

Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA

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The Appellate Body is considered the jewel in the crown of the WTO dispute settlement system. However, since it blocked the re-appointment of Jennifer Hillman to the Appellate Body, the United States has become increasingly assertive in its efforts to control judicial activism at the WTO. This was a hot topic in the corridors at the eleventh WTO Ministerial Conference, in Buenos Aires. This article examines judicial activism in the Appellate Body, and discusses the efforts of the United States to constrain the Appellate Body in this context. It also analyses US actions and proposals regarding the dispute settlement systems of the NAFTA, in order to place the WTO debate in a wider context. It concludes that reforms are necessary to break the negative feedback loop between deadlock in multilateral trade negotiations and judicial activism.

1 INTRODUCTION

The international trade dispute settlement system is under threat. The United States appears to be playing the role of bad cop in this drama. Indeed, while not officially on the agenda for the eleventh WTO Ministerial Conference, in Buenos Aires, this was a hot topic in the corridors.

The United States has objected to the renomination of its own Appellate Body member at the WTO, objected to the renomination of a Korean Appellate Body member, and, more recently, adopted a procedural position delaying the nomination of candidates to replace retiring Appellate Body members. Since this issue is decided on the basis of consensus, the US objections have effectively blocked these appointments. Prior to its actions with respect to the WTO Appellate Body, the United States had refused to nominate panellists in a NAFTA dispute with Mexico over Mexican sugar exports, which prevented the formation of a panel and had the effect of disabling this dispute settlement venue.

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NAFTA Chapter 20 has not been used since. This article examines the actions that have been taken to date and considers the causes and possible outcomes of this dispute over dispute settlement.

This article is structured as follows. First, it provides an overview of the WTO Appellate Body and the importance of its judicial functions. Secondly, it examines judicial activism in the Appellate Body. Third, it discusses the efforts of the United States to constrain the Appellate Body. Fourth, it analyses US actions and proposals regarding the dispute settlement systems of the NAFTA, in order to place the WTO debate in a wider context. It concludes that judicial activism has contributed to negotiation failure and vice versa. Reforms are necessary for both functions, in order to break the negative feedback loop between deadlock in multilateral trade negotiations and judicial activism.

2 OVERVIEW AND IMPORTANCE OF THE WTO APPELLATE BODY

The Appellate Body is composed of seven members, broadly representative of the WTO membership.¹ The United States and the European Union (from Germany, Italy, and Belgium) have always had a seat. The practice has been evolving regarding the other seats. Japan had a seat from 1995 to 2012. India has had a seat from 2000 to 2008 and 2011 to 2019. China has had a seat since 2008. New Zealand, Australia, Philippines, and South Korea have each had tenures of varying lengths, as have Egypt, South Africa, and Mauritius. Uruguay, Brazil, and Mexico have each had eight-year tenures, in that order. Some Latin Americans argue that Mexico should count as part of North America for the purpose of Appellate Body selection, but that approach would leave both Mexico and Canada without the chance for a seat, according to the practice to date in the selection of a North American candidate.

On 30 June 2017, the last day of the Mexican Member's term, pursuant to Rule 15 of its own Working Procedures for Appellate Review, the Appellate Body notified the Chairman of the DSB that it had authorized Mr Ramirez to complete the disposition of the appeals to which he had been assigned prior to that date.² On 22 November 2017, the United States refused to consider a replacement for Mr Ramirez, on the grounds that 'Mr. Ramirez continues to serve on an appeal, despite ceasing to be a member of the Appellate Body nearly 5 months

¹ See table of nationalities, tenures and backgrounds of members to date, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (accessed 11 Dec. 2017).

² *Ibid.*, fn. 13.

ago.³ The term of Peter Van den Bossche expired on 11 December 2017, which left only four of seven remaining.

Panels of three decide cases, but in the context of a collegial system in which all members discuss all cases. Time frames are short: ninety days in general, but only sixty days in disputes over actionable subsidies and thirty days in disputes over prohibited subsidies. However, the Appellate Body secretariat gets a head start, by reviewing Panel decisions before a party formally requests an appeal. The Appellate Body also asks parties to delay making their request when it has a heavy workload, in order to permit the Appellate Body to meet its short deadlines, as far as possible.

The importance of the Appellate Body is threefold. First, it provides an opportunity to address divergence in interpretations that arise among WTO panel decisions.⁴ Second, it enhances the predictability of the dispute settlement system by providing decisions that serve as guidance on how settled issues are likely to be addressed in future litigation. This can help to prevent disputes, by discouraging litigation over settled issues of law. Third, Appellate Body interpretations permit the judicial evolution of WTO law at a time when the negotiation function is not working. In a domestic legal system, the judicial branch and the legislative branch of government serve as counterweights; the judiciary can ensure that legislators do not violate fundamental constitutional norms, such as those regarding human rights, while the legislative branch can address judicial overreach by introducing legislation that clarifies ambiguous laws and correcting judicial interpretations that run counter to the wishes of the legislature. In the WTO, where the legislative function of multilateral negotiations have been deadlocked for several years, the main path for the evolution of WTO law has been via the dispute

³ Simon Lester, *U.S. Concerns About AB Members Serving After Expiration of Their Term* (27 Nov. 2017), <http://worldtradelaw.typepad.com/ielpblog/2017/11/us-concerns-about-ab-members-serving-after-expiration-of-their-term.html> (accessed 1 Dec. 2017).

⁴ Indeed, an appellate body has been proposed for international investment disputes. August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. Int'l Econ. L. 761 (2016); Joachim Karl, *An Appellate Body for International Investment Disputes: How Appealing Is It?* Columbia University Academic Commons (2015), <https://doi.org/10.7916/D85H7FFM> (accessed 8 Dec. 2017); Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. Int'l L. & Foreign Aff. 179 (2005); Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2006/01, OECD Publishing (2006), <http://dx.doi.org/10.1787/631230863687> (accessed 8 Dec. 2017); European Commission, *The Multilateral Investment Court Project*, Brussels (21 Dec. 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> (accessed 8 Dec. 2017); Laura Puccio & Roderick Harte, *From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules*, European Parliamentary Research Service (2017), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA\(2017\)607251_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf) (accessed 8 Dec. 2017).

settlement system.⁵ The trouble with this situation is that it increases the risk of unchecked judicial activism.

