

4. STATEMENT BY THE UNITED STATES ON SYSTEMIC CONCERNS REGARDING THE COMPENSATION OF APPELLATE BODY MEMBERS

- The United States placed this item on the agenda to discuss an issue of systemic importance: the compensation structure for Appellate Body members. We also wish to draw attention to the compensation that has been provided in the past to former Appellate Body members who continue to decide appeals past the end of their terms under the so-called Rule 15.
- As Members consider *why* the Appellate Body has felt free to depart from the clear rules agreed upon by Members, certain structural features, such as this one, may be relevant.
- At the outset, let us be clear: the issue raised today by the United States does not concern any particular Appellate Body member or former Appellate Body member. The illustrative figures in today's statement are historical and not intended to reflect the conduct of current Appellate Body members. Rather, the U.S. intention is to further Members' understanding of the compensation structure as a general matter, and to consider the possible consequences of that structure.
- The United States has sought from the WTO Secretariat a deeper understanding of the compensation arrangement and practices. An Appellate Body member's compensation consists of two primary elements.
- First, a person serving on the Appellate Body receives a monthly retainer fee. The purpose of the retainer fee is to ensure that persons can be available at all times, despite the part-time nature of the employment. In 1995, WTO Members considered a retainer fee of CHF 7,000 per month to be appropriate.
- In 2019, Appellate Body members receive a retainer fee plus a monthly administrative fee that totals approximately CHF 9,415 per month. These fees produce an annual income of nearly CHF 113,000.
- We have learned that, in practice, ex-Appellate Body members continuing to decide appeals past the end of their terms also received the retainer fee. Thus, so long as any appeal to which they are assigned remains active, an ex-member receives CHF 9,415 per month.
- The second element is a daily working fee. In addition to the monthly retainer, Appellate Body members receive a daily fee based on the number of days worked. Payment of this fee is not subject to regular reporting requirements to WTO Members, for example, through the Budget Committee.
- In 2019, Appellate Body and ex-Appellate Body members working on appeals receive a fee of CHF 783 per day worked. Looking at the yearly averages over the past four years, Appellate Body members have received, on average, a working fee that ranges from nearly

CHF 12,000 to more than CHF 15,000 *per month*. This would mean that Appellate Body members collected the daily fee for nearly every working day every month.

- Together with the monthly retainer fee, these two elements alone can result in annual compensation of approximately CHF 300,000 for an Appellate Body member. The same is true for ex-Appellate Body members, depending on their level of activity. The value of this compensation is even higher when tax benefits are considered.
- For purposes of comparison, we understand that this compensation is significantly more than the annual salary of a WTO Deputy Director-General. Of course, a Deputy Director-General is a full-time position, while serving as an Appellate Body member is, by design, a part-time role.
- In addition to a monthly retainer and daily fees, Appellate Body members receive a per diem of CHF 374 per day for meals and lodging while in Geneva. As part of the per diem arrangement, Appellate Body members have the option to receive CHF 3000 per month for rent payments. In such cases, the member still receives a per diem allowance for meals of CHF 150 per day.
- It is the U.S. understanding that Appellate Body members have made use of this rental-reimbursement option. By doing so, the annual payment to Appellate Body members increases by CHF 36,000, *plus* the additional meal allowance of CHF 150 per day. We understand that the average monthly per diem payment for each Appellate Body member has routinely exceeded CHF 4000 despite, on average in recent years, only eight days of hearings per year for each member. We do not think it reasonable for an individual to be provided a year-round apartment in Geneva, at WTO Member expense, when that individual's duties require him or her to be in Geneva perhaps a dozen days per year.
- In addition to compensation and per diems, airline tickets are paid for by the WTO. We understand the expenditure for airline tickets has typically exceeded about CHF 5000 per Appellate Body member per month.
- Taken together, the amount of compensation and other payments realized per member has remained steady and at a high level – well in excess of CHF 300,000 for part-time employment. The number of reports circulated over recent years has remained steady – about five to six reports per year.
- During this time, to assist in the preparation of these five or six reports, the Appellate Body has received significant legal and administrative support. Today, the Appellate Body secretariat consists of approximately 20 professional staff with a budget of over CHF 7 million, of which roughly CHF 4.3 million contributes to staffing resources. There can be no question that Appellate Body members are well resourced and supported.
- Although we think it unlikely that any WTO Member anticipated that persons on the Appellate Body would claim to be working on WTO disputes essentially every working

day of the year, Members agreed to this compensation structure. We did so, however, based on the understanding that the Appellate Body would respect the rules as set out in the DSU. Those rules include the requirement that appellate reports be issued in 60 days or, exceptionally, 90 days, and the requirement that WTO Members – and not the Appellate Body itself – appoint Appellate Body members.

- These rules are no longer being respected.
- We would question whether this approach to compensation creates the appropriate incentive.
- Under this system, the more time spent on an appeal means higher compensation. An appeal that extends beyond the 90-day deadline may benefit Appellate Body members in a way that strict adherence to that deadline would not.
- The benefit realized may be even more substantial for an ex-Appellate Body member who would not otherwise receive the monthly retainer for the duration of the appeal. The monthly retainer was intended to compensate persons for making themselves available to hear an appeal on short notice. But this does not apply to an ex-Appellate Body member, who even under the so-called Rule 15 cannot be assigned to any new appeals. Therefore, the not-previously disclosed practice of continuing to pay a monthly retainer fee to persons past the end of their DSB-approved terms has significant financial implications.
- Indeed, were an ex-Appellate Body member to continue to work on an appeal for a year past the end of his or her term, the financial implication would be to receive over CHF 100,000 in additional compensation.
- A system that provides a financial reward for violating DSU rules and prolonging the duration of an appeal would appear inconsistent with the objective behind the DSU rule of providing for the prompt resolution of disputes.
- So we would ask: Does the current structure create the correct incentive, or a negative one? Does this structure encourage prolonged appeals at the expense of clear WTO rules?
- Without debate or effective oversight, have WTO Members acquiesced in a compensation structure that undermines, rather than promotes, the prompt resolution of a dispute?
- As part of this discussion, the United States affirms its strong commitment to the independence of adjudicators, including the Appellate Body. As reflected in the Rules of Conduct, Appellate Body members fulfill their responsibility to act independently by serving in their individual capacity, and by avoiding any conflicts of interest.
- The United States also supports institutional accountability. We do not believe that “independence” and “accountability” are mutually exclusive. Members have a collective

responsibility to ensure accountability, while respecting the independence of WTO adjudicators.

- Understanding and overseeing the compensation of adjudicators is therefore an important responsibility for WTO Members in administering and ensuring the proper functioning of our dispute settlement system.
- It is our hope that Members will reflect further on the questions raised in today's statement. We look forward to continued discussion on this important issue.