

U.S. Statement at the Meeting of the WTO Dispute Settlement Body Under Item 7

Geneva, February 28, 2018

7. APPELLATE BODY MATTERS

A. APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; DOMINICAN REPUBLIC; ECUADOR; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; INDIA; ISRAEL; KAZAKHSTAN; KOREA; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TURKEY; UKRAINE; URUGUAY AND VIET NAM (WT/DSB/W/609/REV.2)

- The United States thanks the Chair for his continued work on these issues.
- We are not in a position to support the proposed decision.
- We have listened carefully to the interventions of other Members at the last meeting and appreciate the willingness expressed by some Members to engage on the important issues and concerns we have raised.
- However, the Dispute Settlement Body has yet to take any action to address the problem of persons continuing to hear appeals well after their terms of appointment, as set by the DSB, have expired.
- One former Appellate Body member continues to serve on an appeal, despite ceasing to be a member of the Appellate Body 8 months ago. Another former member continues to serve on 5 appeals, more than any actual Appellate Body member, despite ceasing to be a member of the Appellate Body in December of last year.
- Some WTO Members may be comfortable with this situation, but it is not legal under our multilaterally agreed rules. Under the Dispute Settlement Understanding, it is the DSB that has the authority to appoint Appellate Body members and to decide when their term in office expires.¹ It would also be for the DSB to decide whether a person who is no longer an Appellate Body member can continue to serve on an appeal.

¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Arts. 17.1, 17.2 (“DSU”).

- The Appellate Body simply does not have the authority to “deem” someone who is *not* an Appellate Body member *to be* a member. Appointing Appellate Body members, or determining that a private individual can nonetheless serve on an appeal, is not a power we WTO Members have assigned to the Appellate Body.
- We have heard a few Members say that Rule 15 does not raise any legal concerns for them because the DSU does provide to the Appellate Body the authority to establish its working procedures, or because it represents long-standing practice. But those assertions are in error. Neither the Appellate Body’s authority to draw up its working procedures nor “practice” can amend the DSU.
- As the Appellate Body itself noted many years ago: “Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: ‘Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute’. Yet that is *all* that it says. Nothing in the DSU gives a panel the authority to disregard or to modify other explicit provisions of the DSU.”²
- Just as a panel may not disregard or modify the DSU through adoption of its working procedures, so too *the Appellate Body* may not disregard or modify the DSU through *its* working procedures.
- Similarly, the fact that the Appellate Body has taken the same action repeatedly does not change the rules in the DSU.
- The DSU sets out our multilaterally agreed rules for WTO dispute settlement. If those rules are to be modified, this could only occur through agreement of all WTO Members.
- We also recall that the Appellate Body provided Members with a Background Note on Rule 15.³ As the United States noted previously, that communication appears to raise more questions than it answers. In several respects, this document fails to provide a correct or complete presentation and therefore does not contribute to Members’ consideration of this issue.

² Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, para. 92.

³ Background Note on Rule 15 of the Working Procedures for Appellate Body Review: Communication from the Appellate Body (JOB/AB/3) (Nov. 24, 2017) (“Background Note”).

- First, the Appellate Body nowhere addresses the legal basis for including Rule 15 in working procedures that otherwise relate to the consideration of appeals by Appellate Body members – not persons who are *not* Appellate Body members. Nor does the document address how continued service by an ex-Appellate Body member relates to the DSB’s appointment decision under Article 17 of the DSU. Instead, the Appellate Body appears to rely on policy considerations of efficient functioning.
- Second, the Appellate Body asserts that “[u]ntil recently, the application of Rule 15 has *never been called into question* by any participant or third participant in any appeal, *nor has it been criticized by any Member in the DSB* when an Appellate Body report signed by an AB Member completing an appeal pursuant to Rule 15 was adopted by the DSB.”⁴
- Unfortunately, the Appellate Body appears to have very carefully crafted this language in a manner to avoid mentioning that in fact Rule 15 *was* “criticized by [a WTO] Member in the DSB” and was “called into question” at the time of its adoption. That WTO Member stated explicitly that Rule 15 raised a “systemic concern” and “was contrary to Article 17.1 of the DSU”.⁵ The omission of this statement from the AB Background Note is misleading at best. WTO Members deserve to be fully informed of the facts, including that Rule 15 has been a serious concern from the very beginning.
- Third, the Appellate Body states that Rule 15 “as initially conceived was intended to apply for relatively short periods of transition.”⁶ If this is the case, the Appellate Body has acted inconsistently with its own understanding of this provision in the past, not just the present. In some cases, an Appellate Body member was appointed to a division shortly before their term ended. In one case, the Appellate Body member was appointed to a division just three days before the term ended – meaning almost the entirety of the appeal was expected to occur after the individual had ceased to be a member.⁷

