strong>United States:</strong> “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 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.”</td>
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<td><strong>Guatemala:</strong></td>
<td>“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. …”</td>
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<td>WT/DSB/M/346, ¶ 7.9 (Aug. 28, 2014).</td>
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| **United States – Certain country of origin labelling (COOL)** | **United States:** “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
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<td>requirements (DS384), (DS386)</td>
<td>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”. …”</td>
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<td>Costa Rica:</td>
<td>“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. …”</td>
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<td>European Union:</td>
<td>WT/DSB/M/320, ¶ 98 (Sept. 28, 2012).</td>
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<td>European Union:</td>
<td>“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. …”</td>
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<td>Japan:</td>
<td>“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 &quot;prompt settlement&quot; 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 &quot;prompt settlement&quot;. Parties' interests in &quot;prompt settlement&quot; 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. …”</td>
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<td>Australia:</td>
<td>WT/DSB/M/320, ¶ 103 (Sept. 28, 2012).</td>
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<td>Australia:</td>
<td>“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 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. …”</td>
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<td>Guatemala:</td>
<td>WT/DSB/M/320, ¶ 104 (Sept. 28, 2012).</td>
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<td>Guatemala:</td>
<td>“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. …”</td>
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<td>Brazil:</td>
<td>WT/DSB/M/320, ¶ 105 (Sept. 28, 2012).</td>
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<td>Brazil:</td>
<td>“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. …”</td>
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<td><strong>Turkey:</strong></td>
<td>WT/DSB/M/320, ¶ 106 (Sept. 28, 2012).</td>
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<td>“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.”</td>
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<td><strong>5</strong></td>
<td><strong>United States – Measures concerning the importation, marketing and sale of tuna and tuna products (DS381)</strong></td>
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<td><strong>United States:</strong></td>
<td>WT/DSB/M/317, ¶ 17 (Jul. 31, 2012).</td>
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<td>“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. …”</td>
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<td><strong>Australia:</strong></td>
<td>WT/DSB/M/317, ¶ 23 (Jul. 31, 2012).</td>
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<td>“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.”</td>
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<td><strong>Japan:</strong></td>
<td>WT/DSB/M/317, ¶ 23 (Jul. 31, 2012).</td>
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<td>“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 Appellate Body in the past.”</td>
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<tr>
<td><strong>6</strong></td>
<td><strong>United States – Measures affecting trade in large civil aircraft (second complaint) (DS353)</strong></td>
</tr>
<tr>
<td><strong>United States:</strong></td>
<td>WT/DSB/M/313, ¶ 74 (May 29, 2012).</td>
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<td>“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.”</td>
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<td><strong>Japan:</strong></td>
<td>WT/DSB/M/313, ¶ 77 (May 29, 2012).</td>
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<td>“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.”</td>
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<tr>
<td><strong>7</strong></td>
<td><strong>China – Measures related to the exportation of various raw materials (DS394), (DS395), (DS398)</strong></td>
</tr>
<tr>
<td><strong>United States:</strong></td>
<td>WT/DSB/M/313, ¶ 77 (May 29, 2012).</td>
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<td>“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.”</td>
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<td>“106. Finally, as for several Appellate Body Reports that had been considered by the DSB in 2011, the</td>
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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. …”

WT/DSB/M/312, ¶ 105-106 (May 22, 2012).

Japan:
“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.”

WT/DSB/M/312, ¶ 120 (May 22, 2012).

Costa Rica:
“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.”

WT/DSB/M/312, ¶ 121 (May 22, 2012).

Norway:
“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.”

WT/DSB/M/312, ¶ 122 (May 22, 2012).

Australia:
“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.”

WT/DSB/M/312, ¶ 123 (May 22, 2012).

Guatemala:
“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.”

WT/DSB/M/312, ¶ 124 (May 22, 2012).

