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THE CRISIS OF THE WTO DISPUTE SETTLEMENT SYSTEM

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ANNOTATION

This article examines the crisis of the World Trade Organization (WTO) dispute settlement system, with particular focus on the paralysis of the Appellate Body since December 2019. The main objective of the study is to analyse the legal, institutional, political, and geopolitical factors contributing to the Appellate Body crisis, assess its implications for the effectiveness and predictability of WTO dispute settlement, and examine possible approaches to reforming the system. The research employs legal analysis, institutional analysis, document analysis, comparative analysis, and a review of relevant WTO practice and scholarly literature. Particular attention is given to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), including the Appellate Body's mandate, the ninety-day requirement for appellate reports, concerns regarding judicial overreach, the development of de facto precedent, and the consequences of the loss of the required quorum. The study also considers the broader relationship between the Appellate Body crisis, the stagnation of WTO negotiations, and increasing geopolitical tensions within the multilateral trading system. The findings indicate that the paralysis of the Appellate Body has weakened the enforceability, predictability, and credibility of WTO dispute settlement, while temporary mechanisms such as the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) provide only a partial response. The article further examines alternative reform approaches, including the restoration of a reformed Appellate Body, arbitration-based mechanisms, and hybrid models combining adjudication with greater political oversight. It concludes that sustainable reform should preserve the rules-based and binding character of WTO dispute settlement while addressing concerns regarding institutional balance, interpretative authority, inclusiveness, and the effective participation of WTO Members.

Key words: WTO, dispute settlement, Appellate Body, Dispute Settlement Understanding, DSU, WTO reform, judicial overreach, appellate review, MPIA, multilateral trading system.

Introduction. Since its establishment in 1995, the World Trade Organization Dispute Settlement Body has been widely regarded as the "crown jewel" of the multilateral trading system, providing a binding, rules-based framework for resolving trade disputes between its members[1]. At the heart of this system lies the Appellate Body created under the Dispute Settlement Understanding to review legal questions arising from panel reports and ensure consistency in the interpretation of WTO law[2]. By December 2019, however, the Appellate Body lost its quorum due to the prolonged blockage of new appointments, primarily by the United States and effectively ceased to function[3]. This essay contends that the paralysis of the Appellate Body is not merely a technical or institutional failure but reflects deeper political, institutional and geopolitical tensions that continue to challenge the credibility and effectiveness of the global trading system.

Causes of the Appellate Body crisis. The United States argued that the Appellate Body engaged in "judicial overreach," exceeding its mandate by reviewing factual determinations made by panels

[1] World Trade Organization, *The WTO Dispute Settlement System: A Training Module* (WTO, 2020) https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/intro1_e.htm.

[2] Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (15 April 1994) 1869 UNTS 401, art 17. https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

[3] World Trade Organization, *Annual Report 2020* (WTO Publications, Geneva 2020) 63–65. World Trade Organization, *Annual Report 2020*.

