

The Appellate Body Crisis: Challenges and Reforms to the World Trade Organization Dispute Settlement Mechanism

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Abstract

The World Trade Organization's Appellate Body – the keystone of the organization's two-tier dispute settlement mechanism – has been immobilized since December 2019, when the United States repeatedly withheld consent for the appointment of new judges, thereby breaking the quorum required to hear appeals. This paralysis has triggered cascading operational, legal, and political consequences. Drawing on doctrinal analysis of WTO agreements and a focused case study of recent unresolved disputes, this article charts three interlinked effects of the gridlock. First, it has produced an expanding backlog of appeals and encouraged so-called "appeals into the void," leaving panel reports in limbo and eroding legal certainty for traders and governments alike. Second, the impasse has incentivized members to experiment with ad hoc alternatives – most notably the Multi-Party Interim Appeal Arbitration Arrangement – risking fragmentation of jurisprudence and unequal access to justice across the membership. Third, the stalemate has weakened trust in the WTO's ability to enforce multilateral rules at a moment of intensifying geopolitical rivalry, undermining incentives for future rule-making on issues such as digital trade and climate-related measures. This study argues that narrowly framed procedural fixes are insufficient; instead, a holistic reform package is required. Recommended measures include a time-bound and automatic judge-appointment process insulated from single-member vetoes, streamlined appellate procedures to curb excessive litigation delays, and a renewed political compact – possibly codified in a ministerial declaration – reaffirming shared commitments to an independent and binding dispute settlement system. Restoring a credible and predictable appellate function is indispensable for preserving the WTO's centrality in global trade governance and for sustaining confidence in a rules-based international trading order.

Keywords: Appellate Body, Dispute Settlement, WTO.



INTRODUCTION

The establishment of the WTO in 1995 represented a new era in global trade. It established a formal means of addressing trade disputes through its Dispute Settlement Mechanism (DSM).¹ The Appellate Body, in particular, has been fundamental in ensuring the consistent interpretation and application of international trade laws. Thus, the DSM was widely credited as the “crown jewel” of the WTO since it provides a compulsory, rule-based process to resolve disputes between any two member states.²

However, the current decade has created a crisis surrounding the institution due to the lack of members in the Appellate Body. The Appellate Body has not been functioning since 2019. To operate, the Appellate Body must have seven members appointed by the Dispute Settlement Body for four years.³ The term of the last sitting Appellate Body member expired on 30 November 2020. The United States has blocked the re-appointment of members and the appointment of new members.

This paralysis has resulted in significant disruptions of the WTO's operations, which might impact its future as the leading governance body in global trade. Consequently, the Appellate Body's challenges stretch beyond its functions since it influences the global trade system. The paralysis has impaired the credibility and efficacy of the WTO due to legal uncertainty and weakened enforcement of global trade rules. The subsequent concerns of WTO member states have led to the utilization of alternative reciprocal and regional mechanisms of dispute settlement that might lead to a more segmented global trade system. Therefore, this study may be considered significant as it explores the implications of these problems, their causes, and possible solutions.

¹ T. N. Srinivasan, ‘The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives’, *The World Economy* 30, no. 7 (July 2007): 1033–68, <https://doi.org/10.1111/j.1467-9701.2007.01011.x>.

² Manfred Elsig, Joost Pauwelyn, and Thomas Bernauer, ‘The Oxford Handbook on The World Trade Organization’, in *Dispute Settlement Mechanism—Analysis And Problems*, ed. Martin Daunton, Amrita Narlikar, and Robert M. Stern (Oxford University Press, 2012), 485–506, <https://doi.org/10.1093/oxfordhb/9780199586103.013.0023>.

³ Jennifer Hillman, ‘Three Approaches to Fixing the World Trade Organization’s Appellate Body: The Good, the Bad and the Ugly’, IIEL Issue Briefs (Institute of International Economic Law, Georgetown University Law Center, December 2018), <https://www.law.georgetown.edu/iel/research/ielissuebriefs/>.

While existing literature has meticulously analyzed the procedural aspects and challenges of the WTO's DSM, there is little discussion of the Appellate Body's membership crisis and the underlying implications that extend far beyond mere procedural issues. Available works have primarily focused on the legal analysis of past disputes and the theoretical background of the WTO's DSM, but have rarely touched upon the recent structuration and geopolitical struggle. They neglect the practical implications of the DSM's paralysis and the extent of reform necessary to restore its operations. This paper intends to bridge this information and presentation gap, providing a deeper examination of the crisis's background and the procedural gaps and geopolitical clash that have stalled the appointment of new judges. This work aims to lay the groundwork for action measures that could be practically implemented to address the Appellate Body's crisis and the entire DSM's value. The originality of this research is in its practical orientation toward addressing the situation by reforming the appointment procedures, streamlining critical processes, and encouraging broad political consensus among WTO members. These recommendations are vital for the WTO to preserve its role as a key contributor to global trade oversight and maintain the international trading system's stability and predictability. In summary, this study will examine the WTO's DSM from its evolution to the present, seeking reform opportunities by focusing on the Appellate Body's crisis. Thus, it will substantially contribute to improving the functionality and credibility of this crucial WTO arm, thereby enhancing the international trading system's predictability and stability.

