Why Congress Should Not Be Deterred by the 2015 WTO Appellate Body Ruling Against MCOOL

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A. In Each of the Three Most Recent Administrations, the United States Has Taken Substantive Steps to Reform the WTO

The United States continues pursuing reforms of the World Trade Organization (WTO) – particularly the Appellate Body of the WTO's dispute settlement system – that is responsible for reviewing appeals. The Obama administration initially blocked an appointment to the Appellate Body; the Trump administration then refused to agree to appoint any members to the Appellate Body; and under the Biden administration, there still is no Appellate Body in operation to hear appeals, rendering the WTO's appeals mechanism unable to function.[1]

B. The Operation of the WTO Dispute Settlement System's Appellate Body Violates WTO Rules and Basic Principles of the United States Government

In its 2020 *Report on the Appellate Body of the World Trade Organization* (Report), the Office of the United States Trade Representative (USTR) expresses the United States concern that the Appellate Body has not functioned according to the rules agreed to by the United States and other WTO Members.[2]

The Report states the Appellate Body has failed to comply with WTO rules, burdening the U.S. with additional obligations and diminishing U.S. rights.

Specifically, it states the Appellate Body:

- Addresses issues it has no authority to address.
- Takes actions it has no authority to take.
- Interprets WTO agreements in ways not envisioned by WTO Members.
- Overreaches in contradiction to the Appellate Body's limited mandate.

[1] *See* Ending the WTO Dispute Settlement Crisis: Where to from here? Simon Lester, International Institute for Sustainable Development, March 2, 2022, available at https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis#:~:text=By%20Simon%20Lester%20on%20March%202%2C%202022%20World,%E2%80%9Cinto%20the%20void%E2%80%9D%20and%20leaving%20the%20dispute%20unresolved.

[2] *See* Report on the Appellate Body of the World Trade Organization, Ambassador Robert Lighthizer, Office of the United States Trade Representative, February 2020, available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

The Report further states the Appellate Body's overreach violates basic principles of the United States Government as there "is no legitimacy under our democratic, constitutional system for the nation to submit to a rule imposed by three individuals sitting in Geneva, with neither agreement by the United States nor approval by the United States Congress."[3]

The limited role of the Appellate Body is to review a dispute settlement panel's legal finding and to 'uphold, modify, or reverse the legal findings and conclusions of the panel.'[4]

However, despite its mandate, the Report states "the Appellate Body has ignored these constraints and has exceeded its limited role, thereby transferring authority over important issues of international trade from WTO Members to themselves."[5]

C. The United States Trade Representative Has Determined that the WTO's Handling of the U.S. COOL Dispute Exemplifies Instances of Appellate Body Malfeasance

In support of its contention that the Appellate Body routinely violates Article 17.5 of the Dispute Settlement Understanding (DSU), which requires the completion of appeals in 90 days, the United States cited three separate Dispute Settlement Body meeting minutes involving the U.S. – COOL dispute, one in relation to the appeal in the U.S. – Country of Origin Labeling (COOL) dispute and two involving the adoption of reports in the U.S. – COOL dispute as evidence that the United States wasn't even consulted by the Appellate Body following the submission of complaints for the Appellate Body's failure to complete appeals by the 90-day deadline.[6]

In support of its contention that the Appellate Body's approach to the non-discrimination obligation under the TBT Agreement and the GATT 1994 prevents some legitimate policy objectives from qualifying as a defense against a breach, the USTR cited country of origin labeling (COOL) as an example of such a legitimate policy objective that does not qualify under the Appellate Body's approach, even though COOL is recognized as a legitimate objective under Article IX of the GATT 1994.[7]

In support of its contention that the Appellate Body's 'Detrimental Impact' standard does not reflect the concept of discrimination as agreed upon by WTO Members, the USTR cited the U.S. – COOL dispute in its discussion of how the Appellate Body incorrectly says that a measure has a detrimental impact on imports even where the measure makes no distinctions in law or in fact based on the nationality of the imported product.[8]

In support of its contention that the Appellate Body has "invented" an improper legal standard that makes it extremely difficult to justify legitimate and important public policy measures, the USTR states:

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[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *See id.*, at 39, fn. 38.
[7] *See id.*, at 92.
[8] *See ibid*.

> The very high level of scrutiny that has been applied under this legal standard ["invented" by the Appellate Body] goes far beyond an inquiry into whether a measure discriminates based on origin. For instance, in the COOL dispute, the Appellate Body added an additional step to the Panel's analysis and ultimately concluded that the U.S. measure was inconsistent with Article 2.1 of the TBT Agreement because the amount of information the labels conveyed was out of proportion to the administrative requirements imposed on upstream producers.
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> This issue was far attenuated from a national treatment analysis under Article 2.1 of the TBT Agreement. Whether or not the COOL measure's administrative requirements were commensurate with the level of information ultimately provided to consumers is irrelevant to the question the Appellate Body had been called to examine – whether the measure reflected discrimination. Rather, the Appellate Body's approach to Article 2.1 of the TBT Agreement asked adjudicators to review the calibration of a measure to risk, cost, and benefit, even if in the end the difference in treatment was not related to origin.[9]

In support of its contention that the Appellate Body has failed to follow WTO rules and has erroneously interpreted WTO agreements, the USTR cited the 2012 and 2015 rulings in the U.S. – COOL dispute as evidence the Appellate Body improperly interpreted the TBT Agreement and violated Article 17.5 of the DSU by disregarding the mandatory 90-day deadline for issuing a report.[10]

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[9] *Id*., at 94-95.
[10] *See id*., at B-12, B-13.