

The fact that a state decides not to appear at, and/or after, a judgment on jurisdiction, frequently leads to corollary problems of compliance and enforceability. International law requires that each member of the United Nations must comply with decisions of the ICJ in cases to which it is a party;³² if any party fails to comply with the judgment, the other party may have recourse to the Security Council, which may make recommendations or decide on measures to give effect to the judgment.³³ In practice, this enforcement mechanism exists largely in name only; an attempt to adopt the “Nicaraguan” resolution urging “full compliance” with the Court’s ruling in the *Venezuela v. United States* (Merits) was, predictably, vetoed by the United States.³⁴ Yet such compliance problems are particularly acute in the context of disputes over territories, where finality and stability of borders are central values.

When the decision in *Guyana v. Venezuela* (Jurisdiction) was given, under two years ago, there were reasons for strong optimism that there would be compliance with the decision on the merits. By restricting itself to considering only the validity of the 1899 Award (and not events that occurred after the 1966 Geneva Agreement) the Court probably signaled that reparation in the form of damages was unlikely; if so, the final decision will probably not require positive fiscal action on the part of the losing state. If the Court finds the 1899 Award to be invalid it would be extremely difficult for Guyana to cavil given its fervent assertion of the Court’s jurisdiction; if the 1899 Award is found to be valid, Venezuela would simply be required to respect the existing boundary established by the Award. Violation by either side would be in fact an invasion of the territorial sovereignty of the other member state of the United Nations and would constitute a direct threat to international peace and security. In these specific circumstances it is hoped that even a largely inoperable Security Council would find it unacceptable not to act. The hope remains but has been appropriately chastened by intervening developments in eastern Europe.

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World Trade Organization—General Agreement on Tariffs and Trade 1994—Agreement on Safeguards—unforeseen developments—causal link—Appellate Body crisis

UNITED STATES—SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS, WT/DS562/R. At https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds562_e.htm.

World Trade Organization Panel, September 2, 2021 (unadopted).

In *U.S. – Safeguard Measure on PV Products (China)*, a Panel of the World Trade Organization (WTO) dismissed China’s complaint that the United States had imposed

³² UN Charter, Art. 94(1).

³³ *Id.* Art. 94(2).

³⁴ Michael J. Berlin, *U.S. Vetoes Nicaraguan Resolution on Compliance with Court Decision*, WASH. POST (Aug. 1, 1986).

impermissible safeguards on certain solar power products.¹ Safeguards are temporary restrictions against foreign products in an emergency situation where imports cause or threaten serious injury to domestic producers. Historically, WTO case law has strictly construed the possibility of resorting to safeguards under the General Agreement on Tariffs and Trade (GATT) and the more specialized Agreement on Safeguards.² The Panel Report in this case is highly unusual for rejecting all parts of the complaint, without finding any violation by the safeguard-imposing country. Also unusually, the panel refrained from citing the previous jurisprudence that expressly accepted “unforeseen developments” as a mandatory investigative inquiry under the Agreement on Safeguards, and it used a new style of referencing past rulings. Given these anomalies, the Panel Report seems best understood in the context of the United States’ crippling of the WTO Appellate Body—probably as an effort, conscious or otherwise, to treat the United States with a light touch.

This dispute concerns a safeguard measure in the form of a tariff-rate quota and duties that the United States imposed on imports of certain crystalline silicon photovoltaic cells (“photovoltaic cells”) pursuant to a U.S. presidential decision of January 23, 2018.³ The presidential decision took into account affirmative determinations of the U.S. International Trade Commission (USITC) on injurious imports of photovoltaic cells and underlying unforeseen developments. In the WTO, China’s complaint about the U.S. measure centered on three issues: (1) the existence of unforeseen developments; (2) a causal link between increased imports and serious injury; and (3) confidential information in investigative records. But the panel turned down all of the complainant’s claims.

First, Article XIX:1(a) of the GATT allows safeguard measures if increased quantities of imports seriously injuring domestic industry are “a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions.”⁴ China questioned whether the United States had really made a finding of unforeseen developments, noting that the USITC discussed this matter in a supplemental report, rather than the final investigation report. But the panel held that the Agreement on Safeguards did “not dictate” a precise format for publishing the competent authorities’ determinations (paras. 7.19–7.20, n. 38).

