

## **The Future of the Dispute Settlement Mechanism of WTO Following the Deadlock of Its Appellate Body**

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### **Abstract**

The dispute settlement mechanism of the World Trade Organization (WTO) represents one of the most sophisticated legal frameworks for resolving international trade conflicts. Nonetheless, the dispute settlement mechanism of the WTO encountered its most severe crisis in 2019 since its inception. Following the unresolved political disagreement by the United States, the Appellate Body, being the first-ever appellate review forum for international trade disputes, ceased to function in December 2019. This article shall comprise a detailed examination of this unprecedented and most severe crisis of the WTO, analysing its historical roots, immediate consequences, and potential pathways for reform. Methodologically, the research combines doctrinal legal analysis with empirical examination of dispute settlement trends since the dysfunction and/or paralysis of the Appellate Body. This study further reviews all 32 cases currently in appellate limbo, analyses the jurisprudence of the MPIA, and assesses the growing trend of forum shopping as members increasingly turn to alternative dispute resolution mechanisms outside the WTO framework. The article concludes by situating the Appellate Body's crisis within broader debates about the future of multilateralism in an era of geopolitical tensions and economic nationalism. This study further highlights the importance of restoring a functional dispute settlement mechanism not only for the WTO's credibility but for the preservation of a legal framework to govern international trade.

**Keywords:** World Trade Organization, Appellate Body, Dispute Settlement Mechanism.

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## **1. Introduction**

The World Trade Organization (WTO) is the world's leading multilateral trade organisation established under the landmark 1994 Marrakesh Agreement, or its often-cited name as the WTO Agreement, created upon the lengthy negotiations throughout the Uruguay Round started from 1986(Article II). Upon the WTO coming into existence, it set the institutional framework for the conduct of trade relations between its Members from its predecessor, the General Agreement on Tariffs and Trade (GATT) 1947. Behind the organization, there exists its dispute settlement mechanism designed to resolve trade conflicts between its Members, which is inconsistent with the rules of global trade imposed, often involving interested third parties to participate in the dispute to view the dispute from other perspectives to protect the third parties' economic interests. The dispute settlement mechanism revolutionised how trade conflicts are resolved pre-WTO and post-WTO. This new dispute settlement mechanism established a rules-based, procedural-based and binding legal framework for the Members of the WTO to ventilate their disputes under the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annexure 2 of the WTO Agreement, or more often cited as the Dispute Settlement Understanding (DSU).

At the heart of this new system lies its compulsory jurisdiction, derived from Article XXIII of GATT 1994 and incorporated into the structure of DSU. Unlike traditional international tribunals, where states maintain the sovereign right to accept jurisdiction on a case-by-case basis, the WTO Agreement sets a bar for the accession of its Members, i.e. all WTO members shall mandatorily and automatically submit to the jurisdiction of the WTO upon accession into the WTO for any trade conflicts to be resolved by means of its legal framework ( Article XII). This mandatory prerequisite for entry into WTO represents a bold commitment by the Members in resolving unavoidable potential trade conflicts vide a multilateral forum rather than unilateral retaliation by the member, which often jeopardised the trade relations between the nations concerned.

Under Article IV, paragraph 3 of the WTO Agreement, the Dispute Settlement Body, which comprises the members of the WTO, is established as the central administrative organ for dispute resolution that consists of a two-tiered review structure. The first tier of the dispute settlement mechanism in WTO is comprised of the ad hoc panel, which is composed of

three or five panellists; whilst the first-ever appellate review forum for international trade is the Appellate Body that consists of seven independent jurists who are experts in law, international trade and with recognised authority (Article 6 of DSU). The appointed members of the Appellate Body shall serve on the Appellate Body on a four-year term, and each member is eligible for one reappointment only (Article 17 of DSU). In the absence of a specific provision in the Dispute Settlement Understanding for the appointment procedures of the members of the Appellate Body, Article IX of the WTO Agreement inevitably steps in as the mandatory requirement for the appointment process of the members of the Appellate Body, which requires a consensus by all the Members of the WTO.

The Appellate Body is a standing body that serves as a permanent appellate review forum in the legal framework of the WTO. Its structure is very much distinct from the ad hoc panel established whenever a dispute arises between the Members of the WTO. This standing tribunal, empowered to review legal errors in panel reports, brought unprecedented consistency to WTO jurisprudence, marking a dramatic improvement over GATT's ad hoc panel system that had often resulted in inconsistent rulings.

Despite these carefully crafted provisions, the system now faces its most severe crisis since inception, paralysed by the continuous blockage by the United States on the appointment and/or reappointment of the Appellate Body members, leading to the appellate function of the WTO being inoperative since December 2019, which poses challenges to multilateral trade governance in modern history. This unprecedented and biggest crisis encountered by the WTO in its history is not a coincidence but a well-structured scheme. The blockade of the appointment of the members of the Appellate Body can be traced since the Obama administration in 2016, when the United States did not consent to the reappointment of one of the members of the Appellate Body, Mr Seung Wha Chang, upon the expiry of his tenure. (Dhlamini,2021). Since 2018, the Trump administration, being the successor of the Obama administration, further blocked the appointment and/or reappointment of any members of the Appellate Body, leaving the Appellate Body with one member remaining in December 2019, Ms Hong Zhao, whose tenure eventually lapsed in November 2020 (Sacerdoti,2021). Given that the Appellate Body no longer had the minimum pre-requisite number of members to form a panel since December 2019, the Appellate

Body became dysfunctional and unable to perform its role as the appellate review stage in the Dispute Settlement Mechanism of the WTO.

