

U.S. Statement at the Meeting of the WTO Dispute Settlement Body Under Item 4

Geneva, October 29, 2018

4. STATEMENT BY THE UNITED STATES CONCERNING THE ISSUANCE OF ADVISORY OPINIONS ON ISSUES NOT NECESSARY TO RESOLVE A DISPUTE
- The United States requested this agenda item to draw Members' attention to an important systemic issue with significant implications for the operation of the dispute settlement system: the issuance by WTO panels and the Appellate Body of findings not necessary to resolve a dispute, including statements or interpretations that are not necessary or even on issues not presented in a dispute. These are often referred to as "advisory opinions", which are commonly defined as "a non-binding statement on a point of law given by [an adjudicator] before a case is tried or with respect to a hypothetical situation."¹
 - The United States has long been concerned with the issuance by WTO adjudicators of such advisory opinions. Such advisory opinions often appear to be an attempt by a panel or the Appellate Body to "make law" rather than resolve a particular dispute. They are contrary to core principles enshrined in the text of the WTO Agreement² and the Dispute Settlement Understanding,³ setting out distinct roles for WTO Members, on the one hand, and WTO adjudicators, on the other. Advisory opinions also run directly counter to the specific mandate we WTO Members have agreed for WTO adjudicators, and therefore breach WTO rules.
 - Through this statement today, the United States again attempts to facilitate a broader discussion among Members on whether we understand and respect the rules we have written and agreed to. To facilitate this discussion, in this statement we will highlight several aspects of this issue for Members.
 - First, the United States will highlight the relevant text of the WTO Agreement and DSU that makes clear that the purpose of the dispute settlement system is not to produce interpretations or to "make law" in the abstract, but rather to help Members resolve a specific dispute. Accordingly, the text of the DSU specifically empowers a WTO panel to make findings that will assist the DSB in making a recommendation to a Member to bring a WTO-inconsistent measure into conformity with WTO rules – but not to make other findings, statements, or interpretations.
 - Second, we draw Members' attention to the dispute settlement rules and procedures of the GATT, from which the relevant provisions of the DSU were drawn. The GATT

¹ See, e.g., Oxford Dictionaries, "advisory opinion" (https://en.oxforddictionaries.com/definition/advisory_opinion).

² *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement").

³ *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

dispute settlement language was substantially the same, and there is no question that the GATT did not provide for advisory opinions.

- Third, we will draw attention to the fact that WTO Members have not given panels or the Appellate Body the power to give “advisory opinions,” and this is significant in contrast with what parties have agreed for some other international tribunals.
- Fourth, we will draw Members’ attention to troubling instances of advisory opinions issued by the Appellate Body and note that some Members have recognized and criticized any such approach to this important issue.
- Fifth, we will conclude by explaining the serious consequences for the WTO dispute settlement system of the failure of panels and the Appellate Body to only make those findings necessary to resolve a dispute.

I. The Purpose of WTO Dispute Settlement is to Resolve Trade Disputes, Not Make Law

- Members established the Dispute Settlement Body (“DSB”) to administer the WTO dispute settlement system in accordance with the DSU.⁴
- The dispute settlement system, which is but one component of the larger multilateral trading system, plays an important, but focused role. The DSU defines the purpose of the dispute settlement system. In Article 3.7, WTO Members agreed: “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.” Thus, the aim of the dispute settlement system is *not* to produce interpretations or “make law” in the abstract. And as we will discuss, within this focused role, WTO panels are charged with a specific task – assisting the DSB in discharging its responsibilities under the DSU – and the Appellate Body is similarly charged with assisting the DSB (albeit in an even more limited, focused capacity).
- In contrast to the focused role of dispute settlement “to secure a positive solution to the dispute”, WTO Members did create a mechanism to provide interpretations of the WTO agreements in the abstract. In Article IX:2 of the WTO Agreement, WTO Members reserved for themselves acting in the Ministerial Conference or General Council “the exclusive authority to adopt interpretations” of the WTO agreements.

⁴DSU Art. 2.1.

