

Written Testimony of
Bruce Hirsh
Before the House Ways and Means Trade Subcommittee
Advancing America's Interests at the World Trade Organization's
13th Ministerial Meeting
Wednesday, February 7, 2023

Mr. Chairman and Ranking Member Blumenauer, thank you for inviting me to appear at this hearing today. I appreciate this opportunity to provide testimony on the World Trade Organization's (WTO) upcoming 13th Ministerial Conference in Abu Dhabi. My testimony will focus on the prospects for outcomes on changes to the dispute settlement system. I have been involved in and have followed this topic for more than two decades since I served as USTR's Legal Advisor to the U.S. Mission to the WTO and as USTR's Chief Counsel for Dispute Settlement, and later as a WTO negotiator and as Chief International Trade Counsel at the Senate Finance Committee.

By agreement, the WTO holds meetings of its Member economy trade ministers every two years. These Ministerial Conferences represent the WTO's highest decision-making body. Past Ministerial Conferences have been used to advance or conclude ongoing negotiations and to initiate and guide new talks. Even under the best of circumstances, WTO negotiations move slowly, constrained by a decision-making process that requires consensus among its 164 Members. As a result, those looking to each Ministerial with expectations of bold outcomes are often disappointed. This Ministerial is likely to be no exception.

Having said that, even without headline outcomes, Ministerials like MC13 can prove important in laying the groundwork for new initiatives and in advancing the ball on key ongoing initiatives, providing energy and guidance to negotiators working day-in and day-out in Geneva and in capitals around the world.

Much of that work over the past few months has been directed at agreeing on how to improve

the WTO's dispute settlement system. The system has been hobbled since 2019 when the United States blocked appointments to the system's Appellate Body, ultimately resulting in the Appellate Body losing a quorum to make decisions. This has created the option for a losing party to a dispute to appeal its first level panel decision "into the void," preventing the completion of the dispute. As detailed further below, the U.S. decision to block Appellate Body appointments grew out of long-standing, bipartisan concerns that the Appellate Body was increasingly straying from its limited role of correcting panel errors to filling gaps in the agreement and otherwise legislating to create new obligations and limit existing rights.

Restoring the dispute settlement system to full functionality has been a priority for most WTO Members and the question of how to do so an active topic, in particular over the past two years. The recent discussions have been marked by an unusual level of cooperation, with Members generating a number of textual proposals for process-related improvements to the system. While discussions on solutions to core U.S. concerns have lagged, this should come as no surprise given the wide gaps in positions and the need for additional groundwork to bridge those gaps. Indeed, while WTO Members at MC12 agreed to conduct discussions "with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024," the United States has been clear that it did not view this as meaning completing discussions by MC13 in February 2024.

Before addressing different positions and future prospects, it is worth providing some background on the system and how we got to this point. The WTO's dispute settlement system is one of the three pillars of the WTO, alongside its negotiation and monitoring functions. It is tasked with facilitating "the prompt settlement of disputes"¹ and "to secure a positive solution to a dispute," preferably "a solution mutually acceptable to the parties and consistent with [WTO rules]."² Claims are initially heard by three *ad hoc* panelists, with losing parties then free to seek review by the Appellate Body. The Appellate Body is a standing body with seven members who are selected by the membership. Its mandate is limited -- to review "issues of law covered in the panel report and legal interpretations developed by the panel"³ and to

¹ Dispute Settlement Understanding (DSU), Art. 3.3.

² DSU Art. 3.7.

³ DSU Art. 17.6.

“uphold, modify or reverse” the panel’s legal findings and conclusions.⁴ Under dispute settlement rules negotiated as part of the WTO’s creation, panels and the Appellate Body may not “add to or diminish” WTO rights and obligations.⁵

The United States was a driving force behind the creation of the dispute settlement system, viewing it as key to enforcing WTO commitments and ensuring day-to-day respect for the rules. Frustrated throughout the 1980s and early 1990s by the ability of losing parties to block panel establishment and panel findings under the dispute settlement procedures of the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT), the United States insisted that panels be automatically established upon request and that panel findings could not be blocked, nor could requests for authorization to raise duties on parties who fail to come into compliance after adverse panel findings.

In the later stages of negotiating these rules, the United States and others concluded that the new rules on automatic adoption of panel reports created the potential for panel errors to go unaddressed, and therefore added the Appellate Body to the new procedures.

