

The Future of the WTO

Will Reform Happen in a Timely Manner?



The World Trade Organization: What's Next?
Washington International Trade Association (WITA)
November 8, 2018

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A. The Setting for WTO Reform

In a world of rapid technological change, the WTO can be characterized as operating on rules developed in the last century where the ability to change has proven very elusive with an ever expanding membership of countries and territories with very different economic systems and various levels of development and a decision system premised on consensus. Thus, while there have been some successes in the 24-year history of the WTO in terms of completed negotiations, most view the multilateral negotiating function as seriously challenged if not largely dysfunctional, and there are serious concerns among some about whether non-market economic systems, like China's, are adequately addressed by the current WTO rules. The question on the table now is whether the WTO members can reform and renew the WTO rulebook to address current realities.

Members have shown a relatively poor record of complying with notification requirements and providing complete information for those notifications that are made, seriously undermining the core need of transparency for members to understand the actions of others and weakening the committee work programs.

Many members view the dispute settlement system as the "jewel" of the WTO, but it is in a present crisis flowing from an inability to address long-standing concerns about the functioning of the panels and the Appellate Body (AB) versus the Dispute Settlement Understanding (DSU) and how to address concerns that the Appellate Body has created rights and obligations not

agreed to by the members. While the concerns in the dispute settlement area are long-standing for the United States and have been voiced by many others over the years, the crisis has been brought to a head by the United States over the last year through use of the WTO's consensus requirements—the same consensus requirement that has effectively blocked reform in the past is now blocking the launch of a process to replace Appellate Body members whose terms have expired. With a DSU requirement that appeals be heard by three AB members, with the AB membership down to three at the present time, and with two of the remaining three AB members having terms that expire on December 10, 2019, the crisis is here with a clearly defined time frame to keep the dispute settlement system functioning.

The prospective breakdown of the Appellate Body at the end of 2019 has impelled many WTO members to action in search of reform—to move into a mode of looking for potential solutions that will permit the WTO to regain relevance, address the past quarter century of changes, renew utility of the committee process through improved transparency, and restore the dispute settlement system to one that respects the balance between the rights of members and the limited role of panels and the Appellate Body. However, unlike traditional negotiations where deadlines are flexible and not particularly consequential if missed, here, if the members proceed to negotiations to avert the present crisis, the deadline is real, and the consequences of failure are obvious, at least for the dispute settlement system.

In an effort to begin a discussion about the need to modernize the WTO, both the EU and Canada have released papers that lay out possible reform ideas that cover not only the functioning of the dispute settlement system but also the need to update core rules so as to encompass technological advances (*e.g.*, e-commerce), to address economic behavior not typical within market economies, to improve transparency, and to better align special and differential

treatment with developing countries' actual needs. Given that ten countries in the G-20 are self-designated developing countries at the WTO, the need for a graduation process at the WTO is apparent.

Canada convened a meeting of 13 like-minded members in Ottawa on October 24-25 to consider what type of reforms might be pursued. A joint communique after the Ottawa meeting indicated that there would be outreach to other members over the coming weeks and months. The EU has indicated that it will be making a submission to WTO members, perhaps in December, with a revised set of suggested issues and proposals.

But, the reform path will not necessarily be smooth. Many uncertainties exist that could doom any reform efforts. First, with 164-members, the WTO negotiating process has proven to be extremely time-consuming, making identification of a package or individual issues capable of support within the WTO in a thirteen month time period an extraordinarily tall order at the least if not an impossible one.

Second, many members oppose considering new issues. They want all energy to be spent on finding solutions to issues from the Doha Agenda that have never been resolved. It is entirely possible that one or more of these countries could refuse to proceed on any reform proposals.

Third, it is notable that the meeting in Ottawa did not include either the United States or China. Whether both of these countries would find a package of reform proposals acceptable also seems a very tall order. The US, for instance, has flagged problems with some of the elements of the EU package, and it is unclear how China would respond to calls to address differences in economic systems that are perceived by others as not covered by existing WTO rules. Certainly, China will have "reform" issues of its own to put forward, such as export restraints and investment restrictions. As stated in Shanghai this week by President Xi "China

believes that rules of the WTO should be upheld firmly, its necessary reforms should be supported and the multilateral trading system should be defended.”¹

Finally, actions by some WTO members have created significant global friction, which may or may not hinder members from finding common ground (with the potential upside of perhaps providing a more acceptable forum to adopt changes for some members). These actions include the Section 232 actions on steel and aluminum, and possibly others on autos and uranium by the US, retaliation by many trading partners against the US actions on steel and aluminum, and the Section 301 action on various alleged practices in China that the US has complained about for years with resulting tariffs, retaliation, additional tariffs and additional retaliation being some of the more obvious examples.

The US views the process of WTO reform as likely incremental, not a one-package process—*i.e.*, members first addressing specific issues such as transparency and notification compliance/completeness before moving on to other issues. The transparency and notification issue has already been teed up through a joint submission on November 1 by Argentina, Costa Rica, European Union, Japan, and the United States (JOB/GC/204, JOB/CTG/14).

Other issues that the US would like to see addressed include: (1) differentiation among countries as to special and differential treatment, (2) developing rules to address economic systems such as China’s that do not comport with WTO norms, (3) pursuing multilateral talks on areas like fisheries subsidies by the end of 2019, (4) pursuing plurilateral initiatives such as e-commerce and digital trade, and (5) addressing long-standing US concerns on the operation of

¹ See “Work Together for an Open Global Economy That is Innovative and Inclusive,” Keynote Speech by H.E. Xi Jinping, President of the People’s Republic of China, at the Opening Ceremony of the First China International Import Expo, Shanghai, November 5, 2018, printed in China Daily, November 6, 2018. <http://www.chinadaily.com.cn/a/201811/06/WS5be0fe72a310eff303286cf5.html>.

the dispute settlement system (in particular, actions of the Appellate Body), essentially seeking a return to the terms of the agreement reached during the Uruguay Round.

