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POLICY BRIEF

19-19 The WTO's Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes

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December 2019

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The World Trade Organization (WTO) faces an existential crisis: A key component of its renowned process for settling trade disputes is about to go out of business and with it the certainty that WTO rights and obligations will be fully enforced. The factor precipitating this crisis is the US claim that the WTO Appellate Body, the top body that hears appeals and rules on trade disputes, has abused its authority by issuing expansive interpretations of WTO provisions while reviewing rulings by WTO dispute resolution panels—what trade lawyers call "judicial overreach." US officials charge that certain Appellate Body decisions have expanded WTO obligations and constrained WTO rights, and so they have blocked the appointment of new Appellate Body members until other WTO countries address US complaints.

On December 10, 2019, the terms of two of the three remaining members of the Appellate Body will expire, and there will no longer be enough members to hear new appeals. WTO panels will still be able to adjudicate disputes but, if either side exercises its WTO right to appeal, the rulings will be in an indefinite legal limbo pending conclusion of the appeals process.

US officials, no big fans of global governance institutions, have refused to negotiate Appellate Body reforms and seem content to let it expire. Without the Appellate Body, the United States can effectively block any WTO panel rulings that go against US practices by simply exercising its right to appeal—to a disabled Appellate Body.

The challenge facing trade negotiators is how to restore the Appellate Body in the face of US officials' complacent acceptance of the status quo and indifference to the damage to the trading system resulting from blockage of Appellate Body reviews.

This Policy Brief examines US discontent with WTO dispute rulings and the revisions needed to address US concerns about judicial overreach. An analysis of cases brought against the United States shows that a large share involves US antidumping (AD) and countervailing duty (CVD) measures—penalty tariffs on imports that are subsidized or sold at unfairly low prices (i.e., dumped). The United States often wins these cases, so the analysis focuses on the US "losses" in AD/CVD cases, which have provoked the Trump administration's ire but account for only 20 percent of the total complaints brought against the United States.[1] The problem of judicial overreach seems to surface primarily in a subset of US losses in AD/CVD cases that target specific methods of calculating dumping margins. Disabling the whole appellate system is a disproportionate response to the specific problem, a sledgehammer when a surgical scalpel might revive the system.

A better approach would be to exempt AD/CVD cases from appellate review (while still subjecting them to dispute panel decisions). This narrow and targeted change in the WTO Appellate Body process, coupled with procedural reforms already advanced in proposals that have been widely supported by WTO members, could mitigate US concerns and allow the Appellate Body to be repopulated.

WHAT THE UNITED STATES WANTS AND WHAT IT WOULD COST

Over the years, the United States has issued broad-ranging indictments of Appellate Body actions that violate WTO rules and misjudge WTO rights and obligations. After years of inconclusive negotiations to reform the WTO's Dispute

1. US losses in AD/CVD cases include decisions favoring the complainant and split decisions, or 31 of the 155 WTO complaints about US practices as of October 2019.

Settlement Understanding (DSU)—the main WTO agreement on settling disputes—US officials have blocked the appointment of new members until other WTO countries address US demands. The Appellate Body will be effectively shuttered on December 10 when it will no longer have the requisite three members to hear new appeals of WTO dispute panel rulings. At issue are US concerns that Appellate Body practices ignore DSU rules and its decisions expand the scope of existing WTO obligations or cancel existing WTO rights (so-called judicial overreach).[2] Left unspoken, but abundantly clear, is the US objective to circumvent obligations that make panel and Appellate Body rulings binding on WTO members. Citing sovereignty concerns, US trade officials want to regain the right that existed prior to the WTO to block rulings on which they disagree.[3] Disabling the Appellate Body will enable them to do so.[4]

The US action is more than a legal spat; it poses an existential threat to the WTO.

Without a functioning Appellate Body but with the continuing right to appeal panel rulings, the system of WTO adjudication will resemble its predecessor under the General Agreement on Tariffs and Trade (GATT) to the extent that either the complainant or respondent can block the resolution of disputes. In the GATT era, the dispute settlement system broke down when major trading powers, the United States and the European Communities, each blocked panel rulings favoring the other side in several high-profile bilateral disputes. To fix that problem, the US Congress insisted that the new WTO contain dispute settlement procedures that would ensure binding enforcement of panel rulings. Current US policy seems intent on reverting to the failed process of the GATT system.

