

## INTERNATIONAL ORGANIZATIONS

*United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process*

doi:10.1017/ajil.2019.59

With only three remaining members of what is supposed to be a seven-member body, the World Trade Organization's (WTO) Appellate Body may soon cease to function. Since 2016, the United States has blocked the reappointment of Appellate Body members and rejected over a dozen proposals to launch selection processes that could fill the remaining vacancies. As a lead reason for these blocks, the United States has cited concerns about the practice whereby members whose terms have expired continue to serve on appeals to which they were previously appointed. On December 10, 2019, the terms of two Appellate Body members will expire, leaving only one member remaining. Because the WTO's dispute settlement process requires three Appellate Body members for each appeal, WTO members will be unable to make any new appeals by this year's end unless a solution emerges to the current impasse.

When a conflict arises between WTO member states over an obligation, members often proceed through the WTO's dispute resolution mechanism. The mechanism, as laid out by the Dispute Settlement Understanding (DSU), consists of consultations, a panel report, and, if the parties choose, an appeal before three members of the WTO Appellate Body.<sup>1</sup> The Appellate Body is comprised of seven persons who each serve for a four-year term with the possibility of a one-time reappointment.<sup>2</sup> Through the Dispute Settlement Body (DSB), representatives from all WTO member states select Appellate Body members using the practice of consensus, which means that any matter submitted for the DSB's consideration is accepted—unless a present member “formally objects to the proposed decision.”<sup>3</sup> The three members of the Appellate Body appointed for a particular case have the authority to “uphold, modify or reverse” panel-made legal conclusions or interpretations and must issue their report within ninety days.<sup>4</sup> In practice, Appellate Body reports provide the only

<sup>1</sup> Lasting from 1986 to 1994, the Uruguay Round of Negotiations established the current dispute resolution system. World Trade Organization, *Understanding the WTO: Basics: The Uruguay Round*, at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm). After consultation attempts and a request by the complaining party, the Dispute Settlement Body (DSB) selects a panel to issue a report including factual findings and legal conclusions. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Arts. 4, 6, 7, 11, 12, Apr. 15, 1994, 1869 UNTS 401, 33 ILM 1226 [hereinafter DSU]. The panel's final report is circulated to all WTO members and, unless appealed or rejected by consensus, becomes the DSB's final ruling or recommendation. *Id.* Art. 16.

<sup>2</sup> DSU, *supra* note 1, Art. 17(1)–(2). The DSU provides that the Appellate Body should be comprised of “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.” *Id.* Art. 17(3).

<sup>3</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Arts. IV(2)–(3), IX(1), n. 1, Apr. 15, 1994, 1867 UNTS 154, 33 ILM 1144 [hereinafter WTO Agreement]; DSU, *supra* note 1, Arts. 2(4), 17(2).

<sup>4</sup> DSU, *supra* note 1, Arts. 17(6), 17(13). Specifically, appellate 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.” *Id.* Art. 17(5). If the Appellate Body is unable to circulate a report within sixty days, it must “inform the DSB in writing of the reasons for the delay” and “[i]n no case shall the proceedings exceed 90 days.” *Id.*

avenue for obtaining a binding resolution in many WTO disputes since, once a panel report has been appealed, the DSB cannot act on the matter until the completion of the appeal.<sup>5</sup>

Currently, the Appellate Body only has three serving members, two of whom have second terms ending on December 10, 2019.<sup>6</sup> The Appellate Body's low member count is due mainly to the United States' continued objections to reappointments and to the selection processes for new Appellate Body members over the last three years.<sup>7</sup> Under the Obama administration, the United States objected in 2016 to the reappointment of Seung Wha Chang (South Korea), citing its view that Chang had deviated from Appellate Body responsibilities.<sup>8</sup>

The administration of President Trump has raised still broader concerns about the WTO Appellate Body. During Trump's first year as president, Mexico introduced a joint proposal by dozens of WTO member states urging that the DSB launch a selection process to fill three upcoming Appellate Body vacancies.<sup>9</sup> The United States refused to support the proposal because one of the Appellate Body members had "continue[d] to serve on an appeal, despite ceasing to be a member of the Appellate Body nearly 5 [five] months ago."<sup>10</sup> The practice of Appellate Body members serving on appeals past their term is rooted in Rule 15 of the Working Procedures for Appellate Review, which provides:

Unless the DSB "decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members," it adopts the report, and the parties to the dispute must accept the Appellate Body's holdings. *Id.* Art. 17(14).