United States – Measures affecting imports of certain passenger vehicle and light truck tyres from China (DS399)

United States:
“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. …”


Japan:
<table>
<thead>
<tr>
<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
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</table>
| **European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China (DS397)** | “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.”
|
| Australia: | “15. … Australia believed that departure from the normal appellate time-frames should occur only in exceptional circumstances and with full transparency. …”
|
| Chile: | “16. … Chile shared the systemic concern expressed by other delegations with regard to the delay in the circulation of the Appellate Body Report. …”
|
| Argentina: | “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 parties' agreement. Like previous speakers, Argentina was concerned about this precedent and its impact on the functioning of the dispute settlement system. …”
|
| Costa Rica: | “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. …”
|
| **United States:*** | “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. …”
|
| Costa Rica: | “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.”
|
| Australia: | |

*WT/DSB/M/304, ¶ 12 (Dec. 2, 2011).*
<table>
<thead>
<tr>
<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
</tr>
</thead>
<tbody>
<tr>
<td>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. …”</td>
<td>WT/DSB/M/301, ¶ 13 (Sept. 23, 2011).</td>
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<td>Japan:</td>
<td>“14. The representative of Japan said that her country also shared the concerns expressed by the United States about the lack of transparency. It 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.”</td>
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<td>Norway:</td>
<td>“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.”</td>
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<td>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 &quot;will be circulated to Members … in accordance with paragraph 5 of Article 17&quot; of the DSU, 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.”</td>
<td>WT/DSB/M/299, ¶ 11 (Sept. 1, 2011).</td>
</tr>
</tbody>
</table>
ATTACHMENT 3

Number of Days Between the Notice of Appeal and Circulation of the Appellate Body Report
## ATTACHMENT 3

