THE UNIVERSITY of ADELAIDE

POLICY BRIEF 01
MARCH 2019

Andrew Stoler

Institute for International Trade

CRISIS IN THE WTO APPELLATE BODY AND THE NEED FOR WIDER WTO REFORM NEGOTIATIONS

Executive Summary

The Marrakesh Agreement's Dispute Settlement Understanding (DSU) represented a major step forward in trade dispute settlement from the largely ineffective pre-1995 General Agreement on Tariffs and Trade (GATT) system. Under GATT, dispute-settlement panels' establishment was frequently blocked; panels that were established frequently had their reports' adoption blocked by losing parties; timeframes were ineffective; and American dissatisfaction often led to unilateral trade actions implemented pursuant to Washington's s. 301 statute.

The DSU fixed problems with the panel process and supplemented those fixes by creating the seven-member Standing Appellate Body (three of whom are selected to hear an appeal). WTO Members who disagreed with certain aspects of a panel report were now able to lodge an appeal limited to issues of law covered in the report, and the panel's legal interpretations. Adoption of the Appellate Body's ruling is guaranteed unless the Dispute Settlement Body (DSB) decides by consensus not to adopt it. For many years, this system worked reasonably well. But for some time now the US has criticised a number of Appellate Body actions and decisions, and blocked new Appellate Body appointments. There are now just three members remaining, with two of these slated to retire at the end of 2019. At that point, the system will cease to operate, except for any ongoing appeals where Appellate Body Rule 15 permits Appellate Body members whose terms have expired to finish their work on the case in question. No new appeals will be possible.

The American complaints seem justified, and a number of other WTO Members have been sympathetic to the US position. These other Members do not, however, agree with the strategy of blocking new Appellate Body appointments. A complicating factor in all this is that solutions to most of the identified problems would probably require DSU amendments, which must be agreed by consensus. Of course, it is possible the DSB could try to discipline future Appellate Body actions in ways that do not require DSU amendment. But in such a case—and where the Appellate Body, in a subsequent report, nevertheless acts in ways Members consider inconsistent with the DSU—what would be the consequences for the Appellate Body report in question?

In this policy brief we look closely at the US complaints and potential ways of dealing with them, and conclude that resolving the current Appellate Body crisis will likely only be possible in the context of wider WTO reform negotiations.

Background to the Appellate Body

An important reason why the GATT dispute settlement machinery failed to work well was that governments were unwilling to accept that the outcome of the panel process couldn't be appealed in cases where a litigant had serious problems with the panel report. The seven-member Standing Appellate Body, where members served in rotation with four-year terms, solved this problem. But the Uruguay Round negotiators didn't want to give the Appellate Body carte blanche, so included a number of provisions in the DSU limiting the Appellate Body's actions. Most significantly:

- Art 17:6 – "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."
- Art 17:13 – "The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel."
- Art 19:2 – "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

Another intended limitation on panels and ultimately the Appellate Body is the so-called "standard of review" provision found in Article 17:6 of the Antidumping Agreement, which provides:

> (i) "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

In the early years of the WTO from 1995, most disputes (up to about two-thirds) were "settled" in some form or another (or lapsed, etc.), while about two-thirds of those that proceeded to panel and decision stage were appealed to the Appellate Body. In later years, perhaps only about half of the disputes were "settled" early, while now closer to three-quarters of panel decisions may be appealed. In 2018, more disputes were initiated than at any time since the WTO's establishment.

At the time of writing, a total of over 520 disputes have been submitted to the WTO dispute settlement mechanism since 1995. Between 1996 and 2017, the Appellate Body dealt with 176 appeals. The US has been a party to 85 disputes subject to an appeal, 55 times initiating the appeal. Between 2015 and 2017, it prevailed in four out of nine appeals and lost only two.[1]

An important point to make at this stage of the discussion concerns so-called "creative ambiguity" in some of the WTO's covered agreements. Notwithstanding Uruguay Round negotiators' efforts to dot all the i's and cross all the t's, it wasn't possible for all issues on the table to be clearly settled in one direction or another. One example is the interface between the Safeguards Agreement and GATT free-trade-agreement rules. Footnote 1 to the Safeguards Agreement states, with no further elaboration: "Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

Where some things were left unclear because it was too problematic for them to be settled (creative ambiguity), it was never the intent of the governments that forged the WTO that the Appellate Body should insert itself into that situation and interpret provisions that could only be decided by WTO Members through further negotiations. Article 19:2 could not be clearer: the Appellate Body is forbidden to add to, or diminish, the rights and obligations provided in the covered agreements.

