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The World Trade Organization's (WTO's) Appellate Body: Key Disputes and Controversies

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SUMMARY

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The World Trade Organization's (WTO's) Appellate Body: Key Disputes and Controversies

The World Trade Organization (WTO) is a 164-member international organization created to oversee and administer multilateral trade rules, serve as a forum for trade negotiations, and resolve trade disputes. The international agreements that established the WTO set forth rules or disciplines for practices affecting international trade in goods and services. These rules can be enforced by the WTO's dispute settlement mechanism, which hears trade disputes between members concerning these rules and may decide whether a member has complied with its WTO obligations. Under this mechanism, a WTO panel first hears a dispute, and a WTO member that is party to it may appeal a panel's decision to the Appellate Body, which is an appeals tribunal that may review a panel's legal interpretations and uphold, modify, or reverse them. The WTO's architects, including the United States, anticipated that the enforceability of WTO rules through the dispute settlement mechanism, with the opportunity for appeal to the WTO's Appellate Body, would further the multilateral trading system's stability and predictability and avoid tit-for-tat trade retaliation, thereby benefiting the global economy.

Although the United States played a central role in the WTO's development, including its adjudicative processes, some Members of Congress and executive branch officials have long raised concerns about the Organization's dispute settlement mechanism, especially the Appellate Body. During the Obama Administration, the United States blocked the reappointment of some members to the Appellate Body; these positions were later filled by consensus (and without objection from the United States) at the WTO. By contrast, the Trump Administration blocked reappointments as Appellate Body members' terms expired, resulting in multiple vacancies. As a result, on December 11, 2019, the WTO's Appellate Body lost its quorum of three members necessary for the Body to decide appeals and issue final reports. The Biden Administration has thus far continued the Trump Administration's approach to blocking appointments, tying the process to the broader negotiations on dispute settlement reform. In withholding its approval of new Appellate Body members, the Office of the United States Trade Representative (USTR) has argued that the Appellate Body has exceeded its mandate, as established in WTO rules, by (1) disregarding the deadline for issuing a decision; (2) allowing former members to decide cases; (3) reviewing panel findings of fact; (4) issuing advisory opinions; (5) treating prior decisions as binding precedent; (6) declining to make recommendations about the WTO-compatibility of measures that expire after panel establishment; and (7) encroaching on other WTO bodies. In addition, the USTR has argued that the appeals tribunal has allegedly exceeded its mandate when interpreting the WTO Agreements, thereby "adding to or diminishing rights or obligations" of WTO members without their consent, in particular when deciding disputes involving subsidies, trade remedies, and technical product regulations.

The USTR maintains that this so-called "judicial activism" restricts the United States' ability "to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices." Other WTO members have shared some of these concerns with respect to their own domestic regulatory measures. Nonetheless, Appellate Body members, WTO members, and some scholars have also defended the Appellate Body's work, noting the practical constraints of international dispute settlement; the Appellate Body's lack of resources; the ambiguity or vagueness in the text of the WTO Agreement provisions governing the Appellate Body's operations, as well as in the WTO Agreements more broadly; and the inherent flexibility in treaty interpretation.

This report examines the USTR's concerns by discussing its critiques of the Appellate Body and describing some of the key WTO disputes identified as problematic. It places these complaints in the broader context of debates about how the Appellate Body construes the WTO Agreements and carries out its role in relation to WTO members. For an overview of proposals to reform the WTO and its dispute settlement mechanism, see CRS Report R45417, *World Trade Organization: Overview and Future Direction*, coordinated by Cathleen D. Cimino-Isaacs.

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Background

The World Trade Organization (WTO) is a 164-member international organization created to oversee and administer multilateral trade rules, serve as a forum for trade negotiations, and resolve trade disputes.[1] The international agreements that established the WTO set forth rules and disciplines for practices that affect international trade in goods and services.[2] These rules can be enforced by the WTO's dispute settlement mechanism, which hears trade disputes between members concerning these rules and may decide whether a member has complied with its WTO obligations.[3] As part of this mechanism, the system has an Appellate Body, which is an appeals tribunal that may review a WTO panel's legal interpretations and uphold, modify, or reverse them.[4] The WTO's architects, including the United States, anticipated that the enforceability of WTO rules through the dispute settlement mechanism, with the opportunity for appeal to the Appellate Body, would further the multilateral trading system's stability and predictability and avoid tit-for-tat trade retaliation, thereby benefiting the global economy.[5]

Although the United States played a central role in the WTO's development, including its adjudicative processes, some Members of Congress and executive branch officials have raised concerns about the Organization's dispute settlement mechanism. For example, in the Trade Act of 2002, Congress established objectives that specifically addressed dispute settlement and appeals at the WTO for U.S. representatives to pursue when negotiating reforms to the WTO system.[6] These objectives sought the amendment of the WTO Agreements to ensure that WTO panels and the Appellate Body would defer to the "fact-finding and technical expertise" of U.S. agencies investigating foreign trade practices—a perennial issue in WTO disputes involving U.S. trade remedy measures.[7] Officials from the Office of the United States Trade Representative (USTR) have also frequently expressed concerns about the Appellate Body's interpretations of the WTO Agreements, among other issues, at meetings of the WTO's Dispute Settlement Body (DSB), the committee composed of all WTO members that oversees the dispute settlement mechanism.[8]

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[1] For an overview of the WTO, see CRS Report R45417, *World Trade Organization: Overview and Future Direction*, coordinated by Cathleen D. Cimino-Isaacs.

[2] For a link to all of the WTO Agreements discussed in this report, see *Legal Texts: The WTO Agreements*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/final_e.htm.

[3] *See generally* WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter DSU]. Some trade practitioners, scholars, and other observers regard the multilateral WTO's dispute settlement mechanism as the "crown jewel" of the international rules-based trading system. *See, e.g.*, Ambassador Ujal Singh Bhatia, 2018 Chair of the Appellate Body, Address at the Launch of the WTO Appellate Body's Annual Report for 2018 (May 28, 2019), https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm; Pascal Lamy, Former WTO Director-General, Address at Bilkent University, Ankara (Mar. 15, 2013), https://www.wto.org/english/news_e/sppl_e/sppl272_e.htm.

[4] DSU, *supra* note 3, art. 17; *Appellate Body Faces Challenges in Meeting Demands for Its Services, Chairman Warns*, WORLD TRADE ORG. NEWS (June 8, 2017), https://www.wto.org/english/news_e/news17_e/ab_08jun17_e.htm.

[5] *See Understanding the WTO: Settling Disputes, A Unique Contribution*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [hereinafter WTO, *A Unique Contribution*].

[6] Trade Act of 2002, Pub. L. No. 107-210, § 2102 (Aug. 6, 2002) (codified at 19 U.S.C. § 3802).

[7] 19 U.S.C. § 3802(b)(12)(C). For more on trade remedies, see CRS Report RL32371, *Trade Remedies: A Primer*, by Vivian C. Jones.

[8] USTR, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION, at B-8 (2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf [hereinafter USTR REPORT] (recounting statements of USTR representatives criticizing, among other things, the Appellate Body's interpretations of the WTO Agreements in specific disputes and issuance of advisory opinions).

Although the United States initially sought to address perceived problems with the WTO's dispute settlement mechanism through negotiations, President Barack Obama's Administration departed from that practice. In 2011, the USTR decided not to support the reappointment of the previously U.S.-nominated Appellate Body member, Jennifer Hillman, reportedly indicating that while there was no other U.S. nominee "in mind," her reappointment "did not align with the administration's plans for the institution."[9] Following this announcement, in 2014, the Obama Administration opposed Kenya's nomination of James Gathii, and, in 2016, blocked the reappointment of Appellate Body member Seung Wha Chang, citing "abstract discussions" in Chang's opinions that allegedly exceeded the Appellate Body's mandate.[10]

Although the DSB later filled Chang's vacant seat during the Obama Administration, the Trump Administration subsequently blocked the appointment of all other members as their terms expired.[11] As a result, on December 11, 2019, the WTO's Appellate Body lost its quorum of three members necessary for the Body to decide appeals of WTO dispute settlement panel decisions and issue final reports.[12] Thus, if a WTO member appeals a panel report, the DSB can no longer adopt such reports unless the disputing parties agree to consider the report as final.[13] The DSB also cannot oversee the losing member's implementation of a panel ruling or authorize the prevailing member to engage in trade retaliation if the losing member ignores the panel's recommendations.[14] This situation may persist unless WTO members agree to reform the system or to use an alternate dispute settlement mechanism, such as an interim appeals system as some members have done.[15] To date, the Biden Administration has continued the Trump Administration's approach by blocking Appellate Body nominations, linking a potential shift in position to the outcome of ongoing dispute settlement reform negotiations.[16]

In withholding its approval of new Appellate Body members, the USTR has pointed to Article 3.2 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which states as follows: "Recommendations and rulings of the DSB cannot add to or

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[9] PAUL BLUSTEIN, SCHISM: CHINA, AMERICA, AND THE FRACTURING OF THE GLOBAL TRADING SYSTEM 161 (2019).

[10] Manfred Elsig, Mark Pollack, & Gregory Shaffer, *The U.S. Is Causing a Major Controversy in the World Trade Organization. Here's What's Happening*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/; Statement by the United States at the Meeting of the Dispute Settlement Body on May 23, 2016 (WT/DSB/M/379), at 14, https://geneva.usmission.gov/wp-content/uploads/sites/290/May23.DSB_.pdf ("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.").

[11] Sunanta Kangvalkulkij, *WTO Dispute Settlement Body—Developments in 2018*, WORLD TRADE ORG. (Apr. 10, 2019), https://www.wto.org/english/tratop_e/dispu_e/sunata_19_e.htm.

[12] For more on this issue, see CRS Legal Sidebar LSB10385, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?*, by Brandon J. Murrill.

[13] DSU, *supra* note 3, art. 16.

[14] *See id.*, arts. 21–22.

[15] The European Union and several other countries (but not the United States) have agreed on an interim appeals mechanism until WTO members agree to reform the Appellate Body. Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes: Addendum, WTO DOC. JOB/DSB/1/Add.12 (Apr. 30, 2020); *The WTO Multi-Party Interim Appeal Arrangement Gets Operational*, EUR. COMM'N, (Aug. 3, 2020), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176.

[16] Statement by the United States at the Meeting of the Dispute Settlement Body on February 22, 2021, https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb22.DSB_.Stmt_.as_.deliv_.fin_.public.pdf ("The United States is not in a position to support the proposed decision. The United States continues to have systemic concerns with the Appellate Body. As Members know, the United States has raised and explained its systemic concerns for more than 16 years and across multiple U.S. Administrations."); *see also* Minutes of the Dispute Settlement Body on February 22, 2021, ¶ 6.13, WTO DOC. WT/DSB/M/449 (Mar. 24, 2021).

diminish the rights and obligations provided in the covered agreements."[17] The USTR's primary concern related to this article is that the appeals tribunal has allegedly exceeded its mandate when interpreting the WTO Agreements, thereby "adding to or diminishing rights or obligations" of WTO members without their consent, in particular when deciding disputes involving subsidies, trade remedies, and technical product standards.[18] Moreover, the USTR is concerned that the Appellate Body has in effect created new obligations for WTO members without following the formal interpretation or amendment processes provided for in the WTO Agreements.[19] The USTR maintains that this so-called "judicial activism" restricts the United States' ability "to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices."[20]

Additional U.S. concerns revolve around certain procedural issues, such as the Appellate Body's failure to meet the 90-day deadline for appeals; its alleged treatment of its rulings as precedential; and its alleged failure to accept a dispute settlement panel's findings regarding a member's domestic law as an unreviewable factual matter.[21] Other WTO members have shared some of these concerns.[22] However, Appellate Body members, WTO members, and some scholars have defended the Appellate Body's work, noting the practical constraints of international dispute settlement; the Appellate Body's lack of resources; the ambiguity in the text of the WTO Agreement provisions governing the Appellate Body's operations and WTO members' obligations; and the inherent flexibility in treaty interpretation.[23]

This report examines major disputes, most of which involve the United States as a complainant or respondent, in which the USTR has alleged that the Appellate Body exceeded its mandate or interpreted the WTO Agreements incorrectly.[24] It discusses the provisions of the WTO Agreements at issue and the major holdings of these selected disputes. It also seeks to situate the USTR's complaints, which have persisted through several presidential administrations, within the broader context of debates about how the Appellate Body construes the WTO Agreements and carries out its role in relation to WTO members.[25]

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[17] DSU, *supra* note 3, art. 3.2.

[18] USTR REPORT, *supra* note 8, at 81–120.

[19] *See generally* Agreement Establishing the World Trade Organization, Apr. 15, 1994, arts. IX, X, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

[20] USTR, 2019 TRADE POLICY AGENDA AND 2018 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 6, 148 (2019), https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf.

[21] USTR REPORT, *supra* note 8, at 25–80.

[22] *See* Cimino-Isaacs, *supra* note 1.

[23] *See, e.g.*, Letter from Former WTO Appellate Body Members to Chairman of Dispute Settlement Body (May 31, 2016), https://worldtradelaw.typepad.com/files/abletter.pdf (letter from all living former Appellate Body members stating: "From time to time, one or more of the Members of the WTO may differ with a decision reached by the Appellate Body, but this does not necessarily mean that the Appellate Body has acted outside its mandate in reaching that decision"); Yuka Fukunaga, *Interpretative Authority of the Appellate Body: Replies to the Criticism by the United States*, *in* THE APPELLATE BODY OF THE WTO AND ITS REFORM 167 (Chang-fa Lo et al. eds., 2020).

[24] This report examines a few disputes in which the United States was not a primary party, particularly those that the USTR has identified as examples of disputes in which the Appellate Body exceeded its authority or incorrectly interpreted the WTO Agreements. Not all of the disputes discussed in this report resulted in adverse rulings against the United States. In several cases in which the United States prevailed, the USTR nonetheless raised concerns about the Appellate Body's actions. *See, e.g.*, Statement by the United States at the Meeting of the Dispute Settlement Body on October 5, 2011, at 1–2, WTO DOC. WT/DSB/M/304 (Dec. 2, 2011) (raising concerns about the Appellate Body's failure to meet the 90-day deadline for issuing reports).

[25] This report does not examine proposals for reforming the dispute settlement system—an issue addressed by other CRS reports. For more information on proposals to reform WTO dispute settlement, see Cimino-Isaacs, *supra* note 1.

Origins of the WTO Dispute Settlement Mechanism

The architects of the WTO's dispute settlement mechanism built upon a system for settling international trade disputes that the United States and other countries established in the 1940s. In the aftermath of World War II, the United States led efforts to establish an institution that would serve as a forum for cooperation among member countries on international trade.[26] However, unlike two other postwar international organizations proposed to address global economic issues (i.e., the International Monetary Fund and the World Bank), the proposed International Trade Organization (ITO) never came to fruition.[27] Nonetheless, the negotiating parties agreed to apply basic trade rules in the more limited General Agreement on Tariffs and Trade (GATT 1947).[28] The parties to the GATT 1947 applied the Agreement from 1948 until it became incorporated into the Uruguay Round Agreements that established the WTO in 1995.[29]

The GATT 1947 contained a mechanism for resolving trade disputes involving a country's alleged noncompliance with its obligations.[30] However, critics argued that the dispute settlement process took too long and that any one country, including the respondent or losing country in a dispute, could block the formation of a panel or the adoption of an unfavorable decision.[31] Thus, during negotiations that led to the WTO's creation, the GATT's contracting parties determined to implement reforms.[32] The Uruguay Round of negotiations, which took place from 1986 to 1994, sought to reform the GATT 1947 and led to the creation of a new dispute settlement mechanism to resolve trade disputes among WTO members. This mechanism sought to correct perceived problems with the GATT 1947 system, including by

- setting specific time frames for resolving disputes in a prompt manner;
- preventing a member from blocking the formation of a panel;
- requiring the automatic adoption of panel and Appellate Body reports unless all member countries, including the prevailing member, objected (the "reverse consensus rule"); and
- establishing a standing Appellate Body that would hear appeals from panel decisions to correct a panel's errors.[33]

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[26] *See, e.g.*, U.S. State Department, Suggested Charter for an International Trade Organization of the United Nations (1946), https://law.drupal.ku.edu/sites/law.drupal.ku.edu/files/docs/resources/library/IntlTradeLaw/1946%20Suggested%20Charter%20for%20an%20International%20Trade%20Organization%20of%20the%20United%20Nations.pdf.

[27] *See The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[28] *See id.*

[29] *See* WTO, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm [hereinafter GATT]. For a detailed history of the evolution from GATT 1947 to the end of the Uruguay Round that established the WTO, *see, e.g.*, FRANCINE MCKENZIE, GATT AND GLOBAL ORDER IN THE POSTWAR ERA (2020).

[30] WTO, *A Unique Contribution*, *supra* note 5. *See also* GATT, *supra* note 29, arts. XXII, XXIII.

[31] WTO, *A Unique Contribution*, *supra* note 5.

