Note

Appellate Body Deadlock at the WTO: State of Play and Pragmatic Way Forward

By Yasmine Ismail

Summary

The Dispute Settlement Mechanism of the World Trade Organisation is facing the most serious challenge since its creation in 1995. In September 2018, the Appellate Body (AB), designed to have a total of seven members, had come down to a total of three members, the minimum required to form a panel. The United States continues to object to the appointment of new AB members since 2016 to date, criticizing the AB and raising concerns about exceeding the limits of its functions. Several Proposals have been tabled and an informal process was initiated in December 2018 to address the US concerns in an attempt to resolve this deadlock before the departure of two more AB members in December 2019 and facing a paralysed AB. This paper outlines the state of play of the AB deadlock discussions and the proposed solutions, exploring areas of convergence for a pragmatic way forward.

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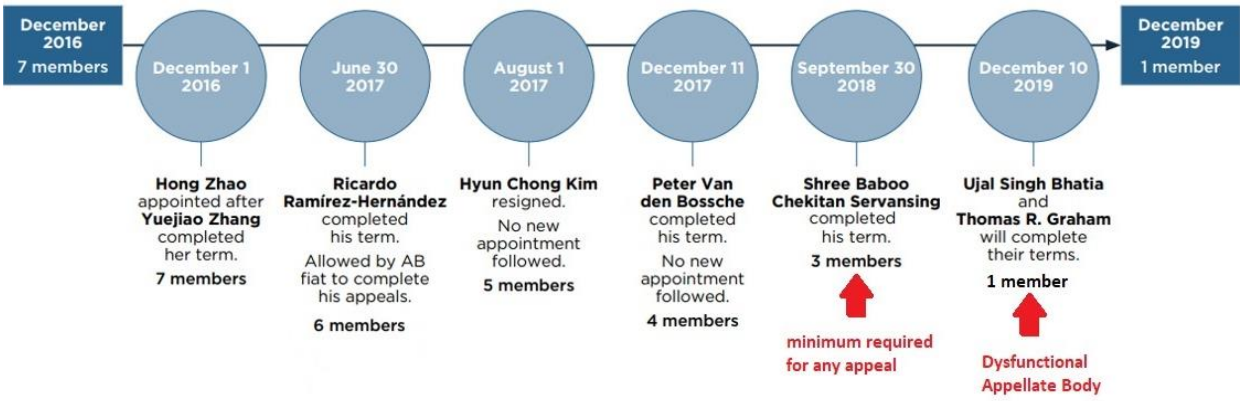
Background

Since its inception in 1995, the Dispute Settlement Mechanism (DSM) has been considered the most effective WTO tool and has earned a reputation as the "crown jewel" of the global trading system[1]. It has managed to resolve an impressive number of trade disputes. As of the beginning of 2019, it had received nearly 580 disputes on behalf of WTO members and had issued more than 350 rulings, with 2018 marking its most active year to date[2].

Today, the DSM is heading towards an imminent Impediment. For the past few years, the US officials have been blocking appointments of AB members expressing several concerns that need to be addressed to allow replacing leaving members. In September 2018, the number of AB members had come down to three, the minimum required to form an appeal panel. With two more AB members retiring in December 2019 and failing to hire at least two new members before that, would lead to a dysfunctional AB (See figure 1).

Figure 1: Timeline for the Appellate Body composition and imminent deadlock, December 2016 to December 2019



Source: Peterson Institute for International Economics, Policy Brief 18-5, March 2018 (amended by author)
https://piie.com/system/files/documents/pb18-5.pdf

Failure to resolve this crisis runs the risk of returning the world trading system to a power-based system where less powerful players would lose interest in negotiating new rules in absence of a functional adjudicative body to protect and enforce those rules. Realising what's at stake, a number of proposals addressing the US concerns have been communicated in the WTO and an informal process to resolve the AB deadlock was launched in September 2018 by the General Council.

[1] Payosova, T. C. Hufbauer, G. J. Schott, J. (2018), 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', *Policy Brief 18-5* : Peterson Institute for International Economics, https://piie.com/system/files/documents/pb18-5.pdf

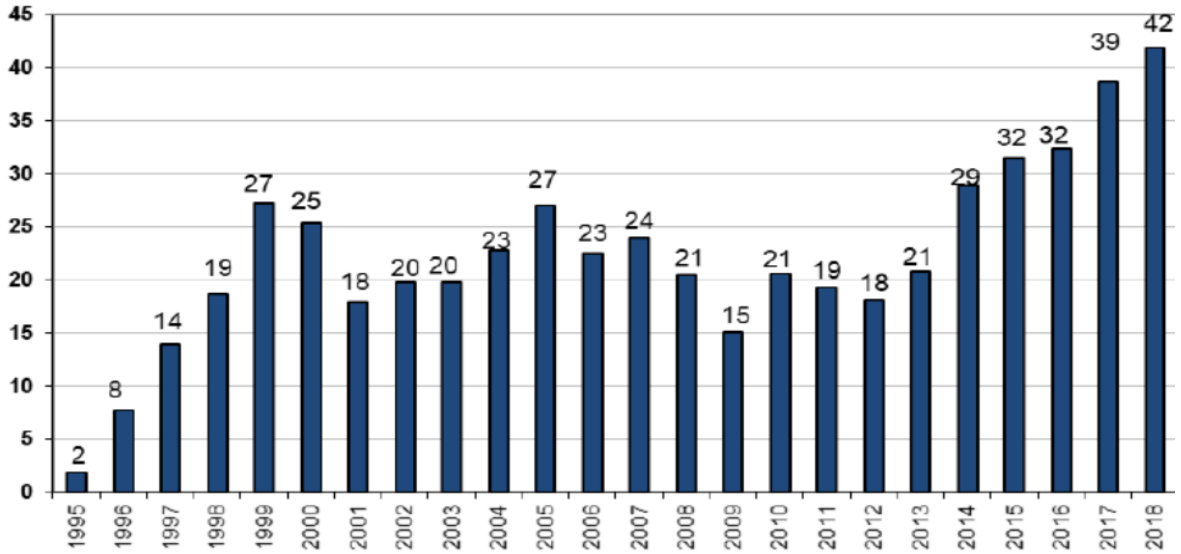
[2] https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

This paper aims to present the status of the AB deadlock and the actions taken within WTO to prevent its paralysis. It starts by laying some key facts and figures showing the increasing level of activity the DS has reached in the recent years and identifying the frequent users of the mechanism from developed and developing countries. Thus, making the case for the fact of its centrality in the World Trading System. The paper, then outlines the concerns expressed by the US officials with regard to the functioning of the DS mechanism, the AB in particular. It tracks the progress of the Informal Process on matters related to the functioning of the AB, launched by the General Council in September 2018 to discuss US concerns and avoid a disabled AB by December 2019. Finally, it maps and compares the various tabled proposals, while attempting to link those to the interests of the developing countries and to identify a suitable solving track.