### Days Between Notice of Appeal and Circulation of Appellate Body Report

<table>
<thead>
<tr>
<th>WTO DISPUTE Notice of Appeal and AB Report</th>
<th>Date of Appeal</th>
<th>Date AB Report Circulated</th>
<th>Date Adopted</th>
<th>No. of Days from Appeal to Circulation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1</strong>&lt;br&gt;US — Gasoline&lt;br&gt;WT/DS2/6&lt;br&gt;WT/DS2/AB/R</td>
<td>February 21, 1996</td>
<td>April 29, 1996</td>
<td>May 20, 1996</td>
<td>68</td>
</tr>
<tr>
<td><strong>3</strong>&lt;br&gt;US — Underwear&lt;br&gt;WT/DS24/5&lt;br&gt;WT/DS24/AB/R</td>
<td>November 11, 1996</td>
<td>February 10, 1997</td>
<td>February 25, 1997</td>
<td>91</td>
</tr>
<tr>
<td><strong>4</strong>&lt;br&gt;Brazil — Desiccated Coconut&lt;br&gt;WT/DS22/8&lt;br&gt;WT/DS22/AB/R</td>
<td>December 16, 1996</td>
<td>February 21, 1997</td>
<td>March 20, 1997</td>
<td>67</td>
</tr>
<tr>
<td><strong>6</strong>&lt;br&gt;Canada — Periodicals&lt;br&gt;WT/DS31/5&lt;br&gt;WT/DS31/AB/R</td>
<td>April 29, 1997</td>
<td>June 30, 1997</td>
<td>July 30, 1997</td>
<td>62</td>
</tr>
<tr>
<td><strong>7</strong>&lt;br&gt;EC — Bananas III&lt;br&gt;WT/DS27/9&lt;br&gt;WT/DS27/AB/R</td>
<td>June 11, 1997</td>
<td>September 9, 1997</td>
<td>September 25, 1997</td>
<td>90</td>
</tr>
<tr>
<td><strong>9</strong>&lt;br&gt;India — Patents (US)&lt;br&gt;WT/DS50/6&lt;br&gt;WT/DS50/AB/R</td>
<td>October 15, 1997</td>
<td>December 19, 1997</td>
<td>January 16, 1998</td>
<td>65</td>
</tr>
<tr>
<td><strong>14</strong>&lt;br&gt;Australia — Salmon&lt;br&gt;WT/DS18/5&lt;br&gt;WT/DS18/AB/R</td>
<td>July 22, 1998</td>
<td>October 20, 1998</td>
<td>November 6, 1998</td>
<td>90</td>
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<tr>
<td>No.</td>
<td>WTO DISPUTE Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
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<td>-----</td>
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<td>--------------</td>
</tr>
<tr>
<td>16</td>
<td>Korea — Alcoholic Beverages</td>
<td>October 20, 1998</td>
<td>January 18, 1999</td>
<td>February 17, 1999</td>
</tr>
<tr>
<td>18</td>
<td>Brazil — Aircraft</td>
<td>May 3, 1999</td>
<td>August 2, 1999</td>
<td>August 20, 1999</td>
</tr>
<tr>
<td>19</td>
<td>Canada — Aircraft</td>
<td>May 3, 1999</td>
<td>August 2, 1999</td>
<td>August 20, 1999</td>
</tr>
<tr>
<td>20</td>
<td>India — Quantitative Restrictions</td>
<td>May 25, 1999</td>
<td>August 23, 1999</td>
<td>September 22, 1999</td>
</tr>
<tr>
<td>21</td>
<td>Canada — Dairy</td>
<td>July 15, 1999</td>
<td>October 13, 1999</td>
<td>October 27, 1999</td>
</tr>
<tr>
<td>22</td>
<td>Turkey — Textiles</td>
<td>July 26, 1999</td>
<td>October 22, 1999</td>
<td>November 19, 1999</td>
</tr>
<tr>
<td>23</td>
<td>Chile — Alcoholic Beverages</td>
<td>September 13, 1999</td>
<td>December 13, 1999</td>
<td>January 12, 2000</td>
</tr>
<tr>
<td>24</td>
<td>Argentina — Footwear (EC)</td>
<td>September 15, 1999</td>
<td>December 14, 1999</td>
<td>January 12, 2000</td>
</tr>
<tr>
<td>25</td>
<td>Korea — Dairy</td>
<td>September 15, 1999</td>
<td>December 14, 1999</td>
<td>January 12, 2000</td>
</tr>
<tr>
<td>26</td>
<td>US — FSC</td>
<td>October 28, 1999</td>
<td>February 24, 2000</td>
<td>March 20, 2000</td>
</tr>
<tr>
<td>27</td>
<td>US — Lead and Bismuth II</td>
<td>January 27, 2000</td>
<td>May 10, 2000</td>
<td>June 7, 2000</td>
</tr>
<tr>
<td>29</td>
<td>Brazil — Aircraft (Article 21.5 — Canada)</td>
<td>May 22, 2000</td>
<td>July 21, 2000</td>
<td>August 4, 2000</td>
</tr>
<tr>
<td>No.</td>
<td>WTO DISPUTE Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
</tr>
<tr>
<td>-----</td>
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<td>--------------</td>
</tr>
<tr>
<td>32</td>
<td>Canada — Patent Term</td>
<td>June 19, 2000</td>
<td>September 18, 2000</td>
