



General Council

AGENDA ITEM 4

**INFORMAL PROCESS ON MATTERS RELATED TO THE FUNCTIONING OF THE APPELLATE
BODY - REPORT BY THE FACILITATOR, H.E. DR. DAVID WALKER (NEW ZEALAND)**

THURSDAY, 28 FEBRUARY 2019

Introductory Remarks

1.1. Let me start by thanking you Chair and all of you as Members for placing your trust in me as Facilitator.

1.2. I am pleased to have this opportunity to report to you on the developments in the informal process and my own consultations.

1.3. As noted by the GC Chair, meetings have been convened in a range of formats, keeping in mind the solution-oriented spirit of this exercise. The idea was to enable an informal, active and constructive exchange among delegations.

1.4. This included two open-ended meetings – on 17 January and 18 February – that the Chair has described.

1.5. I also convened two small-group sessions – on 6 February and 14 February respectively.

1.6. The group comprised delegations and group coordinators that had: (i) tabled written proposals; (ii) raised concerns about the proper functioning of, and the adherence to WTO rules by, the Appellate Body; (iii) made alternative proposals, including at the first open-ended Informal Meeting on 17 January; and/or (iv) raised follow-up questions or concerns on the proposals or issues at hand.

1.7. The objective of the informal sessions was two-fold, namely:

- To actively and constructively review and discuss the various proposals and concerns, issue-by-issue; and
- To provide an opportunity to hear new or counter proposals, concerns and other ideas.

1.8. The issues in focus, during the discussion, were derived from Members' proposals and were discussed, one-by-one, always mindful that some of the issues are interlinked and multifaceted.

1.9. In addition, five new proposals were introduced at the informal sessions.

1.10. Let me now provide you with a short recap of the solution-focused discussion.

Report

1.11. Discussions took place on the basis of proposals and contributions from Members contained in documents WT/GC/W/752/Rev.2; WT/GC/W/753/Rev.1; WT/GC/W/754/Rev.2; WT/GC/W/758; WT/GC/W/759; and WT/GC/W/760; and WT/GC/W/761. Document WT/GC/W/763 was introduced but not yet discussed.

Rule 15

1.12. There appears to be widespread support for the proposition that DSB Members should determine whether a person who is no longer an Appellate Body member pursuant to DSU Article 17.2 can continue to serve on an appeal.

1.13. Ideas that have been advanced include limiting service on an appeal to cases where the oral hearing has taken place, or at least started; and aligning the assignment of members to appeals with the duration of an appeal as stipulated in DSU Article 17.5 (for example that no member should be assigned to a new appeal within 60 days of the expiry of their term).

1.14. Suggested options for exercising such Member instruction include amendment of the DSU or a formal Decision by the DSB/General Council.

1.15. Separately there appears to be convergence that it would be useful, to assist DSB Members in meeting their obligation in DSU Article 17.2 to "appoint persons to serve on the Appellate Body" and to fill vacancies "as they arise", to automatically launch the selection process to replace outgoing Appellate Body members 6 months before the expiry of their term in office.

1.16. Discussions may continue on how such selection process could best be conducted.

90 Days

1.17. There is no disagreement among Members as to the clear text of Article 17.5 of the DSU that "...in no case shall the proceedings [of an appeal] exceed 90 days."

1.18. There was some discussion as to what Members would intend this to mean going forward. For example: should 'proceedings' be taken to mean the issuance of the Appellate Body report in English language version only, or does it require the issuance of the report in all three WTO working languages.

1.19. There was also discussion about whether the parties to an appeal should be able to agree that their appeal could last for longer than 90 days, if they wished to do so. In this context some Members suggested that any such facility for parties to agree an extension should not be open-ended.

1.20. Again, suggested options for addressing this matter include amendment of the DSU or a formal Decision by the DSB/General Council.

1.21. There was also some discussion about behaviours, by Members and by the Appellate Body, which may have contributed to the growing number of appeals that have in practice exceeded 90 days and the average length of such excess.