[32] *Id.*

[33] *Id.*; *see also Historic Development of the WTO Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm.

Under WTO dispute settlement rules, members must first attempt to settle their disputes through consultations.[34] If consultations fail, the member initiating a dispute may request the establishment of a dispute settlement panel composed of trade experts to determine whether another WTO member has violated WTO rules.[35] Prior to December 2019, the WTO Appellate Body heard appeals of these panel reports.[36] If a WTO panel or the Appellate Body rendered an adverse decision against a WTO member, and the DSB adopted that ruling, the WTO member would be expected to remove the offending measure, generally within a reasonable period of time, offer compensation, or be subject to certain countermeasures allowed under the rules.[37] Compensation at the WTO does not refer to a WTO member making payments to another member; it refers to the losing member offering other trade benefits, such as lowering tariffs, to the prevailing member.[38] Countermeasures might include the complaining member imposing higher duties on imports of selected products from the member whose acts were found to be WTO-inconsistent.[39]

Between the time the United States entered the WTO and July 2021, the United States filed 124 dispute cases against other members.[40] Other WTO members have filed 156 disputes against the United States.[41] Many of these disputes did not result in final panel or Appellate Body decisions; in fact, many disputes do not proceed beyond the consultations phase.

Since the Appellate Body lost its quorum to consider appeals in December 2019, WTO dispute proceedings have continued, but some panel reports have not become final due to a WTO member's choice to appeal the report.[42] Concerns about the United States' ongoing decision to

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[34] DSU, *supra* note 3, art. 4.

[35] *Id.* arts. 3–6.

[36] *Id.* art. 17.1.

[37] *Id.* arts. 21–22. WTO members whose measures are deemed inconsistent with WTO obligations and not justified by an exception are expected to implement the panel and/or Appellate Body report. *Id.* art. 21.3. That is, the defending member must withdraw, modify, or replace its WTO-inconsistent measures. *See id.* If a disagreement arises as to whether the defending member has implemented the report, a WTO panel may be convened to hear a dispute over compliance issues. *Id.* art. 21.5.

[38] *See The Process – Stages in a Typical WTO Dispute Settlement Case*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm (noting that compensation must be consistent with WTO rules, including those that require nondiscriminatory tariff treatment, which partly explains why WTO members rarely agree to such compensation).

[39] *See* DSU, *supra* note 3, art. 22.3. Ultimately, when a defending member fails to implement a panel or Appellate Body report within the established compliance period, the prevailing member may request that the defending member negotiate a compensation agreement. *Id.* art. 22.2. If such negotiations are not requested, or if an agreement is not reached, the prevailing member may also request authorization to impose certain trade sanctions against the noncomplying member. *Id.* art. 22.2–22.3. Specifically, the WTO may authorize the prevailing member to suspend tariff concessions or other trade obligations that it otherwise owes the noncomplying member under a WTO agreement. *Id.* These suspensions of concessions should generally be in the same sector as that involved in the dispute, but if this is impracticable or ineffective, then the WTO member imposing the countermeasures may suspend concessions in other sectors covered by the relevant agreement in dispute or, as a last resort, covered by another WTO agreement. *Id.* art. 22.3.

[40] *Disputes by Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. The United States has brought the most complaints of any WTO member, with the EU as the second most frequent complainant (104). The next three most frequent complainants are Canada (40); Brazil (33); and Japan (28). *Id.*

[41] *See id.*

[42] *See, e.g.*, Notification of an Appeal by the United States Under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States—Tariff Measures on Certain Goods from China*, WTO DOC. WT/DS543/10 (Oct. 27, 2020); Notification of an Appeal by the Kingdom of Saudi Arabia Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, and Under Rule 20(1) of the Working Procedures for Appellate Review, *Saudi Arabia—Measures Concerning the Protection of*

block nominations to the Appellate Body motivated other WTO members to endorse an informal process to reform the Appellate Body in December 2018.[43] Although this process was initially designed to avoid the loss of a quorum, since December 2019, it has focused on finding a consensus on reform that will allow all WTO members to support new nominations and the revival, in some form, of the Appellate Body.[44] Meanwhile, disputes between the European Union and a number of other WTO members may be resolved under an interim appeals mechanism pursuant to Article 25 of the DSU.[45]

WTO Disputes in Which the USTR Alleges the Appellate Body Exceeded Its Mandate

One of the USTR's criticisms of the WTO's Appellate Body is that it has exceeded the mandate WTO members established for it by (1) disregarding the deadline for issuing a decision; (2) allowing former Appellate Body members to decide cases; (3) reviewing dispute panels' findings of fact; (4) issuing advisory opinions; (5) treating prior decisions as binding precedent; (6) declining to rule on the WTO-compatibility of measures that expire after panel establishment; and (7) encroaching on other WTO bodies.[46] This section surveys the relevant provisions of the WTO Agreements, as well as examples of WTO dispute settlement cases, related to each of these issues. It also seeks to contextualize the USTR's complaints within the broader debate about how the Appellate Body construes the WTO agreements and fulfills its role in disputes and in relation to the WTO members.

Disregarding the Deadline for Issuing a Report

As noted above, parties to the GATT, which preceded the WTO, expressed concerns that the GATT's dispute settlement system did not resolve trade disputes in a timely manner.[47] The WTO's DSU states that the prompt settlement of disputes is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."[48] In rules applicable to the Appellate Body, the WTO members agreed that as "a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report."[49] Under these rules, the Appellate Body could extend the time period for an additional 30 days when it "consider[ed] that it [could not] provide its report within 60 days," so long as it informed

Intellectual Property Rights, WTO DOC. WT/DS567/7 (July 30, 2020).

[43] General Council, Minutes of Meeting, WTO DOC. WT/GC/M/175 (Dec. 12, 2018).

[44] For more information on proposals to reform WTO dispute settlement, see Cimino-Isaacs, *supra* note 1.

[45] *See supra* note 15.

[46] USTR REPORT, *supra* note 8, at 25–80.

[47] WTO, *A Unique Contribution*, *supra* note 5.

[48] DSU, *supra* note 3, art. 3.3.

[49] *Id*. art. 17.5. The Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides a shorter timeline for appeals involving prohibited subsidies. WTO, SCM Agreement, art. 4.9, https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm ("Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 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 60 days.").

the DSB in writing and explained the reasons for the delay.[50] In no case could the proceedings exceed beyond 90 days.[51]

In several WTO cases, the USTR complained that the Appellate Body exceeded the time allowed for issuing a report without first obtaining the disputing parties' agreement. In 2011, for instance, this issue arose in *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, a case in which the Appellate Body upheld a WTO panel's findings that U.S. safeguards aimed at addressing a surge of tire imports from China did not violate U.S. obligations under the WTO Agreements.[52] Following the Appellate Body's ruling, the DSB met to consider the report's adoption.[53] At the October 2011 DSB meeting, the U.S. representative commended the WTO panel and Appellate Body on their favorable rulings.[54] However, the United States expressed concerns about the Appellate Body's failure to issue its report within 90 days as Article 17.5 of the DSU requires.[55] Specifically, the United States noted that, for the first time, the Appellate Body extended the time period for issuing a report beyond 90 days without "consulting with, and obtaining the agreement of, the parties to the dispute."[56] While acknowledging the Appellate Body's heavy workload, the United States alleged the Body failed to explain the reasons for the delay to the disputing parties or WTO membership, or furnish the disputing parties with the opportunity to provide input about the delay.[57]

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[50] DSU, *supra* note 3, art. 17.5.

[51] *Id*. The DSU directed the Appellate Body to establish Working Procedures to govern its proceedings in consultation with the WTO's Director-General and the head of the DSB and communicate them to the WTO membership. *Id*. art. 17.9 ("Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information."). In fact, in Rule 23*bis* of the Working Procedures, which addresses amendments to Notices of Appeal, the Appellate Body references " the requirement to circulate the appellate report within the time-period set out in Article 17.5 of the DSU or, as appropriate, Article 4.9 of the SCM Agreement." *Working Procedures for Appellate Review*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

[52] Appellate Body Report, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO DOC. WT/DS399/AB/R, ¶¶ 339–40 (Sept. 5, 2011).

[53] *See United States—Tyres*, Statement by the United States at the Meeting of the Dispute Settlement Body on October 5, 2011, WTO DOC. WT/DSB/M/304 (Dec. 2, 2011).

[54] *Id*. at 1.

[55] *Id*. at 2.

[56] *Id*.

[57] *Id*. The United States raised similar concerns following several other Appellate Body decisions. *See, e.g.*, *Ukraine—Ammonium Nitrate* (Russia) (DS493): Statement by the United States, Meeting of the Dispute Settlement Body on September 30, 2019 (WT/DSB/M/434), at 13, https://geneva.usmission.gov/wp-content/uploads/sites/290/Sept30.DSB_.Stmt_.as-deliv.fin_.public.pdf (arguing that an Appellate Body report "was not issued within 90 days, consistent with the requirements of Article 17 of the DSU, [and, thus,] it [was] not an 'Appellate Body report' under Article 17, and therefore it [was] not subject to the adoption procedures reflected in Article 17.14"); *Argentina—Measures Affecting the Import of Goods* (DS438, DS444, DS445): Statement by the United States, Meeting of the Dispute Settlement Body on January 26, 2015 (WT/DSB/M/356), at 10, https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan26.DSB_.Stmt_.as-delivered.Fin_.Public.pdf ("The Appellate Body also continued its recent deviation from its pre-2011 practice and 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 yet again merely informed the parties via form letter that it would not circulate its report within the prescribed time limit."); *China—Raw Materials (United States, EC, Mexico)* (DS394, DS395, DS398): Statement by the United States, Meeting of the Dispute Settlement Body on February 22, 2012 (WT/DSB/M/312), ¶ 106 ("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." (citations omitted)); *European Communities—Definitive Anti-*

In disputes where the Appellate Body has exceeded the DSU's deadline by taking more than 90 days to issue its decision, it could be argued that it has exceeded its mandate. The USTR's complaint about the Appellate Body exceeding the deadline for issuing a report, however, is arguably not solely about deadlines, but also about broader concerns about how the Appellate Body operates. For instance, prior to issuing a decision outside of the DSU's time frame, the Appellate Body has typically notified the disputing parties.[58] In these notifications, the Appellate Body has explained that it is issuing the report late, often because of the complexity of the issues in dispute and limited staff resources.[59] When the United States first raised the timeliness issue, it criticized the Appellate Body for *not* consulting the disputing parties before issuing a notice of delay.[60] This suggests that the United States may sometimes accept the practical need for an extension, but is more concerned about lack of transparency or "due process" in how the Appellate Body relates to and communicates with disputing parties.

Additionally, the U.S. complaint may reflect a sense that the Appellate Body has taken too much control of the proceedings away from the parties when it fails to consult them in advance of issuing a notice of delay.[61] The United States has also argued that the Appellate Body, in exceeding the time for issuing a report and in neglecting to notify third parties to the dispute,[62] has enabled itself to write lengthy reports that include advisory opinions on issues not raised by the parties.[63] Thus, U.S. complaints about the Appellate Body requiring additional time to complete its reports may reflect a deeper concern that the Appellate Body is using extensions of time to exceed its mandate in other ways.

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dumping Measures on Certain Iron or Steel Fasteners from China (DS397): Statement by the United States, Meeting of the Dispute Settlement Body on July 28, 2011 (WT/DSB/M/301), https://geneva.usmission.gov/2011/07/28/statement-by-the-united-states-at-the-july-28-2011-dsb-meeting/ (stating that, even as a third party to a dispute between other members, the United States was entitled to notice of the delay and an explanation).

[58] *See, e.g.*, Communication from the Appellate Body, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO DOC. WT/DS399/7, at 1 (July 27, 2011).

[59] *See, e.g.*, Communication from the Appellate Body, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Docs. WT/DS394/13, WT/DS395/13, WT/DS398/12, at 1 (Dec. 8, 2011); Communication from the Appellate Body, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO DOC. WT/DS397/9, at 1 (July 5, 2011).

[60] *See United States–Tyres*, Statement by the United States at the Meeting of the Dispute Settlement Body on October 5, 2011, WTO DOC. WT/DSB/M/304, at 2 (Dec. 2, 2011).

[61] The United States' free trade agreement (FTA) practice may support this reading of the USTR's complaint. In its most recent FTA, the U.S.-Mexico-Canada Agreement, dispute panels must issue initial reports within 150 days, although in "exceptional cases" they may notify the disputing parties that they require an extension of up to 30 days. Longer extensions may be authorized with the disputing parties' consent. *See* Agreement between the United States of America, the United Mexican States, and Canada art. 31.17, Nov. 30, 2018, *as amended by* Protocol of Amendment, Dec. 10, 2019. Other FTAs also impose deadlines to which panels must adhere "unless the Parties agree otherwise." *See, e.g.*, Agreement Between the United States of America and Australia art. 21.9, May 18, 2004; Agreement Between the United States of America and the Republic of Korea art. 22.11, Dec. 3, 2010, *as amended by* Protocol of Amendment, Sept. 24, 2018.

[62] *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371): Statement by the United States at the Meeting of the Dispute Settlement Body on July 15, 2011, WTO DOC. WT/DSB/M/299, at 4.

[63] Statement by the United States Concerning Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Meeting of the Dispute Settlement Body on June 22, 2018, at 18–19, https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf. For more on the Appellate Body's purported issuance of advisory opinions, see "Issuing Advisory Opinions" *infra*.

Allowing Former Appellate Body Members to Decide Cases

Another USTR concern about the WTO Appellate Body is that it has allowed members whose terms of office have expired to decide cases assigned to them during their term.[64] The DSU provides that the DSB "shall appoint persons to serve on the Appellate Body for a four-year term," that "each person may be reappointed once," and that "[v]acancies shall be filled as they arise."[65] The DSU's text does not address whether an Appellate Body member may serve beyond the end of his or her term. However, the DSU directed the Appellate Body to adopt Working Procedures to govern dispute settlement proceedings.[66] When promulgating its procedural rules, the Appellate Body interpreted the DSU as granting it the authority to extend a member's term in limited circumstances. Rule 15 of these procedures states as follows:

> 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.[67]

The Appellate Body has therefore allowed some members to continue to serve after their terms have expired in order to complete an appeal they had been working on prior to their term's expiration.

At several DSB meetings following the conclusion of a case in which an Appellate Body member served to complete an appeal after the expiration of his or her term, the United States has raised objections. For example, after the Appellate Body's decision in *European Communities—Measures Affecting Trade in Large Civil Aircraft*, the United States brought a compliance proceeding against the European Union, arguing it continued to subsidize Airbus in violation of its WTO obligations.[68] Although the Appellate Body issued a ruling favorable to the United States, the U.S. representative nonetheless raised concerns that the Appellate Body allowed members to serve on the tribunal long after their terms had expired without DSB approval.[69] In other statements, the United States has argued that the Appellate Body, in its application of Rule 15, has violated the DSU by effectively appointing former members to serve on its panel—a task

[64] USTR REPORT, *supra* note 8, at 32.

[65] DSU, *supra* note 3, art. 17.2.

[66] *Id.* art. 17.9.

[67] *Working Procedures for Appellate Review: Rule 15*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#:~:text=Working%20procedures%20%20for%20appellate%20review%201%201., organization%20or%20any%20private%20source.%20More%20items...%20.

[68] *See* Appellate Body Report, *European Communities and Certain Member State—Measures Affecting Trade in Large Civil Aircraft (Recourse to Article 21.5 of the DSU by the United States)*, WTO DOC. WT/DS316/AB/RW, ¶ 1.1 (May 15, 2018).

[69] *European Communities—Large Civil Aircraft (Article 21.5—US)* (DS316): Statement by the United States, Meeting of the Dispute Settlement Body on May 28, 2018, at 15, https://geneva.usmission.gov/2018/05/28/statements-by-the-united-states-at-the-may-28-2018-dsb-meeting/ ("As the United States explained at the November meeting of the DSB in the context of the *Indonesia—Horticultural Products, Animals, and Animal Products* dispute, Mr. Ramirez's term expired on June 30, 2017. The DSB has taken no action to permit him to continue to serve as an Appellate Body member, and, therefore, he was not an Appellate Body member on the date of circulation of this report. Similarly, Mr. Van den Bossche's term expired on December 11, 2017, and the DSB also has taken no action to permit him to continue to serve as an Appellate Body member.").

delegated to the DSB by the DSU.[70] According to the United States, reports produced by Appellate Body members whose terms have expired are invalid.[71]

Differences in the way in which the United States and the Appellate Body interpret the DSU reflect a divergence in how to interpret "gaps" in the WTO Agreements. The U.S. position seems to reflect a strict reading of the agreements under which the Appellate Body could not promulgate and apply Rule 15 because the WTO members did not expressly permit the adoption of such a procedural rule. Under this view, such a practice would be valid only if the DSU or DSB explicitly permitted Appellate Body members to complete pending appeals when their terms expired (as the statutes creating the International Criminal Court[72] and International Court of Justice[73] do).