<td>October 12, 2000</td>
</tr>
<tr>
<td>33</td>
<td>Korea — Various Measures on Beef</td>
<td>September 11, 2000</td>
<td>December 11, 2000</td>
<td>January 10, 2001</td>
</tr>
<tr>
<td>34</td>
<td>US — Certain EC Products</td>
<td>September 12, 2000</td>
<td>December 11, 2000</td>
<td>January 10, 2001</td>
</tr>
<tr>
<td>36</td>
<td>EC — Asbestos</td>
<td>October 23, 2000</td>
<td>March 12, 2001</td>
<td>April 5, 2001</td>
</tr>
<tr>
<td>37</td>
<td>Thailand — H-Beams</td>
<td>October 23, 2000</td>
<td>March 12, 2001</td>
<td>April 5, 2001</td>
</tr>
<tr>
<td>38</td>
<td>EC — Bed Linen</td>
<td>December 1, 2000</td>
<td>March 1, 2001</td>
<td>March 12, 2001</td>
</tr>
<tr>
<td>39</td>
<td>US — Lamb</td>
<td>January 31, 2001</td>
<td>May 1, 2001</td>
<td>May 16, 2001</td>
</tr>
<tr>
<td>40</td>
<td>US — Hot-Rolled Steel</td>
<td>April 25, 2001</td>
<td>July 24, 2001</td>
<td>August 23, 2001</td>
</tr>
<tr>
<td>41</td>
<td>US — Cotton Yarn</td>
<td>July 9, 2001</td>
<td>October 8, 2001</td>
<td>November 5, 2001</td>
</tr>
<tr>
<td>44</td>
<td>US — Section 211 Appropriations Act</td>
<td>October 4, 2001</td>
<td>January 2, 2002</td>
<td>February 1, 2002</td>
</tr>
<tr>
<td></td>
<td>WTO DISPUTE Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
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<td>--------------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>48</td>
<td><strong>India — Autos</strong>&lt;br&gt;WT/DS146/8, WT/DS175/8&lt;br&gt;WT/DS146/AB/R&lt;br&gt;WT/DS175/AB/R</td>
<td>January 31, 2002</td>
<td>March 19, 2002</td>
<td>April 5, 2002</td>
</tr>
<tr>
<td>49</td>
<td><strong>Chile — Price Band System</strong>&lt;br&gt;WT/DS207/5&lt;br&gt;WT/DS207/AB/R</td>
<td>June 24, 2002</td>
<td>September 23, 2002</td>
<td>October 23, 2002</td>
</tr>
<tr>
<td>50</td>
<td><strong>EC — Sardines</strong>&lt;br&gt;WT/DS231/12&lt;br&gt;WT/DS231/AB/R</td>
<td>June 28, 2002</td>
<td>September 26, 2002</td>
<td>October 23, 2002</td>
</tr>
<tr>
<td>52</td>
<td><strong>US — Countervailing Measures on Certain EC Products</strong>&lt;br&gt;WT/DS212/7&lt;br&gt;WT/DS212/AB/R</td>
<td>September 9, 2002</td>
<td>December 9, 2002</td>
<td>January 8, 2003</td>
</tr>
<tr>
<td>55</td>
<td><strong>EC — Bed Linen (Article 21.5 — India )</strong>&lt;br&gt;WT/DS141/16&lt;br&gt;WT/DS141/AB/RW</td>
<td>January 8, 2003</td>
<td>April 8, 2003</td>
<td>April 24, 2003</td>
</tr>
<tr>
<td>56</td>
<td><strong>EC — Tube or Pipe Fittings</strong>&lt;br&gt;WT/DS219/7&lt;br&gt;WT/DS219/AB/R</td>
<td>April 23, 2003</td>
<td>July 22, 2003</td>
<td>August 18, 2003</td>
</tr>
<tr>
<td>No.</td>
<td>WTO DISPUTE Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
</tr>
<tr>
<td>-----</td>
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<td>-------------</td>
</tr>
<tr>
<td>59</td>
<td>US – Corrosion Resistant Steel Sunset Review WT/DS244/7 WT/DS244/AB/R</td>
<td>September 15, 2003</td>
<td>December 15, 2003</td>
<td>January 9, 2004</td>
</tr>
<tr>
<td>61</td>
<td>EC – Tariff Preferences WT/DS246/7 WT/DS246/AB/R</td>
<td>January 8, 2004</td>
<td>April 7, 2004</td>
<td>April 20, 2004</td>
</tr>
<tr>
<td>63</td>
<td>Canada – Wheat Exports and Grain Imports WT/DS276/15 WT/DS276/AB/R</td>
<td>June 1, 2004</td>
<td>August 30, 2004</td>
<td>September 27, 2004</td>
</tr>
<tr>
<td>67</td>
<td>EC – Export Subsidies on Sugar (Australia; Brazil; Thailand) WT/DS265/25, WT/DS266/25, WT/DS283/6 WT/DS265/AB/R WT/DS266/AB/R WT/DS283/AB/R</td>
<td>January 13, 2005</td>
<td>April 28, 2005</td>
<td>May 19, 2005</td>
</tr>
<tr>
<td>68</td>
<td>Dominican Republic – Import and Sale of Cigarettes WT/DS302/8 WT/DS302/AB/R</td>
<td>January 24, 2005</td>
<td>April 25, 2005</td>
<td>May 19, 2005</td>
</tr>
<tr>
<td>70</td>
<td>EC – Chicken Cuts (Brazil; Thailand) WT/DS269/6, WT/DS286/8 WT/DS269/AB/R WT/DS286/AB/R</td>
