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**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)**

TUESDAY, 15 OCTOBER 2019

***Introductory Remarks***

1.1. Thank you, Chair. I am pleased to have this opportunity to report to you, for the fourth time, and in so doing, take stock of where we stand in the Informal Process and my own consultations at this moment in time.

1.2. My previous report to the General Council was in July. At and since the July meeting, I have received useful feedback from Members and work has continued in the Informal Process.

1.3. As requested by the Chair of the General Council, I will therefore provide you today with an update on developments in the process since we have last met.

1.4. It should be read in conjunction with my reports to the General Council on 28 February, 7 May and 23 July, which were issued as JOB/GC/215, JOB/GC/217 and JOB/GC/220 respectively.

***Third Report on Informal Process***

**Process**

1.5. 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.

1.6. This included a further small group session - the 10th in that format - on 26 September, as well as a 5th open-ended Informal Meeting on 4 October to ensure transparency and inclusiveness in the Informal Process.

1.7. 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 and convergence elements.

**Substance**

1.8. As you will recall, I presented to the General Council in July a progress report focusing on the points of convergence that I considered could be drawn from the Informal Process.

1.9. I put forward these points of convergence on my own responsibility in line with the purpose of this Informal Process, as initiated by the General Council Chair: namely, to undertake a discussion aimed at seeking workable and agreeable solutions to improve the functioning of the Appellate Body and avoid deadlock come December.

1.10. These points of convergence were and are of course without prejudice to differences that may remain on some issues that we have been discussing.

1.11. Responding to the feedback that I received from Members at and since the July General Council meeting, the process has focussed on developing a concrete instrument for consideration by Members.

1.12. Based on the discussion to date and the proposals that Members have put forward in this Informal Process, my view is that an appropriate form for such an instrument would be a General Council Decision.

1.13. Following my discussions with the Chair, and drawing on Members' feedback, we therefore started looking to frame up such draft instrument based on the points of convergence from JOB/GC/220.

1.14. The draft as presented today - and I understand that copies have been made available to delegations in the room, as a non-paper for reference - contains some adjustments to the JOB/GC/220 'points of convergence' text, resulting from the feedback that I received - both at and since the General Council meeting, including of a linguistic nature. As you may recall, I highlighted these adjustments at the 4 October open-ended Informal Meeting.

1.15. Rather than reading the entire text of the draft instrument to you, I thought I would highlight for you, as I did on 4 October, just the points of adjustment that have been made (i.e. compared with paragraphs 1.13 through to 1.32 from JOB/GC/220):

- First, in the section on 'Transitional rules for outgoing Appellate Body members', ahead of what corresponds to paragraph 1.13, there is a new point, which reads: "Only WTO Members may appoint members of the Appellate Body."
- In what corresponds to paragraph 1.13, at the end of that sentence, the following has been added: "obligated to fill vacancies as they arise."
- In the section on '90 days', in what corresponds to paragraph 1.18, instead of the phrase that "an Appellate Body report needs to be issued no later than [...]", it now reads: "the Appellate Body is obligated to issue its report no later than [...]".
- Then, in what corresponds to paragraph 1.19, a footnote has been added at the end of where it says that "the parties may agree with the Appellate Body to extend the time-frame for issuance of the Appellate Body report beyond 90 days", and the footnote reads: "Such agreement may also be made in instances of force majeure." - and that is to pick up a point that a number of Members raised in a recent proposal.
- Then, on 'Advisory Opinions', in what corresponds to paragraph 1.23, instead of saying, as it previously did, "should not be ruled or decided upon", it now says "may not be ruled or decided upon".
- And then, in what corresponds to paragraph 1.24, after the word "necessary" and before the words "to resolve the dispute", an additional phrase has been included, which reads: "necessary to assist the DSB in making the recommendations or in giving the ruling provided for in the covered agreements in order to resolve the dispute".
- And finally, on "Regular dialogue between the DSB and the Appellate Body", in what corresponds to paragraph 1.30, an additional phrase has been added after the word "issues" and before "in a manner unrelated to the adoption of particular reports", it now reads: "on issues, including in relation to implementation of this Decision, in a manner unrelated to the adoption of particular reports".

1.16. Taking account of Members' feedback, these are the changes that I have applied to the substantive part of the draft, at this point.

1.17. As a draft General Council Decision, there is of course also some Preambular language. In that Preambular language:

- There is a reference to what the General Council does, i.e. conducting the function of the Ministerial Conference in the interval between its meetings pursuant to paragraph 2 of Article IV of the WTO Agreement.
  - As is common in such decisions, the General Council is having regard to paragraph 1 of Article IX of the WTO Agreement.
  - And, because of the context of our work in this Informal Process, the General Council is mindful of the work, which has been 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.
  - The General Council also recognizes 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.
  - And finally, it states that the General Council desires to enhance the functioning of that system consistent with the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).
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1.18. So, Chair, this is how I see the draft instrument at this point.

1.19. I am putting it forward for Members' consideration, on my own responsibility as Facilitator, based on the proposals submitted by Members and the extensive discussion in the Informal Process, as well as the feedback on the points of convergence that I have received since July.

1.20. It is now up to Members to see how they wish to take this matter forward.

1.21. In considering the draft General Council Decision there are a few observations that, in my view, may be relevant.

1.22. As I noted above, the purpose you set for this Informal Process Chair is to undertake a discussion aimed at seeking workable and agreeable solutions to improve the functioning of the Appellate Body and to avoid deadlock come December.

1.23. It may seem tautological, but a solution to improve the functioning of the Appellate Body can only have effect if there is a functioning Appellate Body for it to apply to. So logically, the adoption of such a General Council Decision should be accompanied by an instruction from the General Council to the DSB to launch the selection process to fill vacant positions.

1.24. As was observed in July, the adoption of a Decision such as that attached – based as it is on the points of convergence from JOB/GC/220 – would constitute a shared assessment by Members that the Appellate Body has, in some respects, not been functioning as intended under the DSU.

1.25. Such a Decision would have implications for the actions of the Appellate Body, but it also carries implications for how Members look to use the Appellate Body.

1.26. To take such 'reset' action, Members will need to have sufficient trust and confidence in each other that they will work together to implement any such Decision in the coming years.

1.27. Building that trust and confidence is an urgent task.

1.28. Even if action was taken today, the time required to conduct a selection process is such that the Appellate Body will inevitably experience a 'technical dip' (i.e. it will fall below the number of members needed to hear a new appeal) as of 11 December. The urgency now is to take action to avoid that situation becoming material for Members in resolving a dispute.

**Concluding Remarks**

1.29. As with my previous reports, this report will be issued in the JOB/GC-series, with the draft General Council Decision annexed to it.

1.30. I continue to stand ready to assist the Chair of the General Council and Members, in my capacity as Facilitator, as may be required.

1.31. *Thank you.*

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## **ANNEX**

### **DRAFT GENERAL COUNCIL DECISION ON FUNCTIONING OF THE APPELLATE BODY**

*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;

*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 Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU");

*Decides* as follows:

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

Only WTO Members may appoint members of the Appellate Body.

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.

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.

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.

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.

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**

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.

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.

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

### **Municipal Law**

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

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.

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**

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

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 ruling provided for in the covered agreements in order to resolve the dispute.

### **Precedent**

Precedent is not created through WTO dispute settlement proceedings.

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

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'**

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.

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**

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.

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

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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