<sup>5</sup> See DSU, *supra* note 1, Art. 16. In a drafted reform proposal, the European Union expressed concern that without a functioning Appellate Body, "any party to the dispute may attempt to block the adoption of panel rulings (by appealing it) . . ." Council of the European Union, *Note for the Attention of the Trade Policy Committee: WTO – EU's Proposals on WTO Modernisation*, at 14, WK 8329/2018 INIT (July 5, 2018), available at <http://src.bna.com/Aoe> [<https://perma.cc/CQ4S-3N2N>] [hereinafter Drafted EU Proposal].

<sup>6</sup> These two members are Ujal Singh Bhatia (India) and Thomas R. Graham (United States). World Trade Organization, *Dispute Settlement Members: Appellate Body Members*, at [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) [<https://perma.cc/5CVE-J2H5>]. Their terms will end on December 10, 2019, leaving only Hong Zhao (China) remaining until his first term ends on November 30, 2020. *Id.* It remains to be seen whether Graham will continue to participate in appeals that were pending prior to the end of his term. Should he not do so, then the Appellate Body would be without a quorum for those appeals as well as for new ones. See Simon Lester, *Clarifying Tom Graham's Status on the Appellate Body*, INT'L ECON. L. & POL'Y BLOG (Sept. 23, 2019), at <https://ielp.worldtradelaw.net/2019/09/clarifying-tom-grahams-status-on-the-appellate-body.html> (reporting that Graham had made a "neutral statement about being undecided on how to approach cases after the expiration of his term").

<sup>7</sup> The U.S. decision to block reappointments or initial appointments is not unprecedented. For a discussion about two blocks the United States made in 2011 and 2014, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 573, 576 (2016).

<sup>8</sup> Statement by the United States at the Meeting of the WTO Dispute Settlement Body, at 1 (May 23, 2016), available at [https://www.wto.org/english/news\\_e/news16\\_e/us\\_statement\\_dsbmay16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/us_statement_dsbmay16_e.pdf) [<https://perma.cc/ML7M-8T9X>]. For more detailed information about the United States' 2016 decision to block Chang's reappointment to the WTO Appellate Body, see generally Daugirdas & Mortenson, *supra* note 7.

<sup>9</sup> Proposal by Argentina, Brazil, Chile, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609, at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/WRK7-CVJM>]; World Trade Organization Press Release, WTO Sets Up Panel to Review UAE Measures on Goods, Services, IP Rights (Nov. 22, 2017), at [https://www.wto.org/english/news\\_e/news17\\_e/dsb\\_22nov17\\_e.htm](https://www.wto.org/english/news_e/news17_e/dsb_22nov17_e.htm) [<https://perma.cc/8NLG-P4QZ>].

<sup>10</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 13 (Nov. 22, 2017), available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB\\_.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf) [<https://perma.cc/E6KB-CH9F>] [hereinafter November 2017 U.S. Statement].

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 DSB, 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.<sup>11</sup>

Although the Appellate Body has unquestioned authority to draft and implement appellate procedural rules, the United States specifically takes issue with Rule 15 insofar as the rule allows the Appellate Body “to deem someone who is not an Appellate Body member to be a member.”<sup>12</sup> The United States has pointed to Article 17(2) of the DSU which states in full:

The DSB shall appoint persons to serve on the Appellate Body for a four-year term, 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. 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.<sup>13</sup>

The United States explained in a statement that under Article 17(2), “the DSB has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving,” and that “Members need to discuss and resolve that issue first before moving on to the issue of replacing such a person.”<sup>14</sup>

From January to May 2018, member states submitted the proposal to fill the three vacancies four more times, each time with additional WTO member states joining the proposal.<sup>15</sup> The United States continued to reject the proposals, again citing to Rule 15:

<sup>11</sup> Appellate Body, *Working Procedures for Appellate Review*, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010). The rules as they existed at the time of this writing can be found permanently here: <https://perma.cc/A7GH-L3EX>.