The blockade of the appointment and/or reappointment of the members of the Appellate Body, either during the Obama or the Trump administration, was the result of effectively abusing the requirement of consensus in the decision-making process of the WTO. The United States justified the blockade of the appointment and/or reappointment of the members of the Appellate Body by utilizing the unresolved issues raised on the function of the Appellate Body, such as judicial activism, delay in delivering decisions in appellate matters and lack of accountability by the members of the Appellate Body.

Following the dysfunction of the Appellate Body, the two-tiered dispute settlement mechanism of the WTO is no longer effective. Any appeals against the decisions by the first-tier ad hoc panel could not be heard and/or disposed of due to the incapability of the Appellate Body to form any panel under DSU, resulting from the insufficiency of membership in the Appellate Body. This phenomenon is often cited by legal scholars as “appeals into the void” (Ungphakorn,2021), where the dysfunctional appellate review stage of the dispute settlement mechanism of the WTO can be abused by the losing party of a dispute, effectively preventing the decisions and/or rulings by the first-tier ad hoc panel from being adopted under DSU as a strategy to nullify the decisions and/or rulings of the ad hoc panel. Perhaps more significantly, the crisis has accelerated the fragmentation of international trade law, with countries increasingly turning to regional trade agreements outside the WTO framework, which may go against the principle in the WTO regime, particularly the principle of most favoured nation (Mohd Zain,2024).

The path forward remains uncertain, with several potential scenarios emerging. One possibility involves comprehensive reformation of the Appellate Body’s legal framework to address the United States’ concerns about judicial overreach. Alternatively, the international community might expand alternative arbitration mechanisms such as the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), effectively creating a parallel appellate forum for dispute settlement mechanism. The establishment of MPIA was spearheaded by the EU and several WTO members in 2020 to preserve an alternative and operative appellate forum to maintain the effectiveness of the dispute settlement mechanism in the WTO.

The Trump administration's blockade has exposed fundamental weaknesses in the WTO's institutional design that would inevitably strike the dispute settlement mechanism of WTO, particularly its vulnerability to unilateral obstruction. To sustain the longevity of WTO to carry on with its functions without further obstructions in the future, the dispute settlement mechanism requires more fundamental reforms - either through restructuring the legal framework of the Appellate Body to overcome critics about judicial overreach, or amending DSU or the basis of WTO Agreement to implement an alternative appointment process of its Appellate Body.

The present study seeks to understand these dynamics through a detailed examination of the crisis faced by the Appellate Body and its implications. The first part of this study traces the historical development of the dispute settlement mechanism, explaining the development of the dispute settlement mechanism from GATT 1947 from the failures of GATT diplomacy and analysing its unique legal architecture. The next part of this study shall follow with studying the root causes of the dysfunction of the Appellate Body from the perspective of the structural enactment of DSU and how the United States abused the gap in the structure of DSU to paralyze the Appellate Body. This study will then continue to discuss the interim solutions surfaced following the paralysis of the Appellate Body, such as the MPIA and whether the interim solutions are capable of substituting the role of the Appellate Body. After that, this study will then study the existing reformative proposals suggested by scholars to restore the Appellate Body and present improvised and practical reformative proposals in an attempt to bring the Appellate Body back into action.

## **2. Methodology**

This study adopts a qualitative legal methodology integrating doctrinal, comparative, and institutional analysis to examine the crisis of the World Trade Organization (WTO) Appellate Body and its implications for the future of multilateral dispute settlement. The doctrinal approach focuses on interpreting key WTO instruments—particularly the Dispute Settlement Understanding (DSU), GATT 1994, and the Marrakesh Agreement—alongside relevant jurisprudence and official reports. The research traces the historical evolution of the dispute settlement mechanism from GATT 1947 to the DSU, identifying structural and procedural weaknesses that culminated in the Appellate Body's paralysis.

A comparative analysis evaluates alternative dispute settlement models such as the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and draws parallels with international adjudicatory institutions including the International Tribunal for the Law of the Sea (ITLOS) and ICSID. The methodology also incorporates empirical case analysis, reviewing WTO disputes currently in appellate limbo and those resorting to MPIA arbitration. As a common approach among legal studies (Adil Kashef Al-Ghetaa, 2023). The study employs contextual and normative reasoning to critique the institutional design of the WTO. This approach allows for an informed assessment of reform proposals aimed at restoring a credible, efficient, and legally coherent global dispute settlement system.

