

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

Geneva, May 23, 2016

### 7. THE ISSUE OF POSSIBLE REAPPOINTMENT OF ONE APPELLATE BODY MEMBER

#### A. STATEMENT BY THE CHAIRMAN

- The United States thanks you, Mr. Chairman, for your work in carrying out consultations on the possible reappointment of one Appellate Body member, Mr. Chang.
- As Members may be aware, after a careful review of Mr. Chang's service on the Appellate Body, the United States has concluded that it does not support reappointing him to a second term, and the United States would object to any proposal to reappoint him.
- The United States thanks Mr. Chang for his willingness to meet with WTO Members to discuss his service on the Appellate Body.
- And we commend his willingness to make efforts to serve the world trading system for the past four years.
- Unfortunately, however, we do not consider that his service reflects the role assigned to the Appellate Body by WTO Members in the WTO agreements. Any failure to follow scrupulously the role we Members have assigned through these agreements undermines the integrity of, and support for, the WTO dispute settlement system.
- In our statement today, we will elaborate on the U.S. position and address questions that have been raised in useful discussions we have had with other WTO Members.
- As an initial matter, it is important to underscore that reappointment is not automatic. Article 17.2 of the DSU provides that each member of the Appellate Body "may be reappointed once." Action by the DSB to reappoint requires a consensus of WTO Members.<sup>1</sup>

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<sup>1</sup> DSU, Article 2.4 ("Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.").

- Numerous WTO Members, from the very early years of the WTO, and prior DSB Chairs, have made the point that reappointment is not automatic.<sup>2</sup> Rather, it is a decision entrusted to Members, and it is an important responsibility.
- Given the critical role the dispute settlement system plays in the WTO, and the Appellate Body's role within that system, the United States considers that this is not a decision for Members to take lightly.
- With respect to the reappointment under consideration, we have reviewed carefully the member's service on the divisions for the various appeals and conducted significant research and deliberation.
- Based on this careful review, we have concluded that his performance does not reflect the role assigned to the Appellate Body by Members in the DSU.
- The role of the Appellate Body as part of the WTO's dispute settlement system is to decide appeals of panel reports to help achieve "[t]he aim of the dispute settlement mechanism[. . .] to secure a positive solution to a dispute," as set out in DSU Article 3.7.<sup>3</sup> And the DSU reminds panels and the Appellate Body not once, but twice, that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."<sup>4</sup>

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<sup>2</sup> See, e.g., *Minutes of 27 October and 3 November 1999 DSB Meeting*, WT/DSB/M/70, pp. 34-35; *Minutes of 21 and 23 July 2003 DSB Meeting*, WT/DSB/M/153, para. 99; *Minutes of 20 June 2005 DSB Meeting*, WT/DSB/M/192, paras. 57 and 58; *Minutes of 25 November 2013 DSB Meeting*, WT/DSB/M/339, paras. 1.1, 1.4, and 1.7; and *Minutes of 25 November 2015 DSB Meeting*, WT/DSB/M/370, paras. 7.1, 7.5, and 7.9.

<sup>3</sup> DSU, Article 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."); see *id.*, Article 3.4 ("Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.").

<sup>4</sup> DSU, Articles 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."), 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.").

- Yet the reports on which this member participated do not accord with the role of the Appellate Body. The United States has previously explained at DSB meetings our concerns with the adjudicative approach in a number of appellate reports with which he was involved. That is, setting aside the substance of the reports, we have been troubled and raised systemic concerns about the disregard for the proper role of the Appellate Body and the WTO dispute settlement system in these reports. And these concerns have arisen in disputes in which the United States was a party and in those in which it was not.
- Although the representatives of Members are no doubt aware of those systemic concerns raised by the United States in past DSB meetings, we consider it would be useful to summarize briefly the comments we have made in the DSB in relation to four of those reports.
- First,<sup>5</sup> in the recent DS453 appellate report in the financial services dispute between Panama and Argentina, more than two-thirds of the Appellate Body’s analysis – 46 pages – is in the nature of *obiter dicta*. The Appellate Body reversed the panel’s findings on likeness and said that this reversal rendered moot all the panel’s findings on all other issues, including treatment no less favorable, an affirmative defense, and the prudential exception under the GATS.<sup>6</sup> Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS. These interpretations served no purpose in resolving the dispute – they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body’s analysis is comprised simply of advisory opinions on legal issues.
- The Appellate Body is not an academic body that may pursue issues simply because they are of interest to them or may be to certain Members in the abstract. Indeed, as the Appellate Body itself had said many years ago, it is not the role of panels or the Appellate Body to “make law” outside of the context of resolving a dispute<sup>7</sup> – in effect, to use an appeal as an occasion to write a treatise on a WTO agreement.
- But that is what the report did in this appeal.