<sup>12</sup> The DSU provides that “[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.” DSU, *supra* note 1, Art. 17(9). For an articulation of the U.S. position on this issue, see OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at 25–26 (2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF> [<https://perma.cc/TZP9-SJFC>].

<sup>13</sup> DSU, *supra* note 1, Art. 17(2).

<sup>14</sup> November 2017 U.S. Statement, *supra* note 10, at 13.

<sup>15</sup> Proposal by Argentina, Australia, Brazil, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.1 (Jan. 11, 2018), at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/DE3G-MNH5>]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.2 (Feb. 15, 2018), at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243206,241536,240077&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/G2GP-Q2AG>]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.3 (Apr. 16, 2018), at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=9&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=9&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/G72H-RUV8>]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.4 (May 17, 2018), at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=8&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=8&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/QEC7-XN3Z>].

For at least the past 8 months, the United States has been raising and explaining the systemic concerns that arise from the Appellate Body's decisions that purport to "deem" as an Appellate Body member someone whose term of office has expired and thus is no longer an Appellate Body member, pursuant to its Working Procedures for Appellate Review (Rule 15).

...

[U]nlike other international tribunals . . . , Rule 15 is not set out in the constitutive text of the WTO dispute settlement system—that is, the DSU. It has therefore not been agreed to by WTO Members.<sup>16</sup>

In August 2018, another appellate body member, Mr. Shree Baboo Chekitan Servansing, faced an approaching end date to his first term.<sup>17</sup> Causing the fourth vacancy on the Appellate Body, the United States announced at a WTO meeting that it "[was] not prepared to support [his] reappointment."<sup>18</sup> The United States explained that its position was "no reflection on any one individual but reflect[ed] [its] principled concerns."<sup>19</sup> The United States again grounded its decision in Rule 15 while also articulating several new areas of contention:

The United States has raised repeated concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.

On procedural, systemic issues, for example, the Appellate Body has issued advisory opinions on issues not necessary to resolve a dispute, reviewed panel fact-finding despite appeals being limited to legal issues, asserted that panels must follow its reports although there is no system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals—all contrary to the WTO's agreed dispute settlement rules.

And for the last year, the United States has been calling for WTO Members to correct the situation where the Appellate Body acts as if it has the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office—as set by the WTO Members—has expired. This so-called "Rule 15" is, on its face, another example of the Appellate Body's disregard for the WTO's rules.

<sup>16</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 23 (May 28, 2018), available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB\\_.Stmt\\_.as-deliv.fin\\_public.Rev\\_.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB_.Stmt_.as-deliv.fin_public.Rev_.pdf) [<https://perma.cc/7Z2P-PUSY>].

<sup>17</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 38 (Aug. 27, 2018), available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB\\_.Stmt\\_.as-delivered.fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_public.pdf) [<https://perma.cc/C6MC-PYBX>] [hereinafter August 2018 U.S. Statement]; Proposal by Argentina, Australia, Bolivia, et al., Appellate Body Appointments, WTO Doc. WT/DSB/W/609/Rev.5 (Sept. 13, 2018), at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=7&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255590,254971,253363,252364,251578,250293,249527,248090,245255,244608&CurrentCatalogueIdIndex=7&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/RGX7-NVQ8>].

<sup>18</sup> August 2018 U.S. Statement, *supra* note 17, at 38.

<sup>19</sup> *Id.*

Our concerns have not been addressed. . . .<sup>20</sup>

In an attempt to address the persistent U.S. refusal to permit the selection of new Appellate Body members, the European Union, China, Canada, Mexico, and several other WTO member states submitted a proposal at the December 12, 2018 WTO General Council Meeting.<sup>21</sup> The member states expressed “deep[] concern[] that the enduring absence of consensus in the [DSB] to fill the vacancies on the Appellate Body risks undermining the viability of the WTO dispute settlement system.”<sup>22</sup> The proposal suggested five different amendments to the DSU which involved: (1) permitting outgoing Appellate Body members to “complete the disposition of a pending appeal in which a hearing has already taken place during that member’s term”; (2) allowing parties to agree to extend the ninety-day timeframe in which Appellate Body panels must issue a report; (3) requiring clarification that issues of law and legal interpretation “do not include the meaning itself of [] municipal measures” in panel reports; (4) “provid[ing] that the Appellate Body shall address each of the issues raised on appeal by the parties to the dispute to the extent this is necessary for the resolution of the dispute”; and (5) hosting annual meetings between the Appellate Body and the DSB where members can discuss the Appellate Body’s jurisprudence.<sup>23</sup> Stressing the proposal’s importance, Commissioner Malmström of the European Union stated that “[t]he appellate body function of the WTO dispute settlement system is moving towards a cliff’s edge” and that “[w]ithout this core function of the WTO, the world would lose a system that has ensured stability in global trade for decades.”<sup>24</sup>

