

This operation, which was quickly squelched by Maduro's forces, involved two speedboats containing a "ragtag band" of several dozen fighters, including two U.S. citizens who had previously served in the U.S. military.⁴⁹ Guaidó denied involvement with the attempted attack, accusing Maduro of "trying to create a state of apparent confusion, an effort to hide what's happening in Venezuela."⁵⁰ Similarly, U.S. Secretary of State Mike Pompeo stated that "there was no U.S. Government direct involvement in this operation."⁵¹ Maduro asserted that since the failed operation, the Trump administration "would not answer the phones. They are mute. We have used three different routes with three different officials from the Donald Trump government. We have sent them texts, and they are completely silent."⁵²

INTERNATIONAL ORGANIZATIONS

U.S. Refusal to Appoint Members Renders WTO Appellate Body Unable to Hear New Appeals
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Over the last few years, the United States has been pressuring the World Trade Organization (WTO) to reform the Appellate Body by refusing proposals to fill vacancies. On December 10, 2019, the terms of two Appellate Body members expired, leaving one member left for the seven-member body. This has brought new appeals to a standstill, as an appeal from a panel established by the Dispute Settlement Body must be heard by three Appellate Body members. In February of 2020, the United States elaborated on its complaints about the Appellate Body in a report published by the Office of the United States Trade Representative. In the spring of 2020, in response to the continued U.S. resistance to filling vacancies on the Appellate Body, a group of WTO members established an interim arrangement to handle appeals through arbitration. Also in the spring of 2020, the United States described as invalid a recent Appellate Body report regarding a dispute between Canada and the United States, asserting that none of the three persons who issued the report were in fact bona fide Appellate Body members.

⁴⁹ John Otis, Kejal Vyas & Jessica Donati, "Freedom Fighters" Led by American Tried Invading Venezuela, WALL ST. J. (May 6, 2020), at <https://www.wsj.com/articles/freedom-fighters-led-by-american-tried-invading-venezuela-11588722164>.

⁵⁰ *Trump Denies Ties to Americans Linked to Venezuela "Coup Plot,"* AL JAZEERA (May 5, 2020), at <https://www.aljazeera.com/news/2020/05/trump-denies-link-venezuelan-attack-men-jailed-200505191938812.html>.

⁵¹ Michael R. Pompeo, Sec'y of State, Secretary Michael R. Pompeo at a Press Availability (May 6, 2020), at <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-5> [<https://perma.cc/Y6AB-9TKG>] (adding "[i]f we had been involved, it would have gone differently. As for who bankrolled it, we're not prepared to share any more information about what we know took place.").

⁵² César Torres, *U.S. Has to Acknowledge Guaidó's Failure as "Puppet President,"* MINISTERIO DEL PODER POPULAR PARA RELACIONES EXTERIORES (May 8, 2020), at <http://mppre.gob.ve/en/2020/05/08/us-failure-guaidos-puppet-presidency> [<https://perma.cc/3SE8-RGX6>].

Through the WTO dispute settlement process, states engaged in a dispute can first try to resolve it through consultations.¹ Should these consultations fail, a state can request the appointment of a panel during a Dispute Settlement Body meeting.² Upon the issuance of the panel's report, either side may appeal.³ Three members of the Appellate Body will hear the appeal, which "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."⁴ The parties to the dispute must accept the Appellate Body report, unless the Dispute Settlement Body rejects the report by consensus.⁵

Because the appointment process for Appellate Body members operates by consensus, a member can block an appointment by formal objection.⁶ In 2016, the United States blocked one proposed reappointment to the Appellate Body and, starting in 2017, it has blocked every proposed appointment or reappointment.⁷ In the latter half of 2019 and the spring of 2020, the United States has continued its refusal to entertain measures to fill the vacancies, citing the lack of progress toward reforms of the Appellate Body.

During the November 2019 Dispute Settlement Body meeting, the United States rejected a proposal for an Appellate Body appointment process that was supported by 116 members.⁸ The U.S. representative stated that "the systemic concerns that the United States had identified remained unaddressed"; that "the fundamental problem was that the Appellate Body was not respecting the current, clear language" of the Dispute Settlement Understanding (DSU); and that this in turn "undermined the legitimacy of the system and damaged the interests of all WTO members."⁹ In a separate portion of the meeting, the United States

¹ Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Art. 4, Apr. 15, 1994, 1869 UNTS 401, 33 ILM 1226 [hereinafter DSU].