Rule 15 represents a flexible and pragmatic approach to interpreting the DSU, which acknowledges that unforeseen situations invariably arise with regard to legal texts and, absent an express instruction not to "fill the gap," the relevant body or institution may adopt an interpretation to address the issue.[74] In other words, because the DSU directs the Appellate Body to draft rules of procedure and does not expressly prohibit these rules from addressing the resolution of pending cases when an Appellate Body member's term lapses, Rule 15 is a permissible exercise of the Appellate Body's rulemaking authority. As the Appellate Body has expressed, Rule 15 "has ensured the efficient functioning of the Appellate Body whenever its composition changed,"[75] and reflects the practices of many other international organizations that allow outgoing arbitrators to complete a case or appeal.[76] Allowing Appellate Body members to serve in these circumstances may avoid a scenario in which the Appellate Body might have to reconsider an appeal from the beginning with a new panel of appellate judges—or simply discontinue an ongoing appeal—because one of its member's terms has ended.[77] Whether this practice is desirable or defensible depends on how one views the appropriate role of the Appellate Body with regard to addressing "gaps" in the WTO Agreements, particularly where the Appellate Body has been given a general authority to create rules of procedure.

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[70] Statement by the United States Concerning Appellate Body Matters, Meeting of the Dispute Settlement Body on February 28, 2018, at 10-13, https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_.Stmt_.as-delivered.fin_.public-1.pdf ("As we have stated before, the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving.").

[71] *See Ukraine—Anti-dumping Measures on Ammonium Nitrate* (DS493): Statement by the United States, Meeting of the Dispute Settlement Body on September 30, 2019 (WT/DSB/M/434), at 15, https://geneva.usmission.gov/wpcontent/uploads/sites/290/Sept30.DSB_.Stmt_.as-deliv.fin_.public.pdf. Despite its objections, the United States nevertheless voted to adopt the Appellate Body report. *Id.*

[72] Rome Statute of the International Criminal Court, art. 36.10, July 17, 1998, 2187 U.N.T.S. 3 (for judges of a Trial or Appeals chamber).

[73] Statute of the International Court of Justice, art. 13.3, June 26, 1945, 33 U.N.T.S. 933.

[74] By comparison, consider the approach taken by U.S. executive agencies, which often "fill gaps" or lend more precision to undefined terms in statutes. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007) ("We have previously pointed out that the 'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" (internal quotation omitted)).

[75] Appellate Body Report, *Background Note on Rule 15 of the Working Procedures for Appellate Body Review, Annex 2* (Nov. 24, 2017).

[76] *Id.*

[77] Steve Charnovitz, *A Defense of the Beleaguered WTO Appellate Body*, IELP BLOG (May 9, 2019), https://worldtradelaw.typepad.com/ielpblog/2019/05/a-defense-of-the-beleaguered-wto-appellate-body.html.

Reviewing Panel Findings of Fact

The USTR has also alleged that the Appellate Body improperly reviews WTO dispute settlement panels' factual findings.[78] The DSU's text does not clearly address whether the Appellate Body may review a panel's factual determinations. Article 11 of the DSU, which establishes the role of WTO panels, provides that a panel should

> make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[79]

Article 17.6, which addresses Appellate Body reports, provides that an "appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."[80] The agreement does not further clarify which issues on appeal constitute "issues of law" or "legal interpretations" subject to appellate review. Controversy over the Appellate Body's review of a panel's factual findings generally concerns two issues: (1) the Appellate Body's apparently shifting standard of review of factual findings; and (2) the Appellate Body's review of a panel's factual determinations regarding the meaning and operation of a WTO member's domestic laws.

General Factual Determinations

A WTO member appealing a panel report may lodge a so-called "Article 11 claim."[81] In general, such claims allege that the panel failed to make an "objective assessment" of the facts of the case as required by Article 11 of the DSU.[82] The United States has complained that the Appellate Body, in resolving these Article 11 claims, has applied differing and increasingly less deferential standards of review to WTO panels' factual determinations that find no basis in the WTO Agreements. For example, in 1998, the Appellate Body articulated the standard of review as whether the panel committed an "egregious error that calls into question the good faith of the panel."[83] Subsequently, it has described the standard of review as whether the panel "exceeded its authority"; whether the panel provides "a reasoned and adequate explanation for its findings and coherent reasoning"; and whether the panel's review is "internally incoherent and inconsistent."[84]

From the USTR's perspective, the Appellate Body's use of its own standards to review a panel's factual determinations demonstrates the Appellate Body has acted outside of its authority.[85] Further, the USTR contends the Appellate Body's gradual lowering of the standard of review raises the risk that it may improperly "second-guess" the application of domestic law by panels

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[78] USTR REPORT, *supra* note 8, at 37.

[79] DSU, *supra* note 3, art. 11.

[80] *Id.* art. 17.6. *See also id.* art. 17.12 ("The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding."); *id.* art. 17.13 ("The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.").

[81] *See, e.g.*, Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO DOC. WT/DS166/AB/R, ¶¶ 147–48 (Dec. 22, 2000).

[82] *See id.* Article 11 requires panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." DSU, *supra* note 3, art. 11.

[83] Appellate Body Report, *EC—Hormones*, WTO DOC. WT/DS26/AB/R, ¶ 133 (Jan. 5, 1998).

[84] USTR REPORT, *supra* note 8, at 39–40 (collecting cases).

[85] *Id.*

and potentially even by domestic tribunals, leading "to the negative consequence of allowing and encouraging WTO members to bring disputed domestic law issues for resolution in the WTO rather than in another member's domestic courts."[86]

Factual Determinations Concerning Domestic Law

Another USTR concern is the Appellate Body's review of panel findings that interpret a WTO member's domestic laws. To determine whether a WTO member's law or other measure violates the WTO Agreements, WTO panels sometimes must decide on the meaning of a member's domestic law. However, the DSU does not specifically indicate whether such panel rulings involve "issues of law" or "legal interpretations" subject to Appellate Body review. The Appellate Body has, in some cases, suggested that it may review a WTO panel's determinations concerning a member's domestic laws, considering such determinations to be issues of law.[87] The USTR, however, considers such interpretations to be factual determinations not subject to appellate review except in narrow circumstances under DSU Article 11.[88]

An example of a case in which the Appellate Body examined a WTO panel's interpretation of U.S. law is *United States—Section 211 Omnibus Appropriations Act of 1998*.[89] In that case, a WTO panel considered a federal law and its implementing regulations that prevented an entity with an interest in a trademark or trade name from renewing or enforcing, without the owner's consent, that trademark or trade name when it was used "in connection with" businesses or assets confiscated by the Cuban government.[90] The European Communities argued that this legal framework violated the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) by discriminating against intellectual property rights-holders of Cuban origin, among other things.[91] Prior to determining whether the U.S. law was WTO-consistent, the panel interpreted the U.S. law.[92]

On appeal, the Appellate Body conducted its own, independent interpretation of the U.S. law, stating, "To address the legal issues raised in this appeal, we must, therefore, necessarily examine the Panel's interpretation of the meaning of Section 211 under United States law."[93] Although the

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[86] *United States—Countervailing and Anti-dumping Measures on Certain Products from China* (DS449): Statement by the United States, Meeting of the Dispute Settlement Body on July 22, 2014 (WT/DSB/M/348), https://geneva.usmission.gov/wp-content/uploads/sites/290/July22-DSB-Stmt-as-delivered.pdf.

[87] *See, e.g.*, Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WTO DOC. WT/DS176/AB/R, ¶ 106 (Jan. 2, 2002) ("An assessment of the consistency of Section 211 with the Articles of the *TRIPS Agreement* and of the Paris Convention (1967) that have been invoked by the European Communities necessarily requires a review of the Panel's examination of the meaning of Section 211."); Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO DOC. WT/DS50/AB/R, ¶ 68 (Dec. 19, 1997) ("And, just as it was necessary for the Panel in this case to seek a detailed understanding of the operation of the Patents Act as it relates to the 'administrative instructions' in order to assess whether India had complied with Article 70.8(a), so, too, is it necessary for us in this appeal to review the Panel's examination of the same Indian domestic law.").

[88] *United States—Section 211 Appropriations Act* (DS176): Statement by the United States, Meeting of the Dispute Settlement Body on February 1, 2002, WTO DOC. WT/DSB/M/119, ¶ 27.

[89] Report of the Panel, *United States—Section 211 of the Omnibus Appropriations Act of 1998*, WTO DOC. WT/DS176/R, ¶ 8.83 (Aug. 6, 2001).

[90] *Id.* ¶ 2.1.

[91] *Id.* ¶ 4.5.

[92] *See, e.g.*, *id.* ¶ 8.83.

[93] Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, *supra* note 88, ¶ 106. *See also* Appellate Body Report, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WTO DOC. WT/DS449/AB/R, ¶ 4.101 (July 7, 2014) ("Although factual aspects may be involved in the

Appellate Body generally agreed with the panel's interpretation of the U.S. law at issue, in the aftermath of the *Section 211* case, the U.S. representative expressed concerns at a DSB meeting that the Appellate Body violated Article 17.6 of the DSU by reviewing factual matters instead of limiting itself to review of legal matters.[94] The United States argued that only a panel could make factual determinations concerning "what a municipal law meant and how it operated," and that the Appellate Body was limited to making legal determinations about "whether—given a particular meaning and operation—the municipal law was consistent with WTO obligations."[95] In other statements before the DSB, the United States has similarly argued that "the manner in which a challenged measure operate[s] within a Member's domestic system [is] a factual issue in a dispute, not a legal issue concerning the applicability of, and conformity with, the covered agreements."[96]

Assessing the USTR's Arguments

As the WTO Agreements do not clarify which issues on appeal constitute "legal interpretations" or "legal findings and conclusions" subject to appellate review, it could be argued that the Appellate Body has some leeway to address factual issues.[97] The line between law and fact can be difficult to distinguish, and applying a specific law or legal rule to facts may blur the distinction.[98] Moreover, addressing legal claims may require that the appellate tribunal address interpretations of domestic law or other factual issues. Such difficulties in distinguishing factual issues from legal interpretations are not unique to the WTO, but arise in other legal systems that limit their courts of appeal to reviewing points of law.[99]

With regard to Article 11 appeals, the literature suggests that the Appellate Body has been inconsistent in how it determines whether a panel has made an objective assessment of the facts of the dispute.[100] Inconsistency by itself does not necessarily demonstrate that the Appellate Body has exceeded its authority. Nonetheless, a less deferential standard of review that might enable the

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individuation of the text and of some associated circumstances, an assessment of the meaning of a text of municipal law for purposes of determining whether it complies with a provision of the covered agreements is a legal characterization." (internal citation omitted)).

[94] *United States—Section 211 Appropriations Act* (DS176): Statement by the United States, Meeting of the Dispute Settlement Body on February 1, 2002, WTO DOC. WT/DSB/M/119, ¶ 27 ("Under Article 17.6 of the DSU, the Appellate Body's review was limited to issues of law and legal interpretation, not issues of fact. In this dispute, the Appellate Body had blurred this distinction by concluding that an examination of the meaning of municipal law – in this case Section 211 – was within its mandate.").

[95] *Id.*

[96] *China—Measures Affecting Imports of Automobile Parts* (DS339, DS340, DS342): Statement by the United States, Meeting of the Dispute Settlement Body on January 12, 2009, WTO DOC. WT/DSB/M/262, ¶ 5.

[97] *See* DSU, *supra* note 3, art. 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."); *id.* art. 17.13 (stating that the Appellate Body "may uphold, modify or reverse the legal findings and conclusions of the panel"); Charnovitz, *supra* note 77.

[98] *See, e.g.*, Simon Lester, *The Development of Standards of Appellate Review for Factual, Legal and Law Application Questions in WTO Dispute Settlement*, 4 TRADE, L. & DEV. 125, 148 (2012) (discussing the difficulties in distinguishing between legal and factual matters in WTO Appellate Body review).

[99] *See, e.g.*, *id.*; Takis Tridimas, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, 9 INT'L J. OF CONST. L. 737, 741 (2011) (discussing the Court of Justice of the European Union and stating: "The difference between making findings of fact and providing an outcome may sometimes be difficult to draw and has given rise to problems in national proceedings.").

[100] *See, e.g.*, ALAN YANOVICH, *General Considerations for Appeal*, *in* PRACTICAL ASPECTS OF WTO LITIGATION 141, 147 (Marco Tulio Molina Tejada ed., 2020) (noting the Appellate Body "has not always been consistent in terms of the threshold required to succeed on an Article 11 claim").

Appellate Body to "second guess" a panel, as the USTR alleges, could arguably be viewed as allowing the appeals tribunal to find or review facts in a manner divorced from their application to the law—actions potentially contrary to the DSU.

It is unclear which, if any, of the Appellate Body's standards for deciding whether a panel has made an "objective assessment of the facts" the USTR believes is appropriate. The USTR's 2020 report on the Appellate Body may suggest that it believes this part of Article 11 should never serve as the basis for appeals.[101] In other words, the USTR may believe the Appellate Body should be limited to hearing claims that the panel misinterpreted the meaning of a WTO Agreement, or misapplied the agreement to the facts; it should not be permitted to review whether a panel failed to make an objective assessment of the facts. As the USTR stated in its report:

> Not surprisingly, since the DSU does not provide for the Appellate Body to conduct a review of factual findings, no provision in the DSU refers to a "standard of review" for such an assessment. Faced with this lack of any agreed "standard of review," the Appellate Body asserted that Article 11 of the DSU provided such a standard. In so doing, however, the Appellate Body again ignored the text of the DSU and simply asserted that the DSU text said something different from what WTO Members agreed.[102]

As discussed, the USTR has also complained about the Appellate Body's review of WTO panels' interpretations of domestic law. Similar to Article 11 claims, the validity of the USTR's concerns may turn on the Appellate Body's method for carrying out such review. For example, reviewing how a panel's interpretation of a domestic measure led to the panel's determination of a measure's WTO-consistency or inconsistency may be less objectionable, as the issue is arguably one of the Appellate Body reviewing the application of law to facts. However, treating a panel's characterization of a domestic measure as a reviewable issue on appeal may be more fairly criticized as treating a factual matter as one of law.[103] The Appellate Body itself has characterized the latter as a factual matter and declined to review a panel's characterization of a domestic measure in some disputes.[104] Given the Appellate Body's inconsistent approach, it may be that the USTR's concern may be relevant to some disputes, but it may not amount to a systemic practice. As with Article 11 appeal issues, this may suggest that the overarching issue is not general overreach but inconsistency, which might reflect Appellate Body error rather than an intention to exceed the Appellate Body's mandate.

Issuing Advisory Opinions

The USTR often complains that the WTO's Appellate Body has issued what the agency considers to be advisory opinions when deciding an appeal—i.e., opinions that include discussion of issues that are unnecessary to resolve the controversy.[105] The WTO Agreements do not specifically address the issue of advisory opinions. Rather, DSU Article 3.7 provides, "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."[106] The DSU limits a WTO

[101] *See* USTR REPORT, *supra* note 8, at 38.

[102] *Id*.

[103] *See, e.g.*, Lester, *supra* note 98, at 143–44.

[104] *See* Tania Voon & Alan Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, 40 J. WORLD TRADE 239, 251–52 (2006).

[105] USTR REPORT, *supra* note 8, at 47. As discussed below, whether the Appellate Body's statements constitute advisory opinions may depend on how one understands the term "advisory opinion" and the Appellate Body's role.

[106] DSU, *supra* note 3, art. 3.7. In an early WTO dispute, the Appellate Body stated: "Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of

panel's standard "terms of reference" (i.e., its jurisdiction) to those matters and WTO-agreement provisions referred to the DSB by the complaining party.[107] Also, Article 17.6, which addresses Appellate Body reports, provides that an "appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."[108]

One oft-cited example of a dispute in which the Appellate Body allegedly issued a lengthy advisory opinion is *Argentina—Measures Related to Trade in Goods and Services*.[109] In that case, Panama alleged that several of Argentina's laws regulating financial services discriminated against countries "not cooperating for tax transparency purposes" like Panama.[110] A threshold issue in the panel's discrimination analysis concerned whether the services and service suppliers of Panama were "like" (generally, "comparable") to those of Argentina and other countries.[111] Without "likeness" there could be no illegal discrimination.[112]

The Appellate Body reversed the panel's findings on "likeness," determining that it had erred in its conclusion that the services and service suppliers at issue were comparable.[113] Having found that no discrimination could have occurred, the appeals tribunal could have concluded its analysis.[114] Nonetheless, the Appellate Body continued its discrimination analysis because, in its view, "several of the issues raised in Panama's appeal [had] implications for the interpretation of provisions of the GATS [General Agreement on Trade in Services]."[115] Although the panel addressed many of the issues the Appellate Body discussed in its subsequent opinion on the discrimination issue, the United States complained that the Appellate Body's analysis on this issue amounted to an advisory opinion.[116]

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resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO DOC. WT/DS33/AB/R, 19–20 (Apr. 25, 1997).

