



**INFORMAL PROCESS ON MATTERS RELATED TO THE FUNCTIONING  
OF THE APPELLATE BODY**

COMMUNICATION FROM JAPAN, AUSTRALIA AND CHILE

*Revision\**

The following communication, dated 25 April 2019, is being circulated at the request of the delegations of Japan, Australia and Chile.

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**1 INTRODUCTION**

1.1. We share the concerns of many WTO Members concerning the importance of an effectively functioning WTO dispute settlement system. We welcomed the initiative to entrust a facilitator to consult informally on matters related to the functioning of the Appellate Body. Like other delegations, we participated in the open-ended meetings and other sessions convened by the facilitator.

1.2. Building on Ambassador Walker's report of 28 February, we wish to present the following ideas as an option to be considered in further work on this subject.

1.3. We propose that Members focus their work toward adopting a decision, or decisions, of the Dispute Settlement Body (DSB), affirming and clarifying the existing provisions of the Dispute Settlement Understanding (DSU). A decision of this nature would be the most practical, feasible and expeditious solution to the key issues confronting all Members in respect of the WTO dispute settlement system.

1.4. A proposed draft of such a decision is laid out below, although other vehicles could be considered if they are effective and realizable.

1.5. Nothing in the decision shall be construed as adding to or diminishing the rights and obligations of Members under the Marrakesh Agreement Establishing the World Trade Organization.

1.6. The draft decision addresses some of the concerns that have been raised in our discussions. Maintaining a focus on the DSB's role to achieve a satisfactory settlement of matters before it, we would also like to address issues like advisory opinions, procedures to select persons to fill Appellate Body vacancies, and managing the implications when an Appellate Body member's term expires (Rule 15 issue) on other occasions. We welcome contribution on these issues as well as on additional contributions on any other issues as part of this process.

**2 DRAFT DECISION**

The Dispute Settlement Body,

*Having regard to* paragraph 1 of Article 2 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),

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\* This revision is to add Chile as co-sponsor to the submission.

*Affirming* that recommendations and rulings made by the DSB are aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under the DSU and the covered agreements, and cannot add to or diminish the rights and obligations provided in the covered agreements,

*Mindful* that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system,

*Decides* as follows:

Scope of issues to be considered by the Appellate Body

1. Members confirm that when the Appellate Body addresses the issues raised by the parties to the dispute per paragraph 12 of Article 17 of the DSU, the scope of the Appellate Review shall be limited to issues of law covered in a panel report and legal interpretations developed by the panel in strict compliance with paragraph 6 of Article 17 of the DSU.
2. Members confirm that the Appellate Body shall not review panel's fact-finding, such as meaning of municipal law, as an issue of law.
3. Members affirm that they should refrain from filing appeals to the Appellate Body beyond the remit of Appellate Body.

Strict observance of the 90-day deadline for Appellate Review

4. Members confirm that the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of the proper balance between the rights and obligations of Members, as stated in Article 3.3 of the DSU.
5. Members confirm that the Appellate Body shall strictly observe the 90 day deadlines for Appellate Review.
6. Members also recognize the difficulty in some cases, in particular, those involving complicated measures and/or legal claims, and confirm that the Members involved would need to resolve the resulting procedural consequences in such cases.

*[Note: This issue in the paragraph above needs to be discussed further in the ongoing process]*

Issue of precedential value of interpretation by the Appellate Body

7. Members confirm that an interpretation by the Appellate Body of any WTO provision does not constitute a precedent for posterior interpretations.
8. Members confirm that panels may adopt an interpretation of a WTO provision that is different from the one developed by the Appellate Body.
9. Members reaffirm the important role of the dispute settlement system in providing security and predictability, as stated in paragraph 2 of Article 3 of the DSU.

Requirements that the panel and Appellate Body cannot add to or diminish the rights and obligations of Members

10. Members confirm that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements, in accordance with paragraph 2 of Article 3 and paragraph 2 of Article 19 of the DSU.
11. Members also confirm that panels and the Appellate Body should refrain from making a finding or recommendation on any of the issues of law and legal interpretation of relevant provisions of the WTO Agreement to the extent that the finding or recommendation adds to or diminishes the rights and obligations provided in the covered agreements.

12. Members confirm that panels and the Appellate Body shall interpret, in accordance with paragraph 6(ii) of Article 17 of the Anti-dumping Agreement, any provision of that Agreement that admits of more than one permissible interpretation, so as not to add to or diminish the rights and obligations provided in the covered agreements.

Regular dialogue between the DSB and the Appellate Body

13. In order to ensure the implementation of the decision afterwards, the DSB, in consultation with the Appellate Body, will establish a regular dialogue channel between the DSB and the Appellate Body.
  14. Members affirm that they will also consider how to ensure the implementation of the outcomes of the regular dialogue between the DSB and the Appellate Body.
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