

***TURKEY – CERTAIN MEASURES CONCERNING THE PRODUCTION,
IMPORTATION AND MARKETING OF PHARMACEUTICAL
PRODUCTS***

(DS583)

**THIRD PARTICIPANT ORAL STATEMENT
OF THE UNITED STATES OF AMERICA**

June 21, 2022

I. INTRODUCTION

Mr. Chairperson and Arbitrators:

1. In this statement, the United States will present its systemic views on certain claims raised under the DSU.¹

2. A proper resolution of these issues would not disturb the ultimate conclusions of the Panel in this dispute and would further the objectives of the Arbitrators as agreed to by the parties in the *Agreed Procedures for Arbitration under Article 25 of the DSU*.²

II. APPELLANT'S CLAIM UNDER ARTICLE 11 OF THE DSU

3. The United States wishes to raise an important systemic concern regarding the claim made by the appellant in this arbitration that the Panel breached its obligations under Article 11 of the DSU. The parties to this arbitration have agreed that “this arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review.”³ In particular, the appeal “shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel.”⁴ The parties also “request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal.”⁵

4. Along with many other claims on appeal in this arbitration, Türkiye has asserted that the Panel breached its obligations under Article 11 of the DSU for “fail[ing] to make an objective assessment” and “fail[ing] to discharge its duties under Article 11 of the DSU.”⁶

5. In its response, the EU has countered that “the Panel did not make any of the errors alleged by Turkey and, in any event, those errors, whether considered singly or together, would not amount to a breach of Article 11 of the DSU.”⁷

6. The United States takes no position in this proceeding on the Agreed Procedures reached by the parties. The U.S. comments relate to Türkiye’s claims of breach under Article 11 of the DSU. These comments are based on the U.S. understanding that the Agreed Procedures are not intended to alter the interpretation of Article 11 for the purpose of this arbitration.

7. Türkiye’s claim of breach under Article 11 of the DSU appears to be based on alleged factual errors by the Panel in its report. This attempt by Türkiye to re-litigate unfavorable factual determinations is not supported by the text of Article 11 of the DSU. This provision does not

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

² See *Agreed Procedures for Arbitration under Article 25 of the DSU* (WT/DS583/10) (“Agreed Procedures”).

³ Agreed Procedures, para. 11.

⁴ Agreed Procedures, para. 9.

⁵ Agreed Procedures, para. 12.

⁶ Turkey Appellant Submission, para. 196.

⁷ EU Appellee Submission, para. 181.

impose an obligation on a panel that can be breached, but rather recognizes that a panel “should make an objective assessment” of the matter before it.⁸

8. Key to this text is the word “should.” Members are familiar with the difference between “should” and “shall” and choose carefully whether to use “should” or “shall” in particular parts of the agreements they negotiate.⁹ In the DSU, Members chose to use “should” in 21 instances, and to use the word “shall” in 259 instances. The word “should” is typically understood to mean a desirable or expected state, as distinct from a firm obligation. The use of “should” in Article 11 therefore must be given its proper meaning: it conveys Members’ desire for panels to undertake an objective examination, but does so in a manner that does not impose a legal obligation or otherwise suggest legal review.

9. There is also no provision in the DSU that refers to a “standard of review” for a panel’s factual findings. Despite this lack of any agreed “standard of review,” the Appellate Body asserted for the first time in *EC – Hormones* that Article 11 of the DSU provided such a standard and implicitly imposed a reviewable obligation on panels. But there was no interpretation – or even acknowledgment – in the *EC – Hormones* report of the term “should make” or how it could be understood as expressing a “duty”, or legal obligation. The Appellate Body failed to grapple with the plain text of Article 11 and instead simply asserted the authority and empowered itself to review a panel’s factual findings.

10. Yet, by describing this function using “should”, rather than creating an obligation using “shall”, WTO Members established in the DSU that an alleged failure to make an objective assessment would not be subject of an appeal. The Arbitrator should therefore interpret DSU Article 11 according to its plain terms and decline to review an alleged breach of that provision.

11. Article 17.6 of the DSU confirms this understanding. Members agreed that the scope of appellate review would be limited. It states that “[a]n appeal shall be limited to *issues of law* covered in the panel report and *legal interpretations* developed by the panel.” The Agreed Procedures similarly circumscribe the scope of appeal.¹⁰

12. Attempts by appellants to re-litigate unfavorable *factual* determinations by panels are not encompassed by the right of appeal based on the plain terms of Article 17.6. Nevertheless, the appellant appears to be requesting the Arbitrators to review the Panel’s findings of fact.

⁸ See Statement of the United States, 29 June 2020 Meeting of the DSB (WT/DSB/M/442), paras. 10.26–10.28; Statement of the United States, 26 September 2018 Meeting of the DSB (WT/DSB/M/419), paras. 4.7–4.11; Statement of the United States, 27 August 2018 Meeting of the DSB (WT/DSB/M/417), paras. 4.2–4.17.

⁹ These differences are reflected in the dictionary definitions of “should” and “shall”. “Shall” is defined (in relevant part) as “a command, promise, or determination.” Oxford English Dictionary online, available at <<http://www.oed.com>>, accessed 6 June 2022. “Should” is “used to say or ask what is the correct or best thing to do; used to show when something is likely or expected” Cambridge Dictionary online, available at <dictionary.cambridge.org>, accessed 20 June 2022. WTO Members collectively express a “command” (shall) when they choose to create and take on legal obligations.

¹⁰ See Agreed Procedures, para. 9.

13. Reviewing the factual findings of a panel significantly expands the scope of review and further undermines the function of panels as agreed by Members in the DSU. There already have been expenditures of both time and resources over the past three years in this dispute.

14. Moreover, consideration of a claim of breach of Article 11 based on objections to factual determinations by the Panel could jeopardize the ability of the Arbitrators to complete this appeal and issue its award within the 90-day deadline agreed to by the parties.

15. In this first appeal arbitration proceeding under Article 25 of the DSU, the United States invites the Arbitrators to take this opportunity to reject the appellant's re-characterization of factual objections to the Panel's determinations and instead to find that Article 11 of the DSU does not support the appellant's claim. We further encourage the Arbitrators to meet their deadline of issuing an award in this arbitration within 90 days, as agreed to by Türkiye and the EU.¹¹

III. CONCLUSION

16. This concludes the U.S. oral statement. The United States thanks the Arbitrators for consideration of its views.

¹¹ Agreed Procedures, para. 12.