

**WTO REFORM: MAKING GLOBAL RULES
WORK FOR GLOBAL CHALLENGES**

HEARING

BEFORE THE

**COMMITTEE ON FINANCE
UNITED STATES SENATE**

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

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JULY 29, 2020
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WTO REFORM: MAKING GLOBAL RULES WORK FOR GLOBAL CHALLENGES

WEDNESDAY, JULY 29, 2020

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 10:17 a.m., in Room SD-215, Dirksen Senate Office Building, Hon. Chuck Grassley (chairman of the committee) presiding.

Present: Senators Crapo, Thune, Portman, Toomey, Cassidy, Lankford, Wyden, Carper, Brown, Whitehouse, Casey, Warner, Whitehouse, Hassan, and Cortez Masto.

Also present: Republican staff: Nasim Fussell, Chief International Trade Counsel; Mayur Patel, International Trade Counsel; and Jeffrey Wrase, Deputy Staff Director and Chief Economist. Democratic staff: Joshua Sheinkman, Staff Director; and Jayme White, Chief Advisor for International Competitiveness and Innovation.

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM IOWA, CHAIRMAN, COMMITTEE ON FINANCE

The CHAIRMAN. The committee will come to order. I want to welcome our witnesses. Today, we are fortunate to have some very smart people who can provide insights on making an important institution—the World Trade Organization—work again.

When the WTO works right, Americans benefit, plain and simple. For example, Americans are leaders in innovation and creativity. WTO rules allow us to reap the rewards of that leadership. When India refused to provide patent protection for American pharmaceutical and agricultural chemical products, we took India to the WTO—and we won.

You often hear about how important the quote/unquote “global box office” is for Hollywood. It has become lucrative because the WTO requires our trade partners to provide copyright protection and market access for our American films. Likewise, the WTO is very important for our farmers, who are the most efficient and productive in the world. If you watch my Cornwatch feed on Instagram, you will know that, thanks to technology, corn grown today is shoulder-high by July 4th, rather than knee-high like when I was a kid. And if you are not watching Cornwatch, you ought to.

Unable to compete, though, some countries try to ban our farm products by falsely claiming that they are dangerous. I just spoke about this on the floor in my 1-minute speech after opening the Senate. So in the WTO, for the first time we had global rules that

took on this form of protectionism by requiring food safety measures to be based on science.

The WTO also ensures that our industrial companies have access to key resources. When China tried to use its control of rare earth metals and other minerals to pressure its neighbors, the WTO is where we joined with the European Union and Japan to take on China's bullying. Facing WTO retaliation, China lifted its export restraints.

The WTO has also helped our broader foreign policy goals. Opening economies means more open societies. One story that needs more attention is how trade has led to more opportunities for women. I am glad that WTO members recognized at the last WTO ministerial to issue a document that was entitled "Declaration on Trade and Women's Economic Empowerment." The WTO needs to stay on top of that important issue.

These are important successes. But we cannot live in the past. From 1947 to 1994, we had eight rounds of multilateral trade negotiations. That is a major global trade deal every 6 years. The WTO is now 25 years old, but we have yet to see any major outcomes liberalizing trade. The President has said that we need dramatic change in the WTO. He emphasized to me that other countries' tariffs and barriers are too high. The President is right. No one expected the Uruguay Round to be the last global trading round, like it has turned out to be.

Over the last 2 decades, countries like China and India got a lot richer, but they have refused to take on any more responsibilities. In fact, they both claim that they are entitled to special treatment in any future negotiations because they are developing countries. It does not even embarrass China to say that. So the notion that China and India should get the same consideration as a country like Cameroon is of course ridiculous. So I applaud the President for taking on this imbalance and pushing to make the WTO relevant.

Today I want to have a thoughtful discussion about getting the WTO back on track. To me, that means a couple of things.

First, the WTO needs to be an effective forum for negotiating agreements once again. That means not only concluding the fisheries negotiations, but also new agreements, including an ambitious agreement on commerce. When Congress ratified the WTO agreements, there was nothing like what we call the digital economy. Today it accounts for nearly \$2 trillion of the U.S. economy. Again, this is an area of U.S. leadership where we need rules to make sure we get a fair shake from our trading partners.

Second, we have to fix dispute settlement. I absolutely believe that we need enforceable rules. It is much better to solve our trade disputes over legal briefs than through tariffs. However, WTO dispute settlement has been breaking down for a long period of time. Fifteen years ago, I warned at a hearing like this that the WTO Appellate Body was not enforcing rules; it was legislating new ones. I do not like that history has proven me right after 15 years.

The WTO's Appellate Body ignored clearly written rules, like finishing cases in 90 days. Cases that should have taken months dragged on for years, of course frustrating our ability to get timely relief. At the same time, the Appellate Body started writing new

rules that impinged on U.S. sovereignty, and maybe on other countries' sovereignty. For example, the Appellate Body has made it harder to use labeling to keep our consumers informed about the country of origin of their meat, or whether their tuna was harvested without hurting dolphins. Of particular concern, the Appellate Body has also made it much harder to use trade remedy measures at a time when we need them more than ever to confront China's state capitalism.

I appreciate that what I am seeking is not going to be easy to get done, particularly when you have to get agreement among 164 countries when you want a freer and fairer trading system. But I do not appreciate embracing protectionism as the alternative, because it can be extremely harmful in the long run.

From 1929 to 1933, governments around the world raised barriers to trade—including our own with the disastrous Smoot-Hawley tariffs. Two-thirds of the world trade was wiped out, and the Great Depression became much worse. World War II followed.

We cannot repeat those mistakes. We are going to continue to do what we have to and what we have been doing since winning World War II, and that is simply, the United States will lead. U.S. leadership will require Congress to step up and fulfill our constitutional role in setting trade policy. Just as Congress set the objectives for negotiating the WTO agreements and approving those agreements, we are working now to secure an ambitious reform agenda that will make this institution fit for global challenges.

That is why I am glad members are considering and debating solutions, and there may be more than one, but I want to point out what Senators Portman and Cardin are doing. They have introduced a resolution that has concrete proposals to reform the WTO. It has never been more important than it is today to ensure the World Trade Organization is equipped to take on the global challenges we face today.

[The prepared statement of Chairman Grassley appears in the appendix.]

The CHAIRMAN. Now, Senator Wyden, please.

**OPENING STATEMENT OF HON. RON WYDEN,
A U.S. SENATOR FROM OREGON**

Senator WYDEN. Thank you very much, Mr. Chairman. And we just looked up Cornwatch, and I was struck by the fact that, not only are you out there standing in the field, but a lot of that corn is taller than NBA players. I wanted you to know that we were paying attention to your counsel with respect to Cornwatch.

Mr. Chairman, I am glad you are holding this hearing. I think it would be fair to say, if you walked into small towns in virtually all of the States that we are proud to represent, and you went to the local coffee shop, I do not think most people would be following the World Trade Organization discussion with any kind of specificity.

The fact is, however, that the World Trade Organization, though little-known in those small towns, plays an enormous role in our ability to secure the kind of high-skill, high-wage jobs that we want for American workers, and it dramatically affects costs of goods and services. So this is an important issue, and it really comes

down to the basic proposition of how you get a better deal for American workers and for American businesses.

Now as we get into this discussion, there really are two different approaches. On the one hand, you have the Donald Trump approach, which is to pull back from the World Trade Organization, forfeit American economic power and stature to the Chinese Government, and cover up this set of weaknesses with a whole bunch of rhetoric about America-first and you do that at home, and it is just empty, and it is to deflect from the consequences of the damage done from walking away.

In my view, this is the same losing playbook the Trump administration ran with respect to a proactive trade agenda in Asia and the Pacific; the same thing they did with walking away from the Paris Climate Agreement and the World Health Organization.

It obviously will not do much of anything to protect American workers against trade cheats if Donald Trump hands the Chinese Government the levers of trade power. In fact, it would be a big win for the trade cheats who rip off American jobs in communities across the country.

Fortunately, there now is a smarter approach to World Trade Organization reform based on addressing the areas where the Chinese Government routinely games the trade system at our expense. The rules that underpin the World Trade Organization were crafted more than 2 decades ago. And that was a period when China was essentially an economic middleweight. At that time, many hoped and predicted that joining the World Trade Organization would drive China further away from an abusive one-party control of government, economics, and society. That obviously is not happening.

Today, China is an economic heavyweight. Much of its growth has come at our expense. That is because the Chinese Government has broken rule after rule after rule and violated the commitments it made 2 decades ago. It is also because 21st-century World Trade Organization rules have totally failed to keep up with 21st-century technology. And the fact is—and we said it in the Finance Committee room some time ago—the fact is the Internet is now the shipping lane of the 21st century.

As a result, there is now a long list of trade ripoffs that have wiped out millions of American jobs: subsidized state-owned enterprises; intellectual property theft; forced tech transfers; the Great Internet Firewall; and government-led shakedowns of foreign investors. China uses those schemes and entities to strong-arm American businesses, steal our innovations, and rip off our workers.

Under President Xi, the government tightened its grip on power. The Chinese Government identifies weaknesses in the way WTO operates, and other multilateral forums, and then it seizes on them to promote their self-interest.

Fixing the WTO is also going to require addressing its Appellate Body, which hampers the application of U.S. trade enforcement laws to the detriment of our workers. There is a broad bipartisan interest in the WTO dispute settlement process, and that it needs to be fixed to clamp down on judicial overreach. And I think that is an important area to explore.

Just a couple of other quick points, and I will wrap up.

First, a long-running battle against unfair fishing subsidies has the potential to bear fruit. Going back years ago, my Pacific Northwest colleague and a member of the committee, Senator Crapo, and I held a hearing on this issue. That hearing was literally a decade ago. Senator Portman was involved in getting those talks off the ground, going back to the days when he served as the USTR.

The bottom line is that an agreement that curbs fishing subsidies is going to protect jobs, fisheries, and promote sustainable oceans. Accomplishing those priorities is vital. Our oceans are key to making sure we stabilize the climate and are feeding people around the world. And obviously our oceans—and my State essentially borders the Pacific Ocean—those oceans provide trillions of dollars in economic activity, if nations around the world can protect them.

Second, WTO discussions around digital trade disciplines are at an early stage, but they are also vital to economic development and empowerment here and abroad. The United States needs to work with our allies to set the rules of the road and set the standard for the free flow of information and ideas.

I believe, Mr. Chairman, you are sitting in the Finance Committee room. Nobody would have thought 2 decades ago about the role of the digital economy in promoting high-skill, high-wage jobs. And the fact is, a digital economy drives everything. It drives agriculture. It drives health care. It drives one industry after another. And setting the standards for the free flow of information and ideas can be one essential part of the World Trade Organization going forward.

There is no chance at all that the United States can get better outcomes—better outcomes on the issues that you talked about, Mr. Chairman, and the issues I have talked about—by handing our power to the Chinese Government and just walking away from the World Trade Organization. That is why Democrats and Republicans need to continue to try to find bipartisan common ground on these issues as an alternative to just pulling back from the World Trade Organization. We are in a position to lead on that debate.

This is an important hearing today. Thank you, Mr. Chairman.
The CHAIRMAN. Thank you, Senator Wyden.

[The prepared statement of Senator Wyden appears in the appendix.]

The CHAIRMAN. I appreciate that very much.

So, on to the introduction of our guests, and I will ask you to testify in the way I am introducing you. Since we have some people virtually, I am not sure where to look.

So let us start with Ms. Jennifer Hillman, who serves as senior fellow for trade and international political economy, Council on Foreign Relations. Ms. Hillman has had a distinguished career in law and politics and knows a lot about the WTO, having served as a member of the WTO Appellate Body. Also, as Commissioner at the International Trade Commission. Also, at the U.S. Trade Representative as their Chief Negotiator and General Counsel. And also, at one time a legislative director here in the U.S. Senate. She also practices teaching of law—I should not say “practices”—at the Georgetown University Law Center.

Thomas Graham has been chair of the WTO’s Appellate Body; also, a partner at the law firm of Cassidy Levy Kent. He was one

of the first lawyers to represent the U.S. respondents in global trade remedy cases. And at King and Spalding, he chaired the international trade practice. He served as Deputy General Counsel at USTR. He has taught also at Georgetown University.

Ms. Laura Lane is chief corporate affairs and communication officer at UPS. Ms. Lane had a notable career in public service, again another person at USTR, negotiating market access commitments on trade and services with China as part of its accession to the WTO, and was U.S. negotiator for World Trade Organization financial services negotiations. She has also served many years in the U.S. Foreign Service.

Dr. Glauber serves as senior research fellow, International Food Policy Research Institute. Dr. Glauber is an expert on crop insurance, disaster policy, and U.S. farm policy. He spent over 30 years at the USDA, including as Chief Economist. During that time, Dr. Glauber was Special Agricultural Envoy for USTR, where he served as Chief Agriculture Negotiator at those talks. Additionally, he served as an economic advisor on export and domestic subsidy reduction commitments as part of the Uruguay Round.

Finally, we welcome Michele Kuruc, vice president of ocean policy at the World Wildlife Fund. Ms. Kuruc worked with the United Nations Food and Agricultural Organization, there specializing in enforcement technology and operations; also, advising on dealing with illegal fishing globally. She has also served as a lawyer at the National Oceanic and Atmospheric Administration.

We look forward to hearing from all of you today. So we start, then, with Ms. Hillman.

STATEMENT OF JENNIFER A. HILLMAN, SENIOR FELLOW FOR TRADE AND INTERNATIONAL POLITICAL ECONOMY, COUNCIL ON FOREIGN RELATIONS; AND PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Ms. HILLMAN. Thank you. I want to commend you, Mr. Chairman, Ranking Member Wyden, and this committee for focusing this hearing on the World Trade Organization, because now is the time when we need the WTO more than ever, with international trade itself and a number of trade-related issues. Whether it is trade-related aspects of global health or climate change or labor, these issues cannot be addressed with a go-it-alone approach. They require multilateral rules and a multilateral system to enforce those rules.

Unfortunately, the WTO is in deep trouble, unable to reach new agreements on critical issues such as fisheries, subsidies, or e-commerce and—due to the decision of the United States to block appointments to its Appellate Body—without a binding dispute settlement system to enforce its rules.

While reforms need to happen across all aspects of the WTO, as I have discussed in my written testimony, I want to focus my brief remarks this morning on the dispute settlement system. Ever since May 2017, when the United States began blocking the appointment of new members to the Appellate Body, our trading partners have been asking the question, is the U.S. goal to reform the Appellate Body or is it to destroy it? With the testimony to the Ways and Means Committee last month, Ambassador Lighthizer gave the an-

swer. For the Trump administration, the goal is to kill the Appellate Body. Ambassador Lighthizer stated, and I quote, “I don’t feel any compulsion to have the Appellate Body ever come back into effect,” end quote.

For my part, I do not believe that decision is in the United States’ interest or that it is consistent with the clear expressions of support for a reformed Appellate Body from members of Congress. U.S. concerns with the Appellate Body have been raised for many years but often ignored in Geneva. As such, the U.S. action to block all appointments got everyone’s attention and resulted in an entire process, both in Geneva and elsewhere, to develop reforms—while giving the United States significant leverage to shape a revised WTO.

But just when the rest of the world was prepared to move, the United States effectively shut itself off from the reform process. American refusal to suggest any way to fix the system, or even what fixes recommended by others would be acceptable, makes it less likely that the U.S. proposals in other areas will receive the attention that they deserve, given the lack of trust in American leadership at the WTO. This includes the U.S. plan to create specific criteria for what it takes to be considered a “developing country,” as well as its well-supported proposal to put teeth into the reporting requirements for notifications and subsidies.

In addition, American failure to engage in the debate on reform of the Appellate Body cedes American leadership to others. Already, the rest of the world is moving ahead without the United States in the area of dispute settlement. Twenty-two countries, led by the European Union and joined by China, Canada, Mexico, and others, have agreed to an arbitration process for conducting appeals. It is quite likely that from this Multi-Party Interim Appeal Arbitration Arrangement, or MPIA, will emerge new approaches to handling appeals, and the United States will not have been a part of that process and will have no ability to shape its direction.

A loss of perceived leadership could also be damaging to U.S. efforts to reach a new agreement on everything from e-commerce to new disciplines on fisheries subsidies, and perhaps most importantly, to address the disruption caused by China’s increasingly Communist Party-dominated nonmarket economy.

Fixing the Appellate Body is achievable. And in my written testimony, I have suggested a number of specific ways to do so. It is in the United States’ interest to lead that process, because a strong mechanism for enforcing the rules makes it much more likely that countries will agree to new commitments, including commitments to reform other aspects of the WTO if they believe there is a system that will hold all countries to those commitments.

It will also be important because other countries will take their existing obligations more seriously if there is a serious mechanism for enforcing them. Fixing the Appellate Body will also give the United States, and like-minded members of the WTO, more leverage over China, given the need for a multilateral approach if we are to have success in achieving structural and systemic changes in China. And it may well help improve the prospects for addressing the growing rift with the European Union over digital trade-

related issues such as data privacy, digital services taxes, and anti-trust disciplines on large high-tech companies.

I urge this committee to keep working for a reformed WTO that can take on the 21st-century trade problems we are all facing. Thank you.

[The prepared statement of Ms. Hillman appears in the appendix.]

The CHAIRMAN. Thank you very much. And now we go to Mr. Graham.

**STATEMENT OF THOMAS R. GRAHAM, PARTNER,
CASSIDY LEVY KENT, WASHINGTON, DC**

Mr. GRAHAM. Thank you, Chairman Grassley, Ranking Member Wyden, members of the committee. Thank you for this opportunity to testify on WTO reform, which I believe has to be done and has to be done well if the WTO is to continue being relevant for international trade.

I will ad lib for a moment in response to what Jennifer said. I agree certainly that there must be reform, and that the United States must be a leader in that reform. However, I believe that for 15 years, increasingly the USTR and the United States have been telling the rest of the world and WTO members what they thought was wrong with WTO dispute settlement, including in a 110-page paper last January that summarized the statements over the years.

And still, during my tenure and my observation on the Appellate Body, the European Union and others continued simply to say, "Tell us what you want. Tell us what you want." In my view, that was a failure to recognize the depth of the U.S. critique of the Appellate Body—which we can talk more about—of dispute settlement in particular, and to be saying in effect, "Come on, put a few chips on the table so that we can get going on negotiations."

So that is where I differ as to the blame that might be placed on the United States. I also differ on this: my interpretation of the U.S. position in the last 3 to 4 years has been that they prefer Appellate Body reform, but deep and serious reform, and they are willing to bring the Appellate Body to a halt unless the reform is engaged with. And I place a considerable amount of blame on the European Union in particular, and others, for not recognizing the sincerity and depth of the U.S. critique—which has been consistent over three administrations, Republican and Democratic, for the last 15 to 20 years—and for not acknowledging or indicating its willingness to come to grips with it, and instead preferring, seemingly, easy or low-hanging fruit over procedural matters.

And with that, I will wind up my ad lib in response and carry on with a few prepared remarks. In a nutshell, my views are that the WTO Appellate Body has strayed from the rules that U.S. negotiators helped to write, and that the Congress reviewed and approved, some 25 years ago. For 20 years spanning three administrations—Republican and Democratic administrations—the United States has consistently called out the Appellate Body for exceeding its role and has sought corrections.

Many WTO members, including the European Union, have been slow to acknowledge the depth and bipartisanship of the U.S. critique, or to engage with it. Reforms of WTO dispute settlement and

reforms in updating the WTO rules should be done together. There should be no rush to restart the Appellate Body, and certainly not to do so as a “price” for the U.S. having blocked appointments in recent years. That would be to give away our leverage and to acknowledge or indicate fault when fault also lies with those who have not indicated a willingness to engage with the depth of the U.S. critique.

Dispute settlement also affects the rest of the WTO in the sense that if the Appellate Body or the dispute settlement system overreaches, it discourages, or provides a disincentive for countries to negotiate, because some believe they can get through litigation what they could not get through negotiations. And it also forces the negotiating governments to believe that they have to cross every “t” and dot every “i” or their words are at risk of being distorted by the Appellate Body and the dispute settlement system.

Over the years, as was indicated both by Chairman Grassley and Ranking Member Wyden, a large part of the U.S. critique has focused on Appellate Body decisions that weakened U.S. trade remedy laws, laws that address dumped or subsidized imports, or sudden increases of imports that injure U.S. manufacturers.

A lot of these cases have involved imports from China, whether the Chinese prices are market prices, whether state-owned enterprises or other Chinese companies with significant government involvement are conduits for Chinese government subsidies. China is the elephant in the room for WTO reform. It is a difficult fit in a WTO system of rules that was based on market competition. I do not readily see how the dispute settlement system can be reformed and the Appellate Body restarted until a core of WTO members comes to grips with how China fits within the system. And that is a question larger than the Appellate Body and dispute settlement.

So I would encourage the United States to take a long view. Above all, I encourage U.S. negotiators—and this committee in its oversight—to resist requests for quick, first-stage agreements that would restart the Appellate Body before there has been a serious engagement on reform of the institution as a whole. I think that would be counterproductive for the goal of significant reform and updating, both by papering over differences, making it likely that the same problems would recur, and by giving away a big chunk of U.S. leverage.

I do not agree with the arguments that the rest of the world is moving on without the United States and we will lose out. There is not going to be a WTO without the United States. They need us. And we have made our point now. It appears that others are more open to basic reform, and I think that we should proceed with all due speed, but together with reform of dispute settlement and reform of the institution and the rules, particularly with regard to China.

I look forward to your questions.

[The prepared statement of Mr. Graham appears in the appendix.]

The CHAIRMAN. Okay; Ms. Lane?

**STATEMENT OF LAURA J. LANE, CHIEF CORPORATE AFFAIRS
AND COMMUNICATIONS OFFICER, UPS, WASHINGTON, DC**

Ms. LANE. Chairman Grassley, Ranking Member Wyden, and members of the committee, thank you for having me here today. My name is Laura Lane, and I am the chief corporate affairs and communications officer for UPS, a global leader in logistics. And I am truly honored to testify on the need for WTO reform.

The subject of today's hearing is of great importance to UPS. We are proudly headquartered in Atlanta, GA. We serve more than 220 countries and territories in the world. We employ almost half a million people, and every day UPS moves 6 percent of U.S. GDP and 3 percent of global GDP.

To begin, let me tell you why the WTO is so important for the American business community. The people we employ depend on the 99 percent of the global trade that takes place in countries that are WTO members. With 96 percent of the world's consumers outside the U.S., American exporters and UPS customers have benefited from a single set of rules as they have entered new markets. That predictability and certainty becomes even more important during a crisis.

As an essential service provider, we at UPS saw how important it was for countries to be able to quickly adapt best practices, from e-signatures on Customs documents to expedited border crossings for our heroic cargo pilots. Time is critical in our business, and never more so than during a pandemic, where the ability to move across borders quickly saved time. And more importantly, it saved lives.

Chairman Grassley, I could not agree with you more that we need the U.S. to lead in reforming the WTO. Because the fact of the matter is, the world has changed since 1995. We need the e-commerce negotiations done and, most importantly, we need trade rules to become more just, inclusive, and fair. On the justice point, Jennifer Hillman is the expert. I would only add that we need disputes resolved more quickly. No one wants to wait for needed critical PPE to be delivered, and so too businesses do not want to wait for justice in the WTO.

And the WTO needs to be a little more like UPS and deliver more in a timely manner. In the 25 years since the creation of the WTO, the members have only concluded one new agreement—the Plurilateral Trade Facilitation Agreement. Now that was a really important agreement for UPS because it eliminated inefficient border processes to the benefit of our customers.

But what about e-commerce? That has provided a lifeline to customers and businesses alike during this pandemic. The WTO needs to reach a deal to foster and not frustrate digitally enabled trade.

On the point of inclusion, the WTO has done some really great work addressing women in trade, and small businesses, but so much more needs to be done now, especially if we are going to help with economic recovery.

No one knows better than this committee working on the stimulus package—and on multiemployer pension reform—that women and small businesses have been the hardest hit by COVID-19. The fact of the matter is that small businesses, and particularly women, have just not benefited as much from trade as they should. Under

U.S. leadership, why not incorporate the language from the USMCA into the WTO to create real platforms to actively support small businesses, and to say that discrimination on the basis of gender or any community is just not allowed?

Finally, on the need for fairness, the coronavirus has made the intervention of governments in markets necessary, but the WTO needs to address the issues of industrial subsidies and market intervention by state-owned and state-sponsored enterprises. We need a modern definition of “developed” versus “developing” country status, as so many countries that were developing in the 1990s have clearly graduated to more developed country status. And how about the all-important issue of environment? That needs to be addressed in the WTO in a way that is fair for business and communities.

Finally, we need a Director General who can get negotiations going again and drive reforms that deliver justice, inclusion, and fairness. Tackling all these issues as we recover from COVID-19 will define the next generation of American trade and global development, which is why we need to invest in reform now.

As an essential service provider, UPS has a vital role in advocating for the needed reforms. And as united problem solvers, we are prepared to deliver policy solutions to accomplish that goal. Thank you for your time today.

[The prepared statement of Ms. Lane appears in the appendix.]

The CHAIRMAN. Thank you. Dr. Glauber?

STATEMENT OF JOSEPH W. GLAUBER, Ph.D., SENIOR RESEARCH FELLOW, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, WASHINGTON, DC

Dr. GLAUBER. Chairman Grassley, Ranking Member Wyden, and distinguished members of the committee, thank you for the opportunity to testify before this committee on the current state of agricultural trade and the World Trade Organization. I have submitted a longer statement for the record, but this morning I would like to summarize a few of the points I make in my written statement.

First, U.S. agriculture has benefited greatly from the rules-based trading system established under the WTO. Many of you remember, like I do, the state of agricultural trade during the 1980s. Many markets were protected through high tariffs, limited quotas, or outright bans on imports. Variable levies were in place in many countries, which allowed countries to adjust tariff levels to protect domestic markets as world prices fell or rose. Domestic support to agriculture, particularly among the rich developed members, was large and growing. Producers in those countries made production decisions largely insulated from the world market. Governments propped up domestic prices by storing production in large public stockpiles and dumping surplus on export markets using export subsidies.

The Uruguay Round agreement on agriculture brought substantial discipline to the areas of market access, domestic support, and export competition—and global agricultural trade has more than tripled in value and doubled in volume since 1995. U.S. ag exports have risen to record levels over the period, largely without the aid of export subsidies or concessional sales, a far cry from the 1980s

when, if you looked at a commodity like wheat, most of that went out under export subsidies or export credits or food aid, or a combination of those.

Exports account for a larger share of U.S. agricultural production in large part because most population and demand growth is occurring outside of this country. These trends are forecast to continue in the future, but it is essential that a functioning, rules-based trading system is in place. I would say trade is essential for improving global food security because, as trade levels have grown, so too has the importance of trade in meeting domestic food needs. As population and incomes grow, food demand will increase in areas where productivity gains are not enough to meet the domestic food needs.

Imports as a percent of consumption have been growing over the past 20 years and are expected to continue to grow in the future. That means a more open trading system will be necessary if we are to meet food security goals. The last 2 years have shown how disruptive trade wars can be. Unilateral trade actions, followed by counter-retaliations, have hurt exports and disrupted global supply chains that have been built over the last 20 years. The short-term costs have been large, with billions of dollars of lost producer revenue in the U.S. alone; but the long-run costs could be more costly if importers no longer trust you as a reliable trading partner. We have already seen increased soybean plantings in South America over the past 2 years, with record exports of soybeans coming out of Brazil this year.

Turning to the Appellate Body reform at the WTO, I think you have two excellent panelists here who can speak far more knowledgeably than I, but I would just say that the system itself has worked very well for U.S. agriculture.

Over the period 1995 to 2019, the U.S. took some 43 cases against WTO members involving agricultural products. Of those, 17 of those cases went to a panel. The others were resolved as part of the dispute settlement process and before they went to a panel. But of the 17 that went to panels, panelists agreed with 80 percent of the claims that we made. If you are looking at those cases involving the agreement on agriculture, it was more like 85 percent of the claims that the U.S. made against other members.

Ironically, in the midst of the trade war with China, the WTO ruled in our favor on two cases first brought to the WTO in late 2016, one on domestic support for grain producers in China, and the other on China's administration of its TRQ for rice, wheat, and corn. I believe this demonstrates the efficacy of the dispute settlement mechanism and its importance to the rules-based trading system.

Does the WTO need reform? Absolutely. It is now 25 years since its creation, and the world is a different place. Developing countries now account for a far greater share of world agricultural imports and exports. South-south trade alone accounts for almost one-quarter of total agricultural trade. And while significant progress has been made in eliminating export subsidies and promoting trade facilitation, market access and trade-distorting domestic support have seen little reform since the Uruguay Round.

We have issues with the Appellate Body process that were articulated just earlier, and whether in particular the Appellate Body is overreaching in its decisions. These are all important issues that need to be addressed, but it would be a huge mistake to walk away from a system of rules that has offered so much. The U.S. has been a leader in helping create the global trading system that we know today, and we cannot shirk that responsibility in the future. We need to work with other like-minded members in helping to reform the WTO to meet the needs of the 21st century.

Lastly, the challenges of meeting future food needs will require a concerted effort from governments to improve the functioning of food and agricultural markets. And the WTO can play an enormous role by reducing trade-distorting support, improving market access, ending distortions caused by export restrictions and subsidies, and perhaps most importantly, continuing to provide a forum to which members can bring and hopefully resolve trade disputes.

Thanks very much, and I look forward to the questions.

[The prepared statement of Dr. Glauber appears in the appendix.]

The CHAIRMAN. Now, Ms. Kuruc.

**STATEMENT OF MICHELE KURUC, VICE PRESIDENT,
OCEAN POLICY, WORLD WILDLIFE FUND, WASHINGTON, DC**

Ms. KURUC. Yes. Thank you very much, Senator Grassley, Senator Wyden, and other members of the committee. My name is Michele Kuruc, and I work for the World Wildlife Fund. Thank you for having me here this morning.

The details of what has transpired during 20 years of negotiations at the WTO on harmful fisheries subsidies is hardly a riveting story, but the inability to successfully conclude those negotiations and reach an agreement has been extremely frustrating. We have had to witness the concurrent decline in the health of the world's oceans, fueled in large part by harmful subsidies funding too many boats chasing too few fish. Our oceans are rife with illegal fishing, over-fishing, and over-capacity. And each of those has its own story of failure.

With illegal fishing, losses are valued at up to \$36.4 billion every year. With over-fishing, more than 80 percent of the world's fish stocks are already over-fished or at the maximum level for harvest. And with over-capacity, over 3 million fishing vessels are estimated to fish in marine waters, and there are just not enough fish for all of them. Each of those damaging activities is furthered by subsidies. And after 20 years, an agreement is overdue that puts an end to subsidies that perpetuate the attractive value proposition for these detrimental activities. And only the WTO can deliver that agreement.

On a global level, the subsidies to fisheries are estimated at \$35.4 billion annually. The top five subsidizing entities are China, the European Union, the United States, the Republic of Korea, and Japan. And while not all subsidies are considered harmful, about two-thirds are, with subsidies supplying fuel, gear, bait, tax breaks, and capacity enhancement for more and larger vessels contributing to declines in the entire sector's productivity and worsening the unsustainable downward spiral.

As an example, local fishers off the coast of Africa and in the South Pacific must compete with much larger, subsidized foreign vessels, many fishing illegally. Inappropriate subsidies not only harm the environment, they directly promote unfair trade, and even contribute to geopolitical strategies on economic control.

China has the world's largest distant water fishing fleet, a fleet that not only fishes in multiple oceans but is used to project Chinese maritime power. That fleet is also supported by subsidies, allowing these Chinese boats to roam the world's oceans and prey on weaker nations—and thwart many laws designed to keep fish stocks at sustainable levels. China is first in giving capacity-enhancing harmful subsidies, supplying about one-quarter of that total.

Subsidies often claim to be essential to help small-scale fishers, those in poverty, or to only impact fishing within one country's waters. But none of that really withstands scrutiny. Large-scale fishing operations receive 84 percent of subsidies globally, while small-scale operators receive only 16 percent. Subsidies also support illegal fishing activities and are believed to provide between \$1.8 and \$3.7 billion annually to facilitating unlawful behavior on our oceans.

Harmful subsidies also undermine fisheries management. Funds that are harmful subsidies ought to be redirected to improving fisheries management, which is a far better investment. The World Bank estimates that effective management of global marine fisheries and subsequent recovery would yield at least \$83 billion in additional revenues each year. In the United States, our own fisheries management is strong, but in many other countries, that is not the case. Continued poor fisheries management, coupled with subsidized over-fishing, is not only putting law-abiding fishers, including our own, at a commercial disadvantage, but it is also a recipe for large-scale economic and biological disasters and compromised food security.

The United States has established a high-ambition outcome in these negotiations and has held to that while discussing the proposals of others. We have excellent negotiators, and they should stay the course and determine when and if compromises are needed. But this issue is also about the strength and value of the WTO as an institution.

Many who have been long-time WTO watchers in this space say they feel there is reason to be optimistic on successfully concluding the negotiations this time, as it is the closest they have come in over a decade. But we also need to address unfair trade practices, and this means import control rules that identify and prevent illegal fish products from entering our lucrative U.S. market. The U.S. Seafood Import Monitoring Program, known as SIMP, is a useful start, but it currently only covers 40 percent of our fisheries imports. Other major fishery importing countries are considering following the U.S. lead, and collectively we can shut off the illegal fish tap if we do it right and expand it to include all species.

Notwithstanding the SIMP import screening, approximately \$1 billion in illegal fish products are still entering the United States. It is important for the U.S. to work to address unfair trade prac-

tices, both subsidies and illegal fishing, that harm the environment, fisheries, U.S. fishermen, and our seafood industry.

Thank you very much, and that concludes my remarks.

[The prepared statement of Ms. Kuruc appears in the appendix.]

The CHAIRMAN. Thank you very much. And before I start questioning, since so many of our members are remote, if you are not going to ask questions, please notify me so I do not wait around to call names that do not need to be called.

And secondly, since people are remote and you might not know when your 5 minutes are up, I might interrupt at 5½ minutes and say, "Wind up." Do not consider it being rude, but I want to keep people from going on for 3 or 4 minutes after their 5 minutes are up like we had yesterday. The other thing is to kind of be careful about the 5-minute rule because we have votes, and I want to keep this meeting going while those votes are going on. So I hope that we will have other members willing to chair while I go vote.

I am going to start with Dr. Glauber. You have done an impressive job in your research, demonstrating that global trade in agriculture has become a mess when these cases are before the WTO. We had high tariffs, export subsidies, and all types of protectionist barriers. I hope we are in a better situation now, but it obviously is not perfect.

The last couple of years have been particularly hard for farmers, because of trade wars and several other challenges. What can we do, both in the short term and long term, at the WTO to improve global market access for our farmers? That is my first and maybe only question to you.

Dr. GLAUBER. Thanks very much. One, I think it is very important to get this Appellate Body crisis resolved. I think that short of the negotiations, where I think we have been fairly successful in opening markets, is when we see a country not implementing their trade regime the way the rules state. We have been able to take cases and argue them successfully.

I think the China cases are a good case in point, both on domestic support. We argued that they were over their domestic support limits, and the panel agreed with us. China is in the process of complying, although I note today I think the U.S. is raising this issue again with the dispute settlement body.

The other one is in TRQ administration. China just was not filling the TRQs that they said they were going to open for us when they acceded to the WTO, not just to us but to other countries. So I think that is very, very important. We have seen progress there. We won that case. If you are looking at TRQs for wheat and corn this year, they are well on the way to being filled. Rice still lags, and so I think that is going to be something that will have to be closely followed.

But I think those things are the immediate issues to get the Appellate Body resolved, because the last thing we need is to get either in a panel or a compliance panel or something where a country decides to appeal that ruling and then we are stuck.

And then lastly, I think we do need to get back to the negotiating table. I think this has been the gist of a lot of the comments that others have made here. I think as a negotiator, it was very frustrating to see the Doha Round sort of collapse the way it did. I

think there were a lot of things in there that were really important to push forward: gains in market access, gains in domestic support.

I think, frankly, the Director General has done a good job of trying to gather what low-hanging fruit was left out of that agreement. So things like trade facilitation—which others have mentioned—is very, very important. It was very important to get export subsidies eliminated. But there are still a lot of distortions in the world, and I think we need to move forward.

The CHAIRMAN. I am going to cut you off because I have time for just maybe one more question. But thank you very much for what you have done to answer my question.

I go to Ms. Hillman. The blocking of the Appellate Body's positions started under the Obama administration, and maybe in my memory even goes back to some things that were done in the Bush administration. So it has continued of course under the Trump administration. So there is a bipartisan agreement, it seems to me, that the Appellate Body is not working properly.

It is unfortunate that we have to do this, but I think it was the only way to get countries to focus on the issue. We have been raising it for several years without success. I am concerned that we will lose leverage at some point in getting dispute reform if we do not find a path forward. In particular, it seems a fair number of countries have signed up for the alternative to the Appellate Body, the Multi-Party Interim Appeal Arbitration Arrangement, I guess it is called. At some point, I am worried that it may become less "interim" because countries will stick to this alternative rather than reform.

Do you think that that is the case? And is there anything in the multi-party arrangement that you think we ought to consider beneficial or concerning?

Ms. HILLMAN. Well, thank you, Mr. Chairman.

I think that the Multi-Party Interim Arrangement—those in it are emphasizing the word "interim." In other words, their view is that this is only being done until the formal Appellate Body can be restored. But I do not think you are wrong in suggesting that if this continues to drag on and on, it will become the only alternative.

The good that may come out of it is that I think those that are involved in it have heard very clearly the United States' complaints. And so I think their hope is that they can develop a system that addresses the U.S. concerns. In other words, the MPIA process will get appeals done in 90 days, will not create precedent, will again do a lot of the things that the United States has been complaining about; will not overreach, will not try to write rules that are not there. So I think those that are involved in it intend for it to be a model of how you can do an appeals process that is consistent with the rules as written, and that is also addressing, to some degree, the United States' concerns.

That is the hope: that it could show the way, if you will, that this can be done. We will have to see how it works out, but implicit in your question, I think, is the problem for the United States, which is that we are not a party to it. And at this point, it does not look like we will be a party to it. So it is ceding the leadership for the reorganization of the dispute settlement system to others that will

not include us. And to me that is a real worry, that the process will not involve U.S. leadership and U.S. input.

The CHAIRMAN. I am going to have to submit the rest of my questions for answer in writing because, with these votes coming up, we will not have time to have a second round. My next question was going to be to Ms. Lane, but you will have to receive it in writing.

[The questions appear in the appendix.]

The CHAIRMAN. Senator Wyden, I am going to step out for a few minutes. Do you have any UC requests that you want me to consider before you start asking your questions?

Senator WYDEN. I do not, Mr. Chairman.

The CHAIRMAN. Okay; and then after his 5 minutes are up, it is Senator Carper, just in case I do not return. But I am only going to be gone a short period of time. Go ahead, Senator Wyden.

Senator WYDEN. Thank you very much, Mr. Chairman.

Let me start with you, Ms. Hillman. And thank you for your years of good work on the very complicated issues surrounding the World Trade Organization, particularly the Appellate Body.

Let me tell you what I am most worried about with respect to the Trump approach, and be very specific about it. It seems to me the Trump approach would put us in the position of our losing rules we have, without getting the rules we need. And that is really a double-whammy against the cause of promoting America's role in a global economy. And let me be specific. What we have now with the rules is access to foreign markets for our farmers and ranchers, our service providers, and for manufacturers. What we need are rules to curb government subsidies that undermine our farmers and fishers, rules to ensure the free flow of information and ideas, and better overseas market access for American manufacturers.

Tell me your reaction to that. And it just seems to me what you really laid out is the risk that what we fought for and obtained could be lost, and we would not get what we need for the future under this Trump approach. What would be your assessment of that?

Ms. HILLMAN. I think that is entirely correct, because the concern is that, in the absence of having an Appellate Body, if we are trying to enforce the rules that we have, all a country needs to do if the United States brings a case—and again, we have discussed many of the cases—and wins that case and the other party that loses does not want to comply, in the world that we are in right now, all they need to do is file a notice of appeal and say, “I am appealing that decision.” And under the rules of the WTO, no one can then do anything while an appeal is pending. You are not allowed to then seek enforcement, or to take other actions while the appeal is pending. And in the absence of having enough Appellate Body members to form a quorum, that appeal could be pending forever. Which means no one actually then formally has to comply.

So then the only way you can think about getting compliance is to start down the road of retaliating, putting on tariffs. And we get back into this tit-for-tat, I put tariffs on you, you then say I should not have put those tariffs on, you put tariffs on me, and we start making every single dispute at the WTO become its own little mini-trade war in which all we are doing is imposing tariffs on one another and not solving the underlying problems.

The other part of what is implicit in your question is, we need American leadership to get those new rules that you are talking about. And right now, the perception is that the United States has to some significant degree walked away from the WTO and from leading the effort for reform, because it has effectively walked away from the reform of the Appellate Body and the dispute settlement system. It is not getting the attention and the traction and the support that it needs on some of its other proposals.

Yes, the United States has been very engaged in the e-commerce negotiations, but again the question is whether there is trust in that American leadership. And to the extent that we are walking away from our negotiations in other places, it is handing a lot of that leadership to others in the WTO. And that, I think, is damaging to the United States.

Senator WYDEN. Thank you, very much. And I want to hold the record open for you, Ms. Hillman, if you would like to amplify on this. Because to me, this seems bizarre even by the policymaking standards of Washington, DC, that you give up rules you have, not get what you need, and I think you laid it out. And if you would like to amplify it for the record, that would be very helpful. And I appreciate your leadership.

I have one more minute, and I want to use it on this question of fisheries subsidies to Ms. Kuruc.

Ms. Kuruc, as you know, this has been the longest-running battle since the Trojan War. Senator Crapo, a thoughtful member of the committee, and I have been looking at this issue for years. Jobs in the seafood industry and a healthy climate in the Pacific Northwest depend on healthy oceans.

Can you elaborate on how the specific obligations proposed by the United States not only improve the health of our shared oceans, but also support the fishers and our seafood industry?

Ms. KURUC. Yes. Thank you very much for the question. I think that some of the primary positions that the United States has taken want to hold all countries to a higher standard, minimize the special and differentiated treatment for IUU fishing, for over-fishing, for over-capacity, trying to make sure that there are not special sort of proxy rules that eliminate the territorial sea—in other words, the distance between the coast and 12 miles—that somehow say some of these subsidy rules should apply in that area.

There are a number of countries that are proposing all sorts of different exceptions—things like “the green box” that make it seem like there should be special situations that are exempt from these sorts of subsidy prohibitions. And I think that the U.S. recognizes that without all countries following the rules, the loopholes are just too great, and that they need to be held to a higher standard. But we know that in international negotiations, compromise is the name of the game. Consensus is how it works.

And I think that smart and influential U.S. leadership, as has been shown in many other forums, regarding this issue would be the way that we bring others along. And this is another example, as others have been talking about, why U.S. leadership, that other countries have come to really depend on, is so critical in this situation as well.

Thank you.

The CHAIRMAN. Senator Carper?

Senator CARPER. Thanks. Again, to each of our witnesses, welcome. To the two ladies who are here in person, thank you for coming. And for those who are joining us remotely, we thank you as well. This is an important subject. And, Mr. Chairman, I am delighted that we are holding this hearing, and I am appreciative of the input. One of the things my colleagues hear me say from time to time, probably too often, is, "if it is not perfect, make it better."

And there has been a lot of conversation today and before about the flaws in the current WTO system. And like this administration, and like past administrations, I believe the WTO must be reformed to better tackle today's global trade challenges. This includes reforms to address non-market economies like China. At the same time, I have long believed that a global rules-based trading system is important to provide certainty and predictability for American farmers, for businesses, and for workers, all of whom rely on keeping overseas markets open for American goods and services.

One of the things I used to do, when life was more normal, is customer calls to businesses in Delaware, all over my State and, in fact, around the country. I always asked three questions. How are you doing? How are we doing—we in the Federal Government—and when I was Governor of Delaware, how are we doing in Delaware? And, what can we do to help you?

And when I ask them, "What can we do to help you?" they say, almost without exception, "Provide us with greater certainty and predictability"—almost everybody says that.

The U.S. led efforts to create a system that allowed for greater certainty and predictability after World War II. And we have ceded that leadership of the WTO now, and I think it is a mistake. It only benefits one country, and that is China, the other giant in the room.

I would just ask if each of you could take just a couple of minutes to share your thoughts on how the U.S. has benefited from being a leader in multilateral institutions like the WTO. And if we could, I am going to ask Thomas—I like that name, Thomas—Thomas Graham, Thomas R. Graham. My middle initial is "R." So, Mr. Graham, why don't you go ahead and lead us off, please? Thank you.