[107] DSU, *supra* note 3, art. 7. *See also id.* art. 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."); *id.* art. 6.2 ("The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."); *id.* art. 11 ("The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.").

[108] *Id.* art. 17.6. *See also id.* art. 17.12 ("The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding."); *id.* art. 17.13 ("The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.").

[109] Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO DOC. WT/DS453/AB/R, ¶ 1.1 (Apr. 14, 2016).

[110] *Id.*

[111] *Id.* ¶ 6.1.

[112] *See generally* WTO, General Agreement on Trade in Services (GATS) arts. II:1, XVII, Apr. 15, 1994, https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

[113] *Argentina—Measures Relating to Trade in Goods and Services*, *supra* note 110, ¶ 6.83.

[114] *Id.* ("Our reversal of these findings means that the Panel's findings on 'treatment no less favourable' are moot because they were based on the Panel's findings that the relevant services and service suppliers are 'like.' Moreover, as a consequence of our reversal of the Panel's 'likeness' findings, there remains no finding of inconsistency with the GATS.").

[115] *Id.* ¶ 6.84.

[116] USTR REPORT, *supra* note 8, at 53. *Argentina—Measures Related to Trade in Goods and Services* (DS453):

Other disputes in which the United States has argued that the Appellate Body has issued advisory opinions include the following:

- *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*. The United States and other WTO members argued that the Appellate Body, after determining the United States had not violated its WTO obligations by continuing to engage in DSB-authorized trade retaliation against the European Communities, nonetheless issued an advisory opinion when it recommended that the DSB instruct the parties to commence a new dispute settlement case.[117]
- *China—Publications and Audiovisual Products*. The United States argued that the Appellate Body issued an improper advisory opinion regarding whether China could invoke a defense under the GATT to defend against a claim brought under its Protocol of Accession—an issue not raised by the parties on appeal or resolved by the panel.[118]
- *Indonesia—Importation of Horticultural Products, Animals and Animal Products*. The United States argued that the Appellate Body should not have examined an issue on appeal involving a particular GATT provision when the appellant did not ask for an analysis of the issue or defend its contested measure under that provision.[119]

At an October 2018 DSB meeting, the United States made a lengthy statement regarding the issuance of advisory opinions.[120] The United States defined an "advisory opinion" as "a non-binding statement on a point of law given by an adjudicator before a case is tried or with respect to a hypothetical situation."[121] Characterizing the issue as "systemic" and "significant," the United States argued that WTO adjudicators exceeded their authority and "made law" when they engaged in such interpretations instead of resolving a particular controversy, contrary to the principles of the WTO Agreements.[122] The United States noted that if WTO members wanted clarity on issues that were unnecessary to a dispute's resolution, they could seek a formal interpretation of the relevant legal provisions using the procedure set out in Article IX:2 of the Agreement Establishing the WTO.[123] The United States also argued that the issuance of advisory opinions resulted in lengthier proceedings, needlessly complicated WTO reports, and did not take into account all aspects of a particular legal issue.[124]

Statement by the United States at the Meeting of the Dispute Settlement Body on May 9, 2016, WTO DOC. WT/DSB/M/378, at 4 ("Having resolved the appeal on the first, threshold issue of 'likeness,' it would have been appropriate to stop the analysis at this point. Indeed, given the unusual circumstances, there were even greater reasons than usual to consider only those issues necessary to resolve the dispute.").

[117] Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the Dispute Settlement Body on October 29, 2018, at 20–21, https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

[118] *Id*. at 22.

[119] *Id*. at 23.

[120] *Id*.

[121] *Id*. at 10 (quoting *Advisory Opinion*, OXFORD DICTIONARIES, https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm).

[122] *Id*.

[123] *Id*. at 11–12.

[124] *Id*. at 25–26.

Whether the Appellate Body's statements constitute advisory opinions may depend on how one understands the term "advisory opinion" and the Appellate Body's role. On one hand, the Appellate Body's discussions in many of the cases cited by USTR might be advisory in the sense that they were unnecessary to the dispute's outcome, as the USTR has argued.[125] However, this view relies on a common law understanding of *dicta* (i.e., an adjudicator's statements that are unrelated to issues necessary to the resolution of a dispute), which the international law system generally, and the WTO specifically, does not necessarily incorporate.[126] Thus, it might be argued that the USTR's concerns on this point are misplaced.

Moreover, although the Appellate Body is required to limit its review of panel decisions "to issues of law covered in the panel report and legal interpretations developed by the panel," a central aim of the WTO dispute settlement system is to "clarify the existing provisions of [the relevant WTO] agreements."[127] This objective could imply that the Appellate Body may discuss all elements of the WTO provisions relevant to the dispute even if unnecessary to the dispute's outcome.[128]

Finally, DSU Article 17.12 obliges the Appellate Body to "address" all issues properly raised on appeal and covered by the panel report.[129] Therefore, one could argue that the Appellate Body is required to address all elements of a relevant WTO Agreement provision that any disputing party has included in its notice of appeal, even if unnecessary to the dispute's outcome.[130] For example, in the *Argentina—Financial Services* case, the Appellate Body could have completed its report after determining the panel erred in its "likeness" analysis, as the USTR suggested.[131] However, Panama's separate appeal in the same dispute raised the issue of whether the panel erred in its "less favourable treatment" (i.e., discrimination) analysis.[132] Thus, under one reading of Article 17, the Appellate Body was arguably required to address the issues that Panama raised even though they may not have been necessary to resolve the dispute.[133]

Declining to Make Recommendations on WTO-Inconsistent Measures That Expire After Panel Establishment

The USTR has argued that some WTO panels have ignored the WTO dispute settlement system's rules by refusing to issue a recommendation on challenged measures when those measures expired after a panel had been established to hear the case.[134] The DSU directs panels and the Appellate Body, upon finding that a WTO member has failed to comply with its WTO

[125] *See supra* notes 117–24.

[126] Henry S. Gao, *Dictum on Dicta: Obiter Dicta in WTO Disputes*, 17(3) WORLD TRADE REV. 509, 511, 517–19 (2018).

[127] DSU, *supra* note 3, art. 3.2.

[128] Gao, *supra* note 126, at 531; Giorgio Sacerdoti, *A Comment on Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes,'"* 17(3) WORLD TRADE REV. 535, 537 (2018) (also noting the role of Art. 3.2).

[129] DSU, *supra* note 3, art. 17.12.

[130] *See* Gao, *supra* note 126, at 531.

[131] USTR REPORT, *supra* note 8, at 53.

[132] Notification of an Appeal by Panama Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Under Rule 20(1) of the Working Procedures for Appellate Review, *Argentina—Measures Relating to Trade in Goods and Services*, WTO DOC. WT/DS453/7, at 1 (Oct. 30, 2015).

[133] *See* Gao, *supra* note 126, at 531.

[134] USTR REPORT, *supra* note 8, at 64–68.

obligations, to issue a recommendation directing that member to bring its measures into conformance with the WTO Agreements.[135] In some cases, however, a WTO panel has declined to recommend that the defending WTO member bring its measure into conformity with its WTO obligations, asserting its discretion to refrain from issuing such a recommendation because the measure expired after the panel was established.[136]

As the Appellate Body has acknowledged, "The DSU does not specifically address whether a WTO panel may or may not make findings and recommendations with respect to a measure that expires or is repealed during the course of the panel proceedings."[137] The United States has argued that because DSU Article 19.1 expressly requires that panels issue recommendations on measures found to be inconsistent with the WTO Agreements, the tribunal lacks discretion to avoid issuing such recommendations even if the measure expired during the dispute.[138] Such recommendations are necessary, the USTR has argued, to prevent members from imposing trade measures "through annually recurring legal instruments [that] could never be successfully challenged through WTO dispute settlement."[139]

Notwithstanding the USTR's perspective, it could be argued that once a measure has expired, the measure can no longer be inconsistent with the WTO Agreements, and thus a panel *may* decline to give recommendations.[140] As the Appellate Body has noted, "there is an obvious inconsistency" between a panel finding that a measure is "no longer in existence" and then recommending that the DSB request the WTO member bring the measure into conformity with its WTO obligations.[141] Nonetheless, the Appellate Body and panels have been inconsistent in practice when deciding whether to provide recommendations concerning expired measures. This may

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[135] DSU, *supra* note 3, art. 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."). *See also id*. art. 7.1 (setting forth a WTO panel's standard terms of reference); *id*. art.11 (stating that a panel should "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements").

[136] *See, e.g.*, Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, ¶ 264 (Jan. 30, 2012) ("In general, in cases where the measure at issue consists of a law or regulation that has been repealed during the panel proceedings, it would seem there would be no need for a panel to make a recommendation in order to resolve the dispute."); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas III (Article 21.5—Ecuador II) / EC—Bananas III (Article 21.5—United States)*, WTO Docs. WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, ¶ 270 (Nov. 26, 2008) ("We thus consider it to be within the discretion of the panel to decide how it takes into account subsequent modifications or a repeal of the measure at issue. Accordingly, panels have made findings on expired measures in some cases and declined to do so in others, depending on the particularities of the disputes before them.").

[137] Appellate Body Report, *China–Measures Related to the Exportation of Various Raw Materials*, WTO DOC. WT/DS394/AB/R, ¶ 263 (Jan. 30, 2012).

[138] Statement by the United States, Meeting of the Dispute Settlement Body on September 29, 2017, at 7, https://geneva.usmission.gov/wp-content/uploads/sites/290/Sept29.DSB_.Stmt_.as-delivered.fin_.public.pdf.

[139] USTR REPORT, *supra* note 8, at 67.

[140] Depending on how one construes the phrase "advisory opinion," this particular USTR complaint may be in tension with its concern that the Appellate Body is issuing advisory opinions. More specifically, if a measure has expired, issuing a recommendation that the WTO member bring the measure into conformity might be viewed as unnecessary to resolving a dispute, and therefore advisory in nature.

[141] Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WTO DOC. WT/DS165/AB/R, ¶ 81 (Dec. 11, 2000).

invite criticism that they are exceeding their mandate or altering the rights and obligations of WTO members.[142]

While it may be defensible for the Appellate Body to articulate a standard by which it (and dispute panels) may refuse to issue recommendations that lack practical effect, the Appellate Body may need to reframe its approach to assuage concerns that its actions contravene the DSU. For instance, the Appellate Body might define the term "measure" in DSU Article 19.1 as reaching "only measures which represent ongoing infringements of WTO Agreements or have legal effect beyond [their] superficial expiry."[143] Alternatively, it might draw on principles of public international law, such as the principle of utility,[144] to justify declining to recommend that a WTO member bring its measure into conformity in such circumstances.[145]

Treating Prior Decisions as Binding Precedent

Another central USTR complaint concerns the Appellate Body's apparent insistence that its rulings are precedential and must be followed by WTO panels absent "cogent reasons."[146] The DSU states that the dispute settlement system "is a central element in providing security and predictability to the multilateral trading system."[147] Although a general policy of adhering to prior rulings may support such security and predictability, the USTR maintains that, contrary to the DSU, the Appellate Body has *required* panels' adherence to prior rulings, thereby overstepping its role in clarifying ambiguous provisions and "add[ing] to or diminish[ing] the rights and obligations" of the WTO members.[148] Article 3.9 of the DSU states that the DSU does not affect the rights of WTO members to seek an "authoritative interpretation of provisions of a covered agreement" through a formal decision by WTO members.[149] Thus, the USTR has argued that the Appellate Body may not require panels to treat its decisions as precedent.[150]

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[142] *See* Arevik Gnutzmann-Mkrtchyan & Isabelle Van Damme, *Expired Measures, Excess Duty Drawbacks and Causation: The Appellate Body Report in* EU-PET (Pakistan), 19 WORLD TRADE REV. 232, 236–37 (2020) (discussing various positions taken by panels and the Appellate Body).

[143] Prakhar Bhardwaj, *Towards a Coherent Theory of Panel Recommendations for Expired Measures*, 22 J. INT'L ECON. L. 483, 500 (2019).

[144] Generally, the principle of utility "is concerned with whether or not it would be appropriate to render judgment when the object of the claim has ceased to exist or been achieved independently of the dispute settlement process." Andrew D. Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 MICH. J. INT'L L. 559, 602 (2010).

[145] *Id.* at 606.

[146] Appellate Body Report, *United States—Final Anti-dumping Measures on Stainless Steel*, WTO DOC. WT/DS344/AB/R, ¶ 160 (Apr. 30, 2008) ("Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.").

[147] DSU, *supra* note 3, art. 3.2.

[148] *Id.*

[149] *Id.* art. 3.9.

[150] *See generally* DSU, *supra* note 3, art. 7.1 (directing panels generally to examine complaints "in the light of the relevant provisions" of the agreements cited by parties to the dispute); *id.* art. 11 ("[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."); *id.* art. 19.2 ("In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.").

In an early case, the Appellate Body suggested that its rulings were not entitled to precedential weight. In *Japan—Taxes on Alcoholic Beverages II*, the Appellate Body indicated that its interpretations of the WTO Agreements were not definitive and did not bind WTO members outside of a particular dispute.[151] Nonetheless, in its 2008 report in *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, the Appellate Body stated that WTO panels should adhere to the Appellate Body's prior decisions in the absence of "cogent reasons" for departing from them.[152] The Appellate Body sought to justify this ruling on the following grounds: (1) WTO members rely upon its rulings, and (2) Article 3.2 of the DSU names the promotion of security and predictability in the dispute settlement system as one of the WTO's objectives.[153] Since the Appellate Body's *Stainless Steel* decision, several WTO panel rulings have expressly stated their reliance on prior Appellate Body decisions.[154]

In a December 2018 DSB meeting, the U.S. representative argued that the Appellate Body should cease treating its reports as binding precedent.[155] In particular, the United States argued that the Appellate Body's treatment of its decisions as binding precedent lacks a basis in the WTO Agreements and would operate as an end-run around the provision for formal interpretations of the WTO Agreements.[156]

As a general matter, international law does not recognize precedent as a legal rule (i.e., the common law principle of *stare decisis* in which tribunals are legally required to follow prior rulings of the same or a higher tribunal). Rather, international law typically recognizes what one might term *de facto* precedent, which results from an adjudicator's attempt to address each individual case on the merits while ensuring stability and predictability in the law.[157] As the USTR has acknowledged, a WTO panel could consider prior Appellate Body decisions to be *de facto* precedents, determining that the Appellate Body's reasoning in one of its prior decisions

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[151] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, WTO DOC. WT/DS8/AB/R, 13–14 (Oct. 4, 1996) ("We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994.").

[152] Appellate Body Report, *United States—Final Anti-dumping Measures on Stainless Steel*, WTO DOC. WT/DS344/AB/R, ¶ 160 (Apr. 30, 2008) ("Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.").

[153] *Id.*

[154] *See, e.g.*, Panel Report, *European Union and its Member States—Certain Measures Relating to the Energy Sector*, WTO DOC. WT/DS476/R, ¶ 7.1350 (Aug. 10, 2018) ("We find no cogent reason to disagree with the legal interpretation of the panel in *India—Solar Cells*."); Panel Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, WTO DOC. WT/DS473/R, ¶ 7.276 (Mar. 29, 2016) ("In the absence of cogent reasons for departing from the approach of the Appellate Body in prior cases, we adopt the same approach.").

[155] Statement by the United States on the Precedential Value of Panel or Appellate Body Reports under the WTO Agreement and DSU, Meeting of the Dispute Settlement Body on December 18, 2018, at 9–12, https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf.

[156] *Id.*

[157] *See, e.g.*, Statute of the International Court of Justice, art. 59, June 26, 1945, 33 U.N.T.S. 933 ("The decision of the Court has no binding force except between the parties and in respect of that particular case."); *Results of the Uruguay Round Trade Negotiations: Hearings before the S. Comm. on Finance*, 103d Cong., 199 (statement of John H. Jackson, Professor, University of Michigan School of Law) ("It should also be understood that the international legal system does not embrace the common law jurisprudence that prevails in the United States which calls for courts to operate under a stricter 'precedent' or 'stare decisis' rule."); Eric De Brabandere, *The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea*, 15 L. & PRAC. OF INT'L CTS. & TRIBUNALS 24, 27 (2016) ("That international law has no doctrine of binding precedent or *stare decisis* is a well-known fact.").

was persuasive and should govern the case before the panel.[158] The USTR, however, seemingly believes the Appellate Body's view that its decisions should be followed "absent cogent reasons" reflects the *de jure* common law sense of precedent instead of the *de facto* sense of precedent.[159]

As some commentators have suggested, the "absent cogent reasons" standard for adhering to prior decisions may amount only to a "restatement" of prior Appellate Body explanations that, for purposes of stability and certainty, it would be "appropriate" and "expected" for panels to rely on Appellate Body reasoning from prior disputes, unless the circumstances of a particular case led the panel to believe it should depart from prior reasoning.[160] In other words, even though the Appellate Body's language on the role of its prior decisions has changed over time, its practice still reflects only the *de facto* sense of precedent in which prior decisions may be persuasive but not binding (similar to what civil law systems refer to as *jurisprudence constante*).

