



**General Council  
9-11 December 2019**

## **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.

---

<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.

---