<td>June 13, 2005</td>
<td>September 12, 2005</td>
<td>September 27, 2005</td>
</tr>
<tr>
<td>71</td>
<td>Mexico – Anti-Dumping Measures on Rice WT/DS295/6 WT/DS295/AB/R</td>
<td>July 20, 2005</td>
<td>November 29, 2005</td>
<td>December 20, 2005</td>
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<td>WTO DISPUTE Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
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<td>--------------</td>
</tr>
<tr>
<td>75</td>
<td>Mexico – Taxes on Soft Drinks WT/DS308/10 WT/DS308/AB/R</td>
<td>December 6, 2005</td>
<td>March 6, 2006</td>
<td>March 24, 2006</td>
</tr>
<tr>
<td>77</td>
<td>US – Zeroing (EC) WT/DS294/12, WT/DS294/13 WT/DS294/AB/R</td>
<td>January 17, 2006</td>
<td>April 18, 2006</td>
<td>May 9, 2006</td>
</tr>
<tr>
<td>79</td>
<td>EC – Selected Customs Matters WT/DS315/11, WT/DS315/12 WT/DS315/AB/R</td>
<td>August 14, 2006</td>
<td>November 13, 2006</td>
<td>December 11, 2006</td>
</tr>
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<td>No.</td>
<td>WTO DISPUTE Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
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</tr>
<tr>
<td>87</td>
<td>US – Shrimp (Thailand)</td>
<td>April 17, 2008</td>
<td>July 16, 2008</td>
<td>August 1, 2008</td>
</tr>
<tr>
<td></td>
<td>WT/DS343/10, WT/DS343/11</td>
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<td>WT/DS343/AB/R</td>
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<td>US – Customs Bond Directive</td>
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<td>WT/DS345/9, WT/DS345/10</td>
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<tr>
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<td>WT/DS345/AB/R</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>88</td>
<td>US – Continued Suspension</td>
<td>May 29, 2008</td>
<td>October 16, 2008</td>
<td>November 14, 2008</td>
</tr>
<tr>
<td></td>
<td>WT/DS320/12, WT/DS320/13</td>
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<tr>
<td></td>
<td>WT/DS320/AB/R</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>89</td>
<td>Canada – Continued Suspension</td>
<td>May 29, 2008</td>
<td>October 16, 2008</td>
<td>November 14, 2008</td>
</tr>
<tr>
<td></td>
<td>WT/DS321/12, WT/DS321/13</td>
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<tr>
<td></td>
<td>WT/DS321/AB/R</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>90</td>
<td>India – Additional Import Duties</td>
<td>August 1, 2008</td>
<td>October 30, 2008</td>
<td>November 17, 2008</td>
</tr>
<tr>
<td></td>
<td>WT/DS360/8, WT/DS360/9</td>
<td></td>
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<td>WT/DS360/AB/R</td>
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<td>WT/DS27/89, WT/DS27/91</td>
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<td>WT/DS27/AB/RW2/ECU and Corr.1</td>
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<td>WT/DS27/AB/RW/USA and Corr.1</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>93</td>
<td>China – Auto Parts (EC)*</td>
<td>September 15, 2008</td>
<td>December 15, 2008</td>
<td>January 12, 2009</td>
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<tr>
<td></td>
<td>WT/DS339/12</td>
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<td>WT/DS339/AB/R</td>
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</tr>
<tr>
<td>94</td>
<td>China – Auto Parts (US)*</td>
<td>September 15, 2008</td>
<td>December 15, 2008</td>
<td>January 12, 2009</td>
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<tr>
<td></td>
<td>WT/DS340/12</td>
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<td>WT/DS340/AB/R</td>
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</tr>
<tr>
<td>95</td>
<td>China – Auto Parts (Canada)*</td>
<td>September 15, 2008</td>
<td>December 15, 2008</td>
<td>January 12, 2009</td>
