

Statement by the United States at the WTO Dispute Settlement Body’s First “Dedicated Session” on the Issue of Reappointments of Appellate Body Members

Geneva, September 26, 2016

- Mr. Chairman, we would like to thank you for convening this informal session.
- The issues involving the reappointment of Appellate Body members are important ones on which it is useful for Members to engage.
- First, we all agree that the Appellate Body plays an important role in the WTO dispute settlement system. And that makes the proper functioning of the Appellate Body critical for the proper functioning of the dispute settlement system. I think we would also all agree that the Appellate Body has made a number of valuable contributions in helping resolve disputes over the past twenty years.
- At the same time, it is useful to recall that the role assigned by WTO Members in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) to the Appellate Body is a critical, but focused one. The Appellate Body is one element of the dispute settlement system. But the Appellate Body is not the center of that system, which provides a number of avenues to resolve a dispute.
- Under the DSU, the Appellate Body has no role in relation to several types of proceedings, such as consultations,¹ good offices, conciliation, or mediation,² or arbitrations under several DSU provisions.³ The Appellate Body exists under DSU Article 17.1 to hear appeals of panel reports.⁴ If there is no appeal in a given dispute, the Appellate Body has no role in that dispute.
- The Appellate Body’s authority under Article 17.6 is “limited to issues of law covered in a panel report and legal interpretations developed by the panel”, and not to find facts.⁵ And because the Appellate Body’s role is to review legal issues in a panel report, its report supplements the report of the panel.

¹ DSU Article 4.

² DSU Article 5.

³ *See, e.g.*, DSU Articles 21.3(c) (arbitration of the reasonable period of time), 22.6 (arbitration of the level of suspension of concessions), 25 (other arbitration).

⁴ DSU Article 17.1 (“A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases.”).

⁵ DSU Article 17.6 (“An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”).

- The panel’s function under DSU Article 11, in turn, is “to assist the DSB in discharging its responsibilities” under the DSU, for example, by making findings on “the applicability of and conformity with the covered agreements”, which may result in recommendations under the DSU.⁶ The Appellate Body, in reviewing a panel’s legal conclusion or interpretation, is thus also assisting the DSB in discharging its responsibilities under the DSU.
- In this way, both reports make a critical contribution to “[t]he aim of the dispute settlement mechanism[, which] is to secure a positive solution to the dispute.”⁷ That is the goal of the system, and the role of the adjudicatory bodies in the system; nothing more, or less.
- The Appellate Body was a relatively late addition in the negotiations of the DSU and was part of a delicate balance of the elements of the system.
- Part of the delicate balance under the dispute settlement system is that there is no automatic reappointment of an Appellate Body member.
- Appellate Body members are appointed and reappointed by consensus.⁸ Any WTO Member is free to object to an appointment or reappointment.
- In its simplest form, a person serving as an Appellate Body member is performing a job. And in general terms, the decision whether to employ someone in a capacity should be based on that person’s qualifications, and the decision whether to retain someone should be based on their performance.
- As explained, the job of the Appellate Body is to review a legal conclusion or interpretation in a panel report so that the recommendations of the DSB help Members to promptly resolve disputes under the covered agreements. The DSU is also clear – a panel or Appellate Body report cannot add to or diminish rights and obligations under the covered agreements.⁹ As a result, the job of the panel or Appellate Body is not to “create

⁶ DSU Article 19.1 (“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”).

⁷ DSU Article 3.7.

⁸ DSU Articles 17.2 (“The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once.”), 2.4 (“Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus”).

