TRENDS IN THE LAST DECADE OF TRADE REMEDY DECISIONS: PROBLEMS AND OPPORTUNITIES FOR THE WTO DISPUTE SETTLEMENT SYSTEM

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I. INTRODUCTION

The WTO dispute settlement system has been functioning now for more than eleven years and generally receives strong endorsements by WTO Members for what it has achieved. The system has responded to requests for answers concerning highly complex international agreements. Panels and the Appellate Body have typically moved with reasonable speed, although concerns over the total time from request for consultations to resolution of the matter remain. Many disputes continue to be resolved through consultation. The availability of an Appellate Body has generally been viewed as a positive by Members. More disputes are brought by more Members, including a significant number of disputes by developing-country participants.

At the same time, many countries have questioned whether WTO panels and the Appellate Body have honored the limitations on their role contained in Articles 3.2 and 19.2 of the Dispute Settlement Understanding (DSU).[1] In the United States, a pattern of decisions in the trade remedy area (generally antidumping, subsidy and countervailing duty matters and safeguards; hereinafter "trade remedy decisions" or "Rules decisions") has been identified and viewed by the U.S. Department of Commerce, the U.S. Trade Representative, and the U.S. Congress as creating obligations not agreed to by the United States during the Uruguay Round.

This Article first examines five trends or concerns ("warning signals") that have been observed with respect to the trade remedy decisions of WTO panels and the Appellate Body. The Article then identifies efforts made by WTO Members to improve the dispute settlement system in the ongoing Doha Development Agenda and separate DSU negotiations.

Warning signal number one is the fact that complaining parties succeed in establishing a WTO violation in almost 90% of all cases. While it could be that only selective cases are brought as governments use great restraint in the

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1. Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 3.2, 19.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

challenges they bring, it is also possible that such a violation rate suggests an institutional bias in favor of complaining parties (i.e., against permitting the use of trade remedies). Because the trade remedy area is highly complex and often involves huge administrative records, the trend in trade remedy decisions may flow from a more fundamental misunderstanding of the interrelationship of agreement requirements with domestic laws and regulations in the context of their historical use. While the GATT dispute settlement system likewise favored complaining parties, that system operated under a significantly different set of controls. Not only could the responding party block a GATT panel decision from being adopted, but complaining parties arguably exercised more restraint in bringing cases.[2]

Warning signal number two is that the structure of disputes, and the efforts by some Members in selected cases to draw in additional Members as complainants, also suggests a belief by at least some Members that the outcome of disputes can be affected by the number of parties alleging a wrong. While it may certainly be the case that Member practices adversely affect more than one trading partner, it is also the case that the DSU is being used to address issues Members do not like, whether or not they actually perceive a WTO violation.

Warning signal number three is the gross imbalance in the number of disputes involving trade remedies compared to the actual amount of trade affected. Trade remedy provisions in most countries typically apply to a tiny part of total trade for the country, generally less than 1%. Yet, roughly one-half of disputes brought to the WTO involve Rules decisions. While it could be that half of the trading systems' pressing issues involve Rules decisions, that is hard to believe.

Discussions with Members suggest that some governments have created an additional level of review of trade remedy decisions for their exporters by essentially permitting affected industries to pay for the costs of bringing WTO challenges through the government. Such action essentially provides one of the private parties to a dispute use of the government-to-government dispute settlement system when the system is not designed for such purposes and when there is no mechanism that permits the other party to raise issues or concerns they may have on decisions or interpretations.

Moreover, underwriting the costs of WTO dispute settlement for exporters results in a disproportionate number of trade remedy disputes. The institutional bias in favor of complainants also encourages Members that were unsuccessful in achieving modifications in agreements during the Uruguay Round

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2. The success rate of complaining parties before GATT panels was roughly 60%. *See* Keisuke Iida, *Is WTO Dispute Settlement Effective?*, 10 GLOBAL GOVERNANCE 207, 214 (2004); Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, *in* POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT HUDEC 457, at tbl.4 (Daniel M. Kennedy & James D. Southwick eds., 2002).

to seek, through panel or Appellate Body interpretation, a de facto modification in the agreements not accepted by their trading partners. This trend is inconsistent with the design and intent of the Members in creating the DSU and accepting the principle of automatic adoption of panel reports and Appellate Body decisions.

Warning signal number four is that the WTO dispute settlement system gives the impression of having a bias against use of trade remedies, based on decisions that re-engineer the results of the Uruguay Round and the seemingly arbitrary selection of definitions in construing terms. For example, the Appellate Body has construed the Safeguards Agreement[3] in conjunction with GATT 1994 Article XIX[4] to allow obligations not contained in the Safeguards Agreement to further condition relief under the Safeguards Agreement. Such an approach has made the Safeguards Agreement much more difficult to use, and ignores the negotiating history of the Agreement and the practical problems some Members had in the past in trying to implement the Article XIX obligation.

The Appellate Body's construction of GATT 1994 Article XIX, however, is inconsistent with its approach to GATT 1994 Article VI. Article XIX involves "Emergency Action" and situations where trade restraints are imposed when no unfair trade practice is being alleged.[5] By contrast, Article VI of GATT 1994 provides a right to Members to impose duties to address unfair trade practices.[6] Indeed, Article VI:1 of GATT 1994 contains some of the harshest language found in the GATT articles against permitting unfair trade practices: "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry . . . ."[7] Yet, panels and the Appellate Body do not appear to reference this fundamental statement from Article VI:1 when construing the meaning of terms in the Antidumping Agreement.[8]

Similarly, despite Article 17.6 of the Antidumping Agreement requiring panels and the Appellate Body to accept interpretations of Members if it is one of the permissible constructions,[9] no adopted panel or Appellate Body decision has

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3. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter Safeguards Agreement].

4. General Agreement on Tariffs and Trade 1994, art. XIX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

5. *See id.*

6. *See id.* art. VI.

7. *Id.* art. VI:1.

8. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter Antidumping Agreement].

9. *Id.* art. 17.6(ii).

ever found that there is more than one permissible construction, even if they are selecting the seventh dictionary definition as the "sole" permissible construction.[10] When there are seven or more definitions of a word used in an agreement, the decision to choose one definition over the others may flow more from a results-oriented exercise of discretion than from contextual constraints and, at a minimum, raises concerns about adherence to the requirements of Article 17.6 and about an institutional bias against the use of WTO-consistent measures.

Warning signal number five is that many WTO Members have recognized and objected to "overreaching" by panels or the Appellate Body in a wide range of dispute settlement cases, not just in those involving trade remedies. In the trade remedy area, the U.S. Congress was so concerned that it included language in the Trade Act of 2002 to ensure that the Administration addressed the problem as part of the ongoing multilateral talks. Indeed, the Bush Administration has confirmed that there is a problem in rules and is working to address the problem within the ongoing negotiations.

A principal reason for the perception of overreaching has been the Appellate Body's position that it is authorized to fill gaps in agreements and interpret silence. Yet, WTO Members nowhere authorized this approach, and the approach deviates from the historical approach of GATT dispute settlement decisions. Specifically, GATT panels generally recognized their inability to "add to or diminish the rights and obligations" negotiated by Members.[11] While WTO panels and the Appellate Body express their adherence to the limits imposed by Articles 3.2 and 19.2 of the DSU,[12] the Appellate Body considers that it is within

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10. *See, e.g.*, Matthias Oesch, *Standards of Review in WTO Panel Proceedings*, *in* KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 161, 174 (Rufus H. Yerxa & Bruce Wilson eds., 2005); EDWIN VERMULST & FOLKERT GRAAFSMA, WTO DISPUTES: ANTIDUMPING, SUBSIDIES AND SAFEGUARDS 63-68 (2002); John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L., 113, 117-18 (2003); Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109, 118-47 (2002) [hereinafter Tarullo, *Hidden Costs*]; Daniel K. Tarullo, *Paved with Good Intentions: The Dynamic Effects of WTO Review of Anti-Dumping Action*, 2 WORLD TRADE REV. 373, 376-79 (2003).

11. *See* Terence P. Stewart, Amy S. Dwyer & Elizabeth M. Hein, *Proposals for DSU Reform That Address, Directly or Indirectly, the Limitations on Panels and the Appellate Body Not to Create Rights and Obligations*, *in* REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 331 (Cameron May Ltd. 2006). "[P]anels generally displayed a considerable amount of deference to the Contracting Parties and to the GATT Council, upon whose functions they were loath to encroach. Panels also sometimes refused to consider measures that were being considered elsewhere in the GATT system." Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 406 (1996) (citing cases supporting this principle).

12. *See, e.g.*, Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 19, WT/DS33/AB/R (Apr. 25, 1997); Panel

its rights to find "implicit" obligations in otherwise silent provisions.[13] This is true despite that DSU Articles 3.2 and 19.2 prohibit the creation of new obligations,[14] and that a special, deferential standard of review was specifically incorporated in the Antidumping Agreement.[15] Many of the claims of overreaching by Members seem to involve the "gap filling" or silence construction being pursued by the Appellate Body. The implications for the system and for the ongoing negotiations are profound, as the only certainty that a country's practices and laws will conform is to obtain extraordinary detail in every agreement.

While some Members have recognized many of these warning signals, there is no clear indication that the problems and concerns identified will be addressed in the ongoing negotiations. A WTO dispute settlement system intended not to create new rights or obligations is increasingly being used to shift the balance of agreed rights and obligations. There are concerns that the system has become too legalistic and that, in many situations, consultations are not meaningfully pursued or engaged in. Because many Members have arguably won disputes through the filling of gaps or silence by panels or the Appellate Body, there is even reluctance by some Members to have the issue of the correct role for the panels and Appellate Body resolved by the Members. For institutional reasons, however, all WTO Members should be troubled by the evolution of the dispute settlement process, whether or not they have been beneficiaries of the current system. While some Members are attempting to raise these issues in the context of the ongoing DSU and Rules negotiations, the Appellate Body could adopt a more restrained role in the process by leaving to Members the role of negotiating rights and obligations.

II. WARNING SIGNAL NUMBER ONE: THE SCORECARD

A review of WTO disputes in the first eleven years reveals that the WTO dispute settlement system can be fairly characterized as a complainant's forum. For example, complaining parties succeed in establishing a WTO violation in

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Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 7.23, WT/DS79/R (Aug. 24, 1998).

13. *See, e.g.*, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶¶ 65, 92, WT/DS213/AB/R (Nov. 28, 2002) [hereinafter *U.S. – Carbon Steel*] ("[T]he task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication.").

14. DSU, *supra* note 1, arts. 3.2, 19.2.

15. Antidumping Agreement, *supra* note 8, art. 17.6.

almost 90% of all disputes that result in actual decisions, regardless of the area in which the WTO obligation is challenged.[16] The propensity of panels to agree with complainants has also been described to the authors by some Members as encouraging complainants who do not like a law, regulation, or practice of a trading partner, but do not believe that they have a strong WTO issue, to seek a large number of co-complainants to evidence broad concern with the validity of the challenged measure.[17] The voting record and apparent willingness to pursue challenges of measures not actually believed to violate WTO obligations is contrary to the historical practice of using dispute settlement only for clear problems.

With respect to the forty-two "trade remedy" disputes in which decisions have been issued,[18] the trend is the same. There were only five cases (or 12%) in which no WTO agreement violation was found. Thus, one cannot claim that decisions in the trade remedy area are "more adverse" than other areas. However, the large volume of cases, despite the relatively small amount of global trade affected, suggests that Members are not exercising reasonable self-restraint. Moreover, WTO challenges in the trade remedy area typically suggest a shotgun approach to litigation—throw as many claims at the other side as possible and hope the panel or Appellate Body will agree on at least some theory or claim presented. Thus, in the forty-two decided trade remedy cases reviewed, complaining parties were successful in claiming WTO violations for less than 40% of the violations claimed, excluding the *U.S. – Steel Safeguards*[19] case. No violations were found or no rulings were made on over 60% percent of violations

16. *See, e.g.*, Peter Holmes, Jim Rollo & Alasdair R. Young, *Emerging Trends in WTO Dispute Settlement: Back to the GATT?* 21 tbl.10 (World Bank Pol'y Research, Working Paper No. 3133, 2003).