3 THE PRECIPICE OF JUDICIAL ACTIVISM

Ambiguity in treaty texts opens the door to judicial activism. In turn, judicial activism creates pressure for less ambiguity in treaty texts, making it more difficult to make progress in treaty negotiations. Where should international economic law draw the line between the functions of treaty negotiation, treaty interpretation, and dispute settlement? For example, who should decide in which circumstances there is a duty to negotiate prior to implementing public interest regulation? In 2001, Kenichiro Urakami observed that deciding such a highly contested issue would undermine the legitimacy of WTO panels and the Appellate Body.⁶ This prescient observation applies with greater force with the demise of the Doha Round of multilateral trade negotiations and the subsequent efforts to rein in the Appellate Body.⁷

There are several examples of judicial activism at the Appellate Body. This article will examine five: (1) WTO Members have a duty to negotiate in good faith in order to meet the requirements of the chapeau of GATT Article XX (an example of judicial intrusion into the international negotiation process); (2) Appellate Body Reports are de facto precedents, which panels are bound to follow (an example of judicial intrusion into the law-making function of the Ministerial Conference); (3) ambiguity in the Antidumping Agreement should be interpreted to prohibit zeroing methodology (an example of interpreting ambiguity to prohibit a long-held practice, and the reason alleged by many to be the reason behind US actions involving Appellate Body nominations); (4) the prohibition of less favourable treatment in TBT Agreement Article 2.1 has an implicit defence in the form of the legitimate regulatory distinctions test (an example of judicial overreach to remedy a perceived gap in the treaty text); and (5) the scope of application of the

⁵ Committees, such as the one on SPS measures, also do important work to permit the ongoing evolution of WTO law, but are a complement to negotiations, not a substitute. Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues*, 11 *J. Int'l Econ. L.* 751 (2008); Paolo Vergano, *The Sanitary and Phytosanitary Agreement*, 2 *ERA Forum* 118 (2001), <https://doi.org/10.1007/BF02817546> (accessed 8 Nov. 2017); Boris Rigod, *The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 24 *Eur. J. Int'l L.* 503 (2013).

⁶ Kenichiro Urakami, *Unsolved Problems and Implications for the Chapeau of GATT Article XX*, in *Reconciling Environment and Trade* 167–184, 182 (Edith Brown Weiss & John H. Jackson eds, Transnational Publishers 2001). *also see* Bradley J. Condon, *Does international economic law impose a duty to negotiate?*, 17 *Chin. J. Intl. L.* 73 (2018).

⁷ *Dispute Unsettled: America Holds the World Trade Organisation Hostage*, *The Economist* (23 Sept. 2017), <https://www.economist.com/news/finance-and-economics/21729462-rules-based-system-trade-faces-threats-beyond-trumps-tariffs-america-holds> (accessed 18 Nov. 2017).

SCM Agreement excludes clean energy subsidies (an example of judicial overreach to remedy a failure to negotiate a replacement for an expired provision that was to be revisited in future negotiations). What ties these examples together is not only judicial activism. They serve to illustrate the tension that exists between the negotiation and judicial functions at the WTO and how the Appellate Body has crossed the line into the law-making and negotiation jurisdiction of the Ministerial Conference. Taken together, they represent an expansion of judicial power into the legislative realm. While there may be other examples that would illustrate this point further, it is beyond the scope of this article to do a comprehensive survey of all of the instances of judicial activism in the WTO Appellate Body.

3.1 THERE IS A DUTY TO NEGOTIATE IN GATT ARTICLE XX

In two early WTO cases, the Appellate Body found that a failure to engage in negotiations meant that a WTO Member could not justify a measure under the GATT Article XX chapeau due, at least in part, to the failure to engage in consultations or negotiations in order to avoid discrimination.⁸ However, that interpretation has no support in the ordinary meaning of the treaty text, the context, the object and purpose or the relevant rules of international law.

The wider context of the WTO covered agreements does not support a general duty to negotiate. The WTO Agreements set out various degrees of cooperation, ranging from enquiry (SPS Agreement) or contact points (GATS), notification requirements (SPS Agreement, TBT Agreement), and consultations (DSU), to the use of good offices, conciliation, and mediation (DSU), and even specific negotiation obligations (GATS Article XIX, TRIPS Article 31(b)). For example, DSU sets out the procedural step of consultations, which is a step below negotiations, but a panel may be validly established without being preceded by consultations.⁹ Similarly, Article 15 of the Antidumping Agreement, which requires that ‘possibilities of constructive remedies ... shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members’, imposes no obligation to actually provide or accept any constructive remedy. It only requires the developed country authorities to

⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996; and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, adopted 6 Nov. 1998.

⁹ Appellate Body Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States (Mexico – Corn Syrup (Article 21.5 – US))*, WT/DS132/AB/RW (21 Nov. 2001), paras 61–63. Urakami has also observed that reading a negotiation requirement in the chapeau is curious in light of the DSU consultations requirement. Urakami, *supra* n. 6.

actively undertake the 'exploration' of possibilities with a willingness to reach a positive outcome.¹⁰ Even where the covered agreements contain an explicit requirement of consultations or explorations, they do not require any particular outcome. In this context, it is difficult to read into the language of the Article XX chapeau a requirement for negotiations, even if they require only good faith and no specific outcome. That would read into the chapeau language that is not there, creating a requirement that requires explicit language elsewhere in the covered agreements. Where there is a negotiation requirement in the covered agreements, it is explicit, and often is carefully circumscribed.¹¹ The absence of that requirement must be interpreted in this context.

In *US – Shrimp*, the factual context and legal framework – including international environmental law, WTO documents on trade and environment, and the reference to sustainable development in the preamble of the WTO Agreement – provided the basis for finding an implicit duty to negotiate in Article XX chapeau.¹² In this case, the survival of highly migratory species depended on concerted and cooperative efforts on part of many countries whose waters are traversed in the course of the migration. The panel characterized the legal framework as follows: (1) the need to protect migratory species has been recognized by the WTO and numerous international instruments; (2) sustainable development is a WTO objective; (3) there was the common opinion of WTO membership expressed in the 1996 Report of the CTE endorsing 'multilateral solutions based on international cooperation and consensus as the best and most effective way ... to tackle environmental problems of a transboundary or global nature'; and (4) the parties to the dispute had accepted almost all of the relevant MEAs.¹³ In the panel's view, this duty imposed the following obligations:

¹⁰ Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC – Bed Linen)*, WT/DS141/R, adopted 12 Mar. 2001, as modified by Appellate Body Report WT/DS141/AB/R, para. 6.233. See also Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India (US – Steel Plate)*, WT/DS206/R and Corr.1, adopted 29 July 2002, paras 7.113–7.115 and Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC – Tube or Pipe Fittings)*, WT/DS219/R, adopted 18 Aug. 2003, as modified by Appellate Body Report WT/DS219/AB/R, para. 7.72.

¹¹ E.g. Art. 31(b) of the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement), 15 Apr. 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments – Results of the Uruguay Round, Annex 1A, 33 ILM 1197 (1994), requires that compulsory licensing be preceded by 'efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time'. Moreover, 'This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.' In the event that this requirement is waived, the negotiation obligation is reduced to a notification obligation.

¹² *US – Shrimp*, *supra* n. 8, paras 5.59–5.60.

¹³ *Ibid.*, paras 5.53–5.57.

- (1) the United States had to take the initiative of negotiations;
- (2) the negotiations had to be with all interested parties and aimed at establishing consensual means of sea turtle conservation;
- (3) the United States had to make serious efforts in good faith to negotiate, taking into account conditions in different countries;¹⁴
- (4) serious efforts in good faith had to take place before the enforcement of a unilaterally designed import prohibition;
- (5) there must be a continuous process, including once a unilateral measure has been adopted and pending the conclusion of an agreement; and
- (6) a multilateral, ideally non-trade restrictive, solution is generally to be preferred, in particular if it is established that it constitutes an 'alternative course of action reasonably open'.¹⁵

The panel's approach is striking in its intrusiveness. In other, similar cases involving transboundary or global environmental negotiations, would a WTO panel today feel as confident about expressing its views on the adequacy of a WTO Member's approach to international environmental negotiations?