The papers from the EU and Canada address many of these same issues. This suggests that there will be some significant interest in most or all of these issues, whether or not consensus is found. The timeline challenge (*i.e.*, the December 10, 2019 deadline), of course, only actually applies to the dispute settlement system absent linkage to other issues by the proponents, which is unlikely in light of the challenges of a single undertaking approach that did not succeed in the Doha Development Agenda talks.

The following sections of the paper review some of the foregoing issues in greater detail.

B. US Concerns Regarding WTO Dispute Settlement

For more than a year, the United States has blocked the initiation of a process to replace Appellate Body members whose terms have expired. The US has blocked AB appointments to focus WTO members on the need to negotiate new rules that address US concerns about the AB's operations and limit the scope for judicial overreach, which the US characterizes as systemic issues. The US has blocked the AB appointment process until members address these systemic issues. Currently there is no consensus to even begin a process to fill those posts.

At the October 29, 2018 meeting of the Dispute Settlement Body (DSB), the US again stated its reasons for objecting to new AB appointments:

As we have explained in prior meetings, we are not in a position to support the proposed decision {*i.e.*, AB appointments}.

The systemic concerns that we have identified remain unaddressed.

As the United States explained at the DSB meeting on August 27, 2018, for more than 15 years, across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members.

Through persistent overreaching, the WTO Appellate Body has been adding obligations that were never agreed by the United States and other WTO Members.

And for more than a year, the United States has been calling for WTO Members to correct the situation where the Appellate Body acts as if it has the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office – as set by the WTO Members – has expired. This so-called “Rule 15” is, on its face, another example of the Appellate Body’s disregard for the WTO’s rules.

Our concerns have not been addressed. When the Appellate Body abuses the authority it was given within the dispute settlement system, it undermines the legitimacy of the system and damages the interests of all WTO Members who care about having the agreements respected as they were negotiated and agreed.

The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system, and will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.²

The WTO Appellate Body (AB) consists of seven members appointed for four year terms with the possibility of one reappointment. Most countries, including the United States, have accepted or supported many of the AB’s decisions, but the United States and other WTO members have identified significant problems with the AB from almost the beginning of the WTO. These problems and concerns voiced by the US have been persistent and largely unaddressed, and have led to the current impasse in the WTO’s Dispute Settlement Body (DSB) in selecting Appellate Body members. The Appellate Body is now down to three sitting members. For two of the current AB members, Ujal Singh Bhatia and Thomas Graham, their second, and final, terms expire on December 10, 2019. The prospect of the Appellate Body being reduced to one member threatens the continued operation of the Appellate Body.

² See Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, at 53-54. https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf

For more than fifteen years, the United States has raised concerns with the WTO's dispute settlement system. In general, the US has been concerned that some WTO dispute settlement panels and the Appellate Body have not followed the WTO's dispute settlement rules. For example, the US (and other members) has complained that some panel and AB decisions have added to or diminished rights and obligations under the WTO Agreement. In both 2002 and 2015, the US Congress noted this concern in its trade negotiating objectives,³ and also required the Executive Branch to develop strategies to address this concern.⁴ Although the Bush and Obama administrations pursued corrections and reforms in WTO dispute settlement, their efforts did not have significant results.

The DSU is the foundational document for the WTO dispute settlement system and, thus, it sets the institutional boundaries within which the panels and Appellate Body are to operate. DSU Article 3.2 recognizes that the WTO dispute settlement system “serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” DSU Articles 3.2 and 19.2 explicitly prohibit panels, the Appellate Body, and the Dispute Settlement Body (DSB) from making findings or recommendations that “add to or diminish the rights and obligations provided in the covered agreements.”⁵ Thus, DSU Articles

³ See Trade Act of 2002, 19 U.S.C. § 3801(b)(3); Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 U.S.C. § 4201(b)(16).

⁴ See 19 U.S.C. § 3805(b)(3); Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body: Report to Congress Transmitted by the Secretary of Commerce (Dec. 30, 2002).

⁵ DSU Article 3.2 states:

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

DSU Article 19.2 states:

3.2 and 19.2 are designed to prevent panels and the Appellate Body from, in effect, legislating from the bench. Consistent with the DSU's proscription against adding to or diminishing rights and obligations in dispute settlement, the WTO Charter provides that "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."⁶

In March 2018, the Office of the US Trade Representative (USTR) issued the 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program.⁷ USTR's 2018 Trade Policy Agenda summarized US concerns with WTO Dispute Settlement, and, particularly, with decisions of the Appellate Body.⁸ USTR cited a number of examples in which panel and AB reports overreached, that is, where they added to or diminished rights or obligations in a range of areas (*e.g.*, subsidies, antidumping (AD) and countervailing duties (CVD), standards, and safeguards). The examples cited include:

- SOEs – AB interpretations significantly restricted members' ability to counteract trade-distorting subsidies provided through state-owned enterprises (SOEs) (*e.g.*, findings on "public body" and simultaneous application of CVD/AD duties under a non-market economy methodology).
- TBT – AB interpretation of the non-discrimination obligation under the Agreement on Technical Barriers to Trade (TBT Agreement) which calls for reviewing factors unrelated to any difference in treatment due to national origin.
- Tax – Panel and AB interpretations under which WTO rules do not treat different (worldwide vs. territorial) tax systems fairly (*US – FSC*).
- Safeguards – AB's non-text-based interpretation of Article XIX of GATT 1994 and the Safeguards Agreement seriously undermines members' ability to use safeguards measures.

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.

⁶ See Marrakesh Agreement Establishing the World Trade Organization art. IX.2 (Apr. 15, 1994), 1867 U.N.T.S. 154.

⁷ See <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf>

⁸ See Office of the US Trade Representative, 2018 Trade Policy Agenda at 22-28.