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rather than limiting itself strictly to legal issues[4]. It also pointed to the frequent failure of the Appellate Body to meet the ninety-day deadline set out in the Dispute Settlement Understanding for issuing reports[5]. In addition, the United States criticized the creation of de facto binding precedent by the Appellate Body, despite the Dispute Settlement Understanding being silent on the concept of stare decisis, arguing that this constrained Members' freedom to interpret their obligations[6]. Concerns were further raised regarding advisory opinions, whereby the Appellate Body commented beyond the immediate dispute and, in effect, created new obligations or rights[7]. Finally, the United States objected to Appellate Body members remaining in office beyond the expiry of their term in order to finish appeals, contrary to the provisions of the Dispute Settlement Understanding. While these criticisms have a legal basis, with empirical reviews showing that reports frequently exceeded the ninety-day period and occasionally addressed issues of fact, there is reason to believe that these legal claims also reflected deeper political discontent[8]. The United States perceived that the multilateral trading system failed to protect its interests, particularly in relation to rising competition from the People's Republic of China, state-subsidized enterprises, and issues relating to intellectual property[9]. In this sense, the critique of the Appellate Body can be understood as one facet of a broader challenge to the institutional balance of the World Trade Organization. Beyond the Appellate Body itself, the crisis reflects a wider institutional problem: the legislative paralysis of the World Trade Organization. Since the launch of the Doha Development Round in 2001, Members of the World Trade Organization have been unable to conclude comprehensive new rules on issues such as state-owned enterprises, digital trade, or subsidies[10]. In the absence of new negotiated rules, the Appellate Body increasingly faced ambiguous treaty language and was compelled to interpret and fill gaps. Therefore, the argument that the Appellate Body overreached may, in part, reflect the necessary function of adjudication in an institution where negotiation has stalled. The paralysis of the Appellate Body culminated in late 2019 when it lost the required three-member quorum. At that time, only a single judge, Kim Jong Il from the Republic of Korea, remained in office. His term expired without a replacement being appointed, primarily due to the United States' continued blocking of new appointments as a political strategy to constrain the Appellate Body's authority. Because the Appellate Body requires a minimum of three judges to hear appeals, the departure of Judge Kim resulted in the body being entirely inoperative[11]**.** Importantly, his departure was not due to personal reasons or misconduct but rather a direct consequence of the quorum requirement and the appointment blockade. This situation highlighted both the vulnerability of the institution to politicization and the critical importance of timely appointments to maintain the functioning of multilateral adjudication. Finally, the geopolitical dimension is pivotal. The intensifying rivalry

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[4] United States Trade Representative (USTR), *Report on the Appellate Body of the World Trade Organization* (February 2020) https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[5] Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) 1869 UNTS 401, art 17.5. https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

[6] ennifer Hillman, "Three Approaches to Fixing the WTO's Appellate Body: The Good, the Bad and the Ugly?" (2019) *Journal of International Economic Law* 22 629. https://www.tresor.economie.gouv.fr/Articles/4c69c305-4f37-45f5-aa28-09a6aab19768/files/6907e255-e134-410a-8135-070e9fe62cda.

[7] Robert McDougall, 'The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance' (2018) 52 Journal of World Trade 867. https://kluwerlawonline.com/journalarticle/Journal%2Bof%2BWorld%2BTrade/52.6/TRAD2018038.

[8] Claus-Dieter Ehlermann, 'Experiences from the WTO Appellate Body' (2003) 38 *Texas International Law Journal* 469. https://legal.un.org/unjuridicalyearbook/pdfs/english/by_volume/2003/bibliography.pdf.

[9] Chad P. Bown, *"US-China Trade War Tariffs: An Up-to-Date Chart"* (Peterson Institute for International Economics, 2019) US-China Trade War Tariffs: An Up-to-Date Chart.

[10] WTO, *The Doha Round: What It Is and Why It Matters* (WTO, 2019). https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

[11] WTO, *Appellate Body Members* (WTO, 2019). https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

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between the United States and the People's Republic of China has placed additional stress on the multilateral trading system. From the perspective of the United States, the Chinese model of state capitalism, large-scale subsidies, and forced technology transfer runs counter to the principles of a rules-based system[12]. In this context, the United States' blockage of Appellate Body appointments reflects not merely procedural concern but also a strategic posture, aimed at limiting the empowerment of an institution perceived as unable to address Chinese practices effectively.

Implications of the Appellate Body paralysis. The practical consequences of the World Trade Organization Dispute Settlement Body functioning without an active Appellate Body are significant. Since December 2019, the Appellate Body has lacked the required three-member quorum and could no longer hear appeals, effectively rendering them "into the void"[13]. This means that panel reports favorable to a Member cannot be supported by an enforceable appellate judgment, allowing the losing party to delay or stall implementation. The result is increased legal uncertainty, reduced credibility of the system, and a weakening of the binding nature of the World Trade Organization dispute settlement process. Scholars have noted that this crisis diminishes the capacity of the World Trade Organization to resolve trade disputes and may undermine the predictability and rule-based character of multilateral trade[14]. In response, Members of the World Trade Organization have sought temporary solutions. The Multi-Party Interim Appeal Arbitration Arrangement, launched in 2020 by the European Union and over twenty-five Members under Article 25 of the Dispute Settlement Understanding, offers an alternative appellate mechanism for participants[15]. However, the arrangement is limited: membership is voluntary, major economies such as the United States have not joined, and as of mid-2024 it had only resolved a single case[16]. Meanwhile, as the World Trade Organization system falters, regional trade agreements with their own dispute settlement mechanisms have proliferated. This trend further dilutes the centrality of the World Trade Organization in global trade governance. The fragmentation of the dispute settlement landscape has become a defining feature of what scholars now call the "new normal." From my perspective, the current situation goes beyond a temporary setback. It represents a structural weakening of the dispute-settlement pillar of the multilateral trading system. Without meaningful reforms, the international trade order risks evolving into a multipolar system in which the World Trade Organization plays a diminished or refereed role. This shift suggests more of a systemic evolution than a brief deviation from established norms.