Howse argues that negotiation efforts in the Shrimp case were only relevant to determining whether the United States had discriminated between the countries around the Indian Ocean and the countries in the Americas.¹⁶ He argues that 'there is nothing in the wording of the chapeau (or any other part of Article XX) to suggest that a nation must first secure agreement by WTO Members or any other nation before exercising its rights under Article XX(g)'.¹⁷ In his critique of the Appellate Body's interpretation of the Article XX chapeau in *US – Gasoline*

¹⁴ The panel determined that this was the 'standard of review' that should be applied in assessing the effort to negotiate. See *ibid.*, para. 5.73. However, the panel also recognized that 'no single standard may be appropriate'. *Ibid.*, para. 5.77. The Appellate Body rejected the view expressed by the panel that the United States should be held to a higher standard given its scientific, diplomatic and financial means, noting that the principle of good faith applies to all WTO members equally. See *ibid.*, para. 5.76 and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia (US – Shrimp (Article 21.5 – Malaysia))*, WT/DS58/AB/RW, adopted 21 Nov. 2001, para. 134, fn. 97. Also see Robert Howse & Damien J. Neven, *US – Shrimp: United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, 2 *World Trade Rev.* 41 (2003).

¹⁵ *Ibid.*, paras 5.66–5.67, 5.73. Regarding this expression of the least-trade-restrictive test, also see Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, *supra* n. 14, para. 5.51, where the panel states: '[I]t seems that the Appellate Body meant to imply that other, less trade restrictive measures existed and also that import prohibitions, because of their impact, had to be subject to stricter disciplines.'

¹⁶ Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 *Colum. J. Envtl. L.* 491, 507 (2002).

¹⁷ *Ibid.*, at 510. Howse further supports his argument that there is no general duty to negotiate in Art. XX by comparing GATT Arts XX and XXI: 'By contrast, where the drafters wanted to make the exercise of some kind of exception to GATT disciplines contingent on agreement or collective action among Members or states generally, they did so explicitly. For example, Article XXI(c) provides an

and *US – Shrimp*, Charnovitz noted that, ‘the Appellate Body arrogates to itself considerable discretion and adjudicative authority’.¹⁸

Subsequent jurisprudence has not applied a negotiation requirement under the chapeau of GATT Article XX, the chapeau of GATS Article XIV, or other WTO agreements that use the chapeau language.

In *US – Gambling*,¹⁹ the Appellate Body overturned the Panel’s ruling²⁰ that the United States could not justify its measures on internet gambling services as ‘necessary’ under Article XIV(a) of the GATS. The Panel had decided that the United States had not ‘explored and exhausted all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure’,²¹ because it had failed to consult or negotiate with Antigua before imposing the measures.²² The Appellate Body reasoned that negotiations, which have an uncertain outcome, could not qualify as a reasonably available alternative measure that would achieve the desired level of protection of public morals.

In *Brazil – Retreaded Tyres*, the Appellate Body noted that it would ‘have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX’.²³ Similarly, in *EC – Seal Products*, the Appellate Body stated that the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX ‘should focus on the cause of the discrimination, or the rationale put forward to explain its existence’.²⁴

In *US – Tuna II (Mexico)*, Mexico argued that the Appellate Body’s statement in *US – Shrimp* that the United States’ failure to engage the appellees in that case in

exception where Members are taking action “in pursuance of ... obligations under the United Nations Charter for the maintenance of international peace and security.”

¹⁸ Steve Charnovitz, *The WTO’s Environmental Progress*, 3 J. Intl Econ. L. 685, 695–696 (2007).

¹⁹ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R, adopted 20 Apr. 2005.

²⁰ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, adopted 20 Apr. 2005).

²¹ *Ibid.*, para. 6.528.

²² *Ibid.*, para. 6.531.

²³ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 Dec. 2007, para. 227. See also Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products (Indonesia – Import Licensing Regimes)*, WT/DS477/AB/R, adopted 22 Nov. 2017, para. 5.98.

²⁴ Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/AB/R, adopted 18 June 2014, para. 5.303 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, *ibid.*, para. 226, in turn referring to Appellate Body Reports, *US – Gasoline*, *supra* n. 8; *US – Shrimp*, *supra* n. 8; *US – Shrimp (Article 21.5 – Malaysia)*, *supra* n. 14).

‘serious, across the board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles’ ‘bears heavily in any appraisal of justifiable or unjustifiable discrimination’. Mexico argued that the situation was even more aggravated because the United States entered into the Agreement on the International Dolphin Conservation Program (AIDCP), a MEA for protecting dolphins, and then disregarded the standard established by the AIDCP in maintaining its own unilateral measure.²⁵ Mexico also argued that the situation in *US – Gasoline* was ‘closely analogous’ to the situation in *US – Tuna II (Mexico)*; in that case, the basis of the GATT inconsistency was that the United States had acted unilaterally, without first attempting to achieve its goal through cooperation, which made it similar to the United States’ disregard for a multilateral agreement on the same subject of the protection of dolphins and labeling tuna as ‘dolphin-safe’.²⁶ While the Appellate Body acknowledged these arguments regarding cooperation or negotiation requirements, it did not address them in its decision.

The current approach to the chapeau language eliminates the notion that there is a general duty to negotiate before applying unilateral measures. Instead, it analyses whether discrimination is arbitrary or unjustifiable by focusing on the cause of the discrimination, or the rationale put forward to explain its existence. This approach would exclude a duty to negotiate in many circumstances, including measures to protect public morals or human health, as well as measures to combat climate change.

Lack of progress in WTO negotiations is now aggravated by threats to its dispute settlement system. It is not effective or practical to require negotiations at the multilateral level in times of multilateral negotiation failure. Moreover, it is not effective or practical to require negotiations at the bilateral or regional level for global issues like climate change regulation or conservation of endangered species. It is perhaps for these reasons that the Appellate Body has not found a duty to negotiate in the Article XX chapeau since the *US – Shrimp* case. This line of cases, in which a duty to negotiate first appeared and then disappeared, serves as an example of judicial overreach that has been retracted over time, which might serve as a roadmap for stepping back from the precipice of judicial activism on other topics. However, this will not be possible on some issues, such as the de facto precedential effect of Appellate Body decisions, on which reform would need to come from the Members.

²⁵ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted 13 June 2012, para. 86.

²⁶ *Ibid.*, paras 97, 335.

3.2 APPELLATE BODY REPORTS ARE DE FACTO PRECEDENTS

Article XI:2 of the WTO Agreement gives the Ministerial Conference and the General Council ‘the exclusive authority to adopt interpretations’ of the WTO Agreement and of the Multilateral Trade Agreements. Article 3.2 of the DSU gives panels and the Appellate Body the task of clarifying the existing provisions of those agreements in accordance with customary rules of interpretation of public international law, without adding to or diminishing the rights and obligations provided in the covered agreements. WTO Members have never exercised their exclusive authority under Article XI:2 of the WTO Agreement. The Appellate Body now appears to have assumed this role. In so doing, it has intruded on the jurisdiction of the Ministerial Conference.