Municipal Law

1.22. There appears to be no disagreement among Members that the meaning of municipal law should be treated as an issue of fact and therefore not subject to appeal pursuant to Article 17.6 of the DSU.

1.23. Concerns were also raised about Appellate Body review of a panel's fact finding more generally.

1.24. Discussion of this issue remains ongoing including whether Members might provide any additional clarity to the Appellate Body, either through amendment to the DSU or some other form of collective guidance.

Advisory Opinions

1.25. Concerns have been expressed that the Appellate Body has a tendency to make findings on issues beyond those necessary to resolve a dispute.

1.26. Again, discussion remains ongoing including whether Members might provide any additional clarity to the Appellate Body, in particular with respect to Article 17.12 of the DSU, either through amendment of the DSU or some other form of collective guidance.

Precedent

1.27. There appears to be agreement among Members that there is no 'binding precedent' in the WTO absent specific agreement by Members (e.g. negotiated Agreements, WTO Article IX.2 Authoritative Interpretations, or other forms of Decisions by Members).

1.28. At the same time, consistent with DSU Article 3.2, there also appears to be broad agreement that consistency and predictability in interpretation of the rights and obligations of Members under the covered agreements is of significant value to Members, and that panels and the Appellate Body should follow findings of previous panel/Appellate Body reports if and to the extent they find them to be persuasive in the dispute they have before them.

1.29. Again, discussion remains ongoing including whether Members might provide any additional clarity to the Appellate Body and panels, including in relation to the 'cogent reasons' approach developed by the Appellate Body.

1.30. Members have also discussed the idea of holding an annual meeting between the Appellate Body and WTO Members (in the DSB) where Members could express their views on issues in a manner unrelated to the adoption of particular reports. Such meetings could be of relevance to the question of precedent, and also potentially to concerns about 'overreach' as below.

1.31. Suggested options to create such a mechanism include amendment of the DSU or a formal Decision by the DSB/General Council.

Additional Amendments

1.32. In addition to the idea of automatic launch of Appellate Body selection processes covered earlier, delegations also discussed additional proposed amendments of the DSU contained in document WT/GC/W/753/Rev.1 relating to a supplementary transition rule for outgoing Appellate Body members, independence of Appellate Body members, and efficiency and capacity [of the Appellate Body] to deliver.

1.33. On each of these proposed amendments a number of questions were raised and some reservations expressed. It remains to be seen how the proponents would intend to respond to these reactions from other delegations.

'Overreach'

1.34. Members had an initial discussion of the question of 'overreach' based on contributions in WT/GC/W/754/Rev.2 and relevant aspects of WT/GC/W/760.

1.35. Discussion of 'overreach' as part of this informal process was welcomed, with widespread willingness among delegations to engage on the issue.

1.36. At the same time, it was recognized that 'overreach' is potentially the most complex aspect of this process and that, depending on the scope of issues delegations identify and the type of solutions proposed, identifying solutions in this area could take some time.

1.37. Additional guidance on interpretative approaches Members wished the Appellate Body to take was suggested as one potentially productive area for further discussion. As noted above, it was recognized that the idea of an annual meeting between the Appellate Body and WTO Members could also be relevant to addressing the question of 'overreach'.

1.38. Going forward, there was a common desire expressed to focus the discussion – that delegations be specific as to the issues they feel need to be addressed and pragmatic in identifying options for solutions.

Concluding remarks

1.39. Again, I would like to thank all delegations who have contributed with ideas and suggestions, and who participated proactively in this process. I hope that I can continue to count on your guidance and support.

1.40. In spite of – or rather because of – the complexities and challenges that we face, it is our shared responsibility to find common ground with regard to the Appellate Body's effective functioning and future.

1.41. We also have to be mindful that time is of the essence.

1.42. So, unless otherwise advised by you Chair, it is my intention to continue the informal process of solution focused discussion, in a range of different formats, next month.
