



APPELLATE BODY OF THE WORLD TRADE ORGANIZATION CRISIS: CONSEQUENCES AND PATHWAYS TO REFORM

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Abstract

The paralysis of the World Trade Organization's Appellate Body since December 2019 has precipitated the gravest institutional crisis in the history of the multilateral trading system. The inability of WTO Members to agree on new appointments has rendered the appellate mechanism non-functional, leaving the dispute settlement system without its supreme judicial layer and creating a legal vacuum that no interim arrangement has yet adequately filled. This article examines the structural, political, and legal dimensions of this crisis, tracing the origins of Member State dissatisfaction with the Appellate Body, particularly the sustained objections of the United States concerning judicial overreach, procedural delays, and the treatment of trade remedy disciplines. The article analyses the Multi-Party Interim Appeal Arbitration Arrangement and evaluates its adequacy as a substitute for the Appellate Body. It further examines the various reform proposals advanced by WTO Members and academic commentators, assessing their feasibility and implications for the future architecture of multilateral trade governance. Special attention is paid to the interests of developing country Members, who stand to lose most from the erosion of the rules-based trading system. The article argues that durable reform requires a negotiated political settlement among major trading powers that balances rule-of-law imperatives with legitimate concerns about judicial boundaries, and that any viable solution must ensure genuine access for all Members, including those with limited legal and institutional capacity.

Keywords: Appellate Body, Developing Countries, Dispute Settlement, DSU Reform, Judicial Overreach, MPIA, Multilateral Trading System, Trade Governance, WTO, WTO Reform.

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1. Introduction

On 10 December 2019, the World Trade Organization's Appellate Body ceased to function. The retirement of two of its members on that date left the body with only one sitting member, one fewer than the minimum of three required by the Dispute Settlement Understanding to hear any appeal.¹ What might have seemed, to an outside observer, a routine matter of judicial appointments had been rendered anything but routine by the deliberate and sustained refusal of the United States to participate in the selection of replacement members. The result was the most severe institutional rupture in the twenty-five-year history of the WTO and one that has continued to reverberate across every aspect of the multilateral trading system.

The Appellate Body had, from the moment of its creation in 1995, represented something genuinely new in international economic law. Unlike the dispute settlement panels that preceded it under the General Agreement on Tariffs and Trade 1947,² the Appellate Body offered binding appellate review of panel reports, a standing membership with the expectation of professional independence, and a systematic approach to the interpretation of the covered agreements grounded in customary rules of public international law.³ Over the course of nearly a quarter century it produced a substantial and generally coherent body of jurisprudence that gave practical meaning to the rights and obligations contained in WTO law and that was, for the most part, respected and implemented by WTO Members even when they disagreed with particular outcomes.

The crisis now engulfing that institution is not, as is sometimes suggested, a sudden rupture. It is the culmination of a long-simmering dispute between the United States and the Appellate Body over a series of substantive and procedural concerns that American trade officials had articulated with growing intensity since the early 2000s. What changed after 2017 was not the nature of those concerns but the political willingness to press them to their ultimate conclusion, blocking the institution from functioning rather than accepting outcomes deemed inconsistent with American trade policy objectives. The decision to pursue this strategy represented a significant departure from the norms of multilateral engagement that had governed WTO practice since the organisation's founding, and its consequences have been correspondingly profound.

¹Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

²General Agreement on Tariffs and Trade 1947, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

³Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Articles 31-33 of the VCLT set out the customary rules of treaty interpretation which the Appellate Body has consistently applied.

The consequences of this rupture have been significant and multifaceted. Parties to disputes pending before panels can no longer obtain binding appellate review of adverse rulings, at least not within the regular WTO framework. Settlements reached under conditions of legal uncertainty are harder to negotiate. The confidence of smaller trading nations in the system that has historically provided them with a measure of protection against the bilateral pressure of major economies has been shaken. Legal certainty, which the system was designed to provide and which creates the conditions for predictable commercial exchange, has been seriously compromised. And the broader signals sent to international institutions about the relationship between legal obligation and political will are deeply troubling.

The academic and policy community has responded to this crisis with an extensive body of analysis, much of which has focused on the technical dimensions of institutional reform.⁴⁵ This article seeks to contribute to that discussion by examining both the structural causes of the crisis and the conditions necessary for a durable resolution. It proceeds in nine further parts. Part II examines the architecture of the WTO dispute settlement system and the origins of the Appellate Body. Part III surveys the body's jurisprudential contributions and assesses the foundations of its institutional authority. Part IV traces the evolution of United States dissatisfaction with the Appellate Body and explains how that dissatisfaction was translated into the current crisis. Part V analyses the systemic consequences of the body's incapacitation. Part VI examines the Multi-Party Interim Appeal Arbitration Arrangement and evaluates its adequacy. Part VII surveys the principal reform proposals. Part VIII addresses the particular interests and concerns of developing country Members in the reform debate. Part IX proposes conditions necessary for a durable solution, and Part X concludes.

1.1. The Architecture of WTO Dispute Settlement

A. From GATT to the WTO: A Structural Transformation

The dispute settlement provisions of the GATT 1947 were, by the standards of contemporary international adjudication, conspicuously weak. Panel reports required adoption by consensus of the contracting parties, a rule that effectively gave any losing party a veto over the legal conclusions reached against it.⁶ The system was, in consequence, heavily tilted toward the diplomatic resolution of disputes rather than their

⁴Robert McDougall, Crisis in the WTO: Restoring the WTO Dispute Settlement Function 6-8 (CIGI Paper No. 194, 2018).

⁵Tetyana Payosova, Gary Clyde Hufbauer & Jeffrey J. Schott, The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures 12-16 (Peterson Inst. for Int'l Econ., Policy Brief PB18-5, 2018).

⁶John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 109-115 (2d ed. 1997).

legal adjudication. Panels sat on an ad hoc basis, their members drawn from the trade policy community on a case-by-case basis without institutional continuity or the expectation of independent legal reasoning. While the GATT dispute settlement process performed a useful function in managing trade frictions during the early postwar decades, its structural weaknesses became increasingly apparent as global trade expanded and the economic stakes of market access disputes grew correspondingly larger. The system was regularly criticized for producing outcomes shaped more by negotiating power than by law.

