Testimony before the European Parliament
Committee on International Trade
Hearing on "Can we save the WTO Appellate Body?"

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Thank you for the invitation to be here today. I am an American, I am an economist, and I have been researching and writing about the World Trade Organization (WTO), the Appellate Body, and trade defense instruments for my entire professional career. As I hope my testimony makes clear, there is some irony with me being the one tasked to explain American concerns with the WTO's Appellate Body. Many I do not share. Nevertheless, they have triggered a crisis.

Some of the concerns are unique to the current US administration; others are long-standing and shared more broadly by the American policymaking community. I will attempt to distinguish between the two. Throughout, I will also seek to clarify my own perspectives.

Back to the Uruguay Round

Some history is needed to understand how we arrived at today's moment of crisis facing the Appellate Body. Before the WTO there was the General Agreement on Tariffs and Trade (GATT). The GATT provided the backbone for the multilateral, rules-based trading system for nearly five decades beginning in 1948.

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Despite its successes, by the 1980s, three frustrations with the GATT emerged. The result was significant change.

The first concern resulted from the explosion of voluntary export restraints, or VERs. These opaque, government-negotiated, managed trade arrangements short-circuited markets. They resulted in economic inefficiencies, as well as concerns over corruption and collusion. VERs arose in sectors as diverse as steel, automobiles, and semiconductors. The United States in particular had begun to overuse VERs as a way to deal with adjustment pressure created by Japan and other newly emergent export powerhouses. Many developing countries became similarly frustrated by the Multifibre Arrangement, or MFA, which held back their exports in sectors like clothing and textiles. But the VER epidemic of the 1980s also highlights one important tradeoff that advanced economies confront and must continually manage—how to deal with domestic adjustment pressures arising as new, foreign competitors come on the scene.

The second problem that emerged in the 1980s was that the GATT lacked a reliable framework to resolve trade disputes. The GATT's consensus rule meant any party—including the potential respondent in a trade dispute who might be accused of wrongdoing—could block not only rulings but even the initiation of an inquiry. Thus, third-party intermediation was often not possible to resolve trade frictions.

The third frustration was largely American. American export interests had shifted heavily into services, including financial services, and intellectual property–intensive sectors like pharmaceuticals and entertainment; e.g., Hollywood. But the GATT had little to offer for these offensive areas of American export interest.

These second and third concerns led to the American period of "aggressive unilateralism" under its Section 301 policy.[1] The United States would take matters into its own hands if it felt like America wasn't getting sufficient access to foreign markets or foreign protection of its intellectual property. Countries should either open up their market and improve protections of American intellectual property or run the risk of being hit with US tariffs.

[1] Jagdish Bhagwati and Hugh T. Patrick, 1990, *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System,* Ann Arbor: University of Michigan Press.

The WTO emerged as the negotiated compromise. It ushered in binding dispute settlement, including the Appellate Body. No country would be able to block resolution of a dispute, let alone its initiation. This gave many in the United States what they wanted—an internationally sanctioned way of opening up foreign markets that it felt were unfairly closed. And it gave the rest of the world comfort that the United States would no longer act out unilaterally.

The WTO also introduced agreements like the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that were of interest to America's cutting-edge export industries. It phased out the MFA and eliminated most of the other VERs that had plagued many sectors over the prior 15 years. And the WTO modified rules on safeguards to encourage their use as temporary tariffs—by removing the need to compensate trading partners for three years—in addition to banning VERs.[2]

But that wasn't the only negotiated compromise with the WTO, and antidumping requires its own special mention. The United States places a political priority on maintaining vibrant access to antidumping. Antidumping is often referred to as the "third rail" of US trade policy. While Congress has delegated authority to the president to go out and negotiate trade deals and reciprocal tariff reductions since 1934, one quid pro quo has been to demand active use of antidumping. In the late 1970s, for example, Congress grew so frustrated that the US Treasury was not providing enough trade protection under the law that it stripped Treasury of its authority and delegated it to the Commerce Department instead. Congress wanted more antidumping protection and got it.

