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How the WTO Undermines U.S. Trade Remedy Enforcement

Authors:

Terence P. Stewart and Elizabeth J. Drake

Mr. Stewart is the Managing Partner of the Law Offices of Stewart and Stewart.
Ms. Drake is a partner at the firm. This paper reflects the authors' individual views.

For information, address:
Alliance for American Manufacturing
711 D Street NW, 3rd Floor
Washington, D.C. 20004
202-393-3430
americanmanufacturing.org

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I. Introduction

On December 12, 2016, China filed a dispute at the World Trade Organization ("WTO") challenging the U.S.'s continued practice of treating China as a "non-market" economy in antidumping cases. China argues that it is entitled to be treated as a market economy as of December 11, 2016 according to the terms of China's protocol of accession to the WTO. The U.S. disagrees that such a change in treatment is required, and it has continued to find that an array of distortions in China's economy make it ineligible for market economy treatment under U.S. law. While the dispute may take a couple of years or more to reach resolution, it could have far-ranging implications. If the U.S. is required to use internal Chinese prices and costs to determine the extent of dumping that is occurring, it would result in unreliable dumping comparisons due to on-going problems such as Chinese government restrictions on currency convertibility, a lack of free bargaining over wages, and state control over firms, the allocation of resources, and price and output decisions. This would dramatically weaken the ability to effectively remedy harmful Chinese dumping in the U.S. market.

Unfortunately, the current track record of the WTO does not bode well for the outcome of this latest dispute. Since it was established in 1995, the WTO has repeatedly ruled against trade remedy enforcement, both by the U.S. and other WTO members. The WTO has found at least one violation of WTO rules in over 90 percent of the trade remedy disputes it has ruled on to date – a remarkable record of violations given that the WTO rules were negotiated by the members themselves. The U.S. has been the disproportionate focus of these disputes. Since 1995, the WTO has issued 38 separate decisions against U.S. trade remedy measures, nearly five times the number of such decisions issued against any other member.

As a result, WTO decisions are undermining the ability of the U.S. and other countries to effectively enforce their trade remedy laws, laws which provide the vital first line of defense for domestic industries and workers injured by dumped and subsidized imports. There is mounting concern that these decisions result from the failure of WTO dispute settlement panels and the Appellate Body to respect some of the key founding principles of the organization, including long-standing recognition of the legitimacy of trade remedies and limitations WTO members put on the proper role of the dispute settlement system.

This paper provides background on these founding principles and on the WTO's record in trade remedy disputes. It summarizes some of the important WTO decisions that have led the U.S. to revise its determinations, alter its administrative practice, or amend its trade remedy laws. The paper ends with recommendations to policy makers to address these problems and help protect our trade remedy laws from additional erosion. Unless the WTO changes its approach to trade remedy disputes, it threatens to further undermine U.S. trade remedy enforcement – as well as public confidence in the WTO system itself – in the coming years.

II. The WTO's Role in Trade Remedy Dispute

The right of countries to effectively redress dumping and subsidization is part of the foundation of the international trading system. Article VI of the GATT states that dumping which injures a country's domestic industry is "to be condemned," and it permits parties to impose antidumping and countervailing duties to offset the amount of dumping and subsidization from which imports benefit. For decades, ensuring countries can remedy unfair trade practices has provided a vital relief valve as global trade has expanded and liberalized at a rapid pace.

Through successive rounds of negotiations, the GATT parties elaborated additional rules governing countries' imposition of antidumping

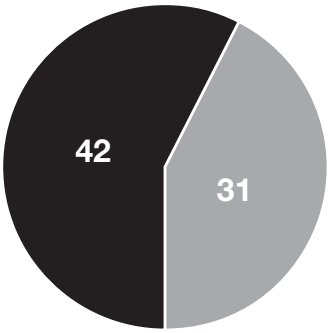
("AD") and countervailing duties ("CVD"). In many respects, the rules mirrored existing provisions in U.S. law. When Congress implemented the Uruguay Round of trade agreements that established the WTO, it modified U.S. trade remedy laws to ensure we would continue to be in compliance with international rules.