Perhaps the USTR's central concern with the Appellate Body's rulings on the effect of its prior decisions may best be framed as a question of balance. As a former President of the International Court of Justice stated: "A balance must be found for the judge and arbitrator between the necessary certainty and the necessary evolution of the law."[161] It might be argued that the USTR's complaint about the Appellate Body's views on precedent does not reflect disagreement with the general proposition that a WTO panel or the Appellate Body may draw on reasoning adopted in prior cases. Instead, the USTR's concerns may stem from divergent perceptions among the United States and other WTO members about whether the Appellate Body has appropriately balanced certainty in the law with the need to correct (perceived) prior errors, or provide new interpretations to suit new factual situations.

Encroaching on Other WTO Bodies

The United States has also alleged that the Appellate Body has usurped the role of other WTO bodies in at least two ways: (1) by considering some WTO bodies' decisions to be authoritative interpretations of the WTO Agreements even though these decisions were not made in accordance with WTO procedures for formal interpretation of the agreements; and (2) by opining on how other WTO bodies (e.g., the DSB) should perform their responsibilities.[162]

Considering Decisions of Various WTO Bodies to Be Authoritative Interpretations of the WTO Agreements

The USTR has argued that the Appellate Body performs roles delegated to other WTO bodies when it considers decisions by WTO bodies (e.g., the Ministerial Conference, WTO committees, and WTO councils) to be authoritative interpretations of the WTO Agreements, even though such interpretations are not made in accordance with Article IX:2 of the WTO's foundational

[158] Statement by the United States on the Precedential Value of Panel or Appellate Body Reports under the WTO Agreement and DSU, Meeting of the Dispute Settlement Body on December 18, 2018, at 15–16, https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf.

[159] USTR REPORT, *supra* note 8, at 55–56.

[160] James Bacchus & Simon Lester, *The Rule of Precedent and the Role of the Appellate Body*, 54(2) J. WORLD TRADE 183, 192 (2020).

[161] Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) J. INT'L DISPUTE SETTLEMENT 5, 6 (2011), *as translated by* B. McGarry, *orig. pub'd as Le Précedent dans la justice et l'arbitrage international*, Journal de droit international 685 (Clunet 2010).

[162] USTR REPORT, *supra* note 8, at 69–80.

agreement.[163] Article IX:2 of the Marrakesh Agreement provides that the "Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by a vote of three-fourths of the members.[164]

During the early years of WTO dispute settlement, the Appellate Body stated that the specific and exclusive procedure for formal interpretation of the agreements in Article IX:2 was "reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere."[165] Nonetheless, in a few recent rulings, the Appellate Body has determined that decisions of other WTO bodies (e.g., the Ministerial Conference or a WTO committee) not made in accordance with Article IX:2's procedures qualify as relevant interpretations of the WTO Agreements.[166]

One case that the USTR has expressed concern with is the decision in *United States—Measures Affecting the Production and Sale of Clove Cigarettes*.[167] In that dispute, the Appellate Body considered the WTO-consistency of a U.S. tobacco control measure that banned the sale of cigarettes containing clove, which were mostly imported from Indonesia, but not cigarettes containing tobacco or menthol.[168] As part of its analysis, the Appellate Body considered whether the United States had violated Article 2.12 of the Agreement on Technical Barriers to Trade (TBT Agreement), which generally requires that a WTO member "allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member."[169] When interpreting a "reasonable interval" as at least six months, the Appellate Body cited the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns, which was adopted by all WTO members, as a "subsequent agreement" of the WTO membership that had interpreted Article 2.12, despite the fact that it had not been adopted as a formal interpretation of the TBT Agreement in accordance with WTO procedures.[170]

The Appellate Body's approach reflects use of the rules for treaty interpretation contained in the Vienna Convention on the Law of Treaties. The Appellate Body considers these rules to reflect customary international law,[171] and WTO members, including the United States, regularly invoke

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[163] *Id*.

[164] WTO, Marrakesh Agreement Establishing the World Trade Organization, art. IX:2, Apr. 15, 1994, https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

[165] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, *supra* note 152, 13.

[166] *See, e.g.*, Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO DOC. WT/DS381/AB/R, ¶¶ 371–78 (May 16, 2012) ("In the present dispute, we consider that the TBT Committee Decision bears directly on the interpretation of the term 'open' in Annex 1.4 to the *TBT Agreement*, as well as on the interpretation and application of the concept of 'recognized activities in standardization.'").

[167] USTR REPORT, *supra* note 8, at 78.

[168] *See* Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO DOC. WT/DS406/AB/R, ¶ 1 (Apr. 4, 2012).

[169] WTO, Agreement on Technical Barriers to Trade, art. 2.12, Apr. 15, 1994, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm [hereinafter TBT Agreement].

[170] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 169, paras. 251–68.

[171] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, *supra* note 152, 10. *See also* Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 170, ¶ 258 ("Article IX:2 of the *WTO Agreement* does not preclude panels and the Appellate Body from having recourse to a

them when involved in disputes. One of the Vienna Convention rules provides that when interpreting a treaty, an interpreter may take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[172] The United States acknowledged in *Clove Cigarettes* that the 2001 Doha Ministerial decision was potentially relevant material for interpreting the WTO Agreements within the meaning of the Vienna Convention.[173] As the Appellate Body has explained, interpretations adopted under Article IX:2 and subsequent agreements "serve different functions and have different legal effects under WTO law."[174] The first clarifies law for all WTO members while subsequent agreements serve as an interpretive tool used in conjunction with others to determine the meaning of a particular treaty provision. In other words, these two tools can exist simultaneously, as they play separate roles in discerning the meaning of particular treaty provisions. Even if a Ministerial decision is not an authoritative interpretation under Article IX:2, its contents are relevant for purposes of applying the Vienna Convention's rules of treaty interpretation.

The USTR's subsequent complaint about *Clove Cigarettes* might be reframed as reflecting the agency's view that the Appellate Body's Vienna Convention interpretation is tantamount to an attempt to improperly issue authoritative interpretation in contravention of Article IX:2. This view is perhaps more coherent when considered in conjunction with USTR's complaint that the Appellate Body is improperly creating a system of binding precedent. In other words, the USTR views these types of treaty interpretations combined with precedent as the Appellate Body's attempt to supplant the WTO members as the final interpreters of the WTO Agreements. How one views the USTR's argument about Article IX:2 may thus turn on one's views of the debate about precedent.

Opining on How Other WTO Bodies Should Perform Their Responsibilities

Another way in which the United States has argued that the Appellate Body encroaches on the work of other WTO bodies is by opining on how such bodies should perform their responsibilities.[175] For example:

- In *Morocco—Hot-Rolled Steel (Turkey)*, the Appellate Body issued a report in which it opined on the time frames the DSB should follow for adopting the panel and Appellate Body Reports after Morocco withdrew its appeal.[176]
- In *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, the Appellate Body explained "the manner in which the DSB is to implement the information-gathering process provided under Annex V of the Subsidies Agreement."[177] The United States argued that, in opining on the

customary rule of interpretation of public international law that, pursuant to Article 3.2 of the DSU, they are required to apply.").

[172] United Nations, Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. For a more detailed discussion of treaty interpretation, see "The Art of Treaty Interpretation" *infra*.

[173] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes, supra* note 170, ¶ 55.

[174] *Id*. ¶¶ 257–58.

[175] USTR REPORT, *supra* note 8, at 69.

[176] Appellate Body Report, *Morocco—Anti-dumping Measures on Certain Hot-rolled Steel from Turkey,* WTO DOC. WT/DS513/AB/R, ¶¶ 1.18–1.19 (Dec. 10, 2019).

[177] USTR REPORT, *supra* note 8, at 70; Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO DOC. WT/DS353/AB/R, ¶¶ 500–02, 524 (Mar. 12, 2012).

procedures for initiating and conducting the Annex V process, the Appellate Body had overstepped its authority.[178]

- The USTR alleged that Appellate Body members "intruded on the authority of the Dispute Settlement Body" when, in May 2016, they issued a letter in support of a colleague on the Appellate Body whose reappointment the United States had opposed.[179]
- In *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, the Appellate Body found that the United States and Canada had not violated certain WTO provisions by *continuing to impose* authorized retaliatory tariffs.[180] The countries continued to impose tariffs even after the EC issued a Directive that it argued brought it into compliance with the WTO's decision in the *EC—Hormones* dispute concerning the EC's ban on imports of meat that contained artificial growth hormones.[181] The Appellate Body stated, however, that WTO members should seek an Article 21.5 compliance panel if they have lingering disagreements about whether a WTO member has complied with a prior dispute settlement ruling.[182] Following the Appellate Body's decision, the USTR expressed concerns that the Appellate Body "had undertaken unnecessary analyses of provisions of the DSU and invented rules, procedures, and even obligations that were simply not present in the DSU."[183]

Contrary to the USTR's assertions, it could be argued that in these cases, the Appellate Body has not sought to dictate to other WTO bodies how to carry out their duties. Rather, in at least some of the cases cited by USTR, the tribunal sought to respond to questions raised on appeal by the disputing parties, which required it to address ambiguous situations not clearly anticipated by the agreements, or explain how it was exercising its authority in relation to other WTO bodies. For example, in *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, the European Union argued on appeal that the panel erred by declining to rule on whether an Annex V procedure for gathering information on a WTO member's subsidies practices had been initiated.[184] During dispute settlement proceedings, the United States did not object to the Appellate Body ruling on the proper procedure; instead, it offered its own interpretation of what the DSB's initiation of such a procedure required.[185] The Appellate Body then ruled on the question submitted to it, finding the panel erred in denying some of the requests that the European Union made to it regarding Annex V.[186] Thus, although one might read the Appellate Body's opinion as instructing the DSB how to initiate an Annex V procedure, one could also understand

[178] Statement by the United States, *U.S.—Large Civil Aircraft,* Meeting of the Dispute Settlement Body on March 23, 2012, WTO DOC. WT/DSB/M/313, ¶ 73.

[179] USTR REPORT, *supra* note 8, at 74.

[180] Appellate Body Report, *United States—Continued Suspension of Obligations in the* EC—Hormones *Dispute,* WTO DOC. WT/DS320/AB/R, ¶¶ 736–37 (Oct. 16, 2008).

[181] *Id*.

[182] *Id*.

[183] Statement of the United States, Meeting of the Dispute Settlement Body on November 14, 2008, WTO DOC. WT/DSB/M/258, ¶¶ 8–9.

[184] Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint),* WTO DOC. WT/DS353/AB/R, ¶ 35 (Mar. 12, 2012).

[185] *Id*. ¶¶ 84–97.

[186] *Id*. ¶ 501.

it as an attempt to resolve the legal questions submitted to it (and not objected to at the time) by the disputing parties, the latter of which falls squarely within the Appellate Body's ambit.[187]

WTO Disputes Involving Substantive Interpretations of Agreement Obligations

The USTR has alleged that the Appellate Body issued a number of incorrect interpretations of the WTO Agreements, particularly with respect to (1) provisions involving nondiscrimination obligations under the TBT Agreement and GATT and (2) provisions of various WTO Agreements involving trade remedies.[188] This section begins by providing an overview of the principles of treaty interpretation and how they might lead the USTR and Appellate Body (among others) to reach different conclusions about the meaning of the WTO Agreements' substantive provisions. It then surveys the relevant provisions of the WTO Agreements—and WTO dispute settlement cases—related to each of the issues identified in the USTR report.

Contextualizing U.S. Allegations of Inaccurate Interpretations

The United States has argued on a number of occasions that the Appellate Body issued substantively incorrect interpretations of some provisions in the WTO Agreements.[189] This section demonstrates how principles of treaty interpretation may reasonably lead different interpreters to reach different results about the meaning of an international agreement.[190]

Treaty interpretation poses many of the same challenges as statutory or other legal interpretation.[191] In the absence of defined, precise terminology or phraseology, reasonable minds may reach different conclusions.[192] Additionally, treaties may present particularly challenging and unique questions of interpretation because the relevant texts may have resulted from political compromises between a large number of countries and customs territories with competing interests and perspectives. Ambiguities may reflect not only oversights in drafting, but also negotiators' deliberate choices made to reach political consensus.

Consequently, assessing the validity of the USTR's complaint that the Appellate Body has erred in its interpretations of certain WTO Agreement provisions may depend on how one applies the rules of treaty interpretation.[193] To illustrate the complexities that adhere to the interpretation of treaties and other international agreements, the following section provides an overview of the main principles of treaty interpretation relevant to interpreting the WTO Agreements. For an

[187] *See* DSU, *supra* note 3, art. 3.2.

[188] USTR REPORT, *supra* note 8, at 81.

[189] *See, e.g.*, *id.* at B-7 to B-16 (collecting statements).

[190] For an illustration of this concept, see the **Appendix**.

[191] *See* Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605, 610 (2010) ("There can be a right answer to a question of interpretation to the same extent and for essentially the same reasons as any other legal question. However, it seems implausible to say that there is *always* a right answer, given the complexities of language and context and changing circumstances, often unforeseen.").

[192] *See id.* at 609 ("Disputants will often propose conflicting and contradicting interpretations of identical treaty language on the basis of the same principle of interpretation.").

[193] One may agree with the USTR's general criticism that the Appellate Body has not "correctly" interpreted a particular provision of the WTO Agreements, but nevertheless disagree with any of the USTR's proposed "correct" interpretations.

example of how a WTO text may lead reasonable interpreters applying these common principles to reach different interpretations about an international agreement's meaning, see the **Appendix**.

The Art of Treaty Interpretation

The Appellate Body and WTO panels must interpret the WTO Agreements "in accordance with customary rules of interpretation of public international law."[194] The Appellate Body has stated that such customary rules include, at a minimum, Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[195] These treaty provisions set forth considerations for interpreters to take into account when interpreting a treaty.[196] The overarching rule, found in Article 31, is as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose*."[197]

The VCLT further instructs that "context . . . shall comprise, in addition to the text, including its preamble and annexes," a number of other instruments related to the treaty in question: (a) any agreement relating to the treaty made between the treaty parties in connection with the conclusion of the treaty, and (b) any instrument made by a treaty party in connection with the conclusion of the treaty that the other parties accept as an instrument related to the treaty.[198] In addition, interpreters "shall" consider the following: (a) subsequent agreements between the parties regarding interpretation or application of the treaty; (b) subsequent practice between the parties in the application of the treaty that may establish how the parties agree a treaty should be interpreted; and (c) any relevant rules of international law applicable to the parties' relationship.[199] Moreover, a tribunal must respect any "special meaning" that parties may have given to a term.[200] Although Article 31 includes distinct elements, the VCLT envisions the "process of interpretation [as] a unity and that the provisions of the article form a single, closely integrated rule."[201] In other words, there is no distinct or rigid hierarchy in how jurists should weigh each of these elements in reaching a conclusion about the "ordinary meaning" of a treaty provision.

Article 32 of the VCLT indicates that tribunals may consider other supplemental materials to "confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31" either "leaves the meaning ambiguous or obscure" or leads to a manifestly absurd or unreasonable result.[202] Article 33 addresses treaties that, like the WTO Agreements, are rendered into multiple languages, stating that the text is equally authoritative in each language unless the treaty provides otherwise or the parties otherwise agree, and that the terms "are presumed to have the same meaning in each authentic text."[203] If the authentic texts differ in meaning and the Article 31 and 32 analyses cannot resolve

[194] DSU, *supra* note 3, art. 3.2.

[195] *See* Van Damme, *supra* note 191, at 608 (discussing consistent Appellate Body practice of relying on the VCLT and citing cases).

[196] *See* VCLT, *supra* note 172, art. 31.1.

[197] *Id*. (emphases added).

[198] *Id*. art. 31.2.

[199] *Id*. art. 31.3.

[200] *Id*. art. 31.4.

[201] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries: Commentary to Arts. 27–28*, ¶ 8 (1966).

[202] VCLT, *supra* note 172, art. 32.