17. For example, in the *U.S. – Offset Act* dispute, eleven WTO Members requested the establishment of a panel to attack the law, as such, even though a number of the WTO Members were unlikely to be adversely affected and, ultimately, have had few, if any, moneys distributed involving duties collected from products exported from their countries. Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) [hereinafter *U.S. – Offset Act*].

18. For the purposes of this Article, the term "trade remedy" is meant to include antidumping duty, countervailing duty, or safeguard laws or measures, excluding disputes requesting findings pursuant to Parts II or III of the SCM (Subsidies and Countervailing Measures) Agreement. As of May 31, 2006, trade remedy decisions were issued in forty-two disputes. *See* Annex, *infra* Part IX. The list of forty-two "trade remedy" disputes identified in the Annex is based on the ninety-six disputes listed as having adopted reports as of February 24, 2006, plus the decisions issued in WT/DS294 and WT/DS308, ranked by date of the panel report. *See* WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/26 (Mar. 1, 2006).

19. Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248, 249, 251-54, 258, 259/AB/R (Nov. 10, 2003) [hereinafter *U.S. – Steel Safeguards*].

claimed. In other words, the vast majority of WTO violations claimed in the forty-two trade remedy disputes failed.

The WTO dispute settlement process, like civil litigation in Member nations, can be misused unless WTO Members are encouraged to exercise greater selectivity in bringing cases and decision-makers are required to adhere to the standard of review. The lack of any procedural guidelines similar to Rule 12(b)(6) of the Federal Rules of Civil Procedure allows complaining parties to bring any sort of claim, however tenuous, without fear of dismissal. There are no provisions to encourage self-control on the part of dispute settlement litigants similar to those in Rule 11 of the Federal Rules of Civil Procedure, which require claims, defenses, and other legal contentions to be warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Nor is it clear that such procedural rules would be useful in the WTO dispute settlement system as it currently operates.

With respect to WTO panels and the Appellate Body, Article 17.6 of the Antidumping Agreement establishes a distinct and deferential standard of review for factual assessments and legal interpretations in antidumping proceedings.[20] Specifically, Article 17.6 requires panels to defer (1) to the expertise of the authorities and their factual determinations if unbiased and objective "even though the panel might have reached a different conclusion," and (2) to authorities' legal interpretations even if the panel would have chosen a different "permissible interpretation."[21] Panels, however, have been unable to reconcile their role as interpreters with the requirement to recognize when provisions of the Antidumping Agreement are susceptible to multiple, permissible interpretations.[22]

Experience has shown that panels and the Appellate Body, in a number of cases, have reached the unwarranted conclusion that applying customary rules of interpretation of international law resulted in a single permissible interpretation of the Antidumping Agreement, thus failing to address meaningfully whether an individual Member's interpretation of the Antidumping Agreement was permissible.[23] Panelists' general lack of familiarity with the intricacies of highly technical antidumping proceedings could also be contributing to this trend in decisions.

The lack of an adequate and uniform standard of review for trade remedy disputes, and the Appellate Body's view that it is authorized to fill gaps in

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20. Antidumping Agreement, *supra* note 8, art. 17.6.

21. *Id.*

22. *See, e.g.*, Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶ 116, WT/DS264/AB/R (Aug. 11, 2004) [hereinafter *U.S. – Softwood Lumber V*].

23. *See, e.g.*, Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 65, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *EC – Bed Linen*].

agreements and construe silence,[24] have also allowed the Dispute Settlement Body (DSB) to find new rights and obligations to which Members have not consented, either because the issue was not the subject of negotiations or was negotiated but not resolved. Whatever the cause, however, any disregard of whether a consensual agreement has been reached by the Members on a given issue is all the more problematic in light of the Appellate Body's statement in *United States – Oil Country Tubular Goods (Argentina)* that panels are expected to follow the Appellate Body's conclusions in earlier disputes, especially where the issues are the same.[25]

Members historically were presumed to know and adhere to their international obligations. What does it say about the dispute settlement system that Members are found to violate their obligations in trade remedy and other areas challenged 90% of the time? Similarly, no Member who has taken a safeguard action and been challenged has been found to have properly implemented its obligations. Can it be that the panels and Appellate Body reviewing safeguard actions understand the obligations undertaken by Members, but none of the Members who negotiated the Safeguards Agreement do? Similarly, one of the principal Members involved in the Antidumping Agreement negotiations during the Uruguay Round was the United States, and many features of the Agreement track historic and current U.S. domestic law. What does it say about the dispute settlement system that a country with 14% of the investigations initiated since the launch of the WTO has faced 60% of the WTO challenges resulting in trade remedy decisions?[26] What does it say about the system that in at least twenty-nine cases, the United States or other countries have complained about the panel or Appellate Body creating obligations not contained in the agreements under review?[27]

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24. *See, e.g.*, *U.S. – Carbon Steel*, *supra* note 13, ¶¶ 65, 92; Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶¶ 138-39, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada – Autos*]; Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, ¶ 88, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter *Argentina – Footwear*] ("[I]f they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not.").

25. Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 188, WT/DS268/AB/R (Nov. 29, 2004) [hereinafter *U.S. – Oil Country*] ("Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.").

26. *See* Table 3, *infra* Part IV and Annex, *infra* Part IX.

27. *See* Table 5, *infra* Part VI.

III. WARNING SIGNAL NUMBER TWO: MULTIPLE COMPLAINING PARTIES

Warning signal number two is that the structure of disputes, and the efforts by some Members in selected cases to draw in additional Members as complainants, suggests a belief by at least some Members that the outcome of disputes can be affected by the number of parties alleging a violation.

Table 1

WTO Disputes with Multiple Complaining Parties[28]

No.	Case Name	WT/DS	Complaining Parties
1	*Japan – Alcohol*	8, 10, 11	EC, Canada, United States
2	*EC – Bananas III*	27	Ecuador, Guatemala, Honduras, Mexico, United States
3	*Indonesia – Autos*	54, 55, 59, 64	EC, Japan, United States
4	*Korea – Alcohol*	75, 84	EC, United States
5	*Canada – Dairy*	103, 113	United States, New Zealand
6	*Canada – Autos*	139, 142	Japan, EC
7	*U.S. – 1916 Act*	136, 162	EC, Japan
8	*Korea – Beef*	161, 169	Australia, United States
9	*U.S. – Lamb Meat*	177, 178	New Zealand, Australia
10	*India – Autos*	146, 175	United States, EC
11	*U.S. – Offset Act*	217, 234	Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand, Canada, Mexico
12	*U.S. – Steel Safeguards*	248-49/ 251-54/ 258-59	EC, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil
13	*EC – Sugar*	265, 266, 283	Australia, Brazil, Thailand
14	*EC – Geographical Indications*	174, 290	United States, Australia
15	*EC – Chicken Cuts*	269, 286	Brazil, Thailand

28. *See* PIERRE PESCATORE & STEWART & STEWART, HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT, List of WTO Citations, Citations CSi (looseleaf ed., Transnational Publishers rev. 2001).

For example, as shown in Table 1 above, there have been at least fifteen disputes which have been brought by multiple complaining parties. In many of these disputes, each of the complaining parties would have major commercial interests at stake. But that is not true in all of the cases. What the record does show is that in all of the disputes, complaining parties were able to establish one or more WTO violations.

The strong pro-complainant bias that the 90% violation record demonstrates not only encourages multiple complaining parties to challenge the same measures where each is adversely affected, but also can result in Members "piling on" to create the appearance of broad Member concern in a trading partner practice. For example, the authors were told that in the *U.S. – Offset Act* challenge, certain major trading partners of the United States were concerned about the strength of the WTO challenge and recruited other countries to improve the chances of success through the appearance of global concern with the law.[29] Indeed, in that case, complaining parties alleged WTO violations on five major issues of which all but one failed (and the one that was successful was viewed by the United States as creating an obligation that could not be found in the relevant WTO agreements).[30]

Thus, while co-complainant Members may generally have a strong trade interest in cases they join, the system may be "gamed" by Members who maximize the perceived psychological impact (or the "theater" value) on decision-makers by enlisting multiple Members to challenge the WTO-consistency of another Member's measure.

IV. WARNING SIGNAL NUMBER THREE: A GROSS IMBALANCE IN THE NUMBER OF DECISIONS INVOLVING TRADE REMEDIES

Warning signal number three is the gross imbalance in the number of disputes involving trade remedies compared to the actual amount of trade affected. As explained above, the inability of panels and the Appellate Body to apply the existing Article 17.6 standard, which was intended to ensure that disputes are in fact well-founded and not the basis for second-guessing by panels or the Appellate Body, has encouraged an extraordinary number of dispute settlement cases challenging trade remedy decisions, including challenges to both the preliminary and final determinations in the same countervailing duty proceeding.[31] Since the

29. *U.S. – Offset Act*, *supra* note 17.

30. *Id.* ¶ 318; Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶¶ 8.1-8.6, WT/DS217/R, WT/DS234/R (Sept. 16, 2002); *see infra* Part VI for a discussion of the *U.S. – Offset Act* case.

31. Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (Sept. 27, 2002) [hereinafter *U.S. –*

Uruguay Round, certain WTO Members have concentrated on using WTO dispute settlement procedures, whether through requests for consultations or panel proceedings, to address perceived problems with trade remedy laws or measures.

Significantly, of the 343 requests for consultations filed as of May 31, 2006, almost 50% involved the WTO Agreements on Antidumping, Subsidies and Countervailing Measures (SCM), or Safeguards. There were sixty-six requests concerning the Antidumping Agreement, seventy requests concerning the SCM Agreement, and thirty-three requests concerning the Safeguards Agreement.[32] Since January 1, 1995, WTO panel or Appellate Body decisions have been adopted in ninety-eight disputes[33] of which there were forty-two "trade remedy" disputes involving antidumping duty, countervailing duty, or safeguard laws or measures.[34] Of those forty-two disputes, the vast majority involved the Antidumping Agreement. Indeed, there were twenty-one disputes involving the Antidumping Agreement, nine disputes involving the SCM Agreement, four disputes involving both the Antidumping and SCM Agreements, and eight disputes involving the Safeguards Agreement.

The concentration of disputes concerning trade remedies is noteworthy given the negligible amount of trade actually affected by those measures. As a major user of trade remedies, the percentage of U.S. imports affected by antidumping and countervailing duty measures has historically been very small

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Softwood Lumber III Panel Report]; Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (Jan. 19, 2004) [hereinafter *U.S. – Softwood Lumber IV*]; *see Dispute Settlement Body [DSB] Minutes of Meeting on November 1, 2002*, ¶ 7, WT/DSB/M/135 (Jan. 30, 2003). At the meeting to adopt the panel report concerning the preliminary determinations, the United States pointed out that "[t]he preliminary countervailing duties that Canada had challenged in this dispute had already been refunded and the Panel Report had no practical effect on the final countervailing duties that were currently in place. In short, the Panel's findings in this report were moot." *U.S. – Softwood Lumber III* Panel Report, *supra.* The Appellate Body had separately observed that "[a]n unrestricted right to have recourse to dispute settlement during an anti-dumping investigation would allow a multiplicity of dispute settlement proceedings arising out of the same investigation, leading to repeated disruption of that investigation." Appellate Body Report, *United States – Anti-Dumping Act of 1916*, at 22 n.38, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000).

32. Requests for consultations were identified by searching the WTO website for "G/ADP/D*," "G/SCM/D*," or "G/SG/D*." The number of requests for consultations citing a violation of the SCM Agreement includes not only disputes involving countervailing duties but also subsidies in general.

33. This total is based on the ninety-six disputes listed as having adopted reports as of February 24, 2006, plus the decisions issued in WT/DS294 and WT/DS308. *See Update of WTO Dispute Settlement Cases*, *supra* note 18.

34. *See* Annex, *infra* Part IX.