Antidumping played a subtle, yet ultimately important, role in the Uruguay Round of negotiations. US negotiators fought for continued access to use antidumping, and this included their ultimate negotiation of Article 17.6 of the WTO's Anti-dumping Agreement. This is a provision whereby WTO adjudicators are supposed to give deference to domestic investigating authorities in any dispute into national use of antidumping. For any disputes involving the United States, the implication was that WTO rulings should give deference to the antidumping investigations and facts provided by the Department of Commerce and the International Trade

[2] Chad P. Bown, 2002, "Why Are Safeguards under the WTO So Unpopular?" *World Trade Review* 1, no 1: 47-62.

Commission. For challenges to European antidumping, similarly, deference would be shown to the European Commission.

There is one final point to make about the Uruguay Round and antidumping. Behind the scenes, there were also hard fought negotiations over certain practices that the United States and Europe utilized in antidumping, including "zeroing." Zeroing is a technique some investigating authorities use when calculating whether and how much "dumping"—or pricing unfairly—has taken place. But its use results in a higher likelihood that dumping is found, as well as higher tariffs being imposed.

Countries whose exports were negatively affected by the practice of zeroing wanted it banned. The Americans in particular wanted to keep it. As was common in trade negotiations back then—but which is an important contributor to today's Appellate Body crisis—the resulting text was deliberately left vague. It was a compromise. The Anti-dumping Agreement is silent on zeroing—it doesn't say a country can do it, but it also doesn't say that a country can't.[3]

But then, of course, came the disputes. And with those cases arrived the implications of the new WTO system of binding dispute settlement.

What happened?

There is a litany of American frustrations with the Appellate Body. These include judicial overreach, reliance on precedent when it should not, as well as engaging in *obiter dicta* and opining on issues where no opinion was sought. There are complaints that the Appellate Body is taking too long to issue its decisions, violating the 90-day rule. There are problems with Rule 15 of its Working Procedures, as Appellate Body members are taking it upon themselves to stay on too long after their terms expire.[4]

[3] Chad P. Bown and Thomas J. Prusa, 2011, "U.S. Antidumping: Much Ado About Zeroing," in William J. Martin and Aaditya Mattoo (eds.), *Unfinished Business? The WTO's Doha Agenda*, London, UK: CEPR and World Bank, 355-392.

[4] Tetyana Payosova, Gary C. Hufbauer, and Jeffrey J. Schott, 2018, "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures," Peterson Institute for International Economics Policy Brief 18-5, March.

Many of these procedural complaints with the Appellate Body could be fixed if there were political will to preserve it.

But to some in America, there is a much bigger concern. Beginning in 1995, trading partners filed a lot of WTO disputes over US use of trade defense instruments, and the Appellate Body simply did not show the deference that the Americans anticipated and thought that they had negotiated. There have been dozens of WTO disputes over "zeroing" alone. Many more disputes challenge how US investigating authorities have conducted other aspects of antidumping investigations.

These Appellate Body rulings made some American policymakers incredulous. Those who are frustrated point to Article 17.6 of the Anti-dumping Agreement in particular and say that the Appellate Body has repeatedly overstepped its bounds.

The lack of Appellate Body deference also arose in the area of safeguards. Each US safeguard imposed after 1995 was met with a formal legal challenge in Geneva, including safeguards on imports of wheat gluten, wire rod and line pipe, and steel—brought by the European Communities—as well as lamb meat and brooms. The WTO typically found that the US measure was inconsistent with its obligations.

These American concerns with Appellate Body decisions over trade defense instruments are long-standing. Thus, they are not new to the Trump administration.

Two things are new to the Trump administration.

First, this administration appears unwilling to trade off political losses in these types of cases against the economic and political upside arising from the dozens of other WTO disputes involving major US interests that the Appellate Body has upheld.