METHODOLOGY

This research employs a doctrinal legal method using statutory and case study approaches. Secondary data were primarily sourced from WTO reports, scholarly articles, and legal analyses to construct a comprehensive review of the Appellate Body's challenges and the broader implications for the global trade system. Another feature of this study is the adoption of an interdisciplinary lens combining legal

discourse with political and economic insights from international relations and trade diplomacy.

RESULT AND DISCUSSION

The WTO Appellate Body's History and Function

Effective January 1, 1995, the WTO under the Marrakesh Agreement superseded the General Agreement on Tariffs and Trade (GATT) as a more efficacious organization for international trade.⁴ GATT primarily targeted eliminating tariffs and trade restrictions but lacked a robust dispute settlement system. The WTO filled this gap with a comprehensive institution focused on global trade, including a legal mechanism for resolving member disputes. The Dispute Settlement Mechanism (DSM) is considered the "crown jewel" of the WTO, promising constituents and trading partners a juridically validated and predictable approach to resolving trade disputes.⁵

The Appellate Body, a key component of the DSM, was established to provide an appeal process for WTO panel decisions. It ensures that panel reports are consistent with WTO agreements and offers a further inquiry into complex legal issues.⁶ The Appellate Body was expected to function as the final authority in trading disputes as it was set to rule on legal issues within the panel reports and maintain a consistent approach to the WTO and the GATT. Representation to the Appellate Body is based on appointment, and typically, the appointments are made to hold the positions for a four-year term, but they can be renewed for another four years.⁷

Establishing the Appellate Body marked a significant development in the international trading system. It was established to function as the ultimate court in trading

⁴ Ernst-Ulrich Petersmann, 'The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization', *European Journal of International Law* 6, no. 2 (1995): 161–221, <https://doi.org/10.1093/ejil/6.2.161>.

⁵ Vitaliy Pogoretsky, Boris Ohanyan, and Laura M. Fernández, 'Is the WTO Losing Its Crown Jewel to FTAs and Why Should This Concern Economically Disadvantaged WTO Members?', *Trade, Law and Development* 14, no. 1 (2022): 105–28.

⁶ Chang-fa Lo, Junji Nakagawa, and Tsai-fang Chen, eds., *The Appellate Body of the WTO and Its Reform* (Singapore: Springer Singapore, 2020), <https://doi.org/10.1007/978-981-15-0255-2>.

⁷ Lo, Nakagawa, and Chen.

disagreements. The Appellate Body's independence and authority are key to maintaining trust in the DSM, as its decisions are binding and impartial. Using the principle of non-discrimination, all member states are treated equitably when defending their trade interests, regardless of political influence and economic prowess.

In the case of a trade dispute, initial consultations are held between the parties to the conflict to find common ground. If these fail, the matter is referred to a panel that hears the case and reports its findings. Disputant parties can seek a review of the panel's legal decision by the Appellate Body.⁸ The review process also involves several checks. The panel diligently evaluates the interpretation and application of the law. It checks the procedures followed and the analysis of legal and factual issues. This ensures the consistent application of WTO dispute settlement procedures and laws.

The Appellate Body is a valuable asset to the global trading system as it provides clear legal interpretations of its cases. These decisions contain detailed guidance on complex trade issues such as anti-dumping, subsidies, countervailing measures (SCM), and safeguard actions. The resolution of individual cases and setting standards enhance legal certainty in WTO member countries.

For example, in anti-dumping measures, the Appellate Body has elaborated the circumstances in which anti-dumping duties may be applied, thus guaranteeing that such measures are adopted only if specific parameters are fulfilled.⁹ This has worked to curtail unfair applications of anti-dumping responsibilities where they are fundamentally meant to be applied.

In the area of SCM, the Appellate Body has provided considerable clarification of the SCM Agreement.¹⁰ It has set the conditions for what can be considered a subsidy, who has the right to launch a legal action, and when a Countervailing Duty (CVD) can be imposed. By defining the legal conditions, the Appellate Body has contributed to

⁸ Lo, Nakagawa, and Chen.

⁹ Lo, Nakagawa, and Chen.

¹⁰ Emmanuel Nyahoho, "The Limited Effectiveness of the Agreement on Subsidies and Countervailing Measures (SCM) in WTO", *The Journal of Social, Political, and Economic Studies* 29, no. 1 (2004): 87–114.

imposing a degree of order in international commercial relations, thus eliminating many opportunities for controversy.

It has also played a crucial role in safeguard actions, which member countries can enact for a limited period to protect their industries against increased imports. By explaining under which circumstances the safeguards can be utilized, the Appellate Body has ensured that they are used properly and do not endanger the soundness of the multilateral trading framework.