Reforming the Appellate Body. The crisis of the Appellate Body in the World Trade Organization Dispute Settlement Body has prompted multiple reform proposals. The European Union's 2018 Concept Paper on World Trade Organization Modernisation emphasised restoring the Appellate Body, limiting its scope, and enhancing transparency and dialogue with Members[17]. Similarly, other proposals, such as the so-called Walker Principles, responded to United States concerns by requiring strict adherence to the ninety-day deadline, returning broad interpretations to Members, ending members' service precisely at term expiration, and treating previous reports as persuasive rather than

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[12] Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 *Harvard International Law Journal* 261. https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/HLI210_crop.pdf?utm_source=chatgpt.com.

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[16] Petros C. Mavroidis, *The Regulation of International Trade, Volume 2: The WTO Agreements on Trade in Goods* (MIT Press, 2020) 112–115. https://mitpress.mit.edu/9780262029995/the-regulation-of-international-trade-volume-2/.

[17] European Union, *Concept Paper on WTO Modernisation* (2018) https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157132.pdf.

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binding[18]. Despite these proposals, the core question remains: should the goal be to restore the Appellate Body in its original form, replace it with a new model, or shift towards a political, diplomacy-based dispute settlement system? A fully restored Appellate Body would preserve the notion of binding multilateral adjudication but might not satisfy the United States unless accompanied by major institutional constraints[19]. A new model, such as a more loosely structured arbitration-based arrangement integrated within the World Trade Organization, could offer flexibility but risks undermining uniformity and equal access[20]. Alternatively, moving disputes into a diplomacy-driven process may reflect current realities but would represent a retreat from a rule-based order. A "plurilateral" approach offers a potential middle path. Examples include the Multi-Party Interim Appeal Arbitration Arrangement or joint statements on new issues. However, this approach risks creating a two-tiered system in which Members inside enjoy full access to binding mechanisms while others are excluded. Such a system could erode the universality of the World Trade Organization and marginalize developing countries[21]. Therefore, any roadmap for reform must consider inclusivity, enforceability, and legitimacy. In my view, the most pragmatic solution is a hybrid model. This would involve restoring a reformed Appellate Body operating under clarified terms that address United States concerns regarding scope and precedent. Optional arbitration tracks could be made available for willing Members, alongside stronger political oversight and renewed negotiating efforts to reduce the burden on adjudicators. In short, the aim should not be to return to the 1995-era system unchanged but to build a resilient dispute-settlement framework suited to twenty-first-century realities.

Conclusion. The crisis of the World Trade Organization dispute settlement system extends beyond the paralysis of the Appellate Body. It reflects deeper institutional challenges, including negotiating stagnation, geopolitical tensions, and the limits of multilateral governance. The effectiveness and legitimacy of the World Trade Organization now depend on addressing questions of enforceability, equity, and the balance of power between smaller and larger Members. Without meaningful reforms, the system risks further weakening, reducing predictability and undermining the rule-based character of global trade. Looking forward, the most promising approach involves a combination of legal precision and political flexibility. Restoring or reforming the Appellate Body, complemented by optional arbitration mechanisms and enhanced political oversight, can help bridge gaps between Members and strengthen dispute resolution. The future of global trade governance will hinge on designing a resilient dispute-settlement framework that is adaptable to twenty-first-century realities rather than simply reverting to previous models.

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