(i.e., typically between 0.5% and 2% of total U.S. imports).[35] In its Performance and Annual Reports for FY2003 and FY2004, U.S. Customs reported the amount of antidumping and countervailing duties (AD/CVD) collected and the total amount of ordinary customs duties collected for FY2002, FY2003, and FY2004. The United States has a very small average ordinary tariff on imported goods. Yet, even compared with ordinary customs duties, U.S. antidumping and countervailing duties barely register, amounting to just 1.20% to 1.58% of the amount of ordinary duties collected.

Table 2

Total U.S. AD/CVD v. Ordinary Duties Collected (2002-2004)

FY	Total AD/CVD Collected	Ordinary Customs Duties Collected	AD/CVD & Customs Duties
2002[36]	$312,000,000	$19,787,943,000	1.58%
2003[37]	$247,400,000	$20,601,425,000	1.20%
2004[38]	$332,000,000	$21,279,612,000	1.56%

Like the United States, the percentage of imports covered by AD/CVD imposed by the EC and Canada, two other significant users of AD/CVD remedies,

35. U.S INT'L TRADE COMM'N [USITC], INV. NO. 332-44, PUBL'N NO. 2900, ECONOMIC EFFECTS OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS AND SUSPENSION AGREEMENTS, at 4-1 (June 1995) (In 1991, hundreds of active antidumping/countervailing duties (AD/CVD) orders affected $9.0 billion in imports from over 1300 ten-digit Harmonized Tariff Schedule (HTS) product categories from nearly fifty countries. This represents 1.8% of total U.S. merchandise imports, which was nearly $491 billion in 1991.); WTO Secretariat, *Trade Policy Review – United States*, at 65, WT/TPR/S/16 (1996); Honorable William M. Daley, Sec'y of Commerce, Prepared Statement Before the Senate Finance Committee (Sept. 29, 1999), *available at* http://www.ogc.doc.gov/ogc/legreg/testimon/106f/daley0929.htm (noting that, in 1998, antidumping and countervailing duty orders covered only 0.5% of total U.S. imports); WTO Secretariat, *Trade Policy Review – United States*, at 50, WT/TPR/S/126 (2004) ("[I]n FY2001 . . . imports subject to AD/CVD measures . . . accounted for less than 0.5% of total U.S. imports."); *see also* TERENCE P. STEWART, AMY S. DWYER, PATRICK J. MCDONOUGH, MARTA M. PRADO & AMY A. KARPEL, RULES IN A RULES-BASED WTO: KEY TO GROWTH; THE CHALLENGES AHEAD 32 (Transnational Publishers 2002); Terence P. Stewart, Patrick J. McDonough & Marta M. Prado, *Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs Are Addressed*, 24 FORDHAM INT'L L.J. 652, 677 (2000).

36. U.S. CUSTOMS & BORDER PROT., PERFORMANCE AND ANNUAL REPORT, FISCAL YEAR 2003, at 93, 100 (2003).

37. *Id.*

38. U.S. CUSTOMS & BORDER PROT., PERFORMANCE AND ANNUAL REPORT, FISCAL YEAR 2004, at 97, 101 (2004).

has been tiny. From 1996 to 2003, the percentage of EC imports affected by antidumping and countervailing duties ranged from 0.3% to 0.6%.[39] From 1988 to 1989, Canadian data indicates that the percentage of Canadian imports affected by antidumping and countervailing measures was in the 0.80% to 0.94% range. From 1990 to 2004, the percentage of Canadian imports affected by antidumping and countervailing measures fell to a range of 0.31% to 0.55%.[40] With such a small amount of trade affected, it is hard to justify nearly 50% of disputes involving trade remedy decisions and, of that 50%, some 60% involving challenges to decisions of the United States.

Based on total initiated cases from 1995 to 2005, the major users of antidumping, countervailing, and safeguard measures include not only the United States, the EC, Australia, and Canada, but also developing countries, such as India, Argentina, South Africa, Brazil, China, Turkey, Mexico, and the Republic of Korea.

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39. *See* EUR. COMM'N, 15TH ANNUAL REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT ON THE COMMUNITY'S ANTI-DUMPING & ANTI-SUBSIDY ACTIVITIES ("ANNUAL REPORT") 4 (1996); EUR. COMM'N, 16TH ANNUAL REPORT 5 (1997); EUR. COMM'N, 17TH ANNUAL REPORT 9 (1998); EUR. COMM'N, 18TH ANNUAL REPORT 20 (July 11, 2000); EUR. COMM'N, 19TH ANNUAL REPORT 24 (Oct. 12, 2001); EUR. COMM'N, 20TH ANNUAL REPORT 16 (Sept. 27, 2002); EUR. COMM'N, 21ST ANNUAL REPORT 23 (Aug. 7, 2003); EUR. COMM'N, 22ND ANNUAL REPORT 5 (Dec. 27, 2004).

40. CANADIAN INT'L TRADE TRIB., CANADIAN & INTERNATIONAL USE OF ANTI-DUMPING AND COUNTERVAILING MEASURES 1988-1995, at 27 (May 1997); CANADIAN INT'L TRADE TRIB., CANADIAN IMPORTS AFFECTED BY ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES 1995-2002, at 4 (Nov. 2003); CANADIAN INT'L TRADE TRIB., CANADIAN IMPORTS AFFECTED BY ANTI-DUMPING AND COUNTERVAILING MEASURES 1995-2003: ANALYTIC REPORT 2 (Apr. 2004); CANADIAN INT'L TRADE TRIB., CANADIAN IMPORTS AFFECTED BY ANTI-DUMPING AND COUNTERVAILING MEASURES 1995-2004: ANALYTIC REPORT 2 (July 2005).

Table 3

Number of AD/CVD/SG Initiations[41] (1995-2005)

Country	No. of AD/CVD/SG Initiations	Percentage of Total Initiations
United States	448	14%
India	440	14%
European Community	376	12%
Argentina	212	7%
South Africa	208	7%
Australia	186	6%
Canada	154	5%
Brazil	126	4%
China, P.R.	124	4%
Turkey	106	3%
Mexico	88	3%
Korea, Rep. of	85	3%
Subtotal	**2553**	**81%**
Total	**3164**	**100%**

While the United States may be among the twelve major users of the antidumping, countervailing, and safeguard (AD/CVD/SG) laws (based on initiations), its initiations during the 1995-2005 period individually accounted for only 14% of all initiations. During that same period, however, the United States was the responding party in 60% (twenty-five of the forty-two) of the trade remedy disputes resulting in panel or Appellate Body decisions, followed by Argentina (four); the EC (three); Mexico, Guatemala, and Korea (two each); and Brazil, Thailand, Chile, and Egypt (one each).[42] As the table in the Annex to this Article indicates, the EC was a complaining party in more "trade remedy disputes" than any other Member, acting as a complaining party in 26% of the

41. Comm. on AD Practices, *AD Initiations: By Reporting Member from January 1, 1995 to December 31, 2005*, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm; Comm. on SCM Practices, *CV Initiations: By Reporting Member from January 1, 1995 to December 31, 2005*, http://www.wto.org/english/tratop_e/scm_e/scm_e.htm; Comm. on Safeguards, *Safeguard Initiations: By Reporting Member from January 1, 1995 to December 31, 2005*, http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm.

42. *See* Annex, *infra* Part IX.

"trade remedy disputes," in general, and 32% of trade remedy disputes against the United States, in particular.

Only one WTO Member, the United States, was the responding party for well over half of those WTO disputes. Common sense suggests that such an outcome is unreasonable. The United States has had an active trade remedy practice for eight decades, has been a major participant in each round of negotiations, has adopted implementing legislation to address such changes as might have been required by its new obligations, and, yet, has been found uniquely not to know what it agreed to or not to have implemented what it agreed to—indeed, the foregoing statistics apparently suggest that the United States is seven times more likely to err than the European Union (another long-term user of trade remedies) and three times as likely not to have implemented its obligations correctly as Argentina, a new user. No one familiar with the trade remedy systems around the world can possibly view these statistical likelihoods as realistic.

The trend in trade remedy decisions may be due to the fact that some Members allow private parties to a dispute to use the government-to-government dispute settlement system. The system was not designed for such a purpose, and there is no mechanism that permits the other party to raise issues or concerns that it may have on decisions or interpretations.

The overall pro-complainant bias in the system also encourages Members to seek de facto modifications in the Rules agreements through panel or Appellate Body interpretations. Indeed, the record shows that the WTO dispute settlement system provides complaining parties with sufficient incentive, even encouragement, to take borderline claims well past the consultations stage of the dispute settlement process to gradually gain modifications in the agreements that all Members had agreed to as part of the Uruguay Round.

V. WARNING SIGNAL NUMBER FOUR: THE IMPRESSION OF A BIAS AGAINST THE USE OF TRADE REMEDIES

Warning signal number four is that the WTO dispute settlement system gives the impression of having a bias against the use of trade remedies, given the Appellate Body's tendency to re-engineer the results of the Uruguay Round in the Rules area and, in a number of cases, its seemingly arbitrary selection of definitions in construing terms in the Antidumping, SCM, and Safeguards Agreements.[43]

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43. *See, e.g.*, Greenwald, *supra* note 10, at 115.

> The pattern of WTO decision-making in these cases is troubling—in order to find anti-dumping duties, countervailing duties, or safeguard

A. Re-Engineering the Results of the Uruguay Round in the Rules Agreements

In at least three distinct instances, the Appellate Body decided to reject arguments that would reinforce the availability of strong trade remedies in the WTO Agreement. First, in *Argentina – Footwear* and *Korea – Dairy*, the Appellate Body rejected arguments that Article 2.1 of the Safeguards Agreement did not refer to an "unforeseen developments requirement," and, therefore, proof of "unforeseen developments" for the application of safeguard measures was not required.[44] Instead, the Appellate Body found that GATT 1994 Article XIX:1 required WTO Members to determine whether increased imports resulted from "unforeseen developments" even though the "unforeseen developments" language in Article XIX:1(a) had been omitted from Article 2.1:

> **Article XIX:1(a) of GATT 1994**
> If, as a result of *unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, *any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products*, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[45]
>
> **Article 2.1 of the Safeguards Agreement**
> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that *such product is being imported into its territory in*

> measures "illegal," the panels and the Appellate Body have (1) read language out of an applicable agreement, (2) read language into an agreement that is nowhere to be found in the text, and (3) interpreted the language of the applicable agreement in a manner that is unreasonably restrictive. In fact, the only constant has been the pro-complainant outcome.

Id.

44. *Argentina – Footwear*, *supra* note 24; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Korea – Dairy*].

45. GATT 1994, *supra* note 4, art. XIX:1 (emphasis added).

> *such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.*[46]

In doing so, the Appellate Body was aware of the fact that inclusion of an "unforeseen" test in the June 1989 negotiating draft of the Safeguards Agreement had been rejected in the July 1990 negotiating draft.[47] The United States had also pointed out to the Appellate Body that legal scholars had agreed that the "unforeseen developments" requirement was "no longer a prerequisite for a safeguard action" under the Safeguards Agreement, and "the great majority of safeguards legislation notified to the WTO [did] not even refer to the requirement."[48] The United States further warned that:

> If it were possible for Members to pick and choose between the rights and obligations in the original package of Article XIX, and the rights and obligations in the Agreement on Safeguards, then the entire project represented by that Agreement would be revised post hoc, and the negotiated balance would be fundamentally upset.[49]

Instead, the Appellate Body rejected evidence that the "unforeseen developments" requirement was intentionally omitted from the Safeguards Agreement and had long since been abandoned. According to the Appellate Body, the provisions in Articles XIX:1 and 2.1 were integral parts of the same treaty and must be read together,[50] arguing that "if they had intended to expressly omit this clause, the Uruguay Round negotiators would and could have said so in the Agreement on Safeguards."[51] Yet, it could also be true that the negotiators had intended to omit the clause in the nearly identical Article 2.1 by simply not including the requirement in the Safeguards Agreement.[52] Based on the Appellate

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46. Safeguards Agreement, *supra* note 3, art. 2.1 (emphasis added) (footnote omitted).

47. Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, ¶¶ 8.65-.66, WT/DS121/R (June 25, 1999); *Argentina – Footwear*, *supra* note 24, ¶¶ 49, 61-62; *see Korea – Dairy*, *supra* note 44; Myron A. Brilliant, *Safeguards*, *in* THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), at 1791 tbl.6 (Terence P. Stewart ed., 1993).

48. *Argentina – Footwear*, *supra* note 24, ¶ 63.

49. *Id.* ¶ 61.

50. *Id.* ¶¶ 81, 84, 88; *Korea – Dairy*, *supra* note 44, ¶¶ 75, 77, 81-82.

51. *Argentina – Footwear*, *supra* note 24, ¶ 88; *Korea – Dairy*, *supra* note 44, ¶ 77.

52. *See* Terence P. Stewart & Amy S. Dwyer, HANDBOOK ON WTO TRADE REMEDY DISPUTES: THE FIRST SIX YEARS (1995-2000), at 335 n.2023 (2001).

Body's 1999 decisions, the United States lost the same issue again in *U.S. – Lamb*,[53] *U.S. – Line Pipe*,[54] and *U.S. – Steel Safeguards*,[55] and Argentina likewise failed to establish the requisite "unforeseen developments" in *Argentina – Peaches*.[56] As a result of the Appellate Body's decision, Members have been repeatedly frustrated in their attempts to use safeguards in a WTO-consistent manner.

Curiously, the Appellate Body's legal theory that "a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole"[57] has not been uniformly applied to other Rules Agreements and their GATT counterparts. For example, the Appellate Body has never read any of the provisions of the Antidumping Agreement to give meaning to the GATT Article VI language condemning injurious dumping. The inconsistent legal approach gives the impression of a distinct bias against the use of trade remedies.

Second, in the *EC – Bed Linen*[58] and *U.S. – Softwood Lumber V*[59] cases, the Appellate Body rejected arguments that Article 2.4.2 of the Antidumping Agreement did not prohibit the so-called practice of zeroing in those antidumping investigations.[60] Not only had two GATT panels decided that the Antidumping Code did not preclude the long-standing practices of both the EC and the United States,[61] but the Appellate Body also dismissed evidence that Uruguay Round

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53. Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 197, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001) [hereinafter *U.S. – Lamb*].

54. Appellate Body Report, *United States – Definitive Safeguard Measures on Imports on Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 8.1, WT/DS202/AB/R (Feb. 15, 2002) [hereinafter *U.S. – Line Pipe*].

55. *U.S. – Steel Safeguards*, *supra* note 19, ¶ 513.

56. Panel Report, *Argentina – Definitive Safeguard Measures on Imports of Preserved Peaches*, ¶ 8.1, WT/DS238/R (Feb. 14, 2003) [hereinafter *Argentina – Peaches* Panel Report].

57. *Korea – Dairy*, *supra* note 44, ¶ 81; *cf.* Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 238, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005) [hereinafter *EC – Chicken Cuts*] (finding that Article 31(1) of the Vienna Convention "makes it clear that the starting point for ascertaining 'object and purpose' is the treaty itself, in its entirety").

58. *EC – Bed Linen*, *supra* note 23, ¶ 46.

59. *U.S. – Softwood Lumber V*, *supra* note 22, ¶ 86.

60. Briefly, the so-called practice of zeroing means calculating no or a "zero" dumping margin on sales that have not been dumped, i.e., with an export price greater than the normal value.

61. Report of the Panel, *European Communities – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ¶¶ 2, 347, 360, ADP/136 (Apr. 28, 1995) (*unadopted*); Report of the Panel, *European Communities – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ¶¶ 1, 500-01, ADP/137 (July 4, 1995) (*adopted* Oct. 30, 1995).

negotiators made proposals concerning the practice of zeroing of non-dumped sales or "negative margins" but did not go so far as to prohibit the practice or even address the proper treatment of non-dumped sales in the final Antidumping Agreement.[62] The Appellate Body dismissed the historical evidence as inconclusive.[63]

Instead, the Appellate Body again pointed out that "when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly."[64] The Appellate Body concluded, "based on the ordinary meaning of Article 2.4.2 read in its context, that zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology."[65] Thus, the Appellate Body's first "zeroing" decision in *EC – Bed Linen* re-engineered the results of the Uruguay Round by adding a new obligation in the Antidumping Agreement and encouraged a steady stream of WTO Members to raise the issue in their own panel requests.[66]

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62. In fact, on June 20, 2005, two principal U.S. negotiators for antidumping rules in the Uruguay Round from 1989 to 1992 wrote to the U.S. Trade Representative and the U.S. Secretary of Commerce, calling their attention to the series of WTO panel and Appellate Body decisions that have materially changed U.S. WTO obligations, which includes the line of cases involving zeroing. *See Former Commerce Officials Call for Stronger Stance on Remedy Laws*, INSIDE U.S. TRADE, June 24, 2005, at 15. According to the letter, the Appellate Body's determination that the Antidumping Agreement prohibits "zeroing" "does not accurately reflect the results of the Uruguay Round negotiations" because proposals to prohibit zeroing were opposed and never successfully incorporated into any of the draft or final texts. Letter from Eric I. Garfinkel & Alan M. Dunn, Former Assistant Sec'ys of Commerce for Imp. Admin., to the Honorable Carlos M. Gutierrez, U.S. Sec'y of Commerce, & the Honorable Robert J. Portman, U.S. Trade Representative (June 20, 2005) (on file with authors).

63. *U.S. – Softwood Lumber V*, *supra* note 22, ¶¶ 107-08.

64. *Id.* ¶ 100.

65. *Id.* ¶ 108.

66. In addition to the three disputes identified above, the issue of "zeroing" has been raised by Mexico in at least two requests for the establishment of a panel. *See, e.g.*, Request for the Establishment of a Panel by Mexico, *United States – Anti-Dumping Measures on Oil Country Tubular Goods from Mexico*, WT/DS282/2 (Aug. 8, 2003); Request for the Establishment of a Panel by Mexico, *United States – Anti-Dumping Measures on Cement from Mexico*, WT/DS281/2 (Aug. 8, 2003). Canada has appealed the Article 21.5 panel decision in *U.S. – Softwood Lumber V*. *See* Notification of an Appeal by Canada, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/25 (May 17, 2006). Japan has also challenged U.S. laws, regulations, and methodology regarding "zeroing" as such and as applied in the context of not only antidumping investigations, but also administrative and sunset reviews. *See* Request for Establishment of a Panel by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/8 (Feb. 7, 2005). Thailand and Ecuador have also raised the issue of "zeroing" in their requests for consultations concerning the U.S. antidumping investigations of shrimp from Ecuador and Thailand. *See* Request for Consultations by

A year and a half later in *U.S. – Zeroing (EC)*, the Appellate Body declined to address the U.S. argument that its precedent could have the effect of nullifying the second sentence of Article 2.4.2.[67] Instead, the Appellate Body articulated a new rationale to support its finding that zeroing in the administrative reviews at issue resulted in excessive antidumping duties contrary to GATT 1994 Article VI:2 and Antidumping Agreement Article 9.3—this time, in the absence of any violation of Article 2.4.2.[68]

It did not go unnoticed that the legal basis for the Appellate Body's finding against the zeroing methodology had changed, inexplicably, over time. At the DSB adoption meeting, the United States responded to the Appellate Body's report in *U.S. – Zeroing (EC)* by stating that it was "deeply troubling" and by taking the unusual step of providing detailed views on the report in a separate written statement.[69] According to the United States, the Appellate Body's "new rationale has serious implications for other provisions of the Antidumping Agreement and the manner in which Members administer their antidumping regimes":

> Based on what we have heard and read thus far, the Appellate Body report is being applauded in some quarters because it goes beyond what negotiators could achieve. However, that is just another way of saying that the report has added to or diminished rights and obligations actually agreed to by Members, notwithstanding DSU Articles 3.2 and 19.2. To the extent that this perception is widely held, the credibility of the WTO dispute settlement system is undermined.[70]

It can also be fairly said that no word or phrase in the Antidumping Agreement expressly prohibits the so-called practice of zeroing. That any given calculation methodology may increase or decrease a dumping margin, however, does not mean that it is inconsistent with the Antidumping Agreement. In three reports, the Appellate Body used the Agreement's silence on the issue to make a policy

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Thailand, *United States – Anti-Dumping Measures on Shrimp from Thailand*, WT/DS343/1 (Apr. 27, 2006); Request for Consultations by Ecuador, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/1 (Nov. 21, 2005).

67. Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr. 18, 2006).

68. *Id.* ¶¶ 133-35, 145, 147.

69. Communication from the United States, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/16 (May 17, 2006).

70. Press Release, U.S. Mission to the United Nations in Geneva, U.S. Statement at the WTO Dispute Settlement Body Meeting (May 9, 2006), *available at* http://www.us-mission.ch/Press2006/0509DSB.html.

decision, apparently driven by its own unfounded concerns regarding the size of dumping margins.[71]

Third, in the *U.S. – Lead and Bismuth II* case, the Appellate Body refused to give meaning to the Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, which states:

> Ministers recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.[72]

In that case, the United States argued that the Ministerial Declaration created binding obligations, which demonstrated "the clear intent of the Ministers to apply the standard of review contained in Article 17.6 of the Anti-Dumping Agreement to disputes involving countervailing duty measures under the SCM Agreement."[73] The Appellate Body dismissed the relevance of the Declaration by finding that the language was merely "hortatory" and, thus, did not impose an obligation to do anything, nevermind require application of the standard of review in Article 17.6 of the Antidumping Agreement to disputes involving countervailing duty measures.[74] Absent such an obligation, the Appellate Body chose to apply the less deferential standard of review in DSU Article 11 to disputes involving countervailing duty measures under the SCM Agreement.[75]

The Appellate Body's decision to dismiss the Declaration as "hortatory" was made without regard for its historical context. The negotiating history shows that the antidumping and countervailing duty provisions of the Antidumping and

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71. Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 135, WT/DS244/AB/R (Dec. 15, 2003); *see U.S. – Softwood Lumber V*, *supra* note 22, ¶ 101.

72. Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures (Apr. 15, 1994), *in* WORLD TRADE ORG., THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 395 (2001) [hereinafter Ministerial Declaration].

73. Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 10, WT/DS138/AB/R (May 10, 2000) [hereinafter *U.S. – Lead and Bismuth II*].

74. *Id.* ¶ 49.

75. *Id.* ¶ 51.

SCM Agreements were intended to be harmonized.[76] In November 1993, Chairman Sutherland explained that "[i]n the areas of subsidies, countervailing measures and anti-dumping, it has long been the intention to harmonise relevant language in the two agreements," and asked the Friends of the Chair to produce revised texts, which would begin to be tabled from November 30, 1993 onwards.[77] During the final days of the Uruguay Round negotiations, however, Article 17.6(ii) was added to the Antidumping Agreement at the insistence of the United States in response to concerns that panels would misinterpret the lack of express permission, or gaps, in the Antidumping Agreement as prohibitions.[78] Without time to make all corresponding changes in the countervailing duty provisions in the SCM Agreements, Members were able to agree upon a Declaration recognizing the "need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."[79]

In the *U.S. – Lead and Bismuth II* case, however, the Appellate Body did not explain why application of a different standard of review to resolve countervailing duty disputes would not somehow frustrate the intentions of the negotiators as expressed in the Declaration. Nor did the Appellate Body consider the context of the Declaration, which serves to bridge two similar agreements with a number of nearly identical provisions. Since then, the Appellate Body has not even applied the standard of review in Article 17.6(ii) of the Antidumping Agreement to antidumping disputes. As explained above, no adopted panel or Appellate Body decision has ever found more than one "permissible interpretation" within the meaning of Article 17.6(ii) of the Antidumping Agreement.

B. The Arbitrary Selection of Definitions in Trade Remedy Disputes

WTO panels and the Appellate Body have an extraordinary amount of discretion in deciding how to interpret WTO agreements when relying on the customary rules of interpretation of public international law found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. DSU Article 3.2 states that one function of the WTO dispute settlement system is to "clarify the existing provisions of . . . agreements in accordance with customary rules of interpretation

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76. *See* Patrick J. McDonough, *Subsidies and Countervailing Measures*, *in* IV THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1994): THE END GAME (PART I) 221, 227-28 (Terence P. Stewart ed., 1999).