- Subsidies – AB created a new category of prohibited subsidies that was neither negotiated nor agreed to by WTO members (*US – CDSOA*).⁹

These are only samples of claimed overreaching. Beyond the US, both developed and developing-country members have criticized panels and/or the AB for overreaching their authority in some manner such as by filling gaps, construing silences, selectively choosing one of many dictionary definitions available to define terms in the texts of the agreements, and creating obligations never agreed to in negotiations.¹⁰

In addition to substantive concerns with the interpretation of WTO agreements by panels and the Appellate Body and their failure to strictly apply and adhere to the text of WTO agreements as negotiated and agreed to by members, the US has raised, over many years, procedural concerns with the AB's apparent disregard of DSU rules. The 2018 Trade Policy Agenda summarized five particular areas of concern where the US believes the AB has disregarded the applicable rules.

1. 90-day deadline for completing appeals

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

⁹ See 2018 Trade Policy Agenda at 23-24.

¹⁰ See Terence P. Stewart, *Can the WTO be Saved From Itself? Not without a major crisis, and probably not even then*, April 13, 2018 ("Stewart WITA paper"), at Attachment 1 (showing 48 particular case examples between 1997 and 2017 of critical statements by WTO Members who believed the Appellate Body (45 cases) or the panel (3 cases) overreached its authority). Members have raised claims of overreaching by the AB in some form in about one-third of appeals. The Stewart WITA paper is available at [http://www.stewartlaw.com/Content/Documents/Terence%20Stewart%20-%20WITA%20paper%20\(April%2013%202018\).pdf](http://www.stewartlaw.com/Content/Documents/Terence%20Stewart%20-%20WITA%20paper%20(April%2013%202018).pdf).

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

Despite the 90-day deadline, the AB has assumed the authority to take whatever time it considers appropriate. Before 2011, the AB respected the 90-day deadline. Since then, however, the AB has not consulted with the parties, but simply informed the Dispute Settlement Body (DSB) that it would not comply with the DSU deadline.

Other members who have expressed concern with the AB's failure to meet the 90-day deadline include Canada, Japan, Australia, Norway, Guatemala, Costa Rica, European Union, Brazil, Turkey, and Chile.¹¹ Between 1996 and 2010, the AB complied with the 90-day requirement in 95 percent of appeals. But since 2011, the AB has exceeded the 90-day limit in about 82 percent of appeals.¹²

WTO members have noted that the AB's departure from its pre-2011 approach raises various concerns, including: that the AB's approach shows a lack of transparency, that the AB's approach, and resulting delay, conflicts with DSU Article 3.3 which states that the "prompt settlement" of disputes "is essential to the effective functioning" of the WTO dispute settlement system, and that the AB's approach results in uncertainty as to whether an AB report issued beyond 90 days is deemed to be an AB report circulated pursuant to DSU Article 17.5.

¹¹ See Stewart WITA paper at Attachment 2 (excerpts from DSB meetings).

¹² See Stewart WITA paper at Attachment 3 (table showing the number of days between the notice of appeal and the date the appellate body report was circulated).

2. AB members continuing to serve after their terms have expired

The AB has taken actions to “authorize” a person who is no longer an AB member to continue hearing appeals. The US contends that the AB lacks the authority to deem someone who is not an AB member to be a member.

The AB has claimed that Rule 15 of its Working Procedures authorizes it to “deem” as an AB member one of its own members whose term has expired.¹³ The AB even issued a background note concerning Rule 15.¹⁴ The AB noted that, since 1996, Rule 15 had been applied in 16 instances, and that, until recently, it had not been questioned.¹⁵ The United States, however, has argued that Rule 15 is inconsistent with the requirements of the DSU. For example, at the DSB meeting on January 22, 2018, the United States said: “The Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving.”¹⁶ The US believes that the AB may not, through its working procedures, unilaterally abrogate or neutralize the DSB’s authority.

Before 2017, Rule 15 was invoked sparingly and was used for relatively short extensions, but, since 2017, the AB has invoked Rule 15 in a number of disputes, for indefinite and extended periods, and “even on appeals where work had not begun before the member’s term expired.”¹⁷

¹³ See Rule 15 of the Working Procedures for Appellate Review (WT/AB/WP/6) (“Rule 15”). Rule 15 provides: “A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.”

¹⁴ See Background Note on Rule 15 of the Working Procedures for Appellate Body Review, Communication from the Appellate Body, JOB/AB/3 (November 24, 2017).

¹⁵ See *id.*

¹⁶ Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, January 22, 2018, at 12. https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan22.DSB_.Stmt_.as-delivered.fin_.public-1.pdf

¹⁷ See 2018 Trade Policy Agenda at 26.

The US believes that WTO members must resolve this issue before moving on to the matter of appointing new Appellate Body members.

3. Advisory opinions on issues not necessary to resolve a dispute

The dispute settlement system is intended to achieve a “prompt settlement” of disputes between WTO members.¹⁸ The US is concerned about the tendency of WTO reports to make findings that are unnecessary to resolve a dispute or on issues not presented by the parties in the dispute.¹⁹ Such unnecessary statements have been described as in the nature of “*obiter dicta*.”

The DSU focuses on achieving settlement of particular disputes.²⁰ The dispute settlement system was not intended to produce reports or “make law,” but to help members resolve trade disputes between them. Because decisions of panels and the Appellate Body become adopted absent a negative consensus (*i.e.*, all WTO members agree not to adopt a decision, including the winner), limitations on the powers of panels and the Appellate Body are an important part of the system and should be respected. One such limit is DSU Article 17.6, which confines the Appellate Body to appeals of “issues of law covered in the panel report and legal interpretations developed by the panel.” As such, it is not the role of a panel or the AB to provide “advisory opinions” (like some national or international tribunals) on matters not in dispute or properly before the panel or Appellate Body. Doing so only delays resolution of the dispute and runs counter to the goal of a “prompt settlement.”

