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**General Council**

**AGENDA ITEM 5**

**INFORMAL PROCESS ON MATTERS RELATED TO THE FUNCTIONING OF THE APPELLATE BODY – REPORT BY THE FACILITATOR, H.E. DR. DAVID WALKER (NEW ZEALAND) AND DRAFT DECISION ON THE FUNCTIONING OF THE APPELLATE BODY (WT/GC/W/791)**

MONDAY, 9 DECEMBER 2019

***Introductory Remarks***

1.1. Thank you, Chair. I am pleased to report to you for the fifth time as Facilitator of this Informal Process.

1.2. Chair, you and your predecessor initiated this Informal Process to undertake a discussion aimed at seeking workable and agreeable solutions to improve the functioning of the Appellate Body and avoid deadlock come December. That is the purpose of my report to you today.

1.3. As previously, this report should be read in conjunction with my earlier reports to the General Council on 28 February, 7 May, 23 July and 15 October, which were issued as JOB/GC/215, JOB/GC/217, JOB/GC/220 and JOB/GC/222 respectively.

***Fifth Report on Informal Process***

**Process**

1.4. As mentioned by the Chair, I have continued my consultations and meetings in a range of formats, keeping in mind the solution-focused spirit of this Informal Process.

1.5. This included a further small group session - the 11<sup>th</sup> in the small group-format - on 27 November, as well as a 6<sup>th</sup> open-ended Informal Meeting on 29 November to ensure transparency and inclusiveness in the Informal Process.

1.6. As before, the informal small group meeting 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 on the proposals, issues, convergence elements and the Draft General Council Decision annexed to JOB/GC/222.

**Substance**

1.7. As you recall, based on the 12 proposals submitted to the Informal Process and the extensive discussions held until July, I identified and reported to the General Council, on my own responsibility, a set of areas and issues where I detected convergence during the exchanges. These convergence points were circulated in JOB/GC/220.

1.8. Thereafter, a draft General Council instrument was drawn up based on: i) the convergence points reported in July; ii) further comments I received from Members at and following the July meeting; and iii) my continued consultations and discussions with Members in a range of formats. The draft instrument, which was put forward on my own responsibility as Facilitator, was annexed to the report I presented to the General Council in October, which was issued in JOB/GC/222.

1.9. In presenting the draft instrument at the October meeting of the General Council, I made four particular observations, which I would like to recall:

- First, the adoption of such a General Council Decision would constitute a shared assessment by Members that the Appellate Body has, in some respects, not been functioning as intended under the DSU.
- Second, the adoption of such a Decision should be accompanied by agreement to launch the selection processes to fill vacant positions - that being, of course, on the basis that a Decision can only apply if there is a body to which it can apply.
- Third, such a Decision would have implications for the actions of the Appellate Body, but it would also carry implications for how Members look to use the Appellate Body.
- Fourth, to take such 'reset' action, Members would need to have sufficient trust and confidence in each other that they will work together to implement any such Decision in the coming years.

1.10. Since the October General Council meeting, I have continued my contacts with Members, and the issues surrounding the Appellate Body – as we all know – have been raised and discussed in various fora and settings, in and outside of Geneva.

1.11. I believe delegations have had sufficient time to carefully consider the draft instrument, which was attached to my report (circulated in JOB/GC/222).

1.12. To this end, and in my capacity as Facilitator, I have put forward, for Members' consideration, the Draft General Council Decision, which was issued in document WT/GC/W/791 as a stand-alone General Council document on 28 November and is before Members under this Agenda item for consideration and action.

1.13. With regard to the Draft Decision, I applied some further slight adjustments to the text of the draft instrument to take account of Members' feedback and comments received at and since the October General Council meeting.

- First, on the basis of my engagement with delegations, I believe there is indeed a shared assessment that the Appellate Body has, in some respects, not been functioning as intended under the DSU. This has therefore been acknowledged in the preambular part of the Draft Decision.
- Second, discussions in the Informal Process about Municipal Law have ranged more broadly across questions of law and fact, so it is more correct to describe that section as 'Scope of Appeal'; and I considered it would be useful to reinforce the point Members have frequently made in the discussions, namely that:

"Article 17.6 of the DSU restricts matters that can be raised on appeal to issues of law covered in the relevant panel report and legal interpretations developed by that panel."

1.14. In all other substantive aspects, the Draft Decision remains unchanged, and as you have already seen it in JOB/GC/222.