The Uruguay Round negotiations produced a fundamentally different conception of international trade dispute settlement. The Understanding on Rules and Procedures Governing the Settlement of Disputes introduced what its drafters described as an integrated dispute settlement mechanism.⁷ Its most significant innovations were three in number. First, the adoption of negative consensus, under which reports would be adopted automatically unless all Members agreed not to adopt them, eliminating the losing party's veto and making adoption virtually automatic. Second, the establishment of strict time limits for each stage of the process, designed to provide certainty and predictability to the parties. Third, and most consequentially for present purposes, the creation of the Appellate Body as a standing tribunal to review legal questions arising from panel reports.

The significance of these innovations cannot be overstated. For the first time in the history of the multilateral trading system, binding legal obligations would be interpreted and applied by an independent adjudicative body whose rulings states could not simply refuse to accept without consequence. The system was, in the words of one of its most perceptive analysts, transformed from one primarily oriented toward negotiated outcomes into one oriented toward legal determinations.⁸ This transformation was broadly welcomed at the time of the WTO's creation, reflecting the prevailing conviction that a rules-based system would benefit all Members, including those with limited power, by constraining the bilateral leverage of the strong. It contained within it, however, the seeds of the tensions that were ultimately to produce the current crisis: the tension between the aspiration to legal determinacy and the political reality of sovereign states operating in a system they had designed but did not fully control.

B. The Two-Tier Structure and Its Rationale

The WTO dispute settlement system operates through a two-tier adjudicative structure. At the first level, ad hoc panels of three or five individuals are constituted to

examine specific disputes, hear evidence and argument from the parties, and issue reports addressing the consistency of challenged measures with WTO covered agreements. Panel members serve on a case-by-case basis and are typically trade law experts drawn from government, academia, or legal practice in WTO Member states. Their selection is governed by a process designed to ensure independence and competence, though the requirement of party agreement on composition has sometimes produced delays and strategic maneuvering.

The Appellate Body constitutes the second and superior tier of this structure.⁹ Unlike the panels, it is a standing body whose seven members serve four-year terms, renewable once. It reviews legal questions arising from panel reports rather than conducting fresh factual inquiries. Its jurisdiction is accordingly confined to issues of law covered in the panel report and legal interpretations developed by the panel. This limitation has been the subject of considerable controversy, particularly in cases where panels have made findings of fact that appear to rest on disputed legal characterisations, and the Appellate Body has grappled with the boundary between factual and legal review in a series of decisions that have not always produced entirely satisfying distinctions.

The rationale for a standing appellate tier was explicitly recognised during the Uruguay Round negotiations. Ad hoc panels, however expert their members, could not be expected to produce consistent legal interpretations across a large and diverse caseload. Different panels might reach different conclusions on identical legal questions, producing the kind of jurisprudential incoherence that would undermine the predictability and stability of the system. A standing appellate body with a defined membership and an institutional interest in consistency could, it was hoped, develop a coherent body of interpretive doctrine that would give practical meaning to the rights and obligations of Members. This aspiration was broadly realised in the Appellate Body's first two decades, during which it developed a body of doctrine that, despite the inevitable inconsistencies and tensions that attend any judicial exercise, was recognised as substantively serious and methodologically disciplined.

The Appellate Body was given authority under Article 17.13 of the DSU to uphold, modify, or reverse the legal findings and conclusions of the panel.¹⁰ Its reports, once adopted by the Dispute Settlement Body under the negative consensus rule, create obligations for the responding party to bring its measures into conformity with WTO law. The system thus combines the binding character of international arbitration with the

⁹DSU, *supra* note 3, art. 17.1. The Appellate Body consists of seven members, three of whom serve on any given appeal.

doctrinal development associated with judicial institutions. It was this combination that justified the authority of the Appellate Body and generated the controversies that now threaten it. The body's institutional success in developing coherent and authoritative doctrine created, over time, the conditions for a political backlash from Members who found that doctrine systematically adverse to their preferred policy positions.

1.2. The Appellate Body's Jurisprudential Contributions

A. Foundational Interpretive Principles

From its first report in *United States: Gasoline*,¹¹ the Appellate Body established interpretive principles that would govern its approach to WTO law for more than two decades. Most significantly, it grounded its interpretive methodology in the customary rules of treaty interpretation reflected in Articles 31 through 33 of the Vienna Convention on the Law of Treaties.¹² This approach, which requires interpreting treaty provisions in good faith in accordance with the ordinary meaning of their terms in context and in the light of the treaty's object and purpose, gave the Appellate Body's analysis a disciplined analytical structure that distinguished it sharply from the more impressionistic reasoning of earlier GATT panels and established WTO dispute settlement as a serious and technically sophisticated exercise in international law.

The adoption of this interpretive framework produced, over time, a substantial body of doctrine on questions ranging across all of the major covered agreements. In the area of goods trade, the Appellate Body developed a sophisticated jurisprudence on the national treatment obligation of GATT Article III, the scope of the general exceptions under Article XX, and the anti-dumping and countervailing duties disciplines of the relevant specialised agreements.¹³ In the area of services, it gave practical meaning to the complex scheduling system of the General Agreement on Trade in Services. In the area of intellectual property, it addressed the relationship between the TRIPS Agreement and other sources of international law. In each of these areas, the Appellate Body's contributions substantially clarified the legal landscape and provided the predictability that trading enterprises require to make long-term investment decisions.

The Appellate Body's contribution to the interpretation of the non-economic exceptions under GATT Article XX deserves particular mention. In cases such as

¹¹Appellate Body Report, *United States: Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US-Gasoline*]. This was the first Appellate Body report and established foundational principles of WTO treaty interpretation.

¹³Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, 1868 U.N.T.S. 201 [hereinafter *Anti-Dumping Agreement*]. Article 17.6 of the *Anti-Dumping Agreement* establishes a specific standard of review for anti-dumping disputes that the US argued the Appellate Body had consistently failed to apply correctly.

European Communities: Asbestos¹⁴ and United States: Shrimp,¹⁵ the body developed an approach to the relationship between trade liberalisation commitments and environmental and health objectives that gave genuine weight to the latter without rendering the former illusory. These decisions were widely praised by scholars working at the intersection of trade and environmental law, and they demonstrated that the WTO system was capable of engaging seriously with policy values beyond market access. The Appellate Body's ability to navigate these competing values with analytical rigour and a degree of institutional sensitivity was, in the assessment of many observers, one of its most significant contributions to the legitimacy of the multilateral trading system.