Second, and most importantly, the Trump administration has adopted the tactic of deliberately undermining the rules-based trading system. Today, we are discussing how it is weakening the functioning of WTO dispute settlement by withholding the appointment of Appellate Body members.

But there are other examples. Take the administration's extraordinarily controversial tariffs on steel and aluminum imposed in 2018 under the US national security law, Section 232 of the Trade Expansion Act of 1962. One way to interpret that action is the administration saying that, since the Appellate Body has not been deferential in its decisions about US application of trade defense instruments, the United States will become even more extreme and impose its tariffs in the name of protecting America's national security.

Economic and political-economic analysis

As an economist, I would be among the first to explain how US imposition of antidumping or safeguard tariffs or quotas are costly for the US economy. Furthermore, to an economist, antidumping laws are problematic even in how they are written. The "unfair trade" rhetoric around the laws makes it sound as if they have something to do with predatory practices. The reality, however, is that antidumping tariff protection is often applied even when there is no evidence of anti-competitive practices.

But as a political economist, I also recognize that countries require some sort of safety valve to maintain engagement in trade agreements like the WTO. Whether it be extreme political pressure arising from a certain domestic industry, or a major import surge of a particular product causing acute adjustment pressure, some sort of temporary escape may be needed to maintain the ability to muddle through.[5] The Uruguay Round's effort to rewrite the Safeguards Agreement was a step in the right direction toward funneling demands for trade protection into a less harmful, temporary policy instrument.

I am therefore sympathetic to concerns with some specific Appellate Body rulings, especially those that may have overly constrained access to safeguards. That said, I do not condone the political tactic of threatening the Appellate Body's existence.

There is hypocrisy, of course

It cannot go unmentioned that even the Trump administration readily applauds WTO dispute settlement after a US "win." Take the recent WTO authorization for the United States to impose

[5] Chad P. Bown and Meredith A. Crowley, 2013, "Self-Enforcing Trade Agreements: Evidence from Time-Varying Trade Policy," *American Economic Review* 103, no. 2: 1071-1090.

counter-tariffs on $7.5 billion of European exports after a ruling over European subsidies to Airbus. The administration did not mention any concerns with the WTO Appellate Body engaging in judicial overreach or relying on precedent in that decision.

What can be done?

The main American concern with the Appellate Body involves trust in the institution.

Yet, this issue is often positioned as if arising from two immovable and differing views of international law; i.e., Europeans see the WTO as being like the European Court of Justice, and the Americans say they never signed up to that. I do not find that particular framing of Appellate Body concerns clarifying or helpful. It fails to identify specific areas of disagreement and is merely an excuse to avoid engaging as well as compromising.

One major concern of the US administration seems to be a desire for explicit political recognition that the Appellate Body has gone too far when ruling against application of trade defense instruments. Ignoring Article 17.6 and the lack of deference is one example.

Is there a way to fix the Appellate Body to appease their concerns and save the system?

Here, it is important to distinguish between Trump administration concerns, American concerns, and even my concerns.

For the Trump administration, I am not certain that there are any fixes to the Appellate Body that it would be willing to accept. Just last week on my podcast, Stephen Vaughn, a former senior Trump administration official, waxed nostalgic of the GATT days and said of US trade policy during the WTO period,[6] "after 1994, we decided to take this out of the hands of the voters and out of the hands of elected officials. And we chose to sort of seal it up in this kind of cage, whereby policymakers wouldn't be able to touch it, and it would sort of run of its own accord.

[6] Chad P. Bown and Soumaya Keynes, 2019, "Trade Policy Under Trump," *Trade Talks* podcast Episode 111, November 25. Similarly, USTR Robert Lighthizer has said, "Back when Senator Brock and I were there and there was a system, it was before 1995, before the WTO, under the GATT, and there was a system where you would bring panels and then you would have a negotiation. And, you know, trade grew, and we resolved issues eventually. And, you know, it's a system that, you know, was successful for a long period of time." (See Center for Strategic and International Studies, 2017, "U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative," September 18.)