⁴ Background Note, para. 2 (italics added).

⁵ DSB Meeting Minutes for February 21, 1996 at 12 (WT/DSB/M/11) (March 19, 1996): India raised “a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, *inter alia*, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU.”

⁶ Background Note, para. 6.

⁷ Communication from the AB Secretariat to the DSB Chair (May 29, 2008) (related to continued service by one person in *US – Continued Suspension* (WT/DS320) (AB-2008-5) and *Canada – Continued Suspension* (WT/DS321) (AB-2008-6)).

- Fourth, it is misleading for the Appellate Body Background Note to analogize to the rules of “some international tribunals” that remain unnamed.⁸ The rules for those other tribunals are based on their constitutive texts. For example, the transition rule for the International Court of Justice is set out in its Statute, which is annexed to and an integral part of the United Nations Charter.⁹ Unlike for those other tribunals, Rule 15 is *not* set out in the DSU and has *not* been agreed by WTO Members.
- Fifth, it is not clear from the communication whether the outgoing Appellate Body member participates in the Appellate Body’s decision to “deem” them to be an Appellate Body member after their term expires. Rule 15 applies to a person “who ceases to be” a member. But some Appellate Body decisions authorizing a person to continue to work on an appeal have been taken *prior to* the expiry of that person’s term of appointment. This raises the question whether the Appellate Body’s decision under Rule 15 would be affected by that person’s participation in that very decision.
- Sixth, the Appellate Body indicates that a new Appellate Body member is not permitted to participate in the exchange of views of an appeal involving a former Appellate Body member.¹⁰ The Note does not explain what is the legal basis for denying a legitimate Appellate Body member appointed by the DSB the ability to participate in the exchange. Rule 4(3) of the Appellate Body Working Procedures states that “the division responsible for deciding each appeal shall exchange views with other [Appellate Body] Members before the division finalizes the appellate report for circulation to the WTO Members.”¹¹ It appears that the Appellate Body may be treating a Rule 15 situation as an exception to Rule 4(3), without having amended the Appellate Body Working Procedures.
- These are but some of the questions raised by the communication addressed to WTO Members.
- As we have stated before, the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has

⁸ Background Note, para. 3.

⁹ Statute of the International Court of Justice, Art. 13(3) (“The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.”); UN Charter, Art. 92 (“The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”).

¹⁰ Background Note, para. 4.

¹¹ Working Procedures for Appellate Review, WT/AB/WP/6, Rule 4(3) (16 August 2010).

expired should continue serving.

- The United States is resolute in its view that Members need to resolve that issue first before moving on to the issue of replacing such a person. We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.

Second Intervention

- At this meeting, we have heard only two Members express the view that the Appellate Body has the authority to “deem” someone who is not an Appellate Body member to be a member of the Appellate Body for the purposes of a particular appeal. And of those two Members, only one put forward any argument for this position. We take this opportunity to comment on that argument.
- That Member asserts that the rotation required by the DSU provides the legal basis for Rule 15. This argument exhibits a fundamental misunderstanding of the DSU. Article 17.1 provides, in relevant part, that the Appellate Body “shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.” Rotation, as used in this provision, is concerned with ensuring variation among the individuals serving in different cases. We fail to see how this rotation has any relevance to the question raised by Rule 15 – continued service on an appeal by an individual that has ceased to be a member of the Appellate Body.
- Today we have also heard certain Members express a willingness to engage on the important issues and concerns we have raised. We look forward to that engagement.