The United States responded with disinterest to the proposed amendments, although it provided little reasoning as to why the proposals were unacceptable or unworkable:

<sup>20</sup> *Id.* at 37. Following the U.S. announcement, Trump told news reporters that if the WTO did not “shape up,” he would withdraw the United States from the WTO. John Micklethwait, Margaret Talev & Jennifer Jacobs, *Trump Threatens to Pull U.S. Out of WTO if It Doesn’t “Shape Up,”* BLOOMBERG (Aug. 31, 2018), at <https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up>. Trump recently threatened to leave the WTO again during a visit to Pennsylvania. White House Press Release, Remarks by President Trump on American Energy and Manufacturing | Monaca, PA (Aug. 13, 2019), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-energy-manufacturing-monaco-pa/> [<https://perma.cc/7H5R-DUHU>] (“We were losing all our cases in the World Trade Organization. Almost every case, we were — lost, lost, lost. They thought we were stupid. . . . We will leave, if we have to. And all of the sudden, we’re winning a lot of cases.”). The U.S. congressional act implementing the WTO’s Uruguay Round of Agreements provides that “[t]he approval of the Congress . . . of the WTO Agreement shall cease to be effective if, and only if, a joint resolution . . . is enacted into law . . .” 19 U.S.C.A. § 3535(b)(1). The implementing legislation further specifies that such a joint resolution will employ the following text: “That the Congress withdraws its approval, provided under section 101(a) of the Uruguay Round Agreements Act, of the WTO Agreement as defined in section 2(9) of that Act.” *Id.* § 3535(c)(1).

<sup>21</sup> Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WTO Doc. WT/GC/W/752 (Nov. 26, 2018), available at [https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157514.pdf](https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf) [<https://perma.cc/VP6L-GDAZ>] [hereinafter December 2018 Reform Proposal]. This proposal was an adaptation of one originally drafted in mid-2018. Drafted EU Proposal, *supra* note 5.

<sup>22</sup> December 2018 Reform Proposal, *supra* note 21, at 1.

<sup>23</sup> *Id.* at 1–3.

<sup>24</sup> European Comm’n Press Release, WTO Reform: EU Proposes Way Forward on the Functioning of the Appellate Body (Nov. 26, 2018), at [https://europa.eu/rapid/press-release\\_IP-18-6529\\_en.htm](https://europa.eu/rapid/press-release_IP-18-6529_en.htm) [<https://perma.cc/F65E-PEB9>].

We recognize the proposals presented by some WTO Members at the December 12 meeting of the General Council. These proposals to some extent acknowledge the systemic concern the United States has been raising in the WTO for years—namely, that the Appellate Body has strayed from the role agreed for it by WTO Members.

...

However, on a close reading, the proposals would not effectively address the concerns that WTO Members have raised. The United States has made its views on these issues very clear: if WTO Members say that we support a rules-based trading system, then the Appellate Body must follow the rules we agreed in 1995.<sup>25</sup>

Despite the apparent U.S. intransigence, member states continued to request a selection process be launched to fill the body's four vacancies.<sup>26</sup> Beginning in June 2019, member states requested two additional selection processes be launched for Mr. Ujal Singh Bhatia and Mr. Thomas Graham, who both have their second four-year terms ending on December 10, 2019.<sup>27</sup> At an August 15 meeting, the United States rejected this proposal to fill the now six vacancies that will exist on the Appellate Body.<sup>28</sup>