American complaints about the Appellate Body

Appellate Body members' term of appointment

AArticle 17:2 is clear that persons are appointed to the Appellate Body by the DSB to serve a four-year term and each person may be reappointed once. There is nothing in the language to suggest the four-year term is to be interpreted as flexible, nor is there a guarantee that, once appointed, a second term should be seen as normal practice. Notwithstanding this hard rule, certain Appellate Body members have continued to work on appeals after their term's expiration. The justification for this is found in Rule 15 of the Appellate Body's Working Procedures, adopted by the group without DSB approval. The US rightly contends that members continuing to work on appeals after their term's expiration undercuts the DSB's authority to decide on Appellate Body appointments.

Additionally, an Appellate Body member's 2017 resignation while working on an ongoing appeal—and without providing the 90-day notice required by the Working Procedures—resulted in that appeal being finally decided by just two members of the division. This raises the issue of whether the Appellate Body acted consistently with art. 17:1.

Review of facts / treatment of municipal law

Article 17:6 clearly states that the Appellate Body is only authorised to review panel reports' issues of law and legal interpretations. The Appellate Body is barred from reviewing reports' factual findings. The US has argued[2] that despite this clear, unambiguous text, the Appellate Body has consistently reviewed, and even reversed, panel fact-finding. It has done so, Washington maintains, under different legal standards that it has had to invent, and has reached conclusions not based on panel factual findings or undisputed facts.

The Americans explain that the Appellate Body has justified its fact reviews by asserting (without legal basis) that there's a "standard of review" applicable for panels in respect of the "ascertainment of facts" under the relevant covered agreements. From this, the Appellate Body considers that, if panels don't live up to their obligations under DSU art. 11—requiring that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case"—it should have authority to review a case's facts. Ignoring art. 11's use of the word "should", the Appellate Body has construed an interpretation that this is a "mandate" and "requirement" for panels; and that "whether or not a panel has made an objective assessment of the facts before it as required by art. 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review"[3].

> The Americans have a strong argument. The DSU is clear and there is nothing in the Understanding's language to suggest the Appellate Body is correct in asserting a right to review panel reports' factual aspects.

A second serious point of contention concerns the Appellate Body's assertion that it has authority to review panel findings on the meaning of a WTO Member's challenged domestic law. The Americans argue that the meaning of domestic law is an issue of fact, while the issue of law in a WTO dispute is whether that fact is consistent with WTO obligations. Supporting their argument, they cite numerous WTO panels that have repeated this proposition[4]. The US notes that, in at least 15 instances, other WTO Members have disagreed with the Appellate Body's assertion that it has the authority to review a panel's factual findings on the meaning of a WTO Member's domestic law.

But the Appellate Body, without justification, has treated the meaning of municipal law as a matter of WTO law, to be decided by the Appellate Body *de novo* in an appeal under DSU art. 17:6. It has been argued that the Appellate Body's expansion of its review authority—contrary to the DSU text—has added complexity, duplication and delay to almost every dispute, as a party to the dispute can now challenge on appeal every aspect of the panel's findings.

Overreaching interpretations, "obiter dicta" and stare decisis

The Americans have long argued that the Appellate Body has wrongly dared to venture into uncharted territory by interpreting provisions that WTO Members left unclear in the texts—often deliberately so, to provide for "constructive ambiguity"—and by delivering opinions

[1] Peterson Institute for International Economics Policy Brief 18-5, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, p. 3 and fn. 23.

[2] US statement in DSB, 27 August 2018.

[3] EC – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS27/AB/R, para. 132.