Coherence in applying rules relating to trade liberalization augments predictability in the context of trade, which is in the interest of the trading partners.¹¹ It benefits businesses as they can invest and manage operations based on legal requirements. Governments can formulate trade policies that comply with WTO law, thus avoiding certain risks. The Appellate Body has also played an essential role in addressing the sovereignty of member states while adhering to the rules of international trade, respecting domestic policies, and simultaneously coming up with fair and just decisions.¹²

From a business perspective, the legal clarity that the Appellate Body delivers allows organizations to confidently engage in the global economy. Businesses realize that the rules to be implemented are consistent throughout the trading system and that any conflicts will be addressed impartially. This cuts the risks inherent in global trade and promotes investments and economic development.¹³

From the government's perspective, the decisions made by the Appellate Body give governments a clear structure concerning trade policies. Trade relations between countries are easily strained when national policies are at odds with international laws and regulations. However, when such policies are brought in line by the government, this problem is solved. It is especially the case with smaller, developing countries, as they can be more vulnerable to the actions of their counterparts. The Appellate Body

¹¹ Richard H. Steinberg et al., *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (Princeton, NJ: Princeton University Press, 2006), <https://doi.org/10.1515/9781400837892>.

¹² Steinberg et al.

¹³ Steinberg et al.

ensures that these countries are treated equally, assuring all the WTO members' equality.

The Appellate Body contributes to the effort to embed the multilateral trading system in rules through offering reliable and fair means of dispute resolution in trade affairs.¹⁴ It reduces the tendency for nations to take unilateral measures and unleash trade wars; encourages compliance with the WTO's regulations and discourages member countries from acting outside the WTO charter. Since the decisions of the Appellate Body are considered legally binding, there is a greater guarantee for members of the WTO and other bodies involved in enforcing rules and regulations for international trade.¹⁵ The Appellate Body also significantly contributes to implementing the rule-based system by highlighting the need for policy alterations. In light of the contending arguments, it is interesting to look at specific litigation examples like the US – Shrimp and EC – Hormones cases to illustrate the practical approach and policy direction provided by the Appellate Body.¹⁶

In the US Shrimp case, the Appellate Body emphasized the environmental aspects of trade, setting a precedent for how trade measures can be devised to protect the environment without transgressing WTO law. In this case, one saw how the Appellate Body undertakes the herculean task of interpreting trade rules that safeguard the environment without disregarding free trade rules.

In the case of EC – Hormones, the Appellate Body discussed the provisions and the scope of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) to provide direction to the countries about safeguarding the health of their citizens without violating the trade rules. This ruling assisted in protecting trading policies from being locked within health frameworks through scientific legitimacy rather than disguised protectionism. The Appellate Body has a significant role in developing a systematic and consistent body of international trade law.

¹⁴ David Palmeter, Petros C. Mavroidis, and Niall Meagher, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, 3rd ed. (Cambridge: Cambridge University Press, 2022), <https://doi.org/10.1017/9781108908009>.

¹⁵ Palmeter, Mavroidis, and Meagher.

¹⁶ Daniel Wüger, 'The Never Ending Story: The Implementation Phase in the Dispute between the EC and the United States on Hormone-Treated Beef', *Law and Policy in International Business* 33 (2002): 777–814.

Therefore, its decisions help resolve trade controversies and set a precedent for future cases. Ultimately, it ensures the global trading system's stability, justice, and equity.

Crisis in the WTO Dispute Settlement Mechanism

The non-operation of the Appellate Body diminished the WTO's capacity to settle trade disagreements, leaving a backlog of 30 cases (12 cases have been brought to arbitration, and 2 of which have been resolved),¹⁷ pending, and generating confusion among the member countries.¹⁸ This has been detrimental to the stability and certainty required in the global trading environment, as it has introduced uncertainty in resolving the various disputes, which is a pillar of the international trading system.

The judges occupying the positions of the Appellate Body left office once their term was up, and their successors were not appointed.¹⁹ The last sitting member retired on November 30, 2020, which means the Appellate Body does not have a quorum to sit.²⁰ The Appellate Body cannot hear appeals or make decisions, which means that the functioning of a key part of the WTO's Dispute settlement system has been stopped completely.

The effects or repercussions of this paralysis are far-reaching. Since no appeal process is established in the WTO, it cannot deal with the cases effectively; thus, there is a backlog of cases.²¹ This backlog does not deny justice to its users; it increases tensions between trading partners waiting for the WTO to resolve trade disagreements and interpretations of rules on trade. This stalemate of the Appellate Body has shown that the WTO's governance structures are very weak, and there is an immediate need for reform so that such a crucial organization can continue to function.

One of the leading causes of the present crisis is America's failure to appoint new members to the Appellate Body. Since 2017, the US has been objecting to new appointments and reappointments of the existing members. The US has claimed that

¹⁷ Nandang Sutrisno, '3 Langkah Penyelesaian Sengketa Nikel Indonesia Di WTO', 13 September 2024, <https://www.hukumonline.com/berita/a/3-langkah-penyelesaian-sengketa-nikel-indonesia-di-wto-lt66e322385af1e>.

¹⁸ Giorgio Sacerdoti, 'Evolution of WTO Dispute Settlement System and Its Current Crisis', *The IUP Journal of International Relations* 17, no. 2 (2023): 7–24.

¹⁹ Sacerdoti.