Several member states have questioned whether the U.S. practice of Appellate Body blocking violates Article 17(2) of the DSU, which states that “[v]acancies *shall* be filled as they arise.”<sup>29</sup> At a DSB meeting earlier this year, over twenty WTO member states tried to present the argument that Article 17(2) places a legal obligation on the United States and all other members to fill appellate body vacancies.<sup>30</sup> The United States responded to these concerns with the following:

<sup>25</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 44 (Dec. 18, 2018), available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB\\_.Stmt\\_.as-deliv\\_fin\\_.public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv_fin_.public.pdf) [<https://perma.cc/Q4HS-RWF6>]. In this statement, the United States also provided an extensive legal analysis for why it believes the Appellate Body engages in a “misguided” practice when it uses reports as precedents “absent cogent reasons.” *Id.* at 10–35.

<sup>26</sup> See Proposal by Argentina, Australia, Benin, et al., Appellate Body Appointments, WT/DSB/W/609/Rev.10 (Apr. 15, 2019), at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=256059,255590,254971,253363,252364,251578,250293,249527,248090,245255&CurrentCatalogueIdIndex=3&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=256059,255590,254971,253363,252364,251578,250293,249527,248090,245255&CurrentCatalogueIdIndex=3&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/38JA-4RMZ>].

<sup>27</sup> Proposal by Argentina, Australia, Benin, et al., Appellate Body Appointments, WT/DSB/W/609/Rev.11 (June 13, 2019), at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=256059,255590,254971,253363,252364,251578,250293,249527,248090,245255&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=256059,255590,254971,253363,252364,251578,250293,249527,248090,245255&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) [<https://perma.cc/XRW5-F2TK>].

<sup>28</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 30 (Aug. 15, 2019), available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug15.DSB\\_.Stmt\\_.as-deliv\\_fin\\_.public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug15.DSB_.Stmt_.as-deliv_fin_.public.pdf) [<https://perma.cc/2KGG-J7YL>].

<sup>29</sup> DSU, *supra* note 1, Art. 17(2) (emphasis added).

<sup>30</sup> World Trade Organization Press Release, Members Consider Thai Request for Panel to Rule on Turkish Air Conditioner Duties (Feb. 25, 2019), at [https://www.wto.org/english/news\\_e/news19\\_e/dsb\\_25feb19\\_e.htm](https://www.wto.org/english/news_e/news19_e/dsb_25feb19_e.htm) [<https://perma.cc/AQW5-HV8V>]. Argentina, Brazil, Colombia, Chile, Guatemala, Mexico, and Peru also presented Article 17(2)'s “shall” language regarding the Appellate Body selection process in late 2017. Communication from Argentina, Brazil, et al., Proposal Regarding the Appellate Body Selection Process, WTO Doc. WT/DSB/W/596/Rev.5 (Oct. 12, 2017), available at <https://www.ip-watch.org/weblog/wp-content/uploads/2017/10/Proposal-Appellate-Body-Selection-Process-Ar-Bz-Col-Chil-Guat-Mex-Peru.pdf> [<https://perma.cc/4F5A-8GVY>].

We note that several Members, including Mexico, the EU, Canada, and China, have referenced the “shall” in the third sentence of Article 17.2 of the DSU.

We would ask these Members to share their views on the “shall” in the first sentence of that article. That sentence reads, in part, that “[t]he DSB shall appoint persons to serve on the Appellate Body. . .”.

Do these Members agree that this provision makes clear that it is the DSB that has the authority to appoint and reappoint members of the Appellate Body? And that the DSB—not the Appellate Body—has the responsibility to decide whether a person whose term of appointment has expired should continue serving, as if a member of the Appellate Body, on any pending appeals?

Can these Members share their views on the “shall” in Article 17.5 of the DSU? As the text of Article 17.5 provides that “[i]n no case shall the proceedings exceed 90 days”, do these Members agree that the Appellate Body breaches this provision when it issues a report beyond the 90-day deadline?

What are these Members’ views on the “shall” in Article 17.6? This article provides that “[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Do these Members agree that the Appellate Body does not respect this text when it engages in review of panel findings of fact?