² *Id.* Art. 4.7.

³ *See id.* Arts. 16–17. Once the panel has set forth its findings in the final report, the report is distributed to WTO members prior to the Dispute Settlement Body meeting. *Id.* Art. 16. The Dispute Settlement Body will adopt the final report, "unless a party to the dispute formally notifies the [Dispute Settlement Body] of its decision to appeal or the [Dispute Settlement Body] decides by consensus not to adopt the report." *Id.* Art. 16.4.

⁴ *Id.* Arts. 17.1, 17.6.

⁵ *Id.* Art. 17.14.

⁶ *Id.* Arts. 2.4, 17.2.

⁷ *See* Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 822, 823–27 (2019). The Obama administration blocked the reappointment of one member in the spring of 2016, raising both specific concerns about the member and more general concerns about the practice of the Appellate Body, but it did not block the appointment of two new members in November of 2016. Statement by the United States at the Meeting of the WTO Dispute Settlement Body (May 23, 2016), available at https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf [<https://perma.cc/N3AW-B88P>]; World Trade Organization Press Release, WTO Appoints Two New Appellate Body Members (Nov. 23, 2016), at https://www.wto.org/english/news_e/news16_e/disp_28nov16_e.htm [<https://perma.cc/H6X7-PCR4>]. One of these two members has since resigned. World Trade Organization, *Appellate Body Members*, at https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [<https://perma.cc/V7U4-BB33>] [hereinafter *Appellate Body Members*] (noting the resignation of Hyun Chong Kim). The other—Hong Zhao—is now the sole remaining Appellate Body member; her term expires on November 30, 2020. *Id.*

⁸ WTO, Minutes of Meeting, §§ 5.7–5.8, WTO Doc. WT/DSB/M/437 (Nov. 22, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260789,258976,258786,258792,258733,258795,258796,258797,258785,258812&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/J6UN-76UB>].

⁹ *Id.*

initiated a discussion of the compensation provided to Appellate Body members, signaling concern that certain aspects of this compensation were excessive or structured in ways that potentially incentivized members to delay deciding appeals.¹⁰ The United States linked this discussion of compensation to its broader concern that Appellate Body members continue to work on ongoing appeals after the expiration of their terms—a practice enabled by Rule 15 of the Working Procedures for Appellate Review that the United States has previously asserted is incompatible with the DSU.¹¹

After the departure of Appellate Body members Ujal Singh Bhatia and Thomas R. Graham on December 10, 2019, the Appellate Body could no longer meet the three-member requirement to hear new appeals.¹² In a letter to the chairman of the Dispute Settlement Body, Graham informed WTO members that, in accordance with Rule 15, he and Bhatia would continue to work on those appeals where oral hearings had already been conducted.¹³ Despite the Appellate Body's inability to hear new appeals, the United States has persisted in its refusal to fill the six vacancies.¹⁴ During the December 2019 Dispute Settlement Body meeting, the United States again rejected the widely supported proposal for filling the vacancies.¹⁵ The U.S. representative stated that members had not addressed the concerns regarding the Appellate Body that the United States had identified in prior meetings.¹⁶ In the January

¹⁰ *Id.* §§ 4.2–4.3 (noting that the United States had placed this issue on the agenda). Other members were reluctant to make such inferences, responding that competitive compensation is necessary to attract competent individuals and that Appellate Body members were spending more time on appeals because of the backlog of cases stemming from vacancies. *Id.* § 4.5 (European Union's response to the United States); § 4.9 (China's response to the United States); § 4.10 (Mexico's response to the United States). The representative from the European Union also observed that “a ‘systematic’ discussion on the remuneration of Appellate Body members could only be fruitful if there was indeed a functioning Appellate Body.” *Id.* § 4.5.

¹¹ *Id.* §§ 4.2–4.3; see also Galbraith, *supra* note 7, at 824–25 (noting that from January to May 2018 the United States referenced concerns about Rule 15 in rejecting four proposals to fill vacancies in the Appellate Body). Rule 15 provides that “[a] person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the [Dispute Settlement Body], complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.” WTO Appellate Body, Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010), at https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm [<https://perma.cc/6TRK-8MKU>] [hereinafter Appellate Body Working Procedures].

¹² DSU, *supra* note 1, Art. 17.1 (requiring three members of the Appellate Body to hear an appeal); *Appellate Body Members*, *supra* note 7.