In *US – Stainless Steel (Mexico)*, the panel accepted the United States’ use of zeroing methodology in the calculation of antidumping duties, choosing to disregard prior Appellate Body jurisprudence on this issue. On appeal, the Appellate Body ruled that its interpretations of the covered agreements are binding on WTO panels. The Appellate Body accepted that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. Nevertheless, subsequent panels are not free to disregard the legal interpretations and the *ratio decidendi* contained in adopted Appellate Body reports; since DSB adoption is virtually guaranteed, this means all of them. The Appellate Body justified its conclusion regarding the effects of its prior decisions as follows. Panels are expected to follow the Appellate Body’s conclusions in earlier disputes, especially where the issues are the same. Dispute settlement practice shows that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports, in dispute settlement proceedings, and when enacting or modifying laws and national regulations. Following the Appellate Body’s conclusions in earlier disputes provides ‘security and predictability’ in the dispute settlement system, as required by Article 3.2 of the DSU. The creation of the Appellate Body to review legal interpretations developed by panels shows that WTO Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. According to the Appellate Body, while the application of a provision may be confined to the context in which it takes place, the relevance of clarifications contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.²⁷ While these arguments sound reasonable at first glance, they do not explain how this approach to judicial interpretation can be squared with

²⁷ Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (US – Stainless Steel (Mexico))*, WT/DS344/AB/R, adopted 20 May 2008, paras 158–161.

Article XI:2 of the WTO Agreement, or how they can justify encroaching on the jurisdiction of the Ministerial Conference. This encroachment on the law-making powers of the Ministerial Conference seems inconsistent with the text and spirit of Article XI:2 of the WTO Agreement. Moreover, it is difficult to see how the Appellate Body could backtrack on this issue and still maintain its credibility, which means that clarifications would have to come from the WTO Members.

3.3 THE ANTIDUMPING AGREEMENT PROHIBITS ZEROING

The Appellate Body has ruled against the use of zeroing in US antidumping investigations on numerous occasions in different contexts: in original investigations, periodic reviews, new shipper reviews, and sunset reviews.²⁸ The Appellate Body has found zeroing to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in original investigations and has found zeroing in periodic reviews to be inconsistent with GATT Article VI:2 and Article 9.3 of the Anti-Dumping Agreement.²⁹ The United States has not accepted these interpretations and continued to use zeroing methodology, in spite of the clear trend in WTO jurisprudence, and to litigate the issue repeatedly, even though it presented no defence in some cases.³⁰ The characterization of the approach of the Appellate Body to zeroing as judicial overreach has been addressed elsewhere.³¹ While not all aspects

²⁸ There is an excellent series of interdisciplinary case comments on zeroing jurisprudence: Chad P. Bown & Alan O. Sykes, *The Zeroing Issue: A Critical Analysis of Softwood V*, 7 World Trade Rev. 121 (2008); Thomas J. Prusa & Edwin Vermulst, *A One-Two Punch on Zeroing: US–Zeroing (EC) and US–Zeroing (Japan): United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) and United States – Measures Relating to Zeroing and Sunset Reviews*, 8 World Trade Rev. 187 (2009); Thomas J. Prusa & Edwin Vermulst, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand: A Cat in the Bag*, 11 World Trade Rev. 257 (2012); Dukgeun Ahn & Patrick Messerlin, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China: Never Ending Zeroing in the WTO?* 13 World Trade Rev. 267 (2014); Meredith Crowley & Robert Howse, *US–Stainless Steel (Mexico)*, 9 World Trade Rev. 117 (2010); James C. Hartigan, *It's Baaaack: Zeroing, the US Department of Commerce, and US–Shrimp II (Viet Nam)*, 15 World Trade Rev. 287 (2016).

²⁹ Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC – Bed Linen)*, WT/DS141/AB/R, adopted 12 Mar. 2001, para. 66; Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada (US – Softwood Lumber V)*, WT/DS264/AB/R, adopted 31 Aug. 2004, para. 117; Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada (US – Softwood Lumber V (Article. 21.5 – Canada))*, WT/DS264/AB/RW, adopted 1 Sept. 2006, para. 124; Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing') (US – Zeroing (EC))*, WT/DS294/AB/R, adopted 9 May 2006, para. 222; and Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews (US – Zeroing (Japan))*, WT/DS322/AB/R, adopted 23 Jan. 2007, para. 138.

³⁰ Hartigan, *supra* n. 28. See Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador (US – Shrimp (Ecuador))*, WT/DS335/R, adopted 20 Feb. 2007, e.g.

³¹ Prusa & Vermulst (2009), *supra* n. 28 (arguing that the Appellate Body overreached in considering zeroing to be in violation of Art. 2.4 AD Agreement); Roger P. Alford, *Reflections on US – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 Colum. J. Transnat'l L. 196 (2007). *Also see*

of the zeroing rulings are considered to be examples of judicial overreach, many commentators acknowledge the ambiguity of the relevant provisions of the Antidumping Agreement.³² Regardless of one's view on the matter, most commentators agree that the zeroing jurisprudence lays at the root of current US opposition to the Appellate Body. The United States has declined to rectify the illegal antidumping duties based on zeroing calculation methods, despite the many WTO rulings. Instead, WTO Members have had to resort to the dispute settlement system individually in order to rectify the US zeroing practices, raising concern regarding the legitimacy and integrity of the WTO dispute settlement system.³³

Opinion is divided on the extent to which Appellate Body rulings on zeroing constitute judicial overreach, but there is a case to be made that there are instances of judicial overreach. As with the related issue of de facto precedents, it is difficult to see how the Appellate Body could backtrack on this issue and still maintain its credibility, which means that clarifications would have to come from the WTO Members. However, that is likely to prove difficult, since the zeroing issue resembles other long-running trade issues that have proved incapable of solution via either negotiation or litigation, such as the two centuries of disputes over lumber trade between Canada and the United States.³⁴ Hard cases do make bad law.

3.4 THE LEGITIMATE REGULATORY DISTINCTIONS TEST IN TBT AGREEMENT ARTICLE 2.1

Article 2.1 of the TBT Agreement does not incorporate the language of the chapeau, but the Appellate Body imported into Article 2.1 a test that effectively converts chapeau language from the preamble of the TBT Agreement into an

Crowley & Howse, *supra* n. 28 (concluding that, under limited circumstances, the 'zeroing' methodology is more effective at remedying injury than the ordinary methodology outlined in the Anti-Dumping Agreement).

³² Edwin Vermulst & Daniel Ikenson, *Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?*, 2 *Global Trade & Cust. J.* 231 (2007); Thomas J. Prusa & Edwin Vermulst, *United States – Continued Existence and Application of Zeroing Methodology: The End of Zeroing?*, 10 *World Trade Rev.* 45 (2011); Kamal Saggi & Mark Wu, *Yet Another Nail in the Coffin of Zeroing: United States–Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, 12 *World Trade Rev.* 377 (2013).

³³ Ahn & Messerlin, *supra* n. 28. Also see Chad P. Bown & Thomas J. Prusa, *U.S. Antidumping: Much Ado About Zeroing*, World Bank Policy Research Working Paper No. 5352 (2010), <https://ssrn.com/abstract=1632798> (accessed 12 Nov. 2017); Thomas J. Prusa & Luca Rubini, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It's déjà vu All over Again*, 12 *World Trade Rev.* 409 (2013); Bernard Hoekman & Jasper Wauters, *US Compliance with WTO Rulings on Zeroing in Anti-Dumping*, 10 *World Trade Rev.* 5 (2011).