B. The Development of Quasi-Precedent

A distinctive and consequential feature of the Appellate Body's institutional practice was its treatment of its own prior reports. Although the WTO agreements contain no provision establishing a formal doctrine of binding precedent, the Appellate Body developed a practice of following its prior reports in the absence of compelling reasons to depart from them.¹⁶ This practice was grounded in the institutional values of predictability and consistency, and it was explicitly articulated and defended in a series of reports, most notably in Japan: Taxes on Alcoholic Beverages¹⁷ and United States: Final Anti-Dumping Measures on Stainless Steel from Mexico.¹⁸

The development of this quasi-precedential practice had significant institutional consequences. It meant that WTO law was not, as it might have been in a purely arbitral system, reset with each new dispute. The interpretations developed in early cases became part of the permanent fabric of WTO law, creating legitimate expectations for future parties even where they were not formally bound by prior determinations.¹⁹ This quality gave the system a robustness and predictability that was genuinely valued by many Members, particularly smaller and developing economies that lacked the resources to litigate settled questions in every proceeding. It also gave the Appellate Body an authority within the WTO system that extended beyond the immediate resolution of individual

¹⁴Appellate Body Report, European Communities: Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001).

¹⁵Appellate Body Report, United States: Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter US-Shrimp].

¹⁶Appellate Body Report, Japan: Taxes on Alcoholic Beverages, WT/DS8/AB/R (Oct. 4, 1996). In this early report, the Appellate Body explicitly stated that adopted panel reports are not binding on panels in future disputes but create legitimate expectations among WTO Members.

¹⁸Appellate Body Report, United States: Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (Apr. 30, 2008). The Appellate Body notably criticised a panel that had declined to follow a prior Appellate Body ruling, reinforcing the quasi-precedential authority of its reports.

¹⁹Petros C. Mavroidis & Damien J. Neven, *El Nombre No Hace la Cosa: Panel and Appellate Body Reports, Precedent, and Their Persuasive Effect*, 19 J. Int'l Econ. L. 283, 296-302 (2016).

disputes and closer to the lawmaking function normally associated with domestic judicial institutions.

The same quality, however, became a source of deep frustration for the United States and certain other large economies that found themselves on the losing side of significant decisions. The Appellate Body's determination to adhere to prior interpretations of the anti-dumping agreement, including its treatment of the zeroing methodology, meant that these decisions could not effectively be overruled through diplomatic pressure or subsequent negotiation.²⁰ Only an amendment to the covered agreements, requiring consensus among all Members, could alter the legal landscape. This institutional rigidity, from the perspective of those dissatisfied with particular outcomes, began to look less like the rule of law and more like a judicial imposition of policy preferences that had never been agreed through the political processes of the organisation. The distance between these two characterisations of the Appellate Body's practice is, at its core, what the current crisis is about.

C. National Security and the Limits of Jurisdiction

Among the most politically sensitive areas of the Appellate Body's recent jurisprudence has been the treatment of national security exceptions under GATT Article XXI. The United States' imposition of tariffs on steel and aluminium imports on grounds of national security under Section 232 of the Trade Expansion Act of 1962 generated a wave of disputes that ultimately raised fundamental questions about the justiciability of national security claims before WTO panels.²¹ The panel in the Section 232 disputes found the measures inconsistent with GATT obligations, a finding that the US regarded as an impermissible encroachment on sovereign authority over national security determinations.

The Appellate Body's approach to the national security exception in *Russia: Traffic in Transit*²² had suggested a more restrained reading of Article XXI that left considerable discretion with Members in determining what constitutes a security interest. But the application of these principles in the context of the US steel tariffs proved deeply controversial, and the inability of the Appellate Body to issue definitive rulings on the appeals in those cases, due to its incapacitation, has left the legal position in a state of

²⁰Frieder Roessler, *Changes in the Jurisprudence of the WTO Appellate Body during the Past Decade*, 11 J. World Trade 1, 4-9 (2019). Roessler identifies a gradual evolution in the Appellate Body's interpretive approach that he argues introduced a degree of judicial creativity not always grounded in textual authority.

²¹Panel Report, *United States: Certain Measures on Steel and Aluminium Products*, WT/DS544/R (Dec. 9, 2022). The Panel found the Section 232 measures inconsistent with GATT Articles II and XI, and declined to uphold the national security defence under Article XXI.

²²Appellate Body Report, *Russia: Measures Concerning Traffic in Transit*, WT/DS512/AB/R (Aug. 26, 2019). The Appellate Body's treatment of GATT Article XXI in the context of Russian measures affecting transit through Ukraine generated considerable commentary.

considerable uncertainty. The unresolved national security issue represents one of the most significant substantive challenges any reformed appellate mechanism will need to confront, since the political sensitivity of the issue in multiple major economies makes it difficult to reach consensus on the appropriate scope of WTO jurisdiction.

1.3. The Origins and Escalation of the Crisis

A. The Zeroing Disputes and Accumulated Grievances

The United States' dissatisfaction with the Appellate Body predates the Trump administration by many years and cannot be understood simply as the product of a particular political moment. The roots of the conflict lie principally in a series of decisions in the area of anti-dumping law, specifically in the Appellate Body's sustained condemnation of the zeroing methodology employed by the US Department of Commerce in calculating anti-dumping margins.²³²⁴ Each adverse ruling deepened the conviction in Washington that the Appellate Body was not applying the law as written but was instead pursuing a policy agenda that systematically disadvantaged US trade remedy practice.

Zeroing refers to the practice, when comparing export prices with normal values across multiple transactions or models, of treating negative margins as zero rather than as negative values, while retaining positive margins at their actual values. The practical effect is to inflate the calculated overall dumping margin. The US maintained that zeroing was a reasonable and longstanding practice explicitly permitted by the Anti-Dumping Agreement.²⁵ The Appellate Body disagreed, finding zeroing inconsistent with the agreement in a series of decisions across different methodological contexts.²⁶ American trade officials argued that the Appellate Body's interpretation had no textual foundation and represented a judicial imposition of a preferred outcome on a genuinely contested question of treaty interpretation.

The zeroing disputes were the most prominent but not the only source of US frustration. Similar concerns arose in the context of trade remedy investigations more broadly, where the Appellate Body developed standards of review that American officials regarded as substituting the body's own judgment for the permissible exercise of

²³Appellate Body Report, United States: Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (Feb. 4, 2009). The zeroing methodology refers to the practice of treating negative dumping margins as zero when calculating the overall dumping margin, thereby inflating the calculated margin.

²⁴Appellate Body Report, United States: Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007). The US lost a series of zeroing disputes spanning more than a decade, generating deep institutional frustration.