¹³ Appellate Body Working Procedures, *supra* note 11, Rule 15; WTO, Communication from the Chairman of the Dispute Settlement Body, WTO Doc. WT/DSB/79 (Dec. 12, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=259733,259711,259694,259703,259704,259705,259706,259710&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/99DP-JXTA>].

¹⁴ WTO, Minutes of Meeting, § 5.7, WTO Doc. WT/DSB/M/438 (Dec. 18, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261535,259754,259519,259522,259514,259527,259521,259523,259525,259524&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/8VM7-XQFW>] [hereinafter December 2019 Meeting]; Proposal by Afghanistan, Angola, Argentina, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.15 (Dec. 5, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=259528,259509,259510,258895,258896&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/J8G6-MWTE>].

¹⁵ December 2019 Meeting, *supra* note 14, §§ 5.2, 5.7.

¹⁶ *Id.* § 5.7.

2020 Dispute Settlement Body meeting, the United States once again rejected the proposal for filling the vacancies and insisted that its concerns were still unaddressed.¹⁷

In February 2020, the Office of the U.S. Trade Representative published a 121-page report detailing what the United States perceives to be the Appellate Body's shortcomings.¹⁸ The report describes the Appellate Body as having "strayed far from the limited role that WTO members assigned it" and "increased its own power and seized from sovereign nations . . . authority that it was not provided."¹⁹ Expanding upon prior views that the United States has expressed at Dispute Settlement Body meetings, the report sets forth numerous criticisms of the Appellate Body.²⁰ As "example[s]," the report's executive summary states that:

- The Appellate Body consistently ignores the mandatory deadline for deciding appeals;
- The Appellate Body allows individuals who have ceased to serve on the Appellate Body to continue deciding appeals as if their term had been extended by WTO Members in the Dispute Settlement Body;
- The Appellate Body has made findings on issues of fact, including issues of fact relating to WTO Members' domestic law, although Members authorized it to address only legal issues;
- The Appellate Body has issued advisory opinions and otherwise opined on issues not necessary to assist the WTO Dispute Settlement Body in resolving the dispute before it;
- The Appellate Body has insisted that dispute settlement panels treat prior Appellate Body interpretations as binding precedent;
- The Appellate Body has asserted that it may ignore WTO rules that explicitly mandate it recommend a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules; and
- The Appellate Body has overstepped its authority and opined on matters within the authority of WTO Members acting through the Ministerial Conference, General Council, and Dispute Settlement Body.²¹

The report asserts that the Appellate Body has erred as well in its substantive interpretations of WTO agreements—interpretations which the U.S. executive branch has elsewhere called "Appellate Body activism."²² As "example[s]," the report's executive summary states:

¹⁷ Proposal by Afghanistan, Angola, Argentina, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.16 (Jan. 16, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260557,260555,260554,259466,259467&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/WX3N-HPMB>]; World Trade Organization Press Release, Members Adopt Panel Ruling in Australia-Indonesia Paper Duty Dispute (Jan. 27, 2020), at https://www.wto.org/english/news_e/news20_e/dsb_27jan20_e.htm [<https://perma.cc/27ZC-8DUM>].

¹⁸ See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (2020), available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf [<https://perma.cc/HH97-YU2E>] [hereinafter USTR APPELLATE BODY REPORT]. The report has an additional forty pages of appendixes. See generally *id.*

¹⁹ *Id.* at 1.

²⁰ See generally *id.*; see also *id.*, App. B2 (identifying prior U.S. statements to the Dispute Settlement Body raising various concerns discussed in the report).

²¹ *Id.* at 1.

²² OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2020 TRADE POLICY AGENDA AND 2019 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 8 (2020), available at https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf [<https://perma.cc/9DEZ-FUQW>] [hereinafter 2020 TRADE POLICY AGENDA] (outlining U.S. trade policies generally and U.S. interests in