We look forward to hearing these Members’ views on these questions.<sup>31</sup>

Although the United States skirted the issue of whether it has an obligation to fill vacancies on the Appellate Body, a recent statement by U.S. Ambassador Dennis Shea at the WTO General Council Meeting recognized that the term “shall” is “mandatory” with respect to the rule requiring the Appellate Body to issue a report within ninety days of an appeal.<sup>32</sup>

Some practitioners and scholars have suggested various workarounds that could be used if the ongoing disagreements are not resolved. During his farewell speech, former Appellate Body member Peter Van den Bossche suggested that “if consensus among all WTO members on such reforms is not possible, a coalition of willing WTO members should consider establishing a new parallel dispute settlement system that would copy the existing, but dysfunctional, DSU, in order to settle WTO disputes between them in an orderly and rules-based manner.”<sup>33</sup> Jennifer Hillman has suggested turning to an arbitration process in place of the dispute settlement mechanism using Article 25 of the DSU.<sup>34</sup> Ernst-Ulrich Petersmann has

<sup>31</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 13–14 (Feb. 25, 2019), available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb25.DSB\\_.Stmt\\_.as-deliv\\_fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb25.DSB_.Stmt_.as-deliv_fin_public.pdf) [<https://perma.cc/W4JF-Z4TN>] (formatting omitted).

<sup>32</sup> U.S. Mission to International Organizations in Geneva, Statements Delivered by Ambassador Dennis Shea – WTO General Council Meeting (July 23, 2019), at <https://geneva.usmission.gov/2019/07/23/statements-delivered-by-ambassador-dennis-shea-wto-general-council-meeting-july-23-2019> [<https://perma.cc/YZ5F-XR8Y>].

<sup>33</sup> World Trade Organization Press Release, Farewell Speech of Appellate Body Member Peter Van den Bossche (May 28, 2019), at [https://www.wto.org/english/tratop\\_e/dispu\\_e/farwellspeech\\_peter\\_van\\_den\\_bossche\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm) [<https://perma.cc/3RA7-TT7K>].

<sup>34</sup> Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization’s Appellate Body: The Good, the Bad and the Ugly?*, INST. INT’L ECON. L., at 8–9 (2018), available at <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>. Article 25 states that “[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes

suggested interpreting the foundational agreements underlying the WTO in a way that offers an escape valve from the consensus procedure with respect to the selection of Appellate Body members.<sup>35</sup>

The Trump administration has been less than clear in articulating a path forward.<sup>36</sup> As of mid-August, there is no indication that the United States will agree to a solution before this December when the terms for two of the three remaining Appellate Body members end.<sup>37</sup> When criticized over the summer for its lack of engagement to date in finding a workable solution, the United States submitted:

[W]e have made clear our willingness to discuss these concerns further with any Member in order to deepen each other's understanding of these substantive issues. . . .

. . .

Unfortunately, one, or perhaps a few, WTO Members have indicated they do not share the concerns of the United States that the Appellate Body has deviated from the DSU text. These Members have not, however, adequately or persuasively explained how they could read the plain DSU text differently. . . .

So the United States continues, as it has always done, to be engaged on these important substantive issues, including by meeting regularly with the Facilitator and Members to exchange views on the issues under discussion.

. . . In other words, Members need to engage in a deeper discussion of *why* the Appellate Body has felt free to depart from what Members agreed to.

Engagement is a two-way street. Without further engagement from WTO Members on the cause of the problem, there is no reason to believe that simply adopting new or additional language, in whatever form, will be effective in addressing the concerns that the United States and other Members have raised.<sup>38</sup>

that concern issues that are clearly defined by both parties." DSU, *supra* note 1, Art. 25(1). But "resort to arbitration shall be subject to mutual agreement of the parties" making it an unequal replacement to the WTO's current dispute settlement mechanism. *Id.* Art. 25(2); Hillman, *supra* note 34, at 9.

<sup>35</sup> Ernst-Ulrich Petersmann, *Petersmann on "How Should WTO Members Respond to the WTO Appellate Body Crisis?"*, INT'L ECON. L. & POL'Y BLOG (Dec. 13, 2018), at <https://worldtradelaw.typepad.com/ielpblog/2018/12/ulli-petersmann-on-how-should-wto-members-respond-to-the-wto-appellate-body-crisis.html>.