¹⁸ See DSU Article 3.3

¹⁹ See Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, at 10-26, concerning the issuance of advisory opinions on issues not necessary to resolve a dispute. https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf

²⁰ See, e.g., DSU Articles 3.4 (“Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.”) and 3.7 (“The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

The DSU and the WTO Agreement provide that the Ministerial Conference or General Council have the “exclusive authority” to render an authoritative interpretation of the WTO agreements.²¹ Yet, panels and the AB have, on numerous occasions, made unnecessary findings or rendered “advisory opinions” which have contributed to delays in concluding an appeal. The US has raised this issue on many occasions at DSB meetings, such as the following:

Substantive review of claims not necessary to resolve the dispute between the parties not only uses the Appellate Body’s scarce resources unnecessarily, but it is not consistent with the role of the dispute settlement system set out in the DSU.²²

The United States also notes that the report contains a separate opinion. In general, we consider it a positive step for the members of a Division to explore and explain where they have not been able to come to one view on a particular legal issue. In the case of this particular opinion, however, we do not see how it relates to an issue raised in this appeal. Accordingly, it would appear to be another example of *obiter dicta*, a problem to which we have drawn the attention of the DSB in the recent past.²³

Findings on claims or issues not raised by the parties to the dispute were, by necessity, not necessary to secure a positive solution to their dispute. ... The Appellate Body Report here, however, went beyond the resolution of the issues raised by the disputing parties to prescribe particular methodological approaches^{24 25}

²¹ See WTO Agreement Article IX:2; DSU Article 3.9.

²² Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 22, 2017 at 11, regarding the AB report in *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477 (NZ), WT/DS478 (US). https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf

²³ Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 14, 2016 at 2, regarding the AB report in *India – Certain Measures Relating to Solar Cells and Solar Modules* (WT/DS456). https://geneva.usmission.gov/wp-content/uploads/sites/290/DSB.Stmt_.14oct16.pdf

²⁴ WT/DSB/M/385, ¶¶ 8.9-8.10 (Nov. 1, 2016), regarding the AB report in *United States – Anti-dumping and countervailing measures on large residential washers from Korea* (DS464).

²⁵ See also Stewart WITA paper at Attachment 4, providing examples of disputes where the US criticized the AB for advancing opinions on extraneous issues not raised or argued by the parties or not necessary to the decision, including where the US was simply a third party but believed that the AB’s actions raised institutional concerns about its proper role.

4. AB review of facts and domestic law

The US has raised concerns about the AB's approach to reviewing facts.²⁶ DSU Article 17.6 limits an appeal to "issues of law covered in the panel report and legal interpretations developed by the panel." The AB, however, has consistently reviewed panel fact-finding under different legal standards, and has reached conclusions not based on a panel's fact findings or on undisputed facts.

The US has also objected to the AB undertaking to review, as a matter of law rather than fact, the meaning of a member's domestic (municipal) law.²⁷ The key fact in a WTO dispute is what a member's challenged measure does or means; the issue of law is whether that fact is consistent with the provisions and obligations of the WTO agreements. However, the AB consistently reviews the meaning of members' domestic measures as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for AB review. Further, when the AB reviews the meaning of a domestic measure, it does not defer to a panel's findings of fact.

5. AB reports as precedent

The US has objected to assertions that AB reports effectively serve as precedent and that panels must follow prior AB decisions absent "cogent reasons." The US believes that this assertion has no foundation in the DSU and is not consistent with WTO rules.

Under the WTO agreements, there is one and only one means for adopting binding interpretations of the obligations which members agreed to—WTO Agreement Article IX: 2. Although AB reports can provide valuable clarification of the covered agreements, the reports themselves are not agreed text nor are they a substitute for the text that was actually negotiated and agreed to. If, as asserted, panels were bound to follow prior AB reports, panels would

²⁶ See, e.g., Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, August 27, 2018, at 10-31, concerning DSU Article 17.6 and appellate review of panel findings of fact, including domestic law. https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.public.pdf

²⁷ *Id.*

effectively abdicate their responsibility to conduct an objective assessment of the matters before them.

C. WTO Reform Proposals by the EU and Canada

Both the European Union and Canada have prepared papers reviewing their current ideas for WTO reform.

1. EU Concept Paper --EU proposals for WTO modernization

On September 18, 2018, the European Commission (EC) released a concept paper presenting the European Union's (EU) proposals on a comprehensive approach for WTO modernization and reform, in pursuit of "making the WTO more relevant and adaptive to a changing world, and strengthening the WTO's effectiveness." The EU paper notes that "the rules-based multilateral trading system is facing its deepest crisis since its inception," that the crisis is "set to deepen further in the coming months, as more unilateral measures are threatened and imposed, leading, in some cases, to countermeasures, or to mercantilist deals," and that, given the impasse in appointing new Appellate Body members, "the dispute settlement system will soon fall into paralysis, rendering enforcement of the rules impossible." For these reasons the EU paper states that there is an "urgent need to move the current debate on a positive path focusing on the modernisation of the WTO."

The EU paper focuses on three subjects: (1) rulemaking and development; (2) regular work and transparency; and (3) dispute settlement.

With respect to the first subject, rulemaking and development, the EU paper states that the overall objective for modernization is to update the rules and to create the conditions for the rules to be updated. In practice this means addressing both substantive and procedural issues. On substance, the EU paper states that the WTO needs to address issues that are key to global trade as it evolves. On process, the EU paper states the WTO negotiating model needs to allow

individual issues to be built up by interested members with eventual agreement by some or all members forming an integral part of the WTO framework.

The EU paper presents proposals for future rulemaking in the WTO. These would involve creating rules that rebalance the system and level the playing field through improving transparency and subsidy notifications, through addressing and better capturing any market-distorting behavior of state-owned enterprises (SOEs), and through capturing more effectively the most trade-distortive types of subsidies, such as those that contribute to overcapacity. The EU paper states that the WTO should establish new rules to address barriers to services and investment, including in the field of forced technology transfer. This would involve addressing market access barriers, discriminatory treatment of foreign investors and behind-the-border distortions (including as they relate to forced technology transfer and other trade distortive policies), and barriers to digital trade. The paper also states that the WTO needs to address the sustainability objectives of the global community. The paper notes that although Sustainable Development Goals were agreed to in 2015, the only issue being negotiated actively is the elimination of harmful fisheries subsidies. The EU paper also proposes that the WTO take a new approach to flexibilities in the context of development objectives. The paper notes that the current distinction between developed and developing countries lacks nuance and fails to reflect economic reality, with some self-designated developing countries now among the top global traders. The EU proposes that the WTO recognize and encourage graduation of developing countries, and that special and differential treatment (SDT) in future trade agreements should no longer provide “open-ended block exemptions” but be focused toward a “needs-driven and evidence-based approach.” Further, the EU paper states that the WTO needs to strengthen the

procedural aspects of its rulemaking activities, including actively pursuing plurilateral negotiations where multilateral consensus is unattainable.