One important feature of the WTO was the strengthening of the GATT dispute settlement system. A standing Appellate Body was established to hear appeals from dispute settlement panels. In addition, the WTO can authorize members to take countermeasures against countries that are found to be out of compliance, a step that previously required the consent of the non-compliant party. To ensure the newly strengthened system respects the sovereignty of WTO member states, the rules also prohibit panels and the Appellate Body from adding to or diminishing the rights and obligations in the covered agreements, and the right to adopt interpretations of the agreements is reserved solely to WTO members.[1]

Members' trade remedy measures have been a disproportionate focus of WTO disputes. Of the 160 disputes on which the WTO has issued final or interim decisions since 1995, 73 of these disputes – or more than 45 percent of the total – have challenged a country's use of its trade remedy laws.[2] This focus on trade remedies is remarkable given that such measures affect only a miniscule portion of world trade.

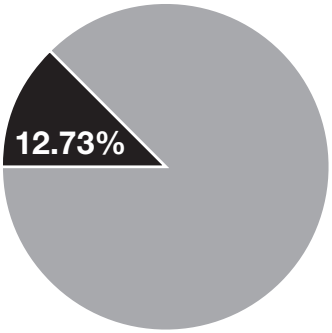
Of the 73 decisions identified above, 42 have involved trade remedies imposed by the United States. The U.S. has been the subject of nearly five times as many trade remedy decisions as the second most frequent respondent in such cases, the EU. This number is far out of proportion to the U.S. share of global imports and its share of trade remedy measures. From 1995 to 2015, the U.S. imported 14.17 percent of global imports and imposed 12.73 percent of all trade remedy measures imposed by WTO members.[3] Yet the U.S. – one country out of the WTO's now 164 members – was the subject of 57.5 percent of the WTO's decisions in trade remedy disputes.

Since 1995, 73 of the disputes on which the WTO has issued decisions have challenged a country's use of trade remedy measures. More than half (42) have involved remedies imposed by the United States.



The U.S. has been the subject of nearly ***five times as many trade remedy decisions*** *as the second-most frequent respondent in such cases (the European Union).*

Since 1995, the U.S. is behind ***only 12.73 percent*** *of all trade remedy measures imposed by WTO decisions.*



The WTO has found the U.S. to be in violation of at least one aspect of WTO rules in 38 of the 42 trade remedy decisions identified above, or in over 90 percent of the cases.[4] Some of the notable WTO decisions that have eroded the effectiveness of U.S. trade remedy law and practice are described in the next section.

These decisions have prompted legal scholars to criticize dispute panels, and especially the Appellate Body, for going beyond their mandate and creating new rights and obligations beyond those contained in the WTO agreements.[5] The U.S. Trade Representative and other WTO members have also repeatedly expressed concern about the Appellate Body's failure to abide by these standards and its propensity for over-reaching and gap-filling, to little avail.[6]

III. Selected WTO Decisions on U.S. Trade Remedies

1. Subsidies to Privatized Producers[7]

In response to a number of countervailing duty orders on various steel products from Europe, the EU challenged the Department of Commerce's practice of countervailing subsidies that had been provided to foreign producers prior to their privatization. Commerce countervailed such subsidy benefits as long as the pre-privatization producer and post-privatization producer were the same legal person. The Appellate Body found that the Department's privatization practice was inconsistent with WTO rules. The Appellate Body instructed that a privatization that occurred at arm's length and for fair market value should be presumed to extinguish the benefit of any pre-privatization subsidies, though the presumption could be rebutted if government distortions or other market factors prevented the establishment of an accurate market price for the transaction. Commerce revised its practice to conform to the Appellate Body's decision, making it more difficult to countervail subsidies provided prior to a privatization.[8]

2. Continued Dumping and Subsidy Offset Act[9]

In 2000, Congress passed the Continued Dumping and Subsidy Offset Act ("CDSOA"). The Act permitted domestic industries and workers who supported AD and CVD orders to receive distributions of the duties that were collected on imports that continued to be dumped and / or subsidized. The purpose of the law was to remedy continued dumping and subsidization that harmed domestic industries. In 2003, the Appellate Body ruled that the WTO agreements did not specifically permit the U.S. to distribute such duties to affected domestic industries. Congress subsequently repealed the law.[10]