³⁴ Mike Apsey, *What's all this Got to Do with the Price of 2x4's?* (University of Calgary Press 2006).

exception to Article 2.1. According to the Appellate Body, the ‘treatment no less favourable’ requirement in Article 2.1 of the TBT Agreement permits technical regulations that pursue legitimate objectives, but not those applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.³⁵ This requires analysing ‘whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products’.³⁶

In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Appellate Body held that the issue of whether a detrimental impact stems exclusively from a legitimate regulatory distinction can be assessed by examining whether the detrimental impact can be reconciled with, or is rationally related to, the policy objective pursued by the measure at issue, so long as it does not preclude consideration of other factors that may also be relevant to the analysis.³⁷ Depending on the nature of the measure at issue and the circumstances of the case, additional factors could also be relevant to the analysis of whether the discrimination is arbitrary or unjustifiable, beyond the question of whether the discrimination can be reconciled with the policy objective.³⁸ One way of assessing whether a measure is ‘even-handed’ is to consider whether the measure or regulatory distinction is designed or applied in a manner that constitutes a means of ‘arbitrary or unjustifiable discrimination’.³⁹

In this example, the Appellate Body created a new exception to an obligation. It is difficult to reconcile this approach with the Article 3.2 of the DSU, which provides that panels and the Appellate Body are not to add to or diminish the rights and obligations provided in the covered agreements. The Appellate Body imported requirements from the preamble of the TBT Agreement, which is not a source of legal rights or obligations. In this example, as in the ‘duty-to-negotiate’ cases, it is not too late to step back from the precipice of judicial activism.

³⁵ Appellate Body Report, *US – Tuna II (Mexico)*, *supra* n. 25, para. 213.

³⁶ *Ibid.*, para. 215. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 24 Apr. 2012, para. 182.

³⁷ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico (US – Tuna II (Mexico) (Article 21.5 – Mexico))*, WT/DS381/AB/RW, adopted 3 Dec. 2015, para. 7.95.

³⁸ *Ibid.*, para. 7.93 (citing Appellate Body Report, *EC – Seal Products*, *supra* n. 24, para. 5.321).

³⁹ Panel Report, *US – Tuna II (Mexico) (Second Recourse to Article 21.5 – Mexico)*, circulated 26 Oct. 2017, WT/DS381/RW/2, para. 7.83 (citing Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, *supra* n. 37, para. 7.93). Also see Philip I. Levy & Donald H. Regan, *EC – Seal Products: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)*, 14 World Trade Rev. 337 (2015) (discussing whether the line to be drawn between legitimate and illegitimate purposes in regulation.); Meredith Crowley & Robert Howse, *Tuna–Dolphin II: A Legal and Economic Analysis of the Appellate Body Report*, 13 World Trade Rev. 321 (2014).

3.5 THE SCOPE OF APPLICATION OF THE SCM AGREEMENT

The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) lacks a general exception and does not incorporate any language from GATT Article XX. The limited exception for environmental subsidies in Article 8 of the SCM Agreement has expired. It is unlikely that clean energy subsidies that are inconsistent with the SCM Agreement could be justified under GATT Article XX. Negotiators developed specific exceptions and language to address the issue of environmental subsidies, and did not incorporate the language of Article XX or incorporate Article XX by reference.⁴⁰

The structure of the SCM Agreement, in which there are no environmental exceptions, requires tribunals to exclude clean energy subsidies from the scope of application if they wish to avoid multilateral disciplines on the use of prohibited subsidies and actionable subsidies. In the SCM Agreement, arguments regarding the scope of application of the agreement as a whole take on greater importance than in the GATT, the TBT Agreement and the SPS Agreement, since the SCM Agreement lacks the exclusions and general exceptions found in these other WTO agreements.

When the text of a specific obligation provides little room for limiting its scope of application, and the treaty contains no general exception in which to address public interest regulation, tribunals should address public interest regulation in the general scope provisions. In the SCM Agreement, the obligation of Article 3 regarding prohibited subsidies provides little room for limiting its scope of application and there are no general exceptions that serve this purpose. Thus, the only means to preserve regulatory autonomy is to limit the general scope of application of the SCM Agreement as a whole, as the Panel and the Appellate Body did in *Canada – Renewable Energy* and *Canada – Feed-In Tariff*

⁴⁰ Bradley J. Condon, *Disciplining Clean Energy Subsidies to Speed the Transition to a Low-Carbon World*, 51 J. World Trade 675 (2017). Also see Gabrielle Marceau & Joel Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade*, 36 J. World Trade 811, 874 (2002); Daniel C. Crosby, *Energy Discrimination and International Rules in Hard Times: What's New This Time Around, and What Can Be Done*, 5 J. World Energy L. & Bus. 325 (2012); Aaron Cosbey & Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17 J. Int'l Econ. L. 11 (2014); Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (2010); Robert Howse, *Climate Change Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis* (Winnipeg, Manitoba: International Institute for Sustainable Development 2010); Luca Rubini, *Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform*, 15 J. Int'l Econ. L. 525 (2012); Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures Balancing Policy Space and Legal Constraints* (Cambridge University Press 2014); Luca Rubini, *ASCM Disciplines and Recent WTO Case Law Developments: What Space for 'Green' Subsidies*, RCSAS, Robert Schuman Centre for Advanced Studies, 2015/3 (Jan. 2015).

Program.⁴¹ However, the result of this approach to the deficient structure of the SCM Agreement is that it is now difficult to apply multilateral disciplines to trade distorting clean energy subsidies.

The complainant bears the burden of proving that a measure falls within the scope of a treaty. In *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, both the Panel and the Appellate Body found that the complainants did not meet their burden of proving that the SCM Agreement applied to the measure, because they failed to prove the existence of a ‘benefit’ under Article 1.1(b).⁴² Thus, there was no need to examine whether the measure was inconsistent with the prohibition of import substitution subsidies under Article 3.1(b) of the SCM Agreement.

In *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, a key issue was which market provides the most appropriate benchmark in determining the existence and magnitude of a benefit for solar and wind power producers.⁴³ In the absence of Ontario’s feed-in-tariff (FIT) program, a competitive wholesale market for electricity in Ontario could not support commercially viable operations of solar and wind power producers.⁴⁴ The Panel rejected the complainants’ argument that the analysis of benefit should compare the terms and conditions of participation in the FIT Program with those that would be available to generators participating in a wholesale electricity market where there is effective competition. The majority held that none of the alternatives that had been advanced by the complainants or Canada could be used as appropriate benchmarks against which to measure

⁴¹ WTO Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada – Renewable Energy)*, WT/DS412/AB/R, and *Canada – Measures Relating to the Feed-in Tariff Program (Canada – Feed-In Tariff Program)*, WT/DS426/AB/R, adopted 24 May 2013, para. 5.219; WTO Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada – Renewable Energy)*, WT/DS412/R, and *Canada – Measures Relating to the Feed-in Tariff Program (Canada – Feed-In Tariff Program)*, WT/DS426/R, adopted 24 May 2013, paras 7.309–7.319. Also see Steve Charnovitz & Carolyn Fischer, *Canada – Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, 14 World Trade Rev. 117 (2015) (that the most noteworthy aspect of the new jurisprudence is the Appellate Body’s reasoning that delineating the proper market for ‘benefit’ analysis entails respect for the policy choices made by a government.); Luca Rubini, ‘*The Wide and the Narrow Gate*’: Benchmarking in the SCM Agreement After the *Canada–Renewable Energy/FIT Ruling*, 14 World Trade Rev. 211 (2015) (that this decision left us with bad law and shows that law reform as the only solution to the current status quo); Rachel Brewster, Claire Brunel & Anna Maria Mayda, *Trade in Environmental Goods: A Review of the WTO Appellate Body’s Ruling in US–Countervailing Measures (China)*, 15 World Trade Rev. 327 (2016) (that CVDs have the standard distortionary effects of tariffs, could go against environmental goals and, in this case, appear driven by pressure of domestic manufacturers of clean energy technology and products.); and Henrik Horn & Petros C. Mavroidis, *United States – Preliminary Determination with Respect to Certain Softwood Lumber from Canada: What Is a Subsidy?*, 4 World Trade Rev. 220 (2005).