77. *Id*.

78. *See GATT Partners Work Out Controversial Dumping Issue*, INSIDE U.S. TRADE, Dec. 14, 1993; Special Report, *Industry Analysis of GATT Draft*, INSIDE U.S. TRADE, Jan. 17, 1992, at S-2.

79. Ministerial Declaration, *supra* note 72.

of public international law."[80] The reference to "customary rules of interpretation of public international law" has been interpreted to mean Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[81] Article 31 of the Vienna Convention states that a treaty must be interpreted "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."[82]

In WTO dispute settlement, interpretations provided in panel decisions generally begin with the dictionary in order to identify the "ordinary meaning" of a given term in the WTO Agreement.[83] Over the years, WTO panels and the Appellate Body have cited to over twenty different dictionaries covering the various official WTO languages as well as legal and technical terms.[84] A former Appellate Body member acknowledged that the *Shorter Oxford English Dictionary* had become, in the words of certain critical observers, "'one of the covered agreements.'"[85]

The existence of multiple English-language dictionaries offers multiple definitions from which to choose an "ordinary meaning" for a single word. For example, the word "dump" has sixteen separate definitions, the word "import" has eight, the word "industry" has seven, and the word "producer" has five in the *Shorter Oxford English Dictionary*. Despite there being multiple dictionary definitions to choose from, there is nothing in the Vienna Convention that requires interpreters to pick a single dictionary definition as the "ordinary meaning" over all or some definitions. WTO Members are then left to make arguments based on all of the definitions.

The Appellate Body has, however, repeatedly cautioned that while panels may start with dictionary definitions of the terms to be interpreted, "dictionary

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80. DSU, *supra* note 1, art. 3.2.

81. *U.S. – Carbon Steel*, *supra* note 13, ¶ 61 ("It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the 'Vienna Convention') are such customary rules.").

82. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

83. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 164, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S. – Gambling*].

84. *See* Terence P. Stewart & Amy S. Dwyer, *The WTO Dispute Settlement System: An Overview*, *in* PIERRE PESCATORE & STEWART & STEWART, HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 3, 21 (looseleaf, rev. ed., Transnational Publishers 2003) (listing the various dictionaries cited).

85. Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 615-16 (2002).

definitions have their limitations in revealing the ordinary meaning of a term."[86] According to the Appellate Body, "dictionary meanings leave many interpretative questions open,"[87] and dictionaries' limitations are especially clear when the meaning of terms used in the different authentic texts are susceptible to differences in scope.[88] "Dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words—be those meanings common or rare, universal or specialized."[89]

The Appellate Body has also explained in a non-trade remedy dispute, *U.S. – Gambling*, that the panel should have first noted that the range of possible meanings of the word "sporting" included both the meanings claimed by Antigua and the United States, and then "continued its inquiry into *which* of those meanings was to be attributed to the word as used in the United States' GATS Schedule."[90] In the context of the Antidumping Agreement, however, the interpretative discretion of WTO panels and the Appellate Body is significantly constrained by the standard of review in Article 17.6(ii). Article 17.6(ii) requires interpreters to accept responding parties' interpretations based on a "permissible interpretation" even if that may not be the one the interpreter would choose. Thus, the Article 17.6(ii) standard of review should affect the selection of the "ordinary meaning" of provisions in the Antidumping Agreement.

To date, however, the Article 17.6(ii) standard of review has not perceptibly affected the outcome of any decision, as no Appellate Body decision has ever concluded that there is more than one permissible meaning to a term. The search for "ordinary meaning" is what is pursued. Indeed, the Appellate Body's selection of an "ordinary meaning" in any given trade remedy case can appear arbitrary.[91] For example, Table 4 provides a review of definitions from both *The New Shorter Oxford English Dictionary* (1993) and the *Shorter Oxford English Dictionary* (2002) selected by the Appellate Body in trade remedy disputes.

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86. *U.S. – Softwood Lumber IV*, *supra* note 31, ¶ 59; *see EC – Chicken Cuts*, *supra* note 57, ¶ 175.

87. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 92, WT/DS135/AB/R (Mar. 12, 2001).

88. *U.S. – Softwood Lumber IV*, *supra* note 31, ¶ 59.

89. *U.S. – Gambling*, *supra* note 83, ¶ 164.

90. *Id.* ¶ 167.

91. For example, in the *U.S. – Offset Act* case, the Appellate Body decided that two out of the three dictionary definitions identified for the word "against" were relevant for purposes of the Antidumping and SCM Agreements. The third definition, relied on by the responding party, could not be used to ascertain the ordinary meaning of the word "against" in those agreements because it was "irrelevant." *U.S. – Offset Act*, *supra* note 17, ¶¶ 248, 250.

Table 4

Examples of Definitions Selected by the Appellate Body in Trade Remedy Disputes

Appellate Body Report	Cite	Para.	Word Defined	Definition Number	Page of Dictionary
U.S. – Wheat Gluten	166	53	investigation	2*	1410
		67	causal	2*	355
		67	cause	1*	355-56
		67	link	3*	1598
		68	attribute	1, 2*	145
		71	bearing	7*	199
Thailand – H-Beams	122	116	establishment	6*	853
		116	proper	A(II)(6)*	2379
U.S. – Hot-Rolled Steel	184	99	cooperate	2*	506
U.S. – Line Pipe	202	163	or	all definitions*	2012
Chile – PBS	207	216	convert	II(9)*	502
		216	converted	II, II(8)*	502
		232	levy	1*	1574
		232	variable	1*	3547
U.S. – Offset Act	217/234	247, 254	against	A I, I(1)*	38
U.S. – Steel Safeguards	248-49/ 251-54/ 258-59	287	conclusion	4**	477
		287	to reason	4(a)**	2482
		315	result	1**	2555
U.S. – Softwood Lumber IV (Final CVD)	257	58	goods	3**	1125
		84	adequate	1**	26
		84	remuneration	all definitions**	2529
		89	in relation to	phrases**	2520
		89	as regards	6**	2512
		89	respect	I (1)**	2550

* THE NEW SHORTER OXFORD ENGLISH DICTIONARY (1993)
** SHORTER OXFORD ENGLISH DICTIONARY (2002)

When all of the dictionary definitions that are not otherwise listed as obsolete can fairly be said to reflect the "ordinary meaning" of the words used in WTO agreements, the Appellate Body's selection of one definition over another can, of course, be said to depend on the context of the words as used in the agreement. Yet, the often scattershot approach to picking and choosing among possible "ordinary meanings" can also appear arbitrary to WTO Members that inexplicably are not considered to have similar discretion.

In the context of a multilateral treaty which sovereign nations themselves have written and to which they have consented, the lack of any initial deference by panels or the Appellate Body to the responding parties' interpretation of a covered agreement, in the absence of an explicit prohibition of their actions, is all the more striking in antidumping disputes. Indeed, the Appellate Body initially recognized the principle of *in dubio mitius* as a widely recognized "supplementary means of interpretation," which calls on interpreters to defer to the meaning that is less onerous if the meaning of a term is ambiguous:

> The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.[92]

It is not clear, however, why the principle would not apply to interpretations which affect the choice of an ordinary meaning or a context for purposes of WTO dispute settlement.

The reality is that when there are seven or more definitions of a word used in an agreement, the decision to choose one definition over the others may flow more from a results-oriented exercise of discretion than from contextual constraints and, at a minimum, raises concerns about adherence to the requirements of Article 17.6 and about an institutional bias against the use of WTO-consistent measures.[93]

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92. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, at 62 n.154, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (quoting OPPENHEIM'S INTERNATIONAL LAW 86, at 1278 (R. Jennings & A. Watts eds., 9th ed. 1992)); *see* LORD MCNAIR, THE LAW OF TREATIES 462 (1961) ("[I]n case of ambiguity, the meaning should be preferred which is less onerous to the obligated party, causing less interference with its personal and territorial supremacy.").

93. Some WTO Members, however, have been concerned enough about the Secretariat's role in assisting WTO panelists that they have proposed that all inputs provided by the Secretariat also be provided to the parties. *See* Proposal by the LDC Group of September 19, 2002, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/17 (Oct. 9, 2002) ("The spectrum of such assistance is very broad. It ranges

VI. WARNING SIGNAL NUMBER FIVE: OVERREACHING BY DISPUTE SETTLEMENT BODIES

Warning signal number five is that many WTO Members have recognized and objected to "overreaching" by panels or the Appellate Body in a wide range of dispute settlement cases, including trade remedy disputes.[94] Table 5 below lists examples of cases in which Members have complained of overreaching by panels or the Appellate Body.

Table 5

Examples of Cases in Which Members Have Complained of Overreaching by Panels or the Appellate Body

No.	Case Name	WT/DS
1	*U.S. – Shrimp*	58
2	*U.S. – DRAMS*	99
3	*Canada – Dairy*	103/113
4	*Australia – Leather II*	126
5	*Korea – Dairy*	98
6	*Argentina – Footwear (EC)*	121
7	*U.S. – Lead and Bismuth II*	138
8	*U.S. – 1916 Act (EC)*	136
9	*EC – Bed Linen*	141
10	*U.S. – 1916 Act (Japan)*	162
11	*U.S. – Wheat Gluten*	166
12	*U.S. – Lamb*	177/178
13	*U.S. – Stainless Steel (Korea)*	179
14	*U.S. – Hot-Rolled Steel (Japan)*	184
15	*U.S. – Export Restraints*	194
16	*U.S. – Line Pipe*	202

from support on the legal, historical and procedural aspects of the case to secretarial and technical support. Often, such support is pernicious and impacts heavily on the outcome of the case, especially when it takes the form of legal research and other internal commentary on matters of procedure."); Proposals by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe of September 20, 2002, *Negotiations on the Dispute Settlement Understanding*, § 5, TN/DS/W/18 (Oct. 7, 2002); Communication from India on Behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia of February 7, 2003, *Dispute Settlement Understanding Proposals*, TN/DS/W/47 (Feb. 11, 2003); Communication from Jordan of January 24, 2003, *Jordan's Contributions Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding*, § XIII, TN/DS/W/43 (Jan. 28, 2003).

94. *See* Stewart, Dwyer & Hein, *supra* note 11.

No.	Case Name	WT/DS
17	*U.S. – CVD Measures (EC)*	212
18	*U.S. – Carbon Steel (Germany)*	213
19	*U.S. – Offset Act*	217/234
20	*U.S. – Softwood Lumber III*	236
21	*U.S. – Corrosion-Resistant Steel Sunset*	244
22	*U.S. – Steel Safeguards*	248-49/ 251-54/258-59
23	*U.S. – Softwood Lumber IV*	257
24	*U.S. – Softwood Lumber V*	264
25	*U.S. – Oil Country Tubular Goods (Argentina)*	268
26	*U.S. – Softwood Lumber VI*	277
27	*U.S. – Upland Cotton*	267
28	*EC – Shipbuilding*	301
29	*U.S. – Zeroing (EC)*	294

It was not unreasonable for WTO Members to think that the WTO dispute settlement system would follow the same practice as GATT panels in recognizing their inability to "add to or diminish the rights and obligations" negotiated by Members.[95] Yet, in the first eleven years and five months, there has been a perceptible shift by WTO panels and the Appellate Body away from strict adherence to DSU limitations on their authority.

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." These fundamental limits on the exercise of interpretative authority, however, are insufficient if they are not respected or enforced. While the Appellate Body recognized in early decisions the finite scope of its authority under DSU Articles 3.2 and 19.2, later cases reflect a distinct inability to leave questions raised unanswered or to defer to the interpretation of the responding party where agreement language is ambiguous or silent.[96] A

95. *See id.* "[P]anels generally displayed a considerable amount of deference to the Contracting Parties and to the GATT Council, upon whose functions they were loath to encroach. Panels also sometimes refused to consider measures that were being considered elsewhere in the GATT system." Nichols, *supra* note 11, at 406 (citing cases supporting this principle).