Mr. GRAHAM. The U.S. has been a leader, obviously, over 60 years or more in creating the GATT and building the WTO, in setting up, actually, the Appellate Body and putting the rules together. Since then, and recently—it is not my place or my role or wish to carry water for the Trump administration. However, on this point, we would not be having these talks—we might here—but the world would not be having talks about reforming the WTO, and reforming the dispute settlement system, had the United States not taken a very firm stand as it did recently, because the U.S. had been offering the same critique for many years. And many, the EU included, were pretty happy with the way things were, and were willing to talk about tinkering, but not basic reform.

So that is why we are talking about basic reform—

Senator CARPER. Mr. Graham, I am going to ask you to hold it right there so some of our other witnesses have a chance to respond.

Mr. GRAHAM. Okay.

Senator CARPER. Thank you for that response. Ms. Hillman, please.

Ms. HILLMAN. I would say the key benefit that all Americans get from the WTO is a fundamental principle that you cannot be discriminated against. In other words, the core basis of the WTO rules is that countries cannot discriminate on the basis of nationality.

So no country can say, "Well, I prefer goods from Europe, and therefore I am going to put a higher tax on goods from America." I mean, we benefit from that basic rule that you cannot be discriminated against—and that foreign goods cannot be discriminated against over domestic production. And it is the predictability and the certainty that your goods will trade, that you can count on your trading partners when you need them, that their goods will be able to move into your market without discrimination, as an absolute core bedrock principle of the WTO. I think we need more than ever to remind everyone that goods will move, that you can count on it, and that you will not be discriminated against.

Senator CARPER. Okay, hold it right there. That was excellent. That was an excellent, excellent response. Thank you.

Let me turn to Ms. Lane, please.

Ms. LANE. I just want to echo what Jennifer Hillman said but focus on one area that is specifically important for UPS, and that is the trade facilitation aspects of the WTO; that agreement that was struck that makes it easier to cross borders.

We have so many small and medium-sized businesses that are challenged with some of the complexities of getting their goods across borders. The Trade Facilitation Agreement, which was launched within the WTO, is so important for making it easier to do trade. When trade is simple and easier to do, more trade happens. Who benefits? The small and medium-sized businesses, which are the heart of the American economy. Thank you.

Senator CARPER. All right; thank you. Dr. Glauber, how has the U.S. benefited from being a leader in institutions like the WTO? That is my question.

Dr. GLAUBER. Yes; thanks, Senator. And I would just say, if you looked at the history of the GATT, one thing that was evident is that agriculture was largely outside of it and we had very distorted markets. I think with U.S. leadership during the Uruguay Round, we brought agriculture within the WTO. We gave it disciplines on domestic support. And in fact I think these are disciplines—some of the work done on domestic support now is being looked at as a potential model for looking at industrials.

So I think all that has resulted in enormous growth in trade, both exports and imports, and I think both U.S. consumers and U.S. producers have benefited from that.

Senator CARPER. Thank you all. Ms. Kuruc, I am going to ask you to answer that same question for the record, because my time has expired.

The CHAIRMAN. Thank you. Is Senator Brown available virtually? Otherwise, I will go—

Senator BROWN. Yes, Mr. Chairman, I am. Yes, sir. Thank you.

The CHAIRMAN. Go ahead, Senator Brown.

Senator BROWN. Thank you, Mr. Chairman, for this hearing. I really appreciate it. I enjoyed Senator Carper's questions.

Ms. Hillman, I want to talk to you. I know you have extensive training and experience, including at the WTO, so I am going to focus my questions on you today.

U.S. trade remedy laws help American workers fight against companies and countries who cheat, particularly Chinese state-owned enterprises. For years I have expressed my concern that WTO and its constituents have undermined these important trade enforcement tools. And I would like a "yes" or "no" answer here. Do you agree the Appellate Body has unfairly targeted and weakened U.S. trade remedy laws, Ms. Hillman, yes or no?

Ms. HILLMAN. Yes, I do.

Senator BROWN. Thank you. You served as a telemember of WTO from 2007 to 2011. Based on your experience, can you name one example when the WTO has purposely taken steps to expand worker rights either in the U.S. or elsewhere in the world?

Ms. HILLMAN. On workers' rights, I think it is difficult, because there are not specific disciplines in the WTO, so there were not specific challenges related to workers' rights, at least not during my time at the WTO.

Senator BROWN. That is exactly right. I mean, I think that—I cannot think of a single time when the WTO purposely put workers at the center of its objectives, and I think that is a fundamental flaw in the organization.

As you know, Senator Wyden and I, the ranking member, authored a provision in USMCA, the Brown-Wyden rapid response mechanism. Probably the USMCA would not have passed the House and Senate were it not for that, because it brought in a lot of support, because there is a lot of support in this Senate for allowing workers to report when a company has violated their labor rights and to see action within months if violations occur.

We designed the provisions, I think you know, to ensure workers had a say on the enforcement of an agreement that will have a direct impact on their lives. WTO decisions affect the lives of workers in the U.S. and around the world, as you know.

In what way did you or other members incorporate workers' interests when you considered cases before the Appellate Body? Did you reach out to unions or other advocates to hear how the decisions that you made might affect workers in the U.S. or around the world?

Ms. HILLMAN. No, Senator, there is not really a process within the WTO dispute settlement. The disputes are government to government. So all of the presentations that are made before panels of the WTO and before the Appellate Body are made solely by governments. There are not direct witnesses. There is not the taking of direct testimony before the Appellate Body.

The decisions are made on that record. So we were very much limited by what the governments chose to present in their disputes. And I would suggest that workers' issues, workers' rights, and workers' claims were rarely if ever raised by those governments.

Senator BROWN. Does that mean that you think Appellate Body reform should include putting workers more at the center of enforcement provisions?

Ms. HILLMAN. Certainly it would be important for workers' rights and issues to be made a part of the consideration within the rules that are being applied. I am not sure how to do so directly; in other words, the dispute settlement system is simply applying the rules as they were written. And the issue that you are clearly pointing out is that the rules today do not include—

Senator BROWN. Would you support—I am sorry to cut you off, Ms. Hillman. Would you support rewriting provisions so that that can be the case?

Ms. HILLMAN. Yes.

Senator BROWN. Okay; good. You have been quoted as saying critics of modern trade deals ask them to do too much. I am a critic of modern trade deals because I think they create a race to the bottom that undermines workers' economic security, which hurts our economic strength and national security.

Do you agree with that, or disagree?

Ms. HILLMAN. Again, I think there has to be an understanding of the link between what trade does and what is done on the domestic side. So I think a lot of what has not happened, particularly I would say in the United States, is the kind of long-term support for worker training, for worker development, that would allow American workers to remain as competitive as they need to and should be. And I think it is important that trade agreements and trade policy start to recognize the important link between trade and domestic policies affecting the competitiveness of our workers and their long-term training, health, and other matters.

Senator BROWN. But you are not saying that trade deals have cost us jobs—well, let me ask it another way. You are putting all of this on worker training, not on the way we write trade laws to advantage corporations over workers?

Ms. HILLMAN. I think it is a more complicated question than that. So I am suggesting that I think the major benefit of trade agreements is to open new doors. And the question is, who walks through that new door once it has been opened? And I think it is very clear that those who walk through that door are those with capital and those with know-how. And so to that extent, I do think those who are lacking in capital and know-how are disadvantaged by the fact that they are not readily able to walk through that new market access door that the agreement opens.

Senator BROWN. So low-skilled workers do not figure in trade agreements?

Ms. HILLMAN. Again, I think they are left out.

Senator BROWN. They are left out.

Ms. HILLMAN. They are left out. In other words, I think their considerations are not as readily taken into account, because when you open up that new market, which is what a trade agreement is supposed to do—open up a market for American goods, American services, American farm products—those who are able to take advantage of that new market access are those who are swiftly and readily able to take a walk through that market access door. And that often requires both capital and know-how.

Senator BROWN. So trade agreements—in closing. I will close, Mr. Chairman; thank you. Trade agreements, if they say they are about opening up markets, they are also agreeing for corporations

to take advantage of cheaper, unskilled labor which out-competes, on a not-level playing field, more expensive labor in another country. And that is what has happened with many of the trade agreements and enforcement that I think you have been involved in.

Thank you, Ms. Hillman. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Thune?

Senator THUNE. Thank you, Mr. Chairman.

In many parts of my home State of South Dakota, and probably some in your home State of Iowa, Mr. Chairman, WTO is a bad word. And that is because South Dakota ranchers feel like the WTO is not with them. And I would say, who can blame them, when the WTO has ruled against them in major disputes impacting their livelihoods, like the country-of-origin labeling case?

Still to this day, it makes no sense to most South Dakotans why the T-shirt that they wear can say "Made in Country Y," but in most instances, the beef that they eat cannot. So my question for this panel is—if you could answer it "yes" or "no," and then I have a follow-up question—do you believe that the WTO decides agriculture disputes involving the U.S. fairly? Ms. Hillman?

Ms. HILLMAN. I think if you look in the main, the vast majority of the agriculture disputes that have been brought to the WTO by the United States, we have won those. So in general, the WTO has ruled in favor of the United States in the vast, vast majority of agriculture cases. I think the case that you are pointing out over country-of-origin labeling is one of the exceptions. And I would only point out that it does not happen to have been decided under the agriculture rules. That decision was decided under the technical rules—technical barriers to trade.

And I would agree with you that there was a lot that was wrong in that decision. But in the main, I think the decisions have been in favor of American agriculture.

Senator THUNE. Dr. Glauber?

Dr. GLAUBER. I would agree with Professor Hillman. I think that in the main, the U.S. has done very well with the dispute settlement process. We do not have time to talk a lot about the COOL ruling, but I would say this, that any beef cuts that are coming in from Canada or Mexico have the country-of-origin labeling. What that case was about was animals that came from Canada or Mexico coming into the U.S. being finished and then slaughtered, that they would have to have that labeling.

I think there are some technical aspects of that agreement that I would disagree with, but again I think generally we have done very, very well at the WTO dispute settlement body.

Senator THUNE. Does anybody have a different view than that? If not, my follow-up question then is—

Mr. GRAHAM. Mr. Thune, could I say very briefly, I think agriculture has done well at the panel stage, the consultation and panel stage. Maybe less well at the Appellate Body stage, which is where the labeling decision we are talking about was made, and as Jennifer said, it was not made under the agriculture rules.

And I think there were problems with that decision.

Senator THUNE. So how then do we fix the impression that these cases are being decided unfairly? Which, again, is certainly how most of my constituents feel. Maybe we have not been as affected

by the decisions that have gone in our favor, but they certainly seem to go against us a lot.

Congress has acted more than once to pass country-of-origin labeling, and it gets appealed. And it is very hard to explain why some products that come into the United States are labeled accordingly, but for something that we consume, that we eat, we cannot seem to get a ruling that recognizes that people in this country would like to know where in the world their beef is coming from.

I mean, it is just—does anybody know how we change the perception or the impression that people have out there?

Mr. GRAHAM. May I start off on that? If we were to dig into the weeds a bit more in reform, there are two problems with regard to agriculture and other areas—I think particularly trade remedies as well—that the people on the Appellate Body deciding them do not have backgrounds in. And one thing we might consider for reform is somehow bringing to review panels a wider range of experience, or experience in some of these key areas. That is first.

Second, I think, again in the weeds of reform particulars, we need a means of review that is more flexible than the “up or down” votes in the dispute settlement body. When the Appellate Body makes a decision, it will be approved and become official unless a consensus opposes it, and that has never happened. So it is virtually automatic. There needs to be a better means of reviewing decisions that are arguably flawed, or that a case can be made are flawed.

Senator THUNE. All right; let me quickly shift. Ms. Hillman, it was recently announced by the UK that it was following the U.S.’s lead and would be banning Huawei 5G technology from its networks. I am concerned that many of our other allies and trading partners may not be taking adequate steps to secure their 5G networks. And in addition to changing our domestic trade policies and laws, do you think there is potentially a role to be played by the WTO in advancing security of the global communications networks?

Ms. HILLMAN. At this point, Senator, where the WTO would come into play is, where do you draw this line between trade and national security? And at this point, the rules in the WTO are simply to say that you are allowed to do a whole series of measures if you can justify them as being done under the terms of what is referred to as Article 21 of the GATT under the national security rules.

So right now there are not per se rules that would affect this. But where the WTO may come into play is helping create a very clear line between what is a genuine national security risk versus what is a protectionist trade policy. Because China is going to want to say, “No, everybody is doing this just for protectionist reasons.” And what we need to make sure that we can do very clearly and without too much burden is to push back and say, “No, this clearly falls within the national security exception,” and therefore the efforts that the United States and others are doing to try to keep Huawei out are justifiably done for legitimate national security reasons. And we need to make that easy and quick in order to make that basic distinction between trade protectionism versus national security.

The CHAIRMAN. Senator Portman, are you ready virtually?

Senator PORTMAN. Thank you, Mr. Chairman.

The CHAIRMAN. Go ahead.

Senator PORTMAN. First of all, thank you and Ranking Member Wyden for holding this hearing. It is a really important matter, and I appreciate what you said at the outset, and Senator Wyden said at the outset, and I agree with you that WTO is incredibly important. But it is also broken. And we need to put these reforms through, and we need to do everything we can here in the Congress to try to come together with a consensus on this, because it is going to be challenging.

To our witnesses, I appreciate your expertise.

Ms. Kuruc, I was glad to see your cautious optimism that the new text circulating could possibly be successful on fishing subsidies. As Senator Wyden said, I worked on this 15 years ago as USTR for President George W. Bush, and we thought we were close then. So it is an important issue for us both, an important issue for the oceans—and I was glad to hear that—and we need to push as hard as we can to help with that.

I am also pleased that we seem to be focusing on WTO reform today, Mr. Chairman, as we have successfully completed USMCA and China Phase One. It is time to turn to this multilateral issue that we face. And people are watching. I think the world is really watching what we are doing here in the United States Senate. In particular, the desire for reform I think cuts across party lines. I heard that this morning from both parties. I think it cuts across branches of government. I know the executive branch has concerns, as has been discussed.

I sat right here before you, Mr. Chairman—and Senator Wyden by the way, who was on the committee at that time—in 2006, and I criticized the WTO overreach by the Appellate Body on anti-dumping rules and on zeroing. So this is a longstanding concern that administrations have had, as you have indicated, through various parties. I see three major related, yet distinct, problems with the WTO.

One thing is, as we have talked about today, the judicial activism by the Appellate Body. I think it has weakened the multilateral system. Second, clearly the WTO has been unable to negotiate these new agreements. And I worked hard on the Doha agreement, and people forget that there even was a Doha agreement. Those negotiations have stalled. And then third, both of these problems have made the WTO ineffective at addressing the challenge that China's non-market, I would say techno-nationalism has posed to the multilateral system. I think China, as was said earlier, is the huge issue that has to be addressed as part of these reforms.

Mr. Graham, I turn to you first. Can you briefly explain how judicial activism by the Appellate Body has prevented members from addressing the issues we are seeing right now with regard to China?

Mr. GRAHAM. Thank you for that, Senator Portman. I appreciate that opportunity. And in fact, had you not asked the question, I would possibly have wanted to intervene on that point.

Judicial activism, particularly in terms of filling gaps—as we all know, gaps or ambiguities exist in agreements, often because the

parties could not agree, and they agree not to agree on them. When the Appellate Body fills those gaps, it makes negotiations more difficult in the future, because negotiators worry about how those silences will be filled, and so they do not want to leave them. They have to cross every “t” and dot every “i,” and they also are uncertain whether it is necessary to negotiate if the Appellate Body makes broad decisions. So there is an interaction between judicial activism and the difficulty of reaching agreements.

Senator PORTMAN. Thank you. I think we cannot look at these Appellate Body issues in isolation. In a way, it is the canary in the coal mine for the multilateral system, and I appreciate your work on that. I want to follow up with you after this hearing.

Senator Wyden and Senator Grassley both talked about the need for reform, and that it could be bipartisan. The chairman noted that Senator Cardin and I have recently introduced a resolution that expresses support for the multilateral system and the need for a WTO, but also proposes some specific reforms such as exploring plurilateral agreements without MFN, which I think is helpful with regard to China; restoring the ability of members to use safeguards and trade remedies; and other changes basically to bring the WTO into the 21st century and strengthen the ability of WTO members to respond to China’s non-market practices. The purpose of this resolution we have introduced, I think is really threefold.

First, we want to get more specific about the concerns at WTO and put those out there. Second, we want to propose solutions so that the world sees that we are not just complaining, we have some specific solutions. And third, we want to make clear that we see the rebalancing of the WTO in favor of negotiating as the primary guide when considering the value of various ideas on WTO reform.

We have worked with Chairman Grassley on this proposal. We have also worked with Ranking Member Wyden, and we also have worked with USTR, and we have appreciated the input from all of them. And we are certainly open to other ideas.

So I would ask today, Mr. Chairman, that we hold a hearing on this—that is important—but also that we consider a markup in this next opportunity we have in September now. And I would like to be able to mark up a resolution in the fall. Again, Senator Cardin and I have one. Others may have other ideas.

I believe it could receive overwhelming bipartisan support if done properly, and I think it could send a very strong signal in terms of the need for WTO reform, and then specific ideas as to how to do it.

The CHAIRMAN. I will be glad to consider your request for a hearing. I have to see how our schedule of hearings is. I do not have it in my mind now, but we can surely consider what you have asked us to do.

Senator Warner, virtually. Senator Warner?

[No response.]

The CHAIRMAN. Okay, then we will go to Senator Hassan.

Senator HASSAN. Well, thank you, Mr. Chairman, and to Ranking Member Wyden as well, for holding this hearing. And thank you to all of our witnesses for your expertise and your presence today.

Ms. Hillman, I will start with a question for you. Shortcomings in the WTO's dispute resolution process have long affected the ability of the United States to respond to unfair trade practices across a whole variety of sectors. For example, the New Hampshire timber industry has struggled for decades with unfair practices that put it at a competitive disadvantage.

Ms. Hillman, going forward, how can we reform the WTO to address past shortcomings and to ensure that the dispute resolution process does not hinder application of our trade remedy laws?

Ms. HILLMAN. Thank you, Senator Hassan. I would say in general, I think the WTO dispute settlement system has been a significant net win for the U.S. in terms of the number of victories. And I outlined a lot of that in my testimony.

But the area that you are talking about, you are absolutely correct. It is the one place in which the WTO Appellate Body has gotten it wrong and has clearly cut back on the U.S.'s ability to use antidumping and countervailing duties and safeguards. That is where the problem really lies.

And to me, there are a couple of ways to think about it. One is, I think you could really consider creating an entirely separate appeals process made up solely of trade remedy experts who could hear the trade remedy cases, so that you have really brought a different level of expertise.

The second way to do it is to think about a totally different standard of review, where you are basically telling the Appellate Body and the WTO dispute settlement system that when it comes to trade remedies, you need to give deference to the investigating authority, to the U.S. Commerce Department, to the U.S. International Trade Commission, to say if you have done a fact-based investigation where the facts show enough to show that, yes, there were dumped goods, yes, there were subsidized goods, then you should simply give an appropriate amount of deference to those investigating authorities and should not be easily, readily overturning the decisions that they have made.

So I think there are ways to get at this. And your question goes right to the heart of it.

The second part of your question, though, goes to the issue of softwood lumber, trading lumber, and timber, and there the problem is the disciplines on subsidies. And it really goes to the heart of the problem with China.

The disciplines in the subsidy rules are simply not good enough. And so in that area, we do need to rewrite the underlying rules themselves. It is too hard to prove subsidy cases. It is too hard particularly in economies like China where you cannot get your hands on any of the data or any of the information. The evidentiary burden is too high and the remedy is not good enough.

So your question goes to two really key issues of reform that are needed in WTO.

Senator HASSAN. Well, I appreciate that, because we obviously need to get at the subsidies issue generally. We also need to provide stability to the timber industry, as well as the other sectors that have been affected by the kind of shortcomings we have just talked about. So I appreciate it very much.

Ms. Lane, I want to turn to you for a minute. The bipartisan U.S.-Mexico-Canada Trade Agreement which went into effect earlier this month created platforms to help small business exporters. As Congress considers WTO reforms, we should be focused on similar ways to support small businesses engaging in international trade.

Ms. Lane, what recommendations do you have to support small exporters through WTO reforms?

Ms. LANE. We need to definitely take some of the provisions that were included in the U.S.-Mexico-Canada Agreement and bring them into the WTO. We need to specifically have mechanisms that help understand the challenges that small businesses face, and provide the tools so that they can use them to be able to trade more.

Everything starts at the borders and ends at the borders for so many small and medium-sized businesses, and that is why we are such champions of the Plurilateral Trade Facilitation Agreement, because it makes borders more efficient.

But we need to be doing more to make those processes easier to follow. Just taking those processes electronic is a simple way that small businesses can be able to engage in more trade, but also, making the rules a lot more simple. We started to do that, and have captured that in the USMCA. Bringing all of those new provisions, plus the mechanisms that specifically focuses on the challenges of small businesses, into the WTO is going to foster so much trade for all of these great companies.

Senator HASSAN. Well, thank you for that. I have one more question, which is, what specific things do you think we could do to expand access to trade opportunity for women- and minority-owned small businesses?

Ms. LANE. I am so glad you asked that question, because that is such an important issue, particularly for UPS. We know that empowering women and allowing them to trade is not just the right thing to do, it is a smart business decision. And that is why we have dedicated so many resources to our Women Exporters Program, really helping women be able to understand how to engage in trade, giving them the tools, and providing them the mentorship as well as great logistic services to get their products around the world.

But what is really important is the legislation that you have introduced, and it is the Women's Global Empowerment Development and Prosperity Act. When we recognize that women are at the center of an important part of U.S. foreign policy, we do so much to lift up women around the world.

The fact of the matter is, women in some parts of the world cannot own property in their own name. They cannot open a bank account to be able to conduct business. Sometimes they cannot even travel without permission to be able to go across borders and sell their products.

If we can get the WTO to recognize that women are important for resiliency and economic recovery and eliminate that discrimination that just is out there and exists in too many countries' laws, then we can really be lifting up 50 percent of the world's population. Your leadership has been tremendous. And I would say to all of the members of the committee, the he-for-she Senators, we

need to stand by the Senator and get her legislation passed. Because when women are empowered, the women of the world win, and the world wins. Thank you.

Senator HASSAN. Thank you. And thank you for your indulgence, Mr. Chairman.

Senator CARPER [presiding]. You are quite welcome. You were worth waiting for.

All right; I am going to try to figure out how to go forward here with the help of our staff. I understand that Senator Cassidy might be next in the lineup. Are you with us?

Senator CASSIDY. I am here.

Senator CARPER. We will hear from Senator Cassidy at this time.

Senator CASSIDY. Can you hear me, Mr. Chairman?

Senator CARPER. Yes, Dr. Cassidy. Please proceed.

Senator CASSIDY. I wondered why you were so lax upon Senator Hassan going long, but that is clearly because there was a change of chairmen.

So thank you all. I have industry—I am from Louisiana. My rice farmers, my shrimpers, my fisheries are all concerned about the issues you have raised. And others have already discussed some of these specific concerns.

But, Mr. Graham, there seems to be a macro issue here, which is that China continues to exploit certain aspects. They are a developing country, and yet they are the second largest GDP in the world. They are considered a recently seated country, even though they have been there 10 years. And it seems like we kind of make statements, this is what you should do, and either there is not compliance—Dr. Glauber I think said it at some point, they are in the process of complying—but I am concerned that process sometimes takes a long time.

So, to the macro issue, can WTO be an effective organization if China, as big as they are, just makes a decision that they are going to attempt to exploit every loophole and/or do whatever they can to thwart the ability of the WTO to rein in their unfair trading practices?

Mr. GRAHAM. It can be an effective instrument. Its effectiveness has been very limited so far because of what I would regard as poor dispute settlement decisions, largely by the Appellate Body, and by such things as the Chinese Government involvement in state enterprises—and Chinese prices sometimes being artificially low but treated as market prices for purposes of trade remedy laws. That is specific.

Second, regarding China's general approach, I think those specifics are more important day-to-day than the question of whether they are a developing country or not. They get certain advantages by the latter, but the day-to-day effect is felt more in competition with them and advantages that they gain as a result of settlement dispute decisions.

Long-term, whether China will join in with a fundamental reform of the rules, including the dispute settlement rules, to address those things, frankly remains to be seen. Recently there has been a statement by a Chinese representative that they did not like that view, but it remains to be seen. But it has to be done. The reform exercise has to be pursued, and then we will see.

Senator CASSIDY. Well, we are not patsies. We do not have “stupid” written across our face, theoretically. So is your best guess that they will, if given the chance—or more the hope that we had when they originally came into the WTO—that if we act in good faith, they in turn will act in good faith as well?

Mr. GRAHAM. My best guess is that in the end they will come around. But my view is that we should not have “stupid” written across our face and unduly go easy on them or unduly stop short of reforms that need to be made with regard to them in order to bring them in. And that is where I think we are eyeball to eyeball.

Senator CASSIDY. Ms. Hillman, you obviously feel as if we have retreated unnecessarily from the process. And yet it does seem that, as I just described, China is intent upon exploiting everything they can to make it ineffective.

So let me ask you the same question I just asked of Mr. Graham. Until we resolve an approach to China, is the WTO going to be as useful vis-à-vis China, since they are clearly—they have been mentioned over and over, whether it is fisheries or rice subsidies, in terms of my State and others. We have not even discussed some other things that are very pertinent. What would you say to that?

Ms. HILLMAN. Well, my own view is that I think we need to do a better job of using the WTO to push back on China. I have long—

Senator CASSIDY. So let me ask. Again, we have heard about fisheries, that they are oversubsidizing. I looked at the WTO rules on worker rights, and there are core values that each country is supposed to agree to, including no forced labor, and China notoriously uses forced labor.

And when Senator Brown was speaking about our trade agreement, I have recently learned that our environmental requirements and worker rights requirements within USMCA actually put Mexico at a competitive disadvantage relative to China because they do not allow any of that. And so therefore it is cheaper to produce in China as opposed to Mexico.

So continue it, but with that context and my understanding.

Ms. HILLMAN. So my own view is the best thing that we can do is to bring a very big, bold, and comprehensive coalition-based case against China. Because an awful lot of what they are doing is a violation of the WTO rules. But the United States, and many other countries, have not pushed China to be held to the rules that it has agreed to.

Some time ago I testified in front of the U.S.-China Security and Economic Commission to recommend exactly this, a big case against China that would include 12 specific violations, including the kind of subsidies that you are talking about—an entire list of complaints where China is violating the commitments that it made when it joined the WTO.

Why do it in a big, bold case? Because I think there is safety in numbers in terms of having a whole coalition of countries going after China. I also think it would make it much harder for China to get out from under trying to comply with a very big case like that that touched on subsidies, intellectual property, technology transfers, some of the labor issues that you are mentioning, the agriculture issues that you are mentioning, the requirement that

China have an independent judiciary reviewing trade decisions. There is an entire list in this where I think you could put together a case that would have 12 or 13 very substantial claims against China, and do that, and do it now.

In other words, make the WTO—

Senator CASSIDY. Before we get cut off by our lenient—

Senator CARPER. I am afraid we are going to have to cut you off. Really quickly, Dr. Cassidy. Really quickly.

Senator CASSIDY. No, no, no, I was trying to take back because I knew that we had to move on. Thank you, Mr. Chairman. Thank you all.

Senator CARPER. All right; that is all right. Thanks.

Okay, next, if she is ready, is Senator Cortez Masto. Are you there?

Senator CORTEZ MASTO. I am here, and thank you to the panelists. And I think, Mr. Graham, you wanted to respond, because it was a great question, so please go right ahead and respond to Senator Cassidy's question.

Mr. GRAHAM. Thank you for the opportunity. I wanted to respond to what Jennifer just said. I think it underscores the points that should be covered in a negotiation with China. How would such a case be brought now, even if there were a functioning Appellate Body? If it had been brought last year, I have no confidence that the Appellate Body would have come out correctly—it might have been 2 to 1, possibly. And the institution is not prepared or in shape to entertain anything like such a big, broad-based complaint.

That underscores the need for reform. All of those things that Jennifer mentioned are things that need to be negotiated together with the rules and dispute settlements over, however long it takes. And there is no case to be brought now. There is no entity to bring it, and no likelihood of success. Thank you.

Senator CORTEZ MASTO. Thank you. Thank you for that. I do want to get to reform. I so appreciate this panel's conversation. I have been in Banking, so I may ask some repetitive questions here, but I do want to start with this. Senator Casey and I recently introduced the Women's Economic Empowerment in Trade Act, an important piece of legislation that is a first step for shifting the conversation to focus on workers' rights and the right of women to have equal protection under the law, particularly in the trade space.

And, Ms. Hillman, I want to thank you. The Council on Foreign Relations recently hosted both of us on a virtual roundtable series to talk about women in foreign policy. We were able to discuss the role of women and the role they play in the trade economy. Thank you so much to the CFR for that great conversation.

So let me start with you, as you specialize in U.S. trade policy and the law and politics of the WTO and international organizations. Would you care to make any comment or observation on the importance of elevating women in a global economy?

I know Ms. Lane talked about it, but I would love for you to weigh in as well.

Ms. HILLMAN. I do not think it can be overstated how important it is, because women make so many of the economic decisions around the world. Empowering women makes a huge difference.

And again, I think you saw this in 2017 at the ministerial meeting of the WTO. There was an effort to create a women's initiative. And the fact is that the initiative passed and that so many countries joined it, and then following on from that there has been so much work done to understand why it is so much harder for women to fully engage in trade, and all of the things that Laura Lane just talked about.

The idea that in so many countries women cannot own property, cannot open a bank account, cannot set up a business, cannot do a lot of these things when they are the drivers of the economy in so many other places, I think underscores how important it is to see the role that women need to play in the trading system.

So I think all efforts to try to make sure that we are constantly aware of that are extremely important. And I think this message has been very, very well received at the WTO. There is much more of an effort to literally scrub through every single aspect of the WTO agreements to try to find out where the language may appear to be neutral when you read it, but when you think about what its implications are, you discover that it is actually having a drag on the ability for women to fully engage in trade.

And that effort to rethink and rewrite an approach to the rules that is not just gender-neutral but is really taking onboard the impediments to women, I think is a serious effort at the WTO, and I think it needs to be underscored. And I applaud your efforts to be part of this process, and thank you for the legislation that you have introduced, because I think it is making an extremely important contribution.

Senator CORTEZ MASTO. Thank you. And I notice that my time is up, so I want to let others get questions in before the vote closes. Thank you all on the panel. I will submit the rest of my questions for the record. I so appreciate the conversation today.

[The questions appear in the appendix.]

Senator CARPER. All right; thank you, Senator Cortez Masto.

Senator Whitehouse, I think you are next.

Senator WHITEHOUSE. Great. Thanks so much, Mr. Chairman. Thank you all for being here.

First, Commissioner Hillman, as we deal with climate change—which, by the way, thank you for having the temerity to mention it in your prepared remarks. This and the board room of Marathon Petroleum may be the only two buildings in the country where people do not have a sensible discussion about climate change. But if you look at climate solutions, and you look at what has been the prominent climate solution proposed on the Republican side, by corporate America, by the sort of libertarian-leaning think tanks and so forth, they all come to a price on carbon. In fact, today thousands of students around the country just issued a joint statement of student campus organizations supporting a price on carbon. So it has a real foothold here.

The critique of it is that, well, the company in America that has paid a price on carbon is going to lose its business to the company in Canada or Mexico, right across the border, that does not have to pay a price on carbon. And the answer to that, of course, is a border adjustment that makes that correction.

Is it possible to have border adjustments that solve the competitive problems created by a carbon price that happens in one country but not in another? And could such a border adjustment meet WTO muster?

Ms. HILLMAN. Absolutely yes, Senator. And there is——

Senator WHITEHOUSE. To both questions?

Ms. HILLMAN. To both questions. Yes, you can put a border adjustment on, and, yes, you can do a border adjustment that is fully consistent with the WTO.

Senator WHITEHOUSE. Thank you.

Ms. Kuruc, if I could get you for a second on ocean stuff. My time is a little bit short, so some of this you may have to respond to for the record in writing, but there is a lot of bipartisan interest in oceans in Congress. I see it firsthand in the Senate.

And we have issues where I think you would find enormous bipartisan support like the China fleet, about which you testified, which is out there ruining oceans and bullying neighbors and ignoring rules and boundaries, all well as acting as an instrument of policy of China.

Generally we have done some good stuff on pirate fishing. We did all the pirate fishing treaties. We have done the Port State Measures treaty. We did the Port State Measures legislation, all of this by unanimous consent in the Senate, all Republicans and Democrats together.

Could you let us know two things? One, what should we be pressing China on, because I think you have a ready audience for that. And two, what should the Oceans Caucus, our bipartisan oceans group here in the Senate, be looking at as the next steps on controlling pirate fishing, including enforcement? I know you said that is not all of it, but enforcement is a lot of it. We have these new technologies for satellite-based wake recognition software and so forth.

So if you could, answer on those two things.

Ms. KURUC. Sure. Thank you very much, Senator Whitehouse. Quickly, just to say that, initially, I think one of the biggest things that China needs to do is be more transparent. They need to provide data. They need to provide information about all sorts of things that they are doing.

Part of the reason that we do not know the full extent of so many of their activities is because they are sort of characteristically a very secretive society. They refuse to provide information. And this has just happened over and over and over again.

Senator WHITEHOUSE. Would you send me a proposal?

Ms. KURUC. Happy to.

Senator WHITEHOUSE. Great. And one last thing on plastics. We are trying to engage more and more on plastics. We just had a hearing in Appropriations where the Republican subcommittee chairman promised that he would support a fund for international ocean plastic cleanup.

PROBLUE is out there already. What do you think, with respect to a plastics treaty, should be our next steps, given that so much of the plastic waste that gets thrown into the ocean comes from maybe a dozen countries and a dozen rivers? If we could clean up

a dozen countries and a dozen rivers, we would really get way ahead of the problem.

Ms. KURUC. Yes; I completely agree. It is not only the cleanup. It is about curtailing the production, and making sure that there are facilities in those megaproducers to actually deal with all of the products that they do not have adequate facilities for disposing of, or recycling, or reducing.

Senator WHITEHOUSE. So if you—and I will throw in Ms. Hillman also, if you are interested—if you have ideas for us on what our best options are through the international treaty process for improving our international performance on ocean plastic waste, if you could send me that list as well along with your China transparency list, I would be grateful. And my time is up.

Thank you. Thank you, Mr. Chairman.

Senator CARPER. Thank you for those questions. I very much approve that line of questioning. I am sure almost all of us do.

Is there anyone else who would like to be recognized for a question to our witnesses?

[No response.]

Senator CARPER. Hearing none, the chairman had to go vote. He was kind enough to ask me to sit in for him for the conclusion of this hearing.

So I want to say to Mr. Graham, to Ms. Hillman, to Ms. Lane, to Dr. Glauber, to Ms. Kuruc, thank you very, very much for joining us today. We want to thank our colleagues who were able to be here in person and those who have joined us remotely. I thank our staffs for helping to make all this work, and it worked flawlessly, as far as I could tell.

But we want to especially thank our witnesses for taking time out of what we know are busy schedules to come here to speak to us, to share your thoughts, and to respond to our questions. Your input on an extremely important topic is much, much appreciated.

I would request that Senators with questions for the record please submit them by close of business on August 14th.

And with that, this hearing is adjourned.

[Whereupon, at 12:16 p.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF JOSEPH W. GLAUBER,¹ PH.D., SENIOR RESEARCH FELLOW,
INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE

Chairman Grassley, Ranking Member Wyden, and distinguished members of the committee, thank you for the opportunity to testify before this committee on the current state of agricultural trade and the World Trade Organization. I am currently a senior research fellow at the International Food Policy Research Institute and visiting scholar at the American Enterprise Institute. Prior to coming to IFPRI in 2015 I spent over 30 years at the U.S. Department of Agriculture, where I served as Deputy Chief Economist from 1992 to 2007 and Chief Economist from 2008 to 2014. In addition, from 2007 to 2008 I served as Special Doha Agricultural Envoy at the office of the U.S. Trade Representative, where I was the U.S. Chief Agricultural Negotiator in the Doha talks at the World Trade Organization.

Global agricultural trade has seen tremendous growth since creation of the WTO in 1995 and U.S. agriculture has been a major beneficiary of the rules-based system that the United States and others helped create. The challenges to meet growing global food demand include population and income growth and supply uncertainties complicated by a changing climate, environmental pressures and water scarcity. All of those point to the increasing importance of trade and need for a more, not less, open trading system. A strong WTO is critical to helping meet future food needs.

AGRICULTURE IN A RULES-BASED GLOBAL TRADING SYSTEM

Today, almost 25 years after the creation of the WTO, many may have forgotten the state of the trading environment facing agriculture in the 1980s. D. Gale Johnson, a prominent University of Chicago economist, referred to it as a “world in disarray.” Many markets were highly protected through high tariffs, limited quotas, or outright bans on imports. Variable levies were in place in many countries, which allowed countries to adjust tariff levels to protect domestic markets as world prices fell or rose. Domestic support to agriculture, particularly among the rich developed members such as the U.S., Japan, and the EU, was large and growing. Producers in those countries made production decisions largely insulated from the world market. Governments propped up domestic prices by storing production in large public stockpiles, by maintaining high tariff barriers, or both. Governments dumped surplus production on export markets, using export subsidies and restitutions. This further distorted markets and harmed other exporters, often developing countries that had little or no means with which to protect their own producers and limited recourse within the General Agreement on Tariffs and Trade (GATT) to redress trade disputes.

The Uruguay Round Agreement on Agriculture (AoA) brought substantial discipline to the areas of market access, domestic support, and export competition. Under the AoA, members agreed to convert non-tariff barriers to tariff equivalents and, where necessary, to guarantee minimum access to domestic markets through the creation of tariff-rate quotas (TRQs). Developed countries were required to cut tariffs (the higher out-of-quota rates in the case of tariff quotas) by an average of 36 percent in equal steps over 6 years. Developing countries were required to cut

¹The views expressed are those of the author and do not reflect those of the International Food Policy Research Institute or the American Enterprise Institute. The American Enterprise Institute is a nonpartisan, nonprofit, 501(c)(3) educational organization and does not take institutional positions on any issue.

tariffs by an average of 24 percent over 10 years. Several developing countries also used the option of offering tariff ceilings in cases in which duties were not “bound” (that is, committed under GATT or WTO regulations) before the Uruguay Round.

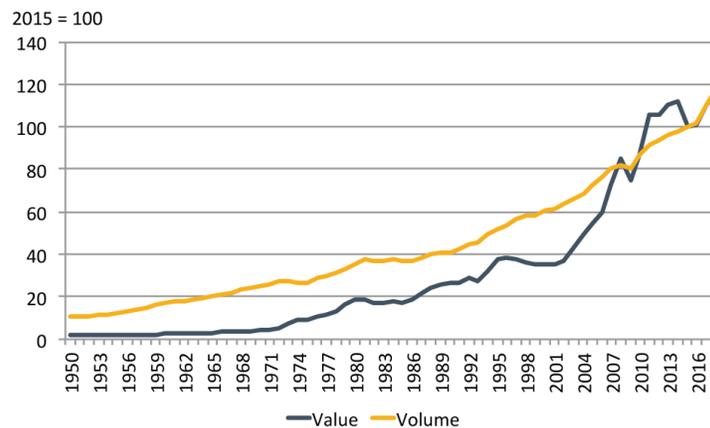
In the area of export competition, export subsidies were capped and then reduced in both value and volume. In Nairobi in 2015, WTO members agreed that developed countries would immediately remove export subsidies except for a handful of agriculture products and that developing countries would do so by 2018 (with a longer time frame in some limited cases).

Finally, under the AoA, domestic support levels were bound and subject to reduction commitments (20-percent reduction over 6 years for developed countries and 13-percent cuts over 10 years for developing countries). Countries were encouraged to adopt support policies that had minimal production- and trade-distorting effects and that were exempt from reduction commitments (so-called green box policies).

GROWTH IN GLOBAL AGRICULTURAL TRADE

Global agricultural exports have more than tripled in value and more than doubled in volume since 1995, exceeding U.S. \$1.8 trillion in 2018 (figure 1). Rapid growth over the period 2000–2010 was due largely to increases in commodity prices, reflecting the impact of several factors on agricultural commodity markets. These included a substantial expansion in biofuel consumption, higher energy prices, relative price effects associated with a weaker U.S. dollar, and shifts in consumption patterns in emerging economies such as China that favored meat, dairy and other high value products. Since 2013, large global harvests and a slowdown in the demand for biofuels have caused cereal and oilseed prices to decline from peaks reached in 2012–13. Yet while agricultural prices have declined somewhat since 2014, trade values and volumes have continued to climb. And while the coronavirus pandemic is expected to sharply curtail overall trade in manufactured goods, food exports will likely be less affected for the simple reason that people must eat.

 **Figure 1--World agricultural exports, 1950-2018**



Source: WTO, *World Trade Statistical Review 2019*

As trade levels have grown, so too has the importance of trade in meeting domestic food needs. In 2019, for example, one quarter of wheat consumed in the world was obtained from imports (table 1). Even for rice, for which in most countries consumption is overwhelmingly met from domestic production, globally import penetration more than doubled (from 4 percent to 9 percent) over that period. Soybean imports accounted for about one quarter of global consumption in 1995; by 2019, such

imports accounted for about 43 percent of consumption. Import penetration for vegetable oils also increased at a similar rate. In the meat sectors, both beef and swine imports have increased relative to global consumption. Import penetration for chicken meat has remained relatively flat at 10 percent, but global chicken consumption has more than doubled since 1995. Import penetration rates for some dairy products such as butter and cheese are lower than rates in 1995 partly as a result of WTO export subsidy disciplines imposed on large dairy exporters like the United States and European Union who had previously used concessional sales and export subsidies to manage surpluses caused by high domestic price supports. Imports of skim and whole milk powder continue to grow in importance in global dairy trade and now account for 35 percent of global consumption.

Table 1—Global Import Penetration Rates

(Imports as Percent of Domestic Consumption)

Commodity	1995/1996	2000/2001	2005/2006	2010/2011	2015/2016	2019/20f
Corn	12%	11%	12%	11%	13%	15%
Rice	4%	6%	7%	8%	9%	9%
Wheat	17%	18%	18%	22%	24%	25%
Soybeans	27%	30%	31%	37%	44%	43%
Vegetable oil	34%	33%	39%	41%	41%	41%
Sugar	29%	31%	32%	31%	32%	29%
Cotton	33%	31%	31%	44%	32%	37%
Beef and veal	10%	11%	12%	12%	13%	15%
Chicken	10%	8%	9%	10%	10%	10%
Swine	4%	4%	5%	6%	7%	8%
Butter	18%	6%	6%	3%	3%	3%
Cheese	21%	7%	8%	7%	6%	6%
Milk powder	47%	29%	25%	27%	28%	35%

Source: USDA, Foreign Agricultural Service, PSD online. 2019/20f = forecast as of July 12, 2020.

As global trade has grown over the past 25 years, an increasing share of exports and imports has come from developing countries. From 1995 to 2016, the share of total food imports and exports accounted for by developing countries grew from 26 percent to 39 percent and from 31 percent to 40 percent, respectively (table 2). If intra-EU trade is excluded, developing countries' imports and exports accounted for almost 60 percent of global food trade in 2016. South-South trade (that is, trade between developing countries) also increased, accounting for over 24 percent of total trade in 2018 compared to 12 percent in 1995.

Table 2—Share of Total Food Trade by Developing Countries

Item	1995	2000	2005	2010	2015	2018
Developing country share of total food exports	31.0%	32.5%	33.6%	38.4%	40.2%	40.2%
Developing country share of total food imports	25.8%	28.2%	27.6%	35.6%	40.1%	39.9%
South-South exports as percent of total food exports	12.2%	13.5%	14.9%	21.2%	23.7%	24.2%

Source: UNCTAD, UNCTADStat 2020

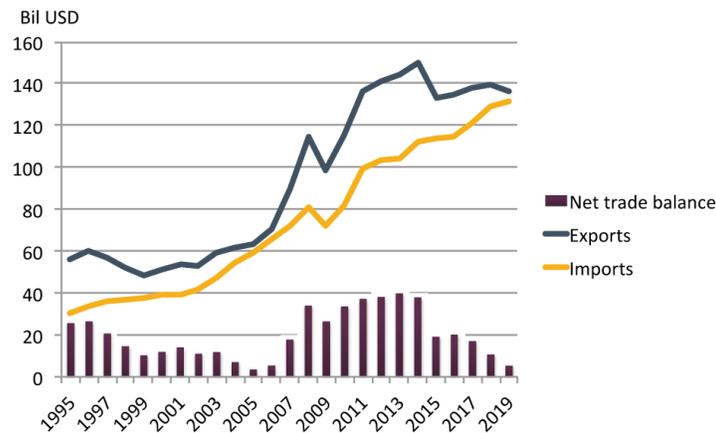
These trends are projected to continue over the next 35 years. The Food and Agricultural Organization of the United Nations projects that global food demand is expected to increase by as much as 50 percent from 2012–2013 levels by 2050, as trends in population growth, urbanization, and income growth are projected to continue, particularly in developing countries. Population projections by the United Nations suggest that 98 percent of the population growth expected between 2015 and 2050 will likely come from developing countries, with Africa south of the Sahara accounting for more than 55 percent of that growth. With income growth rates and urbanization rates also projected to be higher in developing countries, much of the global demand growth for meats, dairy, fruits and vegetables, and processed food products will continue to come from these economies.