[203] *Id*. art. 33. This article is of relevance to the WTO, as its treaties are considered authentic in each of the WTO's

the divergence, the tribunal shall select "the meaning which best reconciles the texts," considering the object and purpose of the treaty.[204]

In addition to the VCLT itself, tribunals may draw upon a number of general principles of international law and customary international law as interpretive tools when appropriate (e.g., the principle of effectiveness and certain provisions of the Draft Articles on State Responsibility).[205] The Appellate Body, as well as other international tribunals, has used these principles in a number of cases, often at the urging of the disputing parties and sometimes noting that these principles constitute "context" within the meaning of Article 31(3)(c) of the VCLT.[206]

How an interpreter applies the above-described principles of interpretation affects the conclusions that the interpreter will draw about the meaning of a legal text. In part, this is due to the flexible nature of the VCLT approach, which does not require jurists to place more emphasis on one element of the interpretive analysis than another, and which recognizes that "context" and "object and purpose" will differ across agreements.[207] Moreover, if context in interpretation includes, for example, additional principles of international law, this inclusion can affect a jurist's determinations. The principle of effectiveness, for instance, can lead an interpreter to various outcomes as it is a "relative concept" and therefore "difficult, if not impossible, to define" in a concrete, all-encompassing manner.[208]

As demonstrated by the illustration in the **Appendix**, which examines different interpretations of the term "public body" in the Agreement on Subsidies and Countervailing Measures (SCM Agreement) by the Appellate Body and a WTO panel, interpreters may reach different results about what constitutes a "correct" interpretation of a WTO Agreement. The flexibility built into treaty interpretation can lead to significantly different, even conflicting, conclusions about the meaning of treaty provisions, especially in cases of undefined, ambiguous, or vague terms. Commentators have written many articles about the Appellate Body's approaches to interpreting specific provisions of the WTO Agreements, including those approaches the USTR has identified as problematic.[209] They have also examined how the Appellate Body has engaged in treaty

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official languages: English, French, and Spanish. Marrakesh Agreement, *supra* note 165, concluding paragraph ("Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.").

[204] VCLT, *supra* note 172, art. 33.4.

[205] *See* International Law Commission, *Draft Articles on the Law of Treaties with Commentaries: Commentary to Arts. 27–28*, *supra* note 201, ¶ 5; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supp. No. 10 (A/56/10), ch.IV.E.1. The International Law Commission is the U.N. body charged with drafting the VCLT.

[206] JAN BOHANES & PANAGIOTIS KYRIAKOU, *Use of Non-WTO International Law in WTO Dispute Settlement*, *in* PRACTICAL ASPECTS OF WTO LITIGATION 383, 401–03 (Marco Tulio Molina Tejada ed., 2020).

[207] RICHARD GARDINER, TREATY INTERPRETATION 459 (2015) ("[T]he Vienna rules envisage taking into account a range of elements . . . . In treaty interpretation it is not a firm dichotomy between original intention and living instrument strategies. The rules allow for a more bespoke approach.").

[208] Van Damme, *supra* note 191, 636–37.

[209] Weihuan Zhou & Henry Gao, *'Overreaching' or 'Overreacting'? Reflections on the Judicial Function and Approaches of WTO Appellate Body*, 53 J. WORLD TRADE 951 (2019); Gregory Messenger, *The Public-Private Distinction at the World Trade Organization: Fundamental Challenges to Determining the Meaning of "Public Body"*, 15 INT'L J. CONST'L L. 60 (2017); ANDREAS R. ZIEGLER & DAVID SIFONIOS, *The Assessment of Environmental Risks and the Regulation of Process and Production Methods (PPMs) in International Trade Law*, *in* RISK AND THE REGULATION OF UNCERTAINTY IN INTERNATIONAL LAW 219 (Mónika Ambrus et al. eds., 2017); DONALD MCRAE, *Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION (Enzo Cannizzaro ed., 2011); Roger P. Alford, *Reflections on US-Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L

interpretation more broadly.[210] As this literature suggests, there may be reasonable grounds on which to criticize the Appellate Body's interpretations. However, absent political agreement among WTO members on how the relevant WTO provisions should be interpreted, it is difficult to make a definitive conclusion as to whether the USTR's critiques are "accurate," and therefore whether the Appellate Body has inappropriately diminished or altered the rights of WTO members through its adoption of "erroneous" interpretations.[211] At least one scholar has argued that, because legal interpretation can always be said to affect law in some way, "merely interpreting the agreements cannot suffice to 'add to or diminish' rights and obligations."[212]

Interpretations of Nondiscrimination Obligations in the WTO Agreements

The USTR has argued that the Appellate Body incorrectly interpreted WTO Agreement provisions concerning the prohibition on origin-based discrimination in the GATT and TBT Agreement.[213] For example, Article III:4 of the GATT prohibits discrimination against like products on the basis of origin.[214] Similarly, TBT Agreement Article 2.1 requires each WTO member to ensure that certain regulatory measures do not treat imported products less favorably than domestic products.[215]

One significant case that prompted the United States to express concerns regarding the Appellate Body's findings with respect to TBT Agreement Article 2.1 was *United States—Certain Country-of-Origin Labeling (COOL)*.[216] In the initial case, Canada and Mexico brought a claim against the United States for imposing laws and regulations that instituted a mandatory country-of-origin labeling requirement for certain agricultural products.[217] The Appellate Body, drawing on its interpretation of nondiscriminatory treatment under Article III:4 of the GATT, indicated that regulatory measures may discriminate in their operation (i.e., *de facto* discrimination) even if they do not discriminate on their face (i.e., *de jure* discrimination).[218] To ascertain whether a measure results in *de facto* discrimination, the Appellate Body stated a panel must assess the "totality of

L. 196 (2006); Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 WORLD TRADE REV. 261 (2003).

[210] *See, e.g.*, ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY (2009).

[211] Even beyond critiques of the substance, there is also no consensus as to *how* the Appellate Body is carrying out treaty interpretation over time. *Compare* PETER VAN DEN BOSSCHE, *Is there Evolution in the Evolutionary Interpretation of WTO Law?*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 221 (Georges Abi-Saab et al. eds., 2019) (discussing the Appellate Body's use of evolutionary interpretation), *and* GRAHAM COOK, *The Illusion of 'Evolutionary Interpretation' in WTO Dispute Settlement*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 181 (Georges Abi-Saab et al. eds., 2019) (arguing the Appellate Body's approach is "evolutionary application" rather than "evolutionary interpretation").

[212] SONDRE TORP HELMERSEN, *The Evolutionary Treaty Interpretation by the WTO Appellate Body*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 207, 208 (Georges Abi-Saab et al. eds., 2019).

[213] USTR REPORT, *supra* note 8, at 90.

[214] GATT, *supra* note 29, art. III:4 ("[The] products of the territory of any [WTO Member] imported into the territory of any other [WTO Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.").

[215] TBT Agreement, *supra* note 169, art. 2.1.

[216] Appellate Body Reports, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO Docs. WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

[217] *See id.* ¶ 1.

[218] *Id.* ¶ 269.

facts and circumstances" and "any implications for competitive conditions," including whether the measure "has a detrimental impact on imported products" due to the "effect of the measure on the competitive opportunities in the market."[219] However, a detrimental impact is not "dispositive of a violation of Article 2.1" because this impact may be due to a "legitimate regulatory distinction."[220] Such a legitimate distinction could not exist if the measure was "not designed and applied in an even-handed manner," in which case it would "reflect discrimination prohibited under Article 2.1."[221]

Applying this test, the Appellate Body concluded the panel did not err in finding that the COOL measure violated Article 2.1.[222] First, the Appellate Body upheld the panel's findings that the measure created a detrimental impact for several reasons, including that the least expensive forms of compliance with the measure involved processing "either exclusively domestic livestock or exclusively imported livestock," and that the measure incentivized U.S. market participants "to process exclusively domestic livestock," which "reduce[d] the competitive opportunities of imported livestock."[223] This detrimental impact did not reflect a legitimate regulatory distinction, according to the Appellate Body, because the regulatory burden imposed on producers and processors, when compared to how well the measure achieved its legitimate aim of providing information to consumers, was disproportionate and, therefore, discriminatory.[224] Among other things, the Appellate Body found disproportionality because (1) the measure required producers and processors to record and transmit information about each step of production; and (2) any producer that used livestock of different origins would incur greater compliance costs related to the recordkeeping and verification requirements, but consumers received only the information about the country of origin, and not about the production steps that had to be recorded.[225]

The USTR complained that the Appellate Body's decision in *COOL* strayed from a nondiscrimination test that considered whether the U.S. regulatory measures discriminated against products on the basis of their origin, and instead applied a test that considered (1) whether a measure that treated domestic and imported products equally would nonetheless have a detrimental impact on the market for the imported products, and (2) whether the regulatory measure was properly calibrated in order to achieve its objective.[226] The United States expressed additional concerns following the Appellate Body's decision in a subsequent case examining U.S. amendments to COOL, stating as follows:

> [T]he Panels and Appellate Body continued to fail to adequately address the fact that there may be measures whose objective was legitimate under the TBT Agreement, and whose detrimental impact flowed exclusively from legitimate regulatory distinctions, such that these measures were consistent with Article 2.1, but at the same time would be inconsistent

[219] *Id.* ¶¶ 269–70.

[220] *Id.* ¶ 271.

[221] *Id.*

[222] *Id.* ¶ 350.

[223] *Id.* ¶¶ 262, 281, 287.

[224] *Id.* ¶¶ 347, 349.

[225] *Id.* ¶¶ 343–47.

[226] Statement of the United States, Meeting of the Dispute Settlement Body on July 23, 2012, WTO DOC. WT/DSB/M/320, ¶¶ 94–96, https://geneva.usmission.gov/2012/07/24/statement-by-the-united-states-at-the-july-23-dsb-meeting/. *See also* Statement by the United States, Meeting of the Dispute Settlement Body on January 11, 2019, at 3-16, https://geneva.usmission.gov/2019/01/16/statements-by-the-united-states-at-the-january-11-dsb-meeting/ (arguing the Appellate Body incorrectly interpreted the GATT and TBT Agreement when reviewing a U.S. dolphin-safe tuna labeling measure).

> with Article III:4 of the GATT 1994 because the legitimate objective did not directly correspond to an exception available under Article XX of the GATT 1994. This was clearly not a sustainable reading of the two agreements.[227]

The Appellate Body's consideration of a regulatory measure's "detrimental impact" and proportionality or evenhandedness was not unique to the *United States—COOL* dispute. Rather, the Appellate Body has applied this test in several other disputes, including *United States—Clove Cigarettes*;[228] *United States—Tuna II (Mexico)*;[229] and *European Communities—Seals*.[230] In the two cases involving the United States, the USTR similarly argued that the Appellate Body's analysis (1) improperly required panels to "review the calibration of the measure to risk, cost, and benefit, even if in the end the difference in treatment was not related to origin," which was beyond the Body's authority, and (2) allowed the Appellate Body to substitute its judgment for that of domestic regulators, thereby diminishing the ability of WTO members to pursue legitimate regulatory objectives.[231]

Interpretations of Obligations Related to Trade Remedies in the WTO Agreements

Appellate Body rulings in the area of trade remedies have proven to be some of the most controversial among WTO members. Trade remedies addressed in WTO case law involve (1) actions to counter market-distorting subsidies; (2) investigations to counter dumping of imports on other markets; and (3) safeguards of domestic products.[232] The USTR has argued that the Appellate Body has erred in its interpretations of several substantive provisions of the WTO Agreements that address these trade remedies, which underlie a substantial number of dispute cases filed against the United States.[233]

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[227] Statement by the United States, Meeting of the Dispute Settlement Body on May 29, 2015, WTO DOC. WT/DSB/M/362, ¶ 1.18. *See also* Statement of the United States, Meeting of the Dispute Settlement Body on June 18, 2014, WTO DOC. WT/DSB/M/346, ¶ 7.7 ("[T]he United States was not fully persuaded by the Appellate Body's finding that the national treatment provisions of the TBT Agreement were to be interpreted differently from the national treatment provisions of the GATT 1994 in light of the fact that these two provisions contained identical wording. These findings appeared to ensure that a measure could be found consistent with Article 2.1 of the TBT Agreement, yet inconsistent with the identically worded Article III:4 of the GATT 1994.").

[228] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO DOC. WT/DS406/AB/R, ¶ 225 (Apr. 4, 2012).

[229] Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO DOC. WT/DS381/AB/R, ¶ 216 (May 16, 2012); Appellate Body Report (Recourse to Article 21.5 by Mexico), *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO DOC. WT/DS381/AB/RW, ¶ 7.31 (Nov. 20, 2015); Appellate Body Report (Second Recourse to Article 21.5 by Mexico), *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO DOC. WT/DS381/AB/RW2, ¶ 6.64 (Dec. 14, 2018).

[230] Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs. WT/DS400/AB/R, WT/DS401/AB/R, ¶ 5.84 (May 22, 2014).

[231] Dispute Settlement Body, Minutes of Meeting, WTO DOC. WT/DSB/M/317, at 6 (June 13, 2012); Dispute Settlement Body, Minutes of Meeting, WTO DOC. WT/DSB/M/315, at 15–17 (Apr. 24, 2012).

[232] *Briefing Note: Anti-dumping, Subsidies, and Safeguards*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_adp_e.htm.

[233] *See Disputes by Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

Interpretation of "Public Body"

The USTR has repeatedly raised concerns about the Appellate Body's interpretation of "public body," a term found in the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[234] Under this Agreement, a WTO member may challenge a market-distorting subsidy granted by another member provided that the Agreement's conditions for bringing such a challenge are satisfied.[235] One of the conditions is that a government or "public body" grant the financial contribution.[236]

The Agreement does not define "public body." The Appellate Body first offered a definition in *United States—Anti-dumping and Countervailing Duties (China)*, which involved a U.S. investigation into whether certain Chinese state-owned enterprises (SOEs) were subsidizing Chinese products in contravention of the SCM Agreement.[237] In this case, the Appellate Body found "public body" meant "an entity that possesses, exercises or is vested with governmental authority," and indicated that WTO panels in future disputes should assess the "core features of the entity concerned, and its relationship with government" to determine whether it qualifies as a public body.[238] The Appellate Body reaffirmed this definition in *United States—Carbon Steel (India)*.[239]

The USTR has repeatedly criticized the definition adopted by the Appellate Body. In particular, the USTR has complained that the definition diverges from the ordinary meaning of "public body" by imposing the extra-textual requirement that it possess or exercise governmental authority.[240] This interpretation, the USTR has argued, permits many SOEs, even when majority or wholly government-owned, to grant subsidies that cannot be disciplined under the SCM Agreement.[241] In the USTR's view, "public body" is more appropriately understood as "an entity controlled by the government such that the government can use that entity's resources as its own."[242] The USTR argues that this reading, which matches the approach taken by the first WTO panel to consider the issue,[243] is the accurate interpretation for several reasons. First, this reading is consistent with the text's ordinary meaning and does not impose conditions from outside the Agreement (i.e., nothing in the SCM Agreement requires a public body to exercise or possess governmental authority).[244] Second, this definition ensures that "government" and "public body" remain distinct entities that can grant financial contributions, therefore more effectively reaching SOEs.[245]

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[234] WTO, Agreement on Subsidies and Countervailing Measures, art. 1.1(a)(1), https://www.wto.org/english/docs_e/legal_e/24-scm.p [hereinafter SCM Agreement].

[235] *Id*. arts. 4, 7.

[236] *Id*. art. 1.1(a)(1).

[237] Appellate Body Report, *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China*, WTO DOC. WT/DS379/AB/R, ¶ 103 (Mar. 11, 2011).

[238] *Id*. ¶ 317.

[239] Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO DOC. WT/DS436/AB/R, ¶ 4.29 (Dec. 8, 2014).

[240] USTR REPORT, *supra* note 8, at 82–89.

[241] *Id*.

[242] *Id*. at 83.

[243] *Id*. at 86. For an example in which a WTO panel interpreted "public body" to be an entity controlled by the government, see the **Appendix**.

[244] USTR REPORT, *supra* note 8, at 82–85.

[245] *Id*.

Subsidies and Out-of-Country Benchmarks

In addition to criticizing the Appellate Body's interpretation of "public body," the USTR claims that the Body has erroneously interpreted provisions of the WTO Agreements that address when WTO members may use out-of-country benchmarks to determine the extent of subsidies that a government provides (1) in the form of goods or services, or (2) through the purchase of goods.[246] Under the SCM Agreement, such government assistance cannot be deemed a subsidy unless the provision of goods or services "is made for less than adequate remuneration" or the purchase of goods "is made for more than adequate remuneration."[247] Moreover, "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase."[248]

The SCM Agreement expressly contemplates using the market conditions of the country making provisions or purchases to determine the extent of a subsidy, but it does not address how to assess the "prevailing market conditions" if the home country's market does not provide for such assessments (e.g., if the market is distorted). Nonetheless, the Appellate Body has recognized that "investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods."[249]

In rejecting a panel's view that Article 14(d) required the use of private market prices in all cases, the Appellate Body, while acknowledging the mandatory nature of "shall" in Article 14(d), noted that the methods of calculation in Article 14 were "guidelines."[250] However, the Appellate Body concluded that, to avoid frustrating the SCM Agreement's purpose of disciplining market-distorting subsidies, "an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."[251] It further stated that the alternate benchmark selected must "relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)."[252] The Appellate Body then found that alternate benchmarks could include "proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs."[253]

Although the United States advocated for the ability to use alternate benchmarks, it has since criticized the Appellate Body's subsequent cases that address the use of such benchmarks.[254] One case the United States has criticized is *United States–Carbon Steel (India*). In that dispute, the

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[246] *Id*. at 105.

[247] SCM Agreement, *supra* note 234, art. 14(d).

[248] *Id*.

[249] Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO DOC. WT/DS257/AB/R, ¶ 90 (Jan. 19, 2004).