⁹ DSU Article 19.2 (“In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”).

law” or devote time to, or opine on, topics (no matter how much they are of interest to someone) that are not necessary to resolve the specific dispute.¹⁰

- The decision on whether to reappoint an Appellate Body member is therefore an important opportunity for Members in the DSB to hold Appellate Body members accountable for their performance in carrying out the Appellate Body’s service to the DSB and to Members.
- In the recent instance where the DSB did not reappoint an Appellate Body member, the process moved forward in keeping with the dispute settlement system.
- The adjudicative approach in reports reflecting that individual’s contributions had been raising concerns for a number of years. Those concerns had been expressed in the DSB, but did not seem to be being addressed. As a result, there was no consensus to reappoint him.
- Far from indicating that this aspect of the dispute settlement system needs to be changed, this action is a validation of the design in the DSU. It is an example of the DSB exercising its responsibility to supervise and administer the dispute settlement system.¹¹ Thus, this recent action demonstrates the DSB can take action when necessary to improve the functioning of the Appellate Body and hold it true to its design, including through the use of the reappointment mechanism.
- I would like to respond to the concerns that Members have raised today regarding assuring the independence and impartiality of the Appellate Body, in particular that not reappointing an Appellate Body member based on particular reports threatens to undermine the impartiality and/or independence of the Appellate Body. As to the suggestion that an individual Appellate Body member’s service should not be linked to the specific appeals in which that member participated, we would ask – what better basis for forming views on that service could there be? Is it really being suggested that WTO Members should ignore the actual, most relevant evidence of how someone is conducting themselves as an Appellate Body member?
- We do not see how holding a member accountable for the views they have endorsed and their actual service carries a risk for the trust WTO Members place in the independence and impartiality of the Appellate Body. To the contrary, WTO Members’ trust is not built on a vacuum. It is based on the actual performance of the Appellate Body.

¹⁰ *US – Wool Shirts and Blouses (AB)*, WT/DS33/AB/R & Corr. 1, at 19 (“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 clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.”)

¹¹ DSU Article 2.1 (“The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements.”).

- It would help build and maintain trust if each WTO Member has confidence that each member of the Appellate Body is adhering to the mandate that WTO Members have given to the Appellate Body.
- The fact that reappointment requires a consensus of all WTO Members helps assure that no Appellate Body member will want to be perceived as partial to any WTO Member. As Norway has previously pointed out, because an Appellate Body member cannot expect to be reappointed, she can only act as independently and objectively as possible – that is, to do her job. To favor one party in a dispute would not only be contrary to her responsibilities, but it would *disfavor* the other party to the dispute, and such partiality would undermine rather than help an Appellate Body member’s interest in reappointment.
- The assertion that reappointment threatens the independence and impartiality of the Appellate Body is built on the assumption that an Appellate Body member’s decisions will be driven by the prospect of reappointment, rather than the WTO Agreements and the arguments of the parties in a dispute. This view would seem to hold the integrity of Appellate Body members in very low regard, and is certainly not one to which we would subscribe.
- From the very first time an Appellate Body member was being considered for reappointment, WTO Members have been clear that reappointment is not automatic. And prior DSB Chairs have reiterated this.
- The DSU should not be re-interpreted now to reduce the role of DSB and WTO Members in the WTO dispute settlement system. This is not a way to sustain confidence in the WTO or its dispute settlement system.
- Article 17.3 of the DSU provides that an Appellate Body member is to be “unaffiliated with any government” and is not to participate in any disputes that would create a direct or indirect conflict of interest. If this is what is meant when referring to the “independence” of the Appellate Body, then it is difficult to see how the authority of the DSB to decline to reappoint a member would cause that member to become affiliated with any government or to develop a conflict of interest in a dispute.
- Moreover, WTO Members have charged WTO adjudicators to be “independent and impartial” through the Rules of Conduct we have adopted.¹² Thus, to be independent is a *responsibility* of each Appellate Body member, and that obligation is compatible with and, in the words of the Rules, “strengthen[s]” the “operation of the DSU” and “in no way modif[ies]” the DSU.¹³

¹² Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (“Rules of Conduct”), WT/DSB/RC/1, para. II.1 (Governing Principle).

¹³ Rules of Conduct, para. I (Preamble), para. II.1 (“These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein.”).