Increased Dispute Settlement Activity and Caseload: Facts and Figures

On the occasion of the 12th Annual Update on WTO organised by the Graduate Institute in Geneva on 10 April 2019, Ambassador Sunanta Kangvalkulkij (Thailand), Dispute Settlement Body (DSB) Chair for the year 2018 and 2019 General Council Chair highlighted that the DSB levels of activity for the year 2018 reached its highest, since its inception in 1995, with an average of 42 active cases/disputes[3] each month[4]. Taking a closer look at the recent WTO statistics on DSB activity, it is found that the average of monthly active disputes handled by the DSB has been increasing since 2012 when there were only 18 active disputes. (See Figure 2).

Figure 2: Average of monthly active disputes, 1995 - 2018



Source: WTO, Dispute Settlement activity – some figures, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm

[3] Active cases are where a panel or arbitration has been composed and where preparations are ongoing for the finalization of a panel arbitration or AB report.

[4] https://www.wto.org/english/tratop_e/dispu_e/sunata_19_e.htm

Such level of activity can be interpreted by an increase in new filed cases (requests for consultations) by WTO members. The number of requests for consultations have reached 38 requests in 2018 exceeding significantly the number of requests submitted in the past five year (See Table 1). But it is also the year with 'the most requests for consultations since 1998'[5]. It is also worth mentioning that the number of panels established by the DSB in 2018 have reached its highest since the creation of the DSB with 28 panels established. What is also significant is the increase of number of appeals with 10 appeals notified in 2018, also the highest number reached since the year 2000.

However, new cases filed or requests for consultations are not the only explanation. Figure 2 shows that the DSB has maintained relatively high average number of active disputes per month in the past five years while the number of new requests were much less than in 2018 (See table 1). For example, only 17 requests for consultations were filed in 2017, while the average of monthly active disputes for this year reached 39 cases/month. This reveals that the DSB is facing an increase in pending caseload (See Figure 3) as cases tend to take much longer to conclude. Reasons behind this can be subject for a separate paper, however on top of these comes the type of cases, their increasing complexity and the lack of human resources[6]. When it comes to the AB, the caseload is becoming more and more of an issue. The AB is recently dealing with an increasing demand for its services since 2013 while unable to appoint new judges since 2016, leading to a significant increase in pending AB proceedings per month in 2017 and 2018 (see Figure 4)

Table 1: Number of requests for consultations, Panels established, Appeals and disputes covered 2012-2018

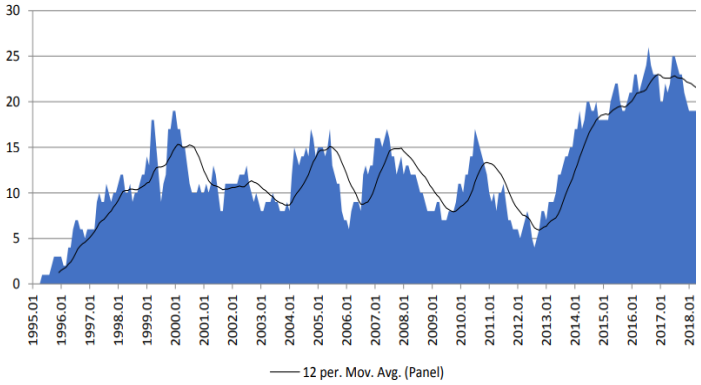
Action	2012	2013	2014	2015	2016	2017	2018
Requests for consultations	27	20	14	13	17	17	38
Panels established by DSB	11	12	13	16	8	10	28
Number of disputes covered by panels established	13	14	13	18	8	10	28
Appeals notified	4	1	6	6	7	7	10
No of disputes covered by Appeals notified	5	2	11	6	7	10	10

Source: WTO, Dispute Settlement activity – some figures, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm

[5] https://www.wto.org/english/tratop_e/dispu_e/sunata_19_e.htm

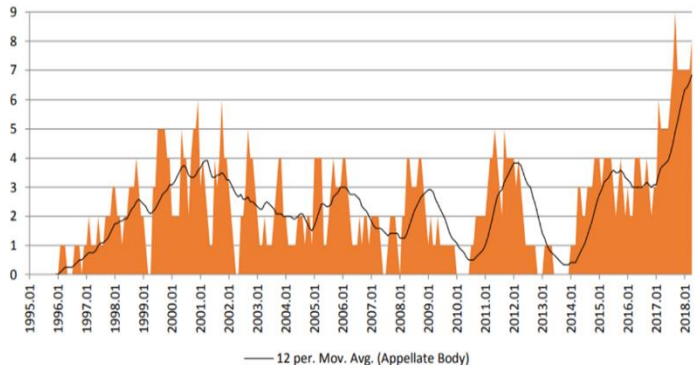
[6] Pauwelyn J. and Zhang W. (2018), 'Busier than ever? A data-driven assessment and forecast of WTO caseload', *CTEI Working Paper*, Geneva : Graduate Institute of International and Development Studies: Geneva, p.3. https://repository.graduateinstitute.ch/record/296010/files/CTEI%202018-02.pdf

Figure 3: Pending WTO Panels/Month



Source: Pauwelyn J. and Zhang W. (2018)

Figure 4: Pending AB Proceedings/ Month



Source: Pauwelyn J. and Zhang W. (2018)

One can conclude from the above that the WTO dispute settlement mechanism has witnessed increasing workload as well as complexity of cases, particularly in more recent years, demonstrating its need, relevance and use by Members.

Frequent Users of the Dispute Settlement and Their Composition

According to recent statistics, the US and the European Union (EU) remain by far the biggest users of the system, followed by Canada, China, India and Brazil. It also shows, that out of the ten most active users, four are defined as developed countries (US, EU, Canada and Japan), while the other six are self-declared as developing countries. Table 2 below shows who the most active users of the dispute settlement system are, and how often they have used it as complainants and as respondents.