96. *See, e.g.*, *U.S. – Carbon Steel*, *supra* note 13, ¶¶ 65, 92 ("[T]he task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by

principal reason for this trend is the Appellate Body's view that interpreters are authorized to fill gaps in agreements and interpret silence.[97] Yet, the Members nowhere authorized this approach, and the approach deviates from the historical approach of GATT dispute settlement decisions.

In the context of trade remedy disputes, there have been numerous cases in which the panel or the Appellate Body could be considered to have "overreached" by filling gaps or construing silence. Some WTO panels and Appellate Body decisions have failed to respect an agreement's silence on a particular issue while other decisions clarify agreement language by creating new guidelines, limitations, and, ultimately, obligations. Below is a partial list of decisions where one or more elements in the underlying decision appear to constitute "overreaching" in the sense described above.

Table 6

Examples of WTO Panel/Appellate Body/Arbitrator "Overreaching" in Disputes Against the United States

Short Title	Agreement(s)	Problematic Issue(s)
U.S. – DRAMS	AD	- Standard of review
U.S. – FSC	SCM	- Financial contribution - Countermeasures
U.S. – Lead and Bismuth II	SCM	- Standard of review - Privatization
U.S. – 1916 Act (EC)	AD	- Specific action - Arbitration
U.S. – 1916 Act (Japan)	AD	- Specific action - Arbitration
U.S. – Wheat Gluten	Safeguards	- Non-attribution analysis - Parallelism
U.S. – Lamb	Safeguards	- Unforeseen developments - Domestic industry - Non-attribution analysis - Standard of review
U.S. – Stainless Steel (Korea)	AD	- Standard of review - Multiple averaging periods

implication."); *Canada – Autos*, *supra* note 24, ¶¶ 138-39; *Argentina – Footwear*, *supra* note 24, ¶ 88 ("[I]f they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not.").

97. *See* sources cited *supra* note 96.

Short Title	Agreement(s)	Problematic Issue(s)
U.S. – Hot-Rolled Steel (Japan)	AD	- Standard of review - Non-attribution analysis - Facts available - Calculation of "all others" rate
U.S. – Export Restraints	SCM	- Advisory opinion on export restraints
U.S. – Line Pipe	Safeguards	- Unforeseen developments - Parallelism - Non-attribution analysis - Standard of review
U.S. – Steel Plate (India)	AD	- Standard of review
U.S. – CVD Measures (EC)	SCM	- Standard of review - Privatization
U.S. – Offset Act	AD/SCM	- Specific action - Arbitration
U.S. – Softwood Lumber III	SCM	- Standard of review - Benchmark - Pass-through analysis
U.S. – Steel Safeguards	Safeguards	- Explicit findings - Unforeseen developments - Parallelism
U.S. – Corrosion Resistant Steel Sunset	AD	- Analysis of challengeable measures (SPB) - Zeroing
U.S. – Softwood Lumber IV (CVD)	SCM	- Pass-through analysis
U.S. – Softwood Lumber VI (ITC)	AD/SCM	- Threat of injury analysis
U.S. – Final Softwood Lumber V (AD)	AD	- Zeroing
U.S. – Oil Country Tubular Goods (Argentina)	AD	- Sunset review waivers - Analysis of challengeable measures (SPB) - Effect of AB decisions on panels
U.S. – Upland Cotton	SCM	- Domestic support measures - Peace Clause analysis - Serious prejudice analysis - Export credit guarantees - Expired measures

A few examples from Table 6 show the types of problems facing Members who believe that the terms of the WTO agreements are being unfairly rewritten through dispute settlement. For instance, in the *U.S. – Offset Act* case, the panel and Appellate Body addressed the WTO consistency of a payment program. Government payment programs are normally viewed as primarily

subject to scrutiny under the SCM Agreement. Certain types of payment programs are prohibited. Others are actionable if harm can be demonstrated by the complaining Member. Some programs are non-actionable if not "specific." Nothing in the SCM Agreement imposes any limitations on the use of moneys from any particular source. Members' governments raise money from a variety of sources and, of course, spend money for a variety of purposes.

The Appellate Body in the *U.S. – Offset Act* case, however, determined that a payment program that had not been alleged or shown to be a prohibited subsidy and had not been shown even to be an actionable subsidy was nonetheless not permissible (i.e., prohibited) by finding that Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively, prohibit the U.S. government's spending of moneys collected from importers from antidumping and countervailing duty orders under the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA). The CDSOA is not part of and does not affect the administration of U.S. antidumping and countervailing duty laws. Nonetheless, the Appellate Body found that the CDSOA is an impermissible "specific action against" dumping or subsidization because it is "implicitly" linked to AD/CVD determinations and mandates the transfer of financial resources from foreign producers/exporters of dumped or subsidized goods to their domestic competitors, which "dissuades" or creates an incentive to terminate the practice of exporting dumped or subsidized goods.

Not only did the Appellate Body's findings in *U.S. – Offset Act* ignore the fact that WTO Members had never made any agreement to limit the use of any particular source of funds collected by a Member, but the Appellate Body ignored the fact that the list of prohibited subsidies in SCM Agreement Article 3 did not include distributions of antidumping and countervailing duties. Significantly, the Appellate Body further erred by finding that antidumping and countervailing duties are paid by foreign producers/exporters, which is not correct. Duties are paid by importers. Finally, the Appellate Body decision interestingly seems to want to protect the right of foreign producers to dump even after injurious dumping has been demonstrated despite the Article VI:1 indication that injurious dumping is to be condemned. In making its decision, the Appellate Body created a new international obligation limiting Members' ability to spend government moneys based on the source of the funds—an extraordinary outcome recognized by the United States as creating an obligation that it did not accept during the Uruguay Round negotiations.

During the antidumping negotiations in the Uruguay Round, there was significant interest by exporters and domestic producers in having time-limited investigations. Domestic parties obviously are concerned with obtaining relief from perceived unfair trade practices as quickly as possible and in having accurate information provided by those believed to be causing the problems. Foreign producers subject to investigation are concerned that there not be long periods of uncertainty in the marketplace and that there be the opportunity to respond to requests for information. Administrators had the concerns of needing time to

investigate and reach decisions based on a record and the need to be able to encourage cooperation by foreign producers who might choose not to supply requested information. The result of the negotiations was an agreement that included some minimum timelines for responding to questionnaires, a maximum time to complete investigations, and the right of administrators to use facts available when information was not forthcoming. In the context of challenges to antidumping measures, as applied, WTO panels and the Appellate Body have rejected investigating authorities' attempts to require respondents to supply necessary information by the deadlines provided in their statutes or regulations and, instead, created a six-factor test before permitting resort to "facts available."

For example, in the *U.S. – Hot-Rolled Steel (Japan)* and the *U.S. – Steel Plate (India)* cases, the panel and Appellate Body explained that the determination of whether information is submitted within "a reasonable period" or "in a timely fashion," or whether resort to facts available is permissible within the meaning of Antidumping Agreement Article 6.8 or Annex II(3), will depend on the facts and circumstances of the case.[98] According to the panel in *U.S. – Steel Plate (India)*, "investigating authorities may not arbitrarily stick to pre-established deadlines as the basis of rejecting information as untimely" and rely instead on facts available.[99] According to the Appellate Body in *U.S. – Hot-Rolled Steel (Japan)*, the Article 6.8 authorization to rely on facts available if necessary information is not submitted "within a reasonable period" requires application of a six-factor test:

> In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether

98. Panel Report, *United States – Antidumping and Countervailing Measures on Steel Plate from India*, ¶ 7.76, WT/DS206/R (June 28, 2002) [hereinafter *U.S. – Steel Plate (India)* Panel Report]; *see* Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 85-86, WT/DS184/AB/R (July 24, 2001) [hereinafter *U.S. – Hot-Rolled Steel (Japan)*].

99. *U.S. – Steel Plate (India)* Panel Report, *supra* note 98, ¶ 7.76.

> acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.[100]

Needless to say, nothing in the Antidumping Agreement supports the imposition of a six-part test before the use of facts available. Nor does the decision by the Appellate Body constitute a recognition of the practical problems faced by administrators. Because the information necessary for calculating an accurate dumping margin is only in the hands of the respondent, the Appellate Body's interpretation undermines the utility of "facts available" and does nothing to prevent respondents from refusing to submit information in a timely manner, thereby limiting the amount of time administering authorities have to analyze the data or request supplemental information.

A number of WTO Members, including the United States, Mexico, India, Chile, Argentina, Pakistan, Costa Rica, and Malaysia,[101] have objected to the problem of "overreaching" by WTO dispute settlement bodies and have faulted the panel or Appellate Body's interpretative approach in DSB meetings or in press releases. For example, the following quotations from DSB meeting minutes in trade remedy cases reveal a consistent dissatisfaction by the United States (as a responding country in 60% of those cases) and other Members with the dispute settlement system's inability to control "overreaching":

> Mexico: "The Appellate Body had contravened the provisions of Article 19.2 of the DSU, because its findings had diminished and added to the rights and obligations provided in the covered agreements."[102]

> Argentina: "The Appellate Body's interpretation . . . had altered the balance of rights and obligations resulting from the Uruguay Round Agreement. It had gone beyond the political agreement reached in this area during the Uruguay Round negotiations . . . . In other words, the Appellate Body would seem to be legislating rather than verifying the application of law in the case at hand."[103]

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100. *U.S. – Hot-Rolled Steel (Japan)*, *supra* note 98, ¶ 85.

101. *See* Stewart, Dwyer & Hein, *supra* note 11, tbl.1.

102. *DSB Minutes of Meeting on November 25, 1998*, at 18, WT/DSB/M/51 (Jan. 22, 1999).

103. *DSB Minutes of Meeting on January 12, 2000*, at 7, WT/DSB/M/73 (Feb. 4, 2000).

> United States: "[T]he Panel had not applied or clarified the SCM Agreement. Instead, it had provided an interpretation of the SCM Agreement, a function which Article IX:2 of the WTO Agreement reserved for the Ministerial Conference and the General Council."[104]
>
> United States: "[A]ll Members, regardless of their views on the substantive subsidy issue, should be concerned about this Panel's usurpation of an authority reserved to Members."[105]
>
> Chile: "[T]he Appellate Body was reconstructing the history in its conclusions, which showed a complete lack of deference to Governments that had taken part in the negotiations. Indeed, the conclusions of the Appellate Body and the Panel had rewritten the results of the negotiations and had altered the balance of rights and obligations."[106]
>
> Chile: "[A]s a result of the Reports such as those at the present meeting, Members would be faced with new obligations which had never been negotiated and which would lead, as in this case, to a transformation of the bases and legal effects of the most fundamental rules of GATT 1994."[107]
>
> United States: "The Appellate Body had created a new category of prohibited subsidies that had neither been negotiated nor agreed to by WTO Members."[108]
>
> United States: "There was a widespread view among the GATT Contracting Parties—including Canada—that such offsetting had not been required in the years and decades before the WTO Agreement, and they had continued in this view as WTO Members after 1995. Thus, it was surprising to find now that the Anti-Dumping Agreement required it."[109]

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104. *DSB Minutes of Meeting on August 23, 2001*, ¶ 49, WT/DSB/M/108 (Oct. 2, 2001).
105. *Id.* ¶ 50.
106. *DSB Minutes of Meeting on October 23, 2002*, ¶ 13, WT/DSB/M/134 (Jan. 29, 2003).
107. *Id.* ¶ 14.
108. *DSB Minutes of Meeting on January 27, 2003*, ¶ 55, WT/DSB/M/142 (Mar. 6, 2003).
109. *DSB Minutes of Meeting on August 31, 2004*, ¶ 36, WT/DSB/M/175 (Sept. 24, 2004).