[4] US statement, 27 August 2018, pp. 15-17.

on issues not necessary to resolve a dispute. In its summary of US concerns in a July 2018 document[5], the European Commission wrote:

> "…the US has formulated a more substantive concern with the "adding or diminishing of rights and obligations" by the Appellate Body in various disputes. This is exemplified by concrete Appellate Body rulings on the following issues: the interpretation of the notion of "public body" under the Subsidies Agreement, the interpretation of the non-discrimination obligation under Article 2.1 of the TBT Agreement, certain interpretations related to safeguard measures (notably on "unforeseen developments"), outcomes in the cases launched by the EU against the Byrd Amendment (giving the proceeds from anti-dumping/countervailing duties to US industry), and on tax treatment for "Foreign Sales Corporations" (that was considered to be an export subsidy). In the view of the US, the findings in those disputes departed from the relevant WTO Agreements, as negotiated."

The Americans also argue that the above situation is made worse by the Appellate Body's position that: its decisions should serve as precedents (*stare decisis*); and panels should follow past Appellate Body decisions absent "cogent reasons". Noting that nothing in the DSU text supports the Appellate Body's position, the US has said that while "Appellate Body reports can provide valuable clarification of the covered agreements, [they] are not themselves agreed text, nor are they a substitute for the text that was actually negotiated and agreed."[6]

Disregard for appeal timeframes

DSU art. 17:5 provides that, "as a general rule", Appellate Body proceedings shall not exceed 60 days, and "in no case…exceed 90 days". In practice, these timeframes are rarely respected. The Americans have argued that cases drawn out far longer raise concerns regarding transparency, inconsistency with "prompt settlement of disputes", and uncertainty regarding reports' validity.

Potential solutions and the broader context

A number of potential solutions to these Appellate Body issues have been raised, and these are discussed below in Annex 1. Before examining them, however, it's appropriate to consider the broader WTO context.

Australia's position in the system

Australia is a respected middle power in the WTO system—a country known for its experienced and honest negotiators, and making or supporting constructive approaches to the system's problems. In fact, Australia has little choice but to follow this approach; it needs the rule-based multilateral system to support and foster its liberal trade regime. Disregard for the system, or its collapse, would be very dangerous for a country like Australia that, although an important trader, is far too small to succeed in an alternative system where "might makes right".

Of course, ministers and government officials in Canberra know this; and because they also know that Australia, by itself, can do little to resolve the issues discussed in this policy brief, they're aware that they'll need to identify and work with other like-minded delegations in a coalition aiming to promote constructive outcomes. Australia also needs to work with delegations that might be outside such a coalition to convince them of why it would be in their interest to support solutions to difficult problems. Australia has done this before, both in the Uruguay Round and since then in the WTO. A starting point is to appreciate that the Appellate Body issues are not likely to be resolved by themselves, but in the context of a broader reform effort.

Consensus decision-making in the WTO

By now, everyone is aware of the fact that decision-making in the WTO is by consensus. Article IX:1 of the Marrakesh Agreement specifies that WTO Members shall continue this practice, and defines consensus as existing where "no Member present at the meeting when the decision is taken formally objects to the proposed decision".

The fact that art. IX goes on to describe how issues shall be decided by voting where consensus can't be reached is immaterial. The voting procedures described will likely never be used, because recourse to voting on any issue would likely lead to the US, and possibly other Members, departing the WTO.

In addition, the Appellate Body crisis must be considered within the DSU context. If resolving the crisis requires DSU amendments, these can only be legally agreed by consensus. More procedural issues will also only be resolvable if WTO Members can reach a consensus on how to reform the system.

[5] *WTO – EU's proposals on WTO modernisation* 5 July 2018, WK 8329/2018 INIT.
[6] *WTO – EU's proposals on WTO modernisation* 5 July 2018, WK 8329/2018 INIT.

