

Statements by the United States at the Meeting of the WTO General Council

Geneva, December 12, 2018

7. APPELLATE BODY APPOINTMENTS – AMENDMENTS OF THE DISPUTE SETTLEMENT UNDERSTANDING

- A. STATEMENT BY THE EUROPEAN UNION, CHINA, CANADA, NORWAY, NEW ZEALAND, SWITZERLAND, AUSTRALIA, REPUBLIC OF KOREA, ICELAND, SINGAPORE AND MEXICO
- B. COMMUNICATION FROM THE EUROPEAN UNION, CHINA, CANADA, INDIA, NORWAY, NEW ZEALAND, SWITZERLAND, AUSTRALIA, REPUBLIC OF KOREA, ICELAND, SINGAPORE, MEXICO, COSTA RICA AND MONTENEGRO (WT/GC/W/752)
- C. COMMUNICATION FROM THE EUROPEAN UNION, CHINA, INDIA AND MONTENEGRO (WT/GC/W/753)

- We thank the proponents for their statements today.
- These proposals to some extent acknowledge the concern the United States has been raising in the WTO for years – namely, that the Appellate Body has strayed from the role agreed for it by WTO Members.
- And, as we have noted in detailed statements in the Dispute Settlement Body over the past year, many WTO Members share these concerns, whether on the mandatory 90-day deadline for appeals, or review of panel findings on domestic law, or issuing advisory opinions on issues not necessary to resolve a dispute.
- However, on a close reading, the proposals would not effectively address the concerns that Members have raised.
- Rather than returning the WTO dispute settlement system to what was agreed to by Members in the Dispute Settlement Understanding, the proposals instead appear to endorse changing the rules to accommodate and authorize the very approaches that have given rise to Members' concerns.
- The United States has made its views on these issues very clear: if WTO Members say that we support a rules-based trading system, then the WTO Appellate Body must follow the rules we agreed to in 1995.

- And so, the Appellate Body must circulate its reports within 90 days of an appeal.¹
- A person who has ceased to be an Appellate Body member may not continue deciding appeals as if his term had been extended by the Dispute Settlement Body.²
- The Appellate Body may not make findings on issues of fact, including but not limited to those relating to domestic law.³
- The Appellate Body may not give advisory opinions on issues that will not assist the DSB in making a recommendation to bring a WTO-inconsistent measure into compliance with WTO rules.⁴
- The Appellate Body may not assert that its reports serve as precedent or provide authoritative interpretations.⁵
- And the Appellate Body may not change Members' substantive rights or obligations as set out in the text of the WTO agreements.⁶
- Rather than seeking to make revisions to the text of the Dispute Settlement Understanding to permit what is now prohibited, the United States believes it is necessary for Members to engage in a deeper discussion of the concerns raised, to consider *why* the Appellate Body has felt free to depart from what WTO Members agreed to, and to discuss *how best* to ensure that the system adheres to WTO rules as written.
- With respect to the proposal advanced by the European Union, China, and India, it is hard to see how it in any way responds to the concerns raised by the United States, as some have alleged. The United States has repeatedly highlighted how the Appellate Body has disregarded WTO rules and that greater accountability is therefore required.

¹ DSU Article 17.5. Statement by the United States Concerning Article 17.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Meeting of the DSB on June 22, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf.

² DSU Articles 17.1, 17.2. U.S. Statement at the August 31, 2017, Meeting of the DSB, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf and U.S. Statement at the February 28, 2018, Meeting of the DSB, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_.Stmt_.as-delivered.fin_.public-1.pdf.

³ DSU Article 17.6. Statement by the United States Concerning Article 17.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and Appellate Review of Panel Findings of Fact, Including Domestic Law, Meeting of the DSB on August 27, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

⁴ DSU Articles 7.1, 11, 17.6. Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on October 29, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

⁵ DSU Article 3.9, WTO Agreement Article IX:2.

⁶ DSU Articles 3.2, 19.2.

- However, the trilateral EU-China-India proposal would make the Appellate Body even *less accountable*, and *more susceptible* to overreaching, by extending the terms of Appellate Body members, removing the opportunity of Members to decide on any possible reappointment, making Appellate Body membership a full-time position, and increasing resources for the Appellate Body Secretariat.
- As we have stated many times in the Dispute Settlement Body, and as we have demonstrated to numerous delegations over the past year, we are ready to engage with other Members on the important issues raised.

8. TARGETED DISCUSSIONS ON DISPUTE SETTLEMENT ISSUES –
COMMUNICATION FROM AUSTRALIA, SINGAPORE AND COSTA RICA
(WT/GC/W/754)
- The United States thanks the proponents for their statement, and we share their concern about Appellate Body overreach.
 - For many years, the United States and other Members have been sounding the alarm about the Appellate Body adding to or diminishing rights or obligations under the WTO Agreement in areas as varied as subsidies, antidumping and countervailing duties, standards under the TBT Agreement, and safeguards.
 - We also agree that it is “the collective responsibility of all Members to ensure the proper functioning of the WTO dispute settlement system, including the Appellate Body.”
 - In that regard, we look forward to further discussions with the proponents and other Members on these critical issues of Appellate Body overreach.