WTO dispute settlement has proven popular, with more than 620 disputes brought since the WTO’s creation in 1995, roughly double the count under the previous 50 years of the GATT. While this has generally been viewed as a sign that WTO Members find the system useful in resolving disputes, others question whether at least some of these disputes have been brought in an effort to achieve through dispute settlement what litigants could not achieve through negotiation. This concern became greater as the WTO’s negotiation function stalled out in the Doha Round, which was launched in 2001. A dynamic developed in which litigants pursued aggressive arguments that were accepted by the Appellate Body, inviting further aggressive argumentation.

The U.S. criticism of the Appellate Body stems in large part from its observation that the Appellate Body took advantage of automatic adoption of its reports to expand its mandate from correcting panel errors to fillings gaps in agreement text and in some cases narrowing the agreed scope for Members to implement their commitments, particularly, but not exclusively,

⁴ DSU Art. 17.13.

⁵ DSU Arts. 3.2 & 19.2.

in the area of trade remedies. The Appellate Body and its supporters justified its actions as consistent with one of the dispute settlement system's functions, to clarify existing obligations, but it became increasingly clear over time to many observers in the United States and elsewhere that the Appellate Body had crossed a line into rule-making, most clearly when it took upon itself the right to extend the deadlines Members had established for it to complete its work -- without authorization by the litigants -- and when it increasingly opined on legal issues not related to the dispute at hand, that is, it provided advisory opinions.

This is not to say that every report of the Appellate Body indulged in overreach from 1995 on, or that the Appellate Body made no positive contributions to the functioning of the system. Its early insistence on legal rigor generally raised the quality of panel reports. And in the early days of the system, Appellate Body reports were generally restrained, in some cases explicitly reflecting an appreciation of the dispute system's limited role of enforcing existing obligations, not creating new ones.⁶ But over time this self-restraint fell away, to the point that in 2016 the Appellate Body included in one of its reports 46 pages opining on the meaning of agreement provisions not relevant to the dispute at hand.⁷

Along with gradually taking an expansive view of its approach to disputes, the Appellate Body from 2008 insisted that its word was the last word, that its findings in effect constituted binding precedent. The dispute settlement rules Members agreed to make clear this was not to be the case. Structurally, panel and Appellate Body reports have no legal status until the full WTO membership adopts them, albeit through a virtually automatic process (Members can, by consensus, reject the reports). And WTO rules are clear – Members have the exclusive authority to adopt interpretations of the WTO Agreement or to amend it,⁸ and, as previously noted, panel and Appellate Body findings may not add to or diminish Member rights and obligations.⁹ Panels are not tasked with following earlier conclusions of the Appellate Body;

⁶ See Appellate Body Report, *United States — Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (2000), at 26.

⁷ See Statement by the United States at the Meeting of the Dispute Settlement Body on May 9, 2016 (WT/DSB/M/378), available at <https://geneva.usmission.gov/wp-content/uploads/sites/290/May-9-DSB.pdf>; Appellate Body Report, *Argentina – Measures Relating to Trade In Goods And Services*, WT/DS453/AB/R (2016).

⁸ Marrakesh Agreement Establishing the World Trade Agreement (“WTO Agreement”), Arts. IX:2 & X.

⁹ DSU Arts. 3.2 & 19.2.

rather, they are required to examine agreement provisions in accordance with customary rules of interpretation of public international law – even when this yields a result at odds with Appellate Body precedent. The Appellate Body’s insistence that panels follow its precedent has locked in mistakes, especially in the area of trade remedies, and forced it to subsequently engage in legal acrobatics to revise its reasoning without acknowledging it is doing so.

This is a brief summary of U.S. concerns with the Appellate Body. The United States comprehensively laid out its concerns in a paper USTR issued in 2020 and which is available on USTR’s website.¹⁰

From the early 2000s, the United States began flagging its concerns with the direction the Appellate Body was heading. In the mid-2000s, the United States submitted proposals I was involved in drafting that attempted to address U.S. concerns as part of a review of the dispute settlement system’s operation. That process suffered from the same fate as many of the WTO’s negotiating efforts, as the need for consensus prevented agreement on a common set of reforms.

Over the years, others at the WTO have shared U.S. concerns and have on occasion joined the United States in expressing them, usually in the context of specific disputes, but there has rarely been a groundswell. Often this was out of a sense of resignation that little could be done given the requirement of a consensus to reject a panel report or to consider reforms. At other times it was because many favored the substantive outcome in the dispute and remained quiet, even if they understood the questionable interpretive approach that achieved that outcome. And many Members have been constrained in their criticism and reluctant to openly join the United States because they believed that whatever the system’s flaws, it was overall operating well and they were reluctant to undermine its credibility through criticism.