3. Safeguards[11]

The WTO Agreement on Safeguards allows parties to impose temporary global import safeguards where imports are increasing in such quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Not one WTO member's global safeguard measure has ever been found to be in compliance with the Agreement.[12] In 1999, the U.S. imposed safeguards on imports of lamb meat, and, in 2002, the U.S. imposed safeguards on surging imports of steel products. The WTO found that the measures violated WTO rules in various respects, including through a failure to identify unforeseen developments and adequately address other conditions for the imposition of safeguards, as well as due to alleged deficiencies in the International Trade Commission's causation analysis. The U.S. ended both the lamb safeguard measure and the steel safeguards before their terms were otherwise set to expire.[13]

4. Zeroing[14]

In a series of cases, the EU, Japan, and other countries challenged an important aspect of U.S. practice in antidumping cases. Under this practice, the Department of Commerce did not give offsets or credits for sales that were not dumped against those sales that were dumped. Instead, it "zeroed" such non-dumped sales from the calculation of the total amount of dumping. The goal of the practice, long upheld by U.S. courts, was to ensure that non-dumped sales did not mask injurious dumped sales. Commerce did include such non-dumped sales in the denominator to determine the overall margin of dumping.

The WTO ruled that this practice was not allowed under WTO rules. These rulings ignored the fact that capturing 100 percent of dumping had been U.S. practice at the time the WTO agreements were negotiated, and that the U.S. and others explicitly refused to agree to negotiating proposals that would have prohibited the practice. WTO members challenged the practice in over a dozen cases involving products ranging from orange juice and shrimp to steel and bearings, requiring Commerce to revise margins and revoke orders against specific countries and companies.[15] In the end, Commerce abandoned the practice of zeroing both in investigations and in administrative reviews, and it developed an alternative set of practices in efforts to continue to unmask targeted dumping while complying with the WTO's decisions.[16]

5. Customs Bond Directive[17]

In 2004, Customs and Border Protection issued a continuous bonding directive with regard to billions of dollars of shrimp imports from six countries that were subject to preliminary antidumping findings. Importers were defaulting on hundreds of millions of dollars of duties owed on similar agriculture and aquaculture products under existing orders.[18] In order to protect the revenue, the directive required importers of shrimp from six countries to post bonds covering the full amount of their preliminary duty liability rather than the usual ten percent. The Appellate Body ruled that the directive violated WTO rules, because there was insufficient evidence establishing that the additional security was both reasonable and necessary. As a result of the WTO decision, Customs rescinded the continuous bonding directive.[19]

6. Countervailing Duty Cases involving China[20]

In 2006, the Department of Commerce determined that China's economy had evolved sufficiently to allow the identification and measurement of subsidies, and thus the application of countervailing duties to imports from China. Commerce determined that China's economy was still too distorted by state intervention to be treated as a market economy in antidumping cases. China challenged dozens of Commerce determinations in a series of cases, claiming various flaws in the countervailing duty methodology and that adjustments must be made in antidumping cases for so-called "double remedies" allegedly arising from the simultaneous application of the CVD law and the non-market economy AD methodology to imports from China.

The Appellate Body found the U.S. had violated WTO rules in several respects. For example, with regard to subsidies provided by state-owned enterprises, the Appellate Body ruled that majority government ownership alone was insufficient to establish that such firms operated like government entities and thus were capable of conferring subsidies. It required Commerce to examine numerous other factors to determine whether these entities in fact exercised government authority. Commerce changed its practice to implement the decision.[21]

In addition, based on its interpretation of the word "appropriate," the Appellate Body ruled that the U.S. had to make adjustments to AD margins to account for any alleged "double remedies" that were found to exist. Congress changed the law to require Commerce to make such adjustments.[22] The Department now routinely lowers AD cash deposit rates on imports from China where it finds that some amount of the subsidies found in a parallel CVD investigation likely passed through to the Chinese export prices used in the AD calculations.