U.S. AGRICULTURAL TRADE

U.S. agricultural trade has benefited greatly from the rule-based system of trade ushered in by the WTO. U.S. agricultural exports totaled almost \$137 billion in 2019 (figure 2). Exports have more than doubled since 1995, though they have remained relatively flat since 2015, in part due to the trade war with China (see below). Agricultural imports have increased as well over the period, totaling \$131 billion in 2019. Much of what the U.S. imports is either not grown much here (for example, coffee and cocoa) or is produced counter-seasonally (for example, asparagus and blueberries). Counter-seasonal imports have enabled U.S. consumers to purchase most fruits and vegetables year round, which has led to increased per-capita consumption of those foods, and have largely supplemented, not replaced, domestic production.



Figure 2--US agricultural trade

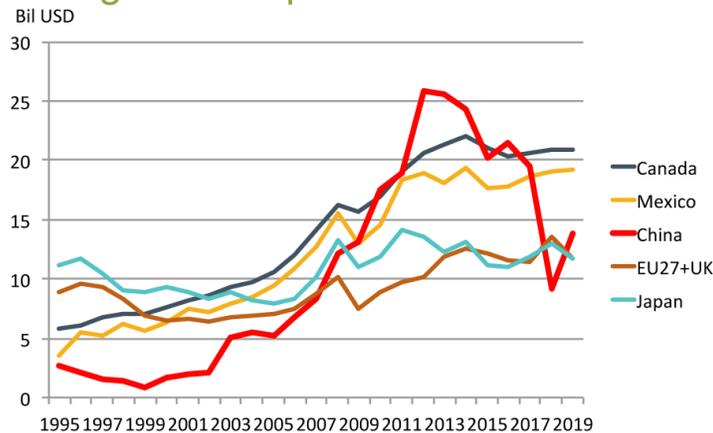


Source: USDA, GATS database

Five markets—Canada, Mexico, China, Japan, and the EU (plus the UK)—account for about 60 percent of agricultural exports from the United States (figure 3). Twenty-five years ago, Japan and the EU were the number one and two markets for U.S. agricultural exports, followed by Canada, South Korea, Mexico and China. With implementation of NAFTA, Canada and Mexico became increasingly more important trading partners and by 2005 had surpassed the EU and Japan as the top U.S. agricultural export destinations. Since then, exports to the EU and Japan have remained relatively flat while that of Mexico and Canada have continue to grow. With the accession of China to the WTO in 2001, U.S. agricultural exports to China began to increase significantly. By 2012, China had surpassed Canada as top market for U.S. agricultural exports and remained as either the number one or number two export destination through 2017. In 2017, for example, the U.S. agricultural ex-

ports to China totaled \$19.5 billion. Soybeans accounted for about \$12.2 billion, or 62 percent of the total. To put this in perspective, production from almost 1 in every 4 rows of soybeans harvested in the United States that year ended up in China where it was processed into protein feed for hog and poultry operations and soybean oil that was bought by China consumers.

 **Figure 3--Top 5 export destinations for US agricultural products**



Source: USDA, GATS database

A WORLD AGAIN IN DISARRAY?

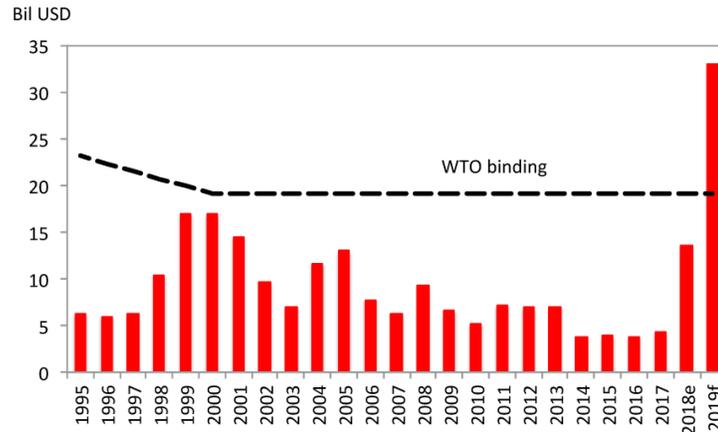
Despite the substantial growth in global agricultural trade since 1995, there are a number of cross currents that bode poorly for the world trading system.

Trade wars have threatened trade growth. The recent trade wars between the U.S. and China, Mexico, Canada, and other trading partners have been well documented by others.² In 2018, in response to tariffs placed on China goods by the United States, China placed counter-retaliatory tariffs on a number of U.S. agricultural exports, including soybeans. Total U.S. agricultural exports to China fell to \$9.1 billion and soybean exports fell by almost 75 percent, to \$3.1 billion, the lowest level since 2006. Brazil was a big beneficiary as China sourced most of its soybeans imports from them in 2018 and 2019, and while the United States was able to send some of its soybeans to markets that would have normally imported from Brazil, overall, U.S. soybean exports fell by \$4 billion in 2018 and \$3 billion in 2019.

U.S. farm receipts fell in 2018 and 2019 and the Trump administration responded by providing \$28 billion to farmers and ranchers adversely affected by the trade actions. Those payments, combined with payments under the price and income support program and Federal crop insurance program, have significantly increased trade-distorting support reported to the WTO. U.S. trade distorting support will likely exceed its WTO bindings (\$19.1 billion) for 2019 (figure 4).³

²See Peterson Institute for International Economics, "Trump's Trade War Timeline: An Up-to-Date Guide." Available at <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

³Glauber, J.W., 2019. "Agricultural Trade Aid: Implications and Consequences for U.S. Global Trade Relationships in the Context of the World Trade Organization." Washington, DC: American Enterprise Institute, <https://www.aei.org/wp-content/uploads/2019/11/Agricultural-Trade-Aid-1.pdf>.


Figure 4—US trade distorting support


Source: WTO; Glauber (2019)

Under the Phase One agreement signed in December 2019, China has agreed to import \$36.5 billion in U.S. agricultural goods in 2020. Thus far, China agricultural imports from the U.S. through May totaled \$7.5 billion, suggesting that imports over the remainder of the year would have to be more than 2.5 times more per month than in the first five months. While outstanding sales to China have been substantial, it is unlikely that the \$36.5 billion target will be met. Nonetheless, those sales, if completed, may bring U.S. agricultural export totals back to more historical levels. USDA will publish an updated forecast of U.S. agricultural exports in late August.

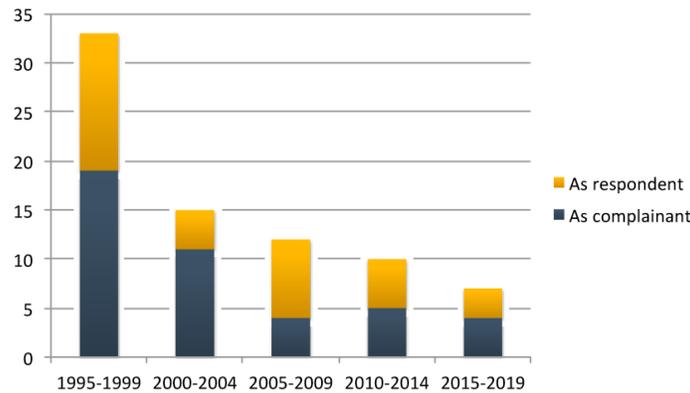
Progress in multilateral negotiations since the Uruguay Round has been limited. While the Doha Development Agenda (DDA) was launched with much anticipation in 2001, members failed to reach agreement in July 2008 and the trade agenda in Geneva has since advanced slowly. Serious efforts were made to renew the negotiations, but in the end, members have had to be content with harvesting the low-hanging fruit, such as trade facilitation and export competition. Although there have been significant accomplishments, they represent but a small portion of what was on the table during the DDA negotiations. In addition, negotiated settlements on the tougher issues, such as market access and domestic support, have become more difficult to obtain in isolation. The recent experience at the WTO's Eleventh Ministerial Conference in Buenos Aires highlights the difficulties of reaching a negotiated settlement on domestic support in isolation from, say, market access. Progress on disciplining export restrictions has also been stymied despite near unanimous agreement that export bans on humanitarian food aid should be prohibited.

Appellate Body crisis threatens the WTO dispute mechanism. A landmark achievement of the Uruguay Round, and notably, the Agreement on Agriculture, was the full inclusion of agriculture in multilateral rules and disciplines. Since the birth of the WTO, a significant number of member countries have used the dispute settlement mechanism (DSM) for resolving the disputes in agriculture. The DSM has played an important role not only for those parties involved in the disputes, but also by helping member countries to better understand the WTO rules, and therefore help guide them in developing domestic policies and trade policies that are consistent with WTO requirements.

U.S. agriculture has been a major beneficiary of the DSM. Over the period 1995–2019, the United States has brought 43 individual cases against WTO members involving an agricultural product; over the same period, 34 cases were brought against

the U.S.. Those numbers have declined over time, with only 7 disputes initiated within the past 5 years: 4 where the U.S. was the complainant and 3 where it was the respondent (figure 5). The greatest number of disputes were with WTO members who have been our largest trading partners (15 disputes with the EU, 11 disputes with Canada, and 6 with Mexico) although in recent years, as developing countries have accounted for larger share of global export and import, they have also accounted for a greater share of agricultural disputes.

 **Figure 5—Number of WTO agricultural trade disputes involving the US**



Source: WTO; Glauber (2020 forthcoming)

Of the 43 cases taken by the U.S. against other WTO members, a majority (26) of those were settled before going to a panel. Thus the WTO provides a forum where WTO members can resolve disputes without resorting to unilateral trade actions, which may ultimately be destructive and counterproductive. Of the 17 disputes that went to a panel, the panels agreed with 80 percent of the claims argued by the U.S. in those disputes. These include recent positive rulings for the U.S. in cases against China on agricultural subsidies and tariff rate quota (TRQ) administration.

The United States has also been a respondent in 34 disputes involving agriculture, 19 of which went to a panel for adjudication. In those cases, the panels agreed with complainants' claims about 72 percent of the time. Among the more prominent cases include the case brought by Brazil against U.S. cotton subsidies (DS267) and the disputes brought by Canada and Mexico against mandatory country-of-origin labeling (COOL) (DS384 and DS386).

WTO members rely on dispute settlement proceedings to ensure transparency, clear rules on trade, and a fair system of trade for WTO member countries. Paralyzing the dispute settlement procedure would be a real loss to the global trading system. Beyond the immediate halt of proceedings, failure to make appointments could come at considerable costs to members' long-term objectives and the stability of the multilateral trading system. The food system is one critical place where consequences could land: disputes over food products that escalate or cause damage to the multilateral system could potentially have human costs for countries that rely on food trade, exacerbating hunger and hurting food producers' income opportunities. To avoid such economic and human costs, it is critical that WTO members find a resolution to the current Appellate Body crisis.

CONCLUSION

It is easy to be pessimistic about the future trade agenda of the WTO given the current state of global trade relations and threats of trade wars. Protectionist pres-

asures have ebbed and flowed throughout history, however, and it is important to recall that within 4 years of passage of the Tariff Act of 1930 (more commonly known as the Smoot-Hawley Tariff Act), the U.S. Congress passed the Reciprocal Trade Agreements Act of 1934, which in part led to the development of the GATT and the long period of trade liberalization that has followed to the present.

The challenges of meeting future food needs will require a concerted effort from governments to improve the functioning of food and agricultural markets. The WTO can play an enormous role by reducing trade-distorting support, improving market access, ending distortions caused by export restrictions and subsidies, and perhaps most importantly, continue to provide a forum to which members can bring and hopefully resolve, trade disputes, rather than engaging in unilateral trade actions that can quickly escalate trade tensions. In the words of the Deputy Director General Alan Wolff, the WTO remains “a place of hope, for the least developed, for the vulnerable, for the conflict-affected, for the industrialized, for any country seeking economic advancement for its people, and that is a category that must include all.”⁴

QUESTIONS SUBMITTED FOR THE RECORD TO JOSEPH W. GLAUBER, PH.D.

QUESTION SUBMITTED BY HON. CHUCK GRASSLEY

Question. Your research has shown that WTO dispute settlement is very important for our farmers. One of the biggest problems we’ve faced is countries using junk science to keep our agricultural products out. The WTO included landmark disciplines on sanitary and phytosanitary measures, or SPS. The disciplines require these measures to be based on science.

Can you tell us about the value of the SPS agreement to our agricultural industry? Do you think there is room to improve that agreement?

Answer. The SPS agreement has provided a means by which WTO members can challenge another member’s sanitary and phytosanitary regulations if they believe those regulations are not science-based. In general, Since 1995, there have been 49 consultations brought to the WTO regarding the SPS agreement. The United States has brought 11 disputes involving the SPS agreement, over half of which were successfully resolved without going to a panel.

The SPS agreement needs to be modernized, ideally along the lines of what was agreed to in the TransPacific Partnership agreement and the USMCA. Those agreements reaffirm the importance of ensuring that sanitary and phytosanitary measures are based on scientific principals and that they are transparent. The agreements also provide for a consultative mechanism that serves to resolve disputes before reaching a stage where they result in a formal consultation in the WTO Dispute Settlement Body.

QUESTION SUBMITTED BY HON. JOHN CORNYN

Question. State-owned enterprises have emerged in the recent decade as a significant issue that threatens free and fair trade. It is a new concept for industrialized goods, but there are existing policies in place to address the issue of subsidies in places like the agriculture sector.

The U.S. has not yet defined SOEs in the context of domestic law. I believe this is something we should explore to help inform the committee during the WTO reform debate.

Can you discuss the issue of state subsidies leading up to the WTO’s initiation and what WTO restrictions are currently in place as a result?

Answer. For agriculture, SOEs have been more of a problem in the area of market access rather than domestic support. Agricultural producer subsidies are disciplined under the Agreement on Agriculture domestic support provisions. Those provisions have generally worked pretty well. Only a handful of agricultural subsidy cases have been taken to the Dispute Settlement Body. In 2016, The United States successfully challenged China’s domestic support measures for wheat and rice.

⁴ Wolff, A. Wm. 2020. “Trade for peace is more than a slogan, it is hope for a better future.” Speech given at a virtual event hosted by American University, July 17, 2020. Available at: https://www.wto.org/english/news_e/news20_e/ddgaw_17jul20_e.htm

For non-agricultural industrial subsidies, a lot could be learned by looking at the Agreement on Agriculture. Those disciplines were established based on research by the OECD and others that classified support measures as to whether or not they were production and trade distorting. Criteria were established for what constituted “minimally trade-distorting practices.” If measures did not meet those criteria, they were classified as trade-distorting and subject to discipline.

Market access has been a problem, particularly in the area of tariff rate quota (TRQ) administration when quota rights are allocated to SOEs. Such was the case in the recent WTO dispute brought by the United States against China over TRQ administration for wheat, corn, and rice. The WTO panel ruled in favor of the United States last year. Thus far, China TRQ fill rates for those commodities are above the pace of previous years and will likely be filled for wheat and corn.

QUESTIONS SUBMITTED BY HON. PATRICK J. TOOMEY

Question. So far, the U.S. has mainly relied on unilateral tariffs under section 301 to push for market-oriented reforms to the Chinese market, but these measures hurt Americans, while not having much effect on Chinese trade practices. But this is not the only way to try and encourage China to adopt reforms—the U.S. can also work with key allies and use the WTO rules to encourage China to adopt reforms.

While the WTO may need reform in some key areas, the fact remains that it has historically been very successful when dealing with China. Uncovering China’s WTO violations is challenging but it can be done, and the U.S. can use the WTO to hold China accountable, in particular in relation to the areas of intellectual property protection, forced technology transfer, and subsidies.

How can the U.S. better utilize the WTO dispute settlement system in addressing the challenges with China’s non-market trade policies?

For those areas of contention that are not well covered by WTO rules, such as state-owned enterprises, how can the United States work with our allies within the WTO to develop new rules?

What are the limits of the WTO in dealing with China, and how can the U.S. help facilitate reforms to strengthen it?

Answer. I believe it is necessary for the United States to work multilaterally through the WTO to achieve a solution to these problems. The United States should use the dispute settlement process and work with other members to bring a case against China’s business practices and their violations of intellectual property.

In the area of industrial subsidies, much can be learned by looking at the Agreement on Agriculture. Those disciplines were established based on research by the OECD and others that classified support measures as to whether or not they were production and trade distorting. Criteria were established for what constituted “minimally trade distorting practices.” If measures did not meet those criteria, they were classified as trade-distorting and subject to discipline.

Question. Maximizing the effectiveness of the WTO through American engagement and leadership is in the broad national interest as a means to provide greater economic stability and prosperity. Detractors say that the WTO system is “rigged,” but the fact remains that the United States has won 85.7 percent of the cases it has initiated before the WTO between 1995 and 2018. Almost 39 million jobs rely upon U.S. global trade, and foreign markets are critical to our agriculture, manufacturing, and service industries. Economists have found that the U.S. withdrawing from the WTO would lead to diminished trade growth, costly market and supply-chain disruptions, and the destruction of jobs and profits, especially in import- and export-dependent U.S. industries.

Can you speak to the projected effects of withdrawing from the WTO?

Do you believe that the resulting trade barriers from withdrawal from the WTO would compel some American companies either to downsize or move offshore?

Answer. I believe withdrawal from the United States would have devastating consequences for U.S. agriculture. While we enjoy preferential bilateral trade agreements with a number of important trading partners most of those reflect mature markets where income levels are high and population growth is flat or even declining. Many of the regions with the largest growth potential for U.S. trade over the next 20 years are in Asia, Africa, and South America. Pulling out of the WTO would

potentially adversely affect trade with those countries. Moreover, we would lose access to the WTO dispute settlement mechanism which provides a forum where trade disputes can be successfully adjudicated. Lastly, the United States needs to take a leadership role at the WTO to ensure that its direction in future trade negotiations reflect U.S. interests.

PREPARED STATEMENT OF THOMAS R. GRAHAM,
PARTNER, CASSIDY LEVY KENT

Chairman Grassley, Ranking Member Wyden, and members of the committee, thank you for the opportunity to testify today on WTO reform, which I believe must occur, and must be done well if the WTO is to continue playing an important role in international trade.

My name is Tom Graham. I was a member of the WTO Appellate Body for 8 years, from late 2011 until last December. I was twice chair of the Appellate Body, including during the final months of 2019, when the Appellate Body effectively came to an end. I am currently a partner in Cassidy Levy Kent, an international trade law firm in Washington and Ottawa.

I will speak mainly about the need for reform of WTO dispute settlement, which I know first-hand. In a nutshell, my view is: that the WTO Appellate Body has strayed far from the rules that U.S. negotiators helped to write—and that the Congress reviewed and approved—some 25 years ago; that for 20 years, spanning three administrations—Republican and Democratic—the United States has consistently called out the Appellate Body for exceeding its role, and asked for corrections; that some WTO members, including the European Union, have not acknowledged or engaged with the seriousness and bipartisanship of the U.S. critique; and that until they do, and until basic and dependable reforms are made, there should be no tinkering with words, no “restarting selections,” no “early harvest” of AB reform.

Why do I say that? The difference of views is long and deep, and it has intensified in recent years as a result of accelerating globalization and the rise of China as a leading exporter.

The Walker Convergence Principles, which we’ll probably discuss, can be a start, but only a start. They are the low-hanging fruit, dealing mostly with procedural matters, some in general terms. And they are just words, as are words of the WTO Dispute Settlement Understanding that arguably have been ignored or stretched, and words of Article 17.6(ii) of the Antidumping Agreement, which have been ignored.

What’s needed is a credible demonstration that our major trading partners understand the depth of the U.S. critique, accept that it is broadly and deeply held, and on that basis engage in negotiations aimed at updating the rules and reforming the Appellate Body.

What is also needed, I believe, is the for United States take a long view and not be in a hurry to resurrect the Appellate Body. That would only lead to papering over differences and reverting to the same problems. It is better to get it right, even if that means a long period of interim or ad hoc appellate arbitration systems.

Nobel Prize-winning economist Paul Romer said “a crisis is a terrible thing to waste.” Let’s not waste this opportunity to learn from the history of the Appellate Body, and to try to create something better, no matter how long that takes.

QUESTIONS SUBMITTED FOR THE RECORD TO THOMAS R. GRAHAM

QUESTIONS SUBMITTED BY HON. CHUCK GRASSLEY

Question. Your experience with the Appellate Body is fairly recent, having served until December of last year. One troubling thing I have heard over the years is that the WTO’s Secretariat exerted an unusual amount of control over Appellate Body members. Supposedly, it exerted a lot of pressure on members to avoid writing separate opinions or expressing disagreement. That’s really troubling if true.

The WTO is a member-driven organization. Members should be in the driver’s seat, not bureaucrats. Moreover, the Appellate Body members themselves go through a vetting process by members, and are supposed to have integrity and impartiality under the rules. There’s no such vetting for the Secretariat staff.

Do you agree that the Appellate Body's Secretariat was acting beyond its mandate, or contributing to the overreach in various decisions?

Answer. Yes, based on my 8 years as a member of the Appellate Body, I believe the AB Secretariat consistently acted beyond its proper role and contributed significantly to overreach and other problems, including rigid adherence to precedent, exceeding 90 days, long and unclear reports, and undermining national trade remedy laws.

The reasons are threefold.

First, the prevailing view among some past Appellate Body members and academics was that the AB was akin to a court of international law, authorized to interpret broadly and to create a body of international jurisprudence. The U.S. has consistently opposed that view arguing that the AB was intended only to help settle particular disputes by correcting serious errors of panels in applying the texts of the rules. I think the U.S. view is closer to the text of the WTO Dispute Settlement Understanding and the negotiating history.

Second, the long-time Director of the AB Secretariat held the broader view and advocated it frequently. He edited staff papers that were sent to AB members, and participated actively in meeting in which AB members decided cases, or wrote decisions.

Third, the structure of the Secretariat enabled over-stepping. The staff was a separate entity, headed by the Director, who edited staff papers that went to AB members, and wrote staff evaluations. In effect, that gave the Director, with the staff of about 15 lawyers, influence equal or sometimes greater than individual Appellate Body members, who, by contrast, were part-time, did not live in Geneva, and arrived shortly before work on cases began.

Efforts by a few AB members to change things were mostly not successful, for various reasons.

Question. What can we, the Congress, do to make sure Appellate Body members are sufficiently independent of the Secretariat?

Answer. First, accept that the current standoff on dispute-settlement is not about words or procedures—it is about the fundamental nature of the rules and dispute settlement.

Second, remember that the U.S. critique is longstanding, bipartisan, and legitimate.

Third, consider that the reluctance of major trading partners, including the European Union, to engage with the depth of the U.S. critique has been a primary reason for the U.S. blocking of appointments to the Appellate Body, and that the U.S. blocking is a reason that talk about dispute settlement reform is occurring.

Accordingly, oppose any early, or separate, fix of the Appellate Body. Instead, support the U.S. insistence on genuine engagement with the question of what the WTO appellate entity is, what it is supposed to do, and whether it is necessary. And support the U.S. position of not being in a hurry. The discussion of dispute settlement reform needs to occur alongside discussions of WTO reform, no matter how long that takes.

Fourth, if, in the future, as a result of reform discussions, there is to be a staff director for an appellate entity, confine the Staff Director's role to administration, and prohibit them from engaging in the substance of cases.

Fifth, if an appellate entity results from future reform discussions, structure it so that members of the appellate entity have their own staff assistant(s), either by permanent assignment, or by choice case-by-case from a pool of staff. That is important to combat the problem of "group-think," and encourage sharper views, clearer reports, and less reliance on precedent.

Question. The Appellate Body has received a lot of attention about its shortcomings. However, I'm not sure the panel process is completely perfect. The initial panel process takes much longer than anyone anticipated. Compliance panels have an important task of deciding disputes in which a party has already found they've breached their WTO obligations. The rules provide those panels should issue decisions in 90 days, but they almost never do.

Do you think we need to look at reforming the panel process?

Answer. Yes, there needs to be reform of the entire dispute settlement system, including panels, in order to address basic disagreements over what that system was intended to be. If there is to be an appellate entity, then basic, systemic reform of it also would improve the operation of panels. For example, de-emphasizing appellate precedents would simplify panels' analyses and reports. Narrower and more strictly textual appellate reports would reduce the incentive for WTO members to file speculative cases and attempts to get by litigation what they could not get by negotiation. Similarly, it would reduce the incentive for WTO litigants to make an excessive number of claims.

QUESTIONS SUBMITTED BY HON. JOHN CORNYN

Question. State-owned enterprises have emerged in the recent decade as a significant issue that threatens free and fair trade. It is a new concept for industrialized goods, but there are existing policies in place to address the issue of subsidies in places like the agriculture sector.

The U.S. has not yet defined SOEs in the context of domestic law. I believe this is something we should explore to help inform the committee during the WTO reform debate.

What can be done to rein in the practice of SOEs at the WTO's Appellate Body? How has the Appellate Body interpreted policies related to state-subsidies since the WTO's creation?

Answer. I would like to start with the second part of your second question: How has the Appellate Body interpreted policies related to state-subsidies since the WTO's creation?

The answer to this question is telling and bears on broader reform.

The WTO rules do not use the term "state-owned enterprises," or "SOEs." Instead, countervailable SOEs are included in the term "public bodies": governments may impose countervailing duties on subsidies conferred by "a government or public body." "Public body" *should be* a valuable concept—because it is broader than "state-owned enterprise," extending to any entity that confers a benefit on behalf, or at the behest, of a government, regardless of the degree of government ownership.

But the Appellate Body went seriously wrong on this subject. Its first decision required a public body to "exercise, possess, or [be] vested with government authority," leading many to wonder whether, for example, China could not be held accountable for subsidies conveyed through Chinese companies unless those companies wrote regulations and operated like, say, Amtrack.

That led to WTO litigators making broad claims about what constituted exercising, possessing, or being vested with government authority, in efforts to make reality fit the rigid standard. In later cases the AB played along, adding many other criteria, such as "the legal and economic environment prevailing in the country," while keeping the "exercises . . . government authority" criterion, thus adding layers to the confusion.

Finally, the United States expressly asked the AB to clarify the standard in an appeal by China challenging the Commerce Department's assessment of countervailing duties against Chinese imports, for benefits conferred by a Chinese "public body." And in a 2–1 decision, the majority of AB members hearing the case considered clarification unnecessary and declined to amend the existing standard.

In an anonymous dissent, one AB member called the original "exercises . . . government authority" standard "a mistake . . . that has sown confusion as participants and the Appellate Body have struggled to show how situational criteria fit with a rigid and limiting phrase." The dissenter said it is not necessary to show that a public body "exercises, possesses, or is vested with government authority," and asked that future panels and AB members consider this proposed standard in comparison with, or instead of, the previous standard. The report containing these two views of the "public body" standard, identified as "DS 437 Compliance," was released July 26, 2019, and is publicly available.

Second part of question: What can be done to rein in the practice of SOEs at the WTO's Appellate Body?

First, make sure that the “precedent” described above, and all other past precedents, are nullified and that any reformed dispute settlement system starts over with a clean slate.

Second, obtain from the WTO General Council an interpretation of “public body” that omits the “exercises, possesses, or vested with” criterion and that leaves considerable discretion to national investigating authorities to determine on a case-by-case basis whether an entity is a “public body,” provided the determination results from an opportunity for differing views to be heard, and is supported by evidence and explained.

Third, in broader WTO reform, carve out trade remedies (investigations of dumping or subsidization, and “safeguards” meaning sudden injurious increases in imports) for separate procedures. And require that the adjudicators in those separate procedures have significant familiarity with the subject of trade remedies, beyond academic familiarity.

It may not be necessary to change the WTO rules on this subject, which are clear enough if correctly interpreted and applied.

QUESTIONS SUBMITTED BY HON. PATRICK J. TOOMEY

Question. So far, the U.S. has mainly relied on unilateral tariffs under section 301 to push for market-oriented reforms to the Chinese market, but these measures hurt Americans, while not having much effect on Chinese trade practices. But this is not the only way to try and encourage China to adopt reforms—the U.S. can also work with key allies and use the WTO rules to encourage China to adopt reforms.

While the WTO may need reform in some key areas, the fact remains that it has historically been very successful when dealing with China. Uncovering China’s WTO violations is challenging but it can be done, and the U.S. can use the WTO to hold China accountable, in particular in relation to the areas of intellectual property protection, forced technology transfer, and subsidies.

How can the U.S. better utilize the WTO dispute settlement system in addressing the challenges with China’s non-market trade policies?

For those areas of contention that are not well covered by WTO rules, such as state-owned enterprises, how can the United States work with our allies within the WTO to develop new rules?

What are the limits of the WTO in dealing with China, and how can the U.S. help facilitate reforms to strengthen it?

Answer. Overall, the U.S. should be explicit about the fact that non-market economies, such as China, are a difficult fit in the GATT/WTO system, which was designed as a framework for market competition.

Question. How can the U.S. better utilize the WTO dispute settlement system in addressing the challenges with China’s non-market trade policies?

Answer. A series of Appellate Body decisions—on Chinese pricing, “public bodies,” and U.S. conduct of verification audits in unfair trade cases—hinder investigations of Chinese imports by the U.S. Commerce Department and authorities in other market economy countries.

At a minimum, nullify the status of those cases as precedents.

Beyond that, I do not think it will be possible to address adequately the competitive challenges of China within the WTO dispute settlement system unless and until the WTO dispute settlement system is thoroughly reformed, together with reforms of the WTO itself.

Question. For those areas of contention that are not well covered by WTO rules, such as state-owned enterprises, how can the United States work with our allies within the WTO to develop new rules?

Answer. The rules on state-owned enterprises may be sufficient if they are applied and adjudicated correctly. The problem is that the AB has interpreted those rules in ways that have reduced their effectiveness. The existing rules permit the national authorities to hold SOEs responsible for countervailable subsidies; they permit national authorities to disregard distorted Chinese home market prices in calculating dumping or subsidization; and they permit national authorities to ask hard ques-

tions and conduct probing audits of information provided by exporters from non-market economies.

Nullification of the precedential value of the AB decisions weakening those rules would be a start.

I also said, in response to a question by Senator Cornyn, that the WTO General Council might use its power to make authoritative interpretations of the rules. Where necessary, in addition to nullifying harmful AB precedents, the U.S. could seek to join with allies to secure General Council interpretations making clear the intended operation of the trade remedy rules as they apply to competition from non-market economies. And, if and when basic reform negotiations occur, the U.S. should enlist others to address the problem of non-market economies through clarifications of the rules, if necessary.

Question. How can the U.S. better utilize the WTO dispute settlement system in addressing the challenges with China's non-market trade policies?

Answer. This goes to the heart of what is at stake in WTO reform.

Over 15-plus years and three administrations—Republican and Democratic—the United States has been consistent and bipartisan in its critique of the Appellate Body. That critique, in essence, is that AB exceeded the modest role that was intended for it and written into the WTO Dispute Settlement Understanding, and assumed for itself the role of a court of international law, and that, in doing so, the AB weakened trade remedy measures in ways not intended by WTO negotiators.

Whether one agrees with it or not, the U.S. critique is respectable as a matter of text, logic, and negotiating history. Former (non-U.S.) negotiators of WTO trade remedies agreements have been outspoken in expressing views similar to those of the U.S.¹ Some WTO-member government representatives and many knowledgeable persons within the WTO building have quietly agreed with much of the U.S. critique. But others, including the European Union, many academics, and leadership of the AB Secretariat, have dismissed and disregarded the U.S. critique, apparently content with the AB as a more broadly empowered international court.

These differences have become more acute with the rise of competition from China and others with varying degrees of non-market policies.

In my view, the United States should not engage in negotiations about reform—of the dispute settlement system or the WTO—until our counterparts are credibly willing to show understanding of the depth of the U.S. critique and to engage with it.

And that engagement/negotiation should cover both WTO and dispute settlement reform, without considering dispute settlement reform to be an easier matter that can be resolved earlier. An agreement that did not to come to grips with basic differences would risk only papering over differences that would soon reemerge.

Question. One area of concern that many have with the WTO is the current treatment of “developing country status,” or “special and differential treatment.” SDT was meant to help the poorest WTO members meet their obligations to the fullest extent possible, and gives “developing” countries more time to implement obligations, preferential tariff schemes, and technical support from “developed” countries. However, nowhere in the WTO rules does it define what a “developing country” is, and as a result, members practice self-declaration, whereby they alone decide their development status.

Thus, we are seeing that rapidly growing countries with significant global reach lay claim to these special rights, due to members' ability to “self-declare” their developing country status. This has led to a situation where more-advanced countries receive similar treatment to those that are much poorer, undermining the initial rationale for SDT to help those countries in most need with the transition to full compliance. Except for least-developed countries, SDT also does not differentiate between levels of development *among* developing countries, and as a result, the poorest countries are made worse off, while those that are economically better off receive a “free ride” from the rest of the multilateral trading system.

Do you agree that the WTO should work to adopt a new evidence-based, case-by-case approach to SDT to ensure both that the concerns of the poorest countries are

¹See Cartland, DePayre, Woznowski, “Is Something Going Wrong in WTO Dispute Settlement?”, Vol. 46 *Journal of World Trade Law* (2012).

addressed and that advanced developing countries carry their weight in the organization?

Answer. Yes, I think the issue of SDT status is current and important. I agree that the WTO should work to adopt objective criteria that would enable members governments to decide on a case-by-case basis, in a way that respected the concerns of the least developed members, and differentiated those members from newly developed, or perhaps advanced developing members.

This would be an appropriate subject for WTO reform negotiations.

I also consider that until there are such criteria, the U.S. (and others) should be willing, where appropriate, to “graduate” WTO members from special and differential treatment. Such actions, if challenged, could usefully be tested in a reformed dispute settlement process.

Question. Advocates of reforming the SDT have suggested looking at factors ranging from a country’s economic measures (like economic production or per-capita income), social measures (human development index), or trade indicators (export levels, high-technology trade) to define whether it is “developed.” How can we best define “developing country”?

Answer. I don’t claim any special knowledge of how these criteria and other factors should be used, but I’ll say what I can.

As you noted in your previous question, there are differing levels of “developing countries.” It would seem feasible to apply some combination of the criteria you mentioned to identify the “least developed” category. From there it gets more complicated. Can a country be developed in some ways, and not in others, considering the mobility of production and technology? When does a developing country graduate?

This may get back to your previous question: should there be objective, evidence-based criteria, both for initial designation as “developing,” and for graduation from developing status? Having such criteria may be a way to deal with the current problem of self-designation without a clear way for others to disagree. Also, see my suggestion that, in the absence of objective criteria, the U.S. (and others), in appropriate circumstances, consider unilaterally regarding some countries as developed, leaving it to a reformed dispute settlement system to decide.

Question. Maximizing the effectiveness of the WTO through American engagement and leadership is in the broad national interest as a means to provide greater economic stability and prosperity. Detractors say that the WTO system is “rigged,” but the fact remains that the United States has won 85.7 percent of the cases it has initiated before the WTO between 1995 and 2018. Almost 39 million jobs rely upon U.S. global trade, and foreign markets are critical to our agriculture, manufacturing, and service industries. Economists have found that the U.S. withdrawing from the WTO would lead to diminished trade growth, costly market and supply-chain disruptions, and the destruction of jobs and profits, especially in import- and export-dependent U.S. industries.

Can you speak to the projected effects of withdrawing from the WTO?

Answer. First, I don’t think the U.S. should withdraw from the WTO. I also disagree with those who believe that Ambassador Lighthizer’s goal is to withdraw from the WTO.

Instead, I think the U.S. has been determined to force other WTO members to engage with deep reform of WTO dispute settlement, and was willing to bring the Appellate Body to a halt absent that engagement. That is not the same as intending to leave the WTO.

The effects of withdrawing from the WTO—without any substitute—might be similar to what you suggest. But would there be no substitute? Might there be a large plurilateral agreement among market economies, if most members of the current WTO could agree on reforms taking into account non-market competition, and some non-market economy members could not? (That idea was floated publicly recently by a highly respected former EU trade official.)

In short, I don’t think the U.S. is going to withdraw from the WTO. But if it did, we shouldn’t assume that nothing would take its place.

Question. Do you believe that the resulting trade barriers from withdrawal from the WTO would compel some American companies either to downsize or move offshore?

Answer. There would possibly be a period of business and trade chaos, unless a “substitute” were quickly put into place. That could have the effects on American companies that you describe. But I don’t think the U.S. is going to withdraw from the WTO.

QUESTIONS SUBMITTED BY HON. MARIA CANTWELL

Question. The Boeing-Airbus cases at the World Trade Organization took 16 years.

The WTO found that Europe provided illegal subsidies for the development of the A350 and the A380. Even after the cases ended, there are still concerns Europe is providing subsidies to commercial aircraft.

As a result of these cases, the WTO authorized and the U.S. imposed tariffs on a range of European products from whiskey to European aircraft. Europe is preparing to impose tariffs on U.S. products as a result of its case.

Recently, Airbus agreed to pay higher interest rates on the government loans it received to develop the A350. However, it remains to be seen if the dispute will now be considered settled or rounds of tariffs will be imposed.

Clearly we must make sure that the Appellate Body is fully functional and has a quorum. But why does the WTO dispute process take such a long time? What reforms are needed to get disputes resolved more quickly? How can the WTO develop an expedited process?

Answer. I think all parts of your first question—restarting the appellate process, why disputes take so long, reforms to speed it up, and how to develop an expedited process—are interrelated. So, I will try to respond to them together.

In my view, WTO members need to agree on basic reforms if an appellate entity is to be recreated, and if they cannot agree, and it can’t be recreated, that would not be a disaster. Other, simpler forms of dispute settlement could take its place. To restart the Appellate Body, as it was, too quickly, without dealing with its basic problems, would only lead to the same flaws that caused its demise.

And that leads to your questions about lengthy disputes and expediting the process. The WTO Dispute Settlement Agreement says the following, with respect to the timing of panel reports, in Article 8, paragraphs 8 and 9:

. . . the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, *shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months. . . . In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.* (emphasis added)

And with respect to Appellate Body reports, Article 17.5 of the DSU says:

As a general rule, the proceedings *shall not exceed 60 days* from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. . . . *In no case shall the proceedings exceed 90 days.* (emphasis added)

These are stated as hard deadlines, with no qualifications. There is a reason the deadlines are short: they signify the limited nature of review and reports that are expected; that is, precise issues answered crisply.

My view is that disputes take so long because panels and the Appellate Body have allowed them to do so, tolerating broader disputes, more numerous issues, and longer submissions than were foreseen when the WTO was created.

It is often said that the deadline for AB reports is 90 days. In fact, as the text above shows, the DSU calls for appellate reports to be issued in *60 days*, and “in no case” more than 90 days. It is hard to miss the relevance of these deadlines to the nature of appellate review that was intended by the negotiators.

To summarize: reforming the dispute settlement process to return it to the limited role that is expressed in the DSU would itself result in faster, more concise decisions.

Question. What reforms are needed to ensure that countries comply with final WTO rulings and end prohibited trade practices? What tools can countries use to get countries to come into compliance with WTO decisions and negotiate solutions?

How should we be working with our allies and like-minded countries to seek these reforms?

Answer. Overall, the record of compliance with final WTO rulings has been good. More recently, compliance is becoming more questionable.

Legitimacy, in the form of respect for WTO dispute settlement decisions, is an important factor in securing compliance. Currently, that respect is being eroded by deep differences among WTO members about what the dispute settlement system is supposed to be: a limited means of resolving disputes according to the texts of agreements, or a broader court for creating a body of international law precedents. I believe negotiations that recognize, address, and deal with those differences will be needed in order to restore the legitimacy that helps to ensure compliance.

And I believe we should continue to press our allies to acknowledge the deep differences, and to engage in those negotiations.

PREPARED STATEMENT OF HON. CHUCK GRASSLEY,
A U.S. SENATOR FROM IOWA

Good morning. The committee will come to order. I want to welcome our witnesses. Today, we're fortunate to have some very smart people who can provide insights on making an important institution—the World Trade Organization, or WTO—work again.

When the WTO works right, Americans benefit—plain and simple. For example, Americans are leaders in innovation and creativity. WTO rules allow us to reap the rewards of that leadership. When India refused to provide patent protection for American pharmaceutical and agricultural chemical products, we took them to the WTO—and won. You often hear about how important the “global box office” is for Hollywood. It's become lucrative because the WTO requires our trading partners to provide copyright protection and market access for U.S. films.

Likewise, the WTO is very important for our farmers, who are the most efficient and productive in the world. If you watch my Cornwatch feed on Instagram, you'll know that, thanks to technology, corn grown today is shoulder-high by July 4th, rather than knee-high when I was a kid. If you're not watching Cornwatch, you need to. Unable to compete though, some countries try to ban our farm products by falsely claiming they are dangerous. The WTO marked the first time we had global rules that took on this form of protectionism by requiring food safety measures be based on science.

The WTO also ensures that our industrial companies have access to key resources. When China tried to use its control of rare earth minerals to pressure its neighbors, the WTO is where we joined with the EU and Japan to take on China's bullying. Facing WTO retaliation, China lifted its export restraints.

The WTO has also helped our broader foreign policy goals. Opening economies means more open societies. One story that needs more attention is how trade has led to more opportunities for women. I'm glad that WTO members recognized at the last WTO ministerial to issue a “Declaration on Trade and Women's Economic Empowerment.” The WTO needs to stay on top of that important issue.

These are important successes. But we can't live in the past. From 1947 to 1994, we had eight rounds of multilateral trade negotiations. That's a major global trade deal every 6 years on average. The WTO is now 25 years old, but we have yet to see any major outcomes for liberalizing trade.

The President has said we need dramatic change at the WTO. He's emphasized to me that other countries' tariffs and barriers are too high. He's right. No one expected the Uruguay Round to be the last global trading round. Over the last 2 decades, countries like China and India got a lot richer, but they've refused to take on any more responsibilities. In fact, they claim they are entitled to special treatment in any future negotiations because they are developing countries. The notion that China and India should get the same consideration as a country like Cameroon is ridiculous. So I applaud the President for taking on this imbalance and pushing to make the WTO relevant.

Today, I want to have a thoughtful discussion about getting the WTO back on track. To me, that means a couple of things.

First, the WTO needs to be an effective forum for negotiating agreements again. That means not only concluding the fisheries negotiations but also new agreements, including an ambitious agreement on e-commerce. When Congress ratified the WTO agreements, there was no digital economy. Today, it accounts for nearly \$2 trillion of the U.S. economy. Again, this is an area of U.S. leadership where we need rules to make sure we get a fair shake from our trading partners.

Second, we have to fix dispute settlement. I absolutely believe that we need enforceable rules. It's much better to solve our trade disputes over legal briefs than through tariffs. However, WTO dispute settlement has been breaking down for years. Fifteen years ago, I warned at a hearing like this one that the WTO Appellate Body wasn't enforcing rules, it was legislating new ones. I don't like that history proved me right.

The WTO's Appellate Body ignored clearly written rules like finishing cases in 90 days. Cases that should have taken months dragged on for years, frustrating our ability to get timely relief. At the same time, the Appellate Body started writing new rules that impinged on U.S. sovereignty. For example, the Appellate Body has made it harder to use labeling to keep our consumers informed about the country of origin of their meat, or whether their tuna was harvested without hurting dolphins. Of particular concern, the Appellate Body has also made it much harder to use trade remedy measures at a time we need them more than ever to confront China's state capitalism.

I appreciate that what I am seeking is hard: getting 164 countries to agree to a freer and fairer trading system. But I don't appreciate embracing protectionism as the alternative, because it can be extremely harmful in the long run. From 1929 to 1933, governments around the world raised barriers to trade—including our own, with the disastrous Smoot-Hawley tariff. Two-thirds of world trade was wiped out, and the Great Depression became much worse. World War II followed.

We cannot repeat those mistakes. We're going to continue to do what we have been doing since winning World War II: lead. U.S. leadership will require Congress to step up and fulfill our constitutional role in setting trade policy. Just as Congress set the objectives for negotiating the WTO agreements and approving those agreements, we are working now to secure an ambitious reform agenda that will make this institution fit for global challenges. That's why I am glad members are considering and debating solutions, including Senators Portman and Cardin, who have introduced a resolution that has concrete proposals to reform the WTO. It has never been more important than it is today to ensure the WTO is equipped to take on the global challenges we face collectively today.