US officials seem dismissive of the damage such a policy would do to the rules-based WTO trading system. What country would negotiate new rules if the enforcement of WTO obligations, old and new, is haphazard due to the possible blocking of WTO rulings and the lapse of Appellate Body reviews? Indeed, US officials already are putting at risk current and prospective WTO negotiations on new rules for digital trade, subsidies, and other areas of critical importance to the future of the US economy. The United States has led WTO initiatives on digital trade and subsidies but evidently is willing to sacrifice them to secure an outcome that incapacitates the WTO Appellate Body.

Moreover, the US ability to use the WTO DSU to enforce US rights would be compromised. As in the GATT era, US cases against foreign malpractice could be sidetracked. China and others would likely defend themselves by appealing adverse WTO rulings and blocking enforcement of US rights under the WTO. The result undoubtedly would be new episodes of vigilante protectionism.

US trade officials argue that they can extract compliance by threatening to withhold access to the US market, a tactic they have deployed frequently and with mixed results since the advent of the Trump administration. Big powers such as China and the European Union have been less willing to follow US diktats. Instead, they have countered US unilateralism with similar WTO-illegal retaliation against US exports.

In short, disabling the Appellate Body comes at a high cost: It weakens enforcement of WTO obligations and undermines prospects for negotiations to update the WTO rulebook, thus corroding the rules-based trading system, one that has been modeled on US law and practice. The US action is more than a legal spat; it poses an existential threat to the WTO.

For the rules-based trading system to survive, major trading powers need to follow the rule of law, not the law of the jungle. WTO decisions need to be binding on all members, subject to modification only if Appellate Body reviews find flaws in fact or law. Differences in the scope and interpretation of WTO obligations need to be resolved at the negotiating table. That said, US frustration is understandable after 18 years of barren trade talks about DSU reform; WTO members need to work more expeditiously to negotiate solutions to the multiple flaws of the DSU process.

Numerous countries have proposed remedies to what they believe concerns US officials about the WTO process but to no avail. The European Union, China, and several others have jointly proposed solutions to fix most of the procedural complaints put forward by US officials but have not been able to address the more substantive and predominant US concern about judicial overreach.[5] US trade officials have not engaged in negotiations on the former lest they lose leverage

2. Trump administration trade officials argue that WTO obligations should be no more and no less than those written in the WTO agreements. More specifically, they want dispute rulings to give deference to US interpretations of WTO antidumping rights and obligations, citing Article 17.6 of the WTO Anti-Dumping Agreement.

3. "Trade Policy Under Trump," *Trade Talks Podcast*, Episode 111 @22:50, November 25, 2019, www.tradetalkspodcast.com/podcast/111-trade-policy-under-trump.

4. To put the nail in the Appellate Body coffin, US officials now are seeking to sharply reduce funding for it and threatening to block the WTO budget for 2020 if other members don't accept US demands.

5. The recent recommendations put forward by New Zealand Ambassador David Walker, who was appointed by WTO members as the facilitator of DSU reform efforts, are

to achieve their objectives on the latter. They recognize that, so long as the Appellate Body remains inquorate, they will be able to effectively combat attempts at judicial overreach by simply appealing panel decisions that they regard as faulty.

THE UNITED STATES HAS A GOOD RECORD IN WTO DISPUTES

At first glance, the United States seems an unlikely critic of the WTO process for resolving trade disputes. It was a principal architect of the WTO DSU and has been its most active user as well as the top target for complaints by other WTO members. WTO dispute resolution panels have generally validated US complaints, and the United States often prevails in cases where it is the respondent. But some decisions—including some in which the Appellate Body has reversed panel rulings—have found US practices inconsistent with US obligations.

Of the 590 cases brought to the WTO between 1995 and October 2019, the United States filed 124 cases against other WTO members, and 155 cases were brought against the United States (see table 1). The main targets of US litigation have been China and the European Union, while the European Union and Canada have been the leading complainants about US practices, accounting for about one-third of the cases against the United States (table 2). These WTO complaints cover a broad range of US practices, including subsidies, tariff rate quotas, export restraints, sanitary and phytosanitary measures, safeguards, antidumping, and countervailing duties.

As shown in table 3, almost half of the WTO cases brought against the United States (73 out of 155 cases as of October 2019) contest the application of US antidumping and countervailing duties. Why are there so many US AD and CVD disputes at the WTO?

