



The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?

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Some trade practitioners, scholars, and other observers regard the multilateral World Trade Organization's (WTO's) dispute settlement mechanism as the "crown jewel" of the international rules-based trading system. The WTO's architects believed that the enforceability of WTO rules through the dispute settlement mechanism, with the opportunity for appeal to the WTO's Appellate Body to resolve inconsistent dispute settlement panel interpretations, would [further the stability and predictability](#) of the multilateral trading system and avoid tit-for-tat trade retaliation, benefiting the global economy. On December 11, 2019, however, the Appellate Body lost its [quorum of three members](#) necessary for the Body to decide appeals of WTO dispute settlement panel decisions. Because of this, the Dispute Settlement Body (DSB) (i.e., the committee composed of all WTO Members that oversees the dispute settlement mechanism) can no longer adopt panel reports in line with the [WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes](#) (DSU). Consequently, unless WTO Members agree to consider unadopted dispute reports as final, the DSB cannot oversee the losing Member's implementation of a panel ruling or authorize the prevailing Member to engage in trade retaliation if the losing Member ignores the dispute panel's recommendations.

The dormancy of the WTO's Appellate Body, when coupled with the [increasing use of unilateral trade measures](#) by the United States and other countries to address issues that the trading system may be ill-equipped to resolve, has raised questions about the viability of an international trading regime based on enforceable trade rules. This Sidebar explores the background of the WTO Appellate Body's lack of quorum; examines proposals to reform the dispute settlement system; and discusses implications for Congress.

Background

Using the [WTO's dispute settlement mechanism](#), a WTO Member, after trying to negotiate a resolution to a trade dispute, may bring the dispute before an independent international dispute settlement panel for binding resolution. Until recently, a WTO Member dissatisfied with a panel's legal findings could appeal the decision to the [Appellate Body](#), a seven-member standing body that could ultimately uphold, modify,

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or reverse a panel's legal interpretations. WTO Members have [increasingly appealed](#) panel findings to the Appellate Body.

The DSB appoints judges to serve on the Appellate Body and has traditionally operated based on consensus. Although the United States and other WTO Members have [long sought](#) to address perceived problems with the WTO's dispute settlement mechanism through negotiations, questions about the future of the Appellate Body began during the Obama Administration. In May 2016, the Office of the United States Trade Representative (USTR), which represents the United States before the WTO, [blocked](#) the reappointment of South Korean member Seung Wha Chang citing "abstract discussions" in the judge's opinions that allegedly exceeded the Appellate Body's mandate. Although the DSB later filled Chang's former position under the Obama Administration, the Trump Administration's USTR subsequently [blocked](#) the reappointment of other judges as terms continued to expire. Since October 1, 2018, the body had operated with three members, the minimum necessary for a quorum.

As described in the USTR's [2019 Trade Policy Agenda and 2018 Annual Report](#), the United States to support its withholding of approval of judges has cited several concerns with the Appellate Body. A primary concern is that the appeals tribunal has allegedly exceeded its mandate when interpreting the WTO agreements, thereby "adding to or diminishing rights or obligations under the WTO Agreement[s]" without the consent of WTO Members, in particular when deciding disputes involving subsidies, trade remedies, and technical product standards. The USTR maintains that this so-called "judicial activism" restricts the ability of the United States "to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices." The USTR has pointed to [Article 3.2 of the DSU](#), which states that "recommendations or rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." However, the DSU also states that the dispute settlement mechanism may clarify provisions of those agreements in accordance with customary rules of interpreting public international law. While adjudicators must necessarily fill in gaps in the text of an agreement or resolve ambiguities when applying rules in specific factual circumstances, the United States is concerned that the Appellate Body has in effect created new obligations without following the formal [interpretation](#) or [amendment](#) processes provided for in the WTO agreements. Other U.S. concerns revolve around certain procedural issues, such as, among other issues, the Appellate Body's failure to meet the 90-day deadline for appeals; its treatment of its rulings as precedential; and its alleged failure to accept a dispute settlement panel's findings regarding a Member's domestic law as an unreviewable factual matter. Other WTO Members [have shared](#) some of these concerns.

Reform Proposals

As described in this [CRS report](#), WTO Members and scholars have proposed various reforms to the dispute settlement mechanism to address these concerns. The WTO General Council launched an informal inquiry into the Appellate Body's functioning at its December 2018 meeting. This group has met regularly, and its facilitator, Ambassador David Walker of New Zealand, proposed in October 2019 a list of consensus items among its participants as the General Council's [draft decision](#). However, the WTO operates based on consensus among its 164 Members, and trade law experts have [largely agreed](#) that it is unlikely that all Members will agree on these proposals in the near future, despite some areas in which there is growing consensus. To date, the United States has rejected the various reform proposals.

Some commentators have proposed various ways that WTO Members could preserve some aspects of the dispute settlement mechanism through interim arrangements, despite the lack of consensus for reform. Such [proposals](#) include:

- A plurilateral agreement among WTO Members (excluding the United States) to create a separate dispute settlement mechanism that [replicates the Appellate Body's functions](#), using arbitration provisions in [Article 25](#) of the WTO DSU. As an initial step, the

European Union has reached bilateral agreements with [Canada](#) and [Norway](#) on how they will handle appeals in cases between the two Members through the WTO's alternate arbitration provisions, without an effective Appellate Body.