- If this were not clear enough, the DSU expressly provides that the dispute settlement mechanism is “without prejudice to the rights of Members to seek authoritative interpretation” of the WTO agreements through that process under the WTO Agreement.⁵
- To achieve the focused “aim of the dispute settlement mechanism ... to secure a positive solution to a dispute,”⁶ Members established in the DSU particular processes for resolving disputes promptly, including panels, and the Appellate Body where appropriate, assisting the DSB for this purpose.
- Where a dispute between Members arises, the dispute settlement process typically begins with a request for consultations submitted in accordance with Article 4 of the DSU. As Members are aware, the request for consultations must include an “identification of the measures at issue and an indication of the legal basis for the complaint.”⁷ Even at this early stage, Members are required to identify the measures at issue, and not simply request consultations concerning an abstract interpretative legal issue. This is reinforced by Article 3.3 of the DSU, which makes clear that WTO dispute settlement involves “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.”
- If consultations fail to resolve a dispute, a Member may then submit a request to the DSB, in which the Members ask the DSB to establish a panel.⁸ In that request, the Member is required to “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”⁹ So here again, the DSU is not concerned with hypothetical measures or abstract legal questions. A complainant “shall ... identify” with specificity the measures at issue and “shall ... provide” the legal basis for the complaint. A panel request would not comply with the DSU if it merely requested the DSB to establish a panel to provide an

⁵ Article 3.9 of the DSU provides that “[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.”

⁶ *See also*, DSU Art. 3.3 (making clear that the prompt settlement of “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member” is essential to the effective functioning of the WTO.); DSU Art. 3.4 (providing that the DSB’s recommendations and rulings “shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.”).

⁷ DSU Art. 4.4.

⁸ DSU Art. 6.

⁹ DSU Art 6.2.

interpretation of a covered agreement in the abstract or make a finding on a hypothetical measure.

- The DSU establishes standard terms of reference for a panel in Article 7. The DSB charges the panel with two tasks: to “examine ... the matter referred to the DSB” in the panel request and “to make such findings as will assist the DSB in making the recommendations” provided for in the DSU.¹⁰
- And Article 19.1 of the DSU is, again, explicit in what that recommendation is: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” Thus, a finding that a challenged measure is inconsistent with a WTO rule set out in a covered agreement necessarily leads to a recommendation to bring the measure into compliance with that agreement.
- It is through such a finding of WTO-inconsistency and through such a recommendation “to bring the measure into conformity” that panels and the Appellate Body carry out the terms of reference “to make such findings as will assist the DSB in making the recommendations” provided for in the covered agreements.¹¹
- Members reinforced in Article 11 that the “function of panels is to assist the DSB in discharging its responsibilities under [the DSU].”¹² Members reinforced that a panel assists the DSB through the tasks set out in the panel’s terms of reference. In particular, DSU Article 11 states that “a panel should make an objective assessment of the matter and such findings “as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”¹³
- Thus, the text of the DSU establishes that the DSB tasks a panel only with making those findings as would assist the DSB in making the recommendation provided for in the covered agreements – that is, to bring a measure found to be inconsistent with a WTO agreement into conformity with that agreement.
- The inverse is equally clear: it would *not* be within a panel’s terms of reference under Article 7.1, nor would it be consistent with a panel’s function under Article 11, to make findings that *cannot* “assist the DSB in making [its] recommendations” to bring a WTO-inconsistent measure into conformity with WTO rules. Put more succinctly, a panel

¹⁰ DSU Art. 7.1.

¹¹ DSU Art. 7.1.

¹² DSU Art. 11.

¹³ DSU Art. 11.

would act contrary to these articles by issuing advisory opinions, or findings on issues not necessary to resolve a dispute.