Regarding the second subject of the EU concept paper, improving the WTO's regular work and monitoring function, the EU paper states that this is a key component in WTO modernization. This aspect of reform involves ensuring transparency in member notifications, resolving specific trade matters without litigation, incrementally adjusting the WTO rulebook, where necessary. To these ends, the EU proposes that the WTO establish procedures to more effectively monitor notification obligations, examine ways to improve assistance to members to meet notification obligations, and consider sanctions on members for willful and repeated non-compliance. The EU also proposes to cooperate with other like-minded members in preparing counter-notifications, and that the WTO should strengthen the Trade Policy Review Mechanism (TPRM) by including assessment of a member's notification performance in its reports.

The EU proposes to improve pre-litigation problem solving through developing rules that would oblige members to make substantive replies to written questions from other members. The EU proposes that the WTO could make incremental adjustments to its rules outside of the negotiating function through consideration of targeted proposals agreement by agreement. Further, the EU believes that ineffective committees should be downsized.

With respect to the third subject of the EU paper, dispute settlement, the EU states that the WTO's dispute settlement function is in "grave danger" and swift action is needed to preserve it. The paper notes that if Appellate Body appointments continue unfilled, the operation of WTO dispute settlement will be undermined at the latest by December 2019.

In order to improve the functioning of the dispute settlement system, and to preserve and further strengthen its main features and principles, the EU proposes that the WTO should address

the concerns the US has raised at DSB meetings in which it has blocked Appellate Body appointments. The EU proposes that dispute settlement reform be addressed in two stages: procedural issues first and substantive issues second.

The first stage would involve comprehensive amendment of DSU provisions relating to the functioning of the Appellate Body. The EU proposes amending DSU Article 17.5 (90-day rule for issuing AB reports) to allow for longer periods if the parties agree. The EU proposes that the number of Appellate Body members be increased to 9 from its current 7, that the position of AB member be made a full-time job, and that the resources of the AB Secretariat be expanded.

The EU proposes adopting transitional rules for outgoing Appellate Body members, for example by codifying Rule 15 (of the AB's procedural rules) in the DSU. The EU proposes modifying DSU Article 17.12 (requiring the AB to address each of the on appeal) to prevent the AB from making findings unnecessary for the resolution of the dispute, issuing advisory opinions, or writing "obiter dicta." The EU proposes that the WTO clarify that the meaning of municipal law is an issue of fact. The EU proposes providing for regular exchanges between the Appellate Body and WTO members regarding AB reports when they are adopted (outside of DSB meetings), which would allow members to express views on issues such as treating AB reports as precedent or trends in jurisprudence. The EU proposes limiting an AB member to one term but for a longer period (6-8 years), which the EU states would support the independence of AB members.

The EU proposes that the second stage of dispute settlement reform would involve addressing substantive issues, such as those raised by the US concerning interpretations

developed by the Appellate Body (e.g., “overreach”). The EU states that these issues should be addressed only once the AB appointment process has been unblocked.

2. Canada Discussion Paper

On September 25, 2018, Canada circulated a blueprint for reform titled “Strengthening and Modernizing the WTO: Discussion Paper.”²⁸ Canada is seeking to forge an alliance of like-minded countries to “restore confidence in the multilateral trading system and discourage protectionist measures and countermeasures.”

The Canadian paper addresses the WTO’s dispute settlement system, looks at ways to improve the organization’s ability to monitor international trade practices, and seeks to modernize the WTO’s rules to address such twenty-first century trade practices as digital trade, international investment, domestic regulations, state-owned enterprises, industrial subsidies and trade secrets.

The Canadian paper focuses on three specific areas for reforming the WTO: (1) to improve the efficiency and effectiveness of the monitoring function; (2) to safeguard and strengthen the dispute settlement system; and (3) to modernize the trade rules for the twenty-first century.

With respect to the first area—improving the efficiency and effectiveness of the monitoring function—the paper proposes that the WTO should improve the notification and transparency of domestic measures, should improve the capacity and opportunity for deliberation, and should improve the opportunities and mechanisms to address specific trade concerns.

²⁸ See Communication from Canada, JOB/GC/201 (September 24, 2018). The paper is available at http://international.gc.ca/gac-amc/campaign-campagne/wto-omc/discussion_paper-document_travail.aspx?lang=eng.

Regarding the second area—safeguarding and strengthening the dispute settlement system—the paper suggests that some disputes or issues should be diverted from adjudication, that adjudicative proceedings should be streamlined, and that appellate review should be updated (including addressing the concerns raised by the United States and other members regarding the operations of the Appellate Body).

Concerning the third area—modernizing the trade rules for the twenty-first century—the paper proposes that WTO members set priorities for modernizing the trade rules, identify the means to modernize the trade rules, and address the development dimension of reform.

D. Ottawa Ministerial – October 24-25, 2018

On October 24-25, 2018, trade ministers from Canada and 12 other “like-minded” WTO members met in Ottawa to discuss the issue of WTO reform and ways to strengthen and modernize the WTO, in particular the papers issued by the EU and Canada regarding WTO modernization and reform. Canada’s Minister of International Trade Diversification Jim Carr hosted the meeting, which was also attended by WTO Director-General Roberto Azevêdo. The countries represented in Ottawa were Canada, EU, Japan, Switzerland, Norway, Australia, New Zealand, Singapore, Korea, Brazil, Chile, Mexico, and Kenya. Neither the US nor China was invited to the Ottawa meeting. The meeting focused on the discussion papers prepared by Canada and the EU, and addressed three issues: dispute settlement reform, the WTO’s negotiating function, and WTO monitoring and transparency.