7. Cross-Cumulation in Injury Determinations[23]

For many years, the International Trade Commission has cumulated subject imports from different countries that are subject to AD and CVD cases on the same product in order to consider those imports in the aggregate to determine whether they are causing material injury, or threatening material injury, to a domestic industry. The Commission has also done so in cases where some countries are subject to only an AD investigation and / or other countries are subject only to a CVD investigation. India challenged this practice of "cross-cumulation," and the WTO found the practice was inconsistent with U.S. obligations. While the Commission did not alter its general practice, it did consider Indian imports individually in a revised injury determination in order to comply with the WTO decision.[24] The WTO ruling provides an opening for additional challenges to the practice, and at least one Commissioner has invited parties to brief the WTO decision in future cases.[25]

8. Targeted Dumping[26]

As explained above, in response to adverse WTO decisions, the Department of Commerce abandoned zeroing and adopted alternative methodologies to identify targeted dumping (as specifically authorized in the WTO Anti-Dumping Agreement) and to ensure such dumping is not masked by non-dumped sales. In 2016, the Appellate Body ruled against the U.S.'s targeted dumping methodology in a case brought by Korea. The Appellate Body found various flaws with the U.S. methodology, including the way in which Commerce combined different calculation methodologies when targeted dumping was found (a sub-issue never raised by Korea itself). The U.S. is now in the process of determining how it might implement the decision, whether implementation may require Congress to make changes to U.S. law, and what options may remain available to the U.S. to unmask and remedy targeted dumping going forward.

9. Non-Market Economy Antidumping Methodologies[27]

In a 2011 decision, the Appellate Body ruled that the EU was not permitted to presume that entities in China were state-controlled and require Chinese companies to demonstrate otherwise. The EU subsequently changed its practice for investigating whether such state control existed. In follow-on cases brought against the U.S. by Vietnam, Vietnam challenged the Department of Commerce's practice for dealing with entities that are not independent from the state in antidumping cases on products from non-market economies. In those cases, panels followed the earlier Appellate Body decision regarding the EU and found that the U.S. was not allowed to employ a rebuttable presumption that entities in such countries are state-controlled. In one case, the panel ruled that the U.S. had to assign even to state-controlled entities the average of dumping margins found for companies independent of the state. Those cases were settled pursuant to a mutually agreeable solution and were not implemented.

China made similar claims in a follow-on case brought against the U.S. in 2013. In 2016, the panel echoed earlier rulings regarding the impermissibility of the rebuttable presumption, but it made no findings regarding the rates Commerce was allowed to apply. China has appealed that latter finding to the Appellate Body, where it remains pending. If China is successful, Commerce will have to struggle with how to address foreign producers that are not independent from the government of China (or Vietnam) in antidumping proceedings.

10. Price Comparability and Distorted Markets[28]

As noted above, China has recently challenged the U.S.'s continued treatment of China as a non-market economy under the AD law. China filed a similar challenge against the EU on the same day. If the WTO ultimately rules in China's favor in these cases, it would strip the U.S. and the EU of an important tool they currently rely upon to address distortions in China's economy when calculating dumping margins.

An October 2016 Appellate Body ruling regarding AD measures the EU imposed on biodiesel from Argentina (which it treats as a market economy) could further limit the tools available to the U.S. if it is required to treat China as a market economy notwithstanding continued government interventions in the Chinese economy. In the biodiesel case, the EU relied on alternative production costs to determine if dumping was occurring, because Argentine producers' own production costs were artificially depressed by a differential export tax that Argentina imposed on soybeans, a key biofuel feedstock. The Appellate Body ruled that the EU had to rely on the artificially depressed soybean costs regardless of the Argentine government's distortions to those costs. This decision could greatly restrict Commerce's ability to develop alternative tools for addressing distortions in China's economy if it is required to start relying on China's internal costs and prices in its dumping determinations.

IV. Conclusion and Recommendations

For more than two decades, WTO decisions have put sustained pressure on U.S. trade remedy law. Despite the long-standing international recognition of the need for effective AD and CVD laws to remedy unfair trade, and despite the safeguards members attempted to build into the WTO dispute settlement system, the WTO has dealt numerous setbacks to U.S. trade remedy enforcement. The U.S. has been the subject of far more adverse trade remedy decisions than any other WTO member, and it has suffered losses in 90 percent of WTO decisions to date.

