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**General Council**

**AGENDA ITEM 4(A)**

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

TUESDAY, 7 MAY 2019

***Introductory Remarks***

1.1. I am pleased to have this opportunity to report to you, for the second time, on the status of the informal process and my own consultations; and I would like to thank all delegations for their continued guidance and support.

1.2. This report should be read in conjunction with my report to the 28 February meeting of the General Council which was issued as JOB/GC/215.

1.3. Since then meetings have continued in a range of formats, keeping in mind the solution-oriented spirit of this exercise.

1.4. This included the open-ended meeting, on 9 April, that the Chair has described.

1.5. I also convened five small-group meetings – on: 21 and 28 March, 16 and 23 April and 1 May.

1.6. As previously, the group comprised delegations and coordinators that had: (i) tabled written proposals; (ii) raised concerns about the functioning of, and the adherence to WTO rules by, the Appellate Body; and (iii) made alternative proposals and/or raised follow-up questions or concerns on the proposals or issues.

1.7. The objective of these informal sessions remained two-fold, namely:

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

1.8. We also remained mindful that some of the discussed issues are interlinked and multifaceted.

1.9. Ahead of the open-ended meeting, small-group discussions in March were focussed mainly on specific issues.

1.10. Discussions evolved around 'overreach', 'precedent' and the 'issue of law and fact'. These issues had already been discussed, to some extent, in February but – as I indicated in JOB/GC/215 – merited further discussion.

1.11. Since the open-ended meeting, small group discussions in April and on 1 May have revolved around a series of proposals from Members – which are listed under this agenda item today – as follows:

- W/763/Rev.1 - Chinese Taipei;
- W/767/Rev.1 – Brazil, Paraguay and Uruguay;
- W/768/Rev.1 - Japan, Australia and Chile;
- W/769 – Thailand.

1.12. These proposals, which are of a more horizontal nature, look to take account of earlier discussions and seek to frame potential solutions to the issues raised.

1.13. In introducing these proposals in the small-group discussions, proponents argued in favour of a simple and practical approach to reinforce existing DSU provisions and ensure their effective implementation through the vehicle of decisions by the Dispute Settlement Body and/or the General Council, including possible 'guidelines' for the benefit of the Appellate Body, Panels and Members.

1.14. In addition, as I mentioned at the open-ended Informal Meeting on 9 April, a number of supplementary ideas have only been expressed orally in this informal process and are not yet captured in any of the written proposals.

### **Second Report on Informal Process**

1.15. My assessment of the current state of play across the various issues under consideration is as follows.

#### **Rule 15**

1.16. Discussion has reinforced that the DSB has the explicit authority, and responsibility, to determine membership of the Appellate Body.

1.17. To assist Members in discharging this responsibility, the selection process to replace outgoing Appellate Body members should be automatically launched 6 months before the expiry of their term in office. How such selection process could best be conducted remains to be discussed.

1.18. Proposals have been made to better align the assignment of Appellate Body members nearing the end of their term with the general rule on expected duration of an appeal in DSU Article 17.5.

1.19. Discussion continues as to whether, notwithstanding DSU Article 17.2, an Appellate Body member so assigned should be able to complete an appeal process in which the oral hearing has been held.

#### **90 Days**

1.20. There remains no disagreement as to the clear text of DSU Article 17.5 – 90 days means 90 days.

1.21. Proposals have been made to facilitate this deadline being met. For example, that 'proceedings' should be taken to mean the issuance of the Appellate Body report in the 'original language' of the dispute; and that it might be useful to provide guidance to the Appellate Body and Members on potential ways to assist the '90 days' timeframe being met in complex appeals.

1.22. It remains under consideration whether the parties should be able to agree that their appeal can exceed 90 days if the Appellate Body is unable to complete its report within this time period and, in that instance, whether the ability to extend should be time-limited.

1.23. Discussion also continues on the consequences if an Appellate Body report is not completed within 90 days or any allowable extension agreed by the parties.

#### **Municipal Law**

1.24. Discussion has reinforced that the 'meaning of municipal law' should be treated as a matter of fact and therefore is not subject to appeal.

1.25. It is also understood that the DSU does not permit the Appellate Body to engage in a *de novo* review or to 'complete the analysis' of the facts of a dispute.

1.26. There also seemed to be convergence that it was incumbent on Members engaged in appellate proceedings to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a *de facto 'de novo review'*.

1.27. Discussion continues on whether guidance should be provided limiting Article 11 appeals to situations of exceptional circumstances such as 'egregious error' by a Panel.

### **Advisory Opinions**

1.28. Discussion indicated concurrence that issues that have not been raised by either party should not be ruled or decided upon by the Appellate Body.

1.29. Discussions continue on how best to provide guidance to the Appellate Body that it should address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to resolve the dispute.

1.30. In this context, proposals have been made which seek to encourage the Appellate Body to make greater use of judicial economy.

### **Precedent**

1.31. There remains no disagreement that binding precedent is not created through WTO dispute settlement proceedings.

1.32. At the same time, it is clear that consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.

1.33. While Panel/Appellate Body findings are specific to the particular dispute at hand, discussion continues on how best to provide guidance to Panels and the Appellate Body that they should take previous Panel/Appellate Body reports into account to the extent relevant and only follow findings of those reports if and to the extent they find them to be sufficiently persuasive in the dispute they have before them.

### **'Overreach'**

1.34. It is recognised that 'overreach' remains potentially the most complex aspect of this process, depending on the scope of issues identified and the type of solutions proposed.

1.35. It has also been suggested that solutions to some of the general interpretive issues identified above may help contribute to mitigating future concerns about 'overreach'.

1.36. The idea of holding an annual meeting between the Appellate Body and WTO Members, under the auspices of the DSB, where Members can express their views on issues in a manner unrelated to the adoption of particular reports continues to be seen as potentially useful.

1.37. Discussions continue about how to design such a mechanism to be of most use and relevance.

1.38. To date only one proposal has been made to provide guidance on a specific interpretive issue – that in W/768/Rev.1 in respect of Article 17.6(ii) of the Anti-dumping Agreement. It remains to be seen whether delegations will seek to address any further issues of a specific nature.

### **Concluding remarks**

1.39. I have attempted in this report to capture where I think we stand in the discussion and to identify where, in my view, it would be fruitful to explore issues further. Today's report will be issued after the meeting – also in the JOB/GC-series and delegations looking to report to capitals on the evolution and status of this discussion may wish to make reference to it.

1.40. The discussion so far has shown that finding a solution that would address the key concerns raised is not going to be easy. But we need to keep trying and sound out compromise solutions that would help improve the functioning of the Appellate Body, and adherence to the DSU.

1.41. So unless advised otherwise by you Chair, it is my intention to continue our dialogue in a solution-oriented manner in different configurations, in the run up to the next General Council meeting in July.

1.42. In doing so, I will count on the continued input and support of all of you in framing possible areas of convergence – drawing on the ingredients in the specific proposals which have been made and supplementary ideas which have been expressed orally in this informal process.

1.43. To ensure transparency, I will continue to report at open-ended Informal Meetings and formally to the General Council, at the invitation of the Chair of the General Council.

1.44. I would like to, once again, thank all delegations who have contributed with ideas and suggestions so far. If any delegation wishes to discuss any specific issue on this informal process further, please know that you can come to see me at any time.

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