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<tr>
<td></td>
<td>WT/DS342/12</td>
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<td>WT/DS342/AB/R</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>96</td>
<td>US – Continued Zeroing</td>
<td>November 6, 2008</td>
<td>February 4, 2009</td>
<td>February 19, 2009</td>
</tr>
<tr>
<td></td>
<td>WT/DS350/11, WT/DS350/12</td>
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<td>WT/DS350/AB/R</td>
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<td>WT/DS294/28, WT/DS294/29</td>
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<td>WT/DS294/AB/RW and Corr.1</td>
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<td>WT/DS322/32</td>
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<td>WT/DS322/AB/RW</td>
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<td>WT/DS363/10, WT/DS363/11</td>
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<td>WT/DS363/AB/R</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>100</td>
<td>EC and certain member States – Large Civil Aircraft</td>
<td>July 21, 2010</td>
<td>May 18, 2011</td>
<td>June 1, 2011</td>
</tr>
<tr>
<td></td>
<td>WT/DS316/12, WT/DS316/13</td>
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<td>WT/DS316/AB/R</td>
<td></td>
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</tr>
<tr>
<td>101</td>
<td>Australia – Apples</td>
<td>August 31, 2010</td>
<td>November 29, 2010</td>
<td>December 17, 2010</td>
</tr>
<tr>
<td></td>
<td>WT/DS367/13 &amp; Corr.1, WT/DS367/14</td>
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<td>WT/DS367/AB/R</td>
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<td>Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
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<td>--------------</td>
</tr>
<tr>
<td>102</td>
<td>US – Anti-Dumping and Countervailing Duties (China)</td>
<td>December 1, 2010</td>
<td>March 11, 2011</td>
<td>March 25, 2011</td>
</tr>
<tr>
<td>105</td>
<td>US – Large Civil Aircraft</td>
<td>April 1, 2011</td>
<td>March 12, 2012</td>
<td>March 23, 2012</td>
</tr>
<tr>
<td>112</td>
<td>US – Clove Cigarettes</td>
<td>January 5, 2012</td>
<td>April 4, 2012</td>
<td>April 24, 2012</td>
</tr>
<tr>
<td>WTO DISPUTE Notice of Appeal and AB Report</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
<td>No. of Days from Appeal to Circulation</td>
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<td><strong>119</strong> European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*&lt;br&gt;WT/DS400/8, WT/DS400/9 WT/DS400/AB/R</td>
<td>January 24, 2014</td>
<td>May 22, 2014</td>
<td>June 18, 2014</td>
<td>118</td>
</tr>
<tr>
<td><strong>120</strong> European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*&lt;br&gt;WT/DS401/9, WT/DS401/10 WT/DS401/AB/R</td>
<td>January 24, 2014</td>
<td>May 22, 2014</td>
<td>June 18, 2014</td>
<td>118</td>
</tr>
<tr>
<td><strong>121</strong> United States — Countervailing and Anti-Dumping Measures on Certain Products from China&lt;br&gt;WT/DS449/6, WT/DS449/7 WT/DS449/AB/R</td>
<td>April 8, 2014</td>
<td>July 7, 2014</td>
<td>July 22, 2014</td>
<td>90</td>
</tr>
<tr>
<td><strong>122</strong> China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*&lt;br&gt;WT/DS431/9, WT/DS431/10 WT/DS431/AB/R</td>
<td>April 8, 2014</td>
<td>August 7, 2014</td>
<td>August 29, 2014</td>
<td>121</td>
</tr>
<tr>
<td><strong>123</strong> China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*&lt;br&gt;WT/DS432/9 WT/DS432/AB/R</td>
<td>April 25, 2014</td>
<td>August 7, 2014</td>
<td>August 29, 2014</td>
<td>121</td>
</tr>
<tr>
<td><strong>124</strong> China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*&lt;br&gt;China WT/DS/433/9 WT/DS433/AB/R</td>
<td>April 25, 2014</td>
<td>August 7, 2014</td>
<td>August 29, 2014</td>
<td>121</td>