As the U.S. has implemented these adverse decisions, it has had to not only revise duties and / or revoke orders on individual products, it has also had to change its administrative policies and, in some cases, ask Congress to change domestic trade remedy laws. Legal scholars, various administrations, and Members of Congress have all expressed their concern about the WTO Appellate Body's over-reaching in its rulings against trade remedy enforcement. For years, Congress has identified reining in the WTO dispute settlement system and preserving the ability of the United States to rigorously enforce its trade remedy laws as key trade negotiating objectives.[29]

Yet efforts to use WTO challenges to undermine U.S. trade remedy enforcement continue. Until and unless the WTO changes its approach to trade remedies, it will remain an inviting forum for those who wish to further weaken the enforcement of U.S. antidumping and countervailing duty laws in the years to come. The latest dispute filed at the end of last year by China against the U.S. could eviscerate our ability to effectively redress dumped Chinese imports that harm American industries and workers.

Policy makers should make it a priority to counteract these trends and protect domestic trade remedy laws from further erosion. Possible steps to consider, including both new efforts and the strengthening and expanding of existing efforts, include:

- Vigorously defending U.S. trade remedy decisions at the WTO and seriously considering whether and how to implement any adverse decisions depending on the weakening effect they may have on enforcement;
- Forming a coalition with other WTO members concerned about trends in the dispute settlement system's trade remedy decisions to mount a coordinated campaign to critique and reform the decision-making of panels and the Appellate Body;
- Investing in efforts to educate other WTO members, particularly developing countries, about the importance of trade remedies in the international system and the economic contribution they make by reducing market distortions and enabling balanced economic growth;

- Refusing to agree to the nomination or re-nomination of Appellate Body members who have failed to adhere to the standard of review and shown a willingness to overreach and "interpret" WTO agreements rather than merely apply them as negotiated by the members;
- Protest any statements by the WTO Director-General and other WTO officials that paint all trade remedy measures with a broad brush as protectionist without acknowledging the historical recognition that such measures play a key role in facilitating legitimate trade;
- Impressing on other WTO members that further expansion of WTO agreements and routine implementation of adverse decisions is at risk if the dispute settlement system is not effectively reformed to reduce overreach by panels and Appellate Body members;
- Establishing an independent Commission of legal experts to determine whether a WTO panel or the Appellate Body has exceeded its authority or deviated from the applicable standard of review in making a decision adverse to the United States, and creating procedures for Congress to respond to Commission determinations with appropriate action regarding U.S. negotiating positions and membership in the WTO;[30] and
- Working with Members of Congress, the media, and academia to build strong public support for effective trade remedy enforcement that strengthens the hand of U.S. negotiators in Geneva to underscore the political importance of real reform in the WTO dispute settlement system.

The world trading system depends on countries' ability to take rapid, effective, and meaningful action against unfair dumping and subsidization that is harming their manufacturers, farmers, ranchers, and workers. That ability is currently being undermined by the WTO dispute settlement system, contrary to the system's original design. A strong and coordinated response by policy makers is needed to reverse these troubling trends, preserve our trade remedy laws, and help restore faith in the international trading system.

WTO Trade Remedy Decisions, 1995 - 2016

Sorted by Respondent Country

#	Dispute No.	Respondent	Complainant	Short Name	WTO Violation?	Adoption
1	121	Argentina	EU	Footwear (EC)	Yes	2000
2	189	Argentina	EU	Ceramic Tiles	Yes	2001
3	238	Argentina	Chile	Preserved Peaches	Yes	2003
4	241	Argentina	Brazil	Poultry AD Duties	Yes	2003
5	22	Brazil	Philippines	Desiccated Cocnut	No	1997
6	482	Canada	Chinese Taipei	Carbon Steel Welded Pipe	Yes	na
7	414	China	US	GOES	Yes	2012
8	425	China	EU	X-Ray Equipment	Yes	2013
9	427	China	US	Broiler Products	Yes	2013
10	440	China	US	Autos (US)	Yes	2014
11	460	China	EU	HP-SSST	Yes	2015
12	415	DR	Costa Rica, et al.	Safeguard Measures	Yes	2012
13	211	Egypt	Turkey	Steel Rebar	Yes	2002
14	141	EU	India	Bed Linen	Yes	2001
15	219	EU	Brazil	Tube or Pipe Fittings	Yes	2003
16	299	EU	Korea	CVDs on DRAM Chips	Yes	2005
17	337	EU	Norway	Salmon (Norway)	Yes	2008
18	397	EU	China	Fasteners (China)	Yes	2011
19	405	EU	China	Footwear (China)	Yes	2012