²⁰ Sacerdoti.

²¹ Sacerdoti.

the Appellate Body has been operating outside its authority, engaging in judicial legislation, interpreting the WTO agreements to suit the member states. The US claims this has resulted in decisions that have hurt American trade and the principles of the WTO agreements.

The US position has thus effectively halted the operations of the Appellate Body.²² The US has ensured that the Appellate Body cannot be fully staffed and therefore cannot operate normally.²³ These blockades have compounded each other and undermined faith in the WTO's capacity to assert its authority and ensure fairness in the global markets. The US has continuously said that significant changes are required to address its concerns before it will support new appointments. Some of these changes include delimitation of the roles of the Appellate Body and a more circumscribed, strict compliance process with the rules. It also wants more oversight of the processes and decisions of the Appellate Body. However, reaching a consensus with the WTO members about these reforms has been very hard, thus compounding the crisis even more.

The WTO has now entered an unusual phase where it does not possess a functioning Appellate Body, which has resulted in significant problems.²⁴ Legal analysts argue that in the absence of the Appellate Body, the system of settling disputes is only half-formed since no end-point body verifies and approves panel reports. Although the panel has the authority to address disputes, without judges, there is no way the panel's appeal can be determined conclusively. Many WTO members have not had a resolution to their disputes, leading to a legal void.²⁵

While the appeal process is currently halted, the WTO has provided two alternatives for Indonesia and other countries that wish to appeal. The first option is arbitration. Article 25 of the WTO Dispute Settlement Understanding offers this alternative

²² Mark A. Pollack, 'International Court Curbing in Geneva: Lessons from the Paralysis of the WTO Appellate Body', *Governance* 36, no. 1 (January 2023): 23–39, <https://doi.org/10.1111/gove.12686>.

²³ Pollack.

²⁴ Henry Gao, 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement', *Journal of International Economic Law* 24, no. 3 (22 October 2021): 534–50, <https://doi.org/10.1093/jiel/jgab031>.

²⁵ Gao.

solution, allowing disputes to be resolved with the assistance of a third-party arbitrator.

Both parties involved in the dispute grant the arbitrator authority to make a decision that carries the same legal weight as a court ruling with permanent status. This decision is final and binding, meaning it only goes through one level of review. To date, 12 cases have opted for this arbitration route, of which two have been resolved.

The second option is diplomatic resolution through bilateral negotiations. The parties involved in the dispute can pursue diplomatic avenues at any point during the examination by the Panel or the Appellate Body. The WTO permits diplomacy even after the Appellate Body process has concluded.²⁶

However, using bilateral contracts and regional trading arrangements can lead to the fragmentation of the WTO-led world trade order. These alternative mechanisms usually lack the institutional framework and legal certainty characteristic of the WTO multilateral system, which might result in the disparate application of trade rules and trade tensions.

Weak enforcement of trade rules has gravely damaged the WTO, reducing it to an impotent institution that few states can rely on. Seeing the lack of dispute settlement, member countries may cease following WTO regulations and opt for protectionism. This may result in more protectionism and cause trade wars in the global economy.²⁷ The decreasing confidence in the Dispute Settlement Understanding (DSU) as a reliable and effective mechanism that underpins the WTO also threatens the basic principles of the multilateral trading system.

The suspension of the Appellate Body is evidence of the dire need for the WTO to make radical reforms that will address the current challenges that hinder its operations. These reforms should address the US and other members' procedural and substantive concerns regarding the Appellate Body. The WTO must clarify how the

²⁶ Sutrisno, '3 Langkah Penyelesaian Sengketa Nikel Indonesia Di WTO'.

²⁷ Alessandra Mignolli, 'The European Union Faces the Crisis of the WTO Dispute Settlement System: Tensions between Multilateralism and Unilateralism in International Trade Law', *Ordine Internazionale e Diritti Umani* 3 (2020): 485–505.

system will operate strictly within the authority established by the founding members while remaining efficient and autonomous. In the same regard, the selection process for judges should be redesigned to avoid future stalemates and guarantee that the Appellate Body has enough members to operate effectively. A fully functional Appellate Body must be revived to promote the sustainability of the WTO as the key organization for the management of international trade relations.

Consequences of the Appellate Body's Absence

This paper finds that the stalemate of the WTO Appellate Body has had severe and multifaceted impacts on the WTO's dispute settlement system and the world trading system as a whole.²⁸ This has resulted in dysfunction and uncertainty that threaten business agencies, governments, and the world economy.

The WTO is now left without a working appellate body, and the existing state of affairs is often referred to as 'no man's land, as there is no Appellate Body to uphold or reject the decisions made by the panels.²⁹ This has led to a situation where many trade disputes have not been resolved, leaving legal gaps. Litigation costs are critical to businesses and governments, which need the certainty and stability that can only be provided by a precise and dependable method of resolving disputes.³⁰ The inability to request a review of a panel decision shows that there is no final authority on the rules for the sports, and each country may exercise its own rules according to its preferences.