### **3. Results**

#### **3-1. Establishment of the Dispute Settlement Body and Appellate Body**

The Dispute Settlement Body of the WTO was established in 1995 together with the WTO itself, in place of its predecessor, GATT 1947, pursuant to DSU, Annex 2 of the WTO Agreement. Under its predecessor, the absence of binding rules and enforceable outcomes rendered many trade disputes unresolved or politically manipulated. The legal framework created under DSU marks a revolutionary shift in resolving international trade disputes from a political approach to a legal approach.

Prior to the establishment of the Dispute Settlement Body of the WTO, any dispute that arose from international trade was managed through a two-tier process. First and foremost, any contracting parties under GATT 1947 shall undergo the first-round consultation process under Article XII of GATT 1947, where it stipulates that every contracting party shall accord an adequate, instead of sufficient, opportunity for consultation for any matter that may arise from GATT 1947. Only after the matter cannot be resolved by the mere consultation process, the contracting parties concerned may refer this matter to all the contracting parties of GATT 1947 (which shall include the complainant and respondent per se of the dispute concerned) for investigation and appropriate recommendations.

This process of dispute settlement began with the reference of disputes to the chairman of the GATT Council for rulings (Petersmann, 1994). The role of the chairman of the GATT Council was subsequently replaced by working parties that comprised the interested parties to the dispute concerned, including the complainant and respondent of the dispute (Petersmann, 1994). Nonetheless, the findings and/or reports by the working

parties at this stage were only adopted based on consensus (bear in mind that the complainant and respondent are within this group of working parties). This weakness was overcome in a short time, where the adjudicator of any disputes that arose from the GATT 1947 was replaced with a panel of three or five independent experts (Petersmann,1994). The rulings and recommendations made by the panels at this juncture will be referred to the GATT Council, which would only be adopted and binding against all the contracting parties of the GATT 1947 upon its approval (Petersmann,1994). Despite its apparent weaknesses, such as the absence of any mandatory timeline for the adjudicators of disputes to deliver their reports, GATT 1947 has carried out its role in resolving disputes arising from its contracting parties. 132 reports were issued in the era of GATT 1947, and 101 of them were adopted under its provisions, whereby only 32 of the reports were issued by the chairman of the GATT Council and/or the working parties, and 100 of the reports were issued by the ad hoc panels established subsequently (Johansen,2011). Nonetheless, the efficacy of the GATT 1947 in resolving disputes between its contracting parties (approximately resolving 2.1 disputes per annum) boosted the necessity for reformative solutions to the existing dispute settlement system (Aronofsky,2024).

It took approximately seven years for the negotiations in the Uruguay Round, launched in 1986 by 123 contracting parties of the GATT 1947, to finally conclude, resulting in the creation of DSU, which is subsequently available in Annex 2 of the Marrakesh Agreement establishing the WTO. The Dispute Settlement Body and the Appellate Body of the WTO were products of the negotiations in Uruguay Round to introduce new sets of rules and procedures for dispute resolution by modifying the existing legal frameworks (Althabhwani,2024). Detailed procedures and timelines were prescribed under DSU for the disputes to be disposed of and adopted by the first-tier ad hoc panellists and the appellate review panel, signifying a departure from the legal framework of the GATT 1947.

Whilst the ad hoc panellists for dispute settlement originated from GATT 1947 is preserved in the existing legal framework, the creation of the Appellate Body further marked a reformative step taken by the contracting parties of GATT 1947 to shift the existing dispute settlement process from a political approach to a legal approach, to offer members of WTO a chance to review the findings of the first-tier ad hoc panellists. The appointment of

the Appellate Body members departed from the tradition of an ad hoc basis, shifted to a standing body comprised of seven members appointed by the Dispute Settlement Body, who shall serve for a tenure of four years and are eligible to one reappointment.

Notwithstanding the comprehensive framework and provisions crafted under DSU, (Maha,2024) the dispute settlement process under DSU had attracted criticism from the members of WTO, notably the United States. Issues such as judicial activism delay in delivering decisions in appellate matters and lack of accountability by the members of the Appellate Body were raised. These issues remain unresolved and eventually led to the dysfunction of the Appellate Body since December 2019 due to the blockade of appointment and reappointment of members of the Appellate Body by a single nation, the United States, by abusing the consensus requirement of the WTO in the decision-making process, including the appointment and reappointment of the Appellate Body members. Notwithstanding that, the historical establishment and contribution of the WTO dispute settlement mechanism remain critical benchmarks in the architecture of international trade governance.

### **3-2.Paralysis of the WTO Appellate Body**

The paralysis or dysfunction of the WTO Appellate Body is not a drastic event that came as a surprise. It is akin to a visible virus that gradually contaminated the entire system in the eyes of the WTO members, yet none of the members of the WTO can single-handedly contain the virus from contaminating the system. This phenomenon is attributed to the requirement of consensus from the 166 members of the WTO in its decision-making process.

