

Statement of Thomas R. Graham

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Hearing on Making Global Rules Work for Global Challenges

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

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

I will speak mainly about the need for reform of WTO dispute settlement, which I know firsthand. In a nutshell, my view is:

- o that the WTO Appellate Body has strayed far from the rules that US negotiators helped to write -- and that the Congress reviewed and approved -- some 25 years ago;
- o that for 20 years, spanning three Administrations -- Republican and Democratic -- the United States has consistently called out the Appellate Body for exceeding its role, and asked for corrections;
- o that some WTO members, including the European Union, have not acknowledged or engaged with the seriousness and bipartisanship of the US critique;
- o and that until they do, and until basic and dependable reforms are made, there should be no tinkering with words, no "restarting selections," no "early harvest" of AB reform.

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

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

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

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

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