PREPARED STATEMENT OF JENNIFER A. HILLMAN, SENIOR FELLOW FOR TRADE AND INTERNATIONAL POLITICAL ECONOMY, COUNCIL ON FOREIGN RELATIONS; AND PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

THE UNITED STATES NEEDS A REFORMED WTO NOW

The World Trade Organization (WTO) and with it the rules-based trading system is in deep trouble. In December 2020, the United States' blockage of appointments to fill vacancies on the WTO's Appellate Body left it without a quorum to decide any new cases, opening the door to countries avoiding compliance with rulings they do not like or find difficult to implement. Despite multiple calls for swift action, the WTO has not been able to reach an agreement to curb fishery subsidies that are contributing to depleting the world's supply of fish, or to write rules of the road for e-commerce and digital trade. Nor has the WTO been able to adopt new rules to address growing concerns over China's unfair trade practices ranging from intellectual property theft to forcing transfers of technology, or to extensive use of subsidies and state-owned enterprises (SOEs) in an economy increasingly dominated by the Chinese Communist Party. Also left undone are reforms to the operations of the WTO itself.

Many of these problems were slated, perhaps optimistically, for resolution at its bi-annual ministerial meeting that was to have taken place in June 2020 in Kazakhstan but has been indefinitely postponed in the wake of the coronavirus pandemic. On May 14th, the Director General of WTO, Roberto Azevêdo, announced he would be leaving his post prematurely at the end August 2020, leaving the WTO

with the additional task of quickly selecting a new leader. As one of the candidates to fill DG Azevêdo's shoes, Dr. Ngozi Okonjo-Iweala, put it, "Many people regard [the WTO] as an ineffective policeman of an outdated rulebook that is unsuited for the challenges of the 21st-century global economy."¹

Yet now is the time when the United States and the world need the WTO more than ever. As the coronavirus wreaks havoc on the economies of virtually every country in the world, placing great strains on supply chains and raising doubts about whether countries can rely on their trading partners when they need them most, the global community must count on the system working as it should. Moreover, when a vaccine or treatment drugs for the coronavirus are developed, the lessons WTO members learned from the failures to efficiently and effectively distribute HIV/AIDS drugs 3 decades ago will be important reminders of the essential need for cooperation and use of WTO rules to ensure a quick and fair distribution of COVID-19 vaccines and medicines. With all of the uncertainty created by the coronavirus, the stability and predictability of the basic trading rules provided by the WTO are a critical port in the storm.

1. WTO Reform Needs to Restore Balance to the System, Starting With its Dispute Settlement System

At its core, the WTO has three main pillars: (1) a negotiating pillar allowing the WTO to serve as the forum for the creation of new trade rules and trade liberalization accords applicable to its 164 members; (2) an executive function, with the WTO serving as a central clearinghouse for tariff schedules, services commitments, non-tariff measures and subsidy notifications, along with supporting the important work of WTO committees; and (3) a dispute settlement arm designed to resolve disagreements over whether countries have lived up to their trade commitments. The collective work of the three has allowed the WTO to deliver on its promises of creating a rules-based global trading system with broadly declining barriers to trade in goods and services, while its dispute settlement system has held members accountable to follow those rules. This system has contributed immensely to global economic growth over the last 7 decades, improving living standards for billions of people. The eight rounds of trade negotiations since the WTO's precursor, the General Agreement on Tariffs and Trade (GATT) came into being have helped increase global trade more than 40-fold, from \$58 billion in 1948 to more than \$20 trillion today. Moreover, rules-based global trade has helped underpin peace and security, because trading partners are more likely to resolve differences through negotiations than through armed conflict.

But the system is now badly out of balance, as the negotiating process has broken down, unable to reach any major agreements other than the Trade Facilitation Agreement since the WTO was created in 1995. The executive function has been hampered by the failure of many countries to provide timely notifications of their measures and by its limited power in WTO's member-driven system. The dispute settlement system, until its Appellate Body was upended in December 2020, was perceived to be very strong—with nearly 600 requests for consultations to resolve differences filed to date and countries throughout the world choosing to resolve their disputes at the WTO rather than through free-trade agreement or bilateral dispute settlement mechanisms. But that strength has contributed to the lack of balance in the system, with USTR's Ambassador Lighthizer noting "the WTO is losing its essential focus on negotiation and becoming a litigation-centered organization. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table."²

The need and the desire for WTO reform is now well documented.³ But I believe the reform of the WTO needs to start with getting its dispute settlement system back on track. Why? Because the absence of a binding dispute settlement system means: (a) countries will be less willing to make new commitments, including commitments to reform other aspects of the WTO, if they do not believe there is a func-

¹"Reviving the WTO," by Ngozi Okonjo-Iweala, Project Syndicate; June 22, 2020, <https://www.project-syndicate.org/commentary/reviving-the-world-trade-organization-by-ngozi-okonjo-iweala-2020-06?barrier=accesspaylog>.

²<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr>.

³"We reaffirm our support for the necessary reform of the World Trade Organization (WTO) to improve its functions." G20 Leaders Declaration, G20 Summit, Osaka Japan, June 29, 2019; H. Res. 746, a Resolution to Support and Reform the World Trade Organization (WTO); S. Res. 651 (Portman-Cardin), Sense of Senate finding value and usefulness in WTO, but noting significant reforms at the WTO are needed.

tioning dispute settlement system holding countries to those commitments; (b) countries take their existing obligations less seriously if there is no serious mechanism for enforcing them; (c) the United States and like-minded members of the WTO lose considerable leverage over China given the need for a multilateral approach to achieve structural and systemic changes in China; (d) protectionism will continue to grow without a strong system to hold it in check; (e) the growing rift with the European Union over digital trade-related issues such as data privacy, digital services taxes, cross-border data flows, and competition/antitrust disciplines on large high-tech companies will be harder to resolve; and (f) a negative impression of the functionality of WTO prevails, creating a drag on momentum for a broader reform agenda.

II. The United States Has Gained Far More Than it Has Lost From the WTO and its Dispute Settlement System

When the WTO was created in 1995, a top goal for the United States was a binding dispute settlement system to replace the previous GATT process, which could be easily circumvented, thereby allowing countries to dodge their trade commitments. What was created in its stead was a two-stage process to determine whether a country has violated the rules or otherwise undermined the bargain between countries. At the first stage, an ad-hoc panel assesses the facts and applicable WTO rules to determine whether a violation has occurred. The parties can then request that the panel's determination be reviewed by the Appellate Body, which has the power to either uphold or overturn the decision. The Appellate Body is composed of seven people, with a minimum of three required to rule on an appeal. Each member serves a 4-year term and can be reappointed once. The members serve on a part-time basis and are aided in their work by an increasingly powerful staff of full-time lawyers in its Secretariat.

The United States was the strongest proponent of creating an Appellate Body. Since the WTO rules provide for a nearly automatic adoption of panel reports, the United States sought a process to overturn any erroneous panel decisions before they became binding obligations. While appeals were expected to be rare and limited to narrow questions of law, access to the Appellate Body was considered essential both to ensure that countries could challenge decisions by ad hoc panels that they believed were wrongly made and to bring a measure of consistency across disputes over similar legal texts.

The WTO dispute settlement system succeeded initially. An increasing number of WTO members used it. Compliance with its decisions, while not perfect, was considered good. For its part, the United States filed more complaints than any other country, prevailing in 91 percent of these cases. However, the expectations that appeals would be rare and narrow proved to be wrong. Nearly 70 percent of panel reports have been appealed and the average appeal can raise a dozen or more claims, many of them going far beyond narrow legal questions.

More than a decade ago, the U.S. began raising concerns that extended far beyond dashed expectations to cover a range a both procedural and substantive concerns. In February 2020, the Trump administration released a report cataloguing them in significant detail. But there are two major flaws with that report. First, it ignores the more than 100 hundred cases the United States won, providing greater market access for American exporters. Second, it provides no ideas or plan to fix the problems it carefully spells out.⁴

The U.S. wins from the WTO dispute settlement system have been considerable and must be kept in mind when assessing the United States' decision to strike down the Appellate Body. These victories for U.S. exporters are set forth in Annex A to this statement and include:

- In 1999, the United States challenged certain Indian restrictions on imports of auto parts. The panel determined, among other things, that India's measures illegally created a disincentive to import certain auto parts in favor of Indian products. U.S. exports of auto parts to India when the case was filed were \$840,000; their 2019 total is \$21.9 million. (DS175)
- In 2002, the United States challenged two restrictions on the sale and transport of wheat in Canada. A WTO panel found that Canada's laws gave an unfair advantage to Canadian versus American wheat. In 2005, Canada amend-

⁴United States Trade Representative, "Report on the Appellate Body of the World Trade Organization." February 2020, https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf.

ed its rules to comply with the WTO ruling. U.S. exports of grain and wheat to Canada rose from \$3.57 million when the case was filed to \$41.5 million in 2019. (DS 276)

- In 2003, the United States challenged Mexico's decision to impose anti-dumping duties on U.S. long-grain rice and beef. The panel found that Mexico's anti-dumping measures violated the requirements of the WTO's Agreement on Anti-Dumping. U.S. exports at the time the case was filed were \$13 million (long-grain rice) and \$581 million (beef). After compliance with the ruling, U.S. exports rose in 2019 to \$36.3 million (long-grain rice) and \$744 million (beef). (DS 295)
- In 2006, the United States successfully challenged China's tariffs on U.S. auto parts, contending that China's 25-percent tariffs on finished autos was being illegally applied to auto parts, for which China's tariff was 10 percent. U.S. exports of auto parts to China when the case was filed totaled \$532 million; in 2019 they had risen to \$1.52 billion. (DS 342)
- In 2007, the United States challenged India's imposition of additional duties on, among other items, wine and distilled spirits. The Appellate Body found that the additional duties were in excess of India's commitments and must be removed. U.S. exports of wine and distilled spirits to India were \$2.5 million in 2007; in 2019, they had risen to \$7.5 million. (DS 360)
- In 2010, the United States challenged Philippine taxes on distilled spirits, which were found to discriminate against imported spirits. U.S. exports were \$16.3 million in 2010 but have risen in 2019 to \$108.2 million. (DS 403)
- In 2016, the United States challenged China's administration of tariff-rate quotas (TRQs) on wheat, rice, and corn. The Panel ruled that China's TRQs did not meet the WTO requirements of transparency, predictability and fairness and that China's practice inhibited the TRQs from being fully utilized. While it is too early to know the exact trade effects of the ruling. USDA estimates that if China's TRQs had been fully used, it would have imported as much as \$3.5 billion in corn, wheat and rice in 2015 alone. (DS 517)

III. The United States Should Seek to Reform Rather Than Destroy the Appellate Body

Ever since May 2017 when the United States began blocking any process to appoint new members to the Appellate Body, our trading partners have been asking the question: is the U.S. goal to reform the Appellate Body or to destroy it? With his testimony to the Ways and Means Committee on June 17th, Ambassador Lighthizer gave the answer: for the Trump administration, the goal is to kill the Appellate Body.⁵ I do not believe that decision is in the United States' interest or that it is a decision that should be left entirely to the U.S. Trade Representative to make, particularly given the clear expressions of support for a reformed Appellate Body from members of Congress.⁶

First, I believe that the United States won more than it lost from having a binding dispute settlement system and that the concerns that the United States has with the Appellate Body can be fixed. This view is shared by a wide variety of those in the business and agriculture communities in the United States and by our trading partners. Attached as Annex B to this testimony are letters and statements from some of those constituencies expressing support for a reformed Appellate Body.

Second, failure to come forward with any plan to fix the system risks squandering the leverage created by paralyzing the Appellate Body. The United States has now garnered the attention of the world. An entire process, led by New Zealand's Ambassador and Permanent Representative to the WTO, David Walker, was created at the WTO to address U.S. concerns. Numerous outside groups, including, for example, the Ottawa Group, led by Canada and made up of 12 other WTO members, such as the EU, Australia, Brazil, Japan, Mexico, Korea and others, have met regularly to devise Appellate Body reforms. So far, the United States has not been willing to indicate what reforms, if any, would be acceptable and Ambassador Lighthizer's recent testimony suggests that none would be. American refusal to engage in the process risks branding the United States' concerns as illegitimate and an attempt to destroy not just the Appellate Body, but the WTO itself. Moreover, perceived United

⁵ Inside U.S. Trade, June 17, 2020. USTR: If WTO Appellate Body never comes back, "that would be fine." Ambassador Lighthizer: "I don't feel any compulsion to have [the Appellate Body] ever come back into effect." See also, <https://waysandmeans.house.gov/legislation/hearings/2020-trade-policy-agenda>, AB remarks at 2:28:40–2:30:40.

⁶ H. Res. 746, Resolution to Support and Reform the World Trade Organization (WTO); S. Res. 651 (Portman-Cardin), Sense of Senate.

States intransigence on Appellate Body reform makes it less likely that its proposals in others areas, including its plan to create specific criteria for countries to qualify as “developing” in order to be eligible for special and differential treatment⁷ or its proposal to put teeth into the reporting requirements for subsidies and other notifications,⁸ will receive the attention they deserve given the lack of trust created by the U.S. approach to the Appellate Body.

Third, destroying the Appellate Body presumes that the United States will fare better in a system based on power and a willingness to retaliate rather than a rules-based system. For me, this is a dangerous road to travel. It is premised on a belief that the United States will always come out ahead because it can impose unilateral tariffs on countries that do not comply with adverse rulings but presumes other countries will not do the same to the United States. Yet we have seen a wide range of countries retaliate against the United States’ unilateral tariffs on steel and aluminum, while China has not hesitated to apply tit-for-tat tariffs to American exports in response to our section 301 duties. Most recently, China has taken a page from the American book in applying a non-market economy methodology for calculating anti-dumping duties to U.S. exports of n-propanol in light of what China claims are substantial subsidies to U.S. oil, gas and coal industries and overall non-market conditions in the U.S. energy and petrochemical sectors.⁹ If the United States blocks the adoption of panel reports that it does not wish to comply with, other countries are likely to do the same when it is the United States that has prevailed.¹⁰

Finally, failure to engage in the debate to reform the Appellate Body cedes American leadership to others. Already, the rest of the world is moving ahead without the United States in the area of dispute settlement. Twenty-two countries, led by the European Union, have agreed to use an arbitration process for conducting appeals.¹¹ This Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is based on the premise that “a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trade system” and that “an independent and impartial appeal stage must continue to be one of its essential features.”¹² It is quite likely that from the MPIA will emerge new approaches to handling appeals, but the United States will not have been a part of that process and will have no ability to shape its direction. In other areas of WTO reform, the perception that the United States is not genuinely interested in finding solutions and that it may well treat other issues as it has treated the Appellate Body—ultimately taking the view that there is no reform that would be satisfactory—will allow other WTO members, including China, to seek the leadership spot historically occupied by the United States. A loss of perceived leadership could be damaging to U.S. efforts to reach an agreement on new rules for e-commerce or new disciplines on fishery subsidies or a new set of rules to address the disruption caused by China’s increasingly Communist Party-dominated, non-market economy.

IV. A Fix for the Appellate Body Is Achievable if We Act Now

The unwillingness of the United States to engage in negotiations to fix the Appellate Body frustrates many because the problems raised are ones that can be addressed. A solution that improves the efficiency of the Appellate Body and responds to U.S. concerns involves adopting a specific set of operating principles, establishing a new oversight committee to ensure adherence to those principles, and placing term limits on the legal staff to bring in fresh thinking and a better distribution of power between adjudicators and staff.

Adopt an amended version of the Walker principles. New Zealand’s Ambassador and Permanent Representative to the WTO David Walker was appointed in February 2019 to “seek workable and agreeable solutions to improve the functioning of

⁷ WT/GC/W.764/Rev. 1, November 25, 2019.

⁸ JOB/GC/204/Rev. 2, June 27, 2019.

⁹ <https://ielp.worldtradelaw.net/2020/07/the-us-is-now-a-non-market-economy-anti-dumping-ruling-by-china.html>.

¹⁰ Already, the United States has blocked the adoption of a panel report (DS436, U.S.-Carbon Steel India) by filing a notice of appeal. Under the WTO’s Understanding on Dispute Settlement, no action can be taken with respect to an appeal that is pending (DSU Article 16.4). In the absence of a quorum of Appellate Body members, an appeal will pend indefinitely. The U.S. has also indicated that it would not comply with another decision (DS505 U.S.-Supercalendared Paper) because it was issued by Appellate Body members whose terms had expired before the completion of the report.

¹¹ The 22 countries are Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Hong Kong, Iceland, Mexico, Nicaragua, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, and Uruguay.

¹² https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf.

the Appellate Body.” On November 28, 2019, he set forth specific principles designed to address U.S. concerns.¹³ The principles require the Appellate Body to make its decisions in ninety days and for Appellate Body members to leave promptly at the end of a second term of office, to treat facts as facts (not subject to appeal), to respect the more deferential standard of review for antidumping investigations, to address only issues raised by parties and only to the extent necessary to resolving the dispute at hand so that its opinions are not advisory, to take previous Appellate Body or panel reports into account only to the extent they are relevant and not as precedent, and to ensure that its rulings do not add to the obligations or take away any rights of the parties as contained in the WTO rules. Collectively, the Walker principles are designed to make the Appellate Body more efficient by shortening its time frames and its reports while doing what the United States has demanded—return to the rules as written in 1995. Unreserved adoption of the principles by WTO members would demonstrate widespread member agreement that the Appellate Body has a limited mandate to resolve only legal questions raised on appeal in strict accordance with WTO rules.

If the specific provisions of the Walker Principles do not go far enough for the United States, then stricter versions of them can and should be negotiated. Two recent papers commissioned by the National Foreign Trade Council (NFTC), for example, suggest specific ways to enhance the Walker principles.¹⁴

Establish an oversight committee and audit to ensure compliance. To build trust that the Appellate Body will adhere to the Walker principles, the WTO should convene an oversight committee at least once a year and when requested. The oversight committee could be made up of the chairs of the lead WTO committees—its General Council, Council for Trade in Goods, Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property Rights, and the Dispute Settlement Body, with the chair of the Dispute Settlement Body appointing four additional independent trade-law experts to the committee to ensure a proper representation of expertise. The committee’s sole task should be to assess whether the Appellate Body has adhered to the Walker principles, either over the course of a given year or, when asked, in an individual case. In part, this oversight committee would help address the primary query raised by the United States when the Walker principles were presented: why should we believe the Appellate Body will adhere to them when it did not adhere to the language of the Dispute Settlement Understanding (DSU)? It will be the oversight committee’s job to ensure that the Walker principles are followed and that the Appellate Body is called out quickly should it go astray.

Limit the service of members of the Appellate Body Secretariat to no longer than 8 years—the maximum length of time of an Appellate Body member. The root cause of many U.S. concerns rests not just with the Appellate Body members themselves, but with its Secretariat—particularly the lawyers who work for the Appellate Body as a whole. Over time, the Secretariat has gained experience and expertise that often is greater than that of the Appellate Body members, who serve on a part-time basis for a maximum of 8 years. Secretariat lawyers, on the other hand, devote all of their time over many years to working on appeals and are steeped in (and potentially wedded to) past decisions. Adopting a mobility principle would allow staff rotations throughout other WTO offices, bring new perspectives to appeals, reduce the tendency to treat past decisions as precedent, and help restore an appropriate balance of power between the Appellate Body members and the Secretariat staff. It would also send a strong signal of an end to business as usual. If mobility alone were not sufficient, others have suggested that each Appellate Body member could be appointed a clerk that would ensure that Appellate Body reports reflect their specific views and not necessarily the views of the Secretariat as a whole or its leadership.¹⁵

These reforms would make the Appellate Body more efficient while addressing U.S. concerns. For the United States, it is critical that the Appellate Body respect the current language of the WTO’s Dispute Settlement Understanding. The Walker

¹³ https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False.

¹⁴ <https://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=4219&Category=All>, <https://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=4228&Category=All>.

¹⁵ See, for example, the NFTC paper, “Resolving the Appellate Body Crisis: Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators,” June 5, 2020, <https://www.nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=4228&category=All>.

principles require just that. But the United States needs assurance that the mindset of the Appellate Body has been changed and that, this time around, the rules will be respected. The creation of an oversight process ensures that the Appellate Body will be judged on its consistency with the Walker principles, while injecting an additional measure of political oversight over the functioning of the Appellate Body. Staff rotation brings fresh thinking along with a renewed focus on completing appeals in accordance with the needs of WTO members.

V. Appellate Body Reform as Momentum for Overall Reforms of WTO

While the United States has refused to negotiate amendments to the Appellate Body, it has been leading the charge on two other institutional reforms: (1) the ability of countries to self-declare themselves to be “developing countries” eligible for the WTO’s “special and differential treatment,”¹⁶ and (2) the lack of timely compliance with requirements to notify the WTO of changes in trading regimes or levels of subsidies. In addition, the United States has been among those pushing hard to complete pending negotiations to curb fishery subsidies and create new rules on e-commerce. All will be difficult to bring to a final conclusion if the United States is not trusted as being genuinely interested in reform and if other WTO members remain skeptical of the value of reaching new agreements if those deals cannot be enforced because the Appellate Body has been paralyzed.

The surest way for the United States to achieve its various goals is to work to reform the Appellate Body first—both as a sign of good faith and because a reformed Appellate Body is in the United States’ interest. An improved but functioning Appellate Body could also form the core of a broader package of WTO reforms. For example, the United States could agree to unblock the appointments to a reformed Appellate Body while the rest of the WTO members accept clear criteria defining which countries can be considered “developing” for purposes of the WTO’s special treatment. A deal along these lines give everyone something they want. The United States gets both reforms to the Appellate Body and a guarantee that countries that are large enough or rich enough to be in the OECD or the G20 cannot claim special privileges as developing countries while the rest of the world gets a functioning but improved binding dispute settlement system that leaves in place special privileges for those countries that really need it. But such a process is unlikely to start unless and until the United States indicates which of the many ideas for reforming the Appellate Body could form the basis for a bargain.

VI. Conclusion

Given the global economic pain from the coronavirus pandemic and the likely emergence of a post-pandemic wave of protectionism, the world needs a strong and effective WTO more than ever. Successfully confronting a rising China with its state-run economy also requires a fully functioning WTO. The best way to achieve that is to start by fixing the dispute settlement system which underpins the rules-based trading system. Doing so will require U.S. leadership that moves beyond simply tearing the Appellate Body down. Now is the time to rebuild it. A revitalized dispute settlement system can then serve as a catalyst to broader reforms of the WTO itself.

¹⁶ WT/GC/W/757/Rev. 1, December 9, 2019.

Annex A

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners ¹

Case	Title	Date Requested	Summary	Effects
Japan DS 8 (with EU ² and Canada DS 8, 10 and 11)	Taxes on Alcoholic Beverages	7/7/1995	The complainants claimed that spirits exported to Japan were discriminated against under the Japanese Liquor Tax Law which created a system of internal taxes with a substantially lower tax on "shochu" than on whisky, cognac and white spirits. The Panel and the Appellate Body concluded that the Japanese Liquor Tax Law is inconsistent with the GATT, by taxing vodka in excess of shochu and by taxing different liquors at different rates to as to afford protection to domestic production.	Japan eliminated discriminatory taxes and all tariffs on distilled spirits. U.S. distilled spirits exports to Japan were \$138 million in 2019.
EU DS 26	Measures Concerning Meat and Meat Products (Hormones)	1/26/1996	The U.S. claimed that measures taken by the EU restricting or prohibiting imports of meat and meat products from the U.S. because they were produced using hormones are inconsistent with the SPS Agreement. The Panel found that the EC ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent SPS Agreement. The Appellate Body upheld the Panel's finding that the EU import prohibition was inconsistent with Article 5.1 of the SPS Agreement's requirement that measures be based on a risk assessment, which the EU had not done.	Settlement reached in 2009 for quota of 45,000 tons of non-hormone-treated beef exports to the EU; agreement updated in 2019 to ensure U.S. access to 35,000 of the 45,000 tons, estimated at \$420 million in U.S. beef exports.
Canada DS 31	Certain Measures Concerning Periodicals	3/11/1996	The U.S. challenged Canadian restrictions on imports of certain periodicals, which prohibited "special editions," and imposed a tax equal to 80 percent of the value of all the advertisements contained in the split-run edition, along with different postal rates for domestic versus foreign periodicals. The Appellate Body found the quantitative restrictions, tax, and postal rates to be in violation of Canada's commitments under the GATT and its taxes favorable postal rates to be discriminatory.	

**WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating
Violations of WTO Obligations by Trading Partners¹—Continued**

Case	Title	Date Requested	Summary	Effects
India DS 50	Patent Protection for Pharmaceutical and Agricultural Chemicals	7/2/1996	The U.S. challenged India's lack of patent protection for pharmaceutical and agricultural chemical products in India. The Panel, as confirmed by the Appellate Body, found that India has not complied with its obligations under the TRIPS Agreement by failing to establish a mechanism that adequately preserves novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions, and by failing to establish a system for the grant of exclusive marketing rights.	
Argentina DS 56	Measures Affecting Imports of Footwear, Textiles, Apparel and other times	10/4/1996	The U.S. challenged Argentina's imposition of minimum specific import duties on textiles and apparel, which were subject to either a 35-percent ad valorem duty or a minimum specific duty (whichever was higher) and other measures by Argentina. The Panel found that the minimum specific duties imposed by Argentina on textiles and apparel were in excess of those provided for in Argentina's tariff schedule. At the DSB meeting on 22 June 1998, Argentina announced that it had reached an agreement with the U.S., whereby Argentina would reduce the statistical tax to 0.5 percent by 1 January 1999, and cap specific duties on textiles and apparel at 35 percent by 19 October 1998.	
Indonesia DS 59 (with EU DS 54 and Japan DS 55)	Certain Measures Affecting the Automobile Industry	10/8/1996	The U.S. joined the EU and Japan in contesting Indonesia's National Car Program. The claim was that Indonesia's exemption for "national vehicles" and components thereof from customs duties and luxury taxes was discriminatory and violated the WTO's investment and subsidy rules. The Panel found that Indonesia was discriminating against imports in violation of Articles I and II:2 of GATT 1994, along with related violations of the WTO's TRIMs Agreement and the SCM Agreement	

**WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating
Violations of WTO Obligations by Trading Partners¹—Continued**

Case	Title	Date Requested	Summary	Effects
Japan DS 76	Measures Affecting Agricultural Products—II	4/7/1997	The U.S. challenged Japan's quarantine measures applied to imports of certain agricultural products because Japan required that every variety of product be separately tested and subject to quarantine even if the treatment has proved to be effective for other varieties of the same product. The Panel and the Appellate Body found that Japan's varietal testing of apples, cherries, nectarines and walnuts is inconsistent with the requirements of the SPS Agreement.	
Korea DS 84 (with the EU DS 75)	Taxes on Alcoholic Beverages	5/23/1997	Korea internal taxes on certain alcoholic beverages were challenged as violating Korea's national treatment obligations (GATT Article III:2) because the taxes imposed on like imported alcoholic beverages were higher than domestically produced ones. The Panel found that Korea has taxed the imported products in a dissimilar manner, that the tax differential was more than de minimis, and is applied so as to afford protection to domestic production, in violation of Korea's GATT obligations.	U.S. distilled exports to Korea have grown to over \$13 million in 2019. The U.S. is Korea's third largest source of imported distilled spirits.
India DS 90	Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	7/15/1997	U.S. claimed that quantitative restrictions (QRs) on imports of a large number of agricultural, textile and industrial products and the way in which the QRs were administered by India violated India's obligations under the of GATT 1994, the Agreement on Agriculture, and the Agreement on Import Licensing Procedures. The Panel agreed with the U.S. finding the measures to be inconsistent with India's obligations under Articles XI and XVIII11 of GATT 1994, and for agriculture products, inconsistent with Article 4.2 of the Agreement on Agriculture.	

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
Canada DS103	Measures Affecting the Importation of Milk and the Exportation of Dairy Products	10/8/1997	The U.S. challenged Canada's export subsidies for dairy products and the administration by Canada of the tariff-rate quota on milk, claiming the measures distort markets for dairy products and adversely affect U.S. sales of dairy products. The Appellate Body upheld one of the Panel's narrow findings: that Canada's value limitation set at Can \$20 for each importation was inconsistent with the GATT schedule of concessions, as there was no mention of such value limitation in Canada's schedule.	Export Value of Milk to Canada; HS0401, HS0402; 1998 total: \$1.6 million; 2019 total: \$42.5 million
Australia DS126	Subsidies Provided to Producers and Exporters of Automotive Leather	5/4/1998	The U.S. challenged Australia's provision of prohibited export subsidies to Australian producers and exporters of automotive leather, including subsidies provided to Howe and Company Proprietary Ltd. (or any of its affiliated and/or parent companies), which allegedly involve preferential government loans of about \$A25 million and non-commercial terms and grants of about \$A30 million. The Panel found that some, but not all, of the subsidies were prohibited subsidies on the grounds that the payments were "tied to" export performance.	
Mexico DS132	Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States	5/8/1998	The U.S. claimed that Mexico's anti-dumping duties on high-fructose corn syrup (HFCS) grades 42 and 55 were imposed without conducting a proper investigation. The U.S. contended that the manner in which the application for an anti-dumping investigation was made (regarding retroactivity, explanation of determination, and provisional measures), as well as the manner in which a determination of threat of injury was made, were inconsistent with various articles of the Anti-Dumping Agreement. The Panel and the Appellate Body agreed with a number of the U.S. complaints.	Export Value of HFCS to Mexico; HS170260, HS170250; 1998 total: \$58.2 million; 2019 total: \$422.9 million

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
Korea DS161	Measures Affecting Imports of Fresh, Chilled and Frozen Beef	2/1/1999	The U.S. challenged a Korean regulatory scheme that discriminates against imported beef by, among other things, confining sales of imported beef to specialized stores (dual retail system), limiting the manner of its display, and otherwise constraining the opportunities for the sale of imported beef. The Panel and the Appellate Body, found that Korea's dual retail scheme discriminated against imported beef and that sales opportunities were denied.	Export Value of Beef to Korea; HS201, HS202; 1999 total: \$330.5 million; 2019 total: \$1.77 billion
Canada DS170	Term of Patent Protection	5/6/1999	The U.S. challenged Canada's failure to provide a patent term of no less than 20 years from the filing date for the patent for all future and certain pre-existing patents, as required by the TRIPS Agreement.	On 12 July 2001, Bill S-17 came into force which brought Canada's Patent Act into conformity with its obligations under the TRIPS Agreement.
European Union DS174 (with Australia)	Protection of Trade-marks and Geographical Indications for Agricultural Products and Food-stuffs	6/1/1999	The U.S. challenged the EU's lack of protection of trademarks and geographical indications (GIs) for agricultural products and food-stuffs, claiming that EC Regulation 2081/92 does not provide national treatment with respect to geographical indications and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication. The Panel agreed with the U.S. that the EU's GI Regulation does not provide national treatment and that the TRIPS Agreement does not allow unqualified coexistence of GIs with prior trademarks.	
India DS175	Measures Affecting Trade and Investment in the Motor Vehicle Sector	6/2/1999	The U.S. contested certain Indian measures requiring manufacturing firms in the motor vehicle sector to achieve specific levels of local content, neutralize foreign exchange, and limit imports based on the previous year's exports. The Panel determined that India had acted inconsistently with the indigenization requirement, had limited imports in relation to an export commitment, and created a measure to disincentivize purchases of imported products and discriminated against imported products.	Export Value of Included Autos and Auto Parts to India; HS8703, HS8706, HS8707; 1999 total: \$840,000; 2019 total: \$21,850,000

**WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating
Violations of WTO Obligations by Trading Partners¹—Continued**

Case	Title	Date Requested	Summary	Effects
Mexico DS204	Measures Affecting Telecommunications Services	8/17/2000	The U.S. challenged Mexico's adoption or maintenance of anti-competitive and discriminatory regulatory measures, its toleration of certain privately established market access barriers, and its failure to take needed regulatory action in the basic and value-added telecommunications sectors. The Panel ruled that Mexico had violated its GATT commitments.	
Japan DS245	Measures Affecting the Importation of Apples	3/1/2002	The U.S. challenged Japan's restrictions on imports of apples which Japan claimed were necessary to protect against the introduction of fire blight. The Appellate Body upheld the Panel's finding that Japan's phytosanitary measure imposed on imports of apples from the U.S. was maintained "without sufficient scientific evidence," and that the Pest Risk Assessment conducted by Japan failed to evaluate the likelihood of entry, establishment, or spread of fire blight specifically through apple fruit.	Export Value of Apples to Japan; HS080810; 2002 total: \$101,000; 2019 total: \$792,000
Canada DS276	Measures Relating to Exports of Wheat and Treatment of Imported Grain	12/17/2002	The U.S. challenged actions by the Canadian Wheat Board and the treatment accorded to grain imported into Canada, claiming Canada and the Canadian Wheat Board (entity enjoying exclusive rights to purchase and sell Western Canadian wheat for human consumption) gave unfair treatment to domestically produced grain by restricting the mixing of imported and domestic wheat and by capping the maximum revenues that railroads can receive on the shipment of imported grain. In 2005, Canada amended its laws and regulations to bring Canada into compliance with the ruling.	Export Value of Grain and Wheat to Canada; HS1001, HS1007; 2002 total: \$3.57 million; 2019 total: \$41.48 million

**WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating
Violations of WTO Obligations by Trading Partners¹—Continued**

Case	Title	Date Requested	Summary	Effects
European Union DS291	Measures Affecting the Approval and Marketing of Biotech Products	5/13/2003	The U.S. challenged the EU's 1998 moratorium on the approval of biotech products because it restricted imports of agricultural and food products from the U.S. The Panel found that, by applying the moratorium, the European Communities had acted inconsistently with its obligations under the SPS Agreement because the de facto moratorium led to undue delays in the completion of EC approval procedures.	
Mexico DS295	Definitive Anti-Dumping Measures on Beef and Rice	6/16/2003	The U.S. contested Mexico's definitive anti-dumping measures on beef and long grain white rice as well as certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure. The Panel upheld all of the U.S. claims concerning both the injury and the dumping margin determination of the Mexican investigating authority in the rice investigation, applying judicial economy with respect to some other related claims.	Export Value of U.S. Long Grain White Rice to Mexico; HS100630; 2003 total: \$13.8 million; 2019 total: \$36.3 million Export Value of U.S. Beef to Mexico; HS0201; 2003 total: \$581.7 million; 2019 total: \$743.7 million
Mexico DS308	Tax Measures on Soft Drinks and Other Beverages	3/16/2004	The U.S. challenged Mexican taxes on soft drinks and other beverages that use any sweetener other than cane sugar. The tax measures concerned included: (i) a 20-percent tax on soft drinks and other beverages that use any sweetener other than cane sugar ("beverage tax"), which is not applied to beverages that use cane sugar; and (ii) a 20-percent tax on the commissioning, mediation, agency, representation, brokerage, consignment and distribution of soft drinks and other beverages that use any sweetener other than cane sugar ("distribution tax"). The Appellate Body the taxes were levied in excess of taxes levied against like domestic products, were applied in a dissimilar manner to provide protections to domestic production, and gave imported like product less favorable treatment.	Export Value of Soft Drinks to Mexico; HS220210; 2004 total: \$9.9 million; 2019 total: \$15.7 million

**WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating
Violations of WTO Obligations by Trading Partners¹—Continued**

Case	Title	Date Requested	Summary	Effects
European Union DS315	Selected Customs Matters	9/21/2004	The U.S. challenged the EU's convoluted administration of laws and regulations (25 different agencies due to one for each EU member state) pertaining to the classification and valuation of products for customs purposes and its failure to institute tribunals or procedures for the prompt review and correction of administrative action on customs matters. The US claimed the EU's process is a violation of its obligation to administer its customs laws in a uniform manner. The Panel and the Appellate Body found certain specific violations but did not rule on the EU system as a whole.	
European Union DS316	Measures Affecting Trade in Large Civil Aircraft	10/6/2004	The United States challenged a series of subsidies provided by the EU and four of its member states in support of Airbus as violations of the SCM Agreement. The measures included: the provision of financing for design and development to Airbus companies ("launch aid"); the provision of grants and government-provided goods and services to develop, expand, and upgrade Airbus manufacturing sites for the development and production of the Airbus A380; the provision of loans on preferential terms. The Appellate Body upheld the Panel's finding that certain subsidies provided by the European Union and certain member state governments to Airbus are incompatible with Article 5(c) of the SCM Agreement because they have caused serious prejudice to the interests of the U.S. On 2 October 2019, the U.S. requested authorization from the DSB to take countermeasures with respect to the European Union and certain member States (Germany, France, Spain, and the United Kingdom) at a level not exceeding, in total, U.S. \$7,496.623 million annually.	"In 2018, the U.S. requested authority to impose countermeasures commensurate with the adverse effects that the EU subsidies continued to cause and a WTO arbitrator found that the annual adverse effects to the United States amounted to \$7.5 billion per year." USTR Report

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
Turkey DS334	Measures Affecting the Importation of Rice	11/2/2005	The U.S. challenged Turkey's import restrictions on rice, contending that Turkey requires an import license to import rice but fails to grant such licenses at Turkey's bound rate of duty. The Panel found that Turkey's action constitutes a quantitative import restriction and a practice of discretionary import licensing which is inconsistent with the Agreement on Agriculture. The Panel also concluded that Turkey's requirement that importers must purchase domestic rice in order to be allowed to import rice at reduced-tariff levels under the tariff quotas discriminated against imported rice.	Export Value of Rice to Turkey; HS1006; 2005 total: \$38.8 million; 2019 total: \$2.7 million
China DS342 (with the EU and Canada)	Measures Affecting Imports of Automobile Parts	3/30/2006	The U.S. challenged China's imposition of a 25-percent "charge" on imported auto parts "characterized as complete motor vehicles." If the number or value of imported parts in the assembled vehicle exceeded specified thresholds, the regulations assess each of the imported parts a charge equal to the tariff on complete automobiles (typically 28 percent) rather than the tariff applicable to auto parts (typically 10–14 percent). The Appellate Body upheld the Panel's findings that the measures were in violation of China's obligations under the GATT because they imposed an internal charge on imported auto parts that was not imposed on like domestic auto parts and because they accorded imported parts less favorable treatment than like domestic auto parts by, inter alia, subjecting only imported parts to additional administrative procedures.	Export Value of U.S. Auto Parts to China; HS8708; 2006 total: \$532 million; 2019 total: \$1.52 billion "The value of subsidies made available to auto and auto parts manufacturers in China between 2009 and 2011 was at least \$1 billion." USTR Report

**WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating
Violations of WTO Obligations by Trading Partners¹—Continued**

Case	Title	Date Requested	Summary	Effects
India DS360	Additional and Extra-Additional Duties on Imports from the United States	3/6/2007	The U.S. challenged India's "additional duties" or "extra additional duties" that India applied to imports, including wines and distilled products (HS2204, 2205, 2206 and 2208). The Panel concluded that the U.S. has failed to establish that the Additional Duty on alcoholic liquor is inconsistent with Article II:1(a) or (b) of the GATT 1994 and that it has also failed to establish that the SUAD is inconsistent with Article II:1(a) or (b) of the GATT 1994. The Appellate Body reversed the Panel to find that India's additional duties, to the extent that they imposed higher duties on imports than on domestic products, were a violation of India's GATT obligations.	Export Value of Wine and Distilled Products to India; HS2204, HS2208; 2007 total: \$2.5 million; 2019 total: \$7.5 million
China DS362	Measures Affecting the Protection and Enforcement of Intellectual Property Rights	4/10/2007	The U.S. challenged China's protection of intellectual property rights, focusing on four issues: (1) the thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties; (2) goods that infringe intellectual property rights that are confiscated by Chinese customs authorities, in particular the disposal of such goods following removal of their infringing features; (3) the scope of coverage of criminal procedures and penalties for unauthorized reproduction or unauthorized distribution of copyrighted works; and (4) the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings and performances that have not been authorized for publication or distribution within China. The Panel concluded that, to the extent that the Copyright Law and the Customs measures as such are inconsistent with the TRIPS Agreement, they nullify or impair benefits accruing to the U.S. under that Agreement.	

**WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating
Violations of WTO Obligations by Trading Partners¹—Continued**

Case	Title	Date Requested	Summary	Effects
China DS363	Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products	4/10/2007	The U.S. challenged China over: (1) certain measures that restrict trading rights with respect to imported films for theatrical release, audiovisual home entertainment products (<i>e.g.</i> , video cassettes and DVDs), sound recordings and publications (<i>e.g.</i> , books, magazines, newspapers and electronic publications); and (2) certain measures that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products. The Appellate Body upheld the Panel's conclusion that the provisions of China's measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form are inconsistent with China's market access and national treatment commitments of the GATS and violated China's Accession Protocol commitment to grant non-discretionary trade rights.	
European Union DS375	Tariff Treatment of Certain Information Technology Products	5/8/2008	The U.S. challenged the EU (and certain of its member states) over their tariff treatment of certain information technology products. The Panel upheld the U.S. claim that the European Union (EU) violated its WTO tariff commitments by imposing duties as high as 14 percent on three high-tech products. For all three products at issue—flat panel computer monitors, multifunction printers, and certain cable, satellite, and other set-top boxes—the Panel concluded that the EU tariffs were inconsistent with its obligations.	

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
China DS394	Measures Related to the Exportation of Various U.S. Raw Materials	6/23/2009	The U.S. contested China's restraints on the export (export duties, export quotas, minimum export price requirements, etc.) of various forms of raw materials (bauxite, coke, fluorspar, magnesium, etc). The Appellate Body upheld the Panel's finding that China's measures violate China's Accession Protocol, could not be counted as general exceptions under the GATT 1994, and that China failed to publish promptly its decision regarding an export quota.	
Philippines DS403	Taxes on Distilled Spirits	1/14/2010	The U.S. claimed that the Philippines taxes on distilled spirits discriminate against imported distilled spirits by taxing them at a substantially higher rate than domestic spirits. The Panel found that because imported spirits are taxed less favorably than domestic spirits, the Philippine measure, while facially neutral, is nevertheless discriminatory and thus violates the obligations under the first and second sentences of Article III:2 of the GATT 1994. The Appellate Body upheld the Panel's finding that each type of imported distilled spirit at issue—gin, brandy, rum, vodka, whisky, and tequila—made from non-designated raw materials, is "like" the same type of distilled spirit made from designated raw materials and that the Philippine taxes constituted impermissible discrimination.	Export Value of Distilled Spirits to Philippines; HS2207, HS2208; 2010 total: \$16.3 million; 2019 total: \$108.2 million

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
China DS413	Certain Measures Affecting Electronic Payment Services	9/15/2010	The U.S. challenged China's restrictions permit only a Chinese entity (China UnionPay) to supply electronic payment services for payment card transactions denominated and paid in renminbi in China. The Panel found each of these requirements to be inconsistent with China's national treatment obligations under Article XVII of the GATS. It found, through these requirements, that China modifies the conditions of competition in favor of CUP and therefore fails to provide national treatment to EPS suppliers of other members, contrary to China's commitments, in respect of this alleged across-the-board requirement.	"By industry estimates, the U.S. stands to gain 6,000 jobs related to EPS." USTR Report
China DS414	Countervailing and Anti-Dumping Duties on GOES	9/15/2010	The United States challenged China's investigation and decision to impose CVD and AD duties on Grain Oriented Flat-Rolled Electrical Steel (GOES) from the United States. The Panel and the Appellate Body found that China had committed a number of procedural and substantive errors that rendered their CVD and AD decisions inconsistent with the WTO's AD and SCM Agreement.	
China DS427	Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States	9/20/2011	The U.S. contested China's AD and CVD measures on broiler products from the U.S. contending that China acted inconsistently with the Anti-Dumping Agreement in its determination of the cost of production of the foreign like product for the purposes of constructing normal value, by (i) improperly rejecting the cost allocations kept in the normal books and records of the U.S. respondents; (ii) applying its own allocation methodology that did not reflect the costs associated with the production and sale of the products under consideration; and (iii) allocating the costs of producing certain products (blood and feathers) to the other products one of the respondents produced. The Panel upheld the complaint.	Export Value of Boiler Products to China; HS020713, HS020714, HS050400; 2011 total: \$236.2 million; 2019 total: \$235.1 million "In 2009—the year before China imposed the duties—the United States exported over 613,000 metric tons of broiler meat to China. Exports fell almost 90 percent after the imposition of the duties." USTR Report

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
India DS430	Measures Concerning the Importation of Certain Agricultural Products	3/6/2012	The U.S. contested India's SPS restrictions imposed on the importation of various agricultural products, including meat and meat products, egg and egg powder, and milk and milk products, from the U.S. purportedly because of concerns related to Avian Influenza (India's AI measures). The Appellate Body agreed with the Panel that its finding, that India's AI measures were inconsistent with commitments under the Sanitary and Phytosanitary Agreement because they were not based on an international standard or a risk assessment, arbitrarily and unjustifiably discriminated between members where identical or similar conditions prevailed, and were significantly more restrictive that required to achieve India's appropriate level of protection. On 7 July 2016, the U.S. requested the authorization of the DSB to suspend concessions or other obligations pursuant to the DSU because India has failed to comply with the recommendations and rulings of the DSB in this dispute within the reasonable period of time for India to do so.	Export Value of Meat and Meat Products to India; HS02; 2012 total: \$94,000; 2019 total: \$741,000
China DS431	Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum	3/13/2012	The U.S. challenged China's restrictions on the export of various forms of rare earths, tungsten and molybdenum. China had three types of restrictions: export duties, export quotas, and trading rights. The Panel found that the export duties and trading rights requirements were a violation of China's Accession Protocol that could not be justified under Article XX of the GATT. However, the quotas were not determined to be in violation.	