Dissatisfaction of a single member in the system, regardless of a major or minor player in the global trade market, is capable of paralyzing the entire system, and it would be a matter of time for it to happen, and it happens to be one of the major key players in global trade, i.e. the United States whom dissatisfied with the system and abused its weakness to paralyse the Appellate Body. The root causes of this paralysis can be traced to legal, procedural, and political factors that collectively eroded confidence in the Appellate Body's legitimacy and effectiveness.

Prior to the blockage by United States, a total 27 members were appointed and reappointed to serve the Appellate Body for its 24 years history since inception, particulars of which, are as below:-

**Table (1): The Appellate Body's Members**

No.	Members	Nationality	Term of Office
1.	Georges Michel Abi-Saab	Egypt	2000–2004 2004–2008
2.	James Bacchus	United States	1995–1999 1999–2003
3.	Luiz Olavo Baptista	Brazil	2001–2005 2005–2009
4.	Lilia R Bautista	Philippines	2007–2011
5.	Christopher Beeby	New Zealand	1995–1999 1999–2000
6.	Ujal Singh Bhatia	India	2011–2015 2015–2019
7.	Peter Van den Bossche	Belgium	2009–2013 2013–2017
8.	Seung Wha Chang	Korea	2012–2016
9.	Claus-Dieter Ehlermann	Germany	1995–1997 1997–2001
10.	Said El-Naggar	Egypt	1995–1999 1999–2000
11.	Florentino Feliciano	Philippines	1995–1997 1997–2001
12.	Arumugamangala m Venkatachalam Ganesan	India	2000–2004 2004–2008
13.	Thomas R. Graham	United States	2011–2015 2015–2019
14.	Ricardo Ramírez- Hernández	Mexico	2009–2013 2013–2017
15.	Jennifer Hillman	United States	2007–2011
16.	Merit E. Janow	United States	2003–2007
17.	Hyun Chong Kim	Korea	2016–2017
18.	Julio Lacarte- Muró	Uruguay	1995–1997 1997–2001
19.	John Lockhart	Australia	2001–2005 2005–2006
20.	Mitsuo Matsushita	Japan	1995–1999 1999–2000

No.	Members	Nationality	Term of Office
21.	Shotaro Oshima	Japan	2008–2012
22.	Giorgio Sacerdoti	Italy	2001–2005 2005–2009
23.	Shree Baboo Chekitan Servansing	Mauritius	2014–2018
24.	Yasuhei Taniguchi	Japan	2000–2003 2003–2007
25.	David Unterhalter	South Africa	2006–2009 2009–2013
26.	Yuejiao Zhang	China	2008–2012 2012–2016
27.	Hong Zhao	China	2016–2020

Notwithstanding the Appellate Body was paralysed due to insufficiency of members to constitute a panel, the Appellate Body at last ceased to have any members since the blockage by United State upon its last member, Hong Zhao completed her tenure in November 2020.

Following the paralysis of the Appellate Body, there are total 32 cases been referred to the Appellate Body which are pending to be resolved upon its restoration or what is usually known as “appeals into the void” as an instrument by the losing party to escape from the ruling by the panels. One of the most significant example by Members in nullifying the ruling of the panel is United States in cases like US-Steel and Aluminium Products (DS548) and US-Origin Marking (DS597), where United States appealed to the panel reports of those cases to prevent the rulings by the panel being adopted knowingly that no appeals are capable to be heard without the consensus by United States (Voon, 2023). DS548 was eventually resorted to arbitration on 17.01.2022 (McDonough,2021), and DS597 remains an appeal into the void (Chaisse,2023).

### **3-3.Legal and Procedural Overreach**

A central grievance from the United States was the Appellate Body’s alleged judicial overreach, which it argued undermined the balance of power between dispute settlement and member-driven rulemaking. The United States contended that the Appellate Body frequently exceeded its mandate under the DSU, particularly in three key areas. First, the Appellate Body was accused of disregarding the 90-day deadline for issuing reports, as stipulated in Article 17.5 of the DSU, which was acknowledged by the

WTO in its Appellate Body's Annual Report for 2019 – 2020, where the appeals completed by the Appellate Body in 2018 averagely took 395 days (Lighthizer,2020). Delays became routine, with some appeals taking years to resolve, as seen in Russia – Railway Equipment (DS499), where the appeal process took more than two years for the Appellate Body report to be circulated (Sohlberg,2020). Whilst in the case of EC – Fasteners (DS397), the entire dispute settlement process, including the appeals, stretched over six years. (Carlson,2016). This not only violated procedural rules but also created uncertainty for disputing parties. Second, the Appellate Body allowed former members to continue ruling on cases after their terms expired, a practice justified under Rule 15 of the Working Procedures for Appellate Review but criticised by the United States as a violation of Article 17.2 of the DSU, which reserves appointment mandate strictly for WTO members only. Third, the Appellate Body was accused of expanding its jurisdiction by reviewing factual determinations, including interpretations of domestic laws, despite Article 17.6 of the DSU limiting its scope to legal issues. These deviations fostered perceptions of an unaccountable body that was rewriting WTO rules rather than merely interpreting them.