According to the USITC report, U.S. trade negotiators could not have foreseen that China would adopt industrial policies and support programs to boost photovoltaic cell production

¹ Panel Report: United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, WTO Doc. WT/DS562/R (issued Sept. 2, 2021; appealed Sept. 16, 2021; unadopted), at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds562_e.htm. The WTO documents cited in this analysis are available at the WTO website, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S005.aspx. For dispute settlement documents, see also the WTO dispute settlement database, at https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

² See SHERZOD SHADIKHODJAEV, *INDUSTRIAL POLICY AND THE WORLD TRADE ORGANIZATION: BETWEEN LEGAL CONSTRAINTS AND FLEXIBILITIES* 66–68 (2018).

³ Proclamation 9693 of January 23, 2018 – To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes, 83 U.S. Fed. Reg. 3541 (Jan. 25, 2018), at <https://www.federalregister.gov/documents/2018/01/25/2018-01592/to-facilitate-positive-adjustment-to-competition-from-imports-of-certain-crystalline-silicon>.

⁴ General Agreement on Tariffs and Trade 1947, Oct. 30, 1947, 55 UNTS 194, incorporated into General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 190, *reprinted in* WORLD TRADE ORGANIZATION, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 17, 423 (2002) [hereinafter *LEGAL TEXTS*].

and capacity expansion impacting export markets when the United States joined GATT 1947 in 1948 or when it joined the WTO in 1995 and agreed to China's WTO accession in 2001. Nor could they have predicted that U.S. anti-dumping and countervailing measures on Chinese photovoltaic cell products, applied prior to the safeguard measure at issue, would have limited effectiveness and instead induce an influx of photovoltaic cell imports from third countries (para. 7.21). Agreeing that these were "unforeseen developments," the panel held that, contrary to China's view, the USITC had identified industrial policies and support measures properly and that it was specific enough in documenting unexpectedly rapid changes in the global supply chains and production processes that followed the imposition of the U.S. anti-dumping and countervailing measures (paras. 7.25–7.28).

As to whether increased photovoltaic cell imports were attributable to the "unforeseen developments," the panel first observed that it would suffice to find such connection for the identified unforeseen developments as a whole, rather than for each specific development (para. 7.36). After reviewing the investigative findings, it eventually approved of the USITC determination that increased imports resulted from both China's policies of promoting photovoltaic cells and the broader reorganization of global supply chains (paras. 7.37–7.45).

The panel also rebuffed China's counterargument that the USITC had failed to show that imports increased "as a result . . . of the effect of the [trade liberalization] obligations incurred" by the United States. At issue was the USITC's statement that photovoltaic cell imports had been "free of duty" under the U.S. Harmonized Tariff Schedule since at least 1987. While this statement did not say explicitly that such duty-free treatment was a result of a U.S. GATT/WTO obligation, or tariff concession, that would prevent the United States from raising the duties, the panel concluded that the relevant textual context in the USITC report appropriately demonstrated that this was the implication of this statement (paras. 7.53–7.56).

Second, Article 4.2 of the Agreement on Safeguards stipulates that competent authorities must demonstrate a causal nexus between increased imports and serious injury.⁵ The panel recalled from WTO jurisprudence that the causation requirement, lacking any specific methodology under the WTO rules, entails: verification of an overall coincidence between an upward import trend and downward trends in injury factors⁶ that show a fall in the industry's economic indicators; and examination of whether competition between imported and domestic products demonstrates the existence of the causal link (paras. 7.74–7.76). China alleged that the USITC had not established an overall coincidence due to "the prevalence of significant positive injury trends," or improvements in the U.S. industry's situation, during the period of investigation (para. 7.80, n. 161). However, the panel found that the per se presence of positive injury trends or the lack of perfect correlation between import and injury trends did not necessarily rule out an overall coincidence as some injury factors may be "less relevant" due to the prevailing conditions of competition or the nature of serious injury (para. 7.83). Although it would be "more difficult" to establish the causal link in the existence of a

⁵ Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 154, *reprinted in* LEGAL TEXTS, *supra* note 4, at 275.

⁶ According to Article 4.2(a) of the Agreement on Safeguards, an injury determination must evaluate "all relevant factors" having a bearing on the domestic industry's situation, like "the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment."

“significant number” of positive injury factors, the competent authorities are still subject to the common legal standard—that is, they must provide a “reasoned and adequate” explanation demonstrating the causal link between imports and injury (para. 7.84). Then, the panel turned to the USITC’s causality analysis for both negative and positive factors of serious injury.