The bigger picture

Fixing the Appellate Body problems will clearly require reaching agreement on broader reforms to the WTO system. This was certainly apparent in a statement made by the US representative at his country's December 2018 Trade Policy Review. He cited four main areas of concern with the WTO: 1) problems related to the DSU and Appellate Body; 2) Chinese actions incompatible with the WTO's design; 3) the fact that the WTO's negotiating arm has proven incapable of addressing a flawed approach to developing Member status and issues relevant to the 21st century economy; and 4) certain Members' persistent lack of behavioural transparency. Greater detail on the statement can be found in Annex 2.

The Americans are not alone in their desire to see broader WTO reform. In the EU's extensive treatment of issues in its July 2018 paper[7] cited earlier in this brief, the European Commission presented a detailed discussion of proposals on: 1) WTO regular work and transparency; 2) rule-making in the WTO, including its approach to development; and 3) the WTO dispute settlement system. The paper's main points are reproduced in Annex 3. Canada's paper "JOB/GC/201", on strengthening and modernising the WTO, is another useful example.

Other governments, including Australia's, will likely also have concerns about WTO reform that go beyond the issues discussed in this paper in respect of the Appellate Body. Because an eventual resolution of WTO ills will require a negotiation involving a certain number of trade-offs, it's important that these issues are identified as soon as possible; any negotiation that can prevent the DSU's incapacitation will need to be finished in 2019.

The failed Doha Round experience, where negotiations dragged for years and produced practically no meaningful results, might lead today's government negotiators to conclude that it would be next to impossible to conclude such a negotiation in eight to nine months. The final days of the Uruguay Round (September–December 1993), however, demonstrated that a tremendous amount of progress can be made in an even shorter time if participating governments are imbued with a sense of urgency. Eight to nine months is plenty of time to negotiate reforms to the system where governments recognise the need to deliver by an agreed date (which was never there in the Doha Round).

Recommendations

1. Australia should support any effort to launch negotiations on a range of issues designed to reform aspects of the WTO's multilateral trading system, including the Appellate Body. Support for the reform negotiations depends on creating a coalition of WTO Members who appreciate the need for negotiations to be completed *urgently*.

2. In developing its negotiating position on Appellate Body issues, Australia should consider discussions found here in Annex 1.

3. Reform negotiations should aim to produce a consensus result before the end of October 2019.

Annexes

- Annex 1 – Potential solutions to Appellate Body issues
- Annex 2 – Excerpts from US Ambassador Shea's remarks at the December 2018 Trade Policy Review of the United States
- Annex 3 – Outline of main points from "WTO – EU's proposals on WTO modernisation"

ABOUT THE AUTHOR

Andrew Stoler is an independent consultant on international trade and investment policy issues. He currently sits on advisory boards for the European Centre for International Political Economy (ECIPE) and the University of Sydney's United States Studies Centre. Andrew is also a former: WTO Deputy Director-General; Office of the United States Trade Representative senior trade negotiator; and foundation University of Adelaide Institute for International Trade Executive Director.

[7] *WTO – EU's proposals on WTO modernisation* 5 July 2018, WK 8329/2018 INIT.

ANNEX 1: POTENTIAL SOLUTIONS TO APPELLATE BODY ISSUES

Appellate Body members' appointment terms

Issues:

a) Continued work on an appeal after a member's term has expired.

b) Members' independence (threat of no re-appointment where decisions are unpopular).

c) Departure from Appellate Body with less than 90 days' notice and appeal finished by less than the required three-member division.

Solutions:

a) Ensure no member is appointed to a division to decide an appeal unless there's sufficient time remaining in their term of appointment.

b) Extend Appellate Body members' appointment period and don't allow reappointment.

c) In cases where a division member resigns or dies while still working on an appeal, ensure another member is selected to fill the vacancy.

