

Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, December 18, 2020

9. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS (WT/DSB/W/609/REV.19)

- As the United States has explained in prior meetings, we are not in a position to support the proposed decision. The systemic concerns that we have identified for more than 16 years and across multiple U.S. Administrations, remain unaddressed.
- Over the past three years, we have engaged in many discussions with Members – on a bilateral basis, in small groups, and in large settings. After three years of effort, what have we learned?
- First, we have learned that *the Appellate Body thinks it did no wrong*. We know this because, despite U.S. action on appointments under both the Obama Administration and the Trump Administration, the Appellate Body did not change its approach. In fact, it expanded and deepened its WTO-inconsistent practices and interpretations. This reflects an institution that came to view itself as more important than the rules – and the Members – that created it.
- We have learned that *the Appellate Body turned out to be less expert than panels* in adjudicating disputes under the DSU. We know this because the United States catalogued numerous substantive interpretive errors by the Appellate Body.¹ In most cases, a panel reached a correct interpretation, and the Appellate Body got it wrong. And so, while some Members may think the Appellate Body did a better job than panels – we think the record shows the opposite: panels generally respected WTO rules, and the Appellate Body far too often did not.
- We have learned that *some Members think the Appellate Body did no wrong*. This is regrettable because we have not heard any convincing defense of the Appellate Body's

¹ See United States Trade Representative Report on the Appellate Body of the World Trade Organization, February 2020, pp. 81-119, available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; see also, e.g., Dispute Settlement Body, Minutes of the Meetings WT/DSB/M/294, paras. 103-127 (statement of the United States concerning the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China) (AB)*); WT/DSB/M/346, para. 7.7 (statement of the United States concerning the Appellate Body report in *EC – Seal Products (AB)*); WT/DSB/M/211, paras. 37-40 (expressing concerns with the Appellate Body's interpretation of Article 2.4.2 of the Antidumping Agreement); WT/DSB/M/225, paras. 73-76 (expressing concerns with the Appellate Body's interpretation of the Antidumping Agreement with regard to zeroing); WT/DSB/M/250, paras. 47-55 (expressing concerns that the Appellate Body wrongly claims that its reports are entitled to be treated as precedent and must be followed by panels absent "cogent reasons"); WT/DSB/265, paras. 75-81 (expressing concern that the Appellate Body's findings incorrectly expanded the scope of the proceedings, concern with the Appellate Body's interpretation of the Antidumping Agreement with regard to zeroing, and concern that the Appellate Body had failed to apply the special standard of review under the Anti-Dumping Agreement); WT/DSB/M/385, paras. 8.8-8.19; WT/DSB/M/73 (expressing concerns with the Appellate Body's interpretation of the Safeguards Agreement).

errors in interpreting the DSU or substantive WTO rules. The ongoing denial by some of any AB errors reflects, in part, a fundamental divide among Members on the proper role of the Appellate Body in the WTO and the global trading system more generally.

- We have learned that *some other Members may think the Appellate Body did wrong, but are content to maintain the status quo*. We do not understand how a Membership that proclaims its support for a rules-based trading system can nonetheless accept persistent rule-breaking by its dispute settlement system. This unwillingness on the part of some Members may unfortunately reflect a Membership incapable of holding WTO institutions, including the Appellate Body, accountable. Experience shows, however, that without accountability, there can be no reform.
- And we have learned that *some reform-minded Members think the Appellate Body did commit serious errors, and bravely see a need for real, fundamental reform* – reform so that the WTO dispute settlement system supports the WTO as a venue for discussion and negotiation between Members, rather than undermining the WTO and converting it into a mere litigation forum.
- So I think it is fair to say that we have learned a considerable amount. Members have deepened their understanding of the issues and, in some cases, sincerely wrestled with the challenge before us.
- But of course, many questions remain.
- There is the question that everyone here knows well – the “why” question. Some Members may be tired of hearing it, and we could similarly tire of having to ask it – but the question is too important to the future of the WTO to ignore it.
- Despite best efforts by the United States to push the conversation forward, we have heard very little from other Members on their views of how we arrived to this situation – where the Appellate Body had ignored the clear limits placed on it under the DSU and rewrote the substantive rules set out in the WTO agreements.
- In meeting after meeting, we posed this question to the Members. We explained why the “why question” was so important. But most Members did not want to undertake this critical, reflective exercise.
- In the absence of engagement from Members, we offered several potential explanations based on conversations and on our own reflections. For example, we noted:
 - One cause could be the ongoing challenges facing the WTO negotiating function and its oversight function, leading to unchecked “institutional creep” by the Appellate Body.
 - Another cause could be that some WTO Members believe that the Appellate Body is an independent “international court” and its members are like “judges” who have more authority to make rules than the focused review provided in the DSU.

- Relatedly, some Appellate Body members viewed themselves as “appellate judges”² serving on a “World Trade Court” that is the “centerpiece” of the WTO dispute settlement system.³ Of course, such an expansive vision of the Appellate Body is not reflected in the DSU.
- Finally, we also noted that the compensation arrangements for AB members rewarded their delays and staying on beyond the end of their terms, and we learned that there was very little transparency and accountability for the compensation claimed.
- Besides these, we also heard from a former member of the Appellate Body, Mr. Graham, who was willing to speak out candidly on these issues.⁴ He put forward a number of reasons “why” the Appellate Body erred and was unwilling to correct those errors – and these remarks deserve attention from all WTO Members. Among his observations on why the Appellate Body behaved as it did:
 - (1) A “prevailing ethos” to act like a court, and not be accountable to WTO Members,
 - (2) the degree of control by Appellate Body staff,
 - (3) an over-emphasis on “collegiality” that created “peer pressure to conform”,
 - (4) an “excessive striving for consensus” that “led to excessively long and unclear compromise reports” and “encouraged over-reach, gap filling, and advisory opinions”,
 - (5) “a sense of infallibility and of entitlement, to stretch the words of agreed texts, and to stretch decisions beyond merely resolving a particular dispute, so as to create a body of jurisprudence”, and, finally,
 - an “undue adherence to precedent”, “not only as to outcomes, but also as to reasoning, definitions, and obiter dicta”, which “made it more important to know the past” than to “openly consider[] whether the past should be reconsidered.”
- None of these potential reasons “why” are addressed in the decision before the DSB today. Starting a selection process would therefore simply revive the interpretations and practices that the United States has, for years, explained as contrary to the WTO agreement and unacceptable to us.

² Farewell Speech of Appellate Body member Peter Van den Bossche, *available at* https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

³ Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System* (2005).

⁴ Farewell speech of Appellate Body member Thomas R. Graham, *available at* https://www.wto.org/english/tratop_e/dispu_e/farwellspechtgaham_e.htm.

- Nor do these potential reasons “why” suggest a problem that can be resolved by simply agreeing on words that repeat, with feeling, existing WTO principles. Many Members have been unwilling to confront this difficult reality.
- Looking ahead, we must find ways to ensure that the limitations we Members imposed on all WTO adjudicators in the DSU are respected. We have to consider and grapple with the damage to the WTO, as a forum for discussion and negotiation, and as a rules-based system, for continued failure to adhere to those limitations.
- While there are many problems in international trade that require discussion of new norms and rules, the United States considers that the rules that we were able to agree in 1995 represent some important progress in bringing greater fairness and market-orientation to international trade.
- As we see it, the Appellate Body has effectively written a new, less-market-oriented, less reciprocal, and less mutually beneficial WTO agreement, which we never agreed to, and which I believe no U.S. Government would agree to. The United States will continue – as it always has – to engage with Members on these important issues.