Still other Members have been in philosophical agreement with the Appellate Body’s aggressive approach and have dismissed U.S. criticisms as a case of sour grapes at losing. But from my own experience I can tell you that the U.S. criticisms were directed not only at

¹⁰ “Report on the Appellate Body of the World Trade Organization,” Office of the United States Trade Representative (2020), available at <https://www.ustr.gov/sites/default/files/enforcement/DS/USTR.Appellate.Body.Rpt.Feb2020.pdf>.

avoiding and correcting mistakes, but at saving the system from itself, because the USG realized that the Appellate Body's activism could eventually undermine the credibility of and support for a useful and necessary part of the WTO system. And that is what ultimately happened.

WTO Members were shocked in the last years of the Obama Administration when the U.S. blocked reappointment of an Appellate Body member who had been involved in a number of activist Appellate Body reports. And WTO Members were more than shocked during the Trump Administration when the United States blocked the Appellate Body appointment process, causing the Appellate Body to lose its quorum, despite the increasingly detailed and specific critiques the United States offered leading up to that action, including lengthy ones my fellow panelist Ambassador Shea delivered.

While the U.S. tactics were not appreciated, they did get Members' attention. There have been meetings in various configurations since 2019 to better understand U.S. concerns and consider how to address them. The most promising of these has been ongoing for the past two years, an informal process under the direction of the Deputy Permanent Representative of Guatemala to the WTO, Marco Molina. The process has developed in stages, with Members first laying out their interests in the dispute settlement system and how those interests are or are not reflected in the current operation of the system, then considering proposed solutions. Those solutions with broad support have moved forward to the drafting stage. The process has operated through a bottom-up approach, with Members working in small groups to develop textual proposals which are then reviewed by the broader group.

By virtue of this interest-based approach, and at the urging of Ambassador Tai, the process is considering not only U.S. concerns, but more broadly how the system can work more effectively for the entire Membership, including for developing countries whose limited resources have at times left them unable to make use of the current system and its increasingly lengthy, complex, and resource-heavy legal proceedings. In connection with this concern, and with a focus on the system's core purpose of helping Members resolve disputes, the talks have included discussions and proposals on alternatives to litigation, seeking more effectively to operationalize provisions in the original dispute settlement rules on good offices, conciliation,

and mediation. And the talks have reportedly also included a number of proposals to streamline the current operation of the system to better achieve the tight deadlines included in dispute settlement rules and to reduce the burden on litigants. These process-related topics are reportedly furthest along in discussions. Discussions on more contentious topics are reportedly less developed, like those on how to handle what the U.S. considers past erroneous interpretations and how to reform the panel review mechanism – or whether to dispense with it altogether. Most Members have yet to be persuaded to abandon a review mechanism like the Appellate Body altogether, though many have signaled a willingness to undertake changes. The positive news is that Members appear to be listening to U.S. concerns in a way they have not in the past.

Added to the challenge facing negotiators, two panels in late 2022 and early 2023 found against the U.S. position that panels may not second-guess a Member’s decision to take a measure for national security purposes. This long-standing position dates back to 1947, and numerous Members, including ones now challenging the U.S. position, have expressed the same view at one time or another. While there is no scenario in which the United States will back away from this position in current talks, the United States has in the past acknowledged that others may retaliate against national security measures and has been willing to litigate the amount of retaliation. Formalizing that approach might be one way forward on the issue.

The prospects for outcomes on dispute settlement reform at MC13 are thus uncertain. There has been some discussion on whether to reach some sort of agreement on the process-related proposals which are furthest along in their development, a prospect the United States has been open to. Other participants have been reluctant to agree on anything until there is greater certainty on how U.S. concerns with the Appellate Body might be handled. WTO Members are now engaging in very intensive talks to close gaps and determine a way forward on remaining issues.

Regardless of whether there is agreement at MC13 on some of the issues under discussion, the meeting represents an opportunity for Ministers to engage with each other to explore how to close gaps in positions and to recommit to completion of discussions. It is important that they do so. For all of its flaws, the WTO dispute settlement system has played an important role in

resolving and containing disputes and more generally in reinforcing respect for the rules. The increasing resort by Members to appealing into the void, that is, preventing disputes from reaching their conclusion by appealing to the non-existent Appellate Body, highlights the risk of a more general deterioration of respect for the rules, to the detriment of U.S exporters, producers, and their workers. And without a functioning dispute settlement system, we are likely to see more tit-for-tat trade wars that involve cascading cycles of retaliation.

In conclusion, it would be prudent to temper one's expectations for a breakthrough on dispute settlement reform issues at MC13. Having said that, MC13 could provide a welcome boost to the current talks, which provide a real opportunity to address U.S. concerns and restore a more effective dispute settlement system.