

Opening Remarks 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 want to start with a comment on something that was said just now in the first opening statement. I'm not here as a defender of the Trump Administration, but on this issue -- WTO reform -- we would not be having this discussion, and our trading partners would not be talking seriously about WTO reform, if the United States had not taken strong actions to force others, including the European Union, to acknowledge the long-standing, bipartisan US critique of WTO dispute settlement. They are now listening.

In a nutshell, my overall views are:

- o 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 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 Many WTO members, including the European Union, have been slow to acknowledge the depth and bipartisanship of the US critique, and to engage with it.
- o Reforms of WTO dispute settlement and reforms and updating of the WTO should be done together. There should be no rush to restart the Appellate Body, and the US should certainly not do that as a "price" for serious negotiations to update the rules.

Over the years, a large part of the US critique has focused on Appellate Body decisions that weakened US trade remedy laws -- laws that addressed subsidized or dumped imports, or sudden increases of imports, that injure U.S. producers.

A lot of these cases have involved imports from China: whether Chinese prices are "market prices," and whether Chinese state-owned enterprises, or other Chinese companies with significant government involvement, were conduits for Chinese government subsidies.

China is the elephant in the room of WTO reform. China is a difficult fit in a WTO system based on rules for market competition.

I don't readily see how the dispute settlement system can be reformed -- or the Appellate Body restarted -- until a core of WTO members have come to grips with how China is to fit.

And that issue is larger than the Appellate Body and dispute settlement.

So, I would encourage the United States to take a long view. Above all, I urge US negotiators and this Committee in its oversight, to resist requests for a quick "first stage" agreement that would restart the Appellate Body.

I think that would be counterproductive: by papering over differences, making it likely that the same problems would recur, and by giving away a big part of our leverage.

It would be better to take time and get it right, and not to worry too much about temporary arbitration systems spring up. They are likely to render the US less relevant.