Table 2: The 10 most active users of the DS mechanism from 1995 till end of2017[7]

Member	Complainant	Respondent
United States	115	134
European Union	97	83
Canada	38	22
China	15	39
India	23	24
Brazil	31	16
Argentina	20	22
Japan	23	15
Mexico	24	14
Repub. Of Korea	17	16

Source: WTO, Dispute Settlement Activity in 2017, Annual Report 2018, p. 30. Retrieved from: https://www.wto.org/english/res_e/booksp_e/14_anrep18_disputesettlement_e.pdf

[7] The order in the table is based on the total number of cases where the member state has been either complainant or respondent.

The WTO's self-classification system has given rise to a broad and heterogeneous group of developing countries. At one end of this category, we find high income countries such as Argentina and Korea. At the other end, the same group comprises with very low per capita income and GDP. These countries have very different levels of development, market size and foreign trade interests. They also have hugely diverse experience of participation at WTO DSM as some of them have participated actively, while others have had a minimal or no DSM participation experience. So, in attempt to evaluate the experience of this wide group of developing countries with the DS of WTO, it was thought by a recent study to incorporate the World Bank classification of middle-income countries (MICs), as it groups those countries into upper MICs and lower MICs. As some MICs have recently risen faster than the rest of the world and have shown increasing enthusiasm for creating new market opportunities and defending domestic policies using WTO DSM[8].

Table 3 illustrates the total number of times some of the most active DSM users among MICs have participated as a complainant, respondent and third party, throughout the period from January 1995, till January 2017. As per the most recent WB country classification[9], this list includes: 7 Upper MICs: (China, Brazil, Mexico, Thailand, Turkey, Guatemala, Ecuador and Peru) and 6 Lower MICs, on top of them is India, but also includes: Indonesia, Honduras, Philippines and Vietnam. It clearly ranks the leading developing countries, Brazil, India and China (BIC), as the top three users of DSM among MIC countries, with Mexico and Thailand following the trail of participation.

Table 3: Participation of middle-income countries at WTO DSM for the period from January 1995 till January 2017

Country	Complainants	Respondents	Third Party	Total Participation
China	15	39	135	**189**
India	23	24	123	**170**
Brazil	30	16	106	**152**
Mexico	23	14	80	**117**
Thailand	13	4	72	**89**
Turkey	3	9	71	**83**
Guatemala	9	2	36	**47**
Ecuador	3	3	33	**39**
Indonesia	10	14	17	**41**
Honduras	8	0	26	**34**
Peru	3	5	19	**27**
Philippines	5	6	14	**25**
Vietnam	3	0	25	**28**

Source: Bahri, A. (2018). Public Private Partnership for WTO Dispute Settlement Enabling Developing Countries, p.22.

It is worth noticing that most of the countries listed including whether Upper or Lower MICs, have been relatively more active in joining the disputes as third parties, as compared to participating as complainants or respondents. In the 11th Annual Update on WTO Dispute Settlement event, Ambassador Junichi Ihara of Japan, 2017 Chairperson of the DSB, stated that more and more Members participate in the DS process as third parties: the average number of third parties to each dispute has increased from 3 in the first years of the WTO to 12 in 2017[10].

[8] Bahri, A. (2018). *Public Private Partnership for WTO Dispute Settlement Enabling Developing Countries*, Cheltenham: Edward Elgar Publishing, p.21-22.

[9] https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups

[10] https://www.graduateinstitute.ch/sites/default/files/2018-11/Speech%20by%20H.E.%20Ambassador%20Junichi%20IHARA%20-%2011th%20Annual%20Update%20of%20WTO%20Dispute%20Settlement%20-%20Thursday%203%20May%202018.pdf

Ambassador Sunanta Kangvalkulkij (Thailand), also announced in the 12th Annual Update last April, that this average number has risen to 18 in 2018, and that the majority of third parties were developing countries[11].

Third parties to WTO disputes enjoy substantial rights: (i) they can be physically present in substantive meetings at consultative, Panel and Appellate stage; (ii) they can deliver written and oral submissions during the first round of litigation; (iii) they can receive the first submissions filed by the complainant(s) and respondent(s); and (iv) they can be granted additional rights on a case-by-case basis. Developed countries and the top users of the system have realised its importance and participated frequently. As for the interest of developing countries in the third party provision, it can be explained by the fact that it allows to comprehensively observe dispute settlement proceedings and to utilise this experience of observation to expand the understanding of WTO laws and dispute settlement system in a cost-effective manner: learning through observation[12].

One can conclude, from tables 2 and 3, that developed countries' participation in the system remains much higher than of developing countries. However, the increasing participation of developing countries as third parties reflects their understanding of the importance of the DSM and how it can be key in ensuring safeguarding the growth of their markets and economies, as it is now for countries like, China, India and Brazil. But the participation benefits come at a cost and these costs may not be equally affordable by all WTO members.

US Concerns: A Series of Statements but no Tabled Proposals (yet)

The United States is at the top of the DS system active users. Among WTO members, the United States has been a complainant in most dispute cases[13]. Since the system was established in 1995, the US was involved as a complainant for 123 disputes, a respondent in 153 cases and a third party in 150 cases[14]. Which makes a total of 426 disputes involving the US out of 583 disputes brought to the WTO to date[15]. According to the US trade representative, among US WTO disputes through 2015 the US largely prevailed on 'core issues' in 46 of its complaints and lost in 4. Whereas as a respondent the US lost on core issues in 57 cases and won in 17[16].

