

## Rule the Roost

US preventing vacancies from being filled in 7-member Appellate Body for 2 years



**Cites disagreements** with procedures & some of body's rulings

**Move has affected** the body's functioning even as disputes pile up



**May 2016: USTR said it would block reappointment of South Korean member Seung Wha Chang**

**Objected** to his role in decisions with which the US disagreed

# “Appellate Body Held Hostage”: Is Judicial Activism at Fair Trial?

*(Forthcoming in Journal of World Trade (53.2) 2019)*

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# Agenda

- Importance of the WTO
- The Dispute Settlement Mechanism
- The problem: US holding AB hostage
- Why is US doing this?: An overview of the reasons
- Proposals on the table
- Our proposal



## Importance of the World Trade Organization

“In brief, the World Trade Organization (WTO) is the only international organization dealing with the global rules of trade. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.” (WTO)

- Trade negotiations
- Dispute settlement
- 164 members
- 98% of world trade



WORLD TRADE  
ORGANIZATION

# The Dispute Settlement Mechanism

## Consultations

- Requested if a country has reason to believe there is a violation of WTO Law
- Countries try to arrive to a mutually acceptable decision

## *Ad hoc panel*

- A formal panel is constituted on a case-to-case basis
- 3 panelists hear the dispute
- Decision is binding unless appealed for

## Appellate Body

- DSM's uppermost adjudicatory body
- 7 members, 3 to hear each case
- Terms of 4 years, with a possible reappointment
- Decision is final and binding (unless opposed by consensus of DSB)

# The problem: US holding AB hostage



Ujal Singh  
Bhatia (India)



Thomas R. Graham  
(United States)



Hong Zhao  
(China)



Peter Van den  
Bossche (Belgium)



Ricardo Ramírez-  
Hernández (México)



Hyun Chong Kim  
(Korea)



Shree Baboo Chekitan  
Servansing (Mauritius)

US Concern	Proposal
<b>Judicial Activism</b>	<ul style="list-style-type: none"> <li>• The AB shall address all issues raised on appeal but need do so only to the extent necessary to resolve the dispute. (EU and others)</li> <li>• Require an annual meeting of the AB and DSB at which any member could express views on adopted AB reports (EU)</li> </ul>
<b>Delay in 90-day deadline</b>	<ul style="list-style-type: none"> <li>• Parties could agree to exceed 90-day timeframe (EU)</li> <li>• 70 to 9 members (EU)</li> <li>• Full time appointment (EU)</li> <li>• Extended legal and admin support (EU)</li> </ul>
<b>Automatic Reappointment</b>	<ul style="list-style-type: none"> <li>• Extend the term of an AB member from 4 years to 6 or 8 years (EU)</li> <li>• No reappointment (EU)</li> </ul>
<b>Rule 15 (extension of tenure)</b>	‘Carry-over could be limited to those cases where the oral hearing (on the merits) has occurred or started.’ (Georgetown University)
<b>What if there is no AB</b>	<ul style="list-style-type: none"> <li>• Don’t file an appeal (Steve Charnovitz)</li> <li>• Majority voting and a new tribunal under a new DSM treaty (Jan Kuijper)</li> <li>• DSU Art 25 Bilateral arbitration (Jan Kuijper)</li> <li>• Good offices, conciliation and negotiation (Jan Kuijper)</li> <li>• Resort to bilateral and regional mechanisms</li> </ul>
<b>National Sovereignty, Need for AB, threats and pressure games</b>	?????????

## The Paper proposes

- Redesign the selection process of AB members
  - Listing Process, similar to Panel listing
  - Indicative list of potential AB members (ad-hoc, case-to-case basis)
  - Members fit the requirement of Art. 17.3 of DSU
  - Nomination to be approved by DSB by consensus
  - On appeal, AB Secretariat proposes, and appellant and appellee can accept or reject
  - DG has the final decision

US Concern	Our Proposal
Judicial Activism	
Delay in 90-day deadline	
Automatic Reappointment	
Rule 15 (extension of tenure)	
What if there is no AB	
National Sovereignty, Need for AB, threats and pressure games	

Thank you!

ITam