<sup>36</sup> See Simon Lester, *What Does the U.S. Want to See Happen with Appellate Body Reform?*, INT'L ECON. L. & POL'Y BLOG (July 23, 2019), at <https://ielp.worldtradelaw.net/2019/07/what-does-the-us-want-to-happen-with-appellate-body-reform.html> (questioning whether the United States is hoping for the Appellate Body to change its behavior on its own or for the DSB to pass amendments to the Dispute Settlement Understanding which would force the Appellate Body to change).

<sup>37</sup> Trump's 2019 Trade Agenda was unenlightening. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2019 TRADE POLICY AGENDA AND 2018 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at 149 (2019), available at [https://ustr.gov/sites/default/files/2019\\_Trade\\_Policy\\_Agenda\\_and\\_2018\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf) [<https://perma.cc/TT4N-BS4Y>] ("The United States will continue to raise its systemic concerns with Appellate Body overreaching and press for WTO Members to take responsibility to ensure the WTO dispute settlement system operates as intended and agreed in the DSU. . . . Participants will continue to consider reform proposals in 2019.").

<sup>38</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 30–31 (July 22, 2019), available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/Jul22.DSB\\_Stmt\\_as-deliv.fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Jul22.DSB_Stmt_as-deliv.fin_public.pdf) [<https://perma.cc/28GE-PJSC>] (formatting omitted). Some member states have agreed with certain U.S. positions regarding the Appellate Body. For example, China agreed with the United States that "the



The fate of the WTO Appellate Body adds more uncertainty to the brewing global trade developments under Trump's administration. Trade negotiations have continued between the United States and China and appeared to make progress in late July of 2019 when China agreed to increase purchases of U.S. agricultural exports.<sup>39</sup> But then, in early August, Trump tweeted that the United States will “put[] a small additional Tariff of 10% on the remaining 300 Billion Dollars of goods and products coming from China into our Country” in addition to the “250 Billion Dollars already Tariffed at 25%,” which would go into effect on September 1 or December 15, depending on the article.<sup>40</sup> When China retaliated by placing tariffs on \$75 billion of U.S. products, Trump tweeted again later that month that “[s]tarting on October 1st, the 250 BILLION DOLLARS of goods and products from China, currently being taxed at 25%, will be taxed at 30%,” and that the products “being taxed from September 1st at 10% will now be taxed at 15%.”<sup>41</sup> With respect to trade relations across the Atlantic, Trump recently announced that the United States signed an agreement with the European Union “mak[ing] it easier to export American beef,” with the goal that duty-free American beef exports would increase by ninety percent over the next seven years.<sup>42</sup> In statements to reporters, however, Trump described the beef agreement as only breaking the “first barrier” and that “[a]uto tariffs are never off the table.”<sup>43</sup> Adding to the force of Trump's statements, earlier this year the U.S. Court of International Trade assessed the legality of Trump's 2018 steel and aluminum tariffs and held that Congress

Appellate Body should only address the issues appealed by the parties to the dispute and refrain from making findings on the issues that neither party appealed but said concerns about this should not be used to block the launch of the Appellate Body selection process.” World Trade Organization Press Release, Panels Established to Examine Pakistani Duties on Film, Korean Duties on Steel (Oct. 29, 2018), at [https://www.wto.org/english/news\\_e/news18\\_e/dsb\\_29oct18\\_e.htm](https://www.wto.org/english/news_e/news18_e/dsb_29oct18_e.htm). More broadly, member states have expressed “their willingness to discuss the US concerns” with the condition that “the resolution of those concerns [] not be linked to the launching of the selection process.” World Trade Organization Press Release, Qatar Seeks WTO Panel Review of UAE Measures on Goods, Services, IP Rights (Oct. 23, 2017), at [https://www.wto.org/english/news\\_e/news17\\_e/dsb\\_23oct17\\_e.htm](https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm).

<sup>39</sup> White House Press Release, Statement from the Press Secretary (July 31, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-71> [<https://perma.cc/5CFC-SMFE>].