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
China DS440	Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States	7/5/2012	The U.S. challenged China's AD and CVD duties on certain automobiles from the U.S. The AD duties ranged from 2.0 percent to 21.5 percent, and the CVD duties ranged from 6.2 percent to 12.9 percent. The specific products affected by the duties are American-made cars and SUVs with an engine capacity of 2.5 liters or larger. The Panel found that MOFCOM erred in its determination of the residual anti-dumping and countervailing duty rates for unknown exporters of the subject product, by improperly determining that U.S. exports were causing injury to domestic Chinese industry and improperly analyzing the effects of U.S. exports on prices in the Chinese market.	"In 2013, the United States exported \$64.9 billion of autos, with \$8.5 billion of those exports, or 13 percent of the total, going to China. China's unjustified duties, which ranged up to 21.5 percent, affected an estimated \$5.1 billion worth of U.S. auto exports in 2013. . . ." USTR Report
Argentina DS444	Measures Affecting the Importation of Goods	8/21/2012	The U.S. challenged: (i) the requirement to present for approval of a non-automatic import license: Declaración Jurada Anticipada de Importación (DJAI); (ii) non-automatic licenses required in the form of Certificados de Importación (CIs) for the importation of certain goods; (iii) requirements imposed on importers to undertake certain trade-restrictive commitments; and (iv) the alleged systematic delay in granting import approval or refusal to grant such approval, or the grant of import approval subject to importers undertaking to comply with certain allegedly trade-restrictive commitments. With respect to the DJAI requirement, the Appellate Body upheld the Panel's findings that this requirement constitutes a restriction on the importation of goods and is therefore inconsistent with Article XI:1 of the GATT.	"The following U.S. States represented the largest share of exports to Argentina in 2013, each exporting over \$180 million in goods that year: Texas, Florida, Louisiana, California, Illinois, South Carolina, Michigan, New York, Georgia, North Carolina." USTR Report

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
India DS456	Certain Measures Relating to Solar Cells and Solar Modules	2/6/2013	The U.S. challenged India's domestic content requirements under the Jawaharlal Nehru National Solar Mission ("NSM") for solar cells and solar modules. The Panel found that the DCR measures are trade-related investment measures covered by the TRIMs Agreement and that they were inconsistent with both the GATT 1994 and the TRIMs Agreement. On 19 December 2017, the U.S. requested the authorization of the DSB to suspend concessions or other obligations pursuant to Article 22.2 of the DSU on the grounds that India had failed to comply with the DSB's recommendations and rulings within the reasonable period of time.	Export Value of Solar Cells and Modules to India; HS854140; 2013 total: \$15 million; 2019 total: \$15.7 million
Indonesia DS478 (with New Zealand DS 477)	Importation of Horticultural Products, Animals and Animal Products	5/8/2014	The U.S. challenged 18 measures imposed by Indonesia on the importation of horticultural products, animals and animal products. Most of these measures (17) concerned Indonesia's import licensing regimes for horticultural products and animals and animal products. The challenge also included Indonesia's conditioning of importation of these products on the sufficiency of domestic production to fulfill domestic demand. The Panel found that all 18 measures at issue were prohibitions on importation or restrictions having a limiting effect on importation and thus inconsistent with the GATT. On 2 August 2018, the U.S. requested the authorization of the DSB to suspend concessions or other obligations pursuant to Article 22.2 of the DSU on the grounds that Indonesia had failed to comply with the DSB's recommendations and rulings within the reasonable period of time.	"In 2016, exports of the horticultural products and animal products affected by Indonesia's imports totaled \$170 million. . . . These restrictions cost U.S. farmers and ranchers millions of dollars per year in lost export opportunities in Indonesia." USTR Report "In 2015, U.S. exports of affected horticultural products to Indonesia exceeded \$87 million, including \$28 million of apples and over \$29 million of grapes. U.S. exports of affected animals and animal products totaled \$26 million in 2015." USDA Press Release

WTO Dispute Settlement Cases in Which the United States Succeeded in Demonstrating Violations of WTO Obligations by Trading Partners¹—Continued

Case	Title	Date Requested	Summary	Effects
China DS511	Domestic Support for Agricultural Producers	9/13/2016	The U.S. challenged China's provision of domestic support in favor of agricultural producers, in particular, to those producing wheat, India rice, Japonica rice and corn. The Panel first determined all components necessary to compute China's market price support for wheat, Indica rice and Japonica rice before finding that China's level of domestic support in each of the years 2012–2015 exceeded its 8.5-percent de minimis level of support for each of these products.	"In 2015, China's 'market price support' for these products is estimated to be nearly \$100 billion in excess of the levels China committed to during its accession." USTR Report
China DS517	Tariff Rate Quotas for Certain Agricultural Products	12/15/2016	The U.S. contested the manner in which China administers its tariff rate quotas, including those for wheat, short- and medium-grain rice, long grain rice, and corn. The Panel concluded that China's TRQ administration as a whole is inconsistent with its obligations to administer TRQs on a transparent, predictable, and fair basis, to administer TRQs using clearly specified requirements and administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ.	"USDA estimates that if China's TRQs had been fully used, it would have imported as much as \$3.5 billion worth of corn, wheat and rice in 2015 alone." USTR Report " "AgResource calculates that China did not secure and import an estimated \$45 billion of world corn/wheat over the past 16 years." Farm Foundation
India DS541	Export Related Measures	3/14/2018	The U.S. challenged India's provision of export subsidies under five sets of measures: the Export Oriented Units, Electronics Hardware Technology Park and Bio-Technology Park (EOU/EHTP/BTP) Schemes; the Export Promotion Capital Goods (EPCG) Scheme; the Special Economic Zones (SEZ) Scheme; a collection of duty stipulations described in these proceedings as the Duty-Free Imports for Exporters Scheme (DFIS); and the Merchandise Exports from India Scheme (MEIS). The Panel found the subsidies to be inconsistent with India's obligations under the ASCM. India is in the process of appealing.	

¹ While this list is intended to be comprehensive, it is possible that cases have been inadvertently left off of this list. The list does not include cases that were resolved through a mutually agreed upon settlement or means other than a dispute before a WTO panel.

² Throughout this document, the European Union (EU) and the European Communities (EC) shall be designated as "EU" even though the EC did not formally become the EU until the adoption of the Maastricht Treaty in 1992.

Annex B

Statements by U.S. Stakeholders Regarding the WTO Appellate Body

U.S. Chamber of Commerce CEO Thomas J. Donohue, in his annual State of American Business address (1/9/2020):

Staying engaged in the world also means remaining committed to the multilateral organizations and trading arrangements that we helped build. If the World Trade Organization didn't exist, we'd have to create it. Its rules protect American business from unfair treatment and protectionism. Safeguarding this institution and its dispute settlement system should be an urgent international priority. **Let's not shutter the WTO Appellate Body. Such drastic action doesn't serve America's interests.** America must be involved, not isolated.

Letter to President Trump signed by 26 business and agriculture groups:

We urge your administration to embrace the plan to renovate the WTO appeals process outlined below. The proposal seeks to reform the Appellate Body in a manner consistent with concerns raised by USTR. . . .

USTR has resisted negotiating reforms to the WTO appeals process until other countries acknowledge that the Appellate Body has strayed beyond its mandate. The Walker Principles were developed with the purpose of restoring proper functioning to the Appellate Body. By adopting them along with the related enforcement measures and term limits for the secretariat, WTO members would be agreeing with the United States that the Appellate Body has overreached.

We urge your administration to strike while the iron is hot by stating prior to December 10 that the goal of the United States is not to kill the Appellate Body, but rather to reform it. The statement should clarify that adoption of the reform plan would end U.S. opposition to the appointment of new Appellate Body members.

Signed December 6, 2019 by:

Americans for Prosperity, American Craft Spirits Association, American Soybean Association, Center for Freedom and Prosperity, Citizens Against Government Waste, Coalition of American Metal Manufacturers and Users, Competitive Enterprise Institute, Computing Technology Industry Association (CompTIA), Consumer Choice Center, The Fashion Accessories Shippers Association, The Fashion Jewelry and Accessories Trade Association, FreedomWorks, Gemini Shippers Association, Institute for Policy Innovation, International Dairy Foods Association, The LIBRE Initiative, National Corn Growers Association, National Council of Farmer Cooperatives, National Retail Federation, National Taxpayers Union, North American Association of Food Equipment Manufacturers, Retail Industry Leaders Association, R Street Institute, Taxpayers Protection Alliance, USA Poultry and Egg Export Council, U.S. Grains Council.

<https://www.rstreet.org/wp-content/uploads/2019/12/WTO-AB-coalition-letter-to-president-2019-12-06.pdf>

National Foreign Trade Council:

[A] fully functioning and binding dispute settlement system is essential to the credibility and functioning of the global trading system. WTO members must resolve this crisis immediately and agree on a way forward that addresses the legitimate concerns that have been raised. Those members who have raised these concerns have a unique responsibility to put forward specific reform proposals that would enable the AB to resume operating and perform its function more effectively.

<http://www.nftc.org/default/trade/WTO/2019-NFTC-Strengthening-the-WTO.pdf>

Letter to President Donald J. Trump signed by 10 business and trade association groups:

We strongly urge you to state publicly that the goal of the United States is not to kill the Appellate Body, but rather to reform it. We further urge you to develop a reform proposal as quickly as possible and present it to WTO members, while indicating that adoption of such measures would lead to restarting the Appellate Body appointment process. This approach would maximize leverage for reform. That leverage is likely to decrease signifi-

cantly if the Appellate Body stops functioning; some countries already have agreed to use arbitration procedures in lieu of formal appeals. The Appellate Body will go dormant in December unless new members are approved promptly. By acting expeditiously, the United States could lead a process of constructive change. Doing so would help to strengthen worldwide business confidence. This would serve the best interests of the many American companies and workers that earn all or part of their livelihoods from international trade.

Signed October 23, 2019 by:

Americans for Prosperity, The LIBRE Initiative, American Legislative Exchange Council, ALEC Action, Center for Freedom and Prosperity, Coalition of American Metal Manufacturers and Users, Competitive Enterprise Institute, National Taxpayers Union, Precision Metal forming Association, R Street Institute.

<https://mk0xituxemauaaa56cm7.kinstacdn.com/wp-content/uploads/2019/10/WTO-AB-letter-to-president-10-23-2019-2.pdf>

QUESTIONS SUBMITTED FOR THE RECORD TO JENNIFER A. HILLMAN

QUESTIONS SUBMITTED BY HON. CHUCK GRASSLEY

Question. The Appellate Body has received a lot of attention about its shortcomings. However, I'm not sure the panel process is completely perfect. The initial panel process takes much longer than anyone anticipated. Compliance panels have an important task of deciding disputes in which a party has already found they've breached their WTO obligations. The rules provide those panels should issue decisions in 90 days, but they almost never do.

Do you think we need to look at reforming the panel process?

Answer. Yes. Both panels deciding initial cases and panels reviewing compliance with rulings from the Dispute Settlement Body (DSB) are taking longer than initially contemplated. The reason for the lengthy proceedings varies from case to case but is often a combination of significantly more complex complaints with many separate claims; a lack of staff to begin working on cases as soon as they are filed due to the much higher case load than expected when the WTO dispute settlement system was put in place; scheduling difficulties with panelists who sit on panels in addition to demanding, full-time jobs elsewhere; and the parties themselves—often involving the use of private outside counsel seconded to a government delegation—filing long, complicated submissions accompanied by voluminous exhibits. A recent study shows that the average number of claims raised in panel requests stood at eight during the first 5 years of the WTO (1995–2000) but had risen to 23 claims per dispute for those cases filed between 2009 and 2013.¹ As a result, panel reports are longer and the requirement that they be issued in English, French, and Spanish adds additional translation time. While an effort to increase staffing and pressure from the WTO Secretariat on parties and the process has recently reduced time frames for panel reports, more could be done to streamline the process if the WTO members would agree to limit their own submissions, both in length and in number of claims, and if additional measures are taken to ensure that adequate Secretariat resources are devoted to the panel process. Further attention to additional reforms to improve the efficiency of the process is certainly warranted.

Question. You have a very unique perspective. Your career has included being an ITC Commissioner, General Counsel at USTR, and an Appellate Body member. You oversaw U.S. application of trade remedy laws, the negotiation and defense of U.S. international commitments regarding those laws, and judged in Geneva how to apply WTO rules. You know this ground A–Z.

Congress feels strongly that the Appellate Body has overreached in interpreting WTO obligations concerning trade remedies.

What can be done to undo some of that overreach, and make sure it doesn't happen again? Do we need to look at the underlying agreements; how the dispute settlement system works; or something else?

¹ https://www.graduateinstitute.ch/sites/internet/files/2018-11/Busier%20than%20ever%20%20New%20CTE1%20working%20paper%20on%20WTO%20Dispute%20Settlement.pdf?_ga=2.153752760.1037896462.1600707205-2132530211.1600707205.

Answer. The most effective way to address the issue of overreach in assessing trade remedies—anti-dumping duties, countervailing duties, and safeguards—would be both changes to the dispute settlement system itself along with either definitive interpretations of certain key provisions in the trade remedy agreements or changes to the underlying agreements to ensure a more appropriate standard by which panels review the actions of investigating authorities such as the Department of Commerce and the U.S. International Trade Commission.

In terms of changes to the functioning of the dispute settlement, I have previously laid out three reforms to the WTO's Appellate Body that would restore the system to what was envisioned when the WTO was created in 1995.

1. *Adopt the Walker principles.* New Zealand's Ambassador and Permanent Representative to the WTO David Walker was appointed in February to "seek workable and agreeable solutions to improve the functioning of the Appellate Body." On November 28, 2019, he set forth specific principles designed to address the six U.S. concerns spelled out by USTR in its submissions to the DSB: (1) the practice of Appellate Body members staying on after their term has expired to finish an appeal that began while they were still in office; (2) the failure to complete appeals in the required 90 days; (3) the Appellate Body exceeding its authority in reviewing and sometimes overruling factual findings by panels, despite a mandate that appeals be limited to issues of law; (4) the Appellate Body's issuance of statements or interpretations not necessary to resolve a dispute; (5) the elevation of the significance of past decisions to near-binding precedent; and (6) the Appellate Body overstepping its bounds by reaching decisions that go beyond the text of the agreements themselves, potentially taking away rights or adding to U.S. obligations.

The principles require the Appellate Body to make its decisions in 90 days and for Appellate Body members to leave promptly at the end of a second term of office, to treat facts as facts (not subject to appeal), to respect the more deferential standard of review for antidumping investigations, to address only issues raised by parties and only to the extent necessary to resolving the dispute at hand so that its opinions are not advisory, to take previous Appellate Body or panel reports into account only to the extent they are relevant and not as precedent, and to ensure that its rulings do not add to the obligations or take away any rights of the parties as contained in the WTO rules. Collectively, the Walker principles are designed to make the Appellate Body more efficient by shortening its time frames and its reports while doing what the United States has demanded—return to the rules as written in 1995. If adopted with unreserved acknowledgement by the European Union and other skeptics, it would demonstrate widespread member agreement that the Appellate Body has a limited mandate to resolve only legal questions raised on appeal in strict accordance with WTO rules.

2. *Establish an oversight committee and audit to ensure compliance.* To build trust that the Appellate Body will adhere to the Walker principles, the WTO should convene an oversight committee at least once a year and when requested. The oversight committee could be made up of the chairs of the lead WTO committees—its General Council, Council for Trade in Goods, Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property Rights, and the Dispute Settlement Body, with the chair of the Dispute Settlement Body appointing four additional independent trade-law experts to the committee to ensure a proper representation of expertise. The committee's sole task should be to assess whether the Appellate Body has adhered to the Walker principles, either over the course of a given year or, when asked, in an individual case. The WTO should convene an oversight committee.

3. *Limit the service of members of the Appellate Body Secretariat to no longer than 8 years—the maximum length of time of an Appellate Body member.* The root cause of many U.S. concerns rests not just with the Appellate Body members themselves, but with its Secretariat—particularly the lawyers who work for the Appellate Body as a whole. Over time, the Secretariat has gained experience and expertise that often is greater than that of the Appellate Body members, who serve on a part-time basis for a maximum of 8 years. Secretariat lawyers, on the other hand, devote all of their time over many years to working on appeals and are steeped in (and potentially wedded to) past decisions. Adopting a mobility principle would allow staff rotations throughout other WTO offices, bring new perspectives to appeals, reduce the tendency to treat past decisions as precedent, and help restore an appropriate balance of power between the Appellate Body members and the Secretariat staff. It would also send a strong signal of an end to business as usual.

To these changes, I would recommend an additional change to the dispute settlement system with respect to trade remedy actions because the lion's share of the United States' complaints about the WTO dispute settlement system and its Appellate Body have stemmed from rulings related to trade remedies. Therefore, my recommendation would be to treat appeals of trade remedy decisions differently—either by creating a specialized Appellate Body chamber to hear them or by eliminating—or at least temporarily—freezing appeals from panel decisions in trade remedy cases.

A. SPECIAL APPELLATE BODY FOR TRADE REMEDIES

One option would be to create a special Appellate Body to hear only appeals of trade remedy decisions. This special appellate institution—call it the Rules Appellate Body—could be made up of members chosen in large part because of a strong background in trade remedy law. The selection process for members and the procedures of this Rules Appellate Body could largely mirror those of the current Appellate Body—and given that about half of all WTO disputes have been over trade remedy matters, the workload of this Rules Appellate Body and of the existing Appellate Body would be about even, so having complimentary bodies of equal size would make sense.

A variation on this theme could be to simply add two or four additional members to the existing Appellate Body who have deep trade remedy expertise and insist that any three-member division hearing an appeal of a trade remedy case would have to be made up of at least two of these trade-remedy expert Appellate Body members.

B. MORATORIUM ON APPEALS FROM TRADE REMEDY PANEL DECISIONS

A second approach to trade remedy disputes would be to establish a moratorium on appeals from panel decisions—or even just to amend the rules to make panel decisions on trade remedy matters final. The theory behind such an approach is twofold. First, panels examining trade remedy decisions are already playing an appellate role and therefore don't need a second or third level of review. Every trade remedy measure that comes before the WTO's dispute settlement system must be based on an investigation conducted by the investigating authorities in each country—so there is already a factual record that has been compiled and an existing decision that applies the law—including the WTO rules—to those facts to reach a conclusion that trade remedies are justified in the particular case at issue. As such, it may be appropriate to allow the panel's decision to stand in for an appellate report, and not subject such panel reports to further review.

The second reason for a “no appeals of trade remedy panel reports” approach is that most of the controversial decisions of the Appellate Body have been in the trade remedy area, so eliminating appeal rights in this limited arena may suggest a major enough change to break the current impasse over Appellate Body appointments. If so, it would allow the process to move forward, to keep the Appellate Body up and running for all non-trade remedy appeals and would maintain the current consensus-based approach to the appointment of Appellate Body members.

In terms of change to the underlying rules, I would recommend seeking a definitive interpretation of certain key phrases using the process set forth in Article IX.2 of the Marrakesh Agreement Establishing the WTO. For example, a definitive interpretation could be sought to the meaning of “public body” under the Agreement on Subsidies and Countervailing Measures (ASCM) that would have the effect of overruling the Appellate Body's decision that a “public body” is an entity that exercises a governmental function, or the language in the Agreement on Safeguards to clarify that it is not necessary to read the phrase “unforeseen developments” into the requirements for imposing a safeguard. Alternatively, changes could be sought to add a clear standard by which investigating authorities' decisions were reviewed by panels to ensure an appropriate amount of deference to the expertise and discretion of national authorities conducting trade remedy investigations.

QUESTIONS SUBMITTED BY HON. RON WYDEN

Question. The Trump administration has a track record of turning its back on international institutions, and does not seem in a hurry to seriously engage in WTO reform. You have had a long career representing U.S. trade interests. You administered U.S. trade remedy laws—laws that protect American workers—at the inde-

pendent International Trade Commission and you also spent some time at the WTO on the Appellate Body.

From your experience, do you agree there are real problems with the Appellate Body, where it has disregarded rules that apply to it, and creates new obligations to the detriment of the United States, particularly with respect to U.S. trade remedy laws that are in place to protect American workers?

Answer. Yes. It is in the area of trade remedies in particular where the dispute settlement system has rendered a number of decisions that were contrary to the legitimate expectations of the United States at the time that the Uruguay Round Agreements Act was being considered and passed by the Congress. Whether it is the series of disputes in which the Appellate Body outlawed the previously longstanding practice of “zeroing” in the calculation of anti-dumping margins, or the decision to read into the WTO’s Safeguards Agreement a requirement that safeguards can only be imposed if there is evidence that the increase in imports occurred as a result of “unforeseen developments,” or the decision to determine that the entities that are capable of providing subsidies are only those entities which engage in “governmental functions,” it is clear that the decisions that are at the heart of the United States’ substantive concerns about the WTO Appellate Body are those in the trade remedy arena, where as you note in your question, the decisions of the Appellate Body have worked to the detriment of the application of U.S. trade remedy laws. As noted in my answer to Senator Grassley above, addressing the problem would best be done both through changes to the dispute settlement system and through changes (either through definitive interpretations or actual amendments to the existing texts) to the underlying trade remedy agreements—the Agreement on Safeguards, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Antidumping.

Question. The Trump administration is walking away from the enforcement tools at the WTO. There are virtually no new U.S. offensive cases, and there is no movement on reform.

Do you think adequate reforms are achievable to ensure that the WTO agreements operate as they were originally intended, and could you give some concrete examples of what those reforms would be?

Answer. Yes. I believe the Trump administration’s failure to utilize the WTO as a tool to go after trade barriers and unfair practices by our trading partners coupled with its destruction of the Appellate Body without any plans to fix it have left the United States in a much weaker position. The Obama administration filed 22 cases, including 13 against China, to protect the right of American exporters to overseas markets under WTO rules. The Trump administration, by contrast, over the course of 4 years has filed only two new cases (except those complaining about retaliatory tariffs put on in response to unilateral U.S. tariffs) with one of the two directed at China. As outlined in my answer to Senator Grassley above, I believe the WTO Appellate Body could be fixed with three specific actions—the adoption of the Walker Principles to address specific U.S. concerns about the Appellate Body; the creation of an oversight process to ensure that the Appellate Body adheres to those Principles; and a rotation of staff serving Appellate Body members. These actions could be supplemented by changes to the approach to trade remedies as also noted in my response to Senator Grassley. Collectively, these reforms would allow the WTO dispute settlement system to function as originally intended, giving the United States a proper forum to enforce our trading rights.

Question. In addition to the impasse in dispute settlement, the negotiating function of the WTO has also produced few results in recent years. The areas in critical need of updating include disciplines addressing subsidies and state-owned enterprises. We have learned that existing disciplines just are not enough to address the depth of the market-distorting practices that countries such as China engage in to the detriment of U.S. workers and businesses.

What do you see as the path for addressing these issues at the WTO?

Answer. You are correct that among the biggest weaknesses of the WTO is the inability to discipline subsidies or to rein in the practices of China’s state-owned enterprises. The failure largely stems from three flaws in the WTO rules:

(1) The definition of a subsidy is too narrow. Right now, subsidies are defined as financial contributions by a government or public body that confer a benefit and are specific to a given company or sector. With the Appellate Body’s further narrowing of the term “public body” to include only those entities performing a governmental

function, China's state-owned enterprises were effectively carved out of discipline under the WTO's Agreement on Subsidies and Countervailing Measures (ASCM).

(2) The evidentiary burdens are too high in terms of proving the existence of a subsidy, the benchmark against which the contributions can be compared in order to show that a benefit has been provided, or that a subsidy is specific.

(3) The remedies are ineffective. Under the WTO rules, there are two remedies against subsidies: (a) the application of countervailing duties if the subsidized imports are coming in to the U.S. market or (b) an adverse effects ruling if U.S. companies are competing with subsidized imports in third-country markets. The problem with countervailing duties (when they can be shown despite the definitional and evidence problems noted above) is that they can push subsidized goods out into other markets, which keeps world prices low and does not address the underlying unfairness and over production caused by the subsidies in the first place. The problem with an adverse effects ruling is that WTO remedies are prospective only, so China only has to remove the effect of the subsidy on a going-forward basis, which is often far too late to do much good for American companies competing with subsidized products.

The best path for addressing these problems is one that includes working with our allies that share American concerns over China's unfair practices. For example, good work has begun as part of a trilateral cooperative process with Japan and the European Union to develop new disciplines on subsidies.² What is needed now is American leadership that can be trusted by Japan and the EU to finalize the new rules to the benefit of all, then developing sufficient leverage with respect to China coming from all three parties to push China to accept the new rules and finally working to bring them into the WTO system.

QUESTION SUBMITTED BY HON. JOHN CORNYN

Question. I recently held a hearing on the Trade Subcommittee that focuses on censorship as a non-tariff barrier to trade. Countries like China censor American digital content, block our tech companies from operating in the country, and retaliate against American firms. More and more, our companies are self-censoring to do business in China.

Meanwhile, we allow Chinese-owned companies like Tik Tok and others to operate in the U.S. freely. There is a clear lack of reciprocity. One witness testified that censorship has cost three tech companies alone over \$34B in lost revenue. In the past, countries used to block their maritime ports to stop the trade of goods. Today, countries do the same using firewalls and filters to block data and digital trade flowing through an underwater network of submarine cables.

Can you discuss how the WTO Appellate Body has treated censorship in the past and how it might do so going forward, especially as it relates to the exceptions for things such as public morals and national security?

Answer. There have been few cases brought before the WTO where the Appellate Body has ruled on the issue of censorship, the most notable being the 2007 case between the United States and China concerning publications and audiovisual products.³ In that case, the U.S. challenged a series of Chinese measures regulating activities relating to the importation and distribution of certain publications and audiovisual entertainment products, contending that China's restrictions violated a number of commitments China made when it joined the WTO providing a right for American films, music, books and publications to be exported to, distributed and sold in China. China claimed that some of its restrictions, including censorship, were "necessary" to protect the public morals of Chinese citizens (GATT Article XX(a)), but the panel and the Appellate Body rejected China's defense. However, because this case did not raise the basic question of whether Internet censorship is a trade barrier or a violation of the WTO rules, there has not yet been a definitive ruling on the issue you raise.

Going forward, I believe a strong case could be made that China's practices violate its national treatment and MFN obligations to treat all foreign companies the same and no worse than it treats Chinese companies because China's censorship policies

² <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-and-european-union>.

³ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

are not applied even-handedly. Foreign companies, particularly American companies, are treated worse than Chinese companies, which violates China's basic non-discrimination obligations. Similarly, China's guidelines for what can and cannot be published or posted on-line and its basic censorship rules are not transparent or published, which may also be a violation of China's obligations under GATT Article X and GATS Article III. In addition to bringing a WTO dispute against China's practices, the United States could lead an effort for clear rules related to censorship to be included as part of the e-commerce/digital trade negotiations currently underway at the WTO.

QUESTIONS SUBMITTED BY HON. PATRICK J. TOOMEY

Question. So far, the U.S. has mainly relied on unilateral tariffs under section 301 to push for market-oriented reforms to the Chinese market, but these measures hurt Americans, while not having much effect on Chinese trade practices. But this is not the only way to try and encourage China to adopt reforms—the U.S. can also work with key allies and use the WTO rules to encourage China to adopt reforms.

While the WTO may need reform in some key areas, the fact remains that it has historically been very successful when dealing with China. Uncovering China's WTO violations is challenging but it can be done, and the U.S. can use the WTO to hold China accountable, in particular in relation to the areas of intellectual property protection, forced technology transfer, and subsidies.

How can the U.S. better utilize the WTO dispute settlement system in addressing the challenges with China's non-market trade policies?

Answer. To address the wide array of concerns with China, I believe the best approach would be a big, bold, comprehensive case at the WTO filed by a broad coalition of countries that share the United States' substantive concerns about China.

First, a broad and deep WTO case represents the best opportunity to bring together enough of the trading interests in the world to put sufficient pressure on China to make it clear that fundamental reform is required if China is to remain a member in good standing in the WTO. The U.S. needs to use the power of collective action to impress upon both China and the WTO how significant the concerns really are. The United States simply cannot bring about the kind of change that is needed using a go-it-alone strategy. A coalition case also has the potential to shield its members from direct and immediate retaliation by China.

Second, a comprehensive WTO case would restore confidence in the WTO and its ability to address fundamental flaws in the rules of the trading system. As U.S. Ambassador Dennis Shea put it, "If the WTO wishes to remain relevant, it must—with urgency—confront the havoc created by China's state capitalism."⁴ If the WTO can be seen to be able to apply or, where necessary, amend its rules to take on the challenges presented by China's "socialist market economy" framework, then faith in the institution and its rules-based system can be enhanced, for the good of the United States and the world.

The idea of bringing a broad, coalition-based case against China—both for specific violations and for its nullification and impairment of legitimate expectations that the United States and the other members of the WTO had at the time China joined the WTO—was endorsed in a recommendation to the Congress contained in the U.S.-China Economic and Security Review Commission's November 2018 Report to Congress.⁵ The Commission specifically recommended that Congress examine whether USTR "should bring, in coordination with U.S. allies and partners, a 'non-violation nullification or impairment' case—alongside violations of specific commitments—against China at the World Trade Organization under Article 23(b) of the General Agreement on Tariffs and Trade."⁶

Question. For those areas of contention that are not well covered by WTO rules, such as state-owned enterprises, how can the United States work with our allies within the WTO to develop new rules?

⁴ Statement as delivered by Ambassador Dennis Shea, Deputy U.S. Trade Representative and U.S. Permanent Representative to the WTO, WTO General Council, Geneva, May 8, 2018.

⁵ https://www.uscc.gov/sites/default/files/annual_reports/2018%20Annual%20Report%20to%20Congress.pdf

⁶ Commission Recommendation 2, page 21, Executive Summary and Recommendations, 2018 Report to Congress of the U.S.-China Economic and Security Review Commission.

Answer. As noted in my answer to Ranking Member Wyden above, I agree with you that the rules do not do a good job of addressing the problems created by China's large and growing state-owned enterprises. As noted above, I believe that the trilateral cooperative process with Japan and the European Union represents a good start in the process of developing new disciplines on subsidies and state-owned enterprises.⁷ What is needed now is American leadership that can be trusted by Japan and the EU to finalize the new rules agreed to as part of the trilateral process, then developing sufficient leverage with respect to China coming from all three parties to push China to accept the new rules and finally working to bring them into the WTO system.

Question. What are the limits of the WTO in dealing with China, and how can the U.S. help facilitate reforms to strengthen it?

Answer. The biggest limits for the WTO in dealing with China is that the WTO can only apply rules that have been agreed to, and the enforcement of those rules often requires countries to bring disputes before the WTO dispute settlement system. The problem now is two-fold: (1) as a result of the U.S. blocking appointments to the WTO Appellate Body, there is no longer a binding dispute settlement system that can hold China to the commitments it has already made—if the U.S. brings and wins a case against China, China can avoid a formal requirement to comply by filing an appeal to the non-existent Appellate Body; and (2) the WTO does not have effective rules to address some of the systemic problems with China, particularly its use of subsidies and state-owned enterprises, the increasing levels of control over the economy by the Communist Party of China, and the lack of anti-trust/competition or bankruptcy laws that would impose market-based disciplines over the Chinese economy. Addressing those issues will require new rules to be negotiated and agreed upon by WTO members, at a time when reaching any new trade agreements has been very difficult.

Question. There have been two recent cases at the WTO that have challenged the broad applicability of GATT Article 21, the “national security exception” in the WTO.

A new ruling (July 2020) by the World Trade Organization in a case brought by Qatar against Saudi Arabia, stated that Saudi Arabia cannot use national security as an excuse for failing to protect the intellectual property of Qatari rights holders from rampant piracy of their broadcast rights for sports, movies, and television programming. Additionally, a 2018 case between Russia and Ukraine clarified the limits of “national security” as a defense for breaking WTO rules against unjustified tariff barriers to trade, stating that any such claim should be “objectively” true, relating to weapons, war, fissionable nuclear materials or an “emergency in international relations.” Notably, the panel in the Russian transit case—as mandated by the WTO treaty—drew on the “customary rules of interpretation of public international law” in noting that treaties must be upheld in “good faith” by those that are parties to them. On this basis, the panel in that case concluded that governmental actions for which a national security exception is claimed must “meet a minimum requirement of plausibility in relation to the proffered essential security interests.”

Under international law, these two panel rulings apply only to the parties to these disputes and to the measures addressed in them, so they would not directly impact the United States. However, do you believe that these rulings used sound reasoning, and should discourage countries from the increasing trend of misusing a “national security” justification for policies that have little to do with national security?

Answer. I hope so. At its core, the decision in the Russia-Ukraine dispute (DS512) found that invoking the national security exception for violations of the GATT (GATT Article XXI) requires a demonstration that justified “essential security” measures must fall within one of the three classes listed in the text of Article XXI(b): (i) fissionable materials; (ii) arms, ammunition, and implements of war; or (iii) measures taken in a time of war or other emergency in international relations. It also found that the phrase permitting a country to take any action which “it considers necessary for the protection of its essential security interests” gives wide latitude to countries to determine for themselves what it is in their essential interest, but that the phrase is still bounded by principles of good faith. I believe the reasoning behind both of these interpretations is sound and likely to be followed.

⁷ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-and-european-union>.

The decision in the Qatar-Saudi Arabia dispute over Saudi Arabia's refusal to prosecute those pirating sports broadcasts from legitimate operators in Qatar included an agreement by both parties to follow the reasoning and the analysis in the Russia-Ukraine dispute noted above. Because the national security language in Article XXI(b) and in TRIPs Article 73 that was at issue in the Qatar-Saudi dispute is exactly the same, I believe the reasoning is fairly widely accepted, including the limits placed by the requirement to act in good faith, which precludes the use of the security exception as a means to circumvent WTO obligations.

Question. One area of concern that many have with the WTO is the current treatment of "developing country status," or "special and differential treatment." SDT was meant to help the poorest WTO members meet their obligations to the fullest extent possible, and gives "developing" countries more time to implement obligations, preferential tariff schemes, and technical support from "developed" countries. However, nowhere in the WTO rules does it define what a "developing country" is, and as a result, members practice self-declaration, whereby they alone decide their development status.

Thus, we are seeing that rapidly growing countries with significant global reach lay claim to these special rights, due to members' ability to "self-declare" their developing country status. This has led to a situation where more advanced countries receive similar treatment to those that are much poorer, undermining the initial rationale for SDT to help those countries in most need with the transition to full compliance. Except for least-developed countries, SDT also does not differentiate between levels of development among developing countries, and as a result, the poorest countries are made worse off, while those that are economically better off receive a "free ride" from the rest of the multilateral trading system.

Do you agree that the WTO should work to adopt a new evidence-based, case-by-case approach to SDT to ensure both that the concerns of the poorest countries are addressed and that advanced developing countries carry their weight in the organization?

Answer. Yes.

Question. Advocates of reforming the SDT have suggested looking at factors ranging from a country's economic measures (like economic production or per-capita income), social measures (human development index), or trade indicators (export levels, high-technology trade) to define whether it is "developed." How can we best define "developing country"?

Answer. I am not certain of the best approach, as whatever approach is ultimately adopted will need to be developed in a consultative process. It is most likely that a combination of all three factors would have the greatest chance of garnering more support. Currently, the WTO rules do provide a definition for least-developed countries that follows the United Nations determinations. Those UN designations are based on GNI per capita, the UN's human assets index that takes into account the prevalence of undernourishment, child and maternal mortality ratios, secondary school enrollment and adult literacy rates, and economic vulnerability. I believe the criteria for determining developing country status should focus more on economic and trade-related factors than those used by the UN to determine which countries qualify as least-developed.

Question. Maximizing the effectiveness of the WTO through American engagement and leadership is in the broad national interest as a means to provide greater economic stability and prosperity. Detractors say that the WTO system is "rigged," but the fact remains that the United States has won 85.7 percent of the cases it has initiated before the WTO between 1995 and 2018. Almost 39 million jobs rely upon U.S. global trade, and foreign markets are critical to our agriculture, manufacturing, and service industries. Economists have found that the U.S. withdrawing from the WTO would lead to diminished trade growth, costly market and supply-chain disruptions, and the destruction of jobs and profits, especially in import- and export-dependent U.S. industries.

Can you speak to the projected effects of withdrawing from the WTO?

Answer. Withdrawing from the WTO could have a number of effects, the largest of which could be discrimination against American goods, services, and intellectual property once other countries are no longer bound by the WTO rules against discrimination on the basis of origin (MFN and national treatment requirements). An additional significant effect could be the increase in chaos and confusion over what rules apply to American exports, particularly if other countries chose to impose dif-

ferent tariffs or different regulatory measures or different customs procedures to American exports. Withdrawal from the WTO would also cede U.S. leadership to others, most notably China. The U.S. would no longer be at the table when new rules are developed, for example, with respect to digital trade and e-commerce.

Question. Do you believe that the resulting trade barriers from withdrawal from the WTO would compel some American companies either to downsize or move offshore?

Answer. Yes. At their core, the WTO rules provide protection from discrimination based on the origin of a good, service or intellectual property right. If the United States withdraws from the WTO and other countries decide to discriminate (or even threaten to discriminate) against all things American, U.S. companies would have to consider the cost to them of paying additional tariffs or being subject to different regulations or to the loss of IP rights in determining whether they can continue to operate with their goods, services or IP rights carrying a “Made in America” designation. Which industries would move and how quickly would depend on other countries responses to a U.S. withdrawal from the WTO, but the mere possibility of being closed out of other markets because of a U.S. base of operations could prompt companies to center their operations elsewhere.

QUESTIONS SUBMITTED BY HON. TODD YOUNG

Question. Over time, the World Trade Organization (WTO) has deviated from its mission of negotiation and become plagued with inefficiencies resulting in a lack of oversight over unfair trade practices. While the WTO of years past contributed to increased prosperity for the United States and other nations, the WTO of today has enabled unfair trade practices particularly from China to cause significant economic harm to American job creators and workers.

How has the WTO been insufficient in identifying, curbing, and preventing China’s use of unfair trade practices like IP theft and forced digital transfer practices?

Answer. The problems in addressing IP theft and forced digital transfer practices stem from a combination of an unwillingness to challenge China through formal dispute settlement procedures, failures on the part of the WTO to insist that China make timely notifications of its subsidy and other trade-distorting practices, and insufficiency of some of the rules themselves. The reluctance to bring specific disputes against China may be due to concerns over retaliation by China, the difficulty of obtaining sufficient evidence that can be disclosed without inviting further retaliation, and the increasing length of time it takes to complete WTO dispute settlement proceedings.

Question. How would you classify the WTO’s inability to halt unfair trade actions? Is this a result of systemic and pervasive flaws? Or, should each failure be reviewed independently on a case-by-case basis?

Answer. A case-by-case analysis would give a better understanding, as the reasons for the failure to confront China vary by industry (some industries are more able to take on China if they are more confident that China would not retaliate against them), by the nature of the unfair trading practice (the rules for subsidies, as noted above, are far less effective than rules in other areas) and by the underlying WTO rules and commitments made by China when it joined the WTO (some are quite specific while others are too vague to be clearly enforceable). But underneath almost all of them is the pervasive and growing role of the Communist Party of China in the economy of China in both overt and subtle ways that is almost impossible to address through changes to the trading rules.

Question. To what extent are administrative issues responsible for the failed oversight of WTO, and should reform efforts center on these or a more comprehensive strategy to improve the WTO?

Answer. At its core, the WTO has three main pillars: (1) a negotiating pillar allowing the WTO to serve as the forum for the creation of new trade rules and trade liberalization accords applicable to its 164 members; (2) an executive function, with the WTO serving as a central clearinghouse for tariff schedules, services commitments, non-tariff measures and subsidy notifications, along with supporting the important work of WTO committees; and (3) a dispute settlement arm designed to resolve disagreements over whether countries have lived up to their trade commitments. The problem is that the system is now badly out of balance, as the negotiating process has broken down, unable to reach any major agreements other than

the Trade Facilitation Agreement since the WTO was created in 1995. The executive function has been hampered by the failure of many countries to provide timely notifications of their measures and by its limited power in WTO's member-driven system. The dispute settlement system, until its Appellate Body was upended in December, was perceived to be very strong—with nearly 600 requests for consultations to resolve differences filed to date and countries throughout the world choosing to resolve their disputes at the WTO rather than through free-trade agreement or bilateral dispute settlement mechanisms. But that strength has contributed to the lack of balance in the system, with USTR's Ambassador Lighthizer noting "the WTO is losing its essential focus on negotiation and becoming a litigation-centered organization. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table."

As a result, the reform efforts need to involve a comprehensive strategy to restore the balance rather than a focus solely on administrative issues.

Question. What policies can the United States take to proactively seek to reform the Appellate Body to ensure a productive, transparent dispute resolution process?

Answer. As noted above in response to the question from Chairman Grassley, I believe the United States should seek a package of reforms that includes the adoption of the Walker principles to address specific U.S. concerns about the Appellate Body, the creation of an oversight process to ensure that the Appellate Body adheres to those principles and a rotation of staff serving Appellate Body members. These actions could be supplemented by changes to the approach to trade remedies as also noted in my response to Senator Grassley. Collectively, these reforms would allow the Appellate Body to function in a manner consistent with the original intent of the United States when it championed its creation and would give the United States an effective forum to enforce our trading rights.

Question. As problems with the WTO's lack of oversight and inability to be effective have increased, the United States has rightly brought these issues to light. However, other member nations have not treated these infractions with the same vigilance and tenacity. There is tremendous value in a multilateral response to hold China accountable and nations could be persuaded to unite common interests into a broader and more powerful complaint. Specifically, strategies can include making a general IP challenge, addressing trade secret theft and forced technology transfer, and countering subsidies.

How can the United States work with other member countries in order to bring forward comprehensive and fact-based claims against China's unfair trade practices?

How does China seek to undermine the United States' relationships with other countries? How should the United States combat increased investments or threatened retaliation?

What strategies can the United States use to build multilateral support for broad-based challenges to China?

Answer. As noted above in the response to Senator Toomey, I believe the best approach would be a big, bold, comprehensive case at the WTO filed by a broad coalition of countries that share the United States' substantive concerns about China. The case could include over a dozen specific allegations of violations by China of its commitments under its protocol of accession to the WTO or the WTO rules themselves (as spelled out in my testimony before the Senate Foreign Relations Committee),⁸ along with a non-violation claim under Article XXIII of the GATT, focused on the myriad ways in which China's economy fails to meet the Marrakesh Declaration that the WTO was designed as a world trading system "based upon open, market-oriented policies."

Most WTO disputes have as their goal a ruling by the Dispute Settlement Body that the measures complained about violate one or more provisions of the WTO Agreements, after which the responding party brings its measures into compliance, often by removing or amending the offending measures. Here, while one of the goals of a big coalition-based case would be to seek certain specific rulings of violations by China across more than a dozen areas, the goals would be much broader: (1) to seek a common understanding of where the current set of rules are failing and need to be changed (with disciplines on subsidies at the top of that list); (2) to begin the process of scoping out exactly what those rule changes would look like to accommodate the views of the broader WTO membership; (3) to seek recognition from China

⁸https://www.foreign.senate.gov/imo/media/doc/112718_Hillman_Testimony1.pdf.

of where and to what degree its economic structure can or cannot fit within a fair, transparent and market-based trading system; and (4) to give China the opportunity to make a choice that is its sovereign right to make—whether it wants to change its system to one that does fit within the parameters of the WTO or not.

The hope would be that both China and the coalition of parties to the dispute would appreciate that the trading system is better off with China as part of it, that the WTO rules are in some places and in some ways part of the problem and need to be changed, but that tinkering at the margins will not suffice.

Question. One area of significant concern with the WTO's failure to issue corrective action is China's subsidization of its domestic manufacturing. This undercuts U.S. businesses and manipulates the global market. The campaign, "Made in China 2025," was created under the guise of advancing innovation in technology, but is really government-sanctioned subsidies to businesses that purchase government-approved goods from domestic suppliers. This subsidy regime has and continues to have negative effects on foreign competitors—this is a violation of WTO obligations. Personally, I have heard from a number of constituent businesses in Indiana who suffer loss of market share because of an inability to compete with artificially low prices from China.

What tools at the WTO can be used to address Chinese subsidization of their domestic manufacturing?

How should the United States use the functions at the WTO to correct this consistent and manipulative behavior from China?

If the Chinese are not held accountable from a multilateral consensus, what will the future hold for American manufacturers?