⁴² WTO Appellate Body Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, para. 5.219; WTO Panel Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, *supra* n. 41, paras 7.309–7.319.

⁴³ Panel Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, *supra* n. 41, para. 7.270.

⁴⁴ *Ibid.*, paras 7.276–7.277.

whether the FIT Program conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement.⁴⁵

The Appellate Body held that the Panel had erred 'in not conducting the benefit analysis on the basis of a market that is shaped by the government's definition of the energy supply-mix, and of a benchmark located in that market reflecting competitive prices for wind power and solar PV generation'.⁴⁶ However, there were insufficient factual findings for the Appellate Body to complete the analysis, so it was unable to determine whether the measure conferred a benefit. Thus, on this issue, the Appellate Body reached the same conclusion as the Panel majority, but for different reasons. The Appellate Body decision indicates that the benefit analysis can exclude a subsidy from the application of the SCM Agreement if no benefit is conferred to one solar or wind power producer compared to others in the market. That is, the government can use subsidies to determine the mix of energy sources without violating the SCM Agreement.

The Appellate Body's restrictive interpretation of the scope provisions of the SCM Agreement in *Canada – Renewable Energy* may make it more difficult to discipline clean energy subsidies as prohibited or actionable subsidies. It is instructive that the United States did not pursue claims under the SCM Agreement in *India – Certain Measures Relating to Solar Cells and Solar Modules* (which it had invoked in its request for consultations in this dispute), relying instead on TRIMS and GATT Article III:4.⁴⁷ However, in *United States – Certain Measures Relating to the Renewable Energy Sector*, India did allege violations of Articles 3.1(b) and 3.2 of the SCM Agreement because the measures constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement that is contingent upon the use of domestic over imported goods.⁴⁸

Rubini and Howse both take the view that clean energy subsidies are necessary to overcome market structures and subsidies that favour fossil fuels.⁴⁹ Rubini assumes that some clean energy subsidies are 'good'. Rubini also recognizes that some subsidies do require WTO disciplines on market-distorting and rent-seeking subsidies. Regardless of whether clean energy subsidies are 'good' or 'bad', the point here is that the Appellate Body's exclusion of clean energy subsidies from the disciplines of the SCM Agreement qualifies as judicial overreach, since it

⁴⁵ *Ibid.*, paras 7.309–7.319.

⁴⁶ Appellate Body Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, *supra* n. 41, para. 5.219. Also see Rolf H. Weber & Rika Koch, *International Trade Law Challenges by Subsidies for Renewable Energy*, 49 J. World Trade 757 (2015).

⁴⁷ Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells)*, WT/DS456/AB/R, adopted 14 Oct. 2016.

⁴⁸ *United States – Certain Measures Relating to the Renewable Energy Sector*, Request for the establishment of a panel by India, WT/DS510/2 (24 Jan. 2017).

⁴⁹ Howse, *supra* n. 40; Rubini (2012), *supra* n. 40.

effectively excludes a category of subsidy from WTO disciplines without a solid foundation in the text.⁵⁰ It also fails to make sense from an environmental policy perspective. Clean energy technologies and markets are evolving faster than many expected, and already are competitive with fossil fuels in several markets. This makes judicial interpretation an inadequate tool to address the policy concerns associated with clean energy subsidies, as Rubini points out.⁵¹ In this example, as in the ‘duty-to-negotiate’ cases, it is not too late to step back from the precipice of judicial activism.

The examples of Appellate Body jurisprudence in this article are intended to show that there is a problem of judicial activism at the WTO, which sometimes appears to have the objective of compensating for multilateral negotiation deadlock, sometimes has the objective of attempting to make law that creates incentives for public interest regulation, sometimes seeks to empower the judicial branch of the WTO at the expense of the legislative branch, and sometimes combines these objectives in different ways. It is beyond the scope of this article to create a typology of Appellate Body decision-making that might be used to create a benchmark that measures degrees of judicial activism.⁵² Rather, the point of this article is that judicial activism is one of the reasons for multilateral negotiation failure, since it creates incentives for treaty negotiators to swing the pendulum back to a more textual approach, which requires pursuing a degree of clarity in treaty texts that can hamper their ability to reach agreement. When the Appellate Body engages in judicial activism, it is not helping to solve the problem of negotiation failure, but doing the opposite.

4 THIS COULD BE THE BEGINNING OF A BEAUTIFUL FRIENDSHIP

The efforts of the United States to constrain the judicial activism of the Appellate Body should be viewed against the backdrop of the judicial activism, the deadlock in multilateral negotiations, which prevents a ‘legislative’ approach to rectify the judicial activism, and the specific actions that the United States has taken in this context. They should also be considered in light of the politicization of the Appellate Body appointment process and the need for its reform.⁵³

⁵⁰ Cosbey & Mavroidis, *supra* n. 40.

⁵¹ Rubini (2012), *supra* n. 40; Condon, *supra* n. 40.

⁵² Others are rising to this particular challenge. See Robert Howse, *Global Governance by Judiciary*, 27 Eur. J. Int'l L. 9 (2016) (arguing that the Appellate Body is more deferential towards domestic policies and a more intrusive towards trade instruments) and the response of Petros C. Mavroidis, *The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body*, 27 Eur. J. Int'l L. 1107 (2016) (The Appellate Body is particularly deferential towards domestic policies to protect human life and/or health.).

⁵³ Arthur E. Appleton, *Judging the Judges or Judging the Members? Pathways and Pitfalls in the Appellate Body Appointment Process*, in *Judging the State in International Trade and Investment Law, International Law and the*

In zeroing disputes, the United States made WTO Members challenge individual rulings, rather than reforming its methodology to conform to Appellate Body decisions. While adopted reports are only binding on the parties to the dispute, WTO Members are guided by Appellate Body and Panel reports in trade negotiations and in the implementation and interpretation of their domestic trade laws. From this perspective, the actions of the United States on zeroing might be construed as an effort to preserve negotiation flexibility on antidumping. From another perspective, this could be viewed as a warning to the Appellate Body, in the absence of progress in negotiations, that it was overreach to interpret an ambiguous provision in a manner that prohibited a practice that the United States considered valid under a permissible interpretation.