#### **3-4. Creation of De Facto Precedent and Advisory Opinions**

Another major point of contention was the approach adopted by the Appellate Body pertaining its previous rulings, whether by the previous or the existing members, as binding precedents, a practice the United States argued was never intended under WTO regimes. This was seen in the case of US — Oil Country Tubular Goods Sunset Reviews (DS268) where the Appellate Body adopted the position that the earlier decisions by the Appellate Body shall be followed. The exact phrase asserted by the Appellate Body are as such:-

“The Panel had before it exactly the same instrument that had been examined by the Appellate Body in US – Corrosion-Resistant Steel Sunset Review; thus, it was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same. Although the Panel may have expressed itself in a concise manner, we

find no fault in its analysis that could justify ruling that the Panel failed to observe its obligations under Article 11 of the DSU.”

While the Appellate Body maintained that consistency in rulings ensured "security and predictability", the United States dissented from this perspective and viewed this as judicial law making that encroached on the Member's sovereignty. In Mexico — U.S. Stainless Steel (DS344), the Appellate Body resorted that in the absence of any “cogent reason”, effectively cementing a quasi-common law system. Additionally, the Appellate Body occasionally rendered opinions for advisory purposes on hypothetical scenarios (or more commonly referred to as “a non-binding statement on a point of law”) which was often criticized by the United States as going against Article 3.7 of the DSU and Article IX: 2 of the WTO Agreement, which restrict the Appellate Body's objective in resolving disputes between the concerned Members instead of abstracting any questions of law irrelevant in resolving the disputes. These practices fueled accusations that the Appellate Body was assuming powers akin to a global trade court, bypassing the WTO's member-driven governance structure. United States further referred to the excerpts in the Appellate Body Report in US — Wool Shirts and Blouses (DS33) where the Appellate Body in that case opined that Article 3.2 of the DSU does not empower the Appellate Body to clarify any of the provisions of the WTO Agreement save for the purpose of resolving the question in the dispute ( Body,1997).

### **3-5.Political Resistance and the United States Blockade**

Beyond legal objections, the Appellate Body's paralysis was also a product of shifting political dynamics within the WTO. The United States, historically a champion of the dispute settlement mechanism, grew disillusioned as it faced repeated losses in high-profile cases, particularly those involving trade remedies like anti-dumping and countervailing duties. The Trump administration amplified long-standing grievances, framing the Appellate Body as a threat to national sovereignty and refusing to approve new appointments. By 2019, the Appellate Body's membership fell below the minimum required for operation, and by late 2020, it had no remaining members. The Biden administration, while rhetorically supportive of reform, has yet to endorse concrete solutions, leaving the Appellate Body in limbo (Menshikova,2022). With the Trump's administration back to its crown and the recent imposition of the unprecedented global tariffs by Trump's administration (Kapadia,2025), an effective dispute settlement

mechanism in the multilateral forum is needed to be restored. This deadlock reflects broader tensions between multilateralism and unilateral trade strategies, as well as divergent visions for the WTO's future.

In summary, the Appellate Body's paralysis was caused by a combination of procedural overreach, perceived judicial activism (Rathore & Bajpai, 2020), and geopolitical resistance. Addressing these issues will require not only technical fixes to the DSU but also a recalibration of the balance between judicial independence and member control—a challenge that remains unresolved as the WTO struggles to adapt to a fractured global trade landscape.

### **3-6. Interim Measure – Multi-Party Interim Appeal Arbitration Arrangement (MPIA)**

With the Appellate Body rendered inoperative as a result of lacking in membership, WTO Members were confronted with the challenge of maintaining a functional appeals process. In an innovative response, a coalition of nations spearheaded by the European Union and Canada established the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) on 30<sup>th</sup> April 2020. This interim appellate mechanism, grounded in Article 25 of the Dispute Settlement Understanding (DSU), sought to provide continuity in appellate review while navigating the political impasse.

#### **3-6-1. Legal Framework**

The MPIA derives its legal basis from Article 25 of the DSU, which traditionally allowed for arbitration in specific, mutually agreed-upon disputes. This provision was repurposed to create an interim appellate mechanism, demonstrating the flexibility inherent in WTO agreements. A central feature of the MPIA is its rotating panel of ten arbitrators, carefully selected for their expertise in international trade law and their impartiality. Similar to the Appellate Body, the selection of the pool of arbitrators of MPIA shall be composed by way of consensus by its participating members. The selection of the pool of arbitrators begins with the nomination of candidates by each participating member, followed by a pre-selection process to fit the criteria set out in Paragraph 3, Annex 2 of MPIA. Interestingly, MPIA not only opens the vacancy of the pool of arbitrators to the current or former Appellate Body members, but it further encourages the participation of the former Appellate Body members in the pool of

arbitrators by waiving the pre-selection process strictly for them (Gonzalez & Sakhi,2022).

To enhance efficiency, the MPIA introduced several procedural innovations. While the DSU stipulates a rigid 90-day deadline for appellate decisions, the MPIA permits extensions if the parties concerned consent thereto. Additionally, the arrangement incorporates a collaborative review process, enabling all arbitrators within the pool—not just those assigned to a particular case—to engage in discussions about legal interpretations, practice and procedures. This approach aims to foster consistency in rulings, though it has raised concerns about inadvertently creating a system of precedent, a point of contention for the United States.