[250] *Id*. ¶ 92.

[251] *Id*. ¶ 103.

[252] *Id*.

[253] *Id*. ¶ 106.

[254] It might be argued that the USTR's position regarding out-of-country benchmarks is unusual when compared to its other complaints. While the other complaints suggest the Appellate Body has impermissibly created requirements that do not exist in the text, the use of out-of-country benchmarks as a general concept is itself a nontextual creation first advocated for by the United States.

Appellate Body considered whether a WTO member attempting to determine if there is a benefit under Article 14(d) should assess, as part of "prevailing market conditions," the prices offered by government entities in addition to those offered by private parties.[255] The Appellate Body reiterated that a "benchmark analysis begins with a consideration of in-country prices," although those prices should not be relied on if "they are not market determined," and thus, alternate benchmarks could be used.[256] Nonetheless, the Appellate Body cautioned that a government's predominance in a market itself would not establish that the government distorted private prices for the goods or services in question; the investigating authority must make this finding on a case-by-case basis.[257] In other words, whether a price can be relied on "is not a function of its source but, rather, whether it is determined to be reflective of prevailing market conditions," and an investigating authority may not discard government-related prices from its benchmark analysis without first establishing government-caused price distortion.[258] The Appellate Body reaffirmed this approach in several subsequent cases.[259]

The USTR has strongly criticized the requirement that investigating authorities consider government prices in analyses to establish a benchmark, stating such a requirement "presents a risk of introducing distortions into the benchmark" and "is circular and uninformative."[260] The Appellate Body's approach, according to the USTR, "seriously undermine[s]" WTO members' ability to discipline the use of subsidies and "diminishes the rights of WTO members to counteract subsidies that are resulting in harm to their workers and businesses."[261]

Prohibition on the Use of "Zeroing" to Calculate Dumping Margins

One of the USTR's longest-running conflicts with the Appellate Body is whether "zeroing," a methodology used primarily by the United States in calculating antidumping margins, is permitted by the Antidumping Agreement.[262] Antidumping investigations assess whether imported products are being "dumped." A product is dumped if "introduced into the commerce of another country at less than its normal value"—i.e., "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[263] To determine whether a product is being dumped, the investigating agency must calculate, among other things, the extent of dumping, known as the dumping margin, which is the amount by which the normal value (i.e., the price of the like product in the country of export) exceeds the export price.[264]

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[255] Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO DOC. WT/DS436/AB/R, ¶ 4.161 (Dec. 8, 2014).

[256] *Id.* ¶ 4.155.

[257] *Id.* ¶ 4.156.

[258] *Id.* ¶¶ 4.167–4.168.

[259] *See, e.g.*, Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO DOC. WT/DS437/AB/R, ¶ 4.46 (Dec. 18, 2014); Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China–Recourse to Article 21.5 of the DSU by China*, WTO DOC. WT/DS437/AB/RW, ¶ 5.139 (July 16, 2019).

[260] USTR REPORT, *supra* note 8, at 106.

[261] *Id.* at 109.

[262] *See id.* at B-1 to B-4.

[263] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.1, https://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter Antidumping Agreement]; GATT, *supra* note 29, art. VI:1.

[264] Antidumping Agreement, *supra* note 263, art. 2.

The Antidumping Agreement sets out three methods for calculating dumping margins, two to be used generally and one for exceptional cases. Generally, an investigating authority must use a weighted average or transaction-specific basis for calculating the dumping margin, and the application of either method must ensure that "[a] fair comparison shall be made between the export price and the normal value."[265] If "targeted dumping" may exist—i.e., there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods"—and use of the two other methods cannot account for such targeted dumping, then the investigating authority may compare a normal value calculated using weighted averages to the export prices of individual transactions.[266]

The U.S. Department of Commerce's International Trade Administration, charged with investigating allegations of dumping,[267] has sometimes used a methodology known as "zeroing" when calculating dumping margins. While the United States has asserted several reasons in defense of its use of zeroing,[268] the point of contention arises when the margin for a particular transaction is negative—i.e., when an export price is higher than the normal value (normal value – export price < 0). In such instances, the United States enters a zero as the margin instead of the negative number. The effect of zeroing is that "the antidumping margin with zeroing will exceed what the margin would have been had zeroing not been used," and thereby also increase the antidumping duties ultimately imposed, which has led other WTO members to file complaints against the United States' use of this methodology.[269]

In a series of cases, first brought against the European Union and then primarily thereafter brought against the United States, the Appellate Body has held zeroing to be impermissible under the Antidumping Agreement. As first explained by the Appellate Body in *European Union–Bed Linen*, zeroing does not "fully [take] into account the entirety of the prices of *some* export transactions" as textually required by the Antidumping Agreement and does not provide "a fair comparison between export price and normal value, as required by Article 2.4 and by Article 2.4.2."[270]

Following this case, the Appellate Body examined a number of disputes involving challenges to the practice of zeroing, primarily brought against the United States.[271] This has, as a WTO panel noted, led to a number of "often conflicting[] panel and Appellate Body opinions on the matter," although "the string of Appellate Body reports concerning mainly the United States' use of 'zeroing' in anti-dumping proceedings read loud and clear" in concluding the practice is not permitted.[272] For example, in *United States—Softwood Lumber V*, the Appellate Body found the

[265] *Id*. art. 2.4.

[266] *Id*.

[267] The Department of Commerce determines whether a product is being dumped in the United States and the U.S. International Trade Commission makes determinations of whether such dumping has caused a U.S. industry to be "materially injured," threatened with such injury, or has "materially retarded" the establishment of an industry in the United States. 19 U.S.C. § 1673.

[268] For a detailed discussion of antidumping, see CRS Report R46296, *Trade Remedies: Antidumping*, by Christopher A. Casey.

[269] William W. Nye, *The Implications of 'Zeroing' on Enforcement of U.S. Antidumping Law*, Economic Analysis Group Discussion Paper, EAG 08-10, Department of Justice (Aug. 10, 2008).

[270] Appellate Body Report, *European Union—Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WTO DOC. WT/DS141/AB/R, ¶ 55 (Mar. 1, 2001).

[271] Panel Report, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WTO DOC. WT/DS382/R, ¶¶ 7.131, 7.134 (Mar. 25, 2011).

[272] *Id*.

use of zeroing to impose antidumping duties on softwood lumber inconsistent with the weighted average methodology of calculating dumping margins, concluding that the Antidumping Agreement's instruction to include "all comparable export transactions" when using the weighted average method of calculating the dumping margin would not permit the United States to exclude the zeroed transactions.[273] In other words, "all" should include all comparable transactions, regardless of whether the export prices were above or below normal value.[274]

Subsequently, the United States recalculated the antidumping duties on softwood lumber using the transaction-specific method with zeroing.[275] In compliance proceedings in the same dispute, a panel determined that because, among other reasons, the Antidumping Agreement did not apply the phrase "all comparable export transactions" to the transaction-specific method, the use of zeroing was permissible.[276] However, the Appellate Body reversed this conclusion, finding that the term "export prices" in the Antidumping Agreement's description of how to use the transaction-specific method "suggests that all of the results of the transaction-specific comparisons should be included," and thus zeroing was not permitted.[277] The absence of the phrase "all comparable export transactions" in the provisions governing the transaction-specific method did not alter this conclusion.[278] Applying the weighted average method required including only "comparable" transactions, whereas provisions governing the transaction-specific method did not employ the term "comparable," meaning *all transactions* must be included.[279] Finally, the Appellate Body suggested that "it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted-average-to-weighted-average methodology."[280]

The United States has complained about the Appellate Body decisions on zeroing, arguing that the Antidumping Agreement does not prohibit such a methodology.[281] For example, at a 2011 meeting of the DSB, the U.S. representative stated: "The United States has made very clear its significant concerns with the Appellate Body's evaluation of the WTO-consistency of 'zeroing' in past disputes . . . . We continue to believe that those reports go beyond what the text of the agreements provides and what negotiators agreed to in the Uruguay Round."[282] Further, the USTR has contended that the U.S. interpretation of the Antidumping Agreement is permissible, and therefore the Appellate Body has failed to apply properly the deferential standard of review used for antidumping cases, which directs panels to accept a WTO member's determination "if it rests upon" any permissible interpretation of the Agreement.[283] Finally, because the USTR believes the

[273] Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WTO DOC. WT/DS264/AB/R, ¶ 98 (Aug. 11, 2004).

[274] *Id*.

[275] *See* Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, WTO DOC. WT/DS264/RW, ¶ 2.8 (Apr. 3, 2006).

[276] *Id*. ¶ 5.28.

[277] Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, WTO DOC. WT/DS264/AB/RW, ¶ 88 (Aug. 15, 2006).

[278] *Id*. ¶ 91.

[279] *Id*.

[280] *Id*. ¶ 93.

[281] USTR REPORT, *supra* note 8, at 96.

[282] Statements by the United States at the June 17, 2011, DSB Meeting, https://geneva.usmission.gov/2011/06/17/us-statements-june-17-2011-dsb/. For an official summary of the meeting, see Dispute Settlement Body, Minutes of Meeting, WTO DOC. WT/DSB/M/298 (July 29, 2011).

[283] USTR REPORT, *supra* note 8, at 102–03. Article 17.6(ii), second sentence, of the Antidumping Agreement states: "Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation,

U.S. interpretation of the Antidumping Agreement, which permits zeroing, is permissible, the Appellate Body's decisions to the contrary inappropriately diminish the rights of WTO members.[284]

Simultaneous Dumping and Trade-Distorting Subsidization

The USTR has also criticized the Appellate Body for allegedly "invent[ing] additional obligations" for the concurrent application of antidumping and countervailing duties (CVD) (i.e., higher tariffs a WTO member may impose if it determines its domestic industries are, or are threatened to be, materially injured from dumping and market-distorting subsidies, respectively) in cases involving investigations of nonmarket economies.[285] The WTO Agreements permit countries to impose both antidumping duties and countervailing duties, but "[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."[286]

One case that the USTR has cited as an example of the Appellate Body's incorrect interpretation of WTO Agreement provisions that address WTO members' concurrent application of antidumping and countervailing duties is *United States—Anti-Dumping and Countervailing Duties (China)*.[287] In this case, the United States used a nonmarket economy (NME) methodology[288] to determine whether to impose antidumping duties on certain Chinese products, and ultimately also imposed countervailing duties on the same products following the U.S. investigations.[289] China challenged the imposition of both types of duties, arguing it was a "double remedy" because the U.S. investigations "double counted" the same harm for purposes of imposing separate antidumping and countervailing duties.[290]

The Appellate Body first explained that "double remedies" are "'likely' to occur in cases where an NME methodology is used to calculate the margin of dumping."[291] This is because the NME methodology uses a constructed normal value instead of the actual normal value (i.e., the typical price of the product in the home market) to correct for market distortions, and then compares that constructed normal value to the actual export price, which may be artificially low due to subsidization.[292] Put otherwise, the dumping margin is "based on an asymmetric comparison and is generally higher than would otherwise be the case," and may therefore already "remedy or offset a domestic subsidy, to the extent that such subsidy has contributed to a lowering of the export price."[293] This means that any separate countervailing duty that is imposed to remedy

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the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

[284] USTR REPORT, *supra* note 8, at 104.

[285] *Id*. at 114.

[286] GATT, *supra* note 29, art. VI:5.

[287] USTR REPORT, *supra* note 8, at 117.

[288] In brief, this refers to special methods for calculating dumping margins when the market price in the exporting country is distorted due to state intervention.

[289] *See* Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO DOC. WT/DS379/AB/R, ¶ 2 (Mar. 11, 2011).

[290] *See id*. ¶ 4.

[291] *Id*. ¶ 541.

[292] *See id*. ¶¶ 542–43.

[293] *Id*. (internal quotation marks omitted).

material injury from a subsidy likely includes the same domestic subsidy already covered by the NME antidumping calculation; this may lead to a WTO member receiving a remedy for the same subsidy twice (i.e., "a double remedy").[294]

Following this explanation, the Appellate Body assessed whether the SCM Agreement would permit a double remedy that might arise in cases involving concurrent antidumping and countervailing duties, with the antidumping duties calculated using an NME methodology.[295] In particular, the Appellate Body addressed the potential interaction of double remedies with Article 19.3's instruction that any countervailing duty be imposed in "appropriate amounts in each case."[296] The Appellate Body concluded that the "amount of a countervailing duty cannot be 'appropriate' in situations where that duty represents the full amount of the subsidy and where antidumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry."[297] Given the SCM Agreement's instruction that countervailing duties shall not exceed the amount of the subsidy found to exist, and the Antidumping Agreement's similar instruction that antidumping duties not exceed the margin of dumping, it would be "counterintuitive" to find the amounts of such duties combined could be "appropriate" even though they "would exceed the combined amounts of dumping and subsidization found."[298]

Following this dispute, the USTR stated that the Appellate Body's requirement that WTO members adjust how they calculate "appropriate" countervailing duties in similar cases was not "derive[d] from the text" and represented an inappropriately "expansive interpretation of the term 'appropriate amounts,'" which addressed how to collect the duties rather than calculate them.[299] It also complained that such a requirement "turns this clause in Article 19.3 into an obligation concerning the amount of the CVD," and introduces a "subjective standard for what is an 'appropriate amount,'" which may itself introduce "unpredictability into the SCM Agreement."[300]

Interpretations of the Safeguards Provisions

Similarly, the USTR has alleged that the Appellate Body has created requirements for imposing safeguards that are not reflected in the WTO Agreements, thereby diminishing the right of WTO members to use safeguards.[301] Safeguards are temporary measures a WTO member may take if, due to "unforeseen developments" and the effect of WTO obligations, imports "in such increased quantities" (often referred to as "import surges") cause or threaten to cause "serious injury" to domestic producers of like or directly competitive products.[302] Any safeguards may exist only "to the extent and for such time as may be necessary to prevent or remedy such injury."[303] Before imposing safeguards, a WTO member's investigating authority must make a determination that

[294] *Id.* ¶ 543.

[295] *See, e.g.*, *id.* ¶¶ 545–83.

[296] SCM Agreement, *supra* note 234, art. 19.3.

[297] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO DOC. WT/DS379/AB/R, ¶ 582 (Mar. 11, 2011).

[298] *Id.* ¶ 572.

[299] Statements by the United States at the March 25, 2011 DSB Meeting, https://geneva.usmission.gov/2011/03/28/mar-25-2011-dsb-meeting/.

[300] *Id.*

[301] USTR REPORT, *supra* note 8, at 110.

[302] GATT, *supra* note 29, art. XIX:1(a).

[303] *Id.*

these conditions are met, and must generally apply any safeguard to imports from all territories (this is why these are sometimes referred to as "global safeguards").[304]

The Appellate Body has sought to clarify when a WTO member may impose safeguards and to explain the appropriate procedures for doing so in accordance with the Agreement on Safeguards. One case that the USTR has criticized is *United States—Lamb*, in which the Appellate Body was asked to consider if the United States made the requisite findings before imposing safeguards on imports of lamb meat.[305] Australia and New Zealand complained that the United States failed, among other things, to demonstrate the existence of unforeseen developments.[306] The Appellate Body rejected the United States' argument that the Agreement on Safeguards' requirement that a domestic authority publish a report with findings regarding the appropriateness of imposing safeguards should not be "cop[ied] into" or "read[] into" the "unforeseen developments" requirement of GATT Article XIX.[307] In so doing, the Appellate Body stated that GATT Article XIX and the Agreement on Safeguards, which "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994,"[308] must be interpreted "harmoniously."[309]

In prior cases, the Appellate Body applied this approach to conclude that the "unforeseen circumstances" reference in Article XIX did not impose an independent condition for applying safeguards; rather, it described the "circumstances which must be demonstrated as a matter of fact" to justify imposing a safeguard.[310] However, because "the existence of unforeseen developments is a prerequisite that must be demonstrated" to apply safeguards, "it follows that this demonstration must be made *before* the safeguard measure is applied."[311] Moreover, because of the "logical connection" between Article XIX and conditions set out in the Agreement on Safeguards, this demonstration "must also feature in the same report of the competent authorities."[312] As the United States had not made an express finding regarding unforeseen developments, and it was unclear how the discussion of the increased proportion of imports of certain lamb meat and change in cut size demonstrated the existence of such developments, the Appellate Body concluded that the United States acted inconsistently with its WTO obligations.[313]

The United States criticized the report, stating that the requirement regarding unforeseen developments was "simply not supported by the plain text of Article XIX" and the Appellate Body's findings "verged on an interpretation of a WTO agreement," which was not permitted.[314]

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[304] Agreement on Safeguards, art. 2, https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm.

[305] *See* Appellate Body Reports, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand* and *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from Australia*, WTO Docs. WT/DS177AB/R and WT/DS178/AB/R, ¶ 65 (May 1, 2001) [hereinafter *United States—Lamb*].

[306] *Id.*

[307] *Id.* ¶ 67.

[308] Agreement on Safeguards, *supra* note 304, art. 1.