Unlike other retaliatory measures, WTO members can impose AD and CVDs without first getting WTO authorization if subsidized or dumped imports injure domestic industries, provided they follow the rules and procedures for conducting investigations and determining proper remedies.[6] Here's the rub: WTO disputes often revolve around calculations of appropriate countermeasures. In practice, however, such calculations are an exercise in forensic gymnastics. And like gymnastics competitions, the judging is prone to national bias. But in trade, the judges are sometimes taken to court! That has happened frequently when WTO members challenge the US method of calculating antidumping duties by "zeroing" out transactions under investigation that were not sold at less than fair value.[7]

Overall, US legislation implementing trade agreements faithfully reflects the terms of the negotiated accords. But

Table 1

Top 10 users of the WTO dispute settlement system, 1995 to October 2019

Complainant	Number of cases	Respondent	Number of cases
United States	124	United States	155
European Union	102	European Union	85
Canada	40	China	44
Brazil	33	India	32
Japan	26	Canada	23
Mexico	25	Argentina	22
India	24	Korea	18
Argentina	21	Brazil	16
China	21	Japan	16
Korea	21	Mexico	15
Subtotal	*437*	*Subtotal*	*426*
Subtotal as percent of total	*74*	*Subtotal as percent of total*	*72*

Note: From 1995 to October 2019, 590 cases were brought to the WTO.

Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

Table 2

US disputes in the WTO, 1995 to October 2019

Country that the United States filed against	Number of cases	Country that filed against the United States	Number of cases
China	23	European Union	35
European Union	20	Canada	20
Canada	8	China	16
India	8	Korea	14
Mexico	7	Brazil	11
Subtotal	*66*	*Subtotal*	*96*
Others	58	Others	59
Total	**124**	**Total**	**155**

Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

similarly flawed. See WTO document JOB/GC/222 issued on October 15, 2019.

6. Safeguard measures also can be applied unilaterally, but they are time-limited and require a higher threshold of injury than AD and CVD actions.

7. As discussed in the next section, the zeroing methodology has been subject to numerous disputes in WTO cases brought against the United States.

Table 3
Antidumping and countervailing duty cases against the United States, by product and ruling, as of October 2019

Product	Total	Settled or dropped	Pending	Split decision	Ruling favoring the United States	Ruling favoring complainant
Steel	28	10	1	3	6	8
Agriculture[a]	13.5	5	2	0	0	6.5
Not product-specific	10	0	3	1	1	5
Manufactures[a]	8.5	1	0	1	3	3.5
Softwood lumber	8	2	1	0	3	2
Raw materials	5	4	0	0	0	1
Total	**73**	**22**	**7**	**5**	**13**	**26**

a. The DS422 case covers shrimp and diamond sawblades from China, so is partially attributed to two product categories.
Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm; authors' calculations.

the application of laws on unfair trade, particularly AD and CVD statutes, seems to be the main area where there is daylight between the WTO rulebook and US practice.[8] The main explanation for this discrepancy is that—unlike many countries where international agreements have a direct effect under domestic law—the actual provisions in WTO and other trade accords "are not self-executing and accordingly do not have independent effect under US law" (Jackson, Louis, and Matsushita 1984, 170). Instead, Congress passes implementing legislation to revise US laws as needed to comply with the new international obligations. US implementing legislation for the Uruguay Round modified US AD and CVD law to comply with the new obligations in the WTO Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures. But since the legislative language did not imbed the WTO text in US law, the US language has been open to challenge when other WTO members believe that the legislative interpretation of US obligations in key areas differs importantly from what WTO obligations require.

Table 3 reports the results of WTO litigation against the United States in cases involving AD and CVDs. Note that WTO cases rarely produce total victories; panel and appellate rulings often contain decisions in which both parties win some arguments and lose others. For that reason, we classify the results as "favoring" the United States or the complainant; in some cases, the outcome clearly produced a split decision.

Overall, US officials have been moderately successful in defending US AD/CVD practice against foreign challenges. Almost half of the 73 cases have resulted in settlements or decisions favoring the United States. Of that subtotal, 22 cases were settled or dropped during the consultations or before a panel ruling was issued. For example, the softwood lumber case (DS311) was dropped after the Softwood Lumber Agreement between Canada and the United States entered into force in October 2006, though the dispute revived when the agreement lapsed nine years later in 2015, and new cases were subsequently filed and remain unresolved.[9] A few cases on other products were dropped when the United States International Trade Commission determined that imports did not injure the domestic industry.

Only 26 of the 73 rulings, or 36 percent, favored the complainant and another 5 cases had a split decision. Key issues in cases that the United States lost were the use of zeroing methodology, evidence for initiating investigations, definition of public body related to financial contributions, the use of facts available, among others. Steel and agriculture account for about half of the rulings favoring the foreign complainant. Interestingly, US officials lose a higher percentage of cases involving agricultural and manufactured products than they do steel cases.