- Informal agreement among WTO Members to abide by dispute settlement panel decisions despite the lack of an appeals process.
- Returning to a mechanism like that of the WTO's predecessor, the [General Agreement on Tariffs and Trade](#) (GATT), in which any WTO Member could block a panel decision. While the USTR [apparently favors](#) this approach, few other WTO Members appear to support this change. When advocating for binding dispute settlement under the WTO during the WTO's formation, Congress [cited](#) the insufficiencies of the GATT's dispute settlement mechanism.

None of these proposals represents a comprehensive solution. For example, a plurilateral agreement on dispute settlement that excludes the United States would still leave the resolution of many pending and future trade disputes to bilateral negotiations and possible unilateral trade action. And the more drastic option of returning to a GATT-like mechanism would allow the losing WTO Member to block a panel decision, making many WTO rules unenforceable.

Implications for Congress

Since the end of World War II, the United States has played a [central role](#) in the development of the rules-based trading system, including the establishment of the GATT in the 1940s and its successor, the WTO, in the 1990s. Congress, which has [constitutional authority](#) to set tariffs and regulate foreign commerce, has called the WTO the "[foundation of the global trading system.](#)" And the consistency of proposed domestic legislation with U.S. WTO obligations is a perennial issue for legislative drafters and Members of Congress to consider. The seeming inability of the global trading system to address systemic issues through negotiations (e.g., China's subsidies for state-owned industries), combined with the Trump Administration's [approach](#) to trade relations with other countries, has raised questions about the viability of the rules-based trading system. Commentators have [noted](#) that the Appellate Body's dormancy, which prevents the enforceability of WTO decisions, poses a significant challenge to the trading system.

The most immediate implication is the possibility that pending cases will not be resolved through the dispute settlement mechanism. These pending cases include [several cases](#) involving the United States' tariff measures against China imposed under [Section 301 of the Trade Act of 1974](#) and tariffs imposed on products from China and several additional countries under [Section 232 of the Trade Expansion Act of 1962](#). In addition, ongoing appeals of dispute settlement panel reports involving the United States that will not be completed under [Rule 15 of the Appellate Body's Working Procedures](#) include the EU's appeal of a recent WTO compliance ruling against EU concerning its subsidies for Airbus in the [Boeing-Airbus dispute](#).

Without any functioning WTO dispute resolution mechanism, some commentators have suggested that parties might protect their trading interests by relying on [bilateral and regional trade agreements](#). The United States is party to fourteen bilateral and regional free trade agreements (FTA) with twenty countries that provide for enforcement of agreement obligations through recourse to an international dispute settlement mechanism. Although countries rarely use these mechanisms for general trade disputes, it is possible that their use would increase with the dormancy of the WTO appeals system. However, because the procedural rules for dispute settlement under many of these FTAs allow a disputing party to, in effect, [block the formation of a panel](#) to hear a dispute amid a lack of consensus over panelist appointments, there are questions about whether these mechanisms can serve as a viable alternative to the WTO with respect to disputes between the United States and its twenty FTA partners. Such issues were recently

addressed in the U.S.-Mexico-Canada Agreement, which [revises](#) the dispute settlement procedures of the North American Free Trade Agreement.

Another implication of the WTO Appellate Body's dormancy is the possible increasing recourse by the United States and other countries to unilateral trade measures (e.g., tariffs) as a bargaining chip in trade negotiations, to retaliate for alleged lack of compliance with commitments or in response to perceived trade restrictions. Congress has delegated some of its power over foreign commerce to the executive branch in several broadly worded provisions of [federal law](#), which the current Administration has variously invoked in its recent imposition of tariffs. Congress could consider amending these authorities to strengthen them or to exercise more oversight over their use.

Congress's oversight role over the WTO and federal trade agencies may also provide it some leverage in resolving the Appellate Body impasse. Of course, Congress cannot negotiate a resolution itself—it must rely on the executive branch to do so. However, Congress could direct the USTR to allow the appointment of new appellate body judges or [increase engagement](#) with WTO Members on reform efforts. Congress, subject to any constitutional constraints, could also use the appropriations process to encourage USTR to cease blocking appointments or reappointments of judges. Congress could also act to support of the Administration's proposals. A Member of Congress who opposes the Appellate Body's decisions could introduce a resolution disapproving of U.S. membership in the WTO in 2020, which the [Uruguay Round Agreements Act](#) authorizes every five years. Potentially, such a resolution could allow Congress to engage in a debate on U.S. participation in the WTO. Congress could also cut U.S. funding for the Appellate Body in line with a Trump Administration [proposal to cap the salaries of Appellate Body members](#)—a budget proposal the WTO [approved](#). Regardless of the path Congress takes, many observers [remain skeptical](#) that WTO Members will fully resolve the Appellate Body issue in the near-term, absent increased U.S. engagement, leaving the rules-based trading system in a state of uncertainty for the foreseeable future.

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