### **3-6-2.Application in Practice**

Since its inception, the MPIA has been utilised in a limited number of disputes, offering valuable insights into its functionality. Cases such as Canada – Measures Governing the Sale of Wine (Grey,2021), and Canada – Measures Concerning Trade in Commercial Aircraft (Starshinova,2021) saw parties agreeing to specialised procedures for handling sensitive commercial information. In Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico (González & Glauber,2021), WTO dispute settlement cases involving Latin American countries and the agreement on agriculture, 1995-2019.

arbitrators introduced a requirement for pre-hearing written questions, a departure from the Appellate Body's more spontaneous questioning style. These adaptations highlight the MPIA's capacity for customization, allowing parties to tailor procedures to their specific needs.

Despite these successes, the MPIA's impact has been constrained by its limited adoption. As of 26.06.2025, 57 out of the 166 Members of the WTO had joined the arrangement following the recent announcement by United Kingdom to join the arrangement , and none of the cases involved major economies such as the United States or India. This narrow participation underscores both political reluctance and practical challenges. For instance, the MPIA cannot compel arbitration if one party declines, leaving many disputes unresolved. Additionally, the absence of a dedicated administrative body has raised concerns about the mechanism's long-term sustainability, as the WTO's existing infrastructure was not designed to support arbitration under Article 25.

### **3-6-3.Sustaining the Appellate Review for Participating Members**

The MPIA's primary achievement has been its preservation of a two-tier dispute resolution system (Van der Loo,2022). Following the dysfunction and/or paralysis of the Appellate Body, ensuring the panel decisions remain subject to legal review for Members who wish to maintain a good trade relationship. This function is critical for upholding the integrity of WTO rules, as unchecked panel rulings could lead to inconsistent interpretations of trade agreements. The MPIA has also addressed some of the procedural inefficiencies that plagued the Appellate Body, such as chronic delays in issuing rulings. By requiring mutual consent for deadline extensions, the arrangement has introduced a level of accountability absent in the Appellate Body's later years.

On a symbolic level, the MPIA represents a commitment to multilateralism in the face of growing unilateralism. The intention in developing a functional alternative to the Appellate Body is nothing but the resolve of the participating Members to uphold the existing legal framework in dispute resolution. This stance is particularly significant given the United States' opposition, as it shows that other nations are willing to innovate rather than abandon the system entirely.

### **3-6-4.Limitation of MPIA as Appellate Review Tier**

However, the MPIA's interim status and structural weaknesses present significant hurdles. Legally, the arrangement is a voluntary political agreement, not a legally binding treaty that can be enforced. This means Members can unilaterally opt out of arbitration, undermining the mechanism's reliability (Starshinova,2021). For example, a party dissatisfied with a panel ruling could simply refuse to engage in MPIA proceedings, leaving the dispute in limbo. This lack of enforceability stands in stark contrast to the Appellate Body's authority, whose rulings were automatically adopted unless all WTO Members, including the prevailing party, agreed to block them.

The MPIA also does little to address the underlying criticisms that led to the Appellate Body's paralysis. MPIA retains elements that the United States opposes, such as the collaborative review process, which could perpetuate a system of de facto precedent. Moreover, MPIA rulings lack the institutional weight in comparison to the findings and rulings by the Appellate Body. MPIA rulings are merely communicated to the DSB rather than formally

adopted. This diminished status may weaken compliance incentives, particularly for larger economies.

Finally, the MPIA's limited adoption highlights its inability to fully replace the Appellate Body. With major players in international trade abstaining from the arrangement, the arrangement covers only a fraction of potential disputes. This fragmented approach risks creating a patchwork system, where some Members rely on the MPIA while others turn to bilateral agreements or forgo appeals altogether.

#### **4. Discussion and Analysis**

##### **4-1.A Temporary Measure Pending the Reform of DSU**

The MPIA exemplifies the WTO's ability to adapt in the face of institutional crises. By creatively applying Article 25, participating Members have maintained appellate review for select disputes, safeguarding the principles of a rules-based trade system (Yee,2024). Yet the arrangement's voluntary nature, narrow participation, and unresolved legitimacy issues prevent it from serving as a permanent replacement for the Appellate Body.

Ultimately, the MPIA underscores the pressing need for comprehensive reform of the Appellate Body. Notwithstanding that the MPIA now covers 57 out of 166 WTO members to serve as a temporary appellate review stage of the matters decided by the ad hoc panels, the similarity of the legal framework adopted and improvised by the MPIA from the DSU does not resolve the issues and concerns raised by the United States in justifying the paralysis of the Appellate Body. This limitation sets the boundary that prevents the United States, as one of the major key players in global trade, from joining MPIA to restore a two-tiered dispute settlement mechanism any time soon. A structural reformation of the DSU is therefore necessary not only to resolve the United States' concerns over the existing legal framework, but also to establish a rigid dispute settlement system that cannot be paralyzed by any of the WTO members.