US trade representatives have been expressing a series of concerns regarding the DSM and the AB practices. And since 2016, they have been blocking the appointments of AB judges contending that the DSM has procedural shortcomings and that the AB has exceeded its

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11 https://www.wto.org/english/tratop_e/dispu_e/sunata_19_e.htm

12 Bahri, A. (2018). *Public Private Partnership for WTO Dispute Settlement Enabling Developing Countries*, Cheltenham: Edward Elgar Publishing, p.22,

13 Isaacs, C. D., F.Fefer, R., and F.Fergusson, I. (2019). *World Trade Organization: Overview and Future Direction*. Washington: Congressional Research Services. P. 20. https://fas.org/sgp/crs/row/R45417.pdf

14 https://www.wto.org/english/thewto_e/countries_e/usa_e.htm

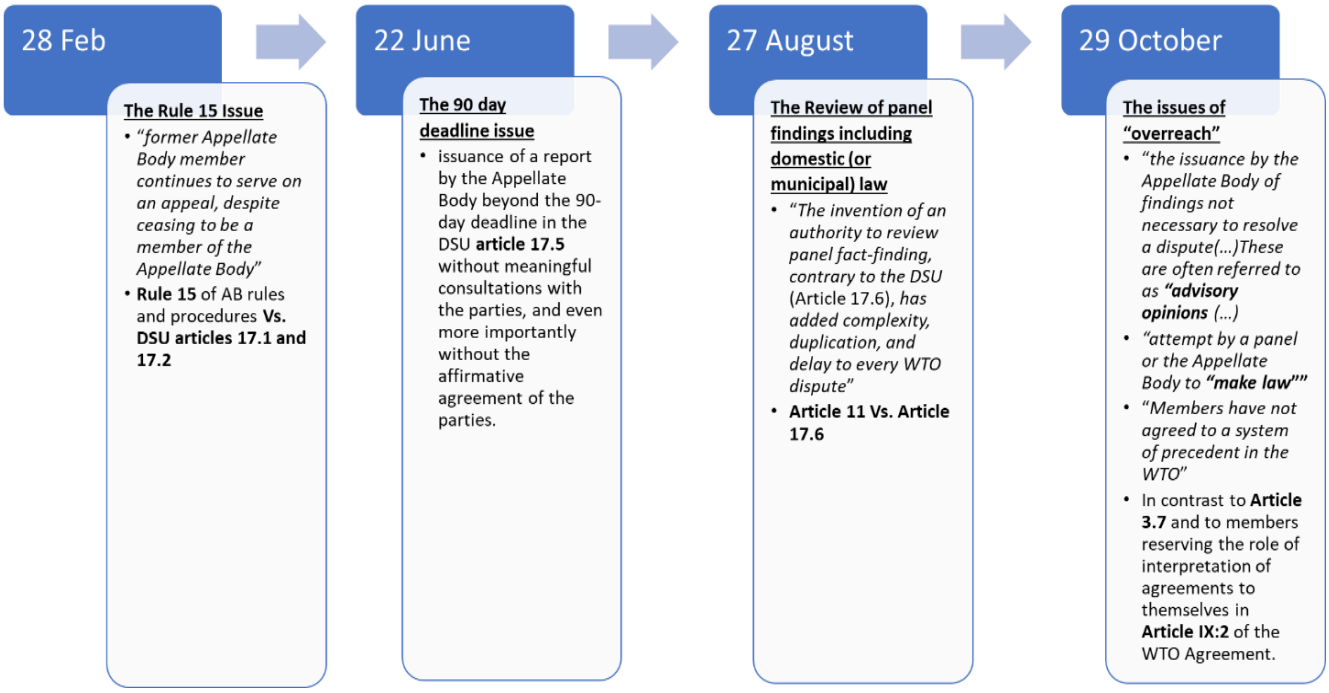
15 https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm

16 https://ustr.gov/sites/default/files/enforcement/spanshot/Snapshot Dec9 fin.pdf

mandate in deciding cases. On top of the US concerns come the following: i. the AB exceeding the 90 days deadline to issue its report; ii. the Rule 15 issue of the AB rules and procedures and AB judges continuing to serve on appeals despite the end of their term; iii. and other issues that are called issues of 'overreach' or of 'Judicial Activism', these include among others: the review of panel findings, providing advisory opinions… etc.

Figure 5 below, presents the concerns as expressed by the US representatives in almost every DSB meeting where a launch of replacement procedure for outgoing AB members is proposed during the year 2018. Based on those repeated reproaches, various countries have formulated their proposals now tabled to reform the Dispute Settlement Understanding (DSU) and subject to discussions to seek convergence. The US has not tabled any proposal of its own nor back one of the existing tabled proposals to date, which means that the chances of a breakthrough remain very little. However, they announced engaging in the informal process discussions. It is also worth mentioning that most disputes initiated by the US between 2016 and early 2019 remain in the consultation or panel stages and have not been decided[17].

Figure 5: Concerns expressed by the US during DSB meetings in 2018



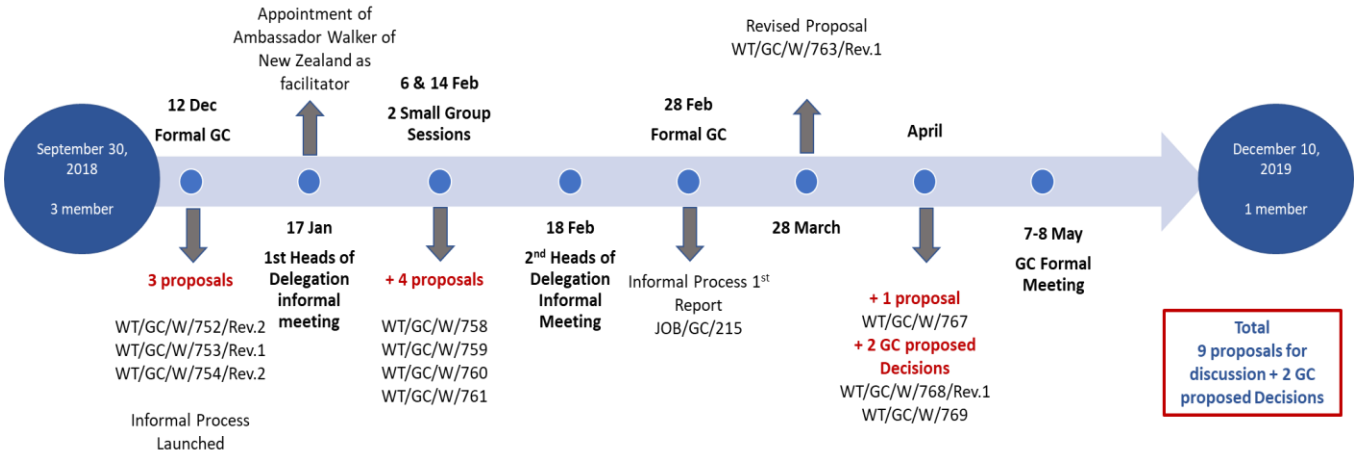
Source: Developed by the Author from US Statements in DSB meetings of 28 Feb, 22 June, 27 August and 29 October 2018

[17] Isaacs, C. D., F.Fefer, R., and F.Fergusson, I. (2019). *World Trade Organization: Overview and Future Direction*. Washington: Congressional Research Services. P. 20.