²⁶Appellate Body Report, United States: Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (Apr. 18, 2006). The dispute crystallised the US-AB confrontation over the zeroing methodology, which the US had employed for decades.

administrative discretion by national investigating authorities.²⁷ These concerns were compounded by the body's practice of taking substantially longer than the sixty-day limit prescribed by Article 17.5 of the DSU to issue its reports,²⁸ a delay that American officials attributed to excessive thoroughness and a failure to observe the basic procedural discipline that the treaty required.

B. The USTR's Articulation of Systemic Concerns

The Trump administration's Office of the United States Trade Representative articulated its concerns in a series of detailed reports that remain the most comprehensive official statement of the US position.²⁹ The 2020 USTR Report identified eleven specific categories of concern grouped under three broad headings: departure from the limits of the Appellate Body's mandate; disregard for specific DSU obligations; and failure to adhere to the applicable standard of review.³⁰ These concerns were not presented as ad hoc policy disagreements but as a systemic critique of the Appellate Body's institutional culture and interpretive practice.

Among the most significant substantive complaints was the allegation that the Appellate Body had systematically issued advisory opinions on issues not necessary to resolve the particular dispute before it. By addressing legal questions in broader terms than required to dispose of the case, the body was effectively legislating, expanding the scope of WTO obligations beyond what the negotiating history supported.³¹ A second major concern related to the treatment of prior Appellate Body reports as binding precedent, a practice the US regarded as inconsistent with the DSU's characterisation of adopted reports as binding only on the parties to the specific dispute. A third concern addressed the body's routine non-compliance with the sixty-day time limit, which the US argued was a substantive legal obligation rather than a merely aspirational guideline.

Importantly, the US critique was not limited to outcomes in specific cases. The USTR reports articulated a broader concern about the institutional direction of the Appellate Body: a perception that the body had developed an institutional ethos that was resistant to political feedback, dismissive of textual constraints on its authority, and

²⁷Simon Lester, *The Scope of DSU Article 17.6: Standard of Review for Panels and the Appellate Body*, 18 J. Int'l Econ. L. 757, 762-770 (2015). Lester argues that the standard of review issue lies at the heart of US concerns about Appellate Body overreach.

²⁸DSU, *supra* note 3, art. 17.5. The provision stipulates that proceedings shall not exceed sixty days. In practice, the Appellate Body routinely required between nine and thirty months.

²⁹Office of the United States Trade Representative, 2020 Report on the Appellate Body of the WTO 1 (Feb. 2020) [hereinafter 2020 USTR Report].

³⁰2020 USTR Report, *supra* note 13, at 4-6. The USTR identified eleven specific concerns, including the treatment of domestic precedents, the sixty-day rule, and the advisory opinion practice.

³¹2020 USTR Report, *supra* note 13, at 21-25. The US argued that the Appellate Body had created WTO obligations that no Member had agreed to, effectively amending treaty texts through interpretation.

systematically oriented toward expanding the scope of WTO obligations at the expense of Members' regulatory autonomy.³² This perception, whether fully accurate or partially overstated, had become sufficiently entrenched in the US trade policy establishment to survive changes in administration and to command broad bipartisan support.

C. From Grievance to Institutional Blockade

What transformed long-standing concerns into a constitutional crisis was the decision of the Trump administration to block the appointment of replacement Appellate Body members as vacancies arose.³³ This strategy exploited a procedural rule requiring consensus to initiate the selection process. Beginning in 2017, the United States deployed this procedural veto systematically, blocking all appointments regardless of the qualifications of proposed candidates. The logic of the strategy was to force substantive reform by making the status quo untenable, though the leverage created by blocking appointments could only materialise if other Members were unwilling to accept a non-functional Appellate Body indefinitely.

By late 2019, three vacancies had accumulated and no appointment had been made. When the remaining two sitting members retired in December 2019, the body fell below the quorum of three required to hear appeals. From that moment it has been unable to function. The Biden administration maintained this blocking strategy despite its expressed broader commitment to multilateral engagement. This bipartisan continuity in the US position has significantly complicated the search for solutions, since it indicates that the concerns driving US behaviour are deep-rooted policy convictions rather than politically contingent preferences that might change with a change of administration.³⁴

1.4. The Systemic Consequences of Appellate Body Incapacitation

A. The Legal Vacuum and Parked Appeals

The incapacitation of the Appellate Body has created a procedural anomaly for which the DSU provides no explicit remedy. When a panel issues a report adverse to a party, that party retains the right to appeal to the Appellate Body under Article 17 of the DSU.³⁵ But since the body cannot currently constitute an appellate panel, any such appeal cannot be heard. The DSU contains no provision addressing what happens to a dispute in

³²WTO, An Underdiscussed Aspect of the Appellate Body Crisis: Systemic Implications for the Dispute Settlement System, Communication from the United States, WT/GC/W/753 (Feb. 26, 2019).

³³WTO, Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/427 (Jan. 28, 2019). The United States formally objected to the commencement of the selection process for the replacement of two departing Appellate Body members.

³⁴Chad P. Bown & Meredith A. Crowley, Introduction to the Symposium on the WTO Appellate Body Crisis, 53 J. Int'l Econ. 1, 3-8 (2019).

these circumstances, and the Working Procedures for Appellate Review similarly contemplate a functioning tribunal rather than an indefinitely incapacitated one.³⁶

The immediate practical consequence has been the emergence of parked appeals, a growing inventory of panel reports against which appeals have been filed but which cannot be adjudicated.³⁷ Since adoption of a panel report is suspended while an appeal is pending, these decisions do not enter into legal force. The losing parties in the underlying disputes are thus relieved, for the time being, of any obligation to bring their measures into conformity with WTO law. The system's enforcement capacity is correspondingly diminished, and the potential for strategic use of the appeal mechanism as a tool of delay, rather than genuine legal review, has increased substantially.³⁸

The enforcement vacuum created by parked appeals is particularly concerning because it affects some of the most economically significant disputes in the WTO system. Major disputes involving the United States, China, India, and other large economies, in areas ranging from steel tariffs to agricultural subsidies, have been affected. The incapacity to obtain definitive appellate rulings in these cases leaves the legal questions they raise unresolved, with significant consequences for the trading enterprises that must make investment decisions in the shadow of that legal uncertainty.³⁹

B. Broader Systemic and Economic Implications

Beyond the specific problem of parked appeals, the incapacitation of the Appellate Body has had broader consequences for the multilateral trading system. The absence of a functioning appellate mechanism removes the quality control function that appellate review provides. Panel reports that contain legal errors cannot be corrected. The resulting legal uncertainty discourages the use of the dispute settlement system and may encourage Members to seek resolution of disputes through bilateral channels where power asymmetries are more pronounced and the interests of smaller economies less protected.⁴⁰

The crisis has also exposed a fundamental tension between the legal and diplomatic modes of dispute resolution. Where binding adjudication is unavailable or ineffective, parties with bilateral leverage tend to revert to power-based bargaining. For smaller and

³⁶Appellate Body Working Procedures for Appellate Review, WT/AB/WP/6 (Aug. 16, 2010).