Required actions by WTO Members:

To address issues 'a' and 'c', amend art. 17:9 by adding the following text:

> *Noting that Article 17:1 requires that three Appellate Body members are required to decide an appeal, no member of the Appellate Body whose term is nearing completion shall be selected to decide on an appeal unless the DSB agrees that the member's term should be extended to allow completion of work on the appeal. In any case where a member of a division is unable to complete work on an appeal due to expiration of term of office, resignation or death, another member shall be appointed to fill the resulting vacancy to ensure that the appeal is decided by the three members required by Article 17:1.*

To address issue 'b', amend art. 17:2 to read:

> *The DSB shall appoint persons to serve on the Appellate Body for a single eight-year term. Vacancies shall be filled as they arise. To that end, the DSB Chairperson shall launch the selection process no later than six 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 the office for the remainder of the predecessor's term.*

Review of facts / treatment of municipal law

Issue:

Contrary to art. 17:6, the Appellate Body has taken the position that it has the right to review panel reports' factual aspects, and has frequently treated the meaning of municipal law as a matter of WTO law, to be decided by the Appellate Body de novo in an appeal under DSU art. 17:6.

Solutions:

a) Take action to strengthen Members' direction to the Appellate Body that it's barred from reviewing panel reports' factual aspects. On the issue of municipal law, give the Appellate Body further guidance on the line between factual and legal issues.

b) In any case where the Appellate Body, in its report, fails to abide by art. 17:6 requirements, provide for a procedure where a party to the appeal can seek arbitration and modification of the Appellate Body report prior to the DSB adopting it.

Required actions by WTO Members:

a) Add a new fn. 7 bis to art. 17:6 that reads:

> *For greater certainty, the "issues of law covered in a 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. In addition, whether or not a panel has made an objective assessment of the facts before it, as required by DSU Article 11, is not a legal question and does not fall within the scope of appellate review.*

Comment: The first sentence of this new footnote is already supported by Australia and a large number of delegations (see annex to document WT/GC/W/752).

b.1) Amend art. 17:14 as follows (new text in italics):

> *Except in those circumstances where a party to the appeal formally notifies the DSB within 30 days of the circulation of an Appellate Body report that they believe that aspects of the Appellate Body report do not respect the provisions of Article 17:6, 17:12, 17:13 and/or Article 19:2,* an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. *Where aspects of a report are challenged on grounds of Article 17:6, 17:12, 17:13 and/or Article 19:2, the provisions of Article 25:1 bis shall apply.*

b.2) Amend art. 25 by adding a new art. 25:1 bis to read:

> *Where a party to an appeal has notified the DSB that it believes aspects of an Appellate Body report are inconsistent with the provisions of Article 17:6, 17:12, 17:13 and/or Article 19:2, the issues raised shall be submitted to arbitration. The arbitration shall be conducted in a period not to exceed 60 days by a panel composed of the Chairperson of the DSB, the Chairperson of the General Council and the Chairperson of the Trade Policy Review Body. Where the decision of the arbitration panel supports the position of the party requesting the arbitration, the offending aspects of the Appellate Body report shall be deleted from the report and stricken from the record before the Appellate Body report is adopted by the DSB, in accordance with the provisions of Article 17:14. Where the decision of the arbitration panel upholds the original Appellate Body report, the report shall be adopted by the DSB.*

b.3) Add a fn. to new art. 25:1 bis to read:

Where one or more of the chairpeople designated to serve on the arbitration are nationals of the parties to the appeal or otherwise conflicted, they shall be replaced by a representative of a WTO Member selected by the Director General in consultation with the Member launching the request for arbitration and a representative of the Appellate Body.

Comment: These proposed DSU modifications are intended to ensure that future Appellate Body reports that don't respect the provisions of art. 17:6, 17:12, 17:13 and/or 19:2 are not automatically adopted as "WTO law". Rather than establishing a "third tier" in WTO dispute settlement, it's expected that such an amendment would: a) serve as a warning to the Appellate Body not to stray from its legitimate role; and b) where invoked in an arbitration, leave the Appellate Body report's legitimate findings and conclusions intact, resolving the dispute as intended by the provisions' original drafters.

Overreaching interpretations, "obiter dicta" and stare decisis

Issue:

It's been argued that the Appellate Body has wrongly dared to venture into uncharted territory by interpreting provisions that WTO Members left unclear in the texts—often intentionally to provide for "constructive ambiguity"—and by delivering opinions on issues not necessary to resolve a dispute. In addition, while it's agreed that Appellate Body reports can provide valuable clarification of the covered agreements, they aren't themselves agreed text, nor are they a substitute for the text that was actually negotiated and agreed.