- The same applies to the Appellate Body. The Appellate Body’s task under the DSU is limited to assisting the DSB in discharging its functions under the DSU. Under Article 17.6, an appeal is “limited to issues of law covered in the panel report and legal interpretations developed by the panel”. Further, under Article 17.13, the Appellate Body is only authorized to “uphold, modify or reverse the legal findings and conclusions of the panel.”
- Since a panel’s function under DSU Article 11 is “to assist the DSB in discharging its responsibilities” under the DSU, the Appellate Body, in reviewing a panel’s legal conclusion or interpretation, is thus also assisting the DSB in discharging its responsibilities to find whether the responding Member’s measure is consistent with WTO rules.¹⁴
- And so just as a panel may not ignore its terms of reference as established by the DSB to make findings that cannot “assist the DSB in making [its] recommendations”, so too the Appellate Body is not authorized to go beyond the panel’s terms of reference to issue findings on issues unnecessary to resolve a dispute.
- At this point, it is worth noting two provisions of the DSU that some have misunderstood as suggesting panels and the Appellate Body can render advisory opinions.
- The first is the reference to “clarify[ing] the existing provisions of the covered agreements” in Article 3.2 of the DSU. Article 3.2 provides in relevant part:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.
- The “it” in the second sentence of Article 3.2 refers to the subject of the first sentence, “the dispute settlement system of the WTO”. In other words, Members recognized that *the dispute settlement system of the WTO* – as set out in the DSU – serves to preserve the

¹⁴ Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, DSU Article 19.1 provides in mandatory terms that “*it shall* recommend that the Member concerned bring the measure into conformity with that agreement.”

rights and obligations of Members under the covered agreements, and *the dispute settlement system of the WTO* – as set out in the DSU – serves to clarify the existing provisions of those agreements.

- As we have seen, the dispute settlement system – as set out in the DSU – charges panels and the Appellate Body with making such findings as will assist the DSB in making the recommendation set out in the DSU, and through that function it serves to preserve Members’ rights and obligations and to clarify existing provisions.
- Furthermore, this text of Article 3.2 is neither a directive to panels or the Appellate Body nor an authorization for them. There is no “shall” or “may” in this text. Instead, it is a statement of what Members have agreed flows from the system when it operates in accordance with the provisions agreed by Members.
- The second provision that is sometimes misread is Article 17.12 of the DSU, which provides that “[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.”
- The ordinary meaning of “address” is to “[t]hink about and begin to deal with (an issue or problem)”.¹⁵ That is, to address an issue is not necessarily to resolve that issue. This term can also be contrasted with the immediate context of Article 17.13, which refers to a panel’s “legal findings and conclusions”. That is, Article 17.12 does not direct the Appellate Body to “make legal findings and conclusions” on each of the issues raised in the appeal.
- Similarly, it is useful to note that Article 7.2 of the DSU also states that “panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.”
- As WTO Members well know, panels and the Appellate Body have often “addressed” an issue through the exercise of judicial economy. As the Appellate Body stated more than 20 years ago in endorsing judicial economy: “Given the explicit aim of dispute settlement that permeates the DSU [to settle disputes], we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”¹⁶

¹⁵ Oxford Dictionaries, “address” (third definition) (<https://en.oxforddictionaries.com/definition/address>).

¹⁶ *US – Wool Shirts and Blouses (AB)*, WT/DS33/AB/R, at 19.

- If a finding would not assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with a covered agreement, the only proper way to “address” such an issue would be to refrain from issuing a finding. Thus, it would be incorrect to read the word “address” as permitting the Appellate Body or a panel to make findings on issues that would not assist the DSB in discharging its responsibilities.
- Neither DSU Article 3.2 nor DSU Article 17.12, then, provides any authority to give advisory opinions.

II. Advisory Opinions Were Not Permitted under the GATT Dispute Settlement Rules and Procedures

- The United States also notes that the lack of authority for panels and the Appellate Body to issue advisory opinions in WTO dispute settlement is consistent with the lack of such authority under the GATT dispute settlement rules and procedures.
- In fact, the text of several provisions of the DSU are carried over directly from the GATT procedures as reflected, for instance, in the *Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures* (or “Montreal Rules”). There was no question that GATT dispute settlement did not authorize advisory opinions.
- Provisions of the GATT dispute settlement rules and procedures – provisions nearly identical to analogous provisions of the DSU – confirm that GATT panels functioned to assist the Contracting Parties in making the recommendations or in giving the rulings provided for in the GATT.
- For example, paragraph F(a) of the Montreal Rules required panel requests to “indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly.” Just like DSU Article 6.2, this demonstrates that GATT dispute settlement was not concerned with hypothetical measures or abstract legal questions.
- Paragraph F(b)(1) of the Montreal Rules provided that GATT panels would have following standard terms of reference:

To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) in document L/... and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.