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<sup>5</sup> *Statement by the United States at 9 May 2016 DSB Meeting*, <https://geneva.usmission.gov/wp-content/uploads/2016/05/May-9-DSB.pdf>.

<sup>6</sup> *General Agreement on Trade in Services* (“GATS”).

<sup>7</sup> *US – Wool Shirts and Blouses (AB)*, WT/DS33/AB/R & Corr. 1, at 19.

- Second,<sup>8</sup> in DS430, a dispute in which the United States was the complaining party and prevailed, we noted that the appellate report engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal, and even expressed “concerns” in that discussion on findings of the panel that were not raised by either party in the appeal. Furthermore, during the hearing, the Appellate Body devoted considerable time to an issue that the parties and the third parties agreed had not been raised on appeal, involving an item that was not on the record, that had not been raised by either party in its arguments, and had not been examined by the panel and was not the subject of any panel findings. The questioning was of such concern that the United States felt compelled to devote its entire closing statement to urging the Appellate Body not to opine on that non-appealed issue.<sup>9</sup>
- It is not the role of the Appellate Body to engage in abstract discussions or to divert an appeal away from the issues before it in order to employ resources on matters that are not presented in, and will not help resolve, a dispute.
- A third example occurred in DS437.<sup>10</sup> The United States explained its concerns that the Appellate Body report suggests a view of dispute settlement that departs markedly from that set out in the DSU and reflected in numerous prior reports.
- There, the Appellate Body report rejected a party’s appeal, but then went on to reverse the Panel report and to find a breach on the basis of an argument and approach entirely of the Appellate Body’s creation. This approach suggests that panels and the Appellate Body are to conduct independent investigations and apply new legal standards, regardless of what either party actually argues to the panel or Appellate Body. But that is not right. Under the DSU, panels and the Appellate Body are to consider the evidence and arguments put forward by the parties to make an objective assessment of the matter before it.

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<sup>8</sup> *Statement by the United States at 19 June 2015 DSB Meeting*, [https://geneva.usmission.gov/wp-content/uploads/2015/06/Jun19.DSB\\_.Stmt\\_.as-delivered.Public.pdf](https://geneva.usmission.gov/wp-content/uploads/2015/06/Jun19.DSB_.Stmt_.as-delivered.Public.pdf); *Minutes of 19 June 2015 DSB Meeting*, WT/DSB/M/364, paras. 7.7.

<sup>9</sup> Closing Statement of the United States at the Oral Hearing in *India – Measures Concerning the Importation of Certain Agricultural Products from the United States* (AB-2015-2 / DS430) (March 20, 2015), [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Enforcement/DS/Pending/US.Oral.Stmt.Closing.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Oral.Stmt.Closing.pdf).

<sup>10</sup> *Statement by the United States at 16 January 2015 DSB Meeting*, [https://geneva.usmission.gov/wp-content/uploads/2015/01/Jan16.DSB\\_.Stmt\\_.as-delivered.Fin\\_.Public.pdf](https://geneva.usmission.gov/wp-content/uploads/2015/01/Jan16.DSB_.Stmt_.as-delivered.Fin_.Public.pdf); *Minutes of 16 January 2015 DSB Meeting*, WT/DSB/M/355, paras. 1.10-1.14.

- The Appellate Body is not there to make the case for either party or to act as an independent investigator or prosecutor.
- Fourth, in DS449,<sup>11</sup> the Appellate Body report took a very problematic and erroneous approach to reviewing a Member's domestic law, risking turning the WTO dispute settlement system into one that would substitute the judgment of WTO adjudicators for that of a Member's domestic legal system as to what is lawful under that Member's domestic law.
- It is inappropriate for a WTO adjudicator to say it would decide the "right" result under a Member's law, in the abstract, while ignoring key constitutional principles of that Member's domestic legal system, but that is what the Appellate Body did. And it is notable that the panel had used a correct approach of examining the constitutional principles of the domestic legal system – but the Appellate Body report ignored that analysis and instead spent 60 pages making its own analysis of domestic law.
- These U.S. DSB statements conveyed our deep concern with the adjudicative approach used in those reports. We also are concerned about the manner in which this member has served at oral hearings, including that the questions posed spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties. As mentioned, the U.S. closing statement in the hearing in DS430 was addressed precisely to this concern. And it is not difficult to ascertain from the questions posed by a member of a division at an oral hearing that the member is associated with the views expressed in an Appellate Body report related to those questions.
- Together, the appeals in which the member participated indicate that he has not been willing to adhere to the proper role of the Appellate Body.
- This is something that should be of concern to all WTO Members. And many delegates have recognized in recent conversations, as well as others over the years, that WTO adjudicators should be focused on addressing those issues necessary to resolve the dispute. It is important to keep in mind that WTO Members cannot have confidence in a system where WTO adjudicators overstep the boundaries agreed by WTO Members in the DSU and the WTO Agreement.