Solutions:

a) Amend art. 17:12 to read (new text in italics):

> 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*.

Comment: This proposed amendment to art. 17:12 is already supported by Australia and a large number of delegations (see annex to document WT/GC/W/752).

b.1) Amend art. 17:14 as follows (new text in italics):

> *Except in those circumstances where a party to the appeal formally notifies the DSB within 30 days of the circulation of an Appellate Body report that they believe that aspects of the Appellate Body report do not respect the provisions of Article 17:6, 17:12, 17:13 and/or Article 19:2,* an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute, unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. *Where aspects of a report are challenged on grounds of Article 17:6, 17:12, 17:13 and/or 19:2, the provisions of Article 25:1 bis shall apply.*

b.2) Amend art. 25 by adding a new art. 25:1 bis to read:

> *Where a party to an appeal has notified the DSB that it believes aspects of an Appellate Body report are inconsistent with the provisions of Article 17:6, 17:12, 17:13 and/or 19:2, the issues raised shall be submitted to arbitration. The arbitration shall be conducted in a period not to exceed 60 days by a panel composed of the Chairperson of the DSB, the Chairperson of the General Council and the Chairperson of the Trade Policy Review Body. Where the decision of the arbitration panel supports the position of the party requesting the arbitration, the offending aspects of the Appellate Body report shall be deleted from the report and stricken from the record before the Appellate Body report is adopted by the DSB in accordance with the provisions of Article 17:14. Where the decision of the arbitration panel upholds the original Appellate Body report, the report shall be adopted by the DSB.*

b.3) Add a fn. to new art. 25:1 bis to read:

> *Where one or more of the chairpeople designated to serve on the arbitration are nationals of the parties to the appeal or otherwise conflicted, they shall be replaced by a representative of a WTO Member selected by the Director General in consultation with the Member launching the request for arbitration and a representative of the Appellate Body.*

Comment: These proposed DSU modifications are intended to ensure that future Appellate Body reports that don't respect the provisions of art. 17:6, 17:12, 17:13 and/or 19:2 are not automatically adopted as "WTO law". Rather than establishing a "third tier" in WTO dispute settlement, it's expected that such an amendment would: a) serve as a warning to the Appellate Body not to stray from its legitimate role; and b) where invoked in an arbitration, leave the Appellate Body report's legitimate findings and conclusions intact, resolving the dispute as the provisions' original drafters intended.

c) Address the s*tare decisis* precedent issue by amending art. 19:2 to read (new language in italics):

> In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements. *Appellate Body reports are not themselves agreed text, nor are they a substitute for the text that was actually negotiated and agreed.*

Disregard for appeal timeframes

Issue:

In practice, it has frequently not proved possible for the Appellate Body to complete its work on an appeal within the required 90-day timeframe.

Solution:

Provide for a procedure where the Appellate Body—when it considers the 90-day timeframe difficult to meet—can propose an alternative timeframe, subject to agreement from parties to the appeal.

Required action by WTO Members:

Amend art. 17:5 to read (new language in italics):

> 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 Appellate Body circulates its report. In fixing its timetable, the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers 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 Appellate Body. The parties shall give sympathetic consideration to such proposals. In the absence of such agreement of the parties, if the Appellate Body considers that it cannot submit its report within 90 days, it shall, after consulting with the parties, propose to them specific procedures or working arrangements and take appropriate organisational measures, without prejudice to the procedural rights and obligations of the parties under this agreement, with a view to enabling the Appellate Body to submit its report within that period. The parties shall cooperate to enable the Appellate Body to circulate its report within 90 days.*

Comment: This proposed amendment to art. 17:5 is already supported by Australia and a large number of delegations (see annex to document WT/GC/W/752).

ANNEX 2: EXCERPTS FROM AMBASSADOR SHEA'S REMARKS AT THE DECEMBER 2018 TRADE POLICY REVIEW OF THE UNITED STATES

"We discussed several of these concerns in the US Government report for this meeting. And I will elaborate on them briefly.