The existence of overreaching has not only been observed by WTO Members in closed-door meetings of the DSB but also by both the executive and legislative branches of the U.S. government as well as by commentators.[110] For example, in the U.S. Trade Act of 2002, Congress expressed its concern with the "recent pattern of decisions by dispute settlement panels of the WTO and the Appellate Body to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures by WTO Members under the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards."[111] Congress further called for a strategy report from the Executive Branch to correct the problem of overreaching.[112] In the resulting December 2002 strategy report, the Administration recognized that support for future trade liberalization depends on a dispute settlement process that does not alter the negotiated balance of rights and obligations by overreaching:

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

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110. *See, e.g.*, Greenwald, *supra* note 10, at 113-24; Terence P. Stewart, *Developments in DSU Negotiations to Address WTO Panel and Appellate Body "Overreaching,"* ABA INT'L LAW NEWS 10, 11 (Spring 2005); John Ragosta, Navin Joneja & Mikhail Zeldovich, *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 37 INT'L LAW. 697, 697-752 (Fall 2003); Tarullo, *Hidden Costs*, *supra* note 10, at 109-81; John Magnus, Navin Joneja & David Yocis, *What Do All These Adverse WTO Decisions Mean?*, Paper Presented at Georgetown University Law Center's Trade Law Update (Jan. 30, 2003); Paul C. Rosenthal & Jeffrey S. Beckington, *Dispute Settlement Before the World Trade Organization in Antidumping, Countervailing and Safeguard Actions: Effective Interpretation or Unauthorized Legislation*, Paper Presented at Developments in World Trade Organization Law, in Geneva, Switz. (Mar. 20-21, 2003).

111. 19 U.S.C. § 3801(b)(3)(A) (Supp. 2005).

112. 19 U.S.C. § 3805(b)(3) (Supp. 2005); Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body: Report to Congress Transmitted by the Secretary of Commerce (Dec. 30, 2002).

> If the perception develops that WTO panels and the Appellate Body are substituting their own policy judgment for a negotiated balance of rights and obligations, then it will be difficult to maintain the support and confidence of Members and the public in the value of future negotiations. *It is essential, therefore, that WTO dispute settlement not alter the negotiated balance by creating limitations or obligations to which Members did not agree*.[113]

In response to questions from Senator Lincoln on his nomination, the former U.S. Trade Representative Portman agreed that "[a] critically important component of maintaining confidence in a rules-based trading system like the WTO is an effective dispute settlement system," i.e., one that "follow[s] the appropriate standard of review in trade remedy cases and [does] not impose obligations that are not contained in the WTO Agreements."[114]

Yet, the structure of the current system contributes to these digressions. While panel reports are reviewable by the Appellate Body, Appellate Body reports are not effectively reviewable by WTO Members. Unlike national court systems where legislative or executive branch action can address judicial activism, only negotiated agreements based on the consensus of all WTO Members can correct overreaching and other errors. More than one commentator has expressed concern that these systemic issues must be addressed to maintain the WTO dispute settlement system:

> Given the imbalance between the very efficient, binding judicial system and the inefficient, cumbersome rulemaking apparatus, *there is the danger—already identified by a number of WTO scholars—that WTO member states will increasingly look to the judicial system to "create" new law or amend existing laws.* As Marco Bronckers, a leading European legal scholar has written: "Governments may too easily think that progress can be made in

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

114. *Hearing on the Nomination of Robert J. Portman To Be the United States Trade Representative*, at 21-22 (Apr. 21, 2005) (questions for the record from Sen. Lincoln for Congressman Portman). More recently, the Trade Lawyers Advisory Group to the U.S.-China Economic and Security Review Commission in May 2005 identified the need to address the problem of overreaching in the context of the Doha negotiations on DSU reform. *See* Trade Lawyers Advisory Group, *A Report to the U.S.-China Commission on the Importance of Trade Remedies to the U.S. Trade Relationship with China – Challenges Facing the Use of Antidumping Law: A Critical Period for the Administration and Congressional Action*, at 17 (May 16, 2005).

> the WTO through enforcement; that litigation is a more convenient way to resolve difficult issues than an open exchange at the negotiating table. That is troubling because it undermines democratic control over international cooperation and rule-making . . . ."[115]
>
> . . . .
>
> [T]he new WTO dispute settlement system is unsustainable, both politically and substantively. It is not sustainable politically because the constitutional flaw stemming from the imbalance between the powerful judicial system and the weak and ineffective rulemaking procedures will, over time, create major questions of democratic legitimacy. In retrospect, it was relatively easy to rebut charges of democratic illegitimacy against the delegates to Seattle in 1999: they were appointed officials of (mostly) democratic governments. *It will be another thing, however, to defend the actions of WTO judicial bodies when it is alleged that they are "legislating" new rights and obligations through judicial interpretation.*[116]

VII. SYSTEMIC IMPROVEMENTS ARE NEEDED FOR THE NEXT DECADE OF WTO DISPUTE SETTLEMENT

Because trade remedy disputes generally account for almost half (43%) of the decisions adopted, the outcome of those decisions necessarily has an effect not only on the Rules negotiations in the Doha Round but also the concurrent DSU negotiations. While there have already been over 200 formal submissions in the Doha Rules negotiations to date, the Rules negotiations do not cover the Safeguards Agreement, and hence problems that have surfaced in disputes involving the Agreement on Safeguards are not addressable as such in the Rules negotiations.[117] As shown in Table 7 below, the Rules negotiations are being used by many Members to seek reversal or modification of adverse portions of decisions in the trade remedy area.

In the Rules negotiations, both complaining and defending Members have sought clarification of existing agreement language to address an aspect of a

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115. Testimony of Dr. Claude Barfield, Ph.D., Resident Scholar & Dir. of Sci. & Tech. Pol'y Studies for the American Enterprise Inst., to the Comm. on Homeland Sec. & Governmental Affairs, Subcomm. on Fed. Fin. Mgmt., Gov't Info., & Int'l Sec., at 2-3 (July 13, 2005) (emphasis added).

116. *Id.* at 3 (emphasis added).

117. The Rules negotiations have been limited to antidumping, subsidies and countervailing duties, fisheries subsidies, and regional trade agreements.

decision deemed to be problematic to the Member. The United States also submitted an initial proposal to consider whether Article 17.6 of the Antidumping Agreement should be addressed to ensure that panels and the Appellate Body properly apply it in reviewing both antidumping and countervailing duty measures.[118] At the Rules meeting to discuss the U.S. proposal, some other participants indicated that they shared U.S. concerns regarding application of the standard of review in Article 17.6.[119] It is unclear which, if any, of these proposals will be adopted during the ongoing Rules negotiations. What is clear is that without significant clarifications during the Round, Members will continue to be encouraged to seek a change in the balance of rights and obligations through resort to the dispute settlement system.

118. Communication from the United States, *Further Issues Identified Under the Anti-Dumping and Subsidies Agreements for Discussion by the Negotiating Group on Rules*, ¶ 7, TN/RL/W/130 (June 20, 2003).

119. *Note by the Secretariat: Summary Report of the Meeting Held on June 18-19, 2003*, ¶ 15, TN/RL/M/10 (July 17, 2003).

Table 7

Examples of Proposals to Modify Agreements to Address Aspects of Adverse WTO Panel or Appellate Body Decisions in Trade Remedy Cases

WT/ DS	Short Title	Issue	Member Proposing Change	Proposal Cite
99	*U.S. – DRAMS*	de minimis tests	Korea, et al. (C)	- TN/RL/W/6 - TN/RL/W/83 - TN/RL/GEN/10 - TN/RL/GEN/44/ S.1 - TN/RL/GEN/52
126	*Australia – Automotive Leather*	withdrawal of subsidy	Australia (R)	- TN/RL/GEN/35
138	*U.S. – Lead and Bismuth II*	privatization	United States (R)	- TN/RL/W/130
141	*EC – Bed Linen*	SG&A hierarchy	India (C)	- TN/RL/W/26
184	*U.S. – Hot-Rolled Steel (Japan)*	period of investigation	Japan, et al. (C)	- TN/RL/W/29
184	*U.S. – Hot-Rolled Steel (Japan)*	domestic industry	Japan, et al. (C)	- TN/RL/W/10
184	*U.S. – Hot-Rolled Steel (Japan)*	facts available	United States (R)	- TN/RL/W/153
184	*U.S. – Hot-Rolled Steel (Japan)*	all others rate	United States (R)	- TN/RL/W/72 - TN/RL/GEN/16
184	*U.S. – Hot-Rolled Steel (Japan)*	sales to affiliates	United States (R)	- TN/RL/W/130
184	*U.S. – Hot-Rolled Steel (Japan)*	causation	United States (R)	- TN/RL/W/98 - TN/RL/W/130 (re standard of review) - TN/RL/GEN/59
194	*U.S. – Export Restraints*	indirect subsidies	United States (R)	- TN/RL/W/78
206	*U.S. – Steel Plate (India)*	facts available	United States (R)	- TN/RL/W/153
206	*U.S. – Steel Plate (India)*	lesser duty	India (C)	- TN/RL/W/26
206	*U.S. – Steel Plate (India)*	undertakings	India (C)	- TN/RL/W/26
206	*U.S. – Steel Plate (India)*	facts available	India (C)	- TN/RL/W/26
213	*U.S. – Carbon Steel*	initiation of sunset review	EC (C)	- TN/RL/W/30
211	*Egypt – Steel Rebar*	causation	Turkey, et al. (C)	- TN/RL/W/28/ Rev.1

WT/ DS	Short Title	Issue	Member Proposing Change	Proposal Cite
221	*U.S. – Section 129(c)(1) URAA*	refunds of deposits/duties	Canada (C)	- TN/RL/W/47
212	*U.S. – CVD (EC Products)*	privatization	United States (R)	- TN/RL/W/130
217/ 234	*U.S. – Offset Act*	standing	Canada (C)	- TN/RL/W/47
217/ 234	*U.S. – Offset Act*	price undertakings	Brazil, Chile, Japan, Korea, Thailand, et al. (C)	- TN/RL/GEN/2
217/ 234	*U.S. – Offset Act*	specific action	United States (R)	- TN/RL/W/153
219	*EC – Tube or Pipe Fittings*	price undertakings	Brazil, et al. (C)	- TN/RL/GEN/2
219	*EC – Tube or Pipe Fittings*	cumulation	Brazil, et al. (C)	- TA/RL/GEN/51
241	*Argentina – Poultry*	domestic industry	Brazil, et al. (C)	- TN/RL/GEN/27
244	*U.S. – Corrosion Resistant Steel Sunset*	prohibiting zeroing in all reviews	Japan, et al. (C)	- TN/RL/W/83 - TN/RL/GEN/8
257	*U.S. – Softwood Lumber IV*	specificity test	Canada (C)	- TN/RL/W/112 - TN/RL/GEN/6

Key: C = complaining party; R = responding party

With respect to the ongoing DSU negotiations, Members have submitted proposals to modify almost every provision of the DSU and every stage of the dispute settlement proceedings from consultations to retaliation. A number of those proposals, reflecting the views of over fifty WTO Members, have appeared to be aimed, either directly or indirectly, at reinforcing limitations on panels or the Appellate Body and have been submitted by (1) Chile and the United States; (2) the European Community; (3) Canada; (4) Jamaica; (5) the African Group; (6) Jordan; and (7) Cuba, Dominican Republic, Egypt, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe.[120]

120. For a review of the DSU proposals directly or indirectly addressing WTO panel or Appellate Body overreaching, see Stewart, Dwyer & Hein, *supra* note 11.