Ambiguity in treaty provisions is an interesting subject in its own right, and a central part of the issue regarding both negotiation and judicial activism. State consent still matters in international law.⁵⁴ It underlies the principle of international law of *in dubio mitius*, that tribunals should interpret ambiguous treaty provisions in the least onerous manner for the parties to the treaty.⁵⁵ In WTO law, it means that ambiguity should not bind members to the more onerous interpretation of an ambiguous provision. However, in many instances, this is not the path that the Appellate Body has taken. Indeed, this principle of deference to State sovereignty is rarely applied in WTO jurisprudence.⁵⁶ WTO Members are reluctant to invoke this principle of treaty interpretation as respondents, given the risk that it will come back to haunt them as complainants.

If the US response to the rulings in the zeroing cases was the first warning to the Appellate Body, then the second warning to the Appellate Body was the US decision to object to the nomination of Appellate Body member Jennifer Hillman

Global South 11–32 (Leïla Choukroune ed., Springer 2016); Steve Charnovitz, *The Obama Administration's Attack on Appellate Body Independence Shows The Need for Reforms* (22 Sept. 2016), <http://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html> (accessed 10 Dec. 2017).

⁵⁴ Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley J. Int'l Law. 137 (2005). Also see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am. J. Int'l L. 535 (2001); Donald McRae, *The WTO in International Law: Tradition Continued or New Frontier?*, 3 J. Int'l Econ. L. 27 (2000), and Donald McRae, *The Contribution of International Trade Law to the Development of International Law*, 260 Recueil des Cours 111 (1996).

⁵⁵ *Oppenheim's International Law* vol. I, 1278 (R. Jennings & A. Watts eds, 9th ed., 1992); *Nuclear Tests Case (Australia v. France)* (1974) ICJ Reports, 267 (International Court of Justice); *Access of Polish War Vessels to the port of Danzig* (1931) P.C.I.J. Reports Series A/B, No 43, 142 (Permanent Court of International Justice). Also see Ian Brownlie, *Principles of Public International Law* 631 (4th ed., 1990); C. Rousseau, *Droit International Public* vol. I, 273 (1990); D. Carreau, *Droit International* 142 (4th ed., 1994); M. Díez de Velasco, *Instituciones de Derecho Internacional Público* vol. I, 163–164 (9th ed., 1991); B. Conforti, *Diritto Internazionale* 99–100 (3d ed., 1987).

⁵⁶ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* EC – Hormones, DS26/AB/R, DS48/AB/R, adopted 13 Feb. 1998, para. 165.

to a second four-year term.⁵⁷ The Appellate Body considered this action to be a challenge to its independence.⁵⁸

The third challenge to its independence was the US decision to object to the nomination of South Korean Appellate Body member, Seung Wha Chang, to a second four-year term.⁵⁹

⁵⁷ Gary Clyde Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, Peterson Institute for International Economics (13 June 2011), <https://piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system> (accessed 10 Dec. 2017). Appellate Body, *Annual Report for 2011*, WT/AB/17, 4 (13 June 2012), https://www.wto.org/english/tratop_e/dispu_e/ab_annual_report11_e.doc (accessed 16 Dec. 2017): ‘On 21 April 2011, Ms. Hillman informed the Chair of the DSB that, while she was willing to serve a second term, it was her understanding that there would be an objection from a Member country to her reappointment. Ms. Hillman considered that, as long as that objection stood, she would not ask the DSB to consider her potential reappointment. The minutes of the DSB meeting of 21 April 2011 state that Ms. Hillman “was not requesting the DSB to consider her for reappointment” [WT/DSB/M/295, 30 June 2011].’ Their also is unconfirmed suspicion that ‘the United States was not happy with Merit Janow’s performance and may have discouraged her reappointment.’ See Appleton, *supra* n. 53, at 30. However, the relevant Annual Report simply states, ‘Merit E. Janow, whose first term of office expired on the same day, informed the DSB that she would not seek reappointment to a second term.’ See Appellate Body, *Annual Report for 2007*, WT/AB/9, 4, https://www.wto.org/english/tratop_e/dispu_e/ab_an_rep_e.htm (accessed 16 Dec. 2017).

⁵⁸ The Appellate Body’s view that this was an issue of judicial independence was evident from the content, delivery, and aftermath of Jennifer Hillman’s speech as an outgoing member. She stated, ‘[I]ndependence and impartiality ... stems from an institutional guarantee of independence. It is on this front that I see a possible cloud on the horizon and that cloud stems from the mere fact that Appellate Body Members are subject to a reappointment process if they are to serve a second four-year term ... The mere fact that Appellate Body Members must go through a reappointment process can invite scepticism on all sides – and raises the possibility that decisions an Appellate Body Member made during his or her first four years have somehow crept into the reappointment process – thereby casting a shadow on the principle of independence and on the support for the rule-of-law system ... Now might be a good time for members to reflect on whether one single term of longer duration might better achieve a more independent Appellate Body and a more efficient one.’ See *Farewell Remarks of Jennifer Hillman to the Dispute Settlement Body of the WTO*, Geneva (8 Dec. 2011), Appellate Body, *Annual Report for 2011*, *ibid.*, at 76–78. In contrast, Lilia Bautista noted in her farewell remarks, ‘My decision not to seek another term and to resign as Appellate Body Chair is personal and has nothing to do with any government.’ See *Farewell remarks of Lilia Bautista to the Dispute Settlement Body of the WTO*, Geneva (8 Dec. 2011), *ibid.*, at 78. See also Appleton, *supra* n. 53, at 30, n. 25, noting that Bautista has stated that Janow and Hillman did not seek a second term. See Luis Olavo Baptista, *A Country Boy Goes to Geneva*, cited in Appleton, *supra* n. 53, at 30, n. 11. While this is true, it neglects to mention that Ms Hillman did not seek a second term because of the ‘objection from a Member country to her reappointment’. See *supra* n. 57.

⁵⁹ Gregory Shaffer, *Will the US Undermine the World Trade Organization?* (May 2016), https://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html (accessed 1 Dec. 2017); Arman Sarvarian & Filippo Fontanelli, *The USA and Re-Appointment at the WTO: A ‘Legitimacy Crisis’?*, EJIL Talk (27 May 2016), <https://www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/> (accessed 1 Dec. 2017). Also see Appellate Body, *Annual Report for 2016*, WT/AB/27, 6 (16 May 2017), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/AB/27.pdf> (accessed 16 Dec. 2017), in which Thomas R. Graham Chair, Appellate Body states: ‘Mr Chang was eligible for reappointment by the DSB to a second four-year term and had expressed his willingness to serve a second term. On 11 May 2016, the Chairman of the DSB was informed that a delegation did not support Mr Chang’s reappointment. Shortly thereafter, this delegation publicized its reasons for its opposition to Mr Chang’s reappointment. Subsequently, Appellate Body members other than Mr Chang, in a letter signed by the Appellate Body Chair,

The fourth warning to the Appellate Body has been the US decision to delay nominations to replace retiring Appellate Body members, reducing the roster to four out of a possible seven members as of December 2017.⁶⁰

Constructive ambiguity can play an important role in treaty negotiations, by allowing parties to agree on an ambiguous term when agreement on a more concrete expression is not possible. However, more ambiguous treaty terms mean more discretion for treaty interpreters, since they open the door to the use of relevant rules of international law and supplementary means of treaty interpretation that would not be available to interpret clearer treaty terms. One of the reasons for multilateral negotiation deadlock is that WTO Members now seek clearer treaty terms in order to avoid empowering the Appellate Body with ambiguous provisions. In this regard, judicial activism on the part of the Appellate Body is contributing to negotiation gridlock, in turn increasing the relative power of the Appellate Body vis-à-vis treaty negotiators. The actions of the United States should be understood in this context.

