



AGENDA ITEM 5(B)

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

TUESDAY, 23 JULY 2019

Introductory Remarks

1.1. I am pleased to have this opportunity to report to you, for the third time, and in so doing, take stock of where we stand in this informal process at this point in time.

1.2. We are now six months into this process. This report therefore provides: (i) updates on recent developments in this process since we have last met; and (ii) an overview of the work undertaken in this informal process since the beginning of the year, as requested by Members and the Chair at the meeting of the General Council in May.

1.3. It should be read in conjunction with my reports to the 28 February and 7 May meetings of the General Council which were issued as JOB/GC/215 and JOB/GC/217 respectively.

Third Report on Informal Process

Process

1.4. As you know, the objective in this informal process has been to address concerns raised by delegations with regard to the functioning of the Appellate Body and adherence with DSU provisions.

1.5. For this purpose, and as mentioned by the Chair, meetings have been: (i) convened in a range of formats, keeping in mind the solution-oriented spirit of the exercise; and (ii) designed to enable an informal, active and constructive exchange among delegations.

1.6. To this end, we have held:

- two formal stock-taking sessions, in February and May respectively, at which I delivered progress reports to the General Council. As noted above, these have been issued respectively in JOB/GC/215 and JOB/GC/217;
- four open-ended informal meetings to ensure transparency and inclusiveness – on 17 January, 18 February, 9 April and 18 July; and
- nine informal small group meetings – on 6 and 14 February; 21 and 28 March; 16 and 23 April; 1 May; and 1 and 15 July.

1.7. The informal small group meetings 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.

Substance

1.8. In total, twelve¹ proposals have been submitted, reviewed and discussed in this informal process.

1.9. As mentioned by Benin a few moments ago, the most recent proposal is contained in WT/GC/W/776 by the African Group. This proposal was first presented at the 8th small group meeting on 1 July during which delegations posed a number of initial questions and commented positively on various elements of the proposal, including its emphasis on ensuring diversity in the selection process of new Appellate Body members.

1.10. All in all, and as requested by the General Council Chair, we conducted – in this first half of the year - an issue-by-issue review of all the concerns raised and discussed a range of potential solutions that have been put forward in the proposals or orally at the meetings.

1.11. From our deliberations, it has become clear that, although some concerns raised are shared by Members, there are also differences of view on the specifics of how to address those concerns.

1.12. Acknowledging these differences of view, and as tasked by the General Council Chair and Members, I have identified, on my own responsibility, the following areas or issues where I detect a certain degree of convergence during the discussion to date. I will be going through these issues per force one-by-one but the convergence I detect is across all these issues in holistic sense.

Convergence elements

Transitional rules for outgoing Appellate Body members

1.13. The DSB has the explicit authority, and responsibility, to determine membership of the Appellate Body.

1.14. To assist Members in discharging this responsibility, the selection process to replace outgoing Appellate Body members shall be automatically launched 180 days before the expiry of their term in office. Such selection process shall follow past practice.

1.15. If a vacancy arises before the regular expiry of an Appellate Body member's mandate, or as a result of any other situation, the Chair of the DSB shall immediately launch the selection process with a view to filling that vacancy as soon as possible.

1.16. Appellate Body members nearing the end of their terms may be assigned to a new division up until 60 days before the expiry of their term.

1.17. An Appellate Body member so assigned may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term.

90 Days

1.18. Consistent with Article 17.5 of the DSU, an Appellate Body report needs to be issued no later than 90 days from the date a party to the dispute notifies its intention to appeal.

1.19. In cases of unusual complexity or periods of numerous appeals, the parties may agree with the Appellate Body to extend the time-frame for issuance of the Appellate Body report beyond 90 days. Any such agreement will be notified to the DSB by the parties and the Chair of the Appellate Body.

¹ W/752/Rev.2; W/753/Rev.1; W/754/Rev.2; W/758; W/759; W/760; W/761; W/763/Rev.1; W/767/Rev.1; W/768/Rev.1; W/769 and W/776.

Municipal Law

1.20. The 'meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal.

1.21. 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.

1.22. Consistent with Article 17.6 of the DSU, it is incumbent upon 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'.

Advisory Opinions

1.23. Issues that have not been raised by either party should not be ruled or decided upon by the Appellate Body.

1.24. Consistent with Article 3.4 of the DSU, the Appellate Body shall address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to resolve the dispute.

Precedent

1.25. Precedent is not created through WTO dispute settlement proceedings.

1.26. Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.

1.27. Panels and the Appellate Body should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them.

'Overreach'

1.28. As provided in Articles 3.2 and 19.2 of the DSU, findings and recommendations of Panels and the Appellate Body and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

1.29. Panels and the Appellate Body shall interpret provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 in accordance with Article 17.6(ii) of that Agreement.

Regular dialogue between the DSB and the Appellate Body

1.30. The DSB, in consultation with the Appellate Body, will establish a mechanism for regular dialogue between WTO Members and the Appellate Body where Members can express their views on issues in a manner unrelated to the adoption of particular reports.

1.31. Such mechanism will be in the form of an informal meeting, at least once a year, hosted by the Chair of the DSB.

1.32. To safeguard the independence and impartiality of the Appellate Body, clear ground rules will be provided to ensure that at no point should there be any discussion of ongoing disputes or any member of the Appellate Body.

Concluding Remarks

1.33. Let me reiterate once again that although the discussion covered a broad spectrum of areas and issues, this report, under my own responsibility, focuses exclusively on the areas or issues where a degree of convergence can be detected – at this point.

1.34. Today's report will be issued after the meeting – in the JOB/GC-series and, as before, delegations looking to report to capitals on the status of this solution-oriented discussion may wish to make reference to it.

1.35. Going forward, if there are other potential points of convergence that I may have missed, I am happy to receive them from delegations.

1.36. Finding common ground *vis-à-vis* the Appellate Body's effective functioning remains our shared responsibility and, as we have already heard this morning, one which is of increasing urgency.

1.37. I would therefore like to thank once again all proponents and delegations that have intervened and provided comments, for their continued efforts and inputs into this informal process since the start of the year.

1.38. I would also like to thank the Chair of the General Council and all delegations for placing trust in me as Facilitator.

1.39. Looking ahead, I will rely on the feedback from the General Council Chair and Members to see how this work can be best carried forward to the next phase in the second half of the year.

1.40. In that context, as I have mentioned before, Members have suggested different vehicles for delivering the different approaches that have been discussed, for example through a Decision of the General Council. Any such vehicle would obviously need to be developed with delegations before it could be considered for action by the Body concerned.

1.41. I continue to stand ready to assist the Chair of the General Council and Members in any way necessary. As always, my door remains open.

1.42. *Thank you.*