- The Appellate Body's erroneous interpretation of the term "public body" threatens the ability of Members to counteract trade-distorting subsidies provided through [state-owned enterprises], undermining the interests of all market-oriented actors;
- The Appellate Body has intruded on Members' legitimate policy space by essentially converting a non-discrimination obligation for regulations into a "detrimental impact" test;
- The Appellate Body has prevented WTO Members from fully addressing injurious dumping by prohibiting a common-sense method of calculating the extent of dumping that is injuring a domestic industry ("zeroing");
- The Appellate Body's stringent and unrealistic test for using out-of-country benchmarks to measure subsidies has weakened the effectiveness of trade remedy laws in addressing distortions caused by state-owned enterprises in non-market economies;
- The Appellate Body's creation of an "unforeseen developments" test and severe causation analysis prevents the effective use of safeguards by WTO Members to protect their industries from import surges; and
- The Appellate Body has limited WTO Members' ability to impose countervailing duties and antidumping duties calculated using a non-market economy methodology to address simultaneous dumping and trade-distorting subsidization by non-market economies like China.²³

During the March 2020 meeting of the Dispute Settlement Body, the United States again rejected the widely supported proposal to fill Appellate Body vacancies, this time citing to its February report.²⁴ Members in support of the proposal stressed the need for its quick adoption, with some members contending that Article 17.2 of the DSU creates an obligation for members to fill the vacancies.²⁵

In response to the deadlock, the European Union and eighteen other WTO members have established a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) to function as a substitute for the Appellate Body.²⁶ The members notified the WTO of the MPIA on April

relation to the WTO). This annual report to Congress is required under the Trade Act of 1974. 19 U.S.C. § 2213 (2011).

²³ USTR APPELLATE BODY REPORT, *supra* note 18, at 2. For one critical response to the report, see Steve Charnovitz, *Statement on USTR Report on the Appellate Body*, INT'L ECON. L. & POL'Y BLOG (Feb. 13, 2020), at <https://iepl.worldtradelaw.net/2020/02/statement-on-ustr-report-on-the-appellate-body.html> (describing the report as "a sophomoric Report teeming with misstatements").

²⁴ World Trade Organization Press Release, WTO Members Consider EU Request for Panels on Indian Tech Tariffs, Colombian Duties on Fries (Mar. 5, 2020), at https://www.wto.org/english/news_e/news20_e/dsb_05mar20_e.htm [<https://perma.cc/E8YC-LLFX>] [hereinafter March 2020 Press Release].

²⁵ *Id.*; see DSU, *supra* note 1, Art. 17.2 ("Vacancies shall be filled as they arise.").

²⁶ European Commission Press Release IP/20/538, EU and 15 World Trade Organization Members Establish Contingency Appeal Arrangement for Trade Disputes (Mar. 27, 2020), at https://ec.europa.eu/commission/press-corner/detail/en/IP_20_538 [<https://perma.cc/4DQ8-H8KF>]. As of April 30, 2020, the eighteen other members are Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, Hong Kong, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, and Uruguay. Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504,257951,257911,255883,253387,246976,240663,238289,237480,237479&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [hereinafter MPIA Notification]. Later, in May 2020, Ecuador and Nicaragua notified the WTO that they would be joining the MPIA. Communication from Ecuador, Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.13 (May 15, 2020), at <https://>

30, 2020, anticipating the pool of arbitrators to be formed three months from that date.²⁷ Rather than pursuing an appeal through the Appellate Body under Articles 16.4 and 17 of the DSU, participating members have committed to receiving comparable review of panel decisions through arbitration, which, if mutually agreed upon, is a form of dispute settlement authorized by Article 25 of the DSU.²⁸ The MPIA will have a pool of ten arbitrators from which three are selected for each appeal.²⁹ While the MPIA substantially mirrors the Appellate Body, it integrates new practices intended to improve the appellate process.³⁰ “Any WTO member [can] join the MPIA at any time,” and the interim arbitration procedure will only hear appeals between participants until the Appellate Body is able to hear new appeals again.³¹

The United States has not signed on to the MPIA, and it remains to be seen what alternatives, if any, it will pursue in lieu of resolving appeals through the Appellate Body. After the departure of the two Appellate Body members in December 2019, the United States notified the Dispute Settlement Body of its decision to appeal the WTO compliance panel’s report addressing the issue of countervailing U.S. measures against Indian carbon steel flat products.³² The United States noted that although “[a]t this time” the Appellate Body would be unavailable to hear its appeal, it would “confer with India so that the parties may determine the way forward in this dispute, including whether the matters at issue may be resolved at this stage or to consider alternatives to the appellate process.”³³ In a later joint communication, India and the United States informed the Dispute Settlement Body that they were “engag[ing] in good faith discussions to seek a positive solution” and that, once the Appellate Body is again operational, the United States “will submit a notice of appeal and

docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263840&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/PLT2-E2XT>]; Communication from Nicaragua, Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.14 (May 19, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263878&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=False [<https://perma.cc/5C2M-YQT3>].