Table 8

Examples of Proposals to Modify the DSU to Reinforce Limitations on WTO Panels or the Appellate Body

WTO Member(s)	Submission(s)	Issue(s) Addressed
United States	TN/DS/W/13 (Aug. 22, 2002)	- treatment of amicus curiae submissions - interim Appellate Body reports - party review/ deletion of interim reports - partial adoption procedures - suspension procedures - panel expertise - additional guidance
Chile, United States	TN/DS/W/28 (Dec. 23, 2002)	
United States	TN/DS/W/46 (Feb. 11, 2003)	
Chile, United States	TN/DS/W/52 (Mar. 14, 2003)	
United States	TN/DS/W/74 (Mar. 15, 2005)	
United States	TN/DS/W/82 (Oct. 24, 2005) TN/DS/W/82/Add.1 (Oct. 25, 2005) TN/DS/W/82/Add.1/Corr.1 (Oct. 27, 2005) TN/DS/W/82/Add.2 (Mar. 17, 2006)	
EC	TN/DS/W/1 (Mar. 13, 2002)	- panel selection process
EC	TN/DS/W/7 (May 30, 2002)	
EC	TN/DS/W/38 (Jan. 23, 2003)	
Canada	TN/DS/W/41 (Jan. 24, 2003)	- panel selection process
Indonesia, Thailand	TN/DS/W/61 (Dec. 12, 2003)	- panel selection process
EC	JOB(05)/48-TN/DS/M/24 (May 26, 2005)	- panel selection process
EC	JOB(05)/144-TN/DS/M/27 (July 29, 2005)	
Jamaica	TN/DS/W/21 (Oct. 10, 2002)	- interpretative guidance with negotiating history
African Group	TN/DS/W/15 (Sept. 25, 2002)	- refer questions to other entities - treatment of unsolicited information
African Group	TN/DS/W/42 (Jan. 24, 2003)	
Jordan	TN/DS/W/43 (Jan. 28, 2003) TN/DS/W/53 (Mar. 21, 2003)	- refer questions to other entities - treatment of amicus curiae submissions

WTO Member(s)	Submission(s)	Issue(s) Addressed
Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania, Zimbabwe	TN/DS/W/18 & 18/Add.1 (Oct. 7 & 9, 2002)	- treatment of amicus curiae submissions
India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica, Malaysia	TN/DS/W/47 (Feb. 11, 2003)	- treatment of amicus curiae submissions

As Table 8 details, a joint Chile/U.S. proposal suggested procedural improvements to strengthen Member control and flexibility over dispute settlement as well as enhanced panel expertise and additional interpretative guidance. On the issue of "gap filling" in particular, the United States submitted a series of additional questions in March 2005 to facilitate discussion of the joint Chile/U.S. proposal to provide additional guidance to WTO adjudicative bodies,[121] including the following pertinent questions:

- What is the significance of the fact that the covered agreements are the result of negotiations among sovereign nations and autonomous customs territories?
- Should the interpretive approach toward a covered agreement be the same as that for domestic regulation or legislation?
- What significance should attach to the fact that some provisions of the covered agreements are imprecise and susceptible to more than one interpretation?
- Where an agreement is silent on an issue, is it appropriate for a panel or the Appellate Body to "fill in the gap" in the agreement text?[122]

There are no publicly available minutes of the DSB meeting to gauge how these questions were addressed by the Members.[123] Several months later in October 2005 and March 2006, the United States submitted a series of papers

121. *Contribution by the United States*, at 2-4, TN/DS/W/74 (Mar. 15, 2005); *see* Stewart, Dwyer & Hein, *supra* note 11.

122. *Contribution by the United States*, at 2-3, TN/DS/W/74 (Mar. 15, 2005).

123. *See DSB Minutes of Meeting on February 28, 2006*, ¶¶ 1, 8, TN/DS/M/23 (May 26, 2005); *DSB Minutes of Meeting on April 5, 2005*, ¶ 1, TN/DS/M/24 (May 26, 2005).

which proposed textual DSU amendments to (1) require the Appellate Body to issue an interim report to the parties, (2) allow parties to agree to delete any finding (or the basic rationale behind a finding) from an Appellate Body report, (3) allow the DSB to decide by consensus not to adopt a finding (or the basic rationale behind a finding) in a report, (4) allow the parties to agree to suspend panel or Appellate Body procedures, and (5) ensure that panelists have the expertise to examine the matter at issue in the dispute.[124]

The United States also offered "draft parameters" for (1) the use of public international law in WTO dispute settlement, (2) the interpretative approach to use in WTO dispute settlement, and (3) the measure under review in WTO dispute settlement.[125] The U.S. draft warned that the interpretative approach taken should not supplement or reduce the rights and obligations of Members under the covered agreements contrary to DSU Articles 3.2 and 19.2. Because the covered agreements reflect differing negotiating objectives and positions, the draft parameters explained that it would not be appropriate for an interpretation to extrapolate from other provisions in a covered agreement the "direction" Members intended to go. The parameters also recognized that application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties may result in a meaning that is ambiguous because the covered agreements embody "constructive ambiguity" by leaving particular issues unresolved.

The U.S. draft parameters on the interpretative approach also tackled the problem of gap-filling by WTO adjudicative bodies. According to the parameters, there are two ways gaps in covered agreements can be unacceptably filled:

> *First* would be to read into the text of a covered agreement an obligation or right that is not present in the text, for example by extrapolating from a different provision.
>
> *Second* would be to resolve ambiguity in the text of a covered agreement in a manner that supplements or diminishes rights and obligations under the covered agreement.[126]

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124. Communication from the United States, *Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement of October 21, 2005*, TN/DS/W/82 (Oct. 24, 2005), TN/DS/W/82/Add.1 (Oct. 25, 2005), TN/DS/W/82/Add.1/Corr.1 (Oct. 27, 2005), TN/DS/W/82/Add.2 (Mar. 17, 2006).

125. *See supra note* 124.

126. Communication from the United States, *Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement of October 21, 2005*, TN/DS/W/82/Add.1 (Oct. 25, 2005), TN/DS/W/82/Add.1/Corr.1 (Oct. 27, 2005).

The parameters unequivocally stated that WTO Members "have not agreed to delegate to WTO adjudicative bodies the task of filling in gaps in the covered agreements."[127] Moreover, the parameters specifically admonished WTO adjudicative bodies not to use prior WTO reports as if they were covered agreements.[128] The parameters further provided that if the covered agreement is ambiguous, "a WTO adjudicative body should not use that language as the basis for validating a claim or defense where that validation would require foreclosing one of those meanings."[129] Unfortunately, there are no publicly available minutes of the DSB meeting revealing Member responses to the U.S. proposals.[130]

Like the Chile/U.S. proposal, other Members have focused on improving panel selection procedures to improve the quality and consistency of panel reports. Other Members suggested that interpretative guidance be provided in the form of a negotiating history[131] or by allowing certain questions to be resolved by other entities, such as the General Council for questions of interpretation or the International Court of Justice for non-WTO issues.[132] Finally, some Members objected to the Appellate Body's overreaching by accepting amicus briefs and proposed to prohibit receipt of unsolicited information.[133]

While the proposals to date attempt to address the problem of overreaching, each one is insufficient alone to offer the type of systemic improvement needed at this point in the development of the WTO dispute settlement system. First, there is no guarantee that panelists with the requisite expertise will not make flawed decisions, especially if the dispute settlement system in place does not provide adequate guidance or allow for the correction of those errors. Second, procedural changes to empower WTO Members would likewise be insufficient without additional interpretative guidance for panels and the Appellate Body. Third, referrals for interpretations or advisory opinions could provide additional guidance only in specific cases so its effect could be too limited. What is needed is a Member consensus on whether the Appellate Body has or does not have the authority to fill gaps and construe silence. The Chile/U.S. proposal is a step in the right direction in this regard but needs broad Member support to return negotiation rights and obligations to the Members.

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127. *Id.*
128. *Id.*
129. *Id.*
130. *DSB Minutes of Meeting on October 24, 2005*, ¶ 5, TN/DS/M/29 (Jan. 20, 2006).
131. *See* Table 8, *supra* Part VII; Stewart, Dwyer & Hein, *supra* note 11.
132. *See* sources cited *supra* note 131.
133. *See* sources cited *supra* note 131.

VIII. CONCLUSION

Over the course of the last eleven years, the WTO dispute settlement system has taken up a significant number of panel requests raising novel and difficult questions. While in general there is strong Member support for the activities of the dispute settlement system, some disturbing trends exist that call into question whether there are institutional biases against defending Members generally, and against Members who use trade remedies in particular. These trends also call into question whether panels and the Appellate Body are limiting their activities as required by the DSU and are respecting the standard of review in trade remedy cases. There have been some efforts made by WTO Members to address, directly or indirectly, the problem of overreaching by the WTO panels and the Appellate Body in the DSU and Rules negotiations. Unfortunately, however, the DSU negotiations have dragged on well past their original January 1, 1999 deadline.

While the problems of how to provide interpretative guidance, establish effective standards of review, and oversee the development of WTO jurisprudence may pose difficult systemic issues, the failure of WTO Members to respond to the warning signals identified by commentators, legislators, and WTO Members would be a serious mistake. A lack of response from WTO Members would seriously undermine public confidence in a dispute settlement system that should respect the sovereign rights of its Members and contribute to an environment in which continued expansion of international trade is broadly supported.

IX. ANNEX

Table 9

Summary of AD/CVD/SG Disputes With Reports Adopted as of May 2006 (ranked by date of panel report)

No.	Case Name	WT/ DS	Rules Agreement Findings	Complaining Part(ies)
1	*Brazil – Desiccated Coconut*	22	SCM	Philippines
2	*Guatemala – Cement I*	60	AD	Mexico
3	*U.S. – DRAMS*	99	AD	Korea
4	*Korea – Dairy*	98	Safeguards	EC
5	*Argentina – Footwear (EC)*	121	Safeguards	EC
6	*U.S. – Lead and Bismuth II*	138	SCM	EC
7	*Mexico – Corn Syrup*	132	AD	United States
8	*U.S. – 1916 Act (EC)*	136	AD	EC
9	*U.S. – 1916 Act (Japan)*	162	AD	Japan
10	*U.S. – Wheat Gluten*	166	Safeguards	EC
11	*Thailand – H-Beams*	122	AD	Poland
12	*Guatemala – Cement II*	156	AD	Mexico
13	*EC – Bed Linen*	141	AD	India
14	*U.S. – Lamb*	177/ 178	Safeguards	New Zealand, Australia
15	*U.S. – Stainless Steel (Korea)*	179	AD	Korea
16	*U.S. – Hot-Rolled Steel (Japan)*	184	AD	Japan
17	*U.S. – Export Restraints*	194	SCM	Canada
18	*Argentina – Ceramic Tiles*	189	AD	EC
19	*U.S. – Line Pipe*	202	Safeguards	Korea
20	*Chile – Price Band System*	207	Safeguards	Argentina
21	*U.S. – Steel Plate (India)*	206	AD	India
22	*U.S. – Carbon Steel*	213	SCM	EC
23	*U.S. – Section 129(c)(1) URAA*	221	AD/SCM	Canada
24	*U.S. – CVD Measures (EC)*	212	SCM	EC
25	*Egypt – Steel Rebar*	211	AD	Turkey

No.	Case Name	WT/ DS	Rules Agreement Findings	Complaining Part(ies)
26	*U.S. – Offset Act*	217/ 234	AD/SCM	Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand, Canada, Mexico
27	*U.S. – Softwood Lumber III*	236	SCM	Canada
28	*Argentina – Preserved Peaches*	238	Safeguards	Chile
29	*EC – Tube or Pipe Fittings*	219	AD	Brazil
30	*Argentina – Poultry*	241	AD	Brazil
31	*U.S. – Steel Safeguards*	248-49/ 251-54/ 258-59	Safeguards	EC, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil
32	*U.S. – Corrosion-Resistant Steel Sunset*	244	AD	Japan
33	*U.S. – Softwood Lumber IV*	257	SCM	Canada
34	*U.S. – Softwood Lumber VI*	277	AD/SCM	Canada
35	*U.S. – Softwood Lumber V*	264	AD	Canada
36	*U.S. – Oil Country Tubular Goods (Argentina)*	268	AD	Argentina
37	*U.S. – DRAMS II (CVD)*	296	SCM	Korea
38	*Mexico – Beef & Rice*	295	AD/SCM	United States
39	*EC – DRAMS*	299	SCM	Korea
40	*U.S. – OCTG (Mexico)*	282	AD	Mexico
41	*Korea – Paper*	312	AD	Indonesia
42	*U.S. – Zeroing (EC)*	294	AD	EC
TOTALS = SCM: 9, AD: 21, AD/SCM: 4, SG: 8