And the result is the rise of China, slowing economies in the West, dislike of globalization, the rise of populism…."

Clearly, there are many factual inaccuracies in such a statement. Thus, if that is the broader perspective of the current administration, it may simply be impossible to come to a shared mutual understanding of the problem and devise a solution to save the Appellate Body.

Let me turn then to the broader American policy position. For many—though not all—Americans, there are concerns that the Appellate Body has not shown sufficient deference to national use of trade defense instruments in particular.

Again, I see this from two different perspectives. According to the data, my estimates are that, in any given year, US trade defense instruments in effect cover somewhere between 2 and 5 percent of total US imports.[7] Most of that trade coverage since 2001 has been US antidumping on imports from China and does not affect the European Union. Furthermore, on the other 95 to 98 percent of US imports that are unaffected, average US tariffs are relatively low.

To Europe, as an attempted intermediary, I might say—if this is the main political demand the Americans are making to retain the Appellate Body, perhaps let them have it?

To the Americans I often say, the Appellate Body is systemically important for US interests. Why are you willing to throw it away over something that affects only 2 to 5 percent of US imports?

And finally, to anyone interested in economics, I say, let's rewrite the text of the WTO agreements and domestic legislation over trade defense instruments to make them more economically sensible. Focus them instead on legitimate, anti-competitiveness concerns, and funnel temporary escape-valve demands for protection into safeguards. The result would likely be fewer disputes and less pressure on the Appellate Body.

Design flaw

[7] Chad P. Bown, 2019, "US Special Protection in Historical Perspective: 1974–2019," manuscript in progress.

To conclude, the Appellate Body crisis also reveals the greater need for a workable WTO legislative function. Even if policymakers can solve the current problems, the system requires an easier way to make basic adjustments to the rules.

Without one, the Appellate Body was never going to succeed, and *something* would have eventually led to a point of crisis. And from that perspective, no one should ever blame the Appellate Body too much.

Appendix: The Economics of the Appellate Body and WTO Dispute Settlement

There are many benefits that a functioning WTO dispute settlement system, and Appellate Body, provide to the global economy. Here, I briefly review some of the benefits as well as caveats to interpreting metrics of dispute settlement activity.[8]

First, the existence of a functioning dispute settlement process encourages efficient and transparent economic policymaking and reduces uncertainty. This allows firms and their workers to undertake the long-term investments necessary to take advantage of trade to further their own economic development and well-being. However, metrics on usage of the system need to be interpreted carefully. Many of the benefits of a functioning dispute settlement system arise from it discouraging economically and socially harmful policies in the first place. Benefits may arise if policy decisions are made "in the shadow of the law" and thus disputes are not even being filed.

Another important benefit of the system is that the outcome of bilateral disputes should follow WTO rules, including those on most-favored nation treatment. Thus, complainants and defendants are generally not permitted to settle disputes in a discriminatory or nontransparent manner that comes at the WTO-inconsistent expense of third-country exporters.

Finally, metrics on legal "wins" and "losses" in dispute settlement can also be misleading. This is analogous to the positive-sum nature of trade itself. While trade has important distributional effects within a country, it is most often win-win (at the country level) for both countries involved. Consumers get access to a greater variety of cheaper products, and producers get access to additional markets. Similarly, but perhaps counterintuitively, the resolution of a dispute

[8] See pp. 1206-1214 of Kyle Bagwell, Chad P. Bown, and Robert W. Staiger, 2016, "Is the WTO Passé?" *Journal of Economic Literature* 54, no. 4: 1125-1231.

is also typically a “win-win” economically for both countries. Take a dispute settlement loss over an economically damaging policy. Making the policy WTO-consistent is likely to result in an improvement in the policy-imposing country’s own economic well-being.