This paralysis has caused a shift towards bilateral trade arrangements. However, bilateral negotiations also have disadvantages compared with the multilateral system provided by the WTO.³¹ Bilateral negotiations are less transparent and have fewer procedural checks and balances than the WTO dispute settlement system. Most of

²⁸ Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 3rd ed. (Oxford: Oxford University Press Oxford, 2009), <https://doi.org/10.1093/oso/9780199553761.001.0001>.

²⁹ Bernard Hoekman and Petros C. Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis', RSCAS Working Paper (Robert Schuman Centre for Advanced Studies, 2019), https://scholarship.law.columbia.edu/faculty_scholarship/2347/.

³⁰ Hoekman and Mavroidis.

³¹ Amrita Narlikar, 'How Not to Negotiate: The Case of Trade Multilateralism', *International Affairs* 98, no. 5 (6 September 2022): 1553–73, <https://doi.org/10.1093/ia/iia063>.

these negotiations are normally conducted behind closed doors, and the outcome of these meetings is not made public. In addition, bilateral agreements are more likely to be influenced by the larger economies that can negotiate more effectively with their counterparts. These structural features can result in more favorable outcomes for the larger economies and be detrimental to smaller or weaker ones. A large economy may be able to negotiate for certain privileges or conditions that a small economy cannot attain on the same level. This dynamic erodes the principle of equity that the WTO seeks to promote in its rules-based multilateral trading system.³² This was to ensure that when cases arise within the WTO, all member countries, regardless of the size of their economy, should be on an equal level regarding dispute settlement. Relying on alternatives to this framework can undermine the stability of the global trade structure and create a situation where numerous agreements may have different rules and sanctions.³³ This can lead to a less stable trading environment because companies and governments have to negotiate one-on-one with other countries, and the rules of engagement keep changing.

The backlog of cases that are still pending before the Appellate Body is in legal limbo.³⁴ The countries involved in these disputes lack certainty regarding implementing the panel decisions. Without the appeal process, there is no way to check if the findings made by the panels are within the context of the WTO agreements. Members who have appealed panel decisions are not willing to rely on those decisions. They want to appeal. However, there is no higher authority to which the panels can report, so member states can either wait until the Appellate Body is operational again, disregard, or partially follow the recommendations made by the panels.³⁵

³² Julieta Zelicovich, 'Are There Still Shared Values to Sustain Multilateralism? Discourse in World Trade Organization Reform Debates', *Third World Quarterly* 43, no. 2 (1 February 2022): 332–51, <https://doi.org/10.1080/01436597.2021.2008796>.

³³ Bryan R Early and Menevis Cilizoglu, 'Economic Sanctions in Flux: Enduring Challenges, New Policies, and Defining the Future Research Agenda', *International Studies Perspectives* 21, no. 4 (27 October 2020): 438–77, <https://doi.org/10.1093/isp/ekaa002>.

³⁴ Nnamdi Stanislaus Umenze, 'Is the WTO Appellate Body in Limbo? The Roots of the Crisis in the WTO Dispute Settlement Body and the Available Routes Navigating the Quagmire', *Potchefstroom Electronic Law Journal / Potchefstroomse Elektroniese Regsblad* 24, no. 1 (8 December 2021): 1–46, <https://doi.org/10.17159/1727-3781/2021/v24i0a8580>.

³⁵ Umenze.

His lack of enforcement does not conform to the principles-based system the WTO has adopted. The trade system relies on the WTO guarantee that the trade rules will be effectively implemented, and there will be repercussions if they are not followed.³⁶ If countries believe that they are free to act without facing any repercussions. There is no reason for countries to abide by the decisions of the WTO. This will lead to a gradual breakdown of the rules under this system and undermine the credibility of the WTO in operating the international trade system.

Confrontation and retaliation from the trading partners may escalate in this trading environment. Members who believe panel decisions are unjust may not implement them and resort to unilateral trade measures or retaliatory tariffs, resulting in trade wars. This may impact world trade relations and result in economic instability.

The case can illustrate this: Nickel Exports in Indonesia vs. the European Union. This case demonstrates how the lack of a definitive authority figure results in drawn-out disputes and animosity between the trading partners, and this affects not only the parties involved but also the international trading system as a whole.³⁷ Indonesia, a top global nickel producer, banned the export of nickel ore at the beginning of 2020 to foster the country's refining capabilities and entice overseas investors for smelting hubs. The aim was to improve the value chain of natural resources by transforming raw materials into final products to strengthen economic growth and decrease reliance on raw material exports.³⁸ The European Union (EU) objected to the ban with the WTO, stating that the export restriction violates international trade rules. The EU argued that the ban disadvantaged its producers since they depended on Indonesian

³⁶ Tamara Kortukova and Liliia Nevara, 'Features of the Principle of Non-Discrimination in International Trade and Economic Law', *Legal Horizons* 17, no. 2 (6 October 2023): 040–050, <https://doi.org/10.54477/LH.25192353.2023.2.pp.040-050>.

³⁷ Giorgio Sacerdoti and Leonardo Borlini, 'Systemic Changes in the Politicization of the International Trade Relations and the Decline of the Multilateral Trading System', *German Law Journal* 24, no. 1 (February 2023): 17–44, <https://doi.org/10.1017/glj.2023.10>.