[309] Appellate Body Reports, *United States—Lamb*, ¶ 69.

[310] *See id.* ¶ 71 (describing prior Appellate Body reports).

[311] *Id.* ¶ 72.

[312] *Id.*

[313] *Id.* ¶¶ 73–75.

[314] Dispute Settlement Body, Minutes of Meeting, WTO DOC. WT/DSB/M/105, ¶ 42 (June 19, 2001) (statement by the United States).

Any such interpretations "could be made only by Members" as provided for in Article IX:2 of the Marrakesh Agreement.[315]

Aside from expressing concerns about the Appellate Body's decisions on "unforeseen developments," the USTR has also criticized the Appellate Body's interpretation of "serious injury."[316] The Agreement on Safeguards defines "serious injury" as "a significant overall impairment in the position of a domestic industry," and the "threat of serious injury" as serious injury "that is clearly imminent" and that is "based on facts and not merely on allegation, conjecture or remote possibility."[317] Investigating authorities must "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry," and the Agreement provides a nonexhaustive list of such factors (e.g., changes in the level of sales and the share of the domestic market taken by increased imports).[318] Finally, the Agreement requires that injury from "factors other than increased imports" not be attributed to the increased imports (the nonattribution rule).[319]

One dispute in which the nonattribution issue arose was *United States—Wheat Gluten*, in which the United States imposed safeguards on wheat gluten.[320] The European Union challenged the safeguards, arguing the United States had not appropriately conducted the causation analysis because the investigating authority had not excluded the injury to U.S. industry from factors other than the imports.[321] The Appellate Body first found that the nonattribution requirement meant that an investigating authority must properly ascertain the injury caused by "factors other than increased imports," which could be done only by "separating or distinguishing the *effects* caused by the different factors in bringing about the 'injury.'"[322] Thus, the Agreement on Safeguards contemplated a two-stage process whereby the domestic authority would first distinguish the effects from the increased imports from the effects of other factors, and then attribute the injury caused by each group of factors, thereby ensuring that "any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports."[323]

Although the United States did not raise objections to, or criticize, the Appellate Body's determination at the time the report was issued,[324] the USTR's 2020 report argues the requirement that an authority separate and distinguish the effects caused by increased imports and those caused by other factors is not found in the text of the relevant WTO Agreements.[325] The USTR then notes that because this approach might "prevent an investigating authority from evaluating the injury caused by other factors and then examining whether that injury attenuates the causal

[315] *Id*. See the discussion *supra* about "interpretations" and Article IX:2, "Considering Decisions of Various WTO Bodies to Be Authoritative Interpretations of the WTO Agreements."

[316] USTR REPORT, *supra* note 8, at 113.

[317] Agreement on Safeguards, *supra* note 304, art. 4.1(a)–(b).

[318] *Id*. art. 4.2(a).

[319] *Id*. art. 4.2(b).

[320] Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO DOC. WT/DS166/AB/R, ¶ 1 (Dec. 22, 2000).

[321] *See id*. ¶¶ 3–4.

[322] *Id*. ¶ 68.

[323] *Id*. ¶ 69.

[324] *See* Dispute Settlement Body, Minutes of Meeting, WTO DOC. WT/DSB/M/97, 2–3 (Jan. 19, 2001).

[325] USTR REPORT, *supra* note 8, at 113.

link between the increased imports and serious injury," it could "diminish the rights of WTO Members to take safeguard action."[326]

Conclusion

The USTR, through a number of presidential administrations, has raised concerns about the WTO's Appellate Body, arguing it has exceeded its authority and incorrectly interpreted the WTO Agreements in a number of disputes, thereby impermissibly altering or diminishing the rights and obligations of WTO members.[327] These concerns might be distilled into two categories: those where the USTR is alleging Appellate Body overreach, and those where the USTR is alleging the Appellate Body's decisions are inaccurate. One may find it easier to assess the validity of these concerns and develop near-term solutions in some cases (e.g., does the Appellate Body take more than 90 days to decide appeals) than others (e.g., was the Appellate Body correct to prohibit the practice of "zeroing"). The significance of each of the USTR's concerns is difficult to judge.[328]

The difficulty in assessing U.S. allegations of overreach and jurist interpretive errors results from a variety of factors. First, there is a certain amount of flexibility in treaty interpretation that may lead interpreters to reach divergent, if not conflicting, conclusions about the meaning of a WTO agreement.[329] Such differences may, in the view of some, represent error.[330] It may be more difficult to conclude whether such error reflects Appellate Body overreach.[331] Second, there are differences in how WTO members and stakeholders view the Appellate Body's role in relation to other WTO bodies and members. These latter differences include broader issues involving institutional design[332] and the WTO's governance style,[333] from political, practical, and legitimacy vantage points.

Although WTO stakeholders are engaged in discussions to reform the dispute settlement system, philosophical and political differences between WTO members about the Appellate Body's appropriate role may prove to be the most challenging obstacle to reaching a solution. The WTO General Council launched an informal inquiry into the Appellate Body's functioning at its December 2018 meeting. This group has met regularly, and its facilitator, Ambassador David

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[326] *Id*.

[327] *Id*. at 1–14.

[328] *See, e.g.*, Petros C. Mavroidis, Matteo Fiorini, Bernand M. Hoekman, Maarja Saluste, & Robert Wolfe, *WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences*, 54(5) J. WORLD TRADE 667 (2020) (noting that some WTO members share U.S. concerns about overreach in some instances, but they do not tend to focus on "incorrect" interpretations, which may not reflect systemic problems).

[329] *See supra* "The Art of Treaty Interpretation."

[330] *See id*.

[331] *See id*. (discussing the scholarly literature).

[332] *See* Zhou & Gao, *supra* note 209, at 18 (discussing methods of treating "constructive ambiguity" within and outside of dispute settlement); CHRISTOPH MÖLLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS 209 (2013) (suggesting the DSB cannot resolve the "economic bias" of the WTO for legitimacy reasons); Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, The Bad and the Ugly?*, INST. OF INT'L ECON. L. (2018), https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf.

[333] PASCAL LAMY, THE GENEVA CONSENSUS 14 (2013) (describing the consensus, member-driven style of WTO decisionmaking and concluding that "institutionally the WTO is weak"); MÖLLERS, *supra* note 332, at 205–06 (noting that, other than the DSB, "[t]he other 'branches' of the WTO seem underdeveloped," because of a lack of a legislative body and the decreased influence of the WTO Secretariat as an "executive" actor due to increased power of the DSB relative to the GATT 1947 arrangements).

Walker of New Zealand, proposed in October 2019 a list of items among its participants as the General Council's draft decision.[334] As the WTO operates based on consensus among its 164 members, reaching this unanimity may prove challenging. To date, the United States has rejected the various reform proposals, and the Biden Administration has not signaled a shift in approach to future Appellate Body nominations or tabled reform proposals.[335] It is unclear how upcoming events, including the WTO Ministerial scheduled for late 2021 and use of the interim appeals mechanism negotiated between the EU and others, might affect Appellate Body reform efforts.

[334] *See* Report by the Facilitator, H.E. Dr. David Walker (New Zealand), Agenda Item 4, Informal Process on Matters Related to the Functioning of the Appellate Body, JOB/GC/222 (Oct. 15, 2019).

[335] Statement by the United States at the Meeting of the Dispute Settlement Body on February 22, 2021, ¶ 6.13, WTO DOC. WT/DSB/M/449 (Mar. 24, 2021) ("The representative of the United States said that the United States was not in a position to support the proposed decision. The United States continued to have systemic concerns with the Appellate Body.).

Appendix. Applying the Rules of Treaty Interpretation to the WTO Agreements

As discussed above, in *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China*, a WTO panel and the Appellate Body considered the meaning of the term "public body" in Article 1.1 of the SCM Agreement.[336] That article provides, in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government *or any public body* within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments . . .[337]

The panel concluded that a public body is "any entity controlled by a government,"[338] which also reflects the USTR's view.[339] In contrast, the Appellate Body determined that a public body is "an entity that possesses, exercises or is vested with governmental authority."[340] Each of these tribunals reached its conclusion after attempting to determine the phrase's ordinary meaning.

Table A-1. Interpreting the "Ordinary Meaning" of "Public Body"

Comparing the Approach of the WTO Panel and Appellate Body in DS379, *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China*

Interpretive Rule	WTO Panel	Appellate Body
Consideration of the Text	Dictionary definitions of "public" and "body," including English, French, and Spanish versions	Dictionary definitions of "public" and "body," including English, French, and Spanish versions
Preliminary Conclusions	Definitions do not "give a conclusive answer to how the term . . . should be understood"	Definitions "suggest a rather broad range of potential meanings"

[336] *See supra* "Interpretation of 'Public Body.'"

[337] SCM Agreement, *supra* note 234, art. 1.1(a) (emphasis added; internal citation omitted).

[338] Panel Report, *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China*, WTO DOC. WT/DS379/R, ¶ 8.94 (Oct. 22, 2010) [hereinafter Panel Report, *US—AD/CVD (China)*].

[339] USTR REPORT, *supra* note 8, at 82.

[340] Appellate Body Report, *United States–Definitive Antidumping and Countervailing Duties on Certain Products from China*, WTO DOC. WT/DS379/AB/R, ¶ 317 (Mar. 11, 2011) [hereinafter Appellate Body Report, *US—AD/CVD (China)*].

Interpretive Rule	WTO Panel	Appellate Body
Consideration of other Context	References to "government" and "private body"	References to "government" and "private body"
	Collective reference to "a government or any public body" as "government"	Collective reference to "a government or any public body" as "government"
	Types of actions in Art. 1.1(a)(1)(i)-(iv)	Types of actions in Art. 1.1(a)(1)(i)-(iv)
		Draft Articles on State Responsibility, arts. 4, 5, & 8
Preliminary Conclusions	Context suggests the phrase refers to "entities controlled by governments"	Context suggests the phrase refers to entities that perform governmental functions by "being vested with, and exercising, the authority to perform such functions"
Consideration of the "Object and Purpose" of the Treaty	Object and purpose of disciplining the use of subsidies cuts against a narrow interpretation of public body	Object and purpose do not cut in favor of any particular definition
Preliminary Conclusion	Defining public body as "any entity that is controlled by the government" best serves the object and purpose	Definition of public body should be determined by assessing the other contextual material
Final Determination	Public body is "any entity controlled by a government"	Public body is "an entity that possesses, exercises or is vested with governmental authority"

Source: CRS analysis of the Appellate Body and panel reports in DS379: WTO Docs. WT/DS379/AB/R, WT/DS379/R.

As demonstrated in **Table A-1**, when interpreting the term "public body" in the SCM Agreement, the WTO panel and Appellate Body considered many of the same materials. However, the tribunals adopted different approaches to using these materials as guides to interpreting the SCM Agreement. For instance, the panel did not find the phrase "a government or any public body within the territory of a Member (referred to in this Agreement as 'government')" particularly relevant to the question of how closely linked a public body must be to a government in order to implicate subsidies obligations.[341] Instead, the panel found it was "merely a device to simplify the drafting" so the entire phrase "government or any public body" need not be repeated throughout the SCM Agreement.[342] By contrast, the Appellate Body thought the phrase suggested that the collective reference to "a government or any public body" as "government" indicated that a public body must have some connection to the government, even if not formally part of the government itself, such as by the performance of governmental functions.[343]

Additionally, the panel determined that "the most important contextual element" was the term "private body."[344] When the definition of private body was juxtaposed with the definition of public body, this indicated "that a 'public' body is any entity that is under State control, while a

[341] Panel Report, *US—AD/CVD (China)*, *supra* note 338, ¶ 8.66.

[342] *Id*.

[343] Appellate Body Report, *US—AD/CVD (China)*, *supra* note 340, ¶ 288.

[344] Panel Report, *US—AD/CVD (China)*, *supra* note 338, ¶¶ 8.68.–8.69.

'private' body is an entity not controlled by the State."[345] While the Appellate Body also compared these two phrases, it considered further the SCM Agreement's statement that the actions of a "private body" could give rise to WTO member liability only if the body was performing acts that would "normally be vested in the government."[346] This suggested that anything deemed a public body must be in a position to "direct" a private body to perform such acts, and therefore indicated that such public body be vested with or somehow itself exercising governmental authority, as otherwise it would not be in a position to direct private bodies to perform such acts.[347]

When considering whether other sources outside of the WTO Agreements could provide additional context, the panel decided that the Draft Articles on State Responsibility, which address when actions may be attributed to a country under international law, were not relevant.[348] This is because the SCM Agreement addressed, and therefore displaced, the rules of attribution under the Draft Articles.[349] The Appellate Body, however, considered the Draft Articles on State Responsibility to be relevant context, as they reflected customary international law, and the concepts found within them appeared to be similar to those in the SCM Agreement.[350] In other words, the Appellate Body found these articles "relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the VCLT, which were useful for confirming the Appellate Body's interpretation from other context that "public body" referred to entities exercising or vested with governmental authority.[351]

The panel and Appellate Body differed in how helpful the object and purpose of the SCM Agreement were in defining the ordinary meaning of public body. The panel looked to prior Appellate Body descriptions of the object and purpose, notably "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time, the right of Members to impose such measures under certain conditions."[352] Based on this language, the panel concluded the object and purpose countenanced against overly narrow interpretations of "public body" that would allow WTO members to avoid SCM Agreement obligations "by excluding whole categories of government non-commercial behaviour undertaken by government-controlled entities," particularly via state-owned enterprises.[353] Thus, the appropriate definition would need to include "any government-controlled entity."[354] The Appellate Body noted its prior descriptions of the object and purpose, but found them "of limited use in delimiting the scope of the term 'public body'" because there is a distinction between

[345] *Id.*

[346] Appellate Body Report, *US—AD/CVD (China)*, *supra* note 340, ¶¶ 291–97.

[347] *Id.*

[348] Panel Report, *US—AD/CVD (China)*, *supra* note 338, ¶¶ 8.87–8.91.

[349] *Id.*

[350] Appellate Body Report, *US—AD/CVD (China)*, *supra* note 340, ¶¶ 308–10.

[351] *Id.* The Appellate Body's and panel's discussions of the Draft Articles on State Responsibility in this dispute focused on whether they were relevant to the question of interpretation that the tribunals confronted. However, this discussion is part of a much broader debate about how the WTO Agreements, known as a "single undertaking," relate to—or are situated in—the broader context of international law. Some view the WTO as largely separate, while others advocate for greater or more consistent use of customary international law and general principles of international law in the WTO dispute settlement system. *See, e.g.*, BOHANES & KYRIAKOU, *supra* note 206, at 409 (noting that WTO lawyers tend to view WTO law as "distinct from the remainder of public international law"); ANASTASIOS GOURGOURINIS, EQUITY AND EQUITABLE PRINCIPLES IN THE WORLD TRADE ORGANIZATION (2016).

[352] Panel Report, *US—AD/CVD (China)*, *supra* note 338, ¶ 8.74.

[353] *Id.* ¶¶ 8.75–8.76.

[354] *Id.* ¶ 8.83.

whether that phrase covers an entity, and whether the conduct at issue is disciplined by the SCM Agreement.[355] In other words, the object and purpose is of little use because even private bodies could be subject to the SCM Agreement's disciplines if their acts were "entrusted or directed by a government or by a public body."[356] Based on its consideration of all other materials, the Appellate Body concluded a public body was "an entity that possesses, exercises or is vested with governmental authority."[357]

As can be seen from this example, the flexibility built into treaty interpretation can lead tribunals to significantly different, even conflicting, conclusions about the meaning of treaty provisions, especially in cases of undefined, ambiguous, or vague terms. Whether one agrees or disagrees with a tribunal's interpretation may depend on how one would engage in a similar interpretive exercise.

Potential dissatisfaction with an opinion may stem from several sources. First, one might disagree with the opinion because of concerns about the panel's approach to treaty interpretation. Second, one might disagree with an interpretation because, as a practical matter, it makes certain actions more difficult within the WTO's legal framework. In either case, this dissatisfaction may also reflect broader problems. For instance, in the above example involving the interpretation of "public body," the disputing parties did not present the panel and Appellate Body with more nuanced alternatives than their own proposed definitions, which may have limited the tribunals' ability to engage meaningfully with alternatives.[358] Regardless of interpretive approach, in some disputes, the WTO Agreement's text may be too imprecise to address consistently or coherently the types of behavior in dispute.

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[355] Appellate Body Report, *US—AD/CVD (China)*, *supra* note 340, ¶¶ 301–02.

[356] *Id.* ¶ 302.

[357] *Id.* ¶ 317.

[358] *See, e.g.*, Ru Ding, *Public Body or Not: Chinese State-Owned Enterprises*, 48 J. WORLD TRADE 167 (2014) (discussing the possibly overly broad or restrictive consequences of the panel's and Appellate Body's definitions); Messenger, *supra* note 209 (proposing greater legal engagement with the concepts of "public" and "government" as a means of reconsidering the definition of "public body").

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