For the negative injury factors, the panel first examined the USITC’s findings regarding conditions of competition in the U.S. market, focusing on market segmentation and substitutability of domestic and imported products. China contended that the small size of the domestic industry relative to the overall U.S. market was unaffected by the increased imports. But the panel disagreed, particularly because the USITC had demonstrated that the domestic industry had significant unused capacity and could not meaningfully expand capacity due to increased imports (paras. 7.89, 7.91). With respect to market segmentation, the issue was whether the USITC had erred in finding that the domestic and imported photovoltaic cell products competed in the residential, commercial, and utility segments of the U.S. market. Contrary to China’s view that domestic and imported products were only in “limited” competition in the residential and commercial segments, the panel found that the record evidence in fact showed that most of the domestic products and a substantial amount of imports were sold to these segments (para. 7.95). The panel also approved of the USITC finding about the existence of competition in the utility segment: a majority of imports entered this segment where the domestic industry also sold its products and participated in bids (paras. 7.97–7.98). In addition, the panel agreed with the U.S. position that domestic and imported products were substitutable because of price competition. Indeed, the records suggested that despite some product differentiations and non-price factors affecting customers’ purchasing decisions, the price was still an “important factor” in competition (para. 7.104).

Next, the panel examined the USITC’s determinations for each negative injury factor at issue (namely, adverse price conditions, the domestic industry’s lost market share, poor financial performance, and plant closures) and found no error in attributing those factors to increased imports of photovoltaic cells (paras. 7.126, 7.140, 7.148, 7.160).

As for “seemingly positive factors of serious injury,” China argued that since the USITC largely ignored the existence of these factors, it failed to prove that increased imports were the cause of serious injury. At the outset, the panel held that this issue directly implicated the legal status of the USITC’s serious injury determination in these proceedings. Because China did not challenge the injury determination *per se*, thus rendering it “uncontested,” and because the USITC determined that the seemingly positive factors supported or did not undermine its injury determination, the panel found these factors to be “necessarily less relevant” to the causal link (para. 7.163). China cited several positive injury factors, such as improvements in: the U.S. domestic industry’s capacity, production, and shipments; employment; and certain expenditures and value of production assets. The panel reviewed each of them, but eventually rejected China’s claim that the USITC could not properly explain why, notwithstanding those improvements, increased imports nevertheless caused serious injury to American producers (paras. 7.171, 7.180, 7.188).

The last point regarding causality was whether the USITC appropriately took into account injurious effects of “other,” or non-import, factors. Article 4.2(b) of the Agreement on Safeguards provides that injury by factors other than increased imports must not be attributed to increased imports. In the USITC investigation, respondents identified such “other” factors as alleged missteps by the domestic industry (e.g., the alleged decision of domestic producers

to focus on the commercial and residential segments, rather than the utility segment) and other non-import factors that allegedly caused domestic prices of photovoltaic cells to fall (e.g., declining raw material costs). China contended that the USITC acted inconsistently with Article 4.2(b) by improperly dismissing those factors (paras. 7.191, 7.195). The panel first clarified that its role in this dispute was not to conduct a *de novo* review of the evidence but to check whether the USITC provided “reasoned and adequate” explanations regarding non-attribution of “other” factors’ injury to increased imports (paras. 7.200–7.201). Then, after considering how the USITC addressed each of these factors, the panel concluded that China’s claim was unconvincing (para. 7.287).

Finally, China challenged the USITC’s treatment of confidential information on the record. According to Article 3.1 of the Agreement on Safeguards, a safeguard investigation “shall include reasonable public notice to all interested parties and public hearings or other appropriate means” for presenting evidence and views, and the competent authorities “shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.” Article 3.2 requires the competent authorities to protect confidential information they receive and allows them to request “non-confidential summaries” from the parties who provide confidential information. China submitted that the USITC had weaponized these confidentiality norms, by providing non-confidential versions of its intermediate reports with such delay that the interested parties could not adequately present a defense (para. 7.300). However, the panel countered that Article 3 did not actually obligate the authorities to publish intermediate decisional documents like those of the USITC in question (paras. 7.308–7.309). China had also complained that the content of the non-confidential summaries, like overbroad redactions, had prevented adequate defense (para. 7.313). But here too, the panel found that Article 3 merely mandated publication of the investigation report. In the panel’s view, it did not require inclusion of non-confidential summaries, nor would the absence of such summaries in the report mean that the authorities failed to publish a valid report (para. 7.316).