On October 25, 2018, the Ottawa meeting countries issued a Joint Communiqué of the Ottawa Ministerial on WTO Reform.²⁹ The ministers’ statement concluded that the “current

²⁹ Joint Communiqué of the Ottawa Ministerial on WTO Reform, October 25, 2018. <https://www.canada.ca/en/global-affairs/news/2018/10/joint-communiqué-of-the-ottawa-ministerial-on-wto-reform.html>.

situation at the WTO is no longer sustainable,” and that the resolve for change must be matched with action. Excerpts of the Joint Communiqué are below:

We reaffirm our clear and strong support for the rules-based multilateral trading system and stress the indispensable role that the WTO plays in facilitating and safeguarding trade. ... We are deeply concerned by recent developments in international trade, particularly the rise in protectionism, which negatively affect the WTO and put the entire multilateral trading system at risk. We note growing trade tensions are linked to major shifts in the global trading landscape. We also note the difficulties to achieve outcomes under the negotiating pillar. We share a common resolve for rapid and concerted action to address these unprecedented challenges and to restore confidence. In this regard, we have identified three areas requiring urgent consideration.

First, we underscore the dispute settlement system as a central pillar of the WTO. An effective dispute settlement system preserves the rights and obligations of WTO members, and ensures that the rules are enforceable. Such a system is also essential in building confidence amongst members in the negotiating pillar. We are deeply concerned that continued vacancies in the Appellate Body present a risk to the WTO system as a whole. We therefore emphasize the urgent need to unblock the appointment of Appellate Body members. We acknowledge that concerns have been raised about the functioning of the dispute settlement system and are ready to work on solutions, while preserving the essential features of the system and of its Appellate Body. ...

Second, we must reinvigorate the negotiating function of the WTO. We need to conclude negotiations on fisheries subsidies in 2019 consistent with instructions from WTO Ministers at MC11. Its rules must also be updated to reflect 21st century realities, such as the Sustainable Development Goals. Addressing modern economic and trade issues, and tackling pending and unfinished business is key to ensuring the relevance of the WTO. ... We welcome ... the work that is being undertaken through the Joint Statement Initiatives from MC11. We recognize the need to address market distortions caused by subsidies and other instruments.

Development must remain an integral part of our work. We need to explore how the development dimension, including special and differential treatment, can be best pursued in rule-making efforts. ...

Third, we should strengthen the monitoring and transparency of members' trade policies which play a central role in ensuring WTO members understand the policy actions taken by their partners in a timely manner. We are concerned with the overall record of compliance by WTO members with their notification obligations and we agree that improvements are required to ensure effective transparency and functioning of the relevant agreements. ...

We seek a fully operational WTO that benefits all. Our objectives outlined above will only be reached through sustained and meaningful political engagement and through dialogue with all WTO members. ...

The current situation at the WTO is no longer sustainable. Our resolve for change must be matched with action: we will continue to fight protectionism; and we are committed politically to moving forward urgently on transparency, dispute settlement and developing 21st century trade rules at the WTO. We look forward to reviewing our progress when we meet again in January 2019.³⁰

Although neither the US nor China attended or participated in the Ottawa meeting, Canadian Trade Minister Carr noted that it will be impossible to achieve WTO renewal without support from China and the US.³¹

E. Other Proposals on WTO Reform

1. Trilateral Initiative - US, EU, and Japan

The United States, the European Union, and Japan have initiated trilateral discussions concerning the development of new trade and investment rules to deal with the economic impact of countries with state-driven economic policies, such as China's. In December 2017, the US, EU, and Japan began a joint initiative at the Buenos Aires Ministerial. At that time, the three countries issued a joint statement in which they agreed to strengthen their commitment to ensure a global level playing field.³² Their joint statement said that "severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises,

³⁰ Joint Communiqué of the Ottawa Ministerial on WTO Reform, October 25, 2018. <https://www.canada.ca/en/global-affairs/news/2018/10/joint-communicue-of-the-ottawa-ministerial-on-wto-reform.html>.

³¹ *Countries look to persuade US, China to buy into WTO reforms*, Washington Post, October 25, 2018; https://www.washingtonpost.com/world/the_americas/countries-look-to-persuade-us-china-to-buy-into-wto-reforms/2018/10/25/0ac6699a-d8a9-11e8-8384-bcc5492fef49_story.html?utm_term=.c1c6956c75ce

³² See Joint Statement by the United States, European Union and Japan at MC11, December 12, 2017; <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>

forced technology transfer, and local content requirements and preferences are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy.”³³ To address these critical concerns, the three countries “agreed to enhance trilateral cooperation in the WTO and in other forums, as appropriate, to eliminate these and other unfair market distorting and protectionist practices by third countries.”³⁴

In September 2018, the three countries followed up on their December 2017 joint statement. On September 25, 2018, the US, EU, and Japan released a trilateral statement addressing a range of issues, including transparency and notification reforms, self-designation of developing country status by advanced economies, forced technology transfers, industrial subsidies and state-owned enterprises, and digital trade and e-commerce. The joint statement³⁵ addressed the following six subjects:

a. Concerns with Non-Market-Oriented Policies and Practices of Third Countries

- Confirmed “their shared objective to address non market-oriented policies and practices of third countries that lead to severe overcapacity, create unfair competitive conditions for their workers and businesses, hinder the development and use of innovative technologies, and undermine the proper functioning of international trade, including where existing rules are not effective.”

b. Industrial Subsidies and State Owned Enterprise

- Confirmed “progress regarding possible new rules on industrial subsidies and State Owned Enterprises so as to promote a more level playing field for their workers and businesses.”
- Noted “the challenges posed by third parties developing State Owned Enterprises into national champions.”
- Recognized the need “to develop effective rules to address market-distorting behavior of state enterprises and confront particularly harmful subsidy practices.”