WTO Trade Remedy Decisions, 1995 - 2016 (CONTINUED)

#	Dispute No.	Respondent	Complainant	Short Name	WTO Violation?	Adoption
20	442	EU	Indonesia	Fatty Alcohols	Yes	na
21	473	EU	Argentina	Biodiesel	Yes	2016
22	60	Guatemala	Mexico	Cement I	No	1998
23	156	Guatemala	Mexico	Cement II	Yes	2000
24	98	Korea	EU	Dairy	Yes	2000
25	312	Korea	Indonesia	Certain Paper	Yes	2005
26	132	Mexico	US	Corn Syrup	Yes	2001
27	295	Mexico	US	AD Measures on Rice	Yes	2005
28	331	Mexico	Guatemala	Steel Pipes and Tubes	Yes	2007
29	341	Mexico	EU	Olive Oil	Yes	2008
30	122	Thailand	Poland	H-Beams	Yes	2001
31	468	Ukraine	Japan	Certain Passenger Cars	Yes	2015
32	99	US	Korea	DRAMS	Yes	1999
33	136	US	EU & Japan	1916 Act	Yes	2000
34	138	US	EU	Lead and Bismuth II	Yes	2000
35	166	US	EU	Wheat Gluten	Yes	2001
36	177	US	Australia & New Zealand	Lamb	Yes	2001
37	179	US	Korea	Stainless Steel	Yes	2001
38	184	US	Japan	Hot-Rolled Steel	Yes	2001
39	194	US	Canada	Export Restraints	No	2001
40	202	US	Korea	Line Pipe	Yes	2001
41	206	US	India	Steel Plate	Yes	2002
42	212	US	EU	CVD Measures on Certain EC Products	Yes	2003
43	213	US	EU	Carbon Steel	Yes	2002
44	217	US	Australia, et al.	Offset Act (Byrd Amendment)	Yes	2003
45	221	US	Canada	Section 129(c)(1)URAA	No	2002
46	236	US	Canada	Softwood Lumber III	Yes	2002
47	244	US	Japan	Corrosion Resistant Steel Sunset Review	No	2004
48	248	US	Brazil, et al.	Steel Safeguards	Yes	2003
49	257	US	Canada	Softwood Lumber IV	Yes	2004
50	264	US	Canada	Softwood Lumber V	Yes	2004
51	268	US	Argentina	Oil Country Tubular Goods Sunset Reviews	Yes	2004
52	277	US	Canada	Softwood Lumber VI	Yes	2004
53	282	US	Mexico	AD Measures on Oil Country Tubular Goods	Yes	2005
54	294	US	EU	Zeroing (EC)	Yes	2006
55	296	US	Korea	CVD Investigation on DRAMs	Yes	2005
56	322	US	Japan	Zeroing (Japan)	Yes	2007
57	335	US	Ecuador	Shrimp (Ecuador)	Yes	2007
58	343	US	India & Thailand	Shrimp (Thailand), Customs Bond Directive	Yes	2008
59	344	US	Mexico	Stainless Steel (Mexico)	Yes	2008
60	350	US	EU	Continued Zeroing	Yes	2009
61	379	US	China	AD and CVD Duties (China)	Yes	2011
62	382	US	Brazil	Orange Juice (Brazil)	Yes	2011
63	383	US	Thailand	AD Measures on PET Bags	Yes	2010
64	399	US	China	Tyres (China)	No	2011
65	402	US	Korea	Zeroing (Korea)	Yes	2011
66	404	US	Vietnam	Shrimp I (Viet Nam)	Yes	2011
67	422	US	China	Shrimp and Sawblades (China)	Yes	2012
68	429	US	Vietnam	Shrimp II (Viet Nam)	Yes	2015
69	436	US	India	Hot-Rolled Carbon Steel Flat Products	Yes	2014
70	437	US	China	CVD Measures on Certain Products	Yes	2015
71	449	US	China	CVD and AD Measures (China)	Yes	2014
72	464	US	Korea	Washers	Yes	2016
73	471	US	China	AD Proceedings Involving China	Yes	na

Note: Where a single decision involved more than one dispute number, only the first dispute number is listed.