³⁷WTO, Appellate Body Annual Report 2022, WT/AB/27 (2023). As of late 2024, more than twenty-five appeals remained parked in the system without adjudication.

³⁸WTO, World Trade Report 2022: Climate Change and International Trade 45-50 (2022). The report notes that between January 2020 and June 2022, at least thirty disputes had been affected by the Appellate Body's incapacitation.

³⁹Meredith Crowley & Lu Han, Appellate Body Paralysis, Retaliatory Tariffs, and Firm-level Export Dynamics 22-25 (CEPR Discussion Paper No. 14264, 2020). The paper estimates significant welfare losses attributable to uncertainty in the dispute settlement system.

developing country Members that lack such leverage, this shift is acutely adverse.⁴¹ The rules-based system has historically provided these Members with a measure of protection that their raw negotiating power could not, and its erosion threatens to accelerate the asymmetries already present in the trading system.

There are also significant macroeconomic consequences. Trade policy uncertainty generates real economic costs, discouraging the long-term investments in production facilities, supply chains, and export infrastructure that trade is supposed to facilitate.⁴² Empirical research has documented welfare losses attributable to the uncertainty created by the Appellate Body's incapacitation, though the precise magnitude of these losses depends significantly on modelling assumptions. What is clear is that a system designed to provide legal certainty has, in its current state, become a source of uncertainty, and that this inversion of its intended function has real consequences for economic welfare.⁴³

1.5. The Multi-Party Interim Appeal Arbitration Arrangement

A. Legal Basis and Institutional Design

Faced with the incapacitation of the Appellate Body, a group of WTO Members concluded in May 2020 the Multi-Party Interim Appeal Arbitration Arrangement.⁴⁴ The MPIA represents an ingenious attempt to maintain functioning appellate review within the WTO framework using the resources already available under the DSU. Its legal basis is Article 25 of the DSU, which provides for arbitration as an alternative means of dispute settlement and authorises parties to agree to expeditious arbitration as a substitute for formal panel and appellate procedures.⁴⁵ The use of Article 25 was a creative institutional response, since that provision was not originally intended to serve as a vehicle for a standing multi-party appellate arrangement, but its broad terms were capable of bearing that interpretation.

The design of the MPIA reflects a conscious effort to replicate, as closely as possible, the institutional features of the Appellate Body. The arrangement establishes a pool of ten experienced trade law arbitrators who serve in three-person divisions to hear

⁴¹Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 Univ. Ill. L. Rev. 1, 17-22 (2019). Shaffer argues that the erosion of dispute settlement disproportionately disadvantages smaller economies that lack the bilateral leverage of major trading powers.

⁴³WTO, *Annual Report 2024: Trade in a Transforming World* 98-101 (2024). The report identifies dispute settlement uncertainty as a significant factor depressing investment in trade-exposed sectors.

⁴⁴Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, WT/DSB/82 (May 13, 2020) [hereinafter MPIA]. The MPIA was initially concluded by the European Union, Canada, China, Norway, Switzerland, Australia, New Zealand, Mexico, and several other Members.

⁴⁵DSU, *supra* note 3, art. 25. Article 25.1 provides that expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of disputes that concern issues that are clearly defined by both parties.

individual appeals.⁴⁶ The arbitrators operate under procedures substantially identical to those of the Appellate Body, incorporating the body's working procedures by reference.⁴⁷ The scope of review replicates that of the DSU's provisions governing appellate review, and the standard of review applicable to factual determinations mirrors that developed in Appellate Body jurisprudence. The MPIA thus aims to maintain as much continuity as possible with the prior system while operating within existing treaty constraints.

B. Participation, Achievements, and Structural Limitations

The MPIA has attracted a substantial and economically significant group of participants, including the European Union, Canada, China, Mexico, Australia, and more than fifty Members in total by early 2025.⁴⁸ A number of actual appeals have been resolved through the arrangement, and the arbitrators appointed under it have demonstrated a capacity for rigorous legal reasoning consistent with prior Appellate Body practice.⁴⁹ The arrangement has also provided a valuable precedent for the proposition that the dispute settlement system can function in a modified form even in the absence of a fully operational Appellate Body.

Nevertheless, the MPIA's fundamental limitation is structural. The United States has declined to participate in or recognise the arrangement,⁵⁰ and its refusal has been joined by India, Brazil, and certain other significant trading nations.⁵¹ Since the MPIA operates on an opt-in basis, it can only provide appellate review in disputes between its members. Any dispute involving the United States or other non-participants falls entirely outside its scope. This limitation is not incidental but goes to the heart of the arrangement's adequacy as a systemic solution.⁵²

⁴⁶MPIA, *supra* note 26, para. 3. The arrangement provides for a pool of ten arbitrators who serve on a part-time basis and are compensated in accordance with the standard WTO scale for Appellate Body members.

⁴⁷MPIA, *supra* note 26, para. 6. The MPIA incorporates the Appellate Body's working procedures by reference, thus preserving institutional continuity in procedure and legal method.

⁴⁸WTO, Communication from Canada, the European Union, China, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica, and Montenegro on an Interim Appeal Arbitration Procedure, WT/GC/W/752/Rev.2 (Jul. 2020).

⁴⁹Arbitration Award, *European Union v. Ukraine, Measures Related to Trade in Goods*, DS525 (filed under MPIA) (Dec. 2021). This was among the first substantive matters resolved through the MPIA appellate procedure.

⁵⁰WTO, Dispute Settlement Body, Statement by the United States at the Meeting of the DSB, WT/DSB/M/439 (Mar. 2020). The US stated it would not participate in or recognise the MPIA process.

⁵¹As of early 2025, the United States, India, Brazil, and several other major trading nations remain outside the MPIA. This severely limits the arrangement's practical scope and its ability to function as a systemic substitute.