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On September 16, 2021, China appealed this Panel Report.⁷ But the Appellate Body is no longer able to hear any appeals because the United States, for the past few years, has blocked the appointment of the Appellate Body members, citing certain flaws in the existing appellate review practice and pressuring the WTO to reform the Appellate Body.⁸ Therefore, this panel decision remains unadopted. Nevertheless, this case is remarkable for at least three reasons: the substantive reasoning of the decision itself; the manner in which the panel engaged with past jurisprudence; and the manner in which China sought to vitiate the decision by appealing it “into the void” with no stated rationale.

⁷ United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products – Notification of an Appeal by China Under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DS562/12 (Sept. 20, 2021) [hereinafter China’s Appeal]. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, *reprinted in* LEGAL TEXTS, *supra* note 4, at 354 [hereinafter DSU].

⁸ In 2016, the United States blocked one proposed reappointment to the Appellate Body but did not oppose the appointment of two new members. But since 2017, it has blocked every proposed (re)appointment. The U.S. criticisms of the Appellate Body concern, *inter alia*, delays in appellate reviews, alleged judicial overreach, and the de facto treatment of appellate interpretations as binding precedent. See Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 518, 519, 521 (2020).

Regarding the substance, two aspects of the panel's decision appear deficient. First, the panel declined to explicitly address the legal relationship between the basic safeguards regime contained in the still-in-force 1947 GATT and the more specialized 1994 Agreement on Safeguards even though there was a wide discrepancy between the parties' positions. GATT Article XIX allows members to impose safeguards only if imports increased "as a result of unforeseen developments and of the effect of the obligations incurred." But the later-in-time and more specialized Safeguards Agreement mentions no such requirement. China sought to read the requirement of the GATT into the Safeguards Agreement, claiming that the latter still obligated the USITC to demonstrate unforeseen developments in its published report (para. 7.9). But the United States argued that the Agreement on Safeguards did not require this, so a safeguard-imposing member was free to supplement or modify its authority's explanation on this aspect in WTO dispute settlement proceedings (para. 7.10). The panel refused to expressly resolve this discrepancy (para. 7.62), exercising judicial economy, even though it could have relied on the Appellate Body precedent that had confirmed that the Agreement on Safeguards did cover the investigating authority's obligation to demonstrate unforeseen developments.⁹ Despite its invocation of judicial economy, the panel essentially accepted China's position by insisting on compliance with the Agreement on Safeguards *and* Article XIX of the GATT (para. 7.14, n. 31, para. 7.18) and recognizing the USITC's unforeseen developments report as part of the investigative "report" within the meaning of the Agreement on Safeguards (para. 7.20). Presumably the panel's reluctance to resolve this controversy could have been affected by the earlier U.S. criticism that the Appellate Body had created a non-treaty-based "additional obligation" regarding unforeseen developments, which was one of the stated main rationales behind the continued U.S. resistance to filling Appellate Body vacancies.¹⁰

Second, the panel was arguably wrong in treating the USITC's serious injury determination as "uncontested" just because China did not challenge this determination per se (n. 148, paras. 7.66, 7.163, 7.169, 7.177, 7.186). The language of Article 4.2 of the Agreement on Safeguards casts doubt on the panel's approach. Article 4.2 provides for the assessment of serious injury factors in subparagraph (a) and for causation in subparagraph (b):

- (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

⁹ Appellate Body Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, paras. 72, 76, WTO Doc. WT/DS177/AB/R, WT/DS178/AB/R (adopted May 1, 2001); Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, paras. 289–90, WTO Docs. 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 Nov. 10, 2003).