²⁷ European Commission Press Release, Interim Appeal Arrangement for WTO Disputes Becomes Effective (April 30, 2020), at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143> [<https://perma.cc/C2K6-JQJX>].

²⁸ MPIA Notification, *supra* note 26, §§ 1–2; *see also* DSU, *supra* note 1, Art. 25.

²⁹ MPIA Notification, *supra* note 26, § 4. The selection process for the three arbitrators who will hear an appeal under the MPIA parallels the Appellate Body’s process. *See id.*, Annex I, § 7.

³⁰ European Commission Press Release, *supra* note 27. For example, rather than the sixty-day deadline for proceedings with a ninety-day allowance for exceptional cases outlined under Article 17.5 of the DSU, the MPIA provides that arbitrators must issue an award within ninety days. MPIA Notification, *supra* note 26, Annex I, § 12; DSU, *supra* note 1, Art. 17.5. The MPIA also provides that arbitrators may exceed the ninety-day deadline with the parties’ consent. MPIA Notification, *supra* note 26, Annex I, § 14. Furthermore, to aid arbitrators in meeting the ninety-day deadline, the MPIA allows arbitrators to streamline proceedings, such as establishing “page limits, time limits and deadlines as well as on the length and number of hearings required.” *Id.* § 12.

³¹ *Id.* §§ 12, 15.

³² Notification of Appeal by the United States Under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, para. 2, WTO Doc. WT/DS436/21 (Dec. 18, 2019), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260024&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/ZG7U-CAUP>].

³³ *Id.*

an appellant submission” and India “may file its own appeal.”³⁴ In another dispute with South Korea, the United States and South Korea agreed to forgo appeals under Article 16.4 of the DSU but left open the possibility that they might later agree to review of the panel report through arbitration.³⁵

Despite its criticisms, the United States remains “one of the most active participants in the WTO dispute settlement process.”³⁶ Since the WTO’s inception, the United States has served as complainant in 124 cases, respondent in 155 cases, and third party in 155 cases.³⁷ In 2019, the United States “launched one WTO dispute and pursued actions in 10 other proceedings.”³⁸ In the late months of 2019, the United States celebrated several WTO panel rulings in its favor.³⁹ And despite its reluctance to entertain proposals to fill vacancies in the Appellate Body, the United States brought three appeals between May 2018 and December 2019.⁴⁰

In one of these cases, the United States received an unfavorable report from the Appellate Body and responded by questioning the legitimacy of the three members assigned to the appeal.⁴¹ This was a dispute with Canada over the U.S. adoption of countervailing duties against Canadian supercalendered paper. At the March 2020 meeting of the Dispute

³⁴ Joint Communication from India and the United States, United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, paras. 1–2, WTO Doc. WT/DS436/22 (Jan. 14, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260523&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/DB2B-BLB3].

³⁵ Understanding Between the Republic of Korea and the United States Regarding Procedures Under Articles 21 and 22 of the DSU, United States—Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea, paras. 4–5, WTO Doc. WT/DS488/16 (Feb. 10, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261132,256173,255958,255585,254984,254318,253366,252356,251575,250969&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/5VGA-BAAG].

³⁶ 2020 TRADE POLICY AGENDA, *supra* note 22, at 49 (listing various active disputes involving the United States).

³⁷ World Trade Organization, *Disputes by Member*, at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [https://perma.cc/8WPL-8BM6] (click on hyperlink under “Disputes by Member” section to find cases in which the United States is involved).

³⁸ 2020 TRADE POLICY AGENDA, *supra* note 22, at 49.

³⁹ See, e.g., Office of the U.S. Trade Representative Press Release, United States Wins for the Sixth Time in Airbus Subsidies Dispute (Dec. 2, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-wins-sixth-time> [https://perma.cc/GJ8V-K9XA]; Office of the U.S. Trade Representative Press Release, United States Wins WTO Challenge to Indian Export Subsidies (Oct. 31, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/united-states-wins-wto-challenge> [https://perma.cc/TT3U-VC6N].