⁵²Marc Bungenberg & Markus Krajewski, *The MPIA as an Interim Solution for WTO Appellate Review: Achievements and Limitations*, 56 J. World Trade 1, 15-18 (2022).

Academic assessments of the MPIA have generally been favourable regarding its design and operation but sceptical regarding its systemic adequacy.⁵³ The arrangement provides genuine appellate review for a subset of WTO Members in a subset of disputes, but it cannot restore the universal, binding, and independent appellate review that the DSU originally envisioned. It is, at best, a framework for managing the crisis among willing participants while the search for a systemic solution continues. The very necessity of the MPIA underlines the gravity of the underlying institutional failure and the urgency of addressing it.

2. Reform Proposals: A Critical Assessment

A. The European Union's Comprehensive Reform Agenda

The European Union has been the most active proponent of comprehensive and structured reform, presenting detailed proposals to the WTO's General Council on multiple occasions.⁵⁴ The EU's reform agenda encompasses both procedural and substantive dimensions and has been notable for its willingness to engage with the substantive concerns articulated by the United States while resisting demands that the Appellate Body be stripped of effective independence. The EU has consistently maintained that the fundamental design of the two-tier system is sound and that the crisis requires reform, not replacement, of the existing architecture.

On procedural matters, the EU has proposed measures to address the sixty-day time limit issue, including enhanced case management procedures, page limits on submissions, and a staffing increase at the WTO Secretariat to support the body's work.⁵⁵ The EU has also proposed modifications to the practice of seeking informal guidance from the full membership of the body, which the US identified as contributing to delays. On substantive matters, the EU has proposed a clarification of the scope of appellate review, making explicit that the body is confined to reviewing the legal questions addressed in the panel report and may not address issues unnecessary to resolve the appeal. This responds directly to the advisory opinion concern.

The EU has also proposed institutional reforms to strengthen the selection and accountability mechanisms for Appellate Body members, including clearer criteria for appointment, enhanced disclosure requirements regarding outside activities, and a more transparent performance review process.⁵⁶ These proposals reflect an understanding that

⁵³Arthur E. Appleton, *The Appellate Body: An International Tribunal in Crisis*, 17 *World Trade Rev.* 521, 535-539 (2018).

⁵⁴WTO, *Proposal for Comprehensive Reform of the Dispute Settlement System*, Communication from the European Union, WT/GC/W/752/Rev.2 (Jul. 5, 2019) [hereinafter EU Reform Proposal].

⁵⁵EU Reform Proposal, *supra* note 33, at 3-5. The EU's reform agenda focused on the sixty-day time limit, procedural transparency, the issue of advisory opinions, and the scope of appellate review.

addressing US concerns about the body's institutional culture requires not merely textual changes to the DSU but a reconfiguration of the body's internal governance. Whether these proposals would, in practice, produce a sufficiently different institutional culture to satisfy the US is a question that cannot be answered in the abstract.

B. Alternative Visions from the United States and Academic Commentators

The United States has not presented a coherent alternative reform proposal that would restore a functioning appellate tier. Its official communications have focused primarily on articulating the deficiencies of the existing system.⁵⁷ Academic analysis of the US position has identified several possible directions. One is a return to a strictly arbitral model without a permanent standing body, in which parties would appoint arbitrators on an ad hoc basis in individual disputes. This approach would eliminate the quasi-precedential development of WTO law but would also sacrifice the consistency and predictability that the standing body had delivered.⁵⁸ A second possibility is a reformed permanent body with a considerably narrower mandate, perhaps limited to review for procedural error and manifest legal error, rather than the plenary legal review currently exercised.

A third possibility, which has attracted academic attention, is the enhancement of the political supervision of Appellate Body decisions through a strengthened role for the Dispute Settlement Body.⁵⁹ Under this conception, the DSB would be empowered to adopt interpretive decisions by qualified majority that could override or supplement Appellate Body rulings, providing a political check on judicial determinations that Members regarded as exceeding the body's mandate. This approach would rebalance the system toward the political, but it would do so at the cost of the independence and consistency that many Members regard as cardinal virtues of the current system.⁶⁰

Other academic proposals have focused on specific substantive reforms designed to address the root causes of US dissatisfaction. These include a revision of the standard of review applicable in anti-dumping disputes under Article 17.6 of the Anti-Dumping

⁵⁸William A. Reinsch & Jack Caporal, WTO Dispute Settlement: Is Reform Possible? 8-11 (CSIS Brief, 2019).

⁵⁹Petros C. Mavroidis, The WTO in Crisis: What Can Be Salvaged?, 54 J. World Trade 3, 329-348 (2020). Mavroidis argues that a wholesale reconstruction of the dispute settlement system is neither necessary nor desirable, and that targeted reforms addressing identified deficiencies offer the most promising path forward.

⁶⁰Maureen Irish, WTO Dispute Settlement Reform and the Question of Independent Adjudication, 55 J. World Trade 3, 421-450 (2021). Irish argues that the maintenance of genuine judicial independence is a non-negotiable condition of any durable reform.

Agreement,⁶¹ clearer treaty language on the treatment of negative dumping margins, and explicit provisions governing the scope of advisory opinions. While these targeted reforms would not address all the systemic concerns articulated in US official documents, they might provide sufficient reassurance to bring the United States back to the table for a broader negotiation, and they have accordingly attracted significant attention among trade policy analysts.⁶²

C. The MC12 Mandate and the Reform Work Programme

The Twelfth WTO Ministerial Conference, held in Geneva in June 2022, adopted a declaration committing Members to conduct necessary discussions with the objective of having a fully and well-functioning dispute settlement system accessible to all Members by 2024.⁶³ The MC12 declaration did not specify what form the reformed system should take, leaving the substantive design questions to be resolved through subsequent negotiations. It thus represented a political commitment to the goal of reform without a commitment to any particular solution, a formulation that was the only outcome capable of commanding consensus among Members with fundamentally different visions of what reform should achieve.

The subsequent reform work programme has generated an extensive body of technical documentation and analysis,⁶⁴ but has not yet produced agreement on the substantive design of a reformed system.⁶⁵ The fundamental political obstacles identified above remain in place, and the gap between what the United States is willing to accept and what other major Members regard as acceptable continues to be the central challenge. The deadline of 2024 established by MC12 passed without the achievement of a comprehensive agreement, and the prospects for early resolution remain uncertain. Nevertheless, the work programme has served the useful function of clarifying the areas of potential convergence and the specific issues on which negotiating energy needs to be focused.