Endnotes

1 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 arts. 3.2 & 19.2 (Apr. 15, 1994), 1869 U.N.T.S. 401. *See also* Marrakesh Agreement Establishing the World Trade Organization art. IX.2 (Apr. 15, 1994), 1869 U.N.T.S. 154.

2 A list of these 73 disputes is attached at Annex I. The list includes any WTO dispute where a panel and / or Appellate Body decision has been adopted by the Dispute Settlement Body as of the date of this writing. It also includes three disputes (DS442, DS471, & DS482) where a panel report has been issued but an appeal remains pending before the Appellate Body. The tally is based on the number of decisions issued rather than the number of disputes, as a single decision may cover a number of disputes filed regarding the same underlying measure. Other disputes never result in a decision because they are resolved in consultations or not further pursued by the complainant. Such disputes that did not result in a panel or Appellate Body decision are not included in the tally. The tally also does not include decisions by compliance panels or arbitrators. For the purposes of this white paper, disputes are included as involving trade remedies if they concern antidumping measures, countervailing duty measures, safeguard measures, and ancillary matters such as Customs enforcement of trade remedies. The tally does not include disputes regarding Section 301 of U.S. trade law or safeguards under the Agreement on Textiles and Clothing.

3 Cumulatively from 1995 to 2015, the U.S. imported $34 trillion worth of goods and all countries combined imported $240 trillion worth of goods. WTO Statistics Database. From 1995 to 2015, the U.S. imposed 460 individual antidumping, countervailing duty, and safeguard measures. All WTO members combined imposed 3,611 such measures during the same period. *See* "Anti-dumping Measures: By Reporting Member 01/01/1995 – 31/12/2015," "Countervailing Measures: By Reporting Member 01/01/1995 – 31/12/2015," and "Safeguard Measures by Reporting Member," available on the WTO website at: https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf , https://www.wto.org/english/tratop_e/scm_e/CV_MeasuresByRepMem.pdf , and https://www.wto.org/english/tratop_e/safeg_e/SG-MeasuresByRepMember.pdf, respectively.

4 *See* Annex I. Almost all cases involve more than one issue. Of the 38 cases cited here, there are many in which the U.S. was found to be in compliance in some respects and out of compliance in others. It is beyond the scope of this white paper to provide an issue-by-issue tally for each of the disputes. There are only four trade remedy cases in which the U.S. was not found to be out of compliance with any of its WTO obligations in any respect.

5 *See e.g.*, Terence P. Stewart, et al., *The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?*, 8 Global Trade and Customs Journal 390 (2013).

6 *See id*. at 393-394.

7 Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted January 8, 2003.

8 *See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37,125 (Dep't Commerce June 23, 2003). The Department's practice was also being challenged in appeals in the U.S. court system. *Id*. at 37,125.

9 Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted January 27, 2003.

10 Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(a), 120 Stat. 4, 154 (2006).

11 Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted May 16, 2001; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/ AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted December 10, 2003.

12 *See* Annex I. The China-specific safeguard the U.S. imposed on passenger vehicle and light truck tires from China was found to be consistent with U.S. obligations under China's Protocol of Accession. Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted October 5, 2011.

13 *Proclamation 7502 of November 14, 2001: To Provide for the Termination of Action Taken With Regard to Imports of Lamb Meat*, 66 Fed. Reg. 57,837 (Nov. 19, 2001); *Proclamation 7741 of December 4, 2003: To Provide for the Termination of Action Taken With Regard to Imports of Certain Steel Products*, 68 Fed. Reg. 68,483 (Dec. 8, 2003).

14 *See, e.g.*, Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted May 9, 2006; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted January 23, 2007; Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted February 20, 2007; Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted May 20, 2008; Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted February 19, 2009; Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, adopted June 17, 2011; Panel Report, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, adopted February 18, 2010; Panel Report, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R, adopted February 24, 2011; Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/R and Add.1, adopted July 23, 2012.