⁴⁰ See Steve Charnovitz, *The Missed Opportunity to Save WTO Dispute Settlement*, INT’L ECON. L. & POL’Y BLOG (Dec. 10, 2019), at <https://ielp.worldtradelaw.net/2019/12/the-missed-opportunity-to-save-wto-dispute-settlement.html> (documenting that since May 2018 the United States filed appeals for United States—Countervailing Measures on Supercalendered Paper from Canada, United States—Countervailing Measures on Certain Pipe and Tube Products, and United States—Certain Measures Relating to the Renewable Energy Sector).

⁴¹ Communication from the United States, United States—Countervailing Measures on Supercalendered Paper from Canada, WTO Doc. WT/DS505/12 (Apr. 17, 2020), at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263318,263214,262588,261047,261045,261046,259939,249158,247763,246621&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/7K73-NM2Z] [hereinafter Supercalendered Paper Communication]. As of the end of May 2020, the other two appeals remain pending. World Trade Organization, *Appellate Body*, at https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm [https://perma.cc/XE8F-M22Z].

Settlement Body, the U.S. representative stated that this report was “not a valid Appellate Body report” because “[e]xtraordinarily, none of the individuals serving on this appeal . . . was a valid member of the Appellate Body when the document was issued to WTO Members.”⁴² The United States noted that two of the Appellate Body members had worked on the report after the expiration of their terms,⁴³ thus reprising its preexisting concern about Rule 15 of the Working Procedures for Appellate Review. The U.S. representative asserted that the third Appellate Body member had improper affiliations with the Chinese government and therefore could not be considered a valid member.⁴⁴ In response, Canada stated that “there was no doubt that the Appellate Body report . . . was a valid Appellate Body report subject to the negative consensus rule for its adoption.”⁴⁵ The Dispute Settlement Body then adopted the appeals report despite the U.S. criticism.⁴⁶ On April 17, 2020, the United States communicated to the Dispute Settlement Body its view that “no recommendation was or could be adopted” by the [Dispute Settlement Body] because “there was no valid Appellate Body report in this dispute.”⁴⁷

While the Appellate Body is unable to hear appeals, it remains to be seen how dispute settlement in the WTO will function in practice. Without an Appellate Body or agreed-upon alternative, members can effectively block the adoption of panel findings by notifying the Dispute Settlement Body of their decisions to appeal.⁴⁸ It is unclear how extensively the MPIA will come to substitute for the Appellate Body during its incapacitation. This incapacitation may last for some time, as the Trump administration remains skeptical toward the WTO.⁴⁹

⁴² Statement by the United States at the Meeting of the WTO Dispute Settlement Body 1 (Mar. 5, 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.Reconvene.Mar5_DSB_Stmt_Item_8.SC_Paper_DS505.as-deliv.fin_public.pdf [<https://perma.cc/NKA5-53MM>] [hereinafter U.S. March DSB Statement]; see also March 2020 Press Release, *supra* note 24.

⁴³ U.S. March DSB Statement, *supra* note 42, at 1.

⁴⁴ *Id.* at 2–3 (stating that Hong’s position as vice president in the “Ministry of Commerce Academy of International Trade and Economic Cooperation” in China creates a conflict because “[t]his entity is a ‘public institution’ under Chinese law that is affiliated with and subordinate to China’s Ministry of Commerce” and receives funding from the Ministry). China responded to the U.S. allegations and noted that the institute to which Appellate Body member Hong belongs is an “independent legal entity” that only receives partial funding from the government. March 2020 Press Release, *supra* note 24.

⁴⁵ March 2020 Press Release, *supra* note 24.

⁴⁶ *Id.* The European Union agreed with Canada that the report should be adopted through negative consensus and that any complaints against the Appellate Body members should be submitted to the Appellate Body so that it may deal with the allegations. *Id.*

⁴⁷ Supercalendered Paper Communication, *supra* note 41.

⁴⁸ Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT’L ECON. L. 297, 303–04 (2019) (explaining that under Article 16.4, if a party were to appeal a panel report without three Appellate Body members available to hear that appeal, the case would not proceed and the panel report could not be adopted); see generally DSU, *supra* note 1, Art. 16.4 (“If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the [Dispute Settlement Body] until after completion of the appeal.”).

⁴⁹ See Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 254, at 17–18 (Apr. 10, 2020) (“So we have the World Trade Organization. And until I came along, we were losing cases, so many cases. It was ridiculous. . . . [T]he World Trade Organization has treated us very unfairly.”).