⁶²WTO, Structured Discussions on Dispute Settlement Reform, Note by the Secretariat, WT/GC/W/840 (Feb. 2023). The note summarised the state of reform discussions following MC12 and identified areas of potential convergence among Members.

⁶³WTO, Ministerial Declaration, Twelfth WTO Ministerial Conference (MC12), WT/MIN(22)/24 (Jun. 22, 2022). The Declaration acknowledged the severe challenges facing the dispute settlement system and mandated a reform work programme.

⁶⁵WTO, Report of the General Council, WT/GC/222 (Nov. 30, 2021). The General Council took note of ongoing discussions but could not reach agreement on the steps necessary to restore the Appellate Body's operational capacity.

3. Developing Countries and the Dispute Settlement Reform Debate

A. Historical Participation and Structural Constraints

The dispute settlement crisis has particular significance for developing country Members, though the implications are complex. On one level, the inability of the Appellate Body to function removes a safeguard that developing countries have historically valued: the capacity to obtain independent and binding legal rulings against the trade-restricting measures of more powerful economies.⁶⁶ The history of the WTO dispute settlement system includes important instances in which developing country Members successfully challenged the trade policies of large economies, obtaining rulings that they could not have secured through bilateral negotiation. Brazil's successful challenges to the US cotton and European sugar subsidy programmes are the most celebrated examples, but there are many others across a range of sectors and legal issues.

The practical access of developing countries to dispute settlement has, however, always been significantly constrained by resource and capacity limitations.⁶⁷ Bringing a WTO dispute requires substantial legal expertise and financial resources that many developing country governments do not possess. The Advisory Centre on WTO Law, established in 2001 to provide legal assistance to developing country Members at subsidised rates, has partially mitigated this constraint,⁶⁸ but it has not eliminated the fundamental asymmetry between Members with large, well-funded trade ministries and those without. The dispute settlement system has, in consequence, been used disproportionately by a relatively small number of developing country Members with significant legal and economic capacity, while the vast majority of developing countries have remained passive observers of proceedings brought by others.

For the large majority of developing country Members, therefore, the crisis primarily matters not through their own litigation experience but through its effects on the systemic legitimacy of the trading order. A rules-based system, even one they rarely directly use, provides a framework of expectations and constraints within which trade policy is formulated by all Members. When that framework is visibly dysfunctional, the resulting uncertainty and the reversion toward power-based bargaining tend to harm

⁶⁶Henrik Horn & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995-2006: Some Descriptive Statistics*, 42 J. World Trade 1107, 1115-1120 (2008).

⁶⁷Gregory Shaffer, James Nedumpara & Aseema Sinha, *Indian Bureaucrats, Policy Entrepreneurs, and WTO Litigation*, 33 Governance 5, 749-768 (2020).

⁶⁸Advisory Centre on WTO Law, *Annual Report 2023*, at 4-6 (2024). The ACWL provided legal assistance in 42 dispute settlement proceedings during 2023, demonstrating continued demand from developing country Members.

smaller economies that have less bilateral leverage to deploy in the absence of legal constraints on major trading powers.⁶⁹

B. Developing Country Interests in Structural Reform

Any durable reform of the dispute settlement system must take developing country interests seriously, not merely as a political accommodation but as a substantive matter of institutional design. A reformed system that successfully accommodates the concerns of major economies but fails to address the capacity constraints facing smaller Members will produce an institution that is formally open but practically inaccessible to most of those it is meant to serve. Such an outcome would represent a significant regression from the aspirations of the WTO's founding charter and would undermine the legitimacy of any reformed system.

Several specific concerns are particularly important from a developing country perspective. The maintenance of a genuinely independent appellate function is even more important for developing countries than for major economies. Where large economies can deploy substantial bilateral leverage to secure outcomes in power-based negotiations, smaller economies depend more completely on legal determinations made by an independent tribunal. Any reform that replaces genuine appellate independence with a body susceptible to political pressure from major economies would be particularly disadvantageous for smaller Members,⁷⁰ and developing country negotiators have been notably vigilant on this point in the reform discussions.

The cost of dispute settlement proceedings must also be addressed in any reform package. The Advisory Centre on WTO Law has done valuable work in reducing the financial barriers to participation,⁷¹ but the broader ecosystem of capacity constraints, including the lack of trained trade lawyers in many developing countries and the opportunity costs of diverting limited government resources to dispute settlement, requires sustained institutional attention. Proposals for simplified procedures applicable to disputes involving smaller economies, and for enhanced technical assistance from the WTO Secretariat, deserve serious consideration as components of a comprehensive reform package.⁷²

The enforcement architecture also requires attention. The existing mechanism, which relies primarily on the authorisation of retaliatory measures, is poorly suited to

⁷⁰Steve Charnovitz, Judicial Independence in the World Trade Organization, in *International Organizations and International Dispute Settlement: Trends and Prospects* 219-240 (Laurence Boisson de Chazournes et al. eds., 2002).

⁷²Lori Wallach, Counterfeit 'Emperor's New Clothes': Public Interest Analysis of the WTO 5th Ministerial 1-12 (Pub. Citizen's Global Trade Watch, 2003).

developing country complainants, since a small economy rarely has the capacity to impose retaliatory tariffs that impose meaningful costs on a large economy.⁷³ More imaginative enforcement mechanisms, including compensation arrangements, collective retaliation authorisation, and the development of a more effective multilateral surveillance function, have been discussed for many years without practical implementation. A reform process that addresses the appellate structure without attending to enforcement will produce a more coherent system of adjudication whose outcomes remain difficult to enforce against powerful respondents.

4. Towards A Durable Settlement: Conditions for Reform

A. The Political Conditions for Resolution

Any assessment of the prospects for reform must begin with a clear-eyed acknowledgment of the political constraints that have produced and perpetuated the current crisis. The fundamental obstacle to resolving the Appellate Body crisis is not a lack of technical proposals or legal ingenuity. It is the absence of political agreement among the major trading powers on the basic design of the appellate mechanism they are willing to live with.⁷⁴ Until that political agreement exists, technical reform discussions, however sophisticated, will produce documents rather than institutions. The MC12 work programme has generated substantial documentation but limited progress precisely because it has not yet been able to resolve the underlying political impasse.

