

# Academic Floats Solution For WTO Appellate Body Turmoil

By **Alex Lawson**

Law360, New York (November 3, 2017, 6:34 PM EDT) -- George Washington University law professor and former WilmerHale attorney Steve Charnovitz said Friday that the World Trade Organization's Appellate Body should cease accepting appeals if it encounters three vacancies, offering a path forward for the beleaguered institution.

The Appellate Body will soon see three of its seven seats vacated and has been **struggling** to get any new appointment processes off the ground as the U.S. delegation raises procedural concerns about opinions signed by departed judges. But Charnovitz, writing on the WorldTradeLaw.net blog, said that the appeals panel can take matters into its own hands.

Nodding to Article 17.9 of the WTO's Dispute Settlement Understanding, which allows the Appellate Body to tweak its own working procedures without requiring consensus from the members, Charnovitz said that the appeals judges should shut down their shop when their ranks get too thin to function properly.

"I propose that the Appellate Body amend Rule 20 of the Working Procedures to state that in the event of three or more expired terms in the Appellate Body membership, the Appellate Body will be unable to accept any new appeals," he wrote. "For a depleted Appellate Body bench to continue processing new cases would necessarily cause huge delays, thus frustrating the Uruguay Round goals of a prompt dispute system."

The Appellate Body has been reeling in the face of a rash of departures and a logjam over how to best replace them. At the beginning of the year, it was well aware that two of its members, Ricardo Ramírez-Hernández of Mexico and Peter Van den Bossche of Belgium, would see their terms end in June and December, respectively.

As the members squabbled over how to conduct searches to replace those candidates — Ramírez-Hernández has remained on after his term expired to finish work on cases that began on his watch — the WTO was thrown another curve ball in early August when South Korea's Kim Hyun-Chong left one month into his term to be his home country's trade minister.

When Van den Bossche's term ends on Dec. 11, just four of the Appellate Body's seven seats will be filled. According to Charnovitz, the U.S. has been using the turmoil to "intimidate other countries to agree to its goals of watering down substantive trade disciplines and rules of WTO judicial procedure."

But if the Appellate Body can tweak its rules so that it can deem appeals are "completed" on the day they are filed, when in actuality they are declining to take up the case at all.

"In other words, by removing itself from the dispute process for new cases, a disabled Appellate Body will step aside so that the panel decision can automatically be adopted by the WTO Dispute Settlement Body on a timely basis," he wrote.

The Appellate Body has been beset with delays and procedural snags for years amid a swollen docket of complex cases, a dynamic that has only worsened with the new vacancies.

But Charnovitz's hope is that shutting the faucet off completely will create a sense of urgency among the membership and prevent the U.S. from using the delays as a political pawn in Geneva.

"I urge the Appellate Body to erect this defense now before it is too late," he said. "By limiting the potential damage to WTO dispute settlement in this way, the Appellate Body could, in effect, call the Trump Administration's bluff as to whether it wants to maintain the option of a United States appeal in future WTO panel decisions."

--Editing by Joe Phalon.