³³ *See id.*

³⁴ *Id.*

³⁵ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statementtrilateral>

- Agreed to “continue exploring how to increase the costs of transparency and notification failures and how to strengthen the ability to obtain information on subsidies.”
- Agreed to intensify discussions with the intent to initiate negotiations on more effective subsidy rules in 2019.

c. Concerns with Forced Technology Transfer Policies and Practices of Third Countries

- Expressed “their shared view that no country should require or pressure technology transfer from foreign companies to domestic companies, including, for example, through the use of joint venture requirements, foreign equity limitations, administrative review and licensing processes, or other means.”
- Condemned “government actions that support the unauthorized intrusion into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets and use that information for commercial gain.”
- Agreed to “reach out to and build consensus with other like-minded partners.”
- Agreed to “deepen their investigation and analysis of the full range of harmful technology transfer policies and practices and their effects.”

d. Discussions on WTO Reform

- Agreed on the “need for the reform of the WTO, and, with respect to its monitoring and surveillance function, agreed as a first step to co-sponsor a transparency and notification proposal for consideration at the next meeting of the WTO Council on Trade in Goods.”
- Agreed to “promote the strengthening of the regular committees’ activities” and to develop a potential joint proposal to promote best practices and increase efficiencies across committees.
- Called on “advanced WTO Members claiming developing country status to undertake full commitments in ongoing and future WTO negotiations.”

e. Digital Trade and E-Commerce

- Expressed concerns about “proliferation of digital protectionism and agreed to cooperate in facilitating digital trade and the growth of the digital economy and to enhance business environments through the promotion of data security.”
- Agreed to support further progress under the WTO Joint Statement Initiative on Electronic Commerce.

f. Cooperation on Other Issues

- Confirmed the “importance of coordination among themselves to mitigate risks to their national security from trade and foreign investment.”

- Welcomed “trilateral cooperation for the International Working Group on Export Credits to develop a new set of guidelines for government-supported export credits as soon as possible in 2019.”
- Reaffirmed their “cooperation in international fora, such as the G7, G20 and the OECD and in sectoral initiatives such as the Global Forum on Steel Excess Capacity and Governments/Authorities Meeting on Semiconductors, to address market-distorting measures.”

2. Proposals to improve transparency and strengthen notification requirements

In October 2017, the US proposed reformed procedures to improve compliance with notification obligations by WTO members. The US proposal was presented in the form of a draft ministerial declaration circulated to members.³⁶ The US said that chronic low compliance with existing transparency obligations undermines the proper functioning and operation of the WTO agreements. The US proposed that members reaffirm existing notification obligations and recommit to providing complete and timely notifications under the WTO Agreements. In addition, the US encouraged members to file counter-notifications in response to delinquent members, and proposed consideration of various levels of punitive measures for failing to comply fully or at all with notification requirements.

On November 1, 2018, the US, together with Argentina, Costa Rica, the EU, and Japan, circulated a proposal³⁷ similar to that put forward by the US in October 2017. The proposal again notes the chronic low level of compliance with notification requirements, again states that members should reaffirm existing notification obligations and recommit to providing complete and timely notifications under the WTO Agreements, again encourages members to file counter-

³⁶ See *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, Communication From The United States, JOB/GC/148, JOB/CTG/10 (October 30, 2017).

³⁷ See *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, Communication from Argentina, Costa Rica, the European Union, Japan, and the United States, JOB/GC/204, JOB/CTG/14 (November 1, 2018).

notifications in response to delinquent members, and again proposes consideration of various degrees of sanctions according to the level of delinquency in notifications.

The proposed penalties for noncompliance would range from increased financial contribution requirements, non-qualification for WTO bodies, additional reporting requirements at General Council meetings, and disregard of the member's questions at trade policy reviews. A member's severest penalty would be a designation of inactive status applied after failing to file notifications by more than two, but less than three, years. The proposal also provides for exemptions from penalties for developing members that lack the capacity to fulfill notification requirements if they request assistance and support for capacity building from the Secretariat.

F. Potential Obstacles to WTO Reform

1. Developing country opposition

While calls for, and discussions about, the need for WTO reform have been increasing, there is also a contrary view among some WTO members. Director-General Azevedo recently said:

... so-called WTO reform or modernisation has increasingly been on the minds and in the speeches of many. It's clear that this discussion is gathering significant momentum, with more leaders becoming engaged and talking to each other about this. So this is something we can't ignore.

Such a modernising effort is being seen as a way to ease some of the trade problems that some members have identified. Precisely which issues are taken forward, and how, is for members to determine — and I would suggest that there are also members who are not convinced that a reform is needed at all.³⁸

³⁸ See DG Azevedo: *Debate on WTO reform should reflect all perspectives*, Trade Negotiations Committee and Heads of Delegation: Informal Meeting, October 16, 2018 (emphasis added); https://www.wto.org/english/news_e/news18_e/tnc_infstat_16oct18_e.htm

This same attitude has been noted by others. For example, one Canadian official has stated that some countries “are happy to do nothing” about WTO reform.³⁹

There also are developing country members that would oppose considering reform issues before WTO members first address unresolved Doha Agenda issues. For example, one press report noted:

The long-running debate over whether the World Trade Organization should continue to pursue the single undertaking of the Doha Development Agenda is continuing to plague WTO reform efforts, with Doha proponents not yet on board with an overhaul, according to an official who participated in the WTO reform ministerial in Canada this week.

One official said “lots of developing countries haven’t understood quite fully about what’s the content of WTO reform.” Some developing countries are still committed to the Doha Development Agenda and want to see outcomes from it, the official said, leading to a disconnect.

“I think that might have to do with the reality at the WTO that still many developing countries are still expecting something out of the Doha round negotiating items and still some countries are resisting a plurilateral approach,” the official said. “So there is still a big gap, even between this meeting’s participants and other especially major developing countries. In that sense I think ambassadors shared that we need to start taking some action. There is a reality at the WTO that some people still talk about the single undertaking.”⁴⁰

One example of a developing country that endorses a continued focus on Doha Agenda issues is India, who continues to seek approval of its public stockholding for security purposes and use of a special safeguard mechanism. Given the “disconnect” noted between those members supporting reform efforts and those members who continue to support Doha development issues, it is apparent that some developing country members could block reform proposals.