</tr>
<tr>
<td><strong>125</strong> United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India&lt;br&gt;WT/DS436/6, WT/DS436/7 WT/DS436/AB/R</td>
<td>August 8, 2014</td>
<td>December 8, 2014</td>
<td>December 19, 2014</td>
<td>122</td>
</tr>
<tr>
<td>No.</td>
<td>Country / Measure</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
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<td>--------------</td>
</tr>
<tr>
<td>132</td>
<td>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</td>
<td>January 6, 2015</td>
<td>April 7, 2015</td>
<td>April 22, 2015</td>
</tr>
<tr>
<td>135</td>
<td>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan*</td>
<td>May 20, 2015</td>
<td>October 14, 2015</td>
<td>October 28, 2015</td>
</tr>
<tr>
<td>137</td>
<td>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by Mexico</td>
<td>June 5, 2015</td>
<td>November 20, 2015</td>
<td>December 3, 2015</td>
</tr>
<tr>
<td>138</td>
<td>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</td>
<td>September 9, 2015</td>
<td>January 18, 2016</td>
<td>February 12, 2016</td>
</tr>
<tr>
<td>139</td>
<td>Argentina – Measures Relating to Trade in Goods and Services</td>
<td>October 27, 2015</td>
<td>April 14, 2016</td>
<td>May 9, 2016</td>
</tr>
<tr>
<td>140</td>
<td>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</td>
<td>January 22, 2016</td>
<td>June 7, 2016</td>
<td>June 22, 2016</td>
</tr>
<tr>
<td>No.</td>
<td>Case Description</td>
<td>Date of Appeal</td>
<td>Date AB Report Circulated</td>
<td>Date Adopted</td>
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</tr>
<tr>
<td>141</td>
<td>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</td>
<td>April 19, 2016</td>
<td>September 7, 2016</td>
<td>September 26, 2016</td>
</tr>
<tr>
<td>142</td>
<td>India – Certain Measures Relating to Solar Cells and Solar Modules</td>
<td>April 20, 2016</td>
<td>September 16, 2016</td>
<td>October 14, 2016</td>
</tr>
<tr>
<td>143</td>
<td>European Union – Anti-Dumping Measures on Biodiesel from Argentina</td>
<td>May 20, 2016</td>
<td>October 6, 2016</td>
<td>October 26, 2016</td>
</tr>
<tr>
<td>145</td>
<td>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</td>
<td>October 13, 2016</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>146</td>
<td>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</td>
<td>November 18, 2016</td>
<td>May 11, 2017</td>
<td>May 22, 2017</td>
</tr>
<tr>
<td>147</td>
<td>United States – Conditional Tax Incentives for Large Civil Aircraft</td>
<td>December 16, 2016</td>
<td>September 4, 2017</td>
<td>September 22, 2017</td>
</tr>
<tr>
<td>149</td>
<td>Indonesia — Import Licensing Regimes</td>
<td>February 17, 2017</td>
<td>November 9, 2017</td>
<td>November 22, 2017</td>
</tr>
<tr>
<td>150</td>
<td>Russia — Commercial Vehicles</td>
<td>February 20, 2017</td>
<td>March 22, 2018</td>
<td>---</td>
</tr>
<tr>
<td>151</td>
<td>US – Large Civil Aircraft (Article 21.5 – EU II)</td>
<td>June 29, 2017</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>152</td>
<td>EU — PET (Pakistan)</td>
<td>August 30, 2017</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>153</td>
<td>Brazil — Taxation (Japan)</td>
<td>September 28, 2017</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>154</td>
<td>Brazil — Taxation</td>
<td>September 28, 2017</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>155</td>
<td>Indonesia — Iron or Steel Products (Viet Nam)</td>
<td>September 28, 2017</td>
<td>---</td>
<td>---</td>
</tr>
</tbody>
</table>
156  |  WTO DISPUTE Notice of Appeal and AB Report  |  Date of Appeal  |  Date AB Report Circulated  |  Date Adopted  |  No. of Days from Appeal to Circulation
---|---|---|---|---|---
Indonesia — Iron or Steel Products (Chinese Taipei)  |  September 28, 2017  |  ---  |  ---  |  ---
WT/DS490/5, WT/DS496/6  |  |

