

U.S. Statements at the Meeting of the WTO Dispute Settlement Body Under Items 6 and 7

Geneva, August 31, 2017

6. APPELLATE BODY MATTERS

A. STATEMENT BY THE CHAIR

- We appreciate the information the Chair has provided. The U.S. comments in relation to this item are also pertinent to items 7 and 8 on today's agenda.
- The resignation of Mr. Kim from the Appellate Body raises important systemic questions for the DSB to consider and resolve.
- At the time of Mr. Kim's resignation, he was one of three members of the Appellate Body serving on the appeal in the dispute *EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (DS442).
- The Chair of the Appellate Body has informed the DSB that the Appellate Body expects to circulate its report in this dispute no later than Tuesday, September 5.¹
- However, Members have been informed that, on August 1, Mr. Kim “tender[ed] [his] resignation as an Appellate Body Member, effective 1 August 2017.”² A WTO press release dated 1 August 2017 reflects the view that “the resignation was with immediate effect.”³
- In light of that information, Mr. Kim is no longer an Appellate Body member as of August 1. Therefore, the report to be circulated on September 5 would not appear to be on behalf of three Appellate Body members. This raises concerns under Article 17.1 of the DSU, which states that “three [members] shall serve on any one case.”
- Given Mr. Kim's resignation to become Korea's Trade Minister, the United States considers it necessary and appropriate for his resignation to have been effective immediately. However, the WTO press release is in tension with Rule 14(2) of the *Working Procedures for Appellate Review*, which states that a “resignation shall take effect 90 days after the notification ... unless the DSB decides otherwise.” We note that the Appellate Body's rule as drafted would permit any appellate report on which the individual was working to be issued *before* that resignation became effective. This reinforces that a person must be a member of the Appellate Body when that report is circulated to the DSB.

1 WT/DS442/8 (10 August 2017).

2 Communication from the Appellate Body: Resignation of an Appellate Body Member, WT/DSB/73 (2 August 2017).

3 https://www.wto.org/english/news_e/news17_e/ab_01aug17_e.htm

- We further note that Mr. Ramirez is serving on this same appeal, although his second term expired on June 30. This means that on the date the Appellate Body report is circulated to the DSB, only one signatory would appear to actually be an Appellate Body member.
- These are unprecedented circumstances, and the United States considers that the DSB needs to consider the implications and decide how to handle this situation.
- In addition to the *Alcohols* (DS442) dispute, Mr. Ramirez continues to serve on two other appeals. In a letter to the DSB Chair, the Chair of the Appellate Body has stated that Mr. Ramirez “has been authorized, pursuant to Rule 15, by the Appellate Body to complete the disposition of these appeals.” Rule 15 only applies to “[a] person who *ceases to be* a Member of the Appellate Body.”⁴
- Under DSU Article 17.2, it is the DSB that has the authority to appoint and reappoint members of the Appellate Body. The DSB exercised that authority in reappointing Mr. Ramirez “for a second four-year term of office, starting on 1 July 2013.”⁵
- As decided by the DSB, his appointment as an Appellate Body member expired on June 30, 2017. It is only by virtue of that DSB decision that WTO Members have been considering the issue of a selection process to replace him. But Members have not discussed how any continued service on appeals might affect that process.
- We appreciate that the approach of Rule 15 could contribute to efficient completion of appeals. As a party in two pending appeals, the United States would welcome Mr. Ramirez’s continued service on the appeals to which he had been assigned as of June 30.
- Under the DSU, however, the DSB has a responsibility to decide whether a person whose term of appointment has expired should continue serving, as if a member of the Appellate Body, on any pending appeals. We consider the DSB should also discuss this issue so it can take appropriate decisions.

4 *Working Procedures for Appellate Review*, Rule 15, WT/AB/WP/6 (16 August 2010) (“A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.”).

5 *Dispute Settlement Body, Minutes of the Meeting Held on 26 March 2013*, WT/DSB/M/330 (4 June 2013) (“In his statement, the then Chair of the DSB had stated the following: “Under Article 17.2 of the DSU the DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once”. The then Chair had continued to say that: “the reappointment of Appellate Body members for a second term of office was not automatic and required consideration by, and a formal decision of, the DSB”. Therefore, consistent with those requirements, the Chair proposed that the DSB adopt, at the present meeting, a formal decision and agree to reappoint Mr. Ricardo Ramírez for a second four-year term of office, starting on 1 July 2013.” The DSB so agreed.”).

- We look forward to consulting with the Chair and other Members on these important systemic issues.

7. APPOINTMENT OF APPELLATE BODY MEMBERS: PROPOSAL BY THE EUROPEAN UNION (WT/DSB/W/597/REV.3)

- As mentioned under item 6, we are not in a position to support the proposed decision.
- We consider that the first priority is for the DSB to discuss and decide how to deal with reports being issued by persons who are no longer members of the Appellate Body.
- Members should consider how resolution of those issues might affect a selection process.
- An informal DSB meeting would be a good place to start.

Second Intervention

- The United States thanks Members for their interventions. We have been listening carefully.
- A number of Members have raised questions on the logic of linking the concerns the United States has raised under Item 6 with the selection of Appellate Body members. There also seems to be some confusion regarding the U.S. position. We further hear the concern that the DSB has the responsibility to address the systemic concerns raised.
- As Members are aware, the United States has a number of long-standing concerns frequently expressed in the DSB regarding the critical necessity of the DSB asserting the authority assigned to it under the DSU.
- The issue the United States raised earlier concerning the continued service of former Appellate Body members is an important example of these concerns that we have been raising for some time.
- In our view, simply moving forward with filling vacancies risks perpetuating and leaving unaddressed the concerns we believe require the urgent attention of the DSB.
- Our view under this item also applies to the proposal that has been put forward under Item 8 by Mexico, Argentina, Brazil, Colombia, Chile, Guatemala, and Peru.