With the current stalemate in WTO negotiations, it appears futile to pursue law reforms to address judicial activism or its consequences.⁶¹ What is needed is a champion to break the logjam. The actions of the United States should be viewed in that context. In the absence of a multilateral solution, a unilateral effort to constrain judicial activism may prove beneficial. While it may not lead to an immediate agreement on law reform, or constrain judicial activism to the degree that is required, the resulting pressures on the system may provoke other responses. When the 'Quad' was the leader in multilateral trade negotiations, they managed to achieve agreements. The European Union, Japan, and the United States made a joint statement at the Buenos Aires Ministerial Conference in December 2017. Could this be the beginning of a beautiful friendship?

expressed concerns about the public statement of reasons given for opposition to Mr Chang's reappointment.'

⁶⁰ The US view is that the Members cannot agree on procedure. See Lester, *supra* n. 3., https://www.wto.org/english/tratop_e/dispu_e/ab_an_rep_e.htm. Also see The Economist, *The WTO Is Under Threat from the Trump Administration* (7 Dec. 2017), <https://www.economist.com/news/leaders/21732108-america-increasingly-resorting-bilateral-trade-measures-wto-under-threat> (accessed 10 Dec. 2017). Also see Rosalind Mathieson, *U.S. Block of WTO Appeals Body Compromises System, Director Says*, Bloomberg (8 Nov. 2017), <https://www.bloomberg.com/news/articles/2017-11-08/u-s-block-of-wto-appeals-body-compromises-system-azevedo-says> (accessed 10 Dec. 2017), and Intellectual Property Watch, *No Progress on WTO Appellate Body Appointments as Ranks Thinning*, <https://www.ip-watch.org/2017/10/25/no-progress-wto-appeal-body-appointments-ranks-thinning/> (accessed 10 Dec. 2017).

⁶¹ There does not seem to be much disagreement on the need for institutional reform. See e.g. Petros C. Mavroidis, *The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body*, RSCAS 2016/31, Robert Schuman Centre for Advanced Studies, Global Governance Programme-220 (2016), at 12 (arguing that targeting individual Appellate Body members will not solve the problem, which requires that 'a serious, institutional debate about the workings of the AB takes place within the WTO').

5 HINDSIGHT IS CHAPTER 20

The actions of the United States regarding the WTO dispute settlement system also need to be considered in the context of its actions regarding the NAFTA dispute settlement system.

In the sugar dispute with Mexico, the United States blocked panel selection under NAFTA Chapter 20 in the early 2000s, effectively ending the viability of this dispute settlement venue. No NAFTA Chapter 20 panel has been established since then. In the NAFTA renegotiation, the USTR proposed changing Chapter 20 to an advisory function, rather than binding dispute settlement.⁶² NAFTA Chapter 20 now appears to have been a warning of the shape of things to come.

NAFTA Chapter 19 is also a target in the NAFTA renegotiation. The United States wants to eliminate this dispute settlement mechanism, having been the target of forty-three of the seventy-one matters brought before Chapter 19 panels.⁶³ Chapter 19 is unique to NAFTA. It originated in the Canada-United States FTA as a substitute for substantive rules on trade remedy laws, and later expanded to include Mexico. There were three reasons for its creation, to replace judicial review by the US judiciary with binational panel review: (1) with no appeals and time limits, it would provide speedier resolution of trade remedy disputes; (2) the panellists would have greater expertise than judges in a highly technical area of law, resulting in less deference to government investigating agencies; and (3) binational panels would have less bias against foreign companies than domestic courts. Initially, there was resistance on the part of the US judiciary to having foreign lawyers interpreting and applying US law, particularly with the expansion of Chapter 19 to include Mexico under NAFTA.⁶⁴ No other US free trade agreement has incorporated a system like Chapter 19.

⁶² Simon Lester, *USTR's NAFTA Chapter 20 Proposals* (21 Sept. 2017), <http://worldtradelaw.typepad.com/ielpblog/2017/09/nafta-chapter-20-proposals.html> (accessed 1 Dec. 2017); Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' Is Cooking*, 9 J. Int'l Econ. L. 1 (2006).

⁶³ USTR, *Summary of Objectives for the NAFTA Renegotiation* (17 July 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf> (accessed 1 Dec. 2017); Riyaz Dattu, Taylor Schappert & Gajan Sathananthan, *The Trump Administration Takes Aim at Chapter 19 of NAFTA* (6 Apr. 2017), <https://www.osler.com/en/resources/cross-border/2017/international-trade-brief-trump-administration-ta> (accessed 17 Nov. 2017).

⁶⁴ See Extraordinary Challenge Committee, United States-Canada Free Trade Agreement, *Certain Softwood Lumber Products from Canada*, USA-CDA-1994-1904-01ECC, 3 Aug. 1994, Dissenting Opinion of Malcolm Wilkey, 90, and critique of Mexican participation in NAFTA Chs 19, 69-70, <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports> (accessed 1 Oct. 2017).

6 CONCLUSION

The confluence of US actions blocking nominations to the Appellate Body, blocking the formation of a NAFTA Chapter 20 panel in the sugar dispute with Mexico, and seeking to eliminate or weaken dispute settlement in the NAFTA renegotiation, add up to a troubling trend in the US approach to international trade dispute settlement systems. While there are legitimate reasons to constrain judicial activism in the Appellate Body, the actions of the Obama and Trump administrations appear to go beyond that end game. More research is needed to consider the underlying causes of US antipathy to international trade dispute settlement systems and to consider possible reform alternatives.

It is clear that the WTO needs reforms in its decision-making processes. Negotiation failure has led to judicial activism, which has contributed, in turn, to further difficulty in achieving a successful outcome in multilateral negotiations. Something is needed to break this negative feedback loop, and that something may be the crisis in which the WTO now finds itself. Two issues are of particular importance to consider: the manner in which current rules permit the politicization of Appellate Body appointments and the short times frames in which the Appellate Body must take decisions in the context of increasingly complex trade disputes.⁶⁵ However, even within the constraints of the current system, it is possible for the Appellate Body to step back from the precipice of judicial activism, at least with respect to some issues.

The world has changed in significant ways since the creation of the WTO. The negotiation dynamic that once worked in the WTO, with the 'Quad' taking decisions and other States deciding whether to accept, has given way to a multipolar world of geopolitics that has yet to find the right solution to decision-making gridlock.⁶⁶ The initial success of the judicialization of dispute settlement, which replaced the quasi-diplomatic system of the GATT, is now under threat. We can only hope that the added pressure of the current crisis will create the necessary movement to break free of the deadlocks and reform the system in a way that works for the geopolitical realities of the twenty-first century.

⁶⁵ See Farewell remarks of Jennifer Hillman to the Dispute Settlement Body of the WTO, *supra* n. 58.

⁶⁶ Alejandro Jara, *El Medio Ambiente y la OMC*, 2 *Rev. Der. Econ. Int'l* 5 (2012); Kristen Hopewell, *Different Paths to Power: The Rise of Brazil, India and China at the World Trade Organization*, 22 *Rev. Int'l Pol. Econ.* 311 (2015).