³⁹ See Brett Fortnam, *Shea warns WTO against falling into all-talk, no-action trap on reform*, Inside U.S. Trade, October 17, 2018. <https://insidetrade.com/daily-news/shea-warns-wto-against-falling-all-talk-no-action-trap-reform>

⁴⁰ See Brett Fortnam, *Official: Divisions on Doha agenda could stymie WTO reform efforts*, Inside U.S. Trade, October 26, 2018. <https://insidetrade.com/daily-news/official-divisions-doha-agenda-could-stymie-wto-reform-efforts>

2. Practical problems in revising trade rules

With the increased importance of countries with major state-involvement/control, there is serious concern among many WTO members that the system does not effectively address a range of practices in economies that are state-directed versus market economies. Many of the tensions currently in the trading system result from distortions flowing from unchecked domestic subsidies, the roles of state-owned enterprises (SOEs) and state-invested enterprises (SIEs), and government planning, which often leads to massive excess capacity overhanging many industries in the global economy. Some countries, including the trilateral initiative of the US, EU, and Japan, are proposing modifications to trade rules, particularly the Agreement on Subsidies and Countervailing Measures (SCM), to address this seeming imbalance.

While it would appear reasonable to make an effort to reform the SCM rules to address the actual conditions found in global competition today, such a reform effort is likely to be fraught with potential difficulties and practical problems. This possibility was highlighted in a recent program at the WTO Public Forum. In a panel titled “Make the playing field level again! (Ensuring global fair trade by 2030),” the participants considered the following topic:

{I}n many respects, today’s trade is unfair as economic operators in a number of countries benefit from targeted and significant market-distorting government support. This triggers and further reinforces anti-trade sentiments among stakeholders who cannot fully reap the benefits of free trade. The most significant distortion in international trade is subsidies and other types of support from governments and government-sponsored institutions. Addressing these issues is a key component of our shared goal to have sustainable and inclusive trade by 2030.⁴¹

⁴¹ See Public Forum 2018: “Trade 2030” (Session 67, October 3, 2018). https://www.wto.org/english/forums_e/public_forum18_e/pf18programme_e.htm#31018. The program was sponsored by the European Commission, the United States Trade Representative (USTR), and the Government of Japan. The panelists were Jimmy Goodrich, Vice President Global Policy, Semiconductor Industry Association (SIA); Jennifer Hillman, Professor, Georgetown University Law Center; Orlando Perez Garate, Director General for International Trade Rules, Ministry of Economy of Mexico; and Mark Wu, Professor, Harvard Law School. The panel was moderated by John Magnus, President, TradeWins LLC. Audio of the program is available at <https://www.wto.org/audio/pf18session67.mp3>

The panelists discussed “whether WTO members are currently able to defend themselves against such subsidies, and whether the WTO rulebook on subsidies needs to be improved and updated.”⁴² The remarks of the panelists illustrated the practical obstacles that would make trade rules reform more difficult from a practical viewpoint.

Mr. Perez Garate discussed the harmful market-distorting effects of excess global steel capacity on the steel industry in Mexico, and that that excess capacity was caused by massive government intervention and subsidies, even where demand was not increasing. He noted that stakeholders in Mexico were most concerned about lack of transparency, lack of stronger disciplines on SOEs, subsidies at sub-central levels, and the lack of rules on subsidies in the services sector.⁴³

Mr. Goodrich discussed the effects that massive government subsidies to the semiconductor sector had on creating excess capacity. He noted that the semiconductor example revealed the need for new rules governing subsidies, especially by improving transparency, clearly defining public bodies based on an objective control standard, and more effectively capturing their adverse effects (*e.g.*, by adding to the list of prohibited subsidies).⁴⁴

Prof. Hillman said that the primary way that trade rules have failed is in their inability to properly discipline subsidies. She identified three issues that have hampered a proper functioning of the SCM Agreement: (1) the issue of a public body is interpreted too narrowly; (2) remedies are prospective only (whereas perhaps there should be a mechanism to require repayment of injurious subsidies retrospectively); and (3) the evidentiary requirements to show

⁴² *See id.*

⁴³ *See* “WTO Public Forum event: Make the playing field level again! (Ensuring global fair trade by 2030),” Summary Report for the WTO (Session 67, October 3, 2018). https://www.wto.org/english/forums_e/public_forum18_e/pf18programme_e.htm#31018.

⁴⁴ *See id.*

adverse effects are burdensome and difficult to meet (this issue is also tied to the lack of adequate transparency). Prof. Wu also highlighted that subsidy remedies are wrongly designed to have prospective effects only, a problem exacerbated by lack of transparency.⁴⁵

While the WTO Forum panel identified substantive problems and inadequacies in the WTO subsidy trade rules which are in need of reform and updating, it is likely that any reform effort would encounter practical problems achieving consensus, particularly from countries that have benefited from current conditions and interpretations of the subsidy rules.

G. Conclusion

As reviewed above, there is increasing discussion by various WTO members that after nearly twenty-four years of existence reform is needed if the WTO is to remain relevant to the needs of a growing membership and a rapidly changing business environment. Many substantive and procedural issues will need to be addressed to make the organization responsive to 21st century needs of the membership and to keep the dispute settlement system functioning. The likelihood that the WTO membership will succeed in agreeing to any meaningful reforms is not great outside of a real crisis. Most agree that there is a crisis in the WTO with the possible reduction of the Appellate Body below the minimum number needed to hear appeals. Whether even that type of crisis will result in reforms being discussed by Washington, Brussels, Ottawa and other capitals is an unknown. The large membership and complexity of many issues among countries of significantly varied sizes and economic development has made forward movement at the minimum extraordinarily time consuming if possible at all. 2019 will be a critical year in the multilateral trading system. Let us hope that all trading nations are able to rise to the occasion.

⁴⁵ *See id.*

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