1.15. At the October General Council, it was said that in order to take meaningful action, Members need to collectively understand how we arrived at this point. Several hypotheses were advanced, two of which particularly caught my attention:

- First, it was noted that when some DSU rules began to be breached (e.g. 90 days), some Members sought to call that out, but others sought to excuse the breach – to take a pragmatic approach for the purpose of a particular dispute and to preserve what they saw as the essentials of the system. Over time, the risk is pragmatism becomes practice.

- Second, it was noted that Members are creative and that, over time, the efforts of enthusiastic and innovative lawyers to prevail in a particular dispute can lead to "institutional creep" beyond Members' collective intention.

1.16. Perhaps these points might have caught your attention also, and to the extent that they are seen to have some descriptive resonance.

1.17. On that basis, I believe the Draft Decision, as recast, does indeed provide the basis for 'reset' action through which to help ensure the system operates according to the DSU rules as agreed by Members:

- It sets out, upfront, a shared acknowledgment that there is a problem;
- It provides instructions and guidance – for the Appellate Body and Members – across areas of convergence that have emerged from Members' discussion of issues identified as part of that problem; and
- It provides a forum for Members to express their views to the Appellate Body on the implementation of the instructions and guidance it contains.

### **Concluding Remarks**

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

1.19. As with my previous reports, this report will be issued in the JOB/GC-series, with WT/GC/W/791 attached to it for ease of reference.

1.20. As I said in October, it is for Members to decide what action they wish to take.

1.21. Since the October General Council there have been other related developments that bear on this:

- First, it has emerged that Members, through the appropriate body, may wish to consider the adequacy of current procedures for transparency and accountability related to Appellate Body expenditures going forward;
- Second, it now appears that Members who filed appeals more than a year ago now find themselves in the situation where those appeals are unable to be heard until resumption of a functioning Appellate Body.

1.22. This second development has only added to the urgency of taking action on a situation that is material to the ability of Members to resolve their disputes.

1.23. As Facilitator, I can only hope that the discussions we have been having since the start of the year, and in recent weeks in particular, will have generated the trust and confidence needed to take such action.

1.24. I commend the Draft Decision in WT/GC/W/791 to the General Council for adoption today on the understanding that Members also agree to launch the selection process to fill vacant Appellate Body positions at the earliest practicable opportunity.

1.25. As always, I stand ready to assist the Chair of the General Council and Members, in whatever capacity may be required.

1.26. Thank you Chair.

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WORLD TRADE  
ORGANIZATION

WT/GC/W/791

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General Council  
9-11 December 2019

## ANNEX

### DRAFT DECISION

#### FUNCTIONING OF THE APPELLATE BODY

*Decision of ...*

The General Council,

*Conducting* the function of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement");

*Having regard to* paragraph 1 of Article IX of the WTO Agreement;

*Mindful of* the work undertaken in the Informal Process of Solution-Focused Discussion on Matters Related to the Functioning of the Appellate Body, under the auspices of the General Council;

*Acknowledging* that the Appellate Body has, in some respects, not been functioning as intended under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU");

*Recognizing* the central importance of a properly functioning dispute settlement system in the rules-based multilateral trading system, which serves to preserve the rights and obligations of Members under the WTO Agreement and ensures that rules are enforceable;

*Desiring* to enhance the functioning of that system consistent with the DSU;

*Decides* as follows:

#### **Transitional rules for outgoing Appellate Body members**

1. Only WTO Members may appoint members of the Appellate Body.
2. The Dispute Settlement Body (the "DSB") has the explicit authority, and responsibility, to determine membership of the Appellate Body and is obligated to fill vacancies as they arise.
3. 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.
4. 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.
5. 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.
6. 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**

7. Consistent with Article 17.5 of the DSU, the Appellate Body is obligated to issue its report no later than 90 days from the date a party to the dispute notifies its intention to appeal.

8. 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.<sup>1</sup> Any such agreement will be notified to the DSB by the parties and the Chair of the Appellate Body.

### **Scope of Appeal**

9. Article 17.6 of the DSU restricts matters that can be raised on appeal to issues of law covered in the relevant panel report and legal interpretations developed by that panel.

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

11. 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.

12. 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**

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

14. 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 assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements in order to resolve the dispute.

### **Precedent**

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

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

17. 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'**

18. 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.

19. 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.

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<sup>1</sup> Such agreement may also be made in instances of *force majeure*.

**Regular dialogue between the DSB and the Appellate Body**

20. 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, including in relation to implementation of this Decision, in a manner unrelated to the adoption of particular reports.

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

22. 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.

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