- Just like DSU Article 7.1, this text made explicit that GATT panels functioned to assist the Contracting Parties in making the recommendations to bring a measure found inconsistent with the GATT into conformity with those rules. The terms of reference of GATT panels, like WTO panels today, did not empower them to make interpretations in the abstract.

- In addition, paragraph A1 of the Montreal Rules provides the following:

Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement *and to clarify the existing provisions of the General Agreement*. It is a central element in providing security and predictability to the multilateral trading system.

- This is identical, in relevant part, to the language in DSU Article 3.2 on the WTO dispute settlement system preserving the rights and obligations of Members and serving to clarify the existing provisions of the covered agreements. The use of “clarify” in this text, like its use in DSU Article 3.2, did not authorize GATT panels to provide interpretations in the abstract, on issues not necessary to resolve the particular dispute. Rather, it was simply a statement of what Contracting Parties agreed flowed from the GATT dispute settlement system when it operated in accordance with the agreed provisions.
- That much of the DSU text tracks the GATT dispute settlement rules and procedures is not surprising as the DSU, as reflected in the provisions we have examined, carried forward the understanding that the “aim of the CONTRACTING PARTIES [in dispute settlement] has always been to secure a positive solution to the dispute”.¹⁷ By choosing the same structure and words, the Contracting Parties were choosing to maintain an approach to dispute settlement under the GATT through the DSU. That approach under the GATT was never understood as giving adjudicators the authority to make interpretations in the abstract that are not necessary to resolve a dispute. That same language when carried forward into the DSU also does not provide panels and the Appellate Body any authority to give advisory opinions.

III. WTO Members have not given panels or the Appellate Body the power to give “advisory” opinions as some international tribunals have.

- The text of the DSU and WTO Agreement make clear that panels and the Appellate Body do not have the authority to issue advisory opinions. This stands in contrast to the

¹⁷ Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, L/4907, para. 4.

authority explicitly provided to some other international tribunals in their respective legal texts.

- For example, the United Nations Charter explicitly provides that the International Court of Justice may be requested to provide “an advisory opinion on any legal question”.¹⁸ And the Statute of the International Court of Justice, which is annexed to and an integral part of the United Nations Charter¹⁹, explicitly provides that the International Court of Justice may provide an advisory opinion:

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.²⁰

- The Statute of the International Tribunal for the Law of the Sea sets out in Articles 159²¹ and 191²², that the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea may give “an advisory opinion on the conformity with th[e] Convention of a proposal” or on other legal questions.
- The explicit authority to provide advisory opinions can also be found in the constitutive texts of certain other international adjudicative fora, including the European Court of

¹⁸ See UN Charter, Art.96(a) (“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”) and Art. 96(b) (“Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”).

¹⁹ UN Charter, Art. 92 (“The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”).

²⁰ Statute of the International Court of Justice, Art.65.

²¹ Statute of the International Tribunal for the Law of the Sea, Art. 159(10) (“Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon...”).

²² Statute of the International Tribunal for the Law of the Sea, Art. 191 (“The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities.”).

Human Rights²³, the African Court on Human and Peoples' Rights²⁴, and the Inter-American Court of Human Rights.²⁵

- Unlike the agreement governing these other tribunals, however, the DSU contains no provision authorizing a panel or the Appellate Body to provide an advisory opinion. To the contrary, as we have seen, the DSU sets out specific terms of reference for the panel and Appellate Body, charging them to make such findings as will assist the DSB in making the recommendation to bring a WTO-inconsistent measure into conformity with a covered agreement. A WTO adjudicator's findings are therefore limited to those findings necessary to resolve a given dispute.

IV. The Appellate Body's Issuance of Advisory Opinions

- Members agreed the DSB would assign a specific function to a panel and the Appellate Body – to make such finding as will assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with a covered agreement. Early on, the Appellate Body appeared to recognize this important but limited role for WTO adjudicators.
- In an early dispute – *US – Wool Shirts and Blouses* – the Appellate Body framed the work of the Appellate Body and panels in the following manner:

Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to “make law” by

²³ European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 31 (“The Grand Chamber shall... (c) consider requests for advisory opinions submitted under Article 47.”) and Art. 47 (“The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.”).

²⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 4(1) (“At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.”).

²⁵ American Convention on Human Rights, Art. 64 (“1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.”); Statute of the Inter-American Court, Art. 2 (“The Court shall exercise adjudicatory and advisory jurisdiction: 1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and 2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention.”).

clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.²⁶

We note, furthermore, that Article IX of the WTO Agreement provides that the Ministerial Conference and the General Council have the ‘exclusive authority’ to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements.²⁷

- The Appellate Body appropriately recognized the distinction between the role of Members – with the exclusive authority to adopt interpretations of the WTO agreements – and the role of a panel and the Appellate Body to assist the DSB in resolving a particular dispute.
- Similarly, in *US – Customs Bonding*, the Appellate Body observed that “it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations.”²⁸
- Over time, however, the Appellate Body has departed from the limited role agreed to by Members. Beyond assisting in resolving the dispute before it, the Appellate Body has improperly stepped into the role of the Membership: increasingly, the Appellate Body first wades into issues not necessary to resolve the dispute, and then circulates interpretations of the WTO Agreements that it considers binding on Members.
- As Members know, the United States has been raising concerns about advisory opinions by WTO adjudicators, and increasingly by the Appellate Body, for over 16 years.²⁹ Despite the complexity that such advisory opinions can add to a report, and the need to understand a dispute in some detail in order to discern when an adjudicator has given an advisory opinion, we find numerous instances when Members have detected an advisory opinion by the Appellate Body and spoken out against those efforts. The range of Members speaking out on this issue is informative.
- For example, in *Canada – Continued Suspension* and *United States – Continued Suspension*, 10 WTO Members spoke in the DSB to question the authority of the

²⁶ *US – Wool Shirts and Blouses (AB)*, page 19.

²⁷ *US – Wool Shirts and Blouses (AB)*, pages 19-20.

²⁸ *US – Customs Bonding (AB)*, para. 92.

²⁹ See 2018 President’s Trade Policy Agenda, at 26-27.

Appellate Body to “recommend” that the DSB request that certain Members initiate further dispute settlement proceedings. The so-called “recommendation” served no purpose in assisting the DSB to resolve the dispute before it and was directly contrary to Article 19.1 of the DSU. The United States and other Members were critical of the Appellate Body’s approach:

- For example, Canada stated: “Since no finding of inconsistency existed, the Appellate Body’s recommendation ... could not constitute a recommendation within the meaning of Article 19.1 of the DSU and was, therefore, without legal consequence.”³⁰
 - Argentina recalled that “the authority to make recommendations in Article 19.1 was contingent on the prior conclusion that a measure was inconsistent with a covered agreement.” That being the case, Argentina asked, “[i]n the case at issue, there was no finding of inconsistency, so on what grounds could the Appellate Body recommend, let alone suggest, to the parties what action they should take with respect to their dispute?”³¹
 - Chile “regretted the inclusion of that recommendation, which in Chile’s view did not help to settle this dispute.”³²
 - Australia³³, Costa Rica³⁴, Ecuador³⁵, Korea³⁶, Japan³⁷, and Mexico³⁸ all made similar statements questioning the authority of the Appellate Body to make a recommendation absent any finding of inconsistency with respect to the measures at issue in these disputes.
- In the same disputes, the Appellate Body also strayed from the issues necessary to resolve the dispute to opine on the application of the DSU in the post-suspension stage of a dispute. Even where some Members agreed in principle with the Appellate Body’s

³⁰ DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 43.

³¹ DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 25.

³² DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 31.

³³ See DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 27.

³⁴ See DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 33.

³⁵ See DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 15.

³⁶ See DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 28.

³⁷ See DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), paras. 23-24.