In sum, table 3 tells us that the US AD and CVD laws are the main source of concern and complaints brought by WTO members under the DSU. But WTO rulings often support the US position, thus confirming US rights in various trade accords. As such, the remedy for US concerns about the WTO process should not be the wholesale exclusion of AD/CVD cases from WTO dispute settlement. Rather we need to drill down deeper into the AD/CVD caseload to find specific defects.

8. US safeguards have been challenged in the WTO 18 times; half of these cases involved US steel restrictions imposed in 2002. Compared with AD/CVD measures, US safeguards are used infrequently.

9. All six softwood lumber cases (DS236, DS247, DS257, DS264, DS277, and DS311) were settled via this agreement during either consultations or compliance proceedings. However, after the settlement agreement expired in October 2015, Canada filed two new cases (DS533 and DS534) against the United States.

STEEL PRODUCTS IN AD AND CVD CASES AGAINST THE UNITED STATES

The natural next step is to look at the largest segment of US AD and CVD cases challenged in the WTO. About 38 percent of those cases involve steel products brought by major steel exporters such as Argentina, Brazil, China, the European Union, India, Japan, Korea, Mexico, and Turkey.[10] Given that half of total US AD and CVD orders were placed on steel products, foreign complaints in this sector are not surprising.[11] What is surprising, and notable, is the mixed record of foreign WTO litigation against US AD and CVD cases involving steel products. Of the 28 cases brought to date, the US scorecard shows 6 wins, 8 losses, 10 settled/dropped, and 3 split decisions; one case is pending.[12]

About 32 percent of the steel cases involve disputes on the use of zeroing to calculate dumping margins. Five of these 9 cases proceeded to final Appellate Body decisions, and in all 5 cases the Appellate Body found that the US practice was inconsistent with WTO obligations, reversing rulings on zeroing put forward in the panel decisions.[13] Zeroing essentially involves excluding transactions with a negative dumping margin (i.e., not sold at less than fair value) from the calculation of the weighted-average margin of dumping of the product of exporters under investigation. Zeroing raises dumping margins, sometimes substantially, and invariably elicits foreign criticism. While the WTO Anti-Dumping Agreement arguably allows the use of zeroing, members can contest the way that officials conducting AD investigations calculate dumping margins when they deploy zeroing methodologies.[14]

Foreign challenges to the US use of zeroing have exacerbated US concerns about Appellate Body decisions that US officials believe expand the scope of WTO obligations beyond what was intended and agreed in the Uruguay Round. US officials have been particularly critical of Appellate Body rulings in AD/CVD cases, which they believe prevent them from exercising their rights under the WTO Anti-Dumping Agreement to determine dumping margins, thus constraining their ability to impose AD duties on dumped imports.[15] As the US Trade Representative Robert Lighthizer noted in praising a recent panel decision on softwood lumber that ruled in favor of US zeroing practices, "WTO Appellate Body reports to the contrary are wrong, and reflect overreach by that body."[16] Canada has appealed that panel decision. US officials presumably expect the Appellate Body to follow past precedent and reverse the panel decision.

To date, US officials have not put forward specific proposals for addressing their concerns about judicial overreach. We suspect their reticence reflects the fact that their specific objective will be met on December 10 when the Appellate Body no longer is operational, and the United States can block panel rulings. To that end, they conclude that they don't need to negotiate with other WTO members to fix the problems with judicial overreach.

The immediate challenge is how to get the United States to change tactics and pursue negotiations to fix the flaws in WTO dispute settlement procedures and practices. We conclude by offering some pragmatic ideas to deal with complaints about judicial overreach drawing on our analysis of the US experience under WTO litigation.

POSSIBLE OPTIONS TO RESOLVE THE APPELLATE BODY CRISIS

An analysis of WTO cases brought against the United States yields insights that can help inform efforts to break the impasse over how to fix the Appellate Body. The WTO dispute settlement system generally works well, though procedural reforms could improve its efficiency and the timeliness of rulings. US officials win a significant share of

10. Many of these countries also face US tariffs or quotas on their steel exports under Section 232 of the Trade Expansion Act of 1962.

11. See USITC Import Injury Investigations, www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm (accessed on April 10, 2019).

12. For details, see the online appendix.

13. The US-Zeroing (Korea) case, DS402, was not appealed. Three other disputes did not move past the consultative phase and were either settled or dropped. For details on the cases involving zeroing, see the online appendix.