- First, the WTO dispute settlement system has strayed far from the system agreed to by Members. It has appropriated to itself powers that the WTO Members never intended to give it. This includes where panels or the Appellate Body have, through their findings, sought to add or diminish WTO rights and obligations of Members in a broad range of areas. The United States has grown increasingly concerned with the activist approach and overreaching of the Appellate Body on procedural issues, interpretative approach, and substantive interpretations. These approaches and findings do not respect WTO rules as written and agreed by the United States and other WTO Members.
- Second, the WTO is not well equipped to handle the fundamental challenge posed by China, which continues to embrace a state-led, mercantilist approach to the economy and trade. China pursues an array of non-market industrial policies and other unfair competitive practices aimed at promoting and supporting its domestic industries while simultaneously restricting, taking advantage of, discriminating against, or otherwise creating disadvantages for foreign companies and their goods and services. From forced technology transfer to the creation and maintenance of severe excess industrial capacity to a heavily skewed playing field in China, the results of China's approach are causing serious harm to the United States and many other WTO Members and their companies and workers. Simply put, China's actions are incompatible with the open, market-based approach expressly envisioned and followed by other WTO Members and contrary to the fundamental principles of this organization and its agreements.
- Third, the WTO's negotiating arm has been unable to reach agreements that are of critical importance in the modern economy. Previous negotiations were undermined by certain Members' repeated unwillingness to make contributions commensurate with their role in the global economy, and by these Members' success in leveraging the WTO's flawed approach to developing-Member status.
- Fourth, certain Members' persistent lack of transparency, including their unwillingness to meet their notification obligations, have undermined Members' work in the WTO committees to monitor compliance with WTO obligations. Their lack of transparency has also damaged Members' ability to identify opportunities to negotiate new rules aimed at raising market efficiency, generating reciprocal benefits and increasing wealth."

ANNEX 3: OUTLINE OF MAIN POINTS FROM "WTO – EU'S PROPOSALS ON WTO MODERNISATION"

Part I – Future EU proposals on rule-making

A. Creating rules that rebalance the system and level the playing field

- Improve transparency and subsidy notifications
- Better capture state-owned enterprises (SOEs)
- Capture more effectively the most trade-distortive types of subsidies

B. Establishing new rules to address barriers to services and investment, including forced technology transfer

- Need to address market access barriers, discriminatory treatment of foreign investors and behind-the-border distortions, including as they relate to forced technology transfer and other trade-distortive policies
- Need to address barriers to digital trade

C. Addressing the global community's sustainability objectives

- Proposals for a new approach to flexibilities in the context of development objectives
  - Graduation
  - Special and differential treatment (SDT) in future agreements
  - Additional SDT in existing agreements
- Proposals to strengthen WTO rule-making activities' procedural aspects
  - Multilateral negotiations
  - Plurilateral negotiations
  - Secretariat's role
  - Building political support

Part II – Future EU proposals on regular work and transparency

A. Transparency and notifications

- More effective committee-level monitoring
- Incentives for improving notification compliance
- Sanctions for willful and repeated non-compliance
- 4Counter-notifications
- Strengthening the trade policy review mechanism

B. Solving market-access problems

C. Adjusting the WTO rule-book incrementally

D. Down-sizing ineffective committees

Part III – Future EU proposals on dispute settlement

A. First stage: Comprehensive amendment of DSU provisions relating to Appellate Body functioning, addressing all points of concern with the Appellate Body's "approach"

- DSU art. 17:5 and the 90-days issue
- Transitional rules for outgoing Appellate Body members
- Findings unnecessary for dispute resolution
- The meaning of municipal law as the issue of fact
- The issue of precedent
- Appellate Body members' independence

B. Second stage: Addressing substantive issues

FOR FURTHER ENQUIRIES

Institute for International Trade
The University of Adelaide
Level 5, 10 Pulteney Street SA 5005 Australia

TELEPHONE +61 8 8313 6900

EMAIL iit@adelaide.edu.au

WEB iit.adelaide.edu.au

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CRICOS 00123M

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