<sup>40</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2019, 10:26 AM), at <https://twitter.com/realDonaldTrump/status/1156979446877962243> [<https://perma.cc/3CS4-M6EY>]. Trump's tweet had announced that all goods would have an additional 10% tariff starting on September 1, 2019, *id.*; however, the U.S. Trade Representative recently announced that the additional tariff would be delayed for certain articles such as “cell phones, laptop computers, video game consoles . . . .” U.S. Trade Representative Press Release, USTR Announces Next Steps on Proposed 10 Percent Tariff on Imports from China (Aug. 13, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/ustr-announces-next-steps-proposed#> [<https://perma.cc/KC82-4Y5M>]. For a longer discussion about the tariffs already imposed on China, see Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 751, 751–53 (2018).

<sup>41</sup> Donald J. Trump, (@realDonaldTrump), TWITTER (Aug. 23, 2019, 2:00 PM), at <https://twitter.com/realDonaldTrump/status/1165005929831702529> [<https://perma.cc/R9BF-ZYAU>]; Alan Rappeport & Keith Bradsher, *Trump Says He Will Raise Existing Tariffs on Chinese Goods to 30%*, N.Y. TIMES (Aug. 23, 2019), at <https://nyti.ms/30eNQEV>. Trump later announced that these tariffs would be delayed by several weeks, amid the continuation of trade negotiations between the United States and China. Ana Swanson, *Trump Delays Planned Tariff Increase in “Gesture of Good Will” to China*, N.Y. TIMES (Sept. 11, 2019), at <https://www.nytimes.com/2019/09/11/us/politics/trump-counterfeit-drugs-china.html>.

<sup>42</sup> Donald J. Trump, Remarks on the Signing of a European Union-United States Trade Agreement, 2019 DAILY COMP. PRES. DOC. No. 532, at 1 (Aug. 2).

<sup>43</sup> Donald J. Trump, Remarks in an Exchange with Reporters Prior to Departure for Bedminster, New Jersey, 2019 DAILY COMP. PRES. DOC. No. 533, at 7 (Aug. 2).

does have the constitutional authority to delegate such tariff-imposing responsibilities to the president.<sup>44</sup>

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

*United States Resists Efforts to Have the Arctic Council Make Climate-Related Statement*  
doi:10.1017/ajil.2019.60

The Arctic Council convened for the eleventh time in early May 2019 in Rovaniemi, Finland, for a two-day conference. On May 7, the Arctic Council released a Joint Ministerial Statement that affirmed the desire of the eight member states to work together to face upcoming challenges but made no substantive commitments and no mention of climate change. In remarks to the Council, Secretary of State Mike Pompeo expressed wariness about collective decision making and warned against potential effects of Chinese activity in the Arctic.

In its final statement, the Arctic Council focused on the member states' commitment to each other rather than on specific policies:

Reaffirming our commitment to maintain peace, stability and constructive cooperation in the Arctic,

Emphasizing the role of Arctic States in providing leadership in addressing new opportunities and challenges in the Arctic, working in close cooperation with the Permanent Participants,

Recognizing the diversity of the societies, cultures and economies in the Arctic, reaffirming our commitment to the well-being of the inhabitants of the Arctic, to sustainable development and to the protection of the Arctic environment,

. . . .

[We] [w]elcome the ongoing strategic work, and instruct the Senior Arctic Officials to continue strategic planning, in order to provide guidance and improve the efficiency and effectiveness of the Arctic Council, further instruct the SAOs to review the roles of the Ministerial meetings, the Senior Arctic Officials and the Permanent Participants, and to report to Ministers in 2021 . . . .<sup>1</sup>

Notably missing from the final statement were any substantive decisions and any mention of climate change.<sup>2</sup> The Arctic Council Chair, Finnish Minister for Foreign Affairs Timo

<sup>44</sup> *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019). For legal analysis of this issue, see Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019), at <https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico>.

<sup>1</sup> Arctic Council Press Release, Rovaniemi Joint Ministerial Statement (May 7, 2019), available at [https://oarchive.arctic-council.org/bitstream/handle/11374/2342/Rovaniemi%20Joint%20Ministerial%20Statement\\_2019\\_Signed.pdf?sequence=1&isAllowed=y](https://oarchive.arctic-council.org/bitstream/handle/11374/2342/Rovaniemi%20Joint%20Ministerial%20Statement_2019_Signed.pdf?sequence=1&isAllowed=y).

<sup>2</sup> *Id.*