Answer. As noted above in my response to Ranking Member Wyden's question, I believe that among the biggest weaknesses of the WTO is the inability to discipline subsidies or to rein in the practices of China's state-owned enterprises. Fixing the problem likely requires a change in the rules around subsidies themselves and a better mechanism to hold China to account for its failures to rein its subsidies and to expand the reach of its state-owned enterprises.

One possible option is for WTO members to create categories of "permitted" or "green light" subsidies that would fall outside the scope of the ASCM disciplines, "red light" or prohibited subsidies, and "amber light" subsidies for all others. Doing so would provide policy space for members to negotiate the types of subsidies in each category, particularly for "green light" subsidies, which could include those that promote the public good or are directed at addressing climate change. Establishing an amber box—which would include subsidies that likely distort production and trade—would require a commitment by members to limit their total spending on such subsidies, with the largest subsidizers potentially committing to reduce their amber light subsidies over a set time period.

A second option is to expand the list of prohibited subsidies. Because prohibited subsidies have both a clearer and faster remedy than merely actionable subsidies, expanding their list could add teeth to the ASCM. Currently, ASCM Article 3 limits prohibited subsidies to export subsidies or subsidies contingent on the use of domestic products over imports. If certain subsidies that are considered more trade distortive, such as those leading to substantial global overcapacity, could be defined and added to Article 3, it would strengthen the ASCM.

Changes are also necessary to redefine "government or public body" and to address the evidence problem by establishing a set of rebuttable presumptions for countries that believe they have suffered as a result of another member's subsidies.

Failure to adopt new rules and new mechanisms to hold China to account will leave U.S. companies competing against low-priced, unfairly trading imports and will keep prices in the world suppressed due to the overproduction emanating from China's heavily subsidized industries. Achieving meaningful disciplines on China will require working with our allies, as pressure from the U.S. alone will not be sufficient, either to establish new rules or to enforce them.

QUESTIONS SUBMITTED BY HON. SHELDON WHITEHOUSE

Question. Professor Hillman, as a former member of the WTO's Appellate Body, you are well-placed to discuss what sorts of trade regulations would pass muster with the WTO.

Could a carbon border adjustment could be constructed in such a way so as to be WTO-compliant, and if so, what would such a regime look like?

Answer. Yes. The United States has a right under applicable WTO provisions to assess a carbon-related tax or a charge on imports—a carbon border adjustment (CBA)—provided such a CBA does not exceed the amount of the tax imposed on similar U.S. products. The key is to structure any CBA as a straightforward extension of the domestic climate policy to imports and to ensure that the amount of the CBA imposed on the imported goods does not exceed the amount of the tax on the domestically produced products. If so designed, there should be few questions about the measure's consistency with the WTO rules. Even if questions were raised, the United States would have strong defenses within the WTO system (Article XX of the GATT). And even if those defenses were somehow to fail, the United States would be able to make adjustments should some aspect of its carbon tax system be found wanting. A non-discriminatory tax enacted in good faith to address climate change should readily pass muster with the WTO.

Question. Some have expressed concern that a carbon fee would disadvantage American heavy industry.

Could a carbon border adjustment be designed in such a way so as to protect American heavy industry, and if so, what would such a border adjustment mechanism would look like?

To the extent that Chinese heavy industry is on average more carbon-intensive than U.S. heavy industry, would a carbon border adjustment provide U.S. industry with an advantage over Chinese industry exporting to the U.S.?

Answer. Yes, a CBA can be designed to ensure that energy-intensive American industries are protected from unfair competition from industries in countries that have no carbon tax or carbon-pricing system in place or are made using a more carbon-intensive process. The easiest and fairest way to do so is to assess the tax (both the domestic tax and the CBA tax on imports) on the basis of the amount of greenhouse gas (GHG) emissions consumed in the production of the product being made or imported. If the tax were a set amount per ton of GHG consumed per ton of product produced, then U.S. producers with a more carbon-efficient process would pay a domestic tax that is less per ton of product produced than the amount of the tax that would be paid by importers per ton of product imported if those imports were made using a more carbon-intensive process.

Question. The European Union is considering implementing a carbon border adjustment regime.

Could the EU do so in compliance with WTO rules, and if they did, would U.S. exporters to the EU be obligated to pay the border adjustment fee?

Answer. Yes, it is possible, but will be extremely difficult, for the EU to impose a WTO-consistent border adjustment fee on imports to the EU from the United States. The reason that it will be so difficult is that the EU does not impose a carbon tax on its own EU producers. Instead, the EU has an emissions-trading system (ETS) in place that requires EU companies to reduce emissions by set amounts; if they cannot do so, they must purchase emissions-trading permits. The problem is that for a border adjustment fee to be lawfully applied, the EU must show that the amount of the import fee is equivalent to what EU companies effectively pay under the ETS. However, objective standards do not exist either to determine the equivalent price of the EU's ETS, or to provide credit based on an equivalent price for the portfolio of policies in nations that export GHG-intensive products to the EU. In addition, ETS requirements are applied to production *facilities* in the EU, while a CBA would be applied to imported *products*, making a comparison between the two to ensure equivalence very difficult. Moreover, the ETS does not prescribe a specific price for emissions allowances; rather it establishes a market-based process that results in a variable, at times volatile, allowance price for emissions. Devising objective methods to address the time-dependent allowance price and assign it to a fixed import charge for specific products would also be extremely challenging.

Question. If the U.S. implemented a carbon price equal to or greater than the average price for EU emissions allowances, would U.S. exporters still have to pay the EU border adjustment fee?

Answer. The answer depends on whether the EU's border adjustment scheme provides for such an offset but the initial descriptions of the EU's scheme suggest that

an offset will be included.⁹ If that is the case, then yes, the adoption of a carbon tax in the United States should exempt U.S. exports to the EU from the EU's CBA.

Question. Together with Senators Schatz, Heinrich, and Gillibrand, last year I re-introduced the American Opportunity Carbon Fee Act. My bill includes a border adjustment mechanism to protect U.S. manufacturers.

In your view, is my bill WTO-compliant, and would it protect U.S. manufacturers from unfair foreign competition?

Answer. Yes, I believe your bill is WTO-compliant, and yes, it would protect U.S. manufacturers from unfair competition from foreign producers that do not face a comparable carbon tax or carbon pricing system. While some initial methodological issues will arise, I believe that the tools and the data to demonstrate that an import fee imposed as a border adjustment in your bill is equivalent to the amount of the tax effectively paid by U.S. producers of similar goods exist such that an equivalence demonstration can be made. It is a showing of comparable taxes being paid by U.S. producers and importers that is necessary to demonstrate WTO compliance. Because your bill assumes that both the tax paid by U.S. producers and the tax paid by importers is based on the amount of GHG emissions burned in the production of a particular good, more energy-efficient U.S. producers will pay a smaller carbon tax per ton of product produced than comparable imports made by a foreign manufacturer that burns more GHGs to produce the same ton of a given product. As such, your bill protects U.S. manufacturers from having to compete directly with goods produced in countries that do not impose a carbon tax or other carbon pricing system.

PREPARED STATEMENT OF MICHELE KURUC, VICE PRESIDENT,
OCEAN POLICY, WORLD WILDLIFE FUND

The details of what has transpired during 20 years of negotiations at the World Trade Organization (WTO) on harmful fisheries subsidies is hardly riveting storytelling. But the inability to successfully conclude the negotiations and reach an agreement to date has been extremely frustrating, as we've had to witness the concurrent decline in the health of the world's ocean, fueled in large part by harmful subsidies funding too many boats chasing too few fish. Our oceans are rife with illegal fishing, (estimated at 36.4 billion USD per year¹), overfishing (more than 80 percent of the world's fish stocks are overfished, or at capacity²) and overcapacity (over 3 million fishing vessels are estimated to fish in marine waters and there are not enough fish for all of them³). All those detrimental activities are furthered by subsidies.

On a global level, subsidies to fisheries are estimated to be 35.4 billion USD⁴ annually. The top five subsidizing entities are China, the EU, the U.S., Republic of Korea, and Japan.⁵ Not all subsidies are considered harmful, cause damage to fish stocks, or thwart sustainability. But those which are considered harmful comprise the majority, with \$22.2 billion classified as harmful.⁶ These harmful subsidies take many forms such as fuel, tax breaks, and capacity enhancement, which drives overcapacity of fleets and overfishing, and worsen the unsustainable, downward cycle. Many examples of the damaging impacts of these subsidies are found in the attachment to this statement.

Inappropriate subsidies not only harm the environment, they directly promote unfair trade and even contribute to geopolitical strategies of economic control. China, for example, has the world's largest distant water fishing fleet—a fleet that in multiple oceans is used not only for fishing but for projecting Chinese maritime power. That fleet is supported by subsidies allowing these Chinese boats to roam the world's oceans to prey on weaker nations and flaunt many laws designed to keep fish stocks at sustainable levels and available to support our collective future. China

⁹ <https://www.bcg.com/publications/2020/how-an-eu-carbon-border-tax-could-jolt-world-trade>.

¹ 2017, Transnational Crime and the Developing World. Global Financial Integrity.

² 2020, State of the World's Fisheries and Aquaculture, FAO.

³ *Id.*

⁴ 2019, Updated Estimates and Analysis of Global Fisheries Subsidies, U. Rashid Sumalia, Marine Policy.

⁵ Subsidizing the Extinction of Fish and Fisheries, U. Rashid Sumalia, webinar presented at The Link Between Fisheries Subsidies at the WTO and Small-Scale Fisheries, Pew Charitable Trusts, July 13, 2020.

⁶ *Id.*

gives more capacity-enhancing (harmful) subsidies than any other nation. Of the \$22.2 billion in annual harmful subsidies, China supplies about one-quarter.⁷

Subsidies are often claimed to be essential to help small-scale fishers, those in poverty, or only impact fishing within one country's waters. None of that withstands scrutiny. Large-scale fishing operations receive 84 percent of subsidies globally while small-scale operators receive only 16 percent.⁸ Subsidies artificially expand the number of vessels and fuel overcapacity, contributing to declines in the entire sector's productivity and making it harder for those who depend on fishing to support their livelihoods, especially those already struggling at the margins. Subsidies support illegal fishing activities as well and are thought to provide 1.8–3.7 billion USD⁹ to do so.

Harmful subsidies undermine fisheries management. And, we will not enforce our way out of these problems. Robust enforcement is certainly an important tool, but an agreement is needed that puts an end to subsidies that perpetuate an attractive value proposition for overfishing and overcapacity. Only the WTO can deliver that agreement. Funds that fuel harmful subsidies ought to be re-directed to improving fisheries management, a far better investment. Research on subsidies reform using 30 case studies worldwide indicates that reorienting subsidies away from capacity-enhancement, and/or conditioning them on specific sustainable performance metrics had the best economic and ecological outcome in terms of fishery performance.¹⁰ The World Bank estimates that effective management of global marine fisheries and the recovery of fish stocks would yield increased revenues of \$83 billion a year. In the United States our own fisheries management is strong but in many other parts of the world this is not the case. But continued poor fisheries management coupled with subsidized overfishing is not only putting law abiding fishers at a commercial disadvantage but is a recipe for larger-scale economic and biological disasters and compromised food security.

Status of negotiations. After COVID-related delays, a chair's text was recently distributed which is seen by many as a good basis for moving forward and text-based negotiations will resume in September, in-person and virtually. Although the talks are behind the initial December 2019 deadline, linked to the UN's Sustainable Development Goals, they may conclude by the end of 2020 or they may await the ministerial-level political negotiation that is likely to be back on the schedule in the first half of 2021.¹¹

Prospects. And if we end up with an agreement, what sort of agreement might it be? There are many issues that are unresolved around key definitions, the scope of an agreement, what and who may be covered and who decides major determinations, application of various formulas and timing issues. The United States has established a high ambition outcome and has held to that while listening to and discussing the proposals of others. This is a characteristic of U.S. leadership, but the next few months will likely determine whether WTO members can come away with an effective agreement or not. Many who have been long-time WTO watchers in this space say they feel there is reason to be optimistic on successfully concluding the negotiations this time, as this is the closest they've come in over a decade to actually reaching an agreement.

Role of the U.S. We have excellent negotiators and they should stay the course and determine when and if compromises are needed. But this issue is also about the strength and value of the WTO as an institution. The WTO is specifically mandated to end harmful subsidies generally, and, after 20 years of preparatory debate, it is uniquely postured to put the kibosh on harmful fisheries subsidies in particular. But only continued and strong U.S. leadership can bring the WTO to delivering this long overdue result. And the time is now to pay attention to this issue once again.

We also need to address unfair trade practices, and this means import control rules that identify and prevent illegal fish products from entering our lucrative U.S.

⁷Subsidizing the Extinction of Fish and Fisheries, U. Rashid Sumalia, webinar presented at The Link Between Fisheries Subsidies at the WTO and Small-Scale Fisheries, Pew Charitable Trusts, July 13, 2020.

⁸*Id.*

⁹<https://www.economist.com/leaders/2017/12/19/a-shameful-failure-to-tackle-overfishing>.

¹⁰Andrés M. Cisneros-Montemayor et al. Strategies and rationale for fishery subsidy reform. *Marine Policy* 69, 229–236, 2016.

¹¹July 21, 2020, Inside Trade.com, WTO to Start Text Negotiations in Fall; U.S. sees “missing pieces.”

market. The U.S. seafood import monitoring program (SIMP) is a useful start, but it only includes 40 percent (by volume and value, it includes 13 species) of our imports.¹² Other major importing countries are considering following the U.S. lead, and collectively we can shut off the IUU tap if we do it right, and expand SIMP to include all species in our program's coverage. Notwithstanding the SIMP import screening, approx. \$1 billion in IUU products are still entering the U.S. Further, a consistent interpretation of IUU in U.S. regulations needs to be applied that will allow the U.S. more tools to address countries that are intransigent bad actors. It is important for the U.S. to work to address unfair trade practices—subsidies and IUU fishing—that are harming the environment, fisheries and U.S. fishermen and our seafood industry.

ENDING HARMFUL FISHERIES SUBSIDIES:
IT IS VITAL FOR THE WTO TO TAKE ACTION NOW

The crisis of depletion affecting fisheries worldwide is one of the defining environmental and social challenges of our times.

The well-documented harmful impact of certain forms of fisheries subsidies on the environment and the health of fish stocks, and the consequences for the economic stability of fishing communities, has been subject of discussion within the WTO for 2 decades. It is now high time for WTO members to take effective action to secure healthy oceans and sustainable livelihoods for the years to come.¹³

Over a billion people depend on fish as their primary source of protein and a hundred million are directly dependent on fishing for their livelihoods. But the productivity of wild capture fisheries has been flat since the late 1980s despite dramatic growth in global fishing capacity. One-third of assessed global fish stocks are now overfished,¹⁴ promoted by subsidies and exacerbated by illegal, unreported and unregulated (IUU) fishing. Another 60 percent of stocks are fished at levels that can no longer support increases in catch, meaning that well over 90 percent of stocks are either fully fished at their biological limits or are overfished.

Massive global subsidies help drive this depletion because they provide economic incentives for fishing even when it is not profitable. Subsidies also fund the overcapacity that undermines best efforts to fish sustainably and to limit bycatch and habitat destruction. Because of the largely unconstrained pressures on the ocean's resources, each dollar of taxpayer funds used to support fishing today places enormous costs on the environment and the well-being of future generations.

THE NEED TO CURTAIL FISHERIES SUBSIDIES

Recent analysis of the extent of global subsidies indicates that over \$22 billion was spent in 2018 on capacity-enhancing subsidies, representing an astounding 17 percent of the value of the fish caught.¹⁵ Fuel subsidies topped the list at nearly \$8 billion.¹⁶ China alone provides over 25 percent of the capacity-enhancing subsidies provided globally, followed by Japan and the EU with over 9 percent each. Other significant subsidizing countries include Korea, Russia, the United States, and Thailand.

Recent research comparing mapped vessel movements against the cost of labor and fuel suggests that as much as 54 percent of high seas fishing may be unprofitable in the absence of government subsidies.¹⁷ The high seas fleets of China (35 percent of high seas catch), Taiwan (12 percent) and Russia (4 percent) are all operating at a loss. Nonetheless, industrial fishing on the high seas is a relatively small

¹² 81 FR 88975, Final Rule, Seafood Import Monitoring Program, December 9, 2016.

¹³ Through Sustainable Development Goal 14.6 the global community has committed to banning harmful fisheries subsidies by 2020. SDG 14.6: "By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiations."

¹⁴ SOFIA 2018, FAO.

¹⁵ FAO Status of World Fisheries. 2016 fisheries production was \$130 billion.

¹⁶ Sumaila, R. et al. Updated estimates and analysis of global fisheries subsidies. *Marine Policy* 109 (2019) 103695, <https://doi.org/10.1016/j.marpol.2019.103695>.

¹⁷ Sala et al., *Science Advances* June 6 2018. The economics of fishing the high seas, <http://advances.sciencemag.org/content/4/6/eaat2504.full>.

portion of global fishing, accounting for only 6 percent of all fishing activity.¹⁸ The vast majority of fish are found and caught within countries' national jurisdictions.¹⁹

THE HARMFUL EFFECTS OF FISHERIES SUBSIDIES

A report by the Organisation for Economic Co-operation and Development (OECD) found subsidies that reduce the cost of fishing through financial support for fuel, gear, or bait expenditures, are the most likely to increase both legal and illicit fishing effort, potentially leading to stock depletion.²⁰

Fuel subsidies encourage the wasteful use of fuel. They also maintain uneconomic and environmentally destructive fishing practices, such as deep-sea trawling, and distort the competition between large-scale, fuel-intensive fishing vessels and small-scale vessels using passive gear. To the extent that fishing capacity remains in use because of these fuel subsidies, the necessary restructuring of the sector through capacity reductions is prevented. In turn, the chronic excess capacity that exists in most countries creates powerful interests in support of ongoing subsidies and continued high fishing quotas, leading to persistent overfishing.

Examples of the negative impact of fisheries subsidies abound. In the Mediterranean, one of the world's richest bluefin tuna fisheries was shut down in the 1990s, being the target of overfishing by heavily subsidized fleets, and only with recent management measures in place have slowly recovered; in the North West Atlantic, the historic cod fishery was closed after years of subsidized overfishing; in the Western and Central Pacific and the Indian Ocean, tuna and other valuable stocks face increased pressure as subsidized competition pushes fleets into fisheries far from their traditional grounds; off the coasts of Africa and in the South Pacific, local fishermen compete with subsidized foreign vessels, many fishing illegally.

In Ghana, subsidized foreign fishing vessels engage in a practice known as saiko, where large canoes meet illegal trawling vessels to trade for slabs of frozen bycatch to sell in local markets. Although the practice is illegal and undercuts local jobs, the lucrative saiko business attracts foreign vessels due to the prevalent challenges of enforcement.²¹

In Suriname, fishermen, fisherfolk organizations, legislators, and NGOs have expressed their concern about overfishing and the impact that factory trawlers will have on their stocks. Collectively they have successfully prevented the introduction of factory trawlers in Surinamese waters.²²

An analysis undertaken by WWF Mexico found no evidence to prove that fisheries subsidies are helping Mexico develop its industry.²³ While subsidies were key to increasing the size of the fleet and continue to support its operation, catch levels have remained constant for the last 2 decades, which means the industry is less productive per vessel and workers make less money. Furthermore, the greatest share of subsidies is given to the wealthier participants in a fishery, instead of the low-income fishers in coastal communities. For example, in Mexico one quarter of beneficiaries receive 80 percent of fisheries fuel subsidies and industrial fishing entities receive 70 percent of modernization subsidies. Overall, capacity and effort-enhancing subsidies are decreasing fisheries productivity, encouraging overfishing and threatening livelihoods in coastal communities.

Government Subsidies Can Fuel Massive Increases in Fleet Capacity and Support IUU Fishing

Large subsidies have led to an expansion of fishing capacity and effort in many regions of the world. For example, government subsidies in China have supported China's distant water fleet (DWF) when the operations may not otherwise be via-

¹⁸ *Ibid.*

¹⁹ An estimated 88 percent of marine catch is from within national jurisdictions. U. Rashid Sumaila, Vicky W.Y. Lam, Dana D. Miller, Louise The, Reg A. Watson, Dirk Zeller, William W.L. Cheung, Isabelle M. Côté, Alex D. Rogers, Callum Roterts, Enric Sala, and Daniel Pauly. *Winners and losers in a world where the high seas is closed to fishing*. Scientific Reports 5, 8481. 2015.

²⁰ Martini, R. and Innes, J. "Relative Effects of Fisheries Support Policies," OECD Food, Agriculture, and Fisheries Papers No. 115. 2018, <http://dx.doi.org/10.1787/bd9b0dc3-en>.

²¹ EJF and Hen Mpoano (2019). Stolen at sea. How illegal "saiko" fishing is fueling the collapse of Ghana's fisheries.

²² See e.g., September 4, 2019, <http://www.starnieuws.com/index.php/welcome/index/nieuwsitem/54397>.

²³ Reforming Harmful Fisheries Subsidies: Making the Economic Case for Mexico. WWF. April 2019.

ble,²⁴ largely through subsidies for fuel that comprise a significant share of income for China's distant water vessels. Operators also receive tax exemptions under the DWF-connected "going out" programs, ship construction subsidies provided by provincial governments and tax breaks provided by coastal Chinese provinces and cities to support local fishing companies.²⁵

Subsidies to the fishing industry provided by the central government alone reached nearly \$22 billion between 2011 and 2015, almost triple the amount spent during the previous 4 years.²⁶ Evidence that these subsidies supported illegal fishing by DWF fleets in West Africa—including using illegal nets, shark finning and fishing without a license—recently prompted the Chinese Ministry of Agriculture to sanction three DWF companies by canceling the subsidies and removing the fishing permits.²⁷

In 2016, the Argentine coast guard sank a Chinese trawler fishing in its territorial waters,²⁸ and Chinese vessels were detained by Indonesia and South Africa. Since 2016, in an effort to combat IUU fishing by its DWF, China reportedly has canceled €90 million in subsidies for 264 vessels.²⁹

SUBSIDIES FOR IUU FISHING

Estimates vary by country and region, but have revealed substantial and widespread IUU fishing, valued at between \$10 and \$23.5 billion per year and accounting for 13 percent to 31 percent of global marine catch. *The Economist* estimates that, based on the extent of IUU fishing and of global subsidies, about \$1.8–\$3.7 billion of government subsidies a year may support illegal fishing activity.³⁰

Subsidies granted to illegal fishing vessels, operators and owners magnify the damage caused by IUU fishing and hamper ongoing global efforts to curtail IUU fishing activity. IUU fishing operators have a lower cost of production than legitimate fishers because they avoid some or all of the rules on catch, monitoring, labor, safety and health that fishing vessels face. Subsidies compound the problem to make IUU fishing even more profitable.

Despite national, regional and global efforts, IUU fishing remains widespread. Much more needs to be done to combat it effectively. The WTO has a special role to play in curtailing the economic benefits of IUU fishing by eliminating the subsidies that promote it.

Penalties and Sanctions on IUU Fishing Are Often Inadequate to Deter Further IUU Fishing

- The absence of severe penalties, combined with limited enforcement, makes IUU fishing a lucrative option. One study found that maximum penalties should be increased considerably—by as much as 24 times—compared to current levels, if they are to have a deterrent effect on IUU fishing.*
- Very few countries have levels of fines that are effective deterrents to IUU activities. Fines and penalties across many legal systems concluded that they are often based on the "ability to pay." Given that fishers often have little income compared to the societal costs of their action and that the true owners of vessels are often disguised, this often works against the deterrence effect.

*Sumaila, U.R., Alder, J., and Keith, H. (2006). Global scope and economics of illegal fishing. *Mar. Policy* 30, 696–703.

²⁴ Greenpeace. Give a Man a Fish—Five Facts on China's Distant Water Fishing Subsidies, https://www.greenpeace.org/eastasia/PageFiles/299371/FINAL_The%20problem%20with%20China%27s%20distant%20water%20fishing%20industry%20subsidies_.pdf.

²⁵ *Ibid.* Half the cost of DWF vessels may be covered by provincial governments, with Shandong and Fujian provinces commissioning two-thirds of China's more than 600 new DWF vessels built between 2012 and 2014.

²⁶ NYT, April 30, 2017. China's appetite pushes fisheries to the brink, <https://www.nytimes.com/2017/04/30/world/asia/chinas-appetite-pushes-fisheries-to-the-brink.html>.

²⁷ Greenpeace press release, March 9, 2018. Chinese companies see subsidies canceled and permits removed for illegal fishing in West Africa, <https://www.greenpeace.org/international/press-release/15209/chinese-companies-see-subsidies-cancelled-and-permits-removed-for-illegal-fishing-in-west-africa/>.

²⁸ <https://www.reuters.com/article/us-argentina-defense-china/argentina-coast-guard-sinks-chinese-trawler-fishing-illegally-idUSKCN0WH2QL>.

²⁹ Greenpeace press release March 9, 2018.

³⁰ <https://www.economist.com/leaders/2017/12/19/a-shameful-failure-to-tackle-overfishing>.

THE BENEFITS OF SUBSIDIES REFORM

At the national level, instead of subsidizing increased capacity and effort in their EEZs, a far more rational policy to maximize government return on investments in the sector would be for countries to (re-)allocate funds to effectively manage their own fishing grounds and ensure a careful balance of fleet capacity and fisheries resources. This is also vital to ensure sustainable livelihoods in the long term.

Research on subsidies reform using 30 case studies worldwide indicates that reorienting subsidies away from capacity-enhancement, and/or conditioning them on specific sustainable performance metrics had the best economic and ecological outcome in terms of fishery performance.³¹ In fact, the World Bank estimates that effective management of global marine fisheries and the recovery of fish stocks would yield increased revenues of \$83 billion a year.³²

Fisheries management is critical for sustainability but subsidies for vessels and operations provide a strong incentive to undermine any attempt to control fishing activities. Ending harmful fisheries subsidies is a pre-requisite for long-term sustainable fisheries management.

CONCLUSION

Harmful subsidies fund a vicious cycle, supporting fishing when it is not economically viable and creating domestic constituencies for bad policies that lead to unsustainable exploitation of fisheries.

Countries must address subsidies reform at the national level, and some are, but the WTO is the only body that can take meaningful action to curtail harmful fisheries subsidies at a global scale. By curtailing subsidies that drive overcapacity and overfishing and support illegal fishing vessels, WTO disciplines can undercut ongoing economic support for activities that destroy our oceans and the livelihoods of millions.

WTO members have made a commitment to fulfil Sustainable Development Goal 14.6 by adopting an agreement on comprehensive and effective disciplines on harmful fisheries subsidies by December 2019. It is time to live up to that promise.

ENDING HARMFUL FISHERIES SUBSIDIES³³

WWF calls for a broad scope of prohibitions on fisheries subsidies. These include prohibitions on, at a minimum, subsidies that increase fishing capacity or effort, as well as subsidies that contribute to IUU fishing, including subsidies for **capital costs including vessel construction and modernization**, subsidies to **operating costs**, subsidies that allow fishing **on stocks that are overfished** and subsidies that **contribute to IUU fishing** vessels, operators, or owners.

A limited scope of prohibitions—for example prohibitions only relating to subsidies linked to overfished stocks, to IUU fishing activities, to high-seas fisheries, and/or prohibitions subject to relatively large potential exemptions—would not be enough to address the harm to fish stocks and fishing communities caused by widespread subsidies.

WWF supports appropriate conditions and flexibilities for developing and least developed countries to implement the disciplines, but there should be no blanket exemption for small-scale fisheries and any exemption for subsistence fishing should be on the basis of socio-economic imperatives rather than vessel size.

New measures are also necessary to increase transparency on fisheries subsidies programs and to increase compliance by making reporting requirements enforceable under WTO law.

PROHIBITING SUBSIDIES FOR IUU FISHING

Strong rules are necessary to address all significant fisheries subsidies programs affecting wild capture fisheries, including subsidies for IUU fishing in international waters as well as within EEZs.³⁴

³¹ Andrés M. Cisneros-Montemayor et al. Strategies and rationale for fishery subsidy reform. *Marine Policy* 69, 229–236. 2016.

³² World Bank 2017.

³³ http://awsassets.panda.org/downloads/WWF_briefing_WTO_Fisheries_Subsidies_MC11_2017.pdf.

³⁴ WWF supports proposals to use the FAO International Plan of Action (IPOA) on IUU as a starting reference for defining IUU fishing and applying potential disciplines to vessels or op-

Any WTO agreement on fishing subsidies must have, as a fundamental obligation, the requirement that members include in national legislation a prohibition on subsidies for IUU fishing activities. Furthermore, to limit support for the full scope of illegal fishing activity it is essential that subsidy disciplines go beyond listed vessels to prohibit subsidies to:

- (a) **Operators who are involved in the ownership,³⁵ management and operation of a vessel engaged in IUU fishing activities; and**
- (b) **IUU activities within EEZs, based on national determinations by the flag or subsidizing state, as well as under the national laws of coastal states where IUU fishing may be occurring.³⁶**

Given the nature of IUU fishing and the particularly pernicious and distorting nature of its subsidization, no exceptions to such a prohibition should be allowed.

QUESTIONS SUBMITTED FOR THE RECORD TO MICHELE KURUC

QUESTIONS SUBMITTED BY HON. CHUCK GRASSLEY

Question. I find it deeply frustrating that the fisheries negotiations have dragged on for so long. An ambitious outcome would save governments money and conserve fisheries that are on the verge of collapse.

Lately, I have been hearing two arguments on why the negotiations have proven so complicated. First, there is a European argument that we don't want to restrict "good subsidies." I haven't seen anything to suggest what would constitute a good subsidy in light of what we're trying to restrict, which is subsidies to illegal, unreported, and unregulated fishing (IUU).

What are your thoughts on these claims?

Answer. The mandate that the WTO is tasked to deliver on commits it to eliminating subsidies to IUU fishing as well as prohibiting subsidies that contribute to overfishing and overcapacity. The second component is the most critical in terms of impact on the environment: harmful subsidies incentivize overfishing by artificially reducing the costs of the activity. This is the same in developing or developed countries. While the science is clear on what constitutes a "bad" and "good" subsidy, politics muddies the waters. If governments want to support their fishing communities in a truly sustainable manner, they should redirect support away from fishing activity and towards fishers themselves. Both the European Union and India have a problem of overfishing in their waters (the Mediterranean for example; India is trying to encourage its fishers to move out of fishing near shore waters because they are so overfished). The European Union is currently considering the reintroduction of subsidies for vessel construction, which it banned in 2004, recognizing that these were harmful. The European Union also provides its fishing industry with a fuel detaxation subsidy. India provides its fishers with fuel subsidies.

It is overfishing that is exacerbating poverty. Fuel subsidies have been shown by the OECD to be a highly inefficient form of support for fishers. One of the rationales behind the call for "flexibility" is to allow poorer nations to build their fleets to compete with the biggest fishing nations. However, poorer nations will never be able to compete with the top five biggest subsidizers who between them provide more than 50 percent of all harmful subsidies worldwide.

What both arguments demonstrate is the need for elimination of harmful fisheries subsidies through a multilateral agreement that levels the playing field across the board and triggers a paradigm shift in how governments manage our precious ocean resources.

With respect to the desired outcome of the fisheries subsidies negotiations referred to above, WWF believes it is essential that a WTO agreement is comprehensive, a prohibition of subsidies that contribute to IUU fishing is a bare minimum but it must go well beyond, and include clear disciplines on harmful subsidies con-

erators found to be engaged in IUU fishing based on national determinations and/or those of the Regional Fisheries Management Organizations (RFMOs) or Arrangements.

³⁵This is particularly important given the global phenomenon of vessels flying flags of convenience and associated challenges in identifying these vessels' beneficial owners.

³⁶Given the often very complex nature of IUU activities and associated subsidies, notification of such types of activities to the WTO should be part of a suite of measures agreed upon to make a prohibition on IUU subsidies effective.

tributing to overfishing and overcapacity. This is also what is mandated by the WTO mandate adopted in December 2017 (and SDG 14.6).

A number of WTO members, including the EU, are proposing a so-called “green box” approach in their draft text on a prohibition of subsidies contributing to overcapacity and overfishing, which does *not* include subsidies contributing to IUU.

While fisheries subsidies that support fishery resource conservation and improved fisheries management can in principle have some positive impact on the sustainability of fisheries, others that are proposed to be included in green box proposals, are at least ambiguous in nature and should not be per se exempted.

Some of the proposals with the green box approach include broad categories of subsidies such as, subsidies to improve safety on board, which could entail fleet renewal or vessel modernization measures that increase the de facto capacity of a vessel to catch fish, even if capacity measured in GT or kW is not increased; or an increase is mandated to be compensated by a withdrawal of capacity elsewhere. Safety on board can be improved by other means than fleet renewal or vessel modernization. A more effective way to secure jobs and safety at sea would be to invest in crew and community schemes rather than in vessels and machinery, *e.g.*, crew safety training, life-saving equipment, rescue services and lifelong learning and acquisition of new professional skills linked to safety.

Beneficial subsidies, a.k.a. good subsidies, if correct, are those that (i) ensure that fishing activities are environmentally sustainable in the long term, by increasing research and data collection on the status of fish stocks and health of the marine environment to inform sustainable fisheries management; and (ii) contribute to a healthy and productive marine environment, supporting thriving ecosystems, abundant fish stocks and, thus, sustainable livelihoods, by enhancing control and monitoring capacities, effectively enforcing legislation, mitigating negative environmental impacts of fishing activities and reducing illegal, unreported, and unregulated (IUU) fishing.

The extent to which certain types of subsidies may be exempted from the disciplines—possibly with certain conditions attached- will ultimately depend on the design and scope of the prohibitions themselves. A green box that is not designed carefully and includes broad categories of subsidies will very likely create loopholes and undermine the effectiveness of the disciplines.

Question. The other point is the Indian argument that developing countries need flexibility, and should be allowed to give bigger subsidies. I’ve never heard of someone saying that their poor economic conditions means they should be allowed to spend *more* on bad behavior.

Answer. Subsidies to small-scale operators are an incredibly small proportion of global fishing subsidies overall, which overwhelmingly go to commercial industrial fishing operators. Despite this, WWF believes that evidence that small-scale fisheries receive a relatively small share of global subsidies is not a reason to provide an exemption to provide capacity- or effort-enhancing subsidies. Rather, it suggests the need for subsidies reform at national level to ensure that when governments spend money on their fisheries sectors, they do so wisely and in ways that encourage healthy and profitable fisheries (*e.g.*, through improved fisheries management, surveillance and enforcement) and/or enable the establishment of alternative livelihoods, coordinating government expenditures with sustainable resource management and economic and social development strategies.

Nevertheless, if a WTO agreement to end harmful Fisheries Subsidies is to be effective, it must address the existing issues of overfishing, overcapacity and IUU fishing globally. As such, it is appropriate that developing countries (such as India) show some level of ambition in disciplining their harmful fisheries subsidies, and more intense, mechanized fisheries within these countries that utilize more harmful fisheries subsidies in particular, are subjected to some level of disciplining. The current Indian proposal argues that developing and least developed countries should be exempted from disciplining harmful fisheries subsidies within their territorial waters, and disciplines should extend to the EEZ only for large scale fisheries if certain criteria are met. This argument is built on the premise that developing and least developed countries have mostly “small scale fisheries” in comparison to more developed nations.

QUESTIONS SUBMITTED BY HON. RON WYDEN

Question. An outcome on fisheries subsidies negotiations is long overdue. As far back as 2010, I held a hearing on fisheries as the chair of the Subcommittee on International Trade to highlight the critical economic and environmental importance of safeguarding our marine environment. Jobs in the seafood industry in Oregon depend on healthy oceans, but it has an impact on the climate and ocean-dependent ecosystems. Unfortunately, many of the major fishing countries have not shown a willingness to sign on to the high-ambition proposals of the United States.

Illegal, unreported, and unregulated (IUU) fishing undermines the fisheries management systems that countries do have in place to ensure the sustainability of fisheries stocks. In your view, is there *any* justification for countries to object to the prohibition on providing subsidies to those that participate in IUU fishing?

Answer. When it comes to combating IUU fishing, the WTO has a special role to play in curtailing the economic benefits of IUU fishing by eliminating the subsidies that promote it. The WTO is the only body that can take meaningful action to curtail harmful fisheries subsidies at a global scale.

By curtailing subsidies that drive overcapacity and overfishing and support illegal fishing vessels, WTO disciplines can undercut ongoing economic support for activities that destroy our oceans and the livelihoods of millions. WWF believes that we need to limit support for the full scope of illegal fishing activity. Disciplines to illegal, unreported and unregulated (IUU) fishing should not have carve outs. While some proposals have referenced a baseline to identify vessels using RFMO blacklists, it is essential that subsidy disciplines go beyond blacklisted vessels, because of the weaknesses and limits in those processes. Given the nature of IUU fishing and the particularly pernicious and distorting nature of its subsidization, *no exceptions to a prohibition ending subsidies supporting IUU fishing should be made.*

Question. The United States is proposing a cap on fisheries subsidies. Currently, there is no limit on what countries can spend on market-distorting subsidies that artificially incentivize overfishing. Many developing countries argue against such caps and a variety of countries have proposed so-called green boxes that would exempt certain subsidies.

What would be the impact of caps on fisheries subsidies on developing countries? How would proposed green boxes undermine the effectiveness of subsidy caps?

Answer. The priority is to design disciplines that obligate the biggest subsidizers to take on the greatest responsibilities. Some of the biggest subsidizers are developing countries. The U.S. capping approach is designed to ensure that even the biggest developing country subsidizers make reductions (*i.e.*, China, South Korea).

A potential green box approach applied to a quantitative restriction in terms of a subsidy cap would likely mean that the amount of funds allocated to green boxed types of subsidies would be deducted from the total amount of subsidies provided by a country that would be subject to a cap. Whether the amount of funds allocated to green boxed types of subsidies would be deducted before or after the cap would be determined.

Green boxes have the potential to undermine the impact of the entire agreement by rendering prohibitions meaningless. Green boxes need to be carefully designed so as not to create loopholes or circumvention of disciplines. The current draft of the chair's text has only a placeholder for the green box—no proposed language. Designing the prohibition is the first step, then the green box. Having said that, examples of the types of subsidies that have been proposed for inclusion in a green box are: widely recognized beneficial subsidies (management, stock assessments), subsidies for natural disaster relief, subsidies for improving health and safety on board vessels, subsidies for implementing international agreements, subsidies for research, development and innovation that aim at ensuring sustainable fishing, including the reduction of negative impact of fishing on the marine environment. Broad, vague language allows a "catch all" that can serve as a loophole.

It's critical that green boxes are carefully designed with clear language. Both the capped approach and the green box are currently flawed. If a green box amount is deducted *before* a cap baseline is established, this potentially lowers the cap and might put a country at an advantage not having to cut as much as they would need to without the green box deduction. A combination of approaches that reflects these limits may be needed for the most effective approach.

QUESTIONS SUBMITTED BY HON. PATRICK J. TOOMEY

Question. So far, the U.S. has mainly relied on unilateral tariffs under section 301 to push for market-oriented reforms to the Chinese market, but these measures hurt Americans, while not having much effect on Chinese trade practices. But this is not the only way to try and encourage China to adopt reforms—the U.S. can also work with key allies and use the WTO rules to encourage China to adopt reforms.

While the WTO may need reform in some key areas, the fact remains that it has historically been very successful when dealing with China. Uncovering China's WTO violations is challenging but it can be done, and the U.S. can use the WTO to hold China accountable, in particular in relation to the areas of intellectual property protection, forced technology transfer, and subsidies.

How can the U.S. better utilize the WTO dispute settlement system in addressing the challenges with China's non-market trade policies?

For those areas of contention that are not well covered by WTO rules, such as state-owned enterprises, how can the United States work with our allies within the WTO to develop new rules?

What are the limits of the WTO in dealing with China, and how can the U.S. help facilitate reforms to strengthen it?

Answer. WWF supports effective and fair trade rules that protect the environment and workers. Specific reforms at the WTO, though, are outside the area of expertise of WWF.

There are other tools available to the U.S. to address issues of China and their impact on global fisheries. The most effective solution, and a more durable one than tariffs, to combat international illegal fishing and prevent illegal products from entering the U.S. market, or any market, is to establish catch documentation and traceability requirements that improve the transparency of fishing operations and help industry and government better identify the legal origin of products that are imported into our market. Within the U.S., NOAA's Seafood Import Monitoring Program (SIMP) allows the U.S. to provide these types of tools, to better detect and prevent illegal imports from entering the U.S. market.

The absence of comprehensive coverage for all seafood imports in SIMP, however, (only approximately 40 percent by volume and value are covered by SIMP today) is a serious impediment to establishing the legal origin of fish products entering the U.S. market. Illegal fishing and seafood fraud are pervasive problems that exist in virtually all foreign fisheries; they are not limited to the 13 species currently covered by SIMP. Even with the current coverage of products under SIMP, the majority of seafood imports to the U.S. are not covered. This gap provides an easy pathway for billions of dollars' worth of illegal products to continue to enter the U.S. With the limited number of covered species, the current implementation of the program provides an incentive for mislabeling between SIMP-covered and non-SIMP products.

Another tool, is the U.S. system for ensuring country level compliance with respect to IUU fishing, derived from mandates in the High Seas Driftnet Fishing Moratorium Protection Act (HSDFMFA). This act requires NOAA to provide a biennial report to Congress that includes a list of nations with vessels engaged in IUU fishing, fishing that results in bycatch of a protected living marine resource, or that have vessels that fish for sharks on the high seas without equivalent conservation protections as the U.S. The Act also requires that the U.S. consult with listed nations on addressing the problems identified in the listing and that the United States provide positive or negative certifications to Congress depending on whether the problems have been resolved in the next biennial report. If a country is negatively certified, the U.S. may invoke sanctions.

NOAA's efforts, though, have been narrowly focused on violations that occur in U.S. waters or of regulations of the Regional Fisheries Management Organizations (RFMO) of which the U.S. is a member. The United States' limited interpretation of IUU in this context, which runs counter to the existing legal definition as found in several acts listed below, results in an ineffective deployment of what could be a powerful tool, and a limitation when working with countries like China to curb their illegal fishing. To address these limits, the U.S. should apply the existing legal

definition of IUU, as codified through Maritime SAFE Act of 2019¹ and the Illegal, Unreported, and Unregulated Fishing Enforcement Act, to the HSDFMPA process. This definition should be interpreted broadly to apply to all IUU fishing, regardless of where it occurs, and to include forced labor violations to allow the U.S. to address the most egregious actions of our trade competitors.

Question. Maximizing the effectiveness of the WTO through American engagement and leadership is in the broad national interest as a means to provide greater economic stability and prosperity. Detractors say that the WTO system is “rigged,” but the fact remains that the United States has won 85.7 percent of the cases it has initiated before the WTO between 1995 and 2018. Almost 39 million jobs rely upon U.S. global trade, and foreign markets are critical to our agriculture, manufacturing, and service industries. Economists have found that the U.S. withdrawing from the WTO would lead to diminished trade growth, costly market and supply-chain disruptions, and the destruction of jobs and profits, especially in import- and export-dependent U.S. industries.

Can you speak to the projected effects of withdrawing from the WTO?

Answer. The absence of a forum at the WTO to negotiate on fishing subsidies would complicate efforts to establish an agreement and create much needed reforms. However, beyond that, this is outside of the area of expertise for WWF to comment on.

Question. Do you believe that the resulting trade barriers from withdrawal from the WTO would compel some American companies either to downsize or move offshore?

Answer. Any future considerations for decisions concerning U.S. participation in the WTO would be speculative and beyond the area of expertise for WWF.

QUESTIONS SUBMITTED BY HON. MARIA CANTWELL

Question. Fishing is very important to Washington State. Commercial fishing and the seafood industry accounts for 15,900 jobs at an average annual wage of \$67,600 in my State.

In total, the fishing industry is a central part of Washington State’s \$30 billion maritime economy.

Fisheries in the United States are governed by the scientific and conservation principles of the Magnuson-Stevens Fishery Conservation and Management Act.

This act requires us to follow the best available science, which ensures healthy fish stocks for future generations. At times, though, this results in additional costs associated with scientific investment, bycatch reduction tools and accountability measures such as observer coverage.

It is important that negotiations consider the high scientific bar our fishermen are held to, because our industry must have a level playing field. It isn’t fair that our fisherman are forced to compete with illegal fishing by countries like Russia, China and India.

Given the global downturn because of the coronavirus pandemic, do you expect illegal, underreported and unregulated fishing to increase?

Answer. Impacts of the coronavirus have led to the loosening of some restrictions in some fisheries—particularly related to management measures for the monitoring, control, and surveillance (MCS) of fisheries. Some fisheries, for example, have temporarily removed requirements for observers on vessels and have extended fishing seasons. The removal of key MCS elements, such as human observer coverage, bans on at-sea transshipment, port inspection, and high seas boarding and inspection would weaken the links that maintain the verifiability of fishing-related activities throughout the seafood supply chain. It would open the door to increased illegal, unreported and unregulated (IUU) fishing and, in doing so, could undermine the recovery and resilience of many important fish stocks globally. It is important that fisheries managers take these impacts into consideration when developing emergency measures, particularly at a time when approximately 33 percent of global fish stocks

¹The Maritime SAFE Act was included in the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, sec. 3531–3572.

are overfished and illegal fishing worldwide is reported to already account for up to \$36.4 billion in catch, or one in five wild-caught marine fish.