³⁸ DSB Meeting Minutes November 14, 2008 (WT/DSB/M/258), para. 17.

statements, the United States and other Members criticized the Appellate Body's overreach:

- Chile, after recalling the ongoing work by Members on the very issue of post-retaliation in the context of negotiations to amend the DSU, observed that “the Appellate Body was imposing its own authority over and above the work which was being carried out by Members, and which was solely their responsibility, and by determining which procedures should, in its opinion, be followed in such circumstances, the Appellate Body was creating new rights and obligations for all WTO Members. Furthermore, in setting out a new procedure, it had established new courses of action with practical application or implications that had not yet been evaluated, as was the case when each party initiated its own proceedings.”³⁹
- Argentina agreed, stating that “the evaluation of the appropriateness of the different options offered by the DSU was not only the responsibility of Members, but required the type of analysis which, in particular circumstances, nobody could perform better than Members.”⁴⁰
- In another instance, *China – Publications and Audiovisual Products*, the Appellate Body made findings on the applicability of Article XX(a) of the GATT 1994 to a claim under China's Protocol of Accession. The Appellate Body made this finding despite the fact that both parties had indicated during the appeal it was not necessary to resolve this issue, and the panel had appropriately avoided resolving it.
 - In its statement to the DSB, Japan stressed that “there would be a risk that the complex issue of law, the novel one in particular, could be prematurely, and possibly improperly, decided by [an] adjudicative body of appellate jurisdiction in situations where the issue was not well presented by the parties and not fully explored or developed by lower tribunals.” Japan concluded that “the resolution of the availability of Article XX defense should have been saved for another day when the resolution of the issue was absolutely necessary and the issue would be more properly presented and fully explored.”⁴¹
- A further example is the Appellate Body's report in *Argentina – Financial Services*. This appeal raised a number of issues under the GATS provisions on national treatment, most-favored-nation treatment, and the prudential exception. The Appellate Body resolved the appeal on the first, threshold issue of “likeness.”

³⁹ DSB Meeting Minutes, November 14, 2008 (WT/DSB/M/258), para. 30.

⁴⁰ DSB Meeting Minutes, November 14, 2008 (WT/DSB/M/258), para. 26.

⁴¹ DSB Meeting Minutes January 19, 2010 (WT/DSB/M/278), paras. 83-84.

- The United States addressed this report extensively in its statement to the DSB. Members may recall that, despite resolving the appeal on the initial threshold issue, the Appellate Body went on to consider issues that the Appellate Body itself considered not necessary to resolve the dispute. As the report states:

Our reversal of these findings [on likeness] means that the Panel's findings on "treatment no less favourable" are moot because they were based on the Panel's findings that the relevant services and service suppliers are "like". Moreover, as a consequence of our reversal of the Panel's "likeness" findings, there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel's analysis . . . pursuant to Article XIV(c) of the GATS and . . . paragraph 2(a) of the GATS Annex on Financial Services.⁴²

- But after clarifying that all of the Panel's findings other than "likeness" were rendered moot, the Appellate Body one paragraph later stated that: "[S]everal of the issues raised in Panama's appeal have implications for the interpretation of provisions of the GATS. With these considerations in mind, we turn to address the issues raised in Panama's appeals."⁴³ The Appellate Body then undertook an analysis – 46 pages – that was in the nature of obiter dicta.
- In other words, the Appellate Body acknowledged that (1) it had already considered all issues necessary to help resolve the dispute, yet (2) it would nevertheless address additional interpretive issues under the GATS.
- *Indonesia – Import Licensing Regimes*, adopted last year, offers another example. The Appellate Body made a threshold finding concerning Article XI:1 of the GATT 1994 that alone resolved the dispute. Indeed, the United States explained in its submission that the Appellate Body's analysis should end there if it made this threshold finding. Several third parties also suggested the Appellate Body should address only those issues necessary to resolve the dispute. Yet, the report went on to substantively address other claims, the outcome of which would have no effect on the recommendations in the dispute, as the Appellate Body itself acknowledged.⁴⁴
- Most striking was a GATT 1994 Article XX claim appealed by Indonesia, where the Appellate Body expressly *agreed* with the United States that addressing the claim was

⁴² *Argentina – Financial Services (AB)*, para. 6.83.

⁴³ *Argentina – Financial Services (AB)*, para. 6.84.