³⁸ Siti Aisyah et al., 'The Impact of Fiscal Policy on Economic Growth: A Case Study of Indonesia', *Management Studies and Entrepreneurship Journal (MSEJ)* 5, no. 2 (2024): 3773–82, <https://doi.org/10.37385/msej.v5i2.4619>.

nickel for their production. With the supply chain disrupted, they were less competitive.³⁹

The EU insists that Indonesia comply with WTO provisions by lifting the nickel export ban and the domestic processing requirement (DPR), also known as downstreaming. It is important to note that, in the case of Indonesia—Measures Relating to Raw Materials (No. DS592)—the WTO Panel determined that Indonesia violated Article XI.1 of the General Agreement on Tariffs and Trade (GATT), which prohibits quantitative restrictions. According to this article, neither exports nor imports can be banned, and even restrictions are not allowed. In its defence, Indonesia claimed that the ban was necessary for economic development and environmental conservation. Indonesia pointed to the benefits of domestic processing industries: they would bring financial growth and help manage the negative ecological consequences of the extraction and export of raw materials.

Indonesia appealed the decision of the WTO, but the case joined the backlog of cases that awaited the formation of a new Appellate Body. For Indonesia, the lack of a final ruling meant that its policy remained under a cloud of legal doubt and its ability to attract foreign investments in the processing industry was thus uncertain;⁴⁰ The EU continued to face disruption in its supply chains, and industries relying on nickel imports were affected. The lack of an Appellate Body meant the dispute settlement process could not bring certainty and predictability to outcomes. Hence, Indonesia and the EU could not effectively develop their trade and industrial policy strategy.⁴¹

The two parties have been forced to find other ways of resolving the disagreement. These approaches included direct diplomacy and different ways of settling disputes outside the WTO. However, these mechanisms are not always proper, precise, or structured like the WTO's dispute settlement. This has led to long-drawn battles in

³⁹ Arianto A. Patunru, 'Trade Policy in Indonesia: Between Ambivalence, Pragmatism and Nationalism', *Bulletin of Indonesian Economic Studies* 59, no. 3 (2 September 2023): 311–40, <https://doi.org/10.1080/00074918.2023.2282821>.

⁴⁰ Melissa Peach, 'Eye of the Tiger: Examining Tension in Indonesia's Trade Regime', *Currents: International Trade Law Journal* 22, no. 1 (2013): 38–47.

⁴¹ Makmun Syadullah and Adwiena Dwiyantri, 'Position of Indonesia in WTO Reform', *International Journal of Economics and Financial Issues* 10, no. 1 (1 January 2020): 42–51, <https://doi.org/10.32479/ijefi.8890>.

dispute settlement and elevated the conflict between the two countries, making it imperative for the Appellate Body to make a final decision regarding trade disputes.⁴²

The case of Indonesia vs. EU demonstrates that the impasse of the Appellate Body in question is not a minor issue. This illustrates how the lack of a proper appeal forum can disrupt the operation of the international trading system and halt the application of international trade laws. To date, no significant progress has been made in negotiations. The urgency for a solution is heightened by the ongoing uncertainty facing Indonesia's nickel industry due to stalled appeal processes. Delayed new investments and cautious long-term planning by companies dependent on nickel exports could hinder growth. Nonetheless, robust domestic demand for electric vehicle batteries presents opportunities for the industry.⁴³

Thus, it is crucial to advance the nickel downstream sector. When negotiations resume and the Appeal Body is active, the reasons for the EU's legal action against Indonesia become irrelevant, especially since the WTO previously viewed Indonesia's downstream efforts as immature.

The nickel export dispute reveals the substantial weaknesses in the WTO's dispute settlement system due to the absence of an Appellate Body. It illustrates why it is crucial to establish the WTO's capacity to address and resolve trade concerns effectively and promptly.⁴⁴

a. The DSM Crisis and the Role of Major WTO Members

The present context of the crisis within the WTO's DSM has invoked various responses from major members of the WTO, which is evidence that they have developed a strategic stance on how they want the international trade regulation to operate without the Appellate Body. These responses demonstrated that all of the members of the WTO have their unique interests and goals,⁴⁵ and that the

⁴² Taylor Todd, 'Who Rules the Rulings? Disputant Strength and Legal Preparedness in World Trade Organization Dispute Settlement', *Undergraduate Journal of Politics* 18 (2019): 29–47.

⁴³ Sutrisno, '3 Langkah Penyelesaian Sengketa Nikel Indonesia Di WTO'.

⁴⁴ Sutrisno.

⁴⁵ Steve Charnovitz, 'Opening the WTO to Nongovernmental Interests', *Fordham International Law Journal* 24, no. 1 (2000): 173–216.

dispute process allows them to both promote their concerns and attempt to control the formation of rules governing future trade.

America has been the key actor in the DSM crisis because it refused to accept admission of new members to the Appellate Body.⁴⁶ This can be attributed to the US's long-standing belief that the Appellate Body has encroached on its authority, which the US considers legally improper. The US has been claiming that the Appellate Body has come up with rules that are not evident in the negotiations of the WTO agreements,⁴⁷ and as such, has formulated new legal standards that no member of the WTO approved for enactment.