- Thus, Appellate Body members fulfill their responsibility to act independently by serving in their individual capacity, unaffiliated with a government, and by avoiding any conflicts of interest. These values are not and cannot be affected by WTO Members fulfilling *their* responsibility under the DSU to decide whether to reappoint an Appellate Body member by assessing that member's service in terms of the role assigned to the Appellate Body in the WTO agreements.
- It is also worth noting that the type of assessment for a reappointment is not unique. An assessment of an individual who may serve on the Appellate Body for an additional four years at the reappointment stage is similar to the type of interaction and assessment that occurs whenever a candidate for the Appellate Body is first considered for appointment.
- Carrying out this responsibility with respect to reappointment does not affect the independence and impartiality of that individual any more at this stage than it does with an appointment to the Appellate Body in the first instance.
- Next, we would like to share initial reactions to some of the ideas proposed today. The United States takes note of Brazil's suggestion that we should not act "comme si de rien n'était"¹⁴. We would suggest instead the adage: "If it is not broken, then don't fix it." As we have just explained, nothing we have heard persuades us that the reappointment authority of the DSB needs to be changed. To the contrary, this discussion reinforces that reappointment is a necessary element and that Members need to take greater responsibility for the functioning of the system.
- With respect to the proposal to amend the terms of Appellate Body members by making it a single, longer term with no reappointment, this would seem to be making the problem worse rather than better, and we would strongly oppose this.
- This can be illustrated by asking: "If the Appellate Body member's service is raising substantial concerns after four years, why should WTO Members be forced to accept that Appellate Body member's service for another several years?"
- And this proposal would be taking away the accountability to the DSB that the reappointment process provides. As we have explained, it is the responsibility of the DSB to administer the dispute settlement system, including taking action as necessary to ensure the proper functioning of the Appellate Body in that system.

¹⁴ Translation: "like nothing ever happened".

- With respect to a proposal to move to voting, we would note that there was very good reason that the DSU negotiators made explicit in the WTO Agreement Article IX:1¹⁵ and DSU Article 2.4 that decisions by the DSB are by consensus, and that any amendment to the DSU is by consensus.¹⁶ We would strongly oppose this proposal.
- With respect to the proposal to add criteria, it would seem difficult to reach agreement on such criteria. But even more challenging, we do not see any appropriate mechanism that could be used to decide if the criteria were met in a particular instance. Who would make that decision? We would also strongly oppose this proposal.
- We welcome discussion on these issues. We appreciate the seriousness with which WTO Members are engaged in this discussion.

Second Intervention

- We would like to comment on a few of the points raised by some delegates.
- We would first point out that the suggestion that the U.S. position on reappointment was based on not prevailing in particular disputes is a strawman argument. It is clear this is not the case. The United States is the most frequent user of the WTO dispute settlement system. Around 19 Appellate Body members have been reappointed in the last 20 years, and it is likely that many of them took part in decisions that went against the United States. So if it were true that the United States would block any Appellate Body member up for reappointment who had taken part in a decision against the United States, then we would not see so many Appellate Body members serving second terms.
- We take note of the suggestion that there should be better communication and more interaction between WTO Members and the Appellate Body. We think this is right. We are surprised to hear the suggestion today because the United States has been pushing for many years for more interaction with Appellate Body members, and we have received enormous push back from some WTO Members.
- And we do not see difficulty in reconciling the U.S. position on reappointment with the independence and impartiality of the Appellate Body. Appellate Body members are independent, but they are also given a specifically defined role by the Members of this organization that they are not to exceed.

¹⁵ WTO Agreement, Article IX:1, n. 3 (“Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.”).

¹⁶ WTO Agreement, Article X:8 (“The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference.”).

- The issue of trust has been raised, and there was a suggestion that the U.S. position on reappointment could erode trust in the system. We would respond that our position was taken because an Appellate Body that exceeds its mandate has eroded trust in the system. We need Appellate Body members who all WTO Members can trust to act within the mandate set out in the DSU.
- As to the suggestion that what happened earlier this year cannot continue or be repeated, we hope that it does not because Appellate Body members are operating within their mandate. We do not see the WTO dispute settlement system as broken.
- There may be small areas here to improve communication between the Members of the WTO and the Appellate Body members. But on some of the ideas and views presented today, it is clear that there are fundamental disagreements.