¹⁰ U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 111–12 (2020), at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

- (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

The first sentence in subparagraph (b) with the word “unless” indicates the existence of a close link between subparagraphs (a) and (b). This proposition finds support in the Appellate Body’s interpretation in *U.S. – Wheat Gluten*:

We believe that Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between these two provisions. According to the opening clause of Article 4.2(b)—“The determination referred to in subparagraph (a) shall not be made unless. . .”—*both* provisions lay down rules governing a *single* determination, made under Article 4.2(a).¹¹

In light of such nexus between these two provisions, it could be argued that an injury determination based on the relevant factors under Article 4.2(a) cannot automatically be deemed as undisputed when the complainant, like China here (e.g., para. 7.187, n. 403), takes issue with injury determination under Article 4.2(b) but not Article 4.2(a). To suggest otherwise may be at odds with the very nature of safeguards as an “emergency action” or “extraordinary remedy” allowed only in exceptional circumstances to restrict fair trade.¹²

Also, this case raises some questions regarding the adequacy of the WTO legal regime itself. Here, the United States applied the safeguard measure because, *inter alia*, it could not have foreseen that China would use trade-distortive programs to support the domestic photovoltaic cell industry. Although WTO law already allows for countervailing duties and anti-dumping duties to address price distortions in import markets, the “limited effectiveness” of these measures prompted the United States to resort to the more-restrictive safeguard measure at issue. Due to their nature, safeguards are supposed to be applied sparingly. But their use may worryingly intensify when, like in this dispute, other WTO-permissible remedies are considered ineffective. Thus, this may add to the need for improving the WTO rulebook as part of ongoing WTO reform attempts.¹³

With respect to case law, the panel engaged in a subtle shift in how it invoked and referred to previous WTO jurisprudence, exhibiting conspicuously cautious language. Past WTO rulings routinely referenced “panel” and/or “Appellate Body” reports, but this panel noticeably changed this long-standing practice by making across-the-board references to “dispute settlement reports previously adopted by the Dispute Settlement Body [DSB]” (e.g., 7.15, 7.74–7.77) or shortly the “previous DSB reports” (para. 7.4, n. 20). In the WTO, a dispute settlement report comes into effect once it is adopted by the DSB to become a DSB report.¹⁴

¹¹ Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, para. 73, WTO Doc. WT/DS166/AB/R (adopted Jan. 19, 2001) (emphasis in original).

¹² Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, paras. 93–94, WTO Doc. WT/DS121/AB/R (adopted Jan. 12, 2000).

¹³ See Sherzod Shadikhodjaev, *Steel Overcapacity and the Global Trading System*, 16 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 179, 201–10 (2021).

¹⁴ Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Second Recourse to Article 21.5 of the DSU by the European Communities*, para. 7.35, WTO Doc. WT/DS108/RW2 (adopted Mar. 14, 2006).

Here, the panel is deliberately shifting from giving weight to all normative output by the Appellate Body and panels as judicial decisions to focusing only on reports that make it to formal adoption by the DSB. Given today's realities, a panel report, sent to the paralyzed Appellate Body for review, gets stuck and cannot move further to the adoption procedure.¹⁵ Thus, this panel seems to have signaled its preference to rely only on adopted WTO rulings,¹⁶ potentially launching a new practice of neglecting (currently twenty-plus) unadopted WTO panel reports that remain stranded at the appellate stage.¹⁷ The panel further takes a less deferential tone in invoking past WTO decisions. Its frequent statements that it “agree[s]” with the previous DSB reports (e.g., paras. 7.18, 7.52, 7.78) implies a level of substantive engagement that differs from the typically more deferential practice of previous panels of simply quoting relevant parts of past reports, taking them for granted.¹⁸

Even if formalistic, these subtle discursive shifts seem at least arguably responsive to the recent U.S. criticism of allegedly inappropriate precedent-setting by the Appellate Body.¹⁹ Yet, it remains to be seen whether such way of “agreeing” with the DSB reports will sustain and if so, how it will impact the de facto precedent rule in the WTO.

Finally, the case continues a troubling procedural development whereby the “appeal into the void” is becoming a flagrant trump card available to frustrated parties. Like four recent U.S. appeals sending panel reports into the void,²⁰ China's appeal in this dispute does not bother to specifically appeal any particular legal issues or interpretations (though China mentioned that it would await further instructions from the Appellate Body if it becomes operational).²¹ The United States' and China's appeals differ from previous appeals into the void that, even in the absence of a functional Appellate Body, at least bothered to specify on which legal questions the panel supposedly erred. Under the WTO procedures, a notice of appeal must identify “the alleged errors in the issues of law covered in the panel report and legal

¹⁵ Article 16.4 of the DSU provides that “[i]f a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal” (emphasis added).

¹⁶ In contrast, another recent panel gave some weight to this dispute's panel report (*supra* note 1) even though the latter was appealed into the void and hence unadopted. See Panel Report, European Union – Safeguard Measures on Certain Steel Products, paras. 7.132–7.133, WTO Doc. WT/DS595/R (adopted May 31, 2022).

