

The WTO Appellate Body Crisis: Causes, Consequences and the Future of Dispute Settlement

Wenyan Cheng*

Yiwu No.3 High School, Yiwu, Zhejiang Province, China

**Corresponding author: Wenyan Cheng.*

Abstract

The WTO dispute settlement system, once a key pillar of the multilateral trading system, has been paralyzed since December 2019 because the US systematically blocked judicial appointments. This paper examines how this paralysis has affected the overall functioning of the dispute settlement mechanism. By analyzing the Appellate Body's institutional design, its interpretive function, the root cause of the crisis, and its systemic consequences, the study argues that the paralysis has severely damaged the system's effectiveness, predictability, and credibility. The suspension has not merely created a backlog of unresolved appeals; more fundamentally, it has disrupted the finality and enforceability of rulings, thereby weakened compliance incentives and undermined public trust in the rule-based system. The crisis also reveals that the institutional framework designed in 1995 no longer fits contemporary political realities, and that major-power politics can exploit procedural rules to neutralize international adjudication. Through textual analysis, the paper argues that reviving the Appellate Body requires more than just fixing rigid appointment rules. On a deeper level, the problem lies in the structural imbalance between the WTO's judicial and legislative functions. To prevent interference from power politics, the system must address both procedural vulnerabilities and the latent malfunction of multilateral negotiation.

Keywords

WTO dispute settlement, appellate body, effectiveness, judicial paralysis, institutional reform

1. Introduction

The World Trade Organization's dispute settlement mechanism was labeled as the jewel in the crown of the multilateral trading system [1]. Yet today, that treasure has become severely tarnished. The system has been paralyzed because the US has been blocking appointments to the Appellate Body, leaving it with too few members to even hear appeals [2]. That means the system can no longer deliver what DSU Article 3.2 promises: security and predictability [3]. This crisis is not just an institutional mechanism. It is really a fight over what international adjudication is supposed to look like-its proper scope and limits. The US says the Appellate Body overstepped, that it ignored its original mandate [4]. This paper examines four key dimensions: first, what the Appellate Body was designed to do; second, why it collapsed; third, what that collapse has done to the dispute settlement system; and finally, what might be done to fix it.

2. The WTO Appellate Body: Purpose, Function and Institutional Framework

2.1 The Establishment of the Appellate Body

The Appellate Body was established in 1995 as part of the Uruguay Round reform that turned GATT into the WTO. Its main job was to fix a glaring problem with the old system: under GATT, the losing party could block a panel report from being adopted just by saying no. The DSU flipped that with reverse consensus-now reports get adopted automatically unless everyone, including the winner, agrees to block them. That moved things from politics to law, making dispute settlement binding and rules-based.

2.2 The Mandate and Functions of the Appellate Body

Under DSU Article 17, the Appellate Body has seven members, with three hearing each appeal. Its job is strictly limited to legal issues-not facts. This legal review is of substantial importance: it fixes errors, ensures consistency in interpretations across cases, and prevents panels from adopting divergent approaches. Over time, the Appellate Body went from a peripheral institution to a central role in WTO governance [5]. This shift occurred because the WTO's legislative side stalled. The Doha Round stalled, so members could not update rules through negotiation. That left panels and the Appellate Body to interpret all vague, incomplete, or politically tricky provisions-and the scope of this mandate continued to expand. This expansion of function was closely bound up with the stalled multilateral negotiation machinery of the WTO. This forms an essential backdrop to grasp why the Appellate Body crisis later unfolded. On method, the Appellate Body embodied Article 31 and 32 of the Vienna Convention on the Law of Treaties-looking at ordinary meaning, context, and object, rather than treating WTO agreements as isolated accords [6]. WTO Law does not formally follow precedent, but the Appellate Body has said a panel cannot just ignore established Appellate Body rulings without good reason-otherwise they're failing their duty under DSU Article 11. That practice has made interpretations more consistent and predictable, which is exactly what DSU Article 3.2 aims for. Scholars have picked up on this too [7]. They see the Appellate Body as deeply embedded in the system-if it fails, it is not just appellate review that suffers, but the whole adjudicative process. Without the Appellate Body, panel rulings lose effective oversight, inconsistencies multiply, and stability falls apart. The lesson is clear: without political consensus, a rules-based trade system is fragile.

3. The Causes of the Appellate Body's Paralysis

3.1 The Immediate Cause: Blocked Appointments

The reason why the Appellate Body's paralysis is straightforward: members' terms ran out, and no one could replace them. The US kept blocking first individual reappointments, every single new appointment [8]. By December 2019 it could not even scrape together three people to hear an appeal. The 2019 was the culmination of years of U.S. obstruction rather than an isolated event. To understand how this procedural deadlock came into being, it is necessary to review the historical sequence of U.S. blocking actions.

3.2 A History of Blocking: From Hillman to Chang

This did not happen overnight. Wagner traced it back to 2011, when the US first blocked Jennifer Hillman's reappointment for not defending US interests [5]. Then came the blocking of Kenyan candidate James Gathi. The real turning point was 2016, when the US blocked Korean member Seung Wha Chang for issuing improper obiter dicta and investigating beyond the dispute scope. Under Trump, the US moved from picking off individual members to what Pollack calls *de facto* delegation reversal-shutting down the Appellate Body by blocking all appointments indefinitely [8]. Behind this series of veto actions lay a set of concrete substantive criticisms raised by the United States concerning the Appellate Body's judicial behaviour.

3.3 U.S. Allegations of Judicial Overreach

Yet this is merely the surface. The US genuinely maintains the Appellate Body exceeded its mandate. Its five main objections: The Appellate Body misses the 90-day deadline; it lets expired-term members keep working on cases; it issues obiter dicta; it reviews factual questions as if they were legal; and it treats past rulings as binding precedents-effectively making law without Member consent [9]. On top of that, the US

objects to the Appellate Body ruling on zeroing in anti-dumping and public body in subsidies. These concrete complaints further reflect fundamentally divergent understandings of the essential nature of WTO agreements, which constitutes the ideological root of the conflict.

3.4 The Contractarian Vs. Constitutional Debate

At a deeper level, you find a clash of worldviews. One side sees the WTO agreements as contracts; adjudicators should stick to the text and follow the negotiators' original intent. The other sees WTO law as a constitutional framework, where adjudicators have the authority-and duty-to resolve ambiguities and keep the system stable [10]. Lighthizer represents the first view; most WTO Members lean toward the second. Even so, it should be acknowledged that part of the U.S. critique is grounded in the ambiguities embedded in the original institutional design of the Appellate Body.

3.5 The Ambiguity of the Original Mandate

It must be acknowledged, however, that the U.S. has some valid points. The Appellate Body has missed the 90-day deadline more than once. Its reliance on prior rulings does raise a legitimate question: if you keep applying the same interpretation, does it not become a *de facto* binding rule without Members formally signing off? And, in complex anti-dumping, subsidy, and science-heavy cases, the line between law and fact is not always clear. These deserve serious discussion. But killing the entire Appellate Body over these problems is a massive overreaction. Hoekman and Mavroidis [2] went back through the Uruguay Round negotiating history and found the Appellate Body's original mandate was far more ambiguous than either side now claims. It was only proposed by Canada in late 1989 as a compromise, and the provisions were deliberately left flexible. Their point: most of the US concerns could be addressed by clarifying the Appellate Body's original mandate-no need to renegotiate or amend the DSU. Asking the Appellate Body to go back to 1995 does not have to mean gutting appellate review. Beyond these substantive and ideological disagreements, the crisis has been magnified by the structural vulnerability of the WTO system and