Many commentators have criticized the Appellate Body's approach to the zeroing cases. *See* Terence P. Stewart, et al., *The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?*, 8 Global Trade and Customs Journal 390, 395-396 n. 23 (2013) (citing articles critiquing the decisions).

15 *See, e.g., Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 (Dep't Commerce May 4, 2007); *Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador*, 72 Fed.

Reg. 48,257 (Dep't Commerce Aug. 23, 2007); *Implementation of the Findings of the WTO Panel in US-Zeroing (EC); Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy*, 72 Fed. Reg. 54,640 (Dep't Commerce Sept. 26, 2007); *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut–to-Length Carbon-Quality Steel Plate Products from Japan*, 73 Fed. Reg. 29,109 (Dep't Commerce May 20, 2008); *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Polyethylene Retail Carrier Bags From Thailand*, 75 Fed. Reg. 48,940 (Dep't Commerce Aug. 12, 2010); *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof From the Republic of Korea*, 76 Fed. Reg. 66,892 (Dep't Commerce Oct. 28, 2011); *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Stainless Steel Plate in Coils From the Republic of Korea; and Partial Revocation of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 76 Fed. Reg. 74,771 (Dep't Commerce Dec. 1, 2011); *Certain Frozen Warmwater Shrimp From the People's Republic of China and Diamond Sawblades and Parts Thereof From the People's Republic of China: Notice of Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Orders*, 78 Fed. Reg. 18,958 (Dep't Commerce Mar. 28, 2013).

16 *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006). *See also Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Dep't Commerce Feb. 14, 2012).

17 Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/ Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted August 1, 2008

18 *See id*. at 71-72 & n.194.

19 *Enhanced Bonding Requirement for Certain Shrimp Importers*, 74 Fed. Reg. 14,809 (CBP Apr. 1, 2009).

20 Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted March 25, 2011; Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted January 16, 2015; Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted July 22, 2014.

For a critique of the Appellate Body's approach in these cases from former WTO officials, *see* Michel Cartland, Gérard Depayre, and Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. World Trade 979 (2012).

21 *Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China*, 77 Fed. Reg. 52,683 (Dep't Commerce Aug. 30, 2012).

22 An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for other Purposes, Pub. L. No. 112-99, § 2, 126 Stat. 265, 265-267 (2012).

23 Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted December 19, 2014.

24 *See* U.S. International Trade Commission, *Hot-Rolled Steel Products from India*, Inv. No. 701-TA-405 (Section 129 Consistency Determination), USITC Pub. 4599 (Mar. 2016).

25 U.S. International Trade Commission, *Polyethylene Terephthalate (PET) Resin from Canada, China, India, and Oman*, Inv. Nos. 701-TA-531-532 and 731-TA-1270-1273 (Final), USITC Pub. 4604 (Apr. 2016) at 35-39 (Separate Views of Commissioner F. Scott Kieff on Cross-Cumulation).

26 Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted September 26, 2016.

27 *See* Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted July 28, 2011. See also Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted September 2, 2011; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/AB/R, adopted April 22, 2015. *See also* Panel Report, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R, circulated to WTO Members October 19, 2016 (appeal in progress).

28 *See* Request for Consultations by China, *United States – Measures Related to Price Comparison Methodologies*, WT/DS515/1, G/L/1169, G/ADP/D115/1 (December 15, 2016); Request for Consultations by China, *European Union – Measures Related to Price Comparison Methodologies*, WT/DS516/1, G/L/1170, G/ADP/D116/1 (December 15, 2016). *See also* Appellate Body Report, *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted October 26, 2016.

29 *See, e.g.*, Defending Public Safety Employees' Retirement Act, Pub. L. No. 114-26, § 102(b)(16)(C) & (17), 129 Stat. 319, 330-331 (2015) (setting out Congressional negotiating objectives for dispute settlement and trade enforcement under the most recent grant of Trade Promotion Authority).

30 Former Senator Robert Dole (R-KS) introduced legislation that would have established such a Commission in 1995, shortly after the WTO came into existence, but the legislation was not enacted. *See* S. 16, 104th Cong (1995).

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