⁴⁴ *Indonesia – Import Licensing Regimes (AB)*, paras. 5.63, 5.102-103.

not necessary.⁴⁵ The report nonetheless discusses the legal standard under Article XX at some length and then, without analysis or further explanation, declares the Panel's findings moot and of no legal effect.⁴⁶ The preceding discussion of Article XX, therefore, was unnecessary to resolve the dispute.

- Lastly, we note the appellate report in *EU – PET (Pakistan)*.
- The EU appealed the panel's issuance of findings in this dispute. The EU argued that "WTO dispute settlement proceedings are intended to secure a positive solution to a dispute and should not serve as a vehicle to obtain 'advisory opinions' on legal matters."⁴⁷ The EU observed that "[t]here are other procedures that allow Members to obtain an authoritative interpretation of particular provisions of a covered agreement."⁴⁸ The EU argued at length that it is not the role of the dispute settlement system to offer advisory opinions not necessary to resolve a dispute. Yet, the Appellate Body did so anyway.
- The United States agreed with the EU that the approach of the panel and the Appellate Body raise serious concerns. Pakistan had made clear that it did not seek a recommendation on the EU measure that expired in the course of the panel proceedings. This fact alone confirms that there was no dispute between the parties. In that sense, Pakistan was seeking an advisory opinion regarding the application of the Subsidies Agreement in the future. As Pakistan requested findings with respect to the interpretation and application of the Subsidies Agreement, but no recommendation on the challenged EU measure, the panel and the Appellate Body should have found Pakistan's request to be outside the terms of reference. There was no finding that would assist the DSB in making the recommendation because Pakistan had requested no recommendation be made.
- As with the other reports discussed, the reports in the *EU – PET (Pakistan)* dispute were not necessary to resolve a dispute, but rather – as the EU rightly pointed out in its appeal – an exercise in making advisory opinions.
- These examples are just a few of the instances in which the Appellate Body has taken it upon itself to offer interpretations not necessary to the resolution of a dispute.

⁴⁵ *Indonesia – Import Licensing Regimes (AB)*, paras. 5.102-103.

⁴⁶ *Indonesia – Import Licensing Regimes (AB)*, paras. 5.91-101, 5.103.

⁴⁷ *EU – PET (Pakistan) (AB)*, para. 5.31.

⁴⁸ *EU – PET (Pakistan) (AB)*, para. 5.31.

- Under the guise of providing clarifications to assist Members in future disputes, the Appellate Body's conduct contravenes the limited role agreed to by Members: to review issues of law and legal interpretation covered in a panel report that will assist the DSB in finding whether the responding Member's measure is inconsistent with a covered agreement.

V. Conclusion

- In conclusion, the text of the DSU and WTO Agreement make clear that panels and the Appellate Body are only to issue those findings necessary to resolve a dispute, and specifically, findings that will assist the DSB in making a recommendation to bring a measure found to be inconsistent with a WTO agreement into conformity with that agreement.
- WTO Members reserved for themselves the exclusive authority to issue authoritative interpretations of the WTO agreements, and they agreed they would adopt such interpretations in the Ministerial Conference or the General Council, not the DSB.
- The United States has long expressed concerns with the issuance of advisory opinions by WTO adjudicators, and increasingly by the Appellate Body, and we have reviewed certain reports in which other Members recognized those concerns.
- This is another example of a failure by the Appellate Body to follow the rules agreed by Members in the WTO agreements. Several immediate consequences flow from this problem. To list a few:
 - As with other systemic problems identified by the United States, advisory opinions will add time to a proceeding and move the system further away from the principle of prompt settlement reflected in DSU Article 3;
 - Advisory opinions add to the complexity of a report and add to the burdens of Members in future disputes when considering past reports bearing on a legal issue;
 - Advisory opinions risk adding to or diminishing a Member's rights and obligations under the covered agreements, inconsistent with DSU Articles 3.2 and 19.2; and
 - By opining on issues that are not before it, and on which the parties may not have engaged fully, or for which relevant facts may not have been fully developed, an advisory opinion risks not taking into account all the facets of an issue.

- Ultimately, the failure of a WTO adjudicator to follow the rules set out in the DSU governing their role and function risks further eroding support for the dispute settlement system and the WTO as a whole.
- We look forward to engaging with Members on this important issue.