14. For details on the use of zeroing to calculate dumping margins, see Bown and Prusa (2010) and Prusa and Vermulst (2009).

15. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." See www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm.

16. Office of the US Trade Representative, "United States Prevails on "Zeroing" Again: WTO Panel Rejects Flawed Appellate Body Findings," press release, April 9, 2019, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/united-states-prevails-%E2%80%9Czeroing%E2%80%9D (accessed on April 16, 2019).

cases in which the United States is a respondent. But they naturally grate about the ones they lose.

The preferred solution would be for WTO members to authorize the Appellate Body to remand issues under dispute that involve ambiguous legal obligations to the responsible WTO committees for a clarification of the scope of the specific obligations or the negotiation of supplemental rights and obligations, preferably under strict time limits. This process, recommended in Payosova, Hufbauer, and Schott (2018), would defer the resolution of disputes until all WTO members negotiate a satisfactory change to the specific obligation at issue. To be sure, this approach could result in lengthy delays and probably would not satisfy the demands of current US officials.

US officials should use the leverage created by this crisis to negotiate a surgical fix to the Appellate Body.

Alternatively, Jennifer Hillman (2018) has suggested a (temporary) moratorium on appeals of panel decisions involving trade remedy disputes. She recommends implementing the moratorium on appeals of trade remedy reports through a resolution of the Dispute Settlement Body that approves an interpretation of DSU Article 17.1 that precludes appeals of trade remedy cases for the duration of the moratorium. Her argument has a clear legal logic, since dispute panels already review decisions taken by the investigating agencies in the WTO member country and thus effectively perform similar functions to the Appellate Body.

Our analysis of the WTO AD/CVD cases defended by the United States suggests that an approach similar to that proposed by Hillman provides the most pragmatic and targeted remedy to US complaints about judicial overreach. It makes sense to focus on the administration of US AD and CVD laws, which represent 47 percent (73 cases) of the total complaints (155 cases) brought against the United States in the WTO; US losses (including split decisions) account for 42 percent (31 cases) of the 73 AD/CVD cases or 20 percent of the total WTO dispute cases defended by the United States. In many of these cases, US officials have objected strongly to Appellate Body decisions, some of which reverse WTO dispute panel rulings, that conclude that the US application of zeroing methodologies does not comply with WTO requirements.

To be sure, this is only a part, albeit an important part, of the US complaint about judicial overreach. Concerns arise in other areas as well. But the pattern of rulings in AD/CVD cases suggests that WTO members should consider a more narrowly focused remedy that does not block the overall functioning of the Appellate Body.

To that end, we suggest two modifications to Hillman's proposal: The moratorium on appeals should be permanent and limited to AD/CVD cases, not all trade remedies like safeguards. AD/CVD cases would still be subject to binding dispute panel decisions. Carving out AD/CVD panel decisions from Appellate Body review, if implemented on a permanent basis, would provide a concrete concession by WTO members to address the predominant US concern about judicial overreach. The changes could be implemented through a discrete negotiation without major damage to the Appellate Body process. To be sure, the changes apply only to Appellate Body reviews for a specific class of cases; they would not provide the untethered right the United States and others will have after December 10 to block all WTO dispute rulings. But in return they would improve the functioning of WTO dispute settlement and help reopen negotiations of new WTO rules that otherwise might not succeed with a disabled WTO enforcement process.

WTO members should support this change in addition to the procedural reforms included in previous proposals to update the DSU. It is a small price to pay to sustain an effective WTO dispute settlement system and an important investment in strengthening the rules-based multilateral trading system.

But would it provide enough change to prompt US officials to engage in negotiations? If US officials insist on the right to block WTO dispute rulings that they regard as aberrant on sovereignty grounds, then there is no viable compromise to fix the WTO system. That would be a costly and strategic mistake, undermining the rules-based trading system and harming US economic and foreign policy interests.

Instead, US officials should use the leverage created by this crisis to negotiate a surgical fix to the Appellate Body. WTO obligations need to be faithfully implemented and enforced. And they need to be modernized. So along with Appellate Body reforms, US officials should condition the deal on the commitment by other major trading nations to conclude negotiations to update WTO rules in key areas, starting with ongoing talks covering digital trade and fisheries subsidies. In other words, use the WTO crisis to build up rather than break down the multilateral trading system.

If US officials are willing to consider reforms that mitigate specific US concerns about judicial overreach, then negotiations could be fruitful. However, if US policy insists on returning to GATT era dispute resolution, then the task is more daunting and ultimately likely to fail.

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