This has threatened the sovereignty of the US since it has been unable to adopt the most appropriate trade policies per the country's strategic needs. The US, which has blocked the appointment of judges to the Appellate Body, insists that the body has issued many decisions that go beyond already extensive trade rules and are detrimental to the US trade interests.⁴⁸ This is part of a larger strategic plan to restructure the WTO to benefit America and its policies. As a result, the US has effectively halted the appointment of new judges, which means that the Appellate Body has not been able to function, and this shows that the issues of the DSM should be considered on a broader level. The US has declared that it will not allow any new appointments unless considerable improvements are made in the sectors of interest to the US. Some of these reforms are: giving detailed directions on the role of the Appellate Body, strict compliance with the set procedures, and measures that promote accountability. This approach elaborates on the US strategic objectives, such as preserving the WTO challenge system without raising questions concerning the US trade policy or the sovereignty of the US.⁴⁹

⁴⁶ Pollack, 'International Court Curbing in Geneva: Lessons from the Paralysis of the WTO Appellate Body'.

⁴⁷ Hoekman and Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis'.

⁴⁸ Robert Howse, 'Appointment with Destiny: Selecting WTO Judges in the Future', *Global Policy* 12, no. Supplement 3 (April 2021): 71–82, <https://doi.org/10.1111/1758-5899.12933>.

⁴⁹ Daniel C.K. Chow, 'United States Unilateralism and the World Trade Organization', *Boston University International Law Journal* 37, no. 1 (2019): 1–33.

b. The European Union and India: Efforts to Maintain the Integrity of the DSM

The European Union and India acknowledge the critical need for an effective dispute resolution process. They seek to safeguard the DSM and support efforts to offer temporary alternatives until the Appellate Body is reinstated. One temporary alternative is the Multi-party Interim Appeal Arbitration Arrangement (MPIA), conceived by a group of countries to replace the Appellate Body.⁵⁰

The MPIA establishes an arbitration panel where WTO members who are parties to a dispute can appeal panel findings through a similar process (though not identical) to disputes resolved at the Appellate Body. It reflects the EU's and India's support for a strong, rules-based multilateral trading system (MTS). The MPIA is institutionalized to perpetuate fairness and predictability, two of the WTO's most important guiding principles. Both partners believe that maintaining a fair and independent dispute resolution system supports continuing their trade relations and the international trading order. The value of the MPIA is that it is not a stop-gap solution but evidence of EU-India's dedication to abiding by multilateralism. They hope to show that the credibility of the DSM can be maintained, even while facing immediate challenges like these, by creating a backup appeals body. This initiative is a clear signal to other WTO members that solutions can be found and work can be done through cooperation and commitment of member states to continue to use the multilateral trade negotiation system even if the Appellate Body is not functioning.

Yet the diplomatic negotiations used in the MPIA are a regressive manifestation of trade relations back to the GATT days. The GATT was characterized by diplomatic negotiations rather than by legally binding frameworks.⁵¹ Shifting away from the WTO's legally binding structure offers advantages and disadvantages. It has advantages for immense powers like the USA, the EU, China, and India, as it is flexible and lends itself to bilateral cooperation. However, it is bad news for

⁵⁰ Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement', *Federalismi.It* 22 (2020): 1–33.

⁵¹ Bernhard Zangl, 'Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO', *International Studies Quarterly* 52, no. 4 (December 2008): 825–54, <https://doi.org/10.1111/j.1468-2478.2008.00528.x>.

smaller or emerging economies that benefit from the protection and resources of a rules-based system.⁵² This works against the principle of equity, as it could lead to bargaining that privileges greater powers, making smaller economies more vulnerable.⁵³ The procedural aspects of the negotiation process are conducted outside the original GATT system, as it involves a panel that does not follow DSB guidelines. It does not make legal determinations and relies on the 'goodwill of negotiations. However, this approach does not reduce the backlog of appeals for the WTO.

This new reliance on diplomatic bargaining, such as the MPIA, has been instrumental in reaching free trade agreements. This means that the rules behind international trading are irregular and fragmented, as different countries have bilaterally struck very different deals based on their respective relationships. This fragmentation challenges the coherence of the multilateral trading system, making it less predictable and stable for traders. This could subject companies and countries to more uncertainty because they would have to navigate a web of bilateral agreements with different rules and enforcement mechanisms.⁵⁴

First, the nature of the MPIA as a temporary mechanism reveals that much larger reforms to WTO dispute settlement will be necessary. However, it can only be short-lived as any lasting solution to the problems facing the WTO must include restoring an operative Appellate Body and a resolution to US concerns (and those expressed by other members) for fundamental reform. This includes clarifying the function of the Appellate Body in line with WTO rules, ensuring adherence to timeframes and procedural requirements, and putting in place mechanisms for accountability and transparency.⁵⁵

⁵² World Trade Organization, 'World Trade Report 2024: Trade and Inclusiveness' (Geneva: World Trade Organization, 2024), https://www.wto.org/english/res_e/booksp_e/wtr24_e/wtr24_e.pdf.