WWF believes that fishery managers should take the following suite of practical actions that could be applied in short order as a complement to any measures that reduce oversight of fisheries during the COVID-19 pandemic to reduce the likelihood of IUU fishing: (1) ensure that any steps to relax, suspend, or remove requirements for observer coverage on fishing and carrier vessels, high-seas boarding and inspection, and/or port inspection, or other form of physical oversight, are limited only to the period of emergency resulting from COVID-19 and based on expert advice related to human health and safety risks, and a date is set for when these suspensions or alternative measures will be reviewed; (2) require vessels whose observer coverage requirements have been waived to collect, record, and report all the observer-provided data; (3) prioritize the development of electronic reporting and electronic monitoring technologies, standards, and programs for use on fishing and carrier vessels, which would allow EM to complement human observers, or if necessary, replace them now or in similar situations in the future; (4) immediately increase VMS polling rates for affected vessels to no less than hourly, which will allow vessels' positions to be verified from port-to-port and therefore enable contact tracing; (5) immediately require the broadcast of AIS data from suitably equipped fishing vessels and carrier vessels as a complement to VMS; (6) immediately ban manual reporting in the case of VMS failure and require vessels that do not report on VMS, experience a VMS "failure," or cannot broadcast on AIS to immediately stop fishing and return to port, while ensuring this does not convey a disproportionate effect on developing States; (7) require reporting to port State authorities prior to vessels making port visits, including advance notice of desired entry accompanied by data on the catch onboard and vessel history, interactions with other vessels and carriers and previous port access, which would allow port States to make more informed decisions with respect to entry requests; (8) publish a list of authorized transshipments, including their time and location, that occur during the emergency period; (9) dedicate additional resources to the analysis of VMS and AIS data, to support port States in carrying out necessary risk assessments; and (10) increase port inspections and strengthen cooperation and information sharing with port authorities of other relevant coastal States.²

Question. Could you discuss more about it would mean for Washington State's commercial fishing if the WTO negotiation on fisheries is further delayed or fails? What do we know about the specific costs that will be borne by our commercial fishing sector?

Answer. Subsidies allow for lower operating costs and thus allow for subsidized cheaper priced products to be trade internationally and to compete with U.S. exports around the world, and with domestic catches as imports within the U.S. This creates an unfair economic advantage for foreign subsidized fishermen and puts U.S. domestic fishermen, who aren't receiving subsidies at a competitive disadvantage. So Washington fishermen are forced to unfairly compete with cheaper subsidized and sometimes illegal products both as exports being traded internationally, and in the domestic market as cheaper imports compete with the catches of U.S. commercial fishermen.

QUESTIONS SUBMITTED BY HON. SHELDON WHITEHOUSE

Question. Could you let us know two things? One, what should we be pressing China on? Because I think you have got a ready audience for that.

Answer. China is the world's largest fishing country, the world's largest seafood processing country, and the world's largest importer and exporter of internationally traded seafood. However, China lacks many needed controls on its processing sector, its fisheries management methods and controls on its fleet, both domestic and distant water: including adequate monitoring of its fleet, transparency in its fleet's size, capacity, location, activities, catch, etc. Appropriate catch documentation and traceability requirements are needed to ensure that the fish landed, processed, and traded in, to and from China are from legal operations. As a result, China is a sort of black box where legally and illegally sourced fish are mixed, where illegal fish may be essentially "laundered" in the processing countries, in China or elsewhere

² WWF et al. 4/7/20. NGO Letter to RFMOs on relaxing certain conditions during COVID-19 pandemic.

and subsequently enter international trade as a “legal” product of the exporting nation. Chinese re-processing of seafood products is staggering in its scale, highly complex in its patterns of sourcing, and characterized by lack of transparency and traceability. An absence of species-specific commodity codes for exported products, and a growing trade of unspecified frozen fish imports create problems in identifying and tracking fish products imported into China and processed for re-export.³ Third-country intermediaries (*e.g.*, Chinese products exported to Canada and then exported from Canada to the United States) also generate problems in traceability of seafood products from China.

The U.S. should press China to adopt comprehensive catch documentation and traceability requirements to ensure that the fish coming into—and often out of—the country are from legal sources. China should move to adopt and implement the Port States Measures Agreement and work with other countries, particularly in jurisdictions where its vessels are allowed to operate, to put in place the same measures. The U.S. should also establish requirements that imports from China and other countries meet fisheries management standards comparable to the U.S. under Magnuson-Stevens, and restrict entry of those products that fail to meet the same sustainability requirements as U.S. fishermen.

China, however, is not the only problem country. Many other Southeast Asian countries (Vietnam, Thailand, etc.) are also growing as processors for fishery products exported to U.S.. Sometimes under the ownership of Chinese nationals. The readily available and simplest solution to the continued presence of illegal fishery imports into the U.S., from China and other countries, is for Congress to push the administration to expand the existing Seafood Import Monitoring Program to cover all fishery imports from all countries.

Question. And two, what should the Oceans Caucus, our bipartisan oceans group here in the Senate, be looking at as the next steps on controlling pirate fishing, including enforcement. I know you said that is not all of it, but enforcement is a lot of it. We have these new technologies for satellite-based wake recognition software and so forth.

Answer. While promising new technologies are being established to better monitor, control, and surveil fishing operations, these need to be combined with systems and requirements to document and verify legal catches and their movement through supply chains. The most effective solution to combat international illegal fishing and prevent illegal products from entering the U.S. market, or any market, is to establish electronic catch documentation and traceability requirements that improve the transparency of fishing operations and help industry and government better identify the legal origin of products.

The need and demand for fast, reliable, and innovative systems for collecting, storing, communicating, and sharing fisheries data has increased. Comprehensive electronic vessel tracking, electronic monitoring, electronic reporting of catch and bycatch, and electronic traceability technologies have been developed and employed in many fisheries, and electronic systems are moving towards integrated electronic fisheries information systems. The benefits of integrated electronic fisheries information systems include improved compliance and reporting, improved fisheries sustainability, improved quality in stock assessment, improved traceability and catch quality, and improved industry profitability. In many fisheries, it is logistically more feasible, cost effective, and safer to use electronic monitoring and reporting to collect catch and bycatch data. The status of electronic fisheries information systems and use in major exporting countries is limited and non-existent in many fisheries.⁴ Helping countries to develop and build these systems is a key factor to establishing successful fisheries management that can verify the legal origin of fish products as they move through supply chains and trade.

Within the U.S., NOAA’s Seafood Import Monitoring Program (SIMP) allows the U.S. the foundation for a tool that can be further developed to better detect and prevent illegal imports from entering the U.S. market. As stated earlier, the absence of comprehensive coverage for all seafood imports in SIMP, is a significant challenge

³Clarke S. Understanding China’s fish trade and traceability. Traffic East Asia. 2009, http://www.trafficj.org/publication/09_understanding_china_fish.pdf

⁴For more information and a review on the status of electronic fisheries information systems for the largest fishing countries please see: Sylvia G, Harte M, Borberg J. 4/23/2020. “Status of Electronic Collection and Reporting of Key Information in Major Fisheries,” <https://www.worldwildlife.org/publications/status-of-electronic-collection-and-reporting-of-key-information-in-major-fisheries>.

to successfully blocking the entry fish products entering the U.S. market. Congress should work to ensure that the SIMP requirements apply to all imports of seafood and that strong verification measures are adopted to prevent illegal seafood from entering the U.S. Robust implementation of the Program is also needed to ensure that information requirements, including for key data elements related to labor practices, can effectively identify the legal origin of products, and prevent the entry of illegal products. As currently implemented, SIMP does not clearly require an importer of record to provide certain key data elements, such as the Unique Vessel Identifier (UVI), or authorization to fish, at the time of entry into U.S. commerce. Moreover, it is unclear if standard auditing procedures for SIMP-derived data includes data validation as well as confirmation of collection. Without transparency about audit procedures and how SIMP data are being verified, confidence in the program's efficacy will undermine support for the program and impair importers' ability to get the necessary documentation from their suppliers.

To address some of these challenges, additional measures to strengthen SIMP are needed, including additional data requirements for: reporting on the location of catches to the smallest management unit that exists, and jurisdiction; the automatic identification system (AIS) unique identifier (MMSI number) for the fishing vessel; the chain-of-custody records, including transshipment, processors, storage facilities, or distributors back to the vessel; the beneficial owner of the fishing and transshipment vessels; refined harmonized tariff schedule (HTS) codes that are more species-specific and differentiate between wild-caught and farmed product; and external review, verification, and certification of the catch information by an independent third-party (and/or competent authority responsible for management of the catch). The data elements and information collected under SIMP should be reviewed and screened automatically by computer database systems, with algorithms developed and based on risk factors for IUU, by NOAA and Customs targeting to more rapidly and effectively identify and screen products that may be of possible IUU origin.⁵

To be truly effective, SIMP must be formally embedded as an operational enforcement tool relied on by NOAA's Office of Law Enforcement and Customs and Border Protection with clear procedures for actionable intelligence and information transfer. These gaps hamper NOAA's ability to proactively identify at-risk shipments. The failure of SIMP to cover all species, to effectively verify the information currently provided, and to require all key data elements at the time of entry as required in the regulations are serious impediments to establishing the legal origin of all fish products entering the U.S. market. Given that in-port inspection capacity is profoundly limited, NOAA's leadership in making the SIMP as robust, efficient, and sophisticated as possible is essential if the program is to achieve its objective of "ensuring that imported fish and fish products derived from illegal harvest of species designated to be at risk of illegal fishing or seafood fraud can be excluded from entry into U.S. commerce."⁶

The U.S. should also apply the existing legal definition of IUU, as codified through Maritime SAFE Act of 2019⁷ and the Illegal, Unreported, and Unregulated Fishing Enforcement Act, to the High Seas Driftnet Fishing Moratorium Protection Act (HSDFMMPA) process that requires NOAA to identify a list of nations with vessels engaged in IUU fishing process. This definition should be interpreted broadly to apply to all IUU fishing, regardless of where it occurs, and to include forced labor violations to allow the U.S. to address the most egregious actions of our trade competitors. Congress should work to also make the certification and sanctions authority more reflexive such that NOAA must act. For countries identified and not subsequently positively certified, the U.S. should restrict importation of fish and fish products not only from the vessels engaged in IUU fishing, given how easily they can change names and flags, but more broadly from vessels flagged to that nation. At the same time, the U.S. may wish to step up its efforts to provide technical assistance to those countries to help them develop needed capacity.

Furthermore, forced labor, human trafficking, child labor, and other major human rights violations often co-occur with IUU fishing. As with IUU fishing, violations of

⁵NOAA has an international fisheries analysis team as part of the Office of Law Enforcement, and this should be part of their remit, to enumerate on a regular basis the list of "red flags" that should trigger a deeper screen by CBP.

⁶NOAA Fisheries, Seafood Important Monitoring Program Final Regulatory Impact Review and Final Regulatory Flexibility Analysis at 18 (2016).

⁷The Maritime SAFE Act was included in the National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92, sec. 3531-3572.

labor laws and standards also lower the costs of production and depress the price of the product, giving those goods an unfair economic advantage when competing with legal U.S. products caught under stronger labor protections. Faced with this reality, it is important that the U.S. provides strong import controls and, expanded transparency, and oversight to safeguard against both IUU fishing and labor abuses, helping to bring greater transparency to opaque supply chains and level the playing field for U.S. fishermen. The U.S. has some programs and authorities designed to combat IUU fishing and human trafficking in supply chains already. These include SIMP as well as the Tariff Act.⁸ Congress should ensure that the agencies are using existing authorities effectively to ensure that all products entering into the U.S. market are not produced through IUU fishing *or with forced labor*. Congress should also direct the agencies to pursue additional tools under these authorities, including requirements for importers to formally share their due diligence approach and management systems with regards to forced labor in their supply chains. Congress should also encourage effective interagency collaboration, to better connect anti-IUU related processes with expertise around forced labor, including taking advantage of the existing State Department Trafficking in Persons report process and internal agency knowledge, the Department of Labor's List of Goods produced with forced and child labor, and other similar efforts.

Congress should also support efforts in other countries to put in place and enforce sustainable fisheries management and labor rights systems. Similarly, increased investment in integrated risk analysis and detection systems with a focus on IUU and labor abuses in the seafood trade should be made a priority for the CBP's Commercial Targeting and Analysis Center (CTAC). CTAC already serves this mission but needs to be better supported and integrated with SIMP and other available tools.

Question. What do you think with respect to a plastics treaty should be our next steps, given that so much of the plastic waste that gets thrown into the ocean comes from maybe a dozen countries and a dozen rivers. If we could clean up a dozen countries and a dozen rivers, we would really get way ahead of the problem. So if you have ideas for us on what our best options are through the International Treaty process for improving our international performance on ocean plastic waste, if you could send me that, I would be grateful.

Answer. Thank you for your question and your incredible leadership in the plastics space, including through enactment last Congress of Save our Seas and passage this Congress in the Senate of Save our Seas 2.0. Your leadership on this issue has significantly increased visibility of the bipartisan interest in reaching meaningful solutions. It has also had direct impacts on the water and in communities around the world.

As to your question, you are right to point out the global nature of this problem. While the U.S. works to better address materials production, disposal, and reuse here at home, we need to strengthen our position as global leaders. We have been pleased to see support for international action through movement of a variety of vehicles through Congress, including Save our Seas 2.0, the Break Free From Plastic Pollution Act, the PLASTICS Act, ongoing conversations around establishment of an international trust fund, and others. WWF would like to see Congress encourage the administration to support establishment of an international binding agreement and to support U.S. accession to the Basel Convention. We envision an international binding agreement moving through either UNEA or UNGA. On the second element, as the U.S. ideally works toward accession to Basel, we hope that Congress will push the administration to establish strong criteria to govern export of waste from the U.S.. As we work toward reducing our materials footprint here in the U.S., the government must ensure that operators don't evade improvements here at home simply by exporting waste to nations least able to manage it. Existing bilateral agreements for the export of waste should be strengthened and criteria developed and implemented for establishment of new agreements. And, finally, ungoverned export of waste must not become an element of the Kenya Free Trade Agreement currently under discussion. Solving the plastics pollution crisis demands that we both remove plastic that exists in our environment and shift to a responsible materials management system that enables reuse and recyclability. Instituting extended producer responsibility, where producers of plastic have significant responsibility—fi-

⁸Tariff Act sec. 307 as amended by the Trade Facilitation and Trade Enforcement Act: "[A]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited."

nancial and/or physical—for the treatment or disposal of post-consumer products, is the key to ensuring that the systems-level changes that are needed are accountable, while also funding desperately needed investment in infrastructure with proper oversight.

QUESTION SUBMITTED BY HON. THOMAS R. CARPER

Question. How has the U.S. benefited from being a leader in an institution like the WTO?

Answer. U.S. participation and cooperation in international institutions is needed to address global problems—such as fishing subsidies, IUU and overfishing, climate change, biodiversity and habitat loss, and many other challenges that go beyond the jurisdiction of one country. The U.S. could benefit by being a leader to include greater protections for the environment and for workers to create needed change within institutions like the WTO.

PREPARED STATEMENT OF LAURA J. LANE,
CHIEF CORPORATE AFFAIRS AND COMMUNICATIONS OFFICER, UPS

Chairman Grassley, Ranking Member Wyden, and members of the committee, thank you for having me here today. My name is Laura Lane, and I am chief corporate affairs and communications officer at UPS, and I am honored to appear before you today to testify on the future of the World Trade Organization (WTO) on behalf of UPS. UPS is a global leader in logistics, offering a broad range of solutions including transporting packages and freight; facilitating international trade, and deploying advanced technology to support the world of business through our smart, multimodal logistics network.

The subject of today's hearing is one of great importance to UPS. While headquartered in Atlanta, UPS serves more than 220 countries and territories worldwide, and every day, our almost half a million employees move 6 percent of U.S. GDP and 3 percent of global GDP. UPS is committed to continuing to find new ways to operate more efficiently, cost effectively and sustainably—for our customers, the environment, and the communities we serve around the world.

At UPS, though, we are situated at the intersection today of many different trends including changing global trade and investment flows; digital modernization that is transforming business models; and the economic effects of the COVID-19 pandemic. UPS is in a unique position given the breadth of our operations and our important role as an essential service provider in the response to the pandemic to provide insights on the WTO reforms needed and the specific policy recommendations to promote greater justice, inclusion and fairness in the multilateral trading system.

From our perspective, the WTO serves as a cornerstone of the global rules-based trading system and has helped accelerate growth and development for decades. However, the world has changed since 1995, and reforms to the WTO are needed to ensure that it remains relevant into the future. In 1948, the first year of the General Agreement on Tariffs and Trade (the precursor to the WTO), world trade was \$58 billion, and today it is well above \$20 trillion. That growth was only possible because of the trading rules that were put in place to foster greater trade and investment flows.

That growth in economic opportunity is why the WTO is so important for the American business community. Ninety-nine percent of global trade takes place in countries that are members of the WTO. Based on the most recent data available, 65 percent of U.S. trade in goods and services takes place on WTO terms, while the other 35 percent occurs in the countries covered under our 14 free trade agreements (FTAs). Those 14 FTAs use the WTO rules as a foundation. The WTO, therefore, creates the basis for the common set of predictable and transparent rules that allow an American worldwide company like UPS to serve our customer and consumers everywhere around the world.

As 96 percent of the world's consumers are outside the U.S., American exporters have benefited from having a single set of rules as they have entered new markets. And, as the world has gone digital, these opportunities have expanded as consumers anywhere in the world can now reach American companies by the click of a mouse or a tap on their smartphone. Those clicks have been especially important for people

everywhere around the world abiding by stay at home orders to get through the current pandemic. If the WTO were to cease to exist, we would go back to a world where any nation could change the rules at a moment's notice, creating great uncertainty and dramatically slowing trade and investment flows.

As we have all seen, that predictability and certainty becomes even more important during a crisis. As an essential service provider facilitating the movement of critically needed supplies during the COVID-19 pandemic, we at UPS saw how important it was for countries to adopt best practices. For example, UPS saw some countries move quickly to accept e-signatures on customs documents; other countries created green lanes designated for rapid cargo-specific movements; and many countries removed or modified mobility limitations for essential workers like our heroic air cargo crews. Time is of the essence in our business, and never more so than during a pandemic where the ability to move across borders quickly saved time and more importantly, it saved lives.

As the WTO looks at potential reforms to ensure it remains an engine of growth, we would like to see that the best practices we have seen adopted throughout the crisis to facilitate the movements of goods and services become permanent realities. We need the e-commerce negotiations completed so that digital trade rules apply globally. We also need the trade rules rebalanced and modernized to become more just, inclusive and fair to support economic recovery. And maybe, most importantly, we need the US leading these reforms.

BRINGING TIMELY REFORMS AND MODERNIZATION TO THE WTO

In many respects, justice delayed is justice denied. While I defer to those on this panel who are more expert in this area, I would argue that reform is needed to ensure that disputes are resolved more quickly. No one wants to wait longer than needed for critical PPE to be delivered; so too no business wants to wait too long for justice to be rendered in the WTO.

I would also argue that the WTO needs to take a page out of the UPS shipping manifests and deliver more in a timely manner. In the 25 years since the creation of the WTO, the members have concluded only one new agreement—the plurilateral Trade Facilitation agreement. UPS strongly supported this pact, which eliminates inefficient border procedures and improves transparency via digital practices at borders.

But we have seen too many dramatic changes in the past 25 years, and the WTO has not been able to move fast enough. That's why we are strong supporters of the current Joint Statement Initiatives (JSIs), which allow trade negotiations among coalitions of willing members to occur more quickly in the WTO. These agreements allow countries to opt in to negotiations on topics such as e-commerce; domestic regulations of services; investment facilitation; micro, small, and medium-size enterprises (MSMEs); and women and trade.

Focusing on one of these, in particular, is the JSI on e-commerce, covering digital trade including data flows and data localization policies, as well as border processes for e-commerce. During the COVID-19 pandemic, we have seen how e-commerce has provided a lifeline to consumers and businesses alike. From our vantage point, the time has come for governments and international organizations such as the WTO to foster, and not frustrate, digitally enabled international trade.

Given our customer base, we know a company no longer needs to be big to be global. There are an estimated 25–30 million formal SMBs in the world, which contribute up to 60 percent of total employment and up to 40 percent of national income in emerging economies, according to a World Bank report. Connectivity through the Internet has enabled even micro-enterprises to sell products and services to consumers across borders. However, their full potential is unrealized if they cannot tap into new global markets.

In that regard, trade rules have traditionally been written for traders who send ocean and air containers, not small parcels. The significant growth of e-commerce in a short span of time brings us into new territory in which too many governments around the world have sought to restrict its reach based on concerns related to:

- The surge in import volume and its impact on customs staffing, as well as the ability to catch illegal and harmful packages;
- New foreign competition for domestic retailers that may not be covered by domestic sales tax or other regimes; and

- E-commerce users' lack of understanding or application of a country's existing trade rules.

While these concerns are important for policy consideration, UPS sees them as opportunities for governments to address the complexities of the process and create greater opportunities for e-commerce growth. An important area for WTO modernization and reform, therefore, should be focused on simplifying the import process for low value goods and recognition that the rules for moving ocean containers should not be the same for e-commerce packages.

The following, therefore, are practical suggestions to form the basis for a new modern e-commerce policy framework within the WTO:

- Leverage new technology solutions to reduce administrative burdens and streamline border processes for low-value shipments;
- Simplify and harmonize returns processes and duty and tax drawback procedures;
- Implement simplified VAT processes for imports of low-value goods; and
- Provide for electronic submission of customs declarations prior to arrival of goods to allow pre-arrival processing and immediate release at the border.

The digital economy and the global e-commerce boom are creating unprecedented and unique opportunities for governments and business to work together to craft an environment that will create jobs and support economic recovery, especially now as countries navigate through the economic downturns caused by the COVID-19 pandemic.

PROMOTING GREATER TRADE INCLUSION FOR WOMEN AND MICRO,
SMALL, AND MEDIUM-SIZE ENTERPRISES

True economic recovery will depend on fostering greater inclusion in trade. In that regard, the WTO has done some great initial work on Women in Trade and MSMEs but so much more needs to be done now. Women and small businesses have been the hardest hit by COVID 19. The WTO, therefore, has a critical role to play in helping with their recovery efforts.

Despite the fact that trade negotiations open new markets, obstacles to women and minority engagement in international business render the full benefit of new trade agreements unrealized and the economic potential limited. Facilitating full engagement in trade through equal opportunities, therefore, is all about promoting prosperity that will be widely shared by all trade partners through increased exports, more jobs, greater consumer choice, and a broader, more diversified supplier network.

The fact of the matter is that SMEs and particularly women have just not benefited as much from trade as they should. While women make up 40 percent of business owners in the U.S., we see globally that only 1 in 5 women-owned businesses export. The WTO has to do more to ensure that there is no discrimination that prevents women and women-owned businesses from trading globally.

UPS has engaged trade negotiators for the past year regarding ideas we have for commitments governments could make to foster greater fairness and inclusion, particularly for women. These recommendations go beyond the sharing of best practices, and include codifying anti-discrimination language in future trade agreements. We have suggested that every member can start by making non-discrimination commitments in their General Agreement on Trade in Services (GATS) schedules so that restrictions on a women's ability to own property in our own name, open a bank account to run her business or move freely across borders to market her goods are explicitly prohibited.

We also support the ongoing negotiations on domestic regulations that seek to eliminate discrimination on the basis of gender for the granting of licenses or recognition of qualifications for the provision of services. For example, in some countries, governments still will only grant licenses to be truck drivers or pilots to men. UPS believes our greatest strength comes from the diversity of our people across our network, coming from both our men and women drivers and pilots who are committed to delivering everywhere in the world. We believe that the WTO's trade rules should reflect that reality and provide that opportunity for men and women alike.

The WTO could go even further and incorporate the language in the USMCA that creates platforms to actively support small and medium sized business as they en-

gage in trade and that includes disciplines that explicitly prohibit the ability of any of the contacting parties from discriminating on the basis of gender.

FAIRNESS AS THE BASIS FOR A MODERN TRADING SYSTEM IN A POST-COVID-19 WORLD

Finally, on the need for fairness, the coronavirus has required extensive government intervention in markets. Going forward, therefore, WTO members will need to address better the issues of industrial subsidies and *state-owned and state-sponsored enterprises* to prevent market-distorting measures from negatively impacting global competition.

The WTO members also need to come up with a more modern definition of *developed* versus *developing country status*, as too many countries that were developing in the 1990s have clearly graduated to more developed country status. The Trade Facilitation Agreement provides a model for how to address this fairness question. How we address questions of the environment through the lens of fairness from a developing versus a developed country perspective is also going to be an important issue for the WTO.

Finally, we need a *Director General who can deliver reforms that bring greater justice, inclusion, and fairness to the global trading system*. In order for the WTO to be properly positioned for the future and implement those needed reforms, strong leadership is required, not only from the members, but also from the top of the WTO itself.

CONCLUSION

Tackling all of these issues will shape economic recovery and define the next generation of trade and investment opportunities for America in the world, which is why we need to invest now in reform of the WTO as an institution. COVID-19 will undoubtedly have a substantial and lasting effect on the global economy, and the WTO must be prepared with the necessary policy changes for the future.

As an essential service, UPS has a vital role in advocating for reform so that the WTO fosters a more just, inclusive and fair trade system that truly delivers economic opportunity for all. Thank you for your time today.

QUESTIONS SUBMITTED FOR THE RECORD TO LAURA J. LANE

QUESTIONS SUBMITTED BY HON. CHUCK GRASSLEY

Question. I want to thank you for your service to the country in Rwanda as a Foreign Service officer during the genocide. You have spent so much time trying to protect and empower people in your career that it warrants emphasis.

Trade is something that can empower people too. In particular, I think an important development is that women's participation in the workforce has increased drastically as we've removed trade barriers around the world, including through the WTO. I think that removing barriers even further will continue to increase opportunities for women.

As we pursue a reform agenda at the WTO, what are the types of things we should be doing to making sure that trade is inclusive, and to make societies more open and free?

Answer. Thank you. I was proud to serve our country in all of my tours of duty. In that regard, my time in Rwanda was definitely a seminal moment in my career and underscored the importance of many of the key values that have formed the basis for my trade advocacy efforts.

Throughout my career, I have seen the largely untapped potential women can have in building businesses and transforming communities and the extensive barriers to realizing that potential that women face around the globe. Before the COVID-19 pandemic, UPS was very focused on helping women-owned businesses and women entrepreneurs to engage in global trade. We saw that only one in five women-owned businesses exported, and we knew that companies that export, pay more, employ more people, and are generally more successful. We also knew that women-owned businesses did more to put money and resources back into their communities, and that they build resilience as a result.

Unfortunately, before the pandemic hit, only approximately 5 percent of working-age women in OECD countries were owners of established businesses (*i.e.*, a busi-

ness more than 42 months old), while 3 percent were owners of new businesses (*i.e.*, a business less than 42 months old) and another 5 percent were actively trying to start a business. These few but definitely empowered women entrepreneurs and women business owners not only succeeded for themselves, they also helped their communities.

Understanding these realities, UPS has been keenly focused on helping these business owners as we view our role as not only to connect companies with customers, but to connect communities. With COVID-19 and the economic effects of the crisis, specifically on women and women-owned businesses, we now see our role as more important than ever in helping to foster economic recovery and improve the health of communities everywhere.

In our view, a key way to promote increased prosperity is by unlocking the potential and power of women entrepreneurs and ensuring they can trade their products around the world. We believe women's economic empowerment isn't just the right thing to do—it's the smart thing too. In many economies, women disproportionately face obstacles to owning and growing their own businesses despite the significant economic payback their empowerment brings in terms of job creation and poverty alleviation. New global commercial trends such as e-commerce—which have become especially critical during the pandemic—have allowed companies of all sizes to tap into international business and trade like never before, spurring job growth and stability for their domestic economy.

UPS, therefore, has worked to advance a “women in trade” trade agreement, initially as part of what was supposed to be the 2020 WTO Ministerial Conference in Kazakhstan, to build upon the 2017 Buenos Aires Declaration and transfer some of the provisions in that declaration into concrete trade obligations. While many view trade as gender-neutral, and trade agreements and trade provisions as not written so as to favor men or women, the facts show that the benefits do not flow equally. This reinforces the need to be more deliberate with regard to how to implement and execute trade agreements.

As just one example among many, in the WTO's domestic services regulation agreement currently being negotiated, there is a provision around how licenses and authorizations are given in-country for service workers, and ensuring that there is no discrimination with regard to how licenses are given. However, there are still provisions on the books in certain countries that limit who can do certain jobs based on gender and anachronistic views of the roles of men and women in any economy. Women in too many countries still can't own property in their name or open bank accounts without male co-signers. Certain trade-related standards are written in ways that advantage men and products exclusively used by women often carry higher tariffs for no demonstrable reason. Addressing each of these issues requires a more deliberate analysis of trade through a gender lens.

UPS also believes that countries should be more thoughtful in promoting diversity in supply chains; this will be especially important during the COVID-19 recovery phase. During the COVID-19 crisis, many companies learned that some of their supply chains were not as resilient or diversified as they needed to be. Evidence from the 2008 financial crisis suggests that women-led businesses are not necessarily more vulnerable than men-led businesses. However, COVID-19 has presented new unique challenges, hitting women the hardest.

More specifically, in developing economies where 70 percent of women's employment is in the informal economy, these women have few protections against dismissal or coverage for paid sick leave. In addition to working in the informal economy, women are more likely than men to work in social sectors—such as services industries, retail, tourism, and hospitality—that require face-to-face interactions. These sectors have been the hardest hit by social distancing and mitigation measures.

According to the International Monetary Fund (IMF), in the United States, unemployment among women was two percentage points higher than men between April 2020 and June 2020. Because of the nature of their jobs, teleworking is not an option for many women. In fact, in the United States, about 54 percent of women working in social sectors cannot telework. In low-income countries, at most only about 12 percent of the population is able to work remotely. By looking at employment and trade through a gender lens and understanding the economic realities of how women are employed, governments around the world would do well to be deliberate about how they help rebuild supply chains so as to truly support COVID-19 recovery and not leave 50 percent of the world's population behind in those efforts.

Question. One of the few agreements that was concluded under the WTO was the Trade Facilitation Agreement. It went into force in 2017, and is designed to remove red tape and delays to moving goods.

In your view, how has the Trade Facilitation Agreement fared? Are there things we should be pressing our trading partners to better implement? Are there disciplines in that agreement that we need to see if we can strengthen as part of improving the WTO?

Answer. The WTO's Trade Facilitation Agreement (TFA), which was completed in December 2013, helps enable a world trading economy by making it easier for smaller businesses and entrepreneurs to engage in trade. As we look at updating trade facilitation policies and regulations for cross-border goods movements, we should try to further simplify the import process for low-value shipments and recognize that the rules for moving ocean containers should not be the same as those for a box with a pair of sneakers, as is currently the case. While the TFA creates the basis for streamlined and predictable border clearance, there are additional, more ambitious measures governments can take to specifically support the significant growth of e-commerce. A few practical suggestions for facilitating trade through a more robust e-commerce policy framework include:

- Leveraging new technology solutions to reduce administrative burdens and streamline border processes for low-value shipments;
- Simplifying and harmonizing returns processes at the borders, including simplifying duty and tax drawback procedures;
- Encouraging a critical mass of countries to implement simplified processes to collect duties or taxes (GST, VAT, etc.) on low-value goods to enable more U.S. exports; and,
- Providing for electronic submission of customs declarations prior to arrival of goods by all modes of transport to allow pre-arrival processing and immediate release at the border.

QUESTION SUBMITTED BY HON. RON WYDEN

Question. As you note in your testimony, trade policy must expand economic opportunities for women, minority communities, and other underrepresented groups. Digital trade is a key component to reducing barriers to entry. In the past year, I have met extraordinary women in Oregon leveraging the Internet to create small businesses and engage in international trade. Paula Barnett, who was a witness before this committee, exports her jewelry using services like the ones UPS supplies. Rebecca Alexander came with me to mark the passage of the USMCA Implementation Act and highlight the importance of the digital provisions. She founded AllGo, an online community for plus-size people that relies on user reviews, comments, and photos for its very existence.

How does digital protectionism threaten the ability of U.S. micro and small businesses to access foreign markets, and what obligations are critical to breaking down these barriers?

Answer. Digital trade is a key component to reducing barriers to engage in international trade and promote inclusive growth. E-commerce's greatest advantages are its less intensive capital and skills requirements and its lower costs for customer engagement for small and medium-sized businesses (SMBs). This is especially important for women who often shoulder the primary responsibility of unpaid care work and need a means of engaging in economic activity that allows them to care for their families, but also earn a livelihood.

Unfortunately, the domestic market's digital infrastructure—or lack thereof—and the strength of a country's trading regime can be overwhelming obstacles to any entrepreneur's entry into international commerce. Digital connection (access to the Internet and secure online payment technology) is integral to boosting exports especially for SMBs, but many countries do not have this strong foundation. According to the WTO, just two percent of most countries' offline SMBs engage in exporting, compared to 97 percent of internet-enabled SMBs. Even after building a reliable digital connection, a strong rules-based trade foundation is also needed. Specifically, it is important in this regard to implement the WTO's Trade Facilitation Agreement to reduce the time, cost, and complexity of trade for SMBs, including simplified and harmonized customs procedures.

Data protection and a secure operating environment based on the rule of law are particularly important. If digital protectionism exists in the country where American SMBs are exporting or considering exporting, they run the risk of having less protection of their data and the risk of not having a safe environment to collect payments or do business with potential local partners. Protecting the flow of data, such as with language similar to Chapter 19 of the USMCA, generates more confidence for SMBs to take the risk of expanding their business online and exporting their products or services.

The COVID-19 pandemic has added another layer of complexity by disrupting the social and economic order and accelerating the shift to e-commerce due to physical distancing. Considering that consumer behaviors change daily due to COVID-19, retailers and SMBs are forced to reinvent how they do business, which means more adoption of e-commerce to sell their products and a need for an efficient digital infrastructure. Government participation can be pivotal in creating or improving the digital framework to boost access to e-commerce tools and improving the ability to more meaningfully engage in cross-border e-commerce that will support global inclusion growth, advance economic recovery, and market resiliency.

Systematic collaboration among global policymakers and stakeholders will be required to establish the digital framework that will facilitate this access. In shaping this framework, governments must cooperate with the private sector to create conditions to increase opportunities for SMBs to access markets and encourage their participation. This will be particularly necessary as all industries are vulnerable to COVID-19 supply chain disruption, with the most affected being those with few sourcing options for critical components and/or lower inventory levels.

Finally, UPS, in partnership with the Women20, wrote a policy paper to be presented to the G20 in October. In this document, we emphasize that the public, private, and civil sectors can narrow the global gender divide by promoting digital connectivity and programs that support women-owned and women-led businesses' engagement in e-commerce. Policymakers, specifically, must codify these protections and promote practices that ensure all businesses can flourish in the new e-commerce ecosystem.

QUESTION SUBMITTED BY HON. JOHN CORNYN

Question. I recently held a hearing on the Trade Subcommittee that focused on censorship as a non-tariff barrier to trade. Countries like China censor American digital content, block our tech companies from operating in the country, and retaliate against American firms. More and more, our companies are self-censoring to do business in China.

Meanwhile, we allow Chinese-owned companies like TikTok and others to operate in the U.S. freely. There is a clear lack of reciprocity. One witness testified that censorship has cost three tech companies alone over \$34 billion in lost revenue. In the past, countries used to block their maritime ports to stop the trade of goods. Today, countries do the same using firewalls and filters to block data and digital trade flowing through an underwater network of submarine cables.

As we hopefully reform and update the WTO, it is clear that e-commerce must be a part of the discussion. How can we address the issue of censorship as a barrier to trade in the context of WTO reform?

Answer. Actions by governments to create “cyber sovereignty” through broad censorship of content must be more forcefully opposed by the U.S. and WTO members. Though the WTO allows members to enact censorship laws that support public policy goals—safety, morality, cyber, and national security—the grant of such broad authority is often over-used, preventing the legitimate flow of goods and services by foreign firms.

UPS supports U.S. and allied efforts to introduce more discipline into the use of such exceptions through strengthening the WTO's standards for transparency in digital rules, and supporting reforms for the domestic regulation of services. We further support U.S. efforts to partner with allied countries to promote trust in digital markets through bilateral and regional agreements, and recommend against the use of “cyber sovereignty” by the U.S. when aimed at restricting the market access of our trading partners.

QUESTIONS SUBMITTED BY HON. PATRICK J. TOOMEY

Question. So far, the U.S. has mainly relied on unilateral tariffs under section 301 to push for market-oriented reforms to the Chinese market, but these measures hurt Americans, while not having much effect on Chinese trade practices. But this is not the only way to try and encourage China to adopt reforms—the U.S. can also work with key allies and use the WTO rules to encourage China to adopt reforms.

While the WTO may need reform in some key areas, the fact remains that it has historically been very successful when dealing with China. Uncovering China's WTO violations is challenging but it can be done, and the U.S. can use the WTO to hold China accountable, in particular in relation to the areas of intellectual property protection, forced technology transfer, and subsidies.

How can the U.S. better utilize the WTO dispute settlement system in addressing the challenges with China's non-market trade policies?

Answer. Now is the time to rely more on the WTO in our trading relationship with China, and not less. The ability of the WTO to resolve disputes between members in fair and lasting ways is critical to improving our bilateral relationship with China. We support the efforts to return the WTO to its full operating capacity by re-constituting the Appellate Body and addressing the concerns of WTO members, including the U.S., regarding the purpose and effectiveness of this essential function. We agree that the dispute settlement process as previously constituted has not supported the role it was intended to serve, but believe that many of the reforms being recommended, once implemented, can form the basis for more effective and timely dispute resolution between trading partners, including China.

We also support getting the WTO and its member countries back to the negotiating table, to negotiate agreements in new areas such as e-commerce, and to write rules on those practices and policies that members believe are unfair and counter to the WTO. The dispute settlement panels cannot and should not make new rules—the members need to do that via negotiation.

Question. For those areas of contention that are not well covered by WTO rules, such as state-owned enterprises, how can the United States work with our allies within the WTO to develop new rules?

Answer. WTO rules on subsidies and countervailing measures need to be enhanced. We applaud the work already underway by the U.S. to partner with like-minded countries in reforming the capabilities for the WTO to address non-market behavior. The trilateral statement by the U.S., EU, and Japan is a good step forward. From the perspective of UPS, we would like to see the scope related to subsidies and pricing in the services sector more clearly defined.

Question. What are the limits of the WTO in dealing with China, and how can the U.S. help facilitate reforms to strengthen it?

Answer. The WTO has been limited by certain structural legacies that impact its ability to address competition issues more directly, *i.e.*, the requirement for consensus in multilateral negotiations. In order to reform the organization and strengthen its ability to tackle new trade issues, the U.S. must continue to work with like-minded members such as Japan, Australia, and Canada to advance productive changes in the standards for transparency and reporting, negotiations, and dispute settlement. By committing to a broad agenda of updates and reforms, we can ensure the WTO serves the interests of today by advancing a more fair, inclusive and accountable trade agenda.

Question. Maximizing the effectiveness of the WTO through American engagement and leadership is in the broad national interest as a means to provide greater economic stability and prosperity. Detractors say that the WTO system is “rigged,” but the fact remains that the United States has won 85.7 percent of the cases it has initiated before the WTO between 1995 and 2018. Almost 39 million jobs rely upon U.S. global trade, and foreign markets are critical to our agriculture, manufacturing, and service industries. Economists have found that the U.S. withdrawing from the WTO would lead to diminished trade growth, costly market and supply-chain disruptions, and the destruction of jobs and profits, especially in import- and export-dependent U.S. industries.

Can you speak to the projected effects of withdrawing from the WTO?

Answer. While the WTO is certainly not perfect, it provides a fundamental level of consistency and certainty upon which the global trading system is based. Now more than ever, with the full effects of the COVID-19 pandemic on the economy

still unknown, American businesses are in need of the stability and clarity provided by the WTO.

Withdrawing from the WTO would be devastating for U.S. businesses and the already hard-hit U.S. economy. Sixty percent of U.S. trade is conducted using the WTO rules, with the remainder covered by bilateral and regional free trade agreements (FTAs). Even for the remaining 40 percent of countries, many of the provisions in such FTAs reference or build upon existing WTO rules. Withdrawing allows countries around the world to no longer abide by WTO commitments and levy tariffs and other barriers to trade against the U.S. By not remaining in the WTO, not only will it be harder for U.S. businesses to operate internationally from a financial perspective, but the U.S. will also be left out of fundamental trade debates happening at the WTO on issues such as e-commerce, domestic regulation on services, and diverse and inclusive trade. UPS remains committed to the success of the organization and advocates against withdrawing from the WTO.

Question. Do you believe that the resulting trade barriers from withdrawal from the WTO would compel some American companies either to downsize or move offshore?

Answer. With 3 percent of the global gross domestic product (GDP) traveling through our network every day, UPS has unique insight into the difficulties of international trade. Even with the predictability currently provided by the WTO, there are still numerous hurdles preventing SMBs from expanding internationally, including the cost of exporting and the complex and outdated nature of the process. While there is no way to know for sure how the private sector would react, withdrawing from the WTO and the resulting tariff increases would create prohibitive hurdles to export for SMBs and encourage larger multinational companies to relocate their supply chains outside the U.S. to operate in WTO member economies where they would not face the same financial and regulatory burdens.

PREPARED STATEMENT OF HON. RON WYDEN,
A U.S. SENATOR FROM OREGON

The Finance Committee meets today to discuss how to fix the WTO to get a better deal for American workers and businesses.

In my view, this whole debate comes down to a choice between two different approaches. On one hand, you've got the Donald Trump approach: pull back from the WTO, forfeiting our economic power and stature to the Chinese Government, and covering up that weakness with a whole lot of empty "America First" rhetoric on the airwaves here at home. It's the same losing playbook the Trump administration ran on the Trans-Pacific Partnership, the Paris Climate Agreement, and the World Health Organization. It obviously won't do much of anything to protect American workers against trade cheats if Trump hands the Chinese Government the levers of power. In fact, it'd be a big win for the trade cheats.

Fortunately, there's bipartisan interest in a smarter approach to WTO reform, based on addressing the areas where the Chinese Government routinely games the system at our expense.

The rules that underpin the WTO were crafted more than 2 decades ago, when China was an economic middleweight. At that time, many hoped and predicted that joining the WTO would drive China further away from abusive, one-party control of government, economics, and society. That obviously did not happen.

Today, China is an economic heavyweight. Much of its growth has come at our expense. That's because the Chinese Government has broken rules and violated the commitments it made 2 decades ago. It's also because 20th-century WTO rules have totally failed to keep up with 21st-century technology.

As a result, there's a long list of trade ripoffs that have wiped out millions of American jobs. Subsidized state-owned enterprises. Intellectual property theft. Forced tech transfers. The Great Internet Firewall. Government-led shakedowns of foreign investors. China uses those schemes and entities to strong-arm American businesses, steal American innovations, and rip off American workers.

Under President Xi, the government tightened its grip on power. The Chinese Government identifies weaknesses in the WTO system and other multilateral forums, and it seizes on them to further its own self-interests.

Fixing the WTO is also going to require addressing its Appellate Body, which hampers the application of U.S. trade enforcement laws to the detriment of American workers. There is a broad bipartisan view that WTO dispute settlement must be fixed to clamp down on judicial overreach.

I'll close with a few other important parts of this debate. First, a long-running battle against unfair fishing subsidies has the potential to bear fruit. Senator Crapo and I held a subcommittee hearing on the issue all the way back in 2010. Senator Portman was involved in getting these talks off the ground all the way back when he served as USTR.

The bottom line is that an agreement that curbs fishing subsidies will protect jobs, fisheries, and promote sustainable oceans. Accomplishing these priorities is vital. Our oceans are key to stabilizing the climate and feeding people all around the world. And our oceans provide trillions of dollars in economic activity, if nations around the world can protect them.

Second, WTO discussions around digital trade disciplines are at an earlier stage, but they're also vital to economic development and empowerment here and abroad. The U.S. needs to work with our allies to set the rules of the road and set the standard for the free flow of information and ideas.

On both of those issues, there's no chance at all that the U.S. can get a better outcome by handing our power to the Chinese Government and pulling back from the WTO. That's why Democrats and Republicans need to continue working together on these issues. I believe this committee is in a position to lead on that debate. And I look forward to our discussion today.

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The American Farm Bureau Federation, a general farm organization, submits these comments for the hearing on “WTO Reform: Making Global Rules Work for Global Challenges.”