¹⁷ For the list of pending but currently frozen appealed cases, see *Ongoing WTO Dispute Settlement Proceedings Under the DSU: Appeals*, WORLD TRADE L. (Sept. 6, 2022), at <https://www.worldtradelaw.net/static.php?type=dsc&page=currentcases#panels>.

¹⁸ See also Jesse Kreier, *The Solar Safeguards Panel Report – Some First Reactions*, WORLD TRADE L. (Sept. 2, 2021), at <https://ielp.worldtradelaw.net/2021/09/the-solar-safeguards-panel-report-some-first-reactions.html>; Simon Lester, *Some Quick Reactions to the WTO Panel Report on U.S. – Safeguards on Photovoltaic Products*, WORLD TRADE L. (Sept. 2, 2021), at <https://ielp.worldtradelaw.net/2021/09/some-quick-reactions-to-the-wto-panel-report-on-us-safeguards-on-photovoltaic-products.html>.

¹⁹ See U.S. TRADE REPRESENTATIVE, *supra* note 10, at 55–64; WTO, Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on December 18, 2020, paras. 8.4–8.7, WTO Doc. WT/DSB/M/447 (Feb. 19, 2021).

²⁰ See: United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Recourse to Article 21.5 of the DSU by India – Notification of an Appeal by the United States Under Article 16 of the DSU, WTO Doc. WT/DS436/21 (Dec. 19, 2019); United States – Countervailing Measures on Softwood Lumber from Canada – Notification of an Appeal by the United States Under Article 16 of the DSU, WTO Doc. WT/DS533/5 (Sept. 29, 2020); United States – Tariff Measures on Certain Goods from China – Notification of an Appeal by the United States Under Article 16 of the DSU, WTO Doc. WT/DS543/10 (Oct. 27, 2020); United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available – Notification of an Appeal by the United States Under Article 16 of the DSU, WTO Doc. WT/DS539/9 (Mar. 22, 2021).

²¹ China's Appeal, *supra* note 7.

interpretations developed by the panel,” related paragraphs in the panel report, and the WTO provisions alleged to be wrongly interpreted or applied by the panel.²² Previously, the Appellate Body saw “significant value” in requiring such information as this importantly demarcates the scope of appellate review in each dispute and enables the appellee to fully exercise its rights of defense.²³ If the current Appellate Body crisis persists, notices of appeal lacking any substance may become a “new normal” but worrisome practice of effectively “blocking” panel decisions even without any stated reason(s).

Thus, the present case shows how the ongoing crisis in the Appellate Body has increasingly undermined the entirety of the WTO dispute settlement system by taking it back to the pre-WTO times when the then GATT parties were able to directly veto panel reports. Ironically, it was the WTO that changed the GATT-era approval procedures to move away from this destructive practice. But sadly, the emergent option of “appealing into the void” undercuts this significant achievement by providing a new way of obstructing panel reports.

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Human Rights Committee—International Covenant on Civil and Political Rights—child’s right to nationality—statelessness

D.Z. v. NETHERLANDS, UN Doc. CCPR/C/130/D/2918/2016. At <https://undocs.org/CCPR/C/130/D/2918/2016>.

Human Rights Committee, January 20, 2021.

The groundbreaking decision of the UN Human Rights Committee (the Committee) in *D.Z. v. Netherlands* represents the first decision of any UN treaty body to impose positive duties on a state to grant nationality to a child born in its territory who would otherwise be stateless. The decision is, in the words of the concurring opinion of member Hélène Tigroudja, “undoubtedly an important contribution to protection against statelessness” (Annex II, para. 1). While primarily concerned with the parameters of the right of every child to acquire a nationality stipulated in Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR),¹ the decision also notably relied on and explicated the 1961 Convention on the Reduction of Statelessness (1961 Convention), which provides the most robust safeguard in international law against statelessness at birth.² The decision also highlights that a statelessness determination procedure is integral to the realization of

²² Appellate Body – Working Procedures for Appellate Review, Rule 20(2)(d), WTO Doc. WT/AB/WP/6 (Aug. 16, 2010).

²³ Working Procedures for Appellate Review – Communication from the Appellate Body, sec. D, 4–5, WTO Doc. WT/AB/WP/W/11 (July 27, 2010).

¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

² Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 UNTS 175 [hereinafter 1961 Convention].