Initiation and Timeline of the WTO Informal Process Related to the Functioning of the Appellate Body

In September 2018, Judge Shree Baboo and Judge Shekitan Servancing have completed their terms, and the number of the AB judges came down to 3. The minimum number of judges required for forming a panel. Countries started proposing solutions to avoid a dysfunctional AB that threatens the efficiency of the DS system. The General Council of 12 September 2018 decided to establish an informal process to stimulate discussions over different proposals and seek solutions. Figure 6 below presents a timeline that tracks the progress made since the launch of the informal process to date. It is followed by a matrix that shows the developed and developing countries who filed each proposal as well as proposed General Council Decision (Table 4).

Figure 6: Timeline of Informal process progress and proposals until May 2019



Source: Developed by the author from information available on WTO website

Table 4: Proposals concerning the Functioning of the AB and relevant submitting Countries

Proposals	Date of Communication	Submitting Countries		
		Developed	Developing	LDCs
WT/GC/W/752/Rev.2	10 Dec 2018	European Union, Canada, Norway, New Zealand, Iceland, Switzerland, Australia	China, India, Republic of Korea, Singapore, Mexico, Costa Rica, Montenegro	-
WT/GC/W/753/Rev.1	10 Dec 2018	European Union	China, India, Montenegro	-
WT/GC/W/754/Rev.2	11 Dec 2018	Australia, Canada, Switzerland	Singapore, Costa Rica	-
WT/GC/W/758	1 Feb 2019		Honduras	-
WT/GC/W/759	1 Feb 2019		Honduras	-
WT/GC/W/760	1 Feb 2019		Honduras	-
WT/GC/W/761	1 Feb 2019		Honduras	-
WT/GC/W/767	28 Mar 2019		Brazil	
WT/GC/W/763/Rev.1	8 Apr 2019		Separate Customs Territory of Taiwan (Chinese Taipei)	-
WT/GC/W/769	25 Apr 2019		Thailand	-
WT/GC/W/768/Rev.1	26 Apr 2019	Japan, Australia	Chile	-

Source: Developed by the author from information available on WTO documents websiteConcerns and Proposed Solutions in the Informal Process in Light of the On-going DSB Special Session to Review, Improve and Clarify the DSU[18]

The first-time members agreed to undertake a full review of DSU was in 1994 but members couldn't meet the set deadline of year 1998. The second time was in 2001 at the Doha Ministerial Conference (MC) where Members agreed to enter negotiations to improve and clarify the DSU. Those negotiations are still ongoing under the track of an open-ended Special Session of the DSB (DSB-SS) with no specific end date. The DSB-SS covers 12 thematic categories: third party rights; panel composition; remand; mutually agreed solutions; strictly confidential information; sequencing; post- retaliation; transparency and amicus curiae briefs[19]; timeframes; flexibility and member control. The informal process is the third that members have initiated in 2018 to address the US concerns and is taking place under a separate track from the DSB-SS[20].

Unlike the on-going open-ended negotiations, the informal process carries an informal "in-built deadline" as it aims to avoid a semi-paralysed DS mechanism end of this year[21]. That

[18] See Annex.
[19] *Amicus curiae* briefs are submissions made to a panel or AB usually by civic organisations not parties to the dispute, but who consider they have a systemic interest in the issue.
[20] Maonera, F. (2018). *The Review, Improvement and Clarification of the WTO Dispute Settlement Understanding*. Geneva: CUTS International. p.6-7.
[21] Ibid. p.9.

said, this process can be considered an opportunity to realise progress on issues in common with the DSB-SS agenda and to advance some of the developing countries interests to enable them to have increased and better access to DSU mechanisms and tools. Annex to the Note maps the different solutions proposed under the informal process, highlighting lead countries of these proposals. The last column on the right attempts to match these proposals with ones made under the DSB-SS for DSU review and clarification.

A Pragmatic Way Forward for an Early Solution to AB Deadlock

Members had set some key principles for the DSB-SS negotiations such as that: the improvements and clarification should be realistic, necessary and achievable, should do no harm to the operation and should benefit the entire membership and the system. Those principles remain very relevant to the on-going informal process related to AB and should continue to guide the discussions about the AB future. Keeping these principles in mind to analyse the concerns raised and their respective proposed solutions can lead to the following pragmatic way forward to unlock the AB deadlock:

The 90 days deadline issue:

Article 3.3 of the DSU stresses the importance of the "prompt settlement of situations… for the effective functioning of the WTO", given that it is sought that the dispute settlement system helps "ensuring security and predictability to the multilateral trading system". This is even more relevant nowadays, where unsolved trade disputes and disagreements are pressuring the system and nearly leading to its paralysis. The original proposition under the DSB-SS review process in this regard was to further shorten the deadlines to speed up the process and reduce the costs of trials. While some of the proposals mentioned in the recent informal process for AB are pro amending the DSU to increase the deadlines such that can be met by the AB given its workload.

A pragmatic approach can be pursued to avoid doing harm to the operation and the system, whether by shortening the deadline without ensuring the capacities needed by the AB and the DSB are provided, or by increasing the deadline and slowing down the reach of a settlement. In fact, the US complaint about the AB exceeding the deadline, was sympathetic to AB's caseload and acknowledges the fact that some cases need more time for study. What the US is reproaching is the AB not following what they referred to as a 'long established standard practice of consulting and obtaining the parties' consent where it considered it could not meet the 90-day requirement'[22]. Including this standard practice in an agreed guiding principle could be an intermediate step until more radical solutions can be taken like reconsidering the deadlines while taking into consideration developing countries' needs and lack of capacities to ensure the amendment will not do harm to members or increase inequality amongst them.

[22] https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf

Rule 15 and "Issues of overreach" or "Judicial Activism":

Quoting from Ambassador Walker, in his report dated 28 February 2019, as facilitator of the informal process,: 'overreach is potentially the most complex aspect of this process and that, depending on the scope of issues delegations identify and the type of solutions proposed, identifying solutions in this area could take some time'[23]. Issues of overreach can behold several sub-issues, like: AB review of findings, mobilising interpretations, establishing precedents… etc. Again, pragmatism is needed due to the time constraint. Members should focus their discussions on the achievable solutions in the short term. For example: Providing a guideline that clarifies limits of retired AB judges' service on ongoing appeals. But also confirming AB judicial limits in DSU, utilizing some of the existing procedures - like the authoritative interpretations by the members - and sketching a clear procedural pathway for it in relation to the AB. Finally, the idea of an annual meeting between the AB and WTO Members to discuss AB reports and members' concerns of AB over-reach could also be relevant and may help establish a new "standard practice".