The World Trade Organization needs to continue to operate even more effectively to implement rules-based trade agreements on behalf of its members. While reforms are needed in the institution, the U.S. can most effectively accomplish those changes as a leader of the organization.

The Uruguay Round Agreements and the dispute-settlement functions of the WTO have worked to provide a more stable world trading environment for U.S. agriculture. With more than 20 percent of overall agricultural production destined for foreign markets, U.S. agriculture is heavily dependent on exports. The 164-member WTO operates to provide a rules-based environment for continued growth in markets for America’s farmers and ranchers, and the millions of American jobs—most of them off the farm—that are linked to and dependent on U.S. agriculture.

The implementation of U.S.-supported agreements through the WTO remains necessary to achieve progress on a wide variety of international agricultural trade concerns. Agriculture’s future continues to lie in expanding access to foreign markets and eliminating barriers to our exports.

Active participation by the U.S. will help ensure that necessary reforms are developed and implemented. Areas for reform include the operation of the Dispute Settlement System, which is important for enforcing a binding rules-based framework to resolve trade disputes. Reform is also needed in the use of special and differential treatment, especially for those nations that have moved into a developed economy status. There also needs to be real improvement in securing timely notifications of trade distorting actions. Negotiations among the members to address and solve challenges to world trade are a critical reason for having a WTO. This function needs to be revitalized and reenergized as the defining feature of the organization. With proper institutional change the WTO will continue to play an important and even more effective role in the future for the United States and the other member nations.

The trade agreements in the WTO also provide an essential framework for the construction of bilateral and multilateral trade agreements. Along with tariff reduction and elimination to expand the opportunities for agricultural trade, the Agreement on Sanitary and Phytosanitary Standards (SPS) provides a set of standards to improve national efforts in this area.

Non-tariff trade barriers can take the form of “standards” that are not based on science but are used to restrict trade. The SPS Agreement must be strengthened to bring the world’s agricultural and food trade fully into the realm of science-based decision making.

Farm Bureau supports efforts to increase agricultural trade through agreements that reduce and eliminate tariffs and non-tariff trade barriers.

The U.S. follows a risk-assessment approach for food safety. The European Union is guided by the “precautionary principle,” which holds that where the possibility

of a harmful effect has not been disproven, non-scientific risk management strategies may be adopted.

The utilization of the “precautionary principle” by the EU has led to many substantive standards that impede agricultural trade, such as longstanding EU barriers against conventionally raised U.S. beef, ongoing restrictions against U.S. poultry and pork, and actions that limit U.S. exports of goods produced using biotechnology. The use of geographic indications as a trade barrier must be ended.

For U.S. agriculture, the improvements to the SPS Agreement involve the use of science-based decision making and removing non-science-based approaches to risk assessment. In particular, the European Union’s use of the “precautionary principle” as a reason to restrict certain U.S. agricultural products highlights the need to reform the areas of the SPS Agreement that allow for the use of precaution instead of science. We support a science-based approach to risk management and the use of science-based international standards, and we oppose the precautionary principle as a basis for regulatory decision-making.

The use of the “precautionary principle” is inconsistent with the WTO SPS Agreement and is used as a basis for scientifically unjustified barriers to trade. Both the U.S. and the EU adhere to the World Trade Organization’s SPS Agreement, which states that measures taken to protect human, animal or plant health should be science-based and applied only to the extent necessary to protect life or health. Unless these trade barriers are properly addressed within negotiations, they will continue to limit the potential for agricultural trade. Scientific standards are the only basis for resolving these issues.

Any future WTO negotiation on agriculture must be dedicated to trade liberalization for all countries, must improve the opportunities for trade and must be designed to work on the issues currently important to agricultural trade. Focusing our efforts on improving science-based decision making in the SPS Agreement and expanding market access through the elimination of tariff and non-tariff trade barriers will yield real benefits for agricultural trade for all countries.

The World Trade Organization, as an agreed upon basis for rules-based trade among the nations, has shown its benefits over the decades. Now is the time to move ahead with a series of reforms that will increase its usefulness to trade and economic growth.

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Statement of Michael G. Bindner

Chairman Grassley and Ranking Member Wyden, thank you for the opportunity to submit these comments for the record to the Committee on Finance. Please see our comments to the Committee from March 2019, “Approaching 25: The Road Ahead for the World Trade Organization,” which are attached, and its attachment on Employee Ownership. See also the latest version of our tax reform plan, which has expanded to include an Asset VAT. To square the circle, our comments to the Trade Subcommittee of Ways and Means on Global Competitiveness were sourced by the March 2019 hearings and dealt with the interaction of tax reform and trade.

Our previous comments explain Regulatory Capture Theory (no agency succeeds unless it is captured by the industries it regulates—this is especially the case for trade policy) and how employee-ownership gets beyond both government regulation and the need to undertake it to protect workers from capital, while saving both American jobs and making overseas jobs create the American standard of living for overseas workers.

Our tax reform plan shows how to get there through both an asset VAT and personal accounts funded as credit to an employer-paid subtraction VAT. We also explain how to turn from tariffs to credit invoice value added taxes (zero rated at the border). The SVAT (not zero rated) is a vehicle for tax credits for each child, for health care and for educational expenses. Both are an alternative to personal income tax filing. Small government libertarians like both, big business libertarians like neither. They want tax filing to remain painful while assuring that those with tax shelters can avoid the sure taxation of invoice VAT.

One year ago, the House Budget Committee did a series of hearings on the impact of climate change, to which we also commented. The gist of our comments to the first hearing is that carbon value added taxes (which is a carbon tax that is receipt visible rather than buried in the product price) would help fight warming. These follow hearings from those held in May 2019 by the Ways and Means Committee.

To get the maximum global effect, they would not be border adjusted. To go to the right place, subsidies for families would come through our employer-paid subtraction VAT, with carbon VAT funding environmental research and serve as an incentive to reduce emissions. Such a tax has no chance of passage, however, unless the alternative of a more robust regulatory program is the alternative industry wishes to avoid. There is no such program offered by this administration, although the next is showing promise.

The second of the hearings dealt with environmental consequences within the United States from “Coast to Heartland.” If the WTO ever has the power to unilaterally act on climate change issues, there is a certainty that they have been captured by industry. The other alternative would require that they become such a powerful international body that QAnon will dedicate a page to them.

Whether or not it is captured, the WTO, as an international organization, is an assembly of sovereigns rather than a sovereign assembly. Campaign finance reports show how sovereign assemblies can be captured as well (no offense intended, at least not much). For such organizations to have any weight at all, they would require direct election by citizens. Until all member nations have a decent respect for human rights and contested elections, including our own regarding voter suppression efforts, there can be no such international assembly. **Let us hope that the police actions in the Ranking Member’s home state are not reflective of future attempts at electoral mischief.**

In my comments on coast to heartland, I addressed the problems of food and of sea level inundation in Asia and Micronesia and how it will produce a surge in migration inland and to our borders. I will develop them further here, rather than simply attaching them.

Given recent incidents leading to marches on police brutality, as well as the general poverty among the newly arrived, I am not sure why anyone wants to migrate here, but they still do. It may be the air conditioning (which is part of the climate change problem). **The irony is that the anarchists at some of the recent marches, rather than the local protestors, cut their teeth protesting against the WTO, World Bank and IMF, starting in Seattle.**

Domestically, inundation impacts families who have been there for generations, vacationers and the very wealthy. Flood insurance has provided the last with no incentive to support remediation efforts. We pay, they rebuild. If we capped repayments at \$200,000, (assuming Congress could get away with it), the wealthy would have skin in the game and support remediation. Of course, this has little to do with the work of the WTO.

The literature on WTO reform is concerned with the role of developing countries and of data, depending on who is writing the report. Tax policy experts want corporate data reported internationally (see the work of Joshua Meltzer of the Brookings Institution, who should be a future witness on this topic).

Food is a huge issue in trade reform. American international food programs tend to have aid show up just before the harvest. While it does feed the people when in most need, it also tends to depress the sale price of domestic crops. In other words, these policies often benefit the Chairman’s home state of Iowa more than the recipients of food aid.

The way we grow our food in America is effective in that very little work produces a lot of food, but it leads to environmental degradation in terms of soil loss, chemicals used and waste produced by factory farms. If there were a subsidized market for farm waste to be converted to fertilizer, even though it may be more expensive than other nitrogen sources, progress could be made—especially if the result can be exported—although as the world’s workers are made wealthier by capitalism, they will eat more meat and create enough of their own farm waste.

Current vegetable based “meat” alternatives are all the rage, but they are not healthy for people with carbohydrate issues (which is most Americans). Cloned meat is an expensive and unsatisfying experience, at least until cloned blood, bone and fat are created and added, with 3D printing processes turning the result into a better facsimile of a steak or real ground beef.

In the current economy, this is unlikely. Unless a methane tax is assessed against farmers, to go along with carbon taxation, such developments will never pass—at least not until global warming becomes extreme or processes become much cheaper than they are now. Fear of nuclear war or COVID type viruses may also spur the development of alternative sources for protein. As we are finding out, fear sells.

The other way to spur alternative food production, such a printed cloned meat, is space exploration. Currently, potential Mars missions include how to do space food. A billion dollars in defense research and development transferred to NASA can create what the market will not touch. Shifting NASA from the Other Independent Agencies appropriation to the Defense subcommittee would make such transfers easier to manage. Cutting the defense budget to increase other high-tech jobs rather than the amorphous demand for social and educational spending is much more palatable.

If there is no necessity, there will be no invention. The environmental necessity of shifting away from current animal husbandry is not as obvious unless you believe in animal rights, live near a factory farm or wish to fish the Severn River. The clean water crisis makes the problem more acute. The person who made a billion shorting the housing market is now working on investments having to do with water.

As your last witness will likely mention, agricultural runoff may be a major problem for the oceans (I am sure stronger language will be used). Like COVID, much of the impact of humans on the ocean is probably misunderstood. There is much more ocean to explore than we have to date and it appears that life there is very robust. A major function of life is adaptability. Even on the ocean floor, we have microbes that eat oil. The human environment is at risk. The planet seems to take care of itself rather nicely.

Space exploration will make artificial and closed loop environmental food production both feasible and cheap. In a capitalistic society, it may not be cheap enough. In a world in which fresh water is probably the biggest planetary challenge, one that climate change may exacerbate, the capability to grow your own food, including meat, and process your own water, may be attractive. Interest costs for a home, let alone an environmentally efficient home, are far in excess of the actual price of the structure, making it a non-starter in a capitalist economy. Only a cooperative economy will produce the demand for alternative food production and the means to both build and finance it.

A state socialist economy cannot produce anything but weapons and vodka. A voluntary cooperative economy can produce everything. State action, however, along with developmental aid, has a high potential for success in dealing with desalinization. In the short term, simply getting fresh water and effective sewage is a bigger short-term challenge, as is corruption. Corruption also interferes, although the current administration is showing that the developing world has no monopoly on corruption.

Be that as it may, significant international investment, particularly with government sponsorship, is essential in producing cheap clean water. Plastic water bottles create pollution in the ocean, may raise estrogen levels in men and are not as tasty as a good glass of Army Corps of Engineers processed water in the national capital region. The very idea makes one thirsty. That thirst should not be held hostage to capitalist schemes when public works solutions are available. Capture by industry of the WTO and/or the United States Senate must not get in the way of an essentially free glass of water.

For both information and development, cooperative economic systems are superior to such bodies as the WTO, World Bank or the USDA Foreign Agricultural Service. A public sector economic research agency, either U.S. or international, could be helpful in comparing prices and standards of living from nation to nation. The price of a hamburger in China is not the price of a hamburger in Iowa or Washington, DC (Douglass Commonwealth, if you please).

Economists calculate purchasing power parity, although determining the common market basket will be contentious. Whether industry and finance will allow it is an even more relevant question. A monthly report on PPP would need a variety of market baskets: one for subsistence of the poor, one for factory labor—both union and non-union states and households, one for the professional class and not one for the rich—for whom money is no object and who buy for prestige as much as usage.

Ideally, PPP information would have as big an impact on currency prices as the operations of the public banking system (*i.e.*, the Federal Reserve, European Central

Bank, etc.). Perfect competition requires perfect information. Capitalism, however, seeks to make information a private good. Keeping wage and cost information secret is why capitalism can exist at all. If workers knew what their real productive value is, they would be paid better. If consumers knew the underlying price of goods, they would pay less. Expecting the WTO or Federal Reserve to provide international information on these very things is very unlikely, given the reality of capture by regulated interests.

Employee-owned firms, as described in the attachments, would have an incentive to know and use PPP information. Indeed, capitalist firms would not have such an incentive. Capitalist firms make money on the margins and play one side against the other. Employee-owned international firms would maximize worker/member well-being. Wages would be set by PPP levels, which “overvalues” foreign labor and thus protects domestic workers from labor arbitrage.

Employee-owned firms are also more likely to be early adopters of advanced food production techniques, which take the most essential goods, food and water, out of the marketplace and into the home. Think of how many fewer hours one could work without having to buy your own food or pay interest on everything from homes to student loans! This is even before considering the fact that most cooperativists are also very likely to be environmentalists as well. It seems to be a package deal.

International employee-ownership makes economic development unnecessary. While capitalism, because it takes low skill and low need workers into more skilled workers and consumers is a powerful engine for development. There is no argument about that. Our contention, however, is that given the option to get the same job in a well-run employee-owned enterprise, there would be no contest. Capitalism would fail, as would government.

I have two final points, ones that are not found in any previous comments for the record.

Point One: Discussions of trade are about labor, who does it and who buys it. Not my idea. It is the essence of Marxism. Marx was as much about social relations as he was about the mechanics of production. The implication for the WTO is that any reform of trade rules must also involve rules governing migration (again, going back to our environmental refugees from Micronesia).

The current Administration does not understand either one of these with any clarity. The two areas where the President has the freest hand are also where he has made the most mistakes. Any reform of trade should both cut any President's wings and must relate the two more closely. **WTO talks must also be migration talks or they are flying blind.**

Point Two: I had hoped that the COVID slowdown and the current solar minimum might have had an impact on short-term warming. Maybe it has overall. The prior certainly impacted wildlife management and cleared the air when America was shut down. The current heat wave, however, has proven that short-term factors and local factors may be two very different things. Still, it would be interesting to see if there is any impact on planetary temperature data.

It begs the imagination to assume that long-term carbon and methane usage are the only factors affecting climate change. If we can prove that short-term climate changes exist (we know that volcanoes have an impact already), we can make our models better. This assumes we can recover from the damage inflicted on our public scientific infrastructure by the current Administration.

The Center for Fiscal Equity's left-wing bias is well known, but the Trump presidency has forced us to make it obvious. Please note that our biases are also on the libertarian side. Please keep this in mind when making lists of witnesses.

Thank you for the opportunity to address the committee. We are, of course, available for direct testimony or to answer questions by members and staff. We also do Zoom.

Attachment—Finance: “Approaching 25: The Road Ahead for the World Trade Organization,” March 12, 2019

Regulatory capture theory is essential to explain how international trade associations work, from NAFTA to the WTO. Capture theory, which is part of the Public Choice School of economics, is associated with George Stigler and others. While it is usually associated with national and state regulation, such as the Food and Drug Administration and the late, great Interstate Commerce Commission, it is equally

applicable here. It is similar to what we all learned as Iron Triangles or Issue Networks.

The gist of the theory is that, while regulation is initially promulgated for the public good, relationships between government and regulated industries grow symbiotic. This occurs because professional expertise is often industry specific. This expertise is interchangeable in regulated industries, regulatory staff, on K Street, the academy and congressional staff. Campaign contributions often grease the skids of communication. Regulation always begins with private sector resistance until relationships are established. Eventually, regulatory agencies are co-opted by industry and the resistance stops. While there is still an oppositional dynamic, by and large capture helps steer the regulatory ship.

Capture is so complete in trade that industrial panels are often the most important part of modern trade agreements. In NAFTA, these take the form of Chapter 19 Panels. These panels wield super-national authority, allowing them to over-ride governmental actions which are seen as contrary to free trade as the industry sees it. Such industrial favoritism is likely the glue that gets trade agreements past congressional approval. While treaties are part of federal supremacy in Article IV of the Constitution, ceding this authority to industry is likely beyond what the framers would have expected—and they were often mercantilists. Of course, the U.S. Constitution may itself be an instance of regulatory capture.

The impact of capture are very real barriers to entry, both for professionals and for newer companies. Larger firms dominate small ones, who must find a link to an existing larger company in order to even function. While regulations favoring small businesses attempt to steer such relationships, especially by introducing affirmative action into such decisions, these actions are also captured by industry.

Many would say that the status quo is unsustainable, others like it perfectly well. Progressives and Democratic Socialists call for bigger and better regulations. The far-left simply considers this an improvement of the same cage. The social democracies of northern Europe have developed a cozy relationship with their capitalists, but have no idea how to transition to true employee sovereignty, which is the ultimate goal of socialism. The answer is that you cannot do deep reform through the deep state. The obstacles are too great.

The only alternative to regulatory capture and industrial domination is not to better regulate capitalism, but to overcome it—not through revolution (which simply turns the party bureaucrats into capitalists), but to occupy capitalism from within. This starts with transforming employee-owned firms. The answer is not change to employee culture over a monthly dinner and pep rally or training line workers to read financial statements. This is also a creating a better cage.

Real change will come from matching corporate governance to corporate ownership. Hierarchical management structures from capitalism are discordant. They do not deliver on the promise of ownership. Employee ownership, to work, must embrace true democracy in both management and the decision to expand the scope of the enterprise from better production to matching production to consumption, also by democratic decision-making. This will start with how leadership is consumed as a good (leading to open auction for executive jobs with the final choice between the low bidders determined by election).

Employee ownership will continue from decisions on the cafeteria menu to local sourcing and farm ownership, building or buying apartments for younger workers, as well as single family units and abandoning outside finance for retirement and home mortgages with no interest loans. Such features will attract workers and firms to this model to something more than the monthly chicken dinner.

Currently, employee ownership is undertaken with smaller companies rather than major industries. It will not remain there when ownership is transformed. Larger enterprises will convert franchisees to managers and absorb their employees, extending union membership and board representation. Consultants paid through 1099 employment with only one client also be added to the employing firm.

The NBRT/SVAT reforms can facilitate the expansion of ownership on a fairly rapid basis, with rates set high enough to pay for obligations to current retirees and the transition to ownership. While the employee contribution to Old-Age and Survivors insurance will continue to be linked to income, the employer contribution will become part of the SVAT, with employer contributions credited to each employee without regard to wage.

Ownership rights and benefits can also be extended to overseas employees, both subsidiaries and in the supply chain, preventing international trade from being used to arbitrage wages in a race to the bottom, raising the standard of living for overseas workers and ending the need for international trade agreements. Industrial and workers interests will be identical to each other and to the national interest of all parties. International organizations could be an honest broker to estimate wages at an equivalent standard of living rather than based on currency trading.

It can go even faster if employers can reduce such taxation by making current employees, former employees and retirees whole as if they had worked under the proposed system from the start. If our proposed high income and inheritance surtax is adopted (where cash from inheritances and estate asset sales are considered normal income), some of the proceeds can be used to distribute the Trust Fund to speed employee ownership, as well as ESOP loans. Note that heirs, sole proprietors and stock holders who share to a broad-based ESOP will avoid taxation on that income, including our proposed 25% VAT on asset sales.

Expediting ownership with the assistance of tax reform will end the need for NAFTA and the WTO (unless national governments balk at allowing international employee ownership). Even then, the need for such organizations, and for government in general, will eventually fade away.

Attachment—Value-Added Taxes (March 2018), Employee Ownership and Trade (February 2019)

The most immediate impact on trade is our proposed goods and services tax, which will finance domestic military and civil spending. Exported products would shed the tax, *i.e.*, the tax would be zero rated, at export. Whatever VAT congress sets is an export subsidy. Seen another way, to not put as much taxation into VAT as possible is to enact an unconstitutional export tax.

The NBRT/Subtraction VAT could be made either border adjustable, like the VAT, or be included in the price. This tax is designed to benefit the families of workers, either through government services or services provided by employers in lieu of tax. As such, it is really part of compensation. While we could run all compensation through the public sector and make it all border adjustable, that would be a mockery of the concept. The tax is designed to pay for needed services. Not including the tax at the border means that services provided to employees, such as a much-needed expanded child tax credit—would be forgone. To this we respond, absolutely not—Heaven forbid—over our dead bodies. Just no.

Personal Accounts would not be used for speculative investments or even for unaccountable index fund investments where fund managers ignore the interests of workers. Accounts invested in index funds do not have that feature, although they do serve to support American retirees who because of them have a financial interest in firms utilizing foreign labor, particularly low-wage Chinese labor.

The tendency for consumerism to follow industrialization is why globalization is a poor substitute for expanding the domestic population, as the Center proposes with its expanded Child Tax Credit, which we propose as an offset to the NBRT.

It would be better for all concerned if American workers were already in an ownership position due to repeal of the Taft-Hartley Act prohibitions on concentrated pension fund ownership and the enactment of personal retirement accounts. We can turn the tide for workers and encourage employee-ownership (aka cooperative socialism) now through Democratic means as part of a Green New Deal.

Over a fairly short period of time, much of American industry, if not employee-owned outright (and there are other policies to accelerate this, like ESOP conversion) will give workers enough of a share to greatly impact wages, management hiring and compensation and dealing with overseas subsidiaries and the supply chain—as well as impacting certain legal provisions that limit the fiduciary impact of management decision to improving short-term profitability (at least that is the excuse managers give for not privileging job retention).

Employee-owners will find it in their own interest to give their overseas subsidiaries and their supply chain's employees the same deal that they get as far as employee-ownership plus an equivalent standard of living. The same pay is not necessary, currency markets will adjust once worker standards of living rise.

Attachment—Tax Reform, Center for Fiscal Equity, February 21, 2020

Individual payroll taxes. These are optional taxes for Old-Age and Survivors Insurance after age 60 (or 62). We say optional because the collection of these taxes

occurs if an income-sensitive retirement income is deemed necessary for program acceptance. Higher incomes for most seniors would result if an employer contribution funded by the Subtraction VAT described below were credited on an equal dollar basis to all workers. If employee taxes are retained, the ceiling should be lowered to \$75,000 reduce benefits paid to wealthier individuals and a floor should be established so that Earned Income Tax Credits are no longer needed. Subsidies for single workers should be abandoned in favor of radically higher minimum wages.

Wage Surtaxes. Individual income taxes on salaries, which exclude business taxes, above an individual standard deduction of \$75,000 per year, will range from 6% to 36%. This tax will fund net interest on the debt (which will no longer be rolled over into new borrowing), redemption of the Social Security Trust Fund, strategic, sea and non-continental U.S. military deployments, veterans' health benefits as the result of battlefield injuries, including mental health and addiction and eventual debt reduction. Transferring OASDI employer funding from existing payroll taxes would increase the rate but would allow it to decline over time. So would peace.

Asset Value-Added Tax (A-VAT). A replacement for capital gains taxes, dividend taxes, and the estate tax. It will apply to asset sales, dividend distributions, exercised options, rental income, inherited and gifted assets and the profits from short sales. Tax payments for option exercises and inherited assets will be reset, with prior tax payments for that asset eliminated so that the seller gets no benefit from them. In this perspective, it is the owner's increase in value that is taxed. As with any sale of liquid or real assets, sales to a qualified broad-based Employee Stock Ownership Plan will be tax free. These taxes will fund the same spending items as income or S-VAT surtaxes. This tax will end Tax Gap issues owed by high income individuals. A 24% rate is between the GOP 20% rate and the Democratic 28% rate. It's time to quit playing football with tax rates to attract side bets.

Subtraction Value-Added Tax (S-VAT). These are employer paid Net Business Receipts Taxes. S-VAT is a vehicle for tax benefits, including

- Health insurance or direct care, including veterans' health care for non-battlefield injuries and long-term care.
- Employer paid educational costs in lieu of taxes are provided as either employee-directed contributions to the public or private unionized school of their choice or direct tuition payments for employee children or for workers (including ESL and remedial skills). Wages will be paid to students to meet opportunity costs.
- Most importantly, a refundable child tax credit at median income levels (with inflation adjustments) distributed with pay.

Subsistence level benefits force the poor into servile labor. Wages and benefits must be high enough to provide justice and human dignity. This allows the ending of state administered subsidy programs and discourages abortions, and as such enactment must be scored as a must pass in voting rankings by pro-life organizations (and feminist organizations as well). To assure child subsidies are distributed, S-VAT will not be border adjustable.

The S-VAT is also used for personal accounts in Social Security, provided that these accounts are insured through an insurance fund for all such accounts, that accounts go toward employee-ownership rather than for a subsidy for the investment industry. Both employers and employees must consent to a shift to these accounts, which will occur if corporate democracy in existing ESOPs is given a thorough test. So far it has not. S-VAT funded retirement accounts will be equal dollar credited for every worker. They also have the advantage of drawing on both payroll and profit, making it less regressive.

A multi-tier S-VAT could replace income surtaxes in the same range. Some will use corporations to avoid these taxes, but that corporation would then pay all invoice and subtraction VAT payments (which would distribute tax benefits. Distributions from such corporations will be considered salary, not dividends.

Invoice Value-Added Tax (I-VAT). Border adjustable taxes will appear on purchase invoices. The rate varies according to what is being financed. If Medicare for All does not contain offsets for employers who fund their own medical personnel or for personal retirement accounts, both of which would otherwise be funded by an S-VAT, then they would be funded by the I-VAT to take advantage of border adjustability. I-VAT also forces everyone, from the working poor to the beneficiaries of inherited wealth, to pay taxes and share in the cost of government. Enactment of both the A-VAT and I-VAT ends the need for capital gains and inheritance taxes (apart from any initial payout). This tax would take care of the low-income Tax Gap.

I-VAT will fund domestic discretionary spending, equal dollar employer OASI contributions, and non-nuclear, non-deployed military spending, possibly on a regional basis. Regional I-VAT would both require a constitutional amendment to change the requirement that all excises be national and to discourage unnecessary spending, especially when allocated for electoral reasons rather than program needs. The latter could also be funded by the asset VAT (decreasing the rate by from 19.5% to 13%).

As part of enactment, gross wages will be reduced to take into account the shift to S-VAT and I-VAT, however net income will be increased by the same percentage as the I-VAT. Adoption of S-VAT and I-VAT will replace pass-through and proprietary business and corporate income taxes.

Carbon Value-Added Tax (C-VAT). A Carbon tax with receipt visibility, which allows comparison shopping based on carbon content, even if it means a more expensive item with lower carbon is purchased. C-VAT would also replace fuel taxes. It will fund transportation costs, including mass transit, and research into alternative fuels (including fusion). This tax would not be border adjustable.

LETTER SUBMITTED BY TERENCE P. STEWART

August 4, 2020

U.S. Senate
Committee on Finance
Dirksen Senate Office Bldg.
Washington, DC 20510-6200

This statement is submitted for the record in the above identified hearing. My name is Terence P. Stewart. I practiced law in Washington, DC for roughly 40 years, focused on trade remedy and GATT/WTO matters. While I retired last August, I have written extensively on the challenges posed to the United States by the WTO dispute settlement system and currently author a blog entitled, Current Thoughts on Trade. The link to the blog is <https://currentthoughtsontrade.com>.

When the World Trade Organization came into existence in 1995, many in Congress were concerned about potential loss of sovereignty if the WTO dispute settlement system created rights or obligations that were not contained in the WTO agreements. As early as the Trade Act of 2002, Congress insisted on action by the Administration to address problems in trade remedy cases where the WTO Appellate Body was perceived to create obligations that the U.S. had never agreed to.

Blockage of filling vacancies in the WTO Appellate Body by the United States has led to WTO Members, after nearly twenty years of U.S. concerns, finally recognizing the problems of concern to the United States (and some other countries). While proposals have been put forward by other countries at the WTO to address many of the procedural issues raised by the U.S., there has not been agreement by major trading partners that gap filling and eliminating discretion where agreements have ambiguity must be addressed. Similarly, to achieve the rebalancing of rights and obligations that were agreed during the Uruguay Round, countries must come to grip with how to correct prior decisions that resulted in a change of rights and obligations actually negotiated. Finally, on the procedural issues, the U.S. has concerns that fixes proposed won't actually provide certainty that the Appellate Body will change its practices. Thus, parties need to consider how to make the provisions of the Dispute Settlement Understanding enforceable by the WTO Members.

I have in several blog posts reviewed efforts by the WTO to address U.S. concerns and have provided thoughts on how the proposals could be made enforceable and how the core issues of overreach can be corrected both going forward and in the context of prior decisions. I provide the most recent post below, <https://currentthoughtsontrade.com/2020/07/12/wtos-appellate-body-reform-revisiting-thoughts-on-how-to-address-u-s-concerns/>.

WTO Appellate Body Reform—Revisiting Thoughts on How to Address U.S. Concerns

In a November 4, 2019 post, I reviewed a draft General Council Decision that had been presented by Amb. David Walker to the General Council on addressing some of the concerns presented over the last several years by the United States with the functioning of the WTO's Appellate Body. The United States has been blocking the process for selecting new Appellate Body members until its longstanding concerns

are addressed. See WTO's Appellate Body Reform—The Draft General Council Decision on Functioning of the Appellate Body, <https://currentthoughtsontrade.com/2019/11/04/wtos-appellate-body-reform-the-draft-general-council-decision-on-functioning-of-the-appellate-body/>.

The Appellate Body ceased to have at least three members on December 11, 2019 at which point it could not hear new appeals. Moreover, only appeals that had gone through hearings were handled after December 10th, with the last report released last month.

The United States released in February a lengthy *Report on the Appellate Body of the World Trade Organization* which provides a detailed review of the purpose of dispute settlement in the WTO and the development of major departures from the agreed language of the Dispute Settlement Understanding by the Appellate Body over the first twenty-five years of the WTO's existence. The report was reviewed in an earlier post. See https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; USTR's Report on the WTO Appellate Body—An Impressive Critique of the Appellate Body's Deviation from Its Proper Role, <https://currentthoughtsontrade.com/2020/02/14/ustrs-report-on-the-wto-appellate-body-an-impressive-critique-of-the-appellate-bodys-deviation-from-its-proper-role/>.

While a number of WTO Members have joined together in supporting an interim arbitration approach, there has been no apparent ongoing effort to find a resolution to the continuing impasse. Indeed, the interim arbitration approach adopted by the EU, Canada, China and others in the view of the U.S. extends and in some cases exacerbates the longstanding concerns the U.S. has had with the Appellate Body and exceeds the proper role of arbitration.

There have been any number of proposals by academics, former government employees and others on what is needed to reform the Appellate Body to deal with U.S. concerns. The National Foreign Trade Council commissioned a multi-part report on Resolving the WTO Appellate Body Crisis from Bruce Hirsch, a former USTR official with significant responsibilities for dispute settlement matters. See Resolving the WTO Appellate Body Crisis, Proposals on Overreach (December 2019), <http://www.nftc.org/default/trade/WTO/Resolving%20the%20WTO%20Appellate%20Body%20Crisis%20Proposals%20on%20Overreach.pdf>; Resolving the WTO Appellate Body Crisis Volume 2, Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators (June 2020), http://www.nftc.org/default/Trade%20Policy/WTO_Issues/Resolving%20the%20WTO%20AB%20Crisis%20vol2%2006042020.pdf. His two papers make an important contribution to those interested in finding a forward path on restoring a second stage to the WTO's dispute settlement system.

Specifically, Mr. Hirsch's two papers address a number of important issues with suggestions presented for possible approaches to help move the WTO dispute settlement system back to what was agreed to in the Dispute Settlement Understanding which became operative in 1995 when the WTO was created.

The NFTC press releases on the two papers provides the following summary of proposals in each paper. From the December 17, 2019 press release:

The paper includes six key proposals:

1. Enforce the 90-day time frame for appeals;
2. Prohibit advisory opinions, and further elaborate the circumstances constituting advisory opinions;
3. Clarify that DSU Article 3.2 does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage;
4. Clarify that customary rules of interpretation of public international law do not justify gap-filling and expanding or narrowing the reach of WTO provisions;
5. Affirm that Article 17.6(ii) of the Antidumping Agreement must be given meaning, by clarifying that the provision reflects the principle just described, that WTO adjudicators may not expand or narrow the meaning of broad provisions and general terms; and
6. Direct the Appellate Body to reject party arguments that expand or narrow the reach of agreement provisions or fill gaps in agreements.

From the June 5, 2020 press release:

Specifically, the paper outlines 3 proposals that will help “reflect the goal of making the Appellate Body operate as Members expected in 1995.”

1. Clarify that Appellate Body reports do not create binding precedent;

2. Replace the Appellate Body secretariat with clerks seconded from the WTO secretariat; and
3. Guidance on the Role of Adjudicators.

The two papers are an effort to help WTO Members focus on moving forward on bringing the Appellate Body's role in the Dispute Settlement system back to its intended limited function.

The first paper which deals with the critical issue of overreach also takes in issues such as advisory opinions and adherence to the timeline for completing appeals (absent party consent) which Mr. Hirsch views as often interrelated. If there is a problem with the first paper it is in not addressing how to restore balance to WTO Members by correcting prior cases where overreach occurred. This has been an issue of some importance to the United States and is critical in a number of agreements where there has been a pattern of decisions changing rights and obligations.

In a prior post from November 12th, I reviewed the large number of WTO Members who have expressed concern about the Appellate Body creating rights or obligations not contained in the WTO Agreements. See Background Materials on WTO Appellate Body Reform Challenges—The Critical Issue of “Overreach,” <https://currentthoughtsontrade.com/2019/11/12/background-materials-on-wto-appellate-body-reform-challenges-the-critical-issue-of-overreach/>.

The second paper by Mr. Hirsch addresses a number of important issues although only the issue of precedent is on the list of concerns raised by the United States. However, Mr. Hirsch makes a strong case that the structure of the Appellate Body Secretariat has likely contributed to the development of problematic issues such as precedent, and his recommendations make a lot of sense and would return control of the Appellate Body process to Appellate Body members.

Mr. Hirsch notes that there is a lack of trust amongst WTO Members, which certainly reflects the current environment. His proposals are all focused on what he perceives to be a view with which all Members should be able to agree—reform the Appellate Body to ensure it performs the limited role articulated in the Dispute Settlement Understanding. I agree with both his observation on the lack of trust (and the need to develop trust through actions) and what the objective of reform can and should be. I differ only in what type of actions Members can take to ensure compliance by the Appellate Body with the limited role it is to play in dispute settlement.

His two papers do not suggest that all issues raised by the U.S. have been addressed in his papers (not clear if there are additional papers yet to be released). Nor is it the intention of his papers to suggest language amendments to the draft General Council Decision put forward by the then facilitator to the General Council, Amb. David Walker (NZ).

As an aid to readers, I have copied my November 4, 2019 recommended modifications to the draft General Council Decision below. The intention of my edits to the draft Decision was to provide changes reflecting the underlying purpose of the DSU that would be enforceable by the parties to disputes and to suggest an approach to deal with overreach that would deal with the past cases and not simply the future disputes. As one of the objectives of the U.S. is restoring the balance that was agreed to in the negotiated texts, I believe any resolution of the Appellate Body impasse has to identify a path forward on past decisions. The next paragraph and the modified draft General Council Decision are copied verbatim from my November 4th post. There are obviously many excellent ideas in papers from experts like Mr. Hirsch. My suggestions may add some flavor or different options on a number of issues that need to be addressed.

Excerpt from November 4, 2019 Post

What follows is my personal effort to identify some consequences of actions that have long concerned the United States. Obviously, only the U.S. can determine what will address its concerns. But possibly some of the following suggestions, if part of any final package, could address some of the ongoing and longstanding U.S. concerns. The text, other than what is both in bold and underlined, is the draft General Council Decision that is contained as an Annex to Amb. Walker's October 15, 2019 report to the General Council. Job/GC/222. Only one number has been deleted—“6” (60 days has been changed to 90 days under the first topic).

DRAFT GENERAL COUNCIL DECISION ON FUNCTIONING OF THE APPELLATE BODY

The General Council,

Conducting the function of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”);

Having regard to paragraph 1 of Article IX of the WTO Agreement;

Mindful of the work undertaken in the Informal Process of Solution-Focused Discussion on Matters Related to the Functioning of the Appellate Body, under the auspices of the General Council;

Recognizing the central importance of a properly functioning dispute settlement system in the rules-based multilateral trading system, which serves to preserve the rights and obligations of Members under the WTO Agreement and ensures that rules are enforceable;

Desiring to enhance the functioning of that system consistent with the Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”);

Decides as follows:

Transitional rules for outgoing Appellate Body members

Only WTO Members may appoint members of the Appellate Body.

The Dispute Settlement Body (the “DSB”) has the explicit authority, and responsibility, to determine membership of the Appellate Body and is obligated to fill vacancies as they arise.

To assist Members in discharging this responsibility, the selection process to replace outgoing Appellate Body members shall be automatically launched 180 days before the expiry of their term in office. Such selection process shall follow past practice.

If a vacancy arises before the regular expiry of an Appellate Body member’s mandate, or as a result of any other situation, the Chair of the DSB shall immediately launch the selection process with a view to filling that vacancy as soon as possible.

Appellate Body members nearing the end of their terms may be assigned to a new division up until 90 days before the expiry of their term.

An Appellate Body member so assigned may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term **if completing such appeal is consistent with Article 17.5 of the DSU or any mutually agreed extension by the parties.**

90 DAYS

Consistent with Article 17.5 of the DSU, the Appellate Body is obligated to issue its report no later than 90 days from the date a party to the dispute notifies its intention to appeal.

In cases of unusual complexity or periods of numerous appeals, the parties may agree with the Appellate Body to extend the time-frame for issuance of the Appellate Body report beyond 90 days. Any such agreement will be notified to the DSB by the parties and the Chair of the Appellate Body.

Failure to complete the appeal within 90 days of the notification of intent to appeal, or such other time as the parties agree to, shall result in the appeal terminating with no decision. In such situations the Dispute Settlement Body will consider adoption of the panel report but rights of the complaining party under Articles 21.6 and 22 of the DSU shall not apply.

The Appellate Body will supply the Dispute Settlement Body with a description of steps taken by the Division to complete any such appeal within 90 days and any modifications to Appellate Body procedures and practice that will be pursued by the Appellate Body to ensure such failure to comply with the 90 day rule is not repeated.

1 Such agreement may also be made in instances of force majeure.

Municipal Law

The “meaning of municipal law” is to be treated as a matter of fact and therefore is not subject to appeal. **Where the Appellate Body nonetheless addresses the meaning of municipal law in an Appellate Body report, either party may request that the paragraphs of the Appellate Body report dealing with such issue or issues and any conclusions drawn there from be stricken, and the**

Appellate Body will reissue the decision without such paragraphs forthwith. Compliance with the 90 day requirement will be measured from the date of the revised decision.

The DSU does not permit the Appellate Body to engage in a “de novo” review or to “complete the analysis” of the facts of a dispute.

Consistent with Article 17.6 of the DSU, it is incumbent upon Members engaged in appellate proceedings to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a *de facto* “de novo review.” **Where Article 11 is invoked by a Member seeking review on appeal of whether the panel failed to make an objective assessment, any other party may file an objection. The Appellate Body will consider the claim only in extraordinary circumstances of facial bias in the assessment by the panel. A Member raising such a claim that is dismissed will be assessed costs to the Member who filed an objection.**

Advisory Opinions and Appellate Body Economy in Decisions

Issues that have not been raised by either party may not be ruled or decided upon by the Appellate Body. **Where issues not raised by either party are addressed in the Appellate Body report, the addressing of such issues constitutes the provision of an advisory opinion and is inconsistent with DSU Article 17.12. Either party may request that the paragraphs of the Appellate Body report dealing with such issue or issues and any conclusion based thereon be stricken, and the Appellate Body will reissue the decision without such paragraphs forthwith. Compliance with the 90 day requirement will be measured from the date of the revised decision.**

Consistent with Article 3.4 of the DSU, the Appellate Body shall address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to assist the DSB in making the recommendations or in giving the ruling provided for in the covered agreements in order to resolve the dispute. **The Appellate Body’s indicating that other issues raised need not be addressed to resolve the dispute satisfies the requirements of DSU Article 17.12.**

Precedent

Precedent is not created through WTO dispute settlement proceedings.

Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.

Panels and the Appellate Body should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them. **The Appellate Body shall not reverse a panel decision on any issue solely on the basis of the panel not conforming to a prior Appellate Body report where the panel has identified different factual and/or legal issues.**

“Overreach”

As provided in Articles 3.2 and 19.2 of the DSU, findings and recommendations of Panels and the Appellate Body and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. **In a large number of Panel and Appellate Body reports, one or more parties and/or third parties have raised concerns about the Panel or Appellate Body adding to or diminishing the rights and obligations contrary to Articles 3.2 or 19.2 of the DSU.**

To clarify situations where rights and obligations are being added to or diminished, Panels and the Appellate Body will not fill gaps in agreements, construe silence to indicate obligations or construe ambiguities in language of existing agreements to require a particular construction. Any such actions by a Panel or by the Appellate Body is inconsistent with Articles 3.2 and 19.2 of the DSU.

Any party to an Appellate Body report that raised at the DSB meeting considering adoption of the Appellate Body report concerns about the creation of rights or obligations inconsistent with Articles 3.2 or 19.2, will have 90 days from the adoption of this General Council decision to request a review of the Appellate Body decision. Such request will be for the limited purpose of having the Appellate Body determine whether on the specific issues raised where the party complained of creating rights or obligations the clarification of meaning provided in this General Council decision would result in a changed decision on the particular issue. The Appellate

Body will render decisions on all such requests within 90 days and will accept no additional briefing or argument from parties. Where the report would have been different on one or more particular issues, it is sufficient for the Appellate Body to so indicate. Where the same decision on an issue would have been made, the Appellate Body shall provide a detailed explanation.

Panels and the Appellate Body shall interpret provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“antidumping agreement”) in accordance with Article 17.6(ii) of that Agreement. **Any party to an Appellate Body report that raised at the DSB meeting considering adoption of the Appellate Body report that Article 17.6(ii) was not applied in interpreting the antidumping agreement, will have 90 days from the adoption of this General Council decision to request a review of the Appellate Body decision. Such a request will be for the limited purpose of having the Appellate Body determine whether a different outcome on one or more issues would have resulted had the Appellate Body applied Article 17.6(ii) of the antidumping agreement. The Appellate Body will render decisions on all such requests within 90 days and will accept no additional briefing or argument from parties. Where the report would have been different on one or more particular issues, it is sufficient for the Appellate Body to so indicate. Where the same decision on an issue would have been made, the Appellate Body shall provide a detailed explanation.**

Regular dialogue between the DSB and the Appellate Body

The DSB, in consultation with the Appellate Body, will establish a mechanism for regular dialogue between WTO Members and the Appellate Body where Members can express their views on issues, including in relation to implementation of this Decision, in a manner unrelated to the adoption of particular reports. Such mechanism will be in the form of an informal meeting, at least once a year, hosted by the Chair of the DSB.

The Appellate Body Secretariat will prepare and circulate to the DSB at least 60 days in advance of such a meeting a document which reviews:

- (a) for any Appellate Body member whose term is or has expired in the last 12 months, assignments to appeals within 90 days of the end of the term and any appeals on which the AB member continued to work after his term expired and whether such continuation was authorized by the parties to the appeal;
- (b) the time from notification of intent to file an appeal to the AB decision in each case filed in the last 12 months (and for the first such report and any subsequent reports where appeals are not current with the 90 day requirement) to an AB report (or revised report where paragraphs are requested to be deleted as addressing issues not raised by any party) and copies of any write-ups filed where reports were not filed within 90 days;
- (c) a list of AB reports where paragraphs were requested stricken and time from request to rerelease of AB report;
- (d) a list of requests for review in appeals pursuant to Article 11 of the DSU of panel decisions as not being an objective assessment, how each request was resolved, and for such claims that were not properly filed whether costs were paid by the party raising the issue;
- (e) the number of AB reports where parties requested review based on statements made at prior DSB meetings that rights or obligations were being added to or diminished and/or that Article 17.6(ii) of the antidumping agreement was not applied or was applied inappropriately, timing of resolution by the Appellate Body and the number of issues where a different decision was rendered.

Where the Appellate Body has been unable to comply with the requirements of the DSU as clarified by this General Council Decision, it is expected that the Appellate Body Chairman will present at the informal meeting the action plan being pursued by the Appellate Body to achieve full compliance with the terms of the DSU and this Decision.

To safeguard the independence and impartiality of the Appellate Body, clear ground rules will be provided to ensure that at no point should there be any discussion of ongoing disputes or any member of the Appellate Body **other than as it relates to compliance with this General Council Decision.**

Conclusion

There are many reforms needed to bring the WTO into the 21st century and permit the organization's rules to address the trade distorting practices of all Members. The dysfunction of the dispute settlement system is but one area where reform is urgently needed.

Sincerely,

Terence P. Stewart