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<sup>11</sup> *Statement by the United States at 22 July 2014 DSB Meeting*, <https://geneva.usmission.gov/wp-content/uploads/2014/07/July22-DSB-Stmt-as-delivered.pdf>; *Minutes of 22 July 2014 DSB Meeting*, WT/DSB/M/348, paras. 7.6-7.8.

- It is also important to consider whether these types of actions have contributed to the complexity of the disputes and thereby exacerbated the workload problems facing the Appellate Body that have made it difficult for Members to get their trade disputes resolved in a timely manner.
- In conversations with delegations, we have heard a suggestion that WTO Members should not consider the reports signed by a particular Appellate Body member in considering whether that individual should be reappointed. The letter faxed to delegations by other Appellate Body members also raises this issue.
- There is something quite ironic about the idea that WTO Members should not be able to even consider the reports signed by an Appellate Body member in forming a view on the quality of that member's service. The only function of the Appellate Body, as set out in Article 17 of the DSU, is to consider an appeal and issue a report.
- 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 have also heard an argument that it is inaccurate to hold an individual Appellate Body member accountable for the reports that he signs because others have also signed the same report. The suggestion appears to be that because *more than one* person expresses the same views, *none* of the members should be held responsible for endorsing those views.
- This is not how the system works and does a disservice to each Appellate Body member who has worked hard to be sure that a report accurately reflects their views. In fact, in a number of instances an Appellate Body member has provided separate, individual views in a report.
- 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.

- 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.
- Furthermore, we have heard a few delegations suggest that reappointment should be treated *as though* it were automatic in order to avoid interfering with the “independence” of the Appellate Body.
- As we already explained, 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 United States is disappointed at the suggestion that the DSU should now be re-interpreted to reduce the role of DSB and WTO Members in the WTO dispute settlement system. This is not a suggestion the United States can support or 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.<sup>12</sup> 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.<sup>13</sup>

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<sup>12</sup> *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).

<sup>13</sup> 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.
- And, Mr. Chairman, let me be very clear on one point – the U.S. position on this issue is not one based on the results of those appeals in terms of whether a measure was found to be inconsistent or not. The United States is a frequent user of the WTO dispute settlement system and recognizes that there can always be legitimate disagreement over the results. Instead, the concerns raised are important, systemic issues that go to the adjudicative approach and proper role of the Appellate Body and the dispute settlement system.
- The U.S. position is based on the approach chosen by the Appellate Body in each appeal on which this member served and whether that approach accords with the role that WTO Members assigned to the Appellate Body in agreeing to the DSU.
- To put this issue in perspective, the United States would ask each DSB Member this question. If a candidate for appointment to the Appellate Body were to say openly that he or she would issue Appellate Body reports that do what the reports we have discussed did – that is, the candidate would issue reports where more than 2/3 of the report were *obiter dicta* on issues not necessary to resolve the dispute, the candidate would issue reports engaging in abstract interpretation and raise concerns on matters not under appeal, the candidate would reject an appeal by a party but then reverse a panel and find a breach on a basis not argued by that party, and the candidate would issue reports substituting the Appellate Body's judgment for what is lawful under a Member's domestic law for the



view of that legal system itself – would your government support that candidate for appointment?

- We would think most WTO Members would say no. But if such a candidate is not suitable for appointment in the WTO dispute settlement system, we do not think the candidate is any more suitable for reappointment.
- It is for this reason that we would not be able to accept this reappointment.
- Mr. Chairman, the United States along with other delegations has received the letter on this issue from other Appellate Body members. I have already addressed the points in that letter, which was sent even before the United States had explained its views to the DSB, as we are doing this morning.
- The United States considers that the action by these Appellate Body members to interject themselves in a decision in which they have no role is, to say the least, unfortunate. The DSU assigns the decision on the appointment or reappointment to WTO Members in the DSB, not to the Appellate Body.
- The Appellate Body members' letter acknowledges this in its final paragraph, yet they sent this letter directly to WTO Members and in advance of this discussion anyway. We can well understand that these Appellate Body members wished to show their appreciation for a colleague. However, the fact that these Appellate Body members are seeking to provide views on this issue is, regrettably, another instance in which Appellate Body members are acting outside the role assigned to them by WTO Members in the DSU.
- In closing, the United States wishes to thank all Members for their careful attention to these remarks. As mentioned, the United States has been raising with Members these concerns with the operation of the WTO dispute settlement system, and in particular with the adjudicative approach of certain Appellate Body reports over several years. We appreciate the engagement we have had with delegations already and look forward to engaging further with all Members on these critical issues of how to reinforce the aim and proper adjudicative approach of the dispute settlement system.