The approach and tools of reform

Given the imminent risk, one cannot be optimistic that a comprehensive General Council decision amending articles of the DSU will be achievable within just few months. Moreover, the informal process was initiated to address the US concerns who sees the problem not in the DSU, but in the non-respect of DSU rules. Hence, a combined and incremental approach may be the more realistic and pragmatic at such a time. For example, agreeing on some guiding principles where necessary articles of the DSU are clarified, but also where the efficiency of the AB is promoted, will not do harm to the system, will reassure the concerned members and will not stop a possible step two where suggested amendments to the DSU can be revisited for a GC decision.

[23] JOB/GC/215

Annex: Map of Proposed Solutions to Issues of Concern Proposed to Date in the Informal Process, and Proposals on Some Similar Issues under the DSB-SS Review Process:

	EU/China	Canada/Australia/ Switzerland	Honduras	Chinese Taipei	Brazil	DSU Review SS[24].
	The 90 Days Rule					
	Ensuring Respect of AB process deadline					
Consultations with parties if deadline can't be met	**Amend Article 17.5 to read as follows:** 'As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the AB circulates its report. In fixing its timetable the AB shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the AB considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report**. In no case shall the proceedings exceed 90 days, unless the parties agree otherwise on a proposal from the AB.** The parties shall give sympathetic consideration to such proposals. In the absence of such agreement of the parties, if the AB considers that it cannot submit its report within 90 days it shall, after consulting with the	**Develop a guidance related to consultations with parties when the AB is unable to meet its deadline.**	**Modify the rule to allow:** - the dispute parties in consultation with the AB, to agree upon a time limit failing which 90 days may be applied as a default time-frame. - disputing parties to agree, in consultation with the AB, upon a time limit for, failing which the AB may decide the required time limit.	Members re-confirm that **the timeframes set out in Article 17.5 of the DSU are mandatory.** Nevertheless, in consideration of practical needs, Members agree that these timeframes could be extended on the agreement of the disputing parties.		No specific proposal was developed regarding the 90 days deadline for issuing AB reports, however, **it was suggested to consider extending the timeframe for completing appellate proceedings and/or agreeing on terms respectful of both parties' interests** and the independence of the AB under which this timeframe could be exceeded in exceptional circumstances. The proposal was more in general to shorten timeframes at specific stages of the dispute settlement proceedings in order, to speed up the process and reduce the amount of resources expended on settling disputes.

[24] TN/DS/27

	parties, propose them specific procedures or working arrangements and take appropriate organizational measures, without prejudice to the procedural rights and obligations of the parties under this agreement, with a view to enabling the AB to submit its report within that period. The parties shall cooperate to enable the AB to circulate its report within 90 days					
Amend the delay in DSU			a more generous period (e.g. 120 days) or a requirement that appeals be processed '*as quickly as possible'*.		The deadlines established under Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) are binding and accord no discretion to the AB to issue reports outside the 90-day deadline set out therein.	
Allow AB to set a suitable deadline			the AB itself sets a time limit for each case.			
Require AB to comply to 90 days rule but adopt a flexible method of days calculation			the methodology of calculating the 90-day timeframe can be modified to refer to **working days only, and/or exclude from the 90 days, the time required for translation of AB report**.			
Extend the period of filing an appeal only when AB is seized with large number of cases			**subject to agreement of the parties.**			

	Ensuring AB Efficiency					
Increasing the Capacity of AB	- **<u>Amend Article 17.1 to read as follows:</u>** "A standing AB shall be established by the DSB. The AB shall hear appeals from panel cases. It shall be composed of ~~seven~~ nine persons, three of whom shall serve on any one case. Persons serving on the AB shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body." - **<u>Amend Article 17.3 to read as follows to add:</u>** They **shall not engage in any other occupation** of a professional nature. - **<u>Amend Article 17.8 to add</u>**: "The employment conditions of persons serving on the Appellate Body shall reflect their **full–time employment** as members of the Appellate Body."		The capacity of the AB to deal with a greater caseload may be increased through various means.			
Procedural steps to help the AB meet the 90-day or otherwise agreed time limit			- Disputing parties, in consultation with the AB, could agree whether to extend the 90-day as soon as a party expresses its intention to appeal and at the latest 30/45 days after the circulation of the panel report. - Empower the AB, in case of no agreement, to suggest and eventually to impose measures to enable it to meet the stipulated deadline, such as: i. indicating to			

			delete issues from the scope of the appeal and/or extending the time-frame; ii. impose limitations on the length of written submissions, number of hearings, etc; iii. issuing shorter reports by narrowing extent of issues analysis, cutting out unnecessary or repetitive information, reducing the extent to which party submissions are presented (this would be facilitated if parties' submissions were public or at least accessible to the WTO Members). - Introducing Remand (however it may lead to the extended length of the overall process in general. - Modify the practice of collegiality in a way that increases delays.			
	Dealing with reports circulated after expiration of duration limit					
Rectifying the delay			- **party's ex post-facto** by way of deeming letters to the DSB recognizing the delivery of the Report within the stipulated timeframe. - **The report may be subject to a positive consensus procedure for adoption.** Such procedure may or may not include the disputing parties' votes. - **The AB may be allowed to demonstrate the existence of 'exceptional or mitigating circumstances'**		At the request of the parties to a dispute, the DSB may decide to deem a report issued beyond the 90-day deadline set out in Article 17.5 to be an AB report circulated pursuant to Article 17.5 of the DSU.	