##### **4-2.Reformation of the Existing Legal Framework**

It is undeniable that the paralysis and/or dysfunction of the Appellate Body serves as the biggest crisis in the history of WTO that threatens its position as the world-leading multilateral trade framework. The absence of a functional Appellate Body had indirectly impaired the entire dispute settlement system of WTO. This unprecedented crisis faced by the WTO exposed the weaknesses in its existing legal framework that can be easily

abused by its members, be it a major or minor player in the global trade, for collateral purposes. From a legal research perspective, the current crisis raises urgent questions about the institutional design of global adjudicatory systems, the balance between state sovereignty and international legal order, and the normative underpinnings of consent, legitimacy, and legal authority in multilateral institutions.

#### **4-3.Striking a Balance in Decision Making Process**

At its core, the paralysis of the Appellate Body reveals a structural flaw in the WTO Agreement and the DSU. Notwithstanding that Article IX of the WTO Agreement slightly improved its inheritance from GATT 1947 by providing an avenue of majority voting in the decision-making process, WTO Members opted for a principle of consensus to apply and the process of voting by majority was never adopted by the WTO Members in its history, perhaps to preserve the rules of fairness in WTO, i.e. all objections must be heard (Tijmes-Lhl,2009). Following the consensus requirement adopted by WTO in appointing and reappointing the Appellate Body members, United States has unilaterally blocked new appointments, citing concerns of judicial overreach, procedural inefficiencies, and lack of accountability. In legal terms, this scenario illustrates the vulnerability of the dispute settlement system to unilateral obstruction—an outcome that undermines the core principle of legal certainty in international adjudication. This situation reflects a fundamental reform in the process of appointing the appellate forum members, which shall kick in without any hassle. This precedent-setting move by the United States unilaterally nullifying the existing regime can always be adopted by any of the WTO Members without a permanent solution.

Comparative institutional analysis suggests that reliance on consensus for judicial appointments may no longer be tenable in a system designed to adjudicate disputes involving 166 diverse sovereign states. A shift toward qualified majority voting (Kuijper,2017) inspired by precedents such as the International Monetary Fund's supermajority voting rule (85%) for critical decisions, could provide a balanced solution (Leech,2002).

Such a reform would likely require amendment of Article IX of the WTO Agreement, which governs institutional decision-making. Alternatively, interim legal innovations may be possible through interpretative declarations under Article IX: 2 or via plurilateral arrangements among a coalition of

willing members. Whilst scholars also viewed that decision making in the WTO by way of consensus shall not be undermined, a balance ought to be struck between consensus and majority voting, perhaps a threshold to invoke the mechanism of majority voting for appointing the members of the appellate forum.

#### **4-4.Mandatory Self-Saving Clause for Appellate Body**

A self-saving clause shall be incorporated into the basis of the existing legal framework to avoid the appellate forum being paralyzed, even if the appellate forum can merely operate at its minimum capacity. Whenever the Appellate Body membership is lesser than its minimum threshold to compose a panel, and no consensus can be achieved in the appointment and/or reappointment Appellate Body members, a mechanism of supermajority voting starting at 90% shall be invoked to ensure the Appellate Body has the minimum number to compose at least a panel to hear an appeal by the Members, whilst the rest of the membership shall only be appointed and reappointed by its traditional method – consensus. An operative Appellate Body, be it at its minimum capacity, would save the matters from being appealed into the void.

Notwithstanding the above, it is pertinent to consider that political disagreement may extend further, perhaps greater than 10% of the Members, and a lacuna shall be disregarded at its utmost best. On top of the proposed 90% of supermajority voting required to preserve the minimum capacity of the Appellate Body, the reformation shall also provide alternatives whenever the majority of 90% cannot be achieved, for example, a subsequent voting process with a gradual decrease of the voting threshold, perhaps a decrease of 5% for every subsequent voting whenever a majority cannot be achieved as a measure to sustain the operation of the Appellate Body, otherwise, the dispute settlement mechanism would remain at risk to be paralysed, despite minimal.

#### **4-5.Restriction of Jurisdiction**

Beyond procedural redesign, reform efforts must also grapple with the substantive scope of the appellate forum's jurisdiction. The perceived expansion of the appellate panels' role beyond the existing legal framework is one of the contentious issues raised, particularly through the issuance of advisory dicta and broad legal interpretations. While the development of consistent jurisprudence is vital for the integrity and predictability of trade law, concerns of judicial overreach cannot be ignored. This presents a legal

dilemma: how to reconcile the need for interpretive consistency with respect for textual constraints and the sovereignty of WTO members.

It would therefore be imperative for the DSU to be amended to confine the permissible power, role and scope by appellate panels, potentially drawing upon jurisdictional models from the legal framework of International Tribunal for the Law of the Sea (ITLOS). According to its guide, this tribunal is specifically empowered to give advisory opinion on legal question arising.