TOTAL Number of Appellate Body Reports (issued as a single document)  |  134

* Indicates multiple Appellate Body cases circulated in a single document.

**Totals:**

134 Appellate Body Reports have been issued as a single document.

43 of the 134 AB reports were issued more than 92 days after the date of appeal.

Since 2011, 38 AB reports have been issued, of which 31 were issued more than 92 days after the date of appeal.
ATTACHMENT 4

Examples of Disputes Where the United States Criticized the Appellate Body for Obiter Dicta
<table>
<thead>
<tr>
<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
</tr>
</thead>
</table>
| **1**  
Indonesia – Importation of Horticultural Products, Animals and Animal Products, WT/DS477 (NZ) WT/DS478 (US) | “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.”
“… [O]nce 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.”
“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.”  
*Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 22, 2017* |
| **2**  
European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia (WT/DS442) | “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.”  
*Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, September 29, 2017* |
| **3**  
India – Certain Measures Relating to Solar Cells and Solar Modules (WT/DS456) | “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.”  
*Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 14, 2016* |
| **4**  
United States – Anti-dumping and countervailing measures on large residential washers from Korea (DS464) | “8.9. … 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. …”
“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.”  
*United States:*  
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<thead>
<tr>
<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
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<tr>
<td><strong>India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430)</strong></td>
<td>“8.11. … 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 &quot;targeted dumping&quot;. The methodology created by the Appellate Body had never been contemplated at the time the Anti-Dumping Agreement had been negotiated and adopted. …”</td>
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<td><strong>Argentina – Measures relating to trade in goods and services (DS453)</strong></td>
<td>“…, 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.&quot; “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.” Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, May 23, 2016</td>
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| **United States – Countervailing duty measures on certain products from China (DS437)** | United States:  
“1.11. … [T]he 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 *prima facie* 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.”  
“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
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<th>WTO Dispute</th>
<th>Critical Statement Excerpt</th>
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| **United States – Countervailing measures on certain hot-rolled carbon steel flat products from India (DS436)** | **United States:**

“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 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.”

“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. …”

WT/DSB/M/354, ¶¶ 1.12-1.13 (Feb. 16, 2015). |
| **United States – Measures affecting trade in large civil aircraft (second complaint) (DS353)** | **United States:**

“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.”

WT/DSB/M/313, ¶ 77 (May 29, 2012). |