			that caused the delay. This can be operationalised via two steps procedure: i. justification is considered sufficient; ii. If not, seeking further review or higher authority approval (suggesting that the period of the review would be 10 days from the date of expiration and to be conducted by the Director General and/or a group of 3 chairpersons from the DSB).			
	The Rule 15 (of the rules and Procedures)					
	Issue of when an AB can serve beyond 4 years term					
Allow AB members to continue the disposition of an appeal after his/her term	**Amend Article 17.2 by adding the following** sentence: "The outgoing person shall complete the disposition of an appeal in which the oral hearing has been held." **(See below under AB independence full amended article)**		**An AB member shall be able to continue to serve beyond their four years term on cases where the oral hearing has occurred or started.** [On a case where a hearing has not been yet, the outgoing AB member should be replaced with an alternate AB member].	**The following transitional rule is suggested:** "a person who ceases to be a Member of the AB may complete the disposition of any appeal to which that person was assigned while a Member, and in which the oral hearing has been held. That person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body"		
Prohibit assigning new appeals to outgoing AB members			**No member of the AB shall be assigned to a new appeal later than 60 days before the final date of his/her term.**			
	Issue of who approves an AB Member can serve beyond 4 years term					

Approval by AB and notification to DSB			The AB can continue to apply Rule 15 subject to approval by the AB and upon notification to the DSB;			
DSB approval by reverse consensus			This would avoid a situation where an AB member who meets the relevant criteria could be blocked by a single WTO Member			
DSB approval			By positive consensus or positive consensus minus the parties of the dispute.	can only be allowed by the DSB, or should be based on transitional rules agreed by the whole WTO Membership (mentioned above)	Only the Ministerial Conference or the DSB may authorize a person who ceases to be a member of the AB to complete the disposition of any appeal to which that person was assigned while a member of the AB.	
	The Review of Panel Findings including Domestic and Municipal Law					
Introduce Remand			**Introduce Remand[25], however this can lead to longer procedure (See proposal above)**			**There is currently no remand mechanism available in the DSU.** **Recent work has allowed important progress toward possible mechanism to allow unresolved issues to be addressed and avoid the initiation of entirely new proceedings:** - the AB would finalize and circulate its report, identifying any issues for

[25] the proposal is that a procedure be introduced to allow the AB to send a case back to the panel for the panel to make additional findings in respect of issues for which the AB believes it needs more factual determination

						which remand would be available; - the AB would be prevented from making findings and recommendations on issues that risk being modified after completion of the remand proceedings; - only the complaining party would have the right to initiate remand, to address only those issues identified by the AB; - the remand panel would make all necessary factual and legal findings and circulate a final remand report; - the remand panel report would be subject to appeal; and - the initial and remand panel and AB reports would be subject to single adoption.
clarify a standard for AB reviews that strictly prohibits dealing with facts, municipal laws, completing the analysis… etc.	**A footnote 7 bis shall be inserted to Article 17.6:** "For greater certainty, the issues of law covered in the panel report and legal interpretations developed by the panel" **do not include the panel findings with regard to the meaning of the municipal measures of a party but do include the panel findings with regard to their legal characterisation** under the covered agreements".	**clarifying the standard of review to be applied by the AB** to panels, especially with regard to factual findings and those related to the operation of domestic law.	**add to the DSU an explicit standard of review for the AB** that would make clear that the AB's mandate is to settle only the specific dispute at issue and interpret relevant provisions accordingly	Members re-confirm that under Article 17.6 of the DSU, the **Appellate Review should be limited to issues of law**. For greater certainty, the 'issues of law' here do not include the panel findings with regard to the meaning of the municipal measures of a Member.	**Descriptions or factual findings,** contained in the factual section of a panel report, issued to the parties pursuant to Article 15.1 of the DSU and possibly modified after the interim review stage, **are not susceptible to appellate review.**	
Allow AB to make an objective			Akin to the obligation on panels under Article 11 of the DSU. A similar provision with	AB should refuse to review any appeals raised under Article 11		

assessment akin to the obligation on panels under Article 11[26] of the DSU			respect to the AB's assessment of the panel's findings and decisions could be included.	of the DSU on the panel's factual findings unless the appellant establishes a prima facie case that the panel committed an egregious error.		
	The Issue of Overreach					
	Unnecessary Findings/Advisory Opinions (Obiter Dictum)[27]					
Mandatory Judicial Economy	**<u>Amend Article 17.12 to read as follows:</u> "**The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding, **to the extent necessary for the resolution of the dispute.**"	**<u>Clarifying</u>** that **only findings that are necessary to achieve the objective** of settling the specific disputes are required.	**<u>modify Article 17.12 to allow limiting</u>** AB to address only appeal claims and legal interpretations developed by the panel, **that are necessary and required for the resolution of the specific dispute**	Members clarify that **Articles 3.3, 3.4, 17.5 and 17.12,** being read together, should mean that the **AB should review issues of law being raised to the extent that they achieve a prompt settlement of the dispute**	To address an issue **pursuant to Article 17.12,** the AB may consider and dispose of the issue to the extent necessary to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. (Also, in **Articles 19.1 and 26 of the DSU.)**	
Prohibition of AB inclusion of advisory opinions			**include a general prohibition or an instruction to the AB, to refrain from including in their opinions *obiter dicta* within the DSU.**		**Article 3.2 of the DSU is not meant to encourage panels or the AB to clarify existing provisions of the covered agreements** outside the context of resolving a particular dispute, **nor to provide opinions** beyond the findings that are	

[26] Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

[27] Obiter dicta can be understood as the expression of general opinions, remarks or statements regarding a case or a legal provision that are unnecessary for resolution of the dispute. They are particularly serious in instances in which they may add or diminish rights and obligations. Obiter dicta is distinct from judicial economy as an obiter dictum could occur even within the appeal claims or legal interpretations necessary for resolving disputes in the form of abstract and unnecessary discussions regarding those claims.

					necessary to assist the DSB in making the recommendations or in giving the rulings in the context of a particular dispute.	
	Precedents					
Maintaining the Status quo while allowing the space for members to express their views on AB reports	**Insert Article 17.15 under a sub-heading "Meetings with the Appellate Body": "**Once a year, the DSB shall meet in the presence of the Appellate Body. At such meetings, any Member may express its views on adopted AB reports. The meetings shall be open to all Members and their conduct shall be respectful of the independence and impartiality of the AB. The DSB shall adopt the rules applicable to such meetings on a proposal from the Chairman of the DSB and in consultation with the Appellate Body".		Members permit the prevailing practice regarding reference and reliance on prior dispute settlement reports.			
Prohibit any doctrine of precedents			expressly prohibiting the AB and Panels from relying on prior reports and/or allow Members in the DSB/General Council to consider on a case by case basis.	**Members confirm that, under the DSU, panel and AB reports do not have binding precedential values.** Findings of a panel and the AB should be based on the covered agreements and the evidence presented in each individual dispute. In that line, prior disputes by panels and the AB may be taken into account by an adjudicator, after proper and independent		