It is also pertinent that the weight of precedents to be considered within the WTO legal system requires careful reconsideration. While the appellate panels of WTO had relied on binding precedent to ensure coherence, this practice is not supported by any legal framework of the existing regime, hence attracting criticism of judicial overreach. The legal framework of WTO can be reformed to confine precedents as merely persuasive, hence the panels would have to justify in reliance on the persuasive precedents.

#### **4-6.Flexibility in the Maximum Membership of Appellate Body**

Procedural shortcomings, especially delays in report issuance, also demand urgent reform. The consistent failure to deliver the appellate reports within the prescribed period constitutes a breach of procedural obligations and undermines the Member's confidence in the credibility of the system. The prolonged appellate process would further prejudice the Members affected by the measures concerned before the rulings and recommendations are adopted under the regime. Despite the views that reforms are necessary to ensure strict compliance with the procedural framework (Hameed et al, 2025), i.e. the appellate review is mandatory to be completed within the 90-day time frame as suggested by New Zealand Ambassador David Walker (Guo & Kong,2024). Prior to the absolute dysfunction of the Appellate Body, the continuous blockade of the appointment and/or reappointment of the members of the Appellate Body by United States reduced the available members of the Appellate Body as well as the supporting lawyers and staff. This has inevitably burdened the existing Appellate Body members and supporting staff at that material time to effectively dispose of appeals referred to the Appellate Body, hence causing delay. The complexity of issues ventilated to the appellate panels also required further consideration and determination. To overcome this issue, it is inevitably that the existing Appellate Body regime shall be operative, and is necessary to increase the

appellate panels from time to time to accommodate the trend of multilateral trade from time to time. With the increasing trend of global trade, the volume and complexity of disputes brought to the WTO would have an upward trend. The limitation of 7 members of the Appellate Body set out 20 years ago would therefore no longer be sufficient to resolve the increasing disputes. Flexibility is vital to be incorporated in the DSU to determine the number of appellate panels required to effectively dispose of all the disputes arisen between the WTO members.

#### **4-7. Interim / Provisional Compliance Measure**

Strengthening the DSU's compliance mechanisms is also essential. Currently, there is a legal and practical void between the issuance of rulings and their implementation. States facing rulings against them can delay compliance through procedural manoeuvres, thereby eroding the authority of the system. Following the dysfunction and/or paralysis of the appellate forum, Members are open to circumventing the rulings and recommendations of the ad hoc panels by lodging an appeal into the void as a mechanism to evade compliance pending an operative appellate forum back into action. To accommodate this hurdle faced by various Members, the introduction of interim relief provisions in the DSU, similar to provisional measures under Article 290 of the United Nations Convention on the Law of the Sea (UNCLOS) or Article 47 of the ICSID Convention could provide immediate legal safeguards to the winning party pending the outcome of the appellate review or the implementation phases to lift the existing deadlock in the existing regime from being abused by the losing parties.

Ultimately, the breakdown of the Appellate Body poses fundamental legal and institutional questions. It compels the WTO community to reflect on the nature of legal authority, the role of adjudicative independence, and the contours of member state consent in a multilateral regime. Reform proposals must carefully navigate the tension between judicial autonomy and sovereign oversight. Doctrinal soundness alone will not suffice; the success of any legal reform will depend on its political acceptability across a highly heterogeneous membership. The future of the WTO dispute settlement system—and indeed of the broader rules-based trading order—hinges on whether its legal framework can adapt to contemporary challenges without compromising its foundational principles.

## **5. Conclusion**

The paralysis of the Appellate Body, being the unprecedented and most severe crisis in the history of the WTO since its establishment, is not merely a procedural crisis that exposed its structural weaknesses. It further threatens the WTO's position as the central pillar of the multilateral trade framework. The absence of a functioning and persistent dispute settlement system in the WTO impaired its credibility and the confidence of its members in the multilateral framework.

Despite the interim measures, such as the MPIA, which came into the picture upon the initiation by some of the members of the WTO to maintain a temporary two-tiered and functional dispute settlement system in the multilateral trade framework on voluntary basis, such an arrangement does not serve as a permanent solution to the severe crisis faced by the WTO at the moment. The dispute settlement mechanism of the WTO remains dysfunctional against any of its members who are not part of the MPIA, as long as the losing party decides to appeal the ad hoc panel's decision to the Appellate Body, or more commonly known as appeals into the void to nullify the decision of the ad hoc panel indefinitely, leading the existing multilateral trade framework of WTO reverting to plurilateral.

The sustainability of this multilateral trade system is therefore heavily reliant on the reformation of its structure to restore the function of the Appellate Body, which shall be capable of addressing the concerns of the United States and/or any other members to regain their support over the multilateral trade framework. Upon that, reform is necessary to recalibrate the appointment process of the members of the Appellate Body to prevent any similar political blockade in the future. Last but not least, flexibility shall be implemented in the system to allow the system to develop following the complexities and evolutions of global trade. Without a functioning dispute settlement system, the 30-year multilateralism framework of the WTO will be in vain and devolve into plurilateralism.

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