The central political challenge is the accommodation of the United States within a reformed system. This does not mean that US demands must be accepted wholesale. Many of the concerns articulated in official US documents raise legitimate points about procedural compliance, the scope of appellate review, and the appropriate boundaries of judicial interpretation.⁷⁵ These concerns can, in principle, be addressed through targeted reforms that strengthen the rule of law without eviscerating the independence and authority of the appellate function. What it does mean is that any reformed system must be capable of securing US participation, since a system that operates without the world's largest economy is not a multilateral system in any meaningful sense. The MPIA demonstrates that a functioning appellate arrangement is possible without US participation, but it also demonstrates the limitations of such an arrangement.

⁷³Bernard Hoekman & Petros Mavroidis, WTO Dispute Settlement, Transparency and Surveillance, 23 World Econ. 527, 534-540 (2000).

⁷⁵Alan O. Sykes, The Dispute Settlement Mechanism: Ensuring Compliance or Generating Litigation? in *The World Trade Organization: Legal, Economic and Political Analysis* 587-618 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., 2005).

A sustainable political settlement will likely require concessions on both sides. The United States will need to accept the continuation of a standing appellate body with genuine independence and the authority to issue legally binding rulings. Other Members will need to accept reforms to the scope of appellate review, the treatment of prior reports, and the procedural practices of the body that address the substantive core of the US concerns. The willingness of both sides to make these concessions is a political question that ultimately depends on factors beyond the control of the legal and policy community, including domestic political dynamics in the United States and the extent to which other major trading powers are prepared to use the leverage available to them in broader trade and geopolitical negotiations.⁷⁶

B. Institutional Design Recommendations

Subject to the political conditions identified above, a reformed appellate mechanism should incorporate several key design features. First, the reformed body should remain a permanent standing institution with a defined membership, not an ad hoc arbitral panel. The consistency and predictability of WTO law, which have been among the most valuable outputs of the Appellate Body over its history, can only be maintained by an institution with an institutional memory and a professional interest in coherent doctrine development. An ad hoc system would sacrifice these values for an uncertain gain in political flexibility.

Second, the scope of appellate review should be clarified. The practice of issuing advisory opinions on issues not necessary to resolve the appeal should be explicitly prohibited, and the principle of judicial economy should be codified in the DSU rather than left to the discretion of the body. These adjustments respond to legitimate concerns about the scope of the body's mandate while preserving its core function of reviewing and correcting legal errors in panel reports. A clearer mandate would also help to focus the body's work and contribute to compliance with time limits.

Third, the time limit for issuing reports should be made practically workable. This will require both institutional reforms, including a larger and better-resourced secretariat, and procedural reforms, including stricter page limits on submissions and a more disciplined approach to the selection of issues for decision. The current practice, in which the Appellate Body issues exhaustive reports addressing every legal argument advanced by the parties regardless of its relevance to the outcome, cannot be sustained within a strict time limit and should be reformed. A reformed body that consistently issues focused,

⁷⁶WTO, General Council, Dispute Settlement Body, Joint Statement of the Ottawa Group on WTO Reform, WT/GC/208 (Oct. 26, 2018). The Ottawa Group, comprising twelve WTO Members including Canada, the European Union, and Japan, committed to working toward WTO reform including restoration of the Appellate Body.

timely reports will better serve the system's needs than one that produces comprehensive legal treatises at irregular intervals.

Fourth, the treatment of prior reports as quasi-precedent should be clarified in a way that acknowledges the legitimate institutional interest in consistency while providing a more explicit mechanism for the body to reconsider prior interpretations when presented with compelling reasons to do so. This might take the form of an enhanced procedure for the body to revisit prior decisions in defined circumstances, subject to a heightened standard of reasoning and a requirement of broader deliberation, in cases where prior decisions are demonstrably inconsistent with the text and negotiating history of the covered agreements.⁷⁷ Such a procedure would provide a safety valve for the pressure that has built up around the body's quasi-precedential practice while preserving the general principle of consistency.

5. Conclusion

The paralysis of the WTO Appellate Body is not merely an institutional malfunction. It is a symptom of a deeper tension within the architecture of the multilateral trading system between the aspiration to a rules-based international order governed by independent legal institutions and the political reality that sovereign states, particularly large and powerful ones, are unwilling indefinitely to accept legal determinations that systematically constrain their preferred policies without recourse. This tension has been present within the WTO system since its founding, and the Appellate Body's remarkable success over its first two decades in managing that tension through principled and generally respected adjudication made it easy, for a time, to underestimate its depth. The current crisis has made it impossible to ignore.

The MPIA represents a creative and commendable effort to maintain functioning appellate review among willing Members while the search for a systemic solution continues. Its operational experience demonstrates that the substantive functions of the Appellate Body can be replicated in a modified institutional form, and the quality of decision-making under the arrangement has been creditably maintained. But the MPIA cannot substitute for the restoration of a universal, independent, and binding appellate mechanism. Its opt-in design necessarily excludes the United States and other major economies, and a dispute settlement system that cannot adjudicate the most economically significant disputes in the trading system cannot claim to fulfill the function the DSU assigned it.

A durable solution to the crisis requires a political settlement among the major trading powers, and most importantly between the United States and the rest of the WTO

membership, on the basic architecture of a reformed appellate mechanism. That settlement must address the substantive concerns at the root of the US position, particularly those relating to the scope of appellate review, the treatment of prior reports, and the applicable standard of review in trade remedy cases, while preserving the core values of independence, consistency, and binding adjudication that have made the WTO dispute settlement system the most sophisticated mechanism for the resolution of interstate trade disputes in the history of international economic law.

The reform process must also take seriously the interests and concerns of developing country Members, who have the most to lose from the erosion of a rules-based trading system and who must be genuine participants in the design of any reformed institution. A reformed appellate body that serves only the interests of major economies, whether by sacrificing independence to placate the United States or by imposing procedural burdens that exclude smaller Members, is not a solution to the current crisis but a reconfiguration of its causes. Genuine reform must be both effective, in the sense of resolving the political impasse that has incapacitated the Appellate Body, and inclusive, in the sense of serving the full range of Members whose interests the system is designed to protect.

The stakes extend well beyond the institutional question of how WTO disputes are adjudicated. They encompass the broader question of whether the international community is capable of maintaining effective multilateral rules in the face of unilateral resistance by powerful states, and whether the legal institutions created to manage interdependence can adapt to changing political conditions without losing their essential character. The answer to that question will have consequences that reach far beyond trade law, shaping the prospects for cooperative governance of the global economy in the decades ahead. The WTO dispute settlement reform process is, in this sense, a test of the durability of the multilateral order itself, and it deserves to be treated with all the seriousness that implies.⁷⁸

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⁷⁸Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

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