⁵³ World Trade Organization.

⁵⁴ Georgie Juszczyk, 'Legitimacy Crisis at the World Trade Organisation Appellate Body: Other Ways Than the MPIA?', in *European Yearbook of International Economic Law 2021*, ed. Jelena Bäumler et al., vol. 12, European Yearbook of International Economic Law (Cham: Springer International Publishing, 2021), 87–119, https://doi.org/10.1007/8165_2021_75.

⁵⁵ Juszczyk.

The "Green Room" in WTO trade negotiations refers to informal, small-group meetings involving key WTO members. These meetings are typically convened by the Director-General or the Chairs of negotiating groups and are designed to facilitate decision-making and consensus-building on complex trade issues. The term "Green Room" originated from a specific room at WTO headquarters in Geneva, but now it broadly signifies any high-level, invitation-only discussion.⁵⁶ These prominent members, like the USA, the European Union, China, India, etc, and other major trading players worldwide, usually play a crucial role in this process. The Green Room exists mainly as a tool for enabling agreement on complex trade matters that have implications for all WTO members. The Green Room talks are not legally binding and are designed to influence broader WTO negotiations. The power of the Green Room derives from its role in shaping and steering formal decision-making processes.

The strategic negotiations in the 'Green Room' have also gained more importance in DSM crisis cases.⁵⁷ This process is less structured and confined to only the principal members of the WTO. This stage aims to reach a consensus on trade matters and develop proposals to fast-track decision-making. These proposals are then brought to the wider WTO membership for acceptance. The Green Room process proves that the international trade regime's formal and informal political, economic, and legal factors are inextricably linked.⁵⁸ To improve the situation, it is necessary to find a consensus between the significant players and address the root causes of the current challenges.

The Green Room negotiations play an important role in the WTO dispute.⁵⁹ They are informal meetings where a small group of major trading countries, like the

⁵⁶ Kent Jones, 'Green Room Politics and the WTO's Crisis of Representation', *Progress in Development Studies* 9, no. 4 (October 2009): 349–57, <https://doi.org/10.1177/146499340900900408>.

⁵⁷ Amrita Narlikar, 'From a Legitimacy Deficit to an Existential Crisis: The Unfortunate Case of the World Trade Organization', in *The Crises of Legitimacy in Global Governance*, by Gonca Oguz Gok and Hakan Mehmetcik, 1st ed. (London: Routledge, 2021), 107–21, <https://doi.org/10.4324/9781003128595-6>.

⁵⁸ Beth V. Yarbrough and Robert M. Yarbrough, *Cooperation and Governance in International Trade: The Strategic Organizational Approach*, vol. 133, Princeton Legacy Library (Princeton: Princeton University Press, 2014), <https://www.amazon.com/dp/0691602956>.

⁵⁹ Narlikar, 'How Not to Negotiate: The Case of Trade Multilateralism'.

United States, the European Union, China, India, and Japan, come together to discuss key trade issues and try to find common ground. These meetings are not focused on making structural changes to the WTO or the Appellate Body. Instead, they aim to keep the wheels of international trade turning by building consensus on current trade matters.⁶⁰

However, the Green Room process has its drawbacks. Because these talks are limited to a select group of powerful members of the WTO, many smaller or less influential countries feel left out. This lack of inclusiveness can lead to concerns about bias, as it gives more influence to the bigger players. Smaller states often feel their voices are not being heard, which can create tensions and raise questions about how fair and transparent the WTO's decision-making process is. To address these concerns, ongoing efforts are to make these meetings more open and include a broader range of member countries.⁶¹

These negotiations will shape the future of the WTO and its ability to meet its goals. Addressing these issues and making necessary changes will be crucial in resolving the current challenges faced by the Appellate Body. This is essential for the WTO to maintain a credible and effective system for settling disputes.

CONCLUSION

The paralysis of the Appellate Body has caused severe disruptions in WTO dispute settlement, leading to legal uncertainty and increased member protectionist measures. Not only does this make the WTO look weak, but it also encourages member countries to seek alternative dispute resolution mechanisms that are less predictable and equitable. The research's conclusions highlight that a non-functioning Appellate Body creates legal uncertainty and diminishes the effectiveness of global trade rules.

The resumption of the functionality of the Appellate Body is imperative to ensure the prime status of the WTO in global trade governance. It also calls for resuming the

⁶⁰ Narlikar.

⁶¹ Jones, 'Green Room Politics and the WTO's Crisis of Representation'.

appointment of Appellate Body members, increasing procedural efficiency, and securing stronger political support from WTO members to back and observe any decisions made. This is essential if further weakening of the multilateral trading system is to be avoided and international trade with regulated laws is to be maintained. These changes will help address the current crisis and provide much-needed resilience to the DSM in anticipation of ongoing threats, guaranteeing stability and trust as prerequisites for the future of global trade. The study underlines the urgency for reformation of a functioning Appellate Body to uphold the WTO's integrity and ensure its future as a crucial dispute settlement mechanism in international trade.

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