				deliberation, in addressing relevant issues.		
A middle path			- Members decide on the DSB reports by negative consensus and on the question of the legal interpretation in the report, and whether it can form precedent by positive consensus. - Members consider an alternative approach where legal interpretations of the AB take the form of precedent only once they have been repeated a given number of times in similar contexts[28]. - cases where all seven AB members endorse an interpretation in a specific report or on a thematic issue, to refer the relevant report/issue to the DSB for discussion as a precedent. The AB could then be obliged to take note of any substantial disagreement among Members on the correctness of the interpretation.		Panels and the AB are not legally bound by the reasoning and findings of previous panel and AB reports. They should be taken into account where they are relevant to any dispute, if adjudicators find the reasoning in such reports sufficiently persuasive to rely on it in conducting their own assessment of the matter in a dispute.	
	Interpretations/adding to the rights and obligations of members					
Prohibit Judicial Activism and interpretations			**Prohibit judicial activism by deleting article 3.2 or amending it** to refer solely to the clarification of provisions			

[28] In line with the 'rule of reiteration', as it is called in certain civil law countries.

			for the purposes of resolving the current dispute			
Develop mechanisms to allow Members provide binding and non-binding guidance to AB. **Strengthening the mechanism of authoritative interpretations is particularly suggested**		- **holding thematic discussions** of issues that arise in disputes - **allowing for the expression of minority views** in panel and AB reports - **develop a formal** (for these issues) **pathway to "authoritative interpretations":** a decision-making option available **under Article IX:2** in the WTO Agreement but never used, which leads to interpretations that are of general validity for all WTO Members[29].	- **acknowledge the existence of 'constructive ambiguities',** by making a stronger emphasis to the negotiating history and *travaux préparatoires*, as opposed to the text - **applying the principle of *non liquet*[30]** where an ambiguity is found such that judicial law-making is avoided. - Urge a very high level of caution where the claim is such that it may require **alternative methods of dispute settlement rather than legal argumentation**. - **strengthening or revising the mechanism of issuing authoritative interpretations**		**Pursuant to Article IX of the WTO Agreement**, the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements.	There is willingness to look at providing further clarity on the operation of the procedures, in a manner that may assist in applying and administering the rules more efficiently, provided that the independence of adjudicators is maintained. One of the suggestions developing a guidance to WTO adjudicators.
A review mechanism to consider whether the AB has, in a particular case, overstepped its			- **Creating an authority responsible for such review would need to be decided by Members by way of discussions. Possible options could include:**		**The Secretariat should periodically publish a report to highlight and summarize the views and concerns expressed by Members under Article 17.14 of**	

[29] unlike interpretations by panels and the AB, which are applicable only to the parties and to the subject matter of a specific dispute according to the 'customary rules of interpretation of public international law' (Article 3.2 of the DSU).

[30] The term *non liquet* originates in Roman law and means 'it is not clear'. It can be said to refer to a situation in which a competent court or tribunal fails to decide the merits of an admissible case for whatever reason, be it the absence of suitable law, the vagueness or ambiguity of rules, inconsistencies in law, or the injustice of the legal consequences.

mandate			• The Director-General; • The DSB itself; • A group of the three Chairpersons of the General Council, DSB and Trade Policy Review; • A small committee of the General Council or DSB members. - Members would also need to discuss the possible consequences of such body findings.		**the DSU** on AB reports, in particular those relating to issues covered in these guidelines. **The AB shall endeavour to respond to those views and concerns by adapting its practices accordingly.**	
	Appellate Body Independence (Guarantees against future deadlocks)					
Amend article 17.2 of the DSU to set a longer term for AB members, identify a deadline for the launch of selection process before the expiry of a member's term and allow continuation of Member's duty until replaced	- **Amend Article 17.2 to read as follows:** "The DSB shall appoint persons to serve on the Appellate Body for a [six-year/eight-year] ~~four-year term which shall be non-renewable, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot~~. Vacancies shall be filled as they arise. To that end, the Chairman of the DSB shall launch the selection process no later than X [e.g. 6] months before the expiry of the term of office. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term. A			Members re-confirm that the rules as set out in Article 17.2 of the DSU, relating to the term of office and the procedure for appointment and re-appointment of AB members, should be strictly followed.	WTO Members sitting in the DSB have a collective duty to ensure that vacancies in the AB shall be filled as they arise, as provided for in Article 17.2 of the DSU. **The discussed guideline encourages that:** - the selection procedure to fill a vacancy shall be launched by the Chair of the DSB 180 days before the expiry of that member's mandate. - **If a vacancy arises before the regular expiry of an AB member's mandate or as a result of any other situation, the Chair of the DSB shall immediately**	Some of the proposals seek to guarantee the independence of the AB members by proposing that they be appointed for one single longer term so that they don't have to worry about re-appointment even if they deliver rulings that some of the Members may not like

	person serving on the Appellate Body whose term of office has expired shall continue to discharge his or her duties until he or she has been replaced but not longer than for a period of two years following the expiry of the term of office. The outgoing person shall complete the disposition of an appeal in which the oral hearing has been held."				**launch the selection** procedure with a view to filling that vacancy as soon as possible.	
	The mean/methodology of reform					
Amend certain articles and provisions of the "DSU" to be adopted by the General Council	**pursuant to Articles IV:2 and X:8** of the Marrakesh Agreement Establishing the World Trade Organization.	New binding multilateral agreements or significant institutional changes are unlikely in the near term.		The problem is not in the rules but in the enforcement of those rules.		
Alternative more flexible and incremental instruments (Developing a Guideline)		Plurilateral Approach, Developing Guiding Principles… etc.		**Developing guidelines on the future functioning of the AB** while clarifying certain DSU provisions, re-confirmation of the obligations imposed and elaboration on the underlying objective.	**Developing guidelines for the work of the AB and the Panels** while clarifying certain DSU provisions, re-confirmation of the obligations imposed and elaboration on the underlying objective.	
Combined approach			A mix of proposals to amend the DSU and to produce soft law mechanisms and guidelines			

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37-39, Rue de Vermont, 1202 Geneva, Switzerland
geneva@cuts.org ● www.cuts-geneva.org
Ph: +41 (0) 22 734 60 80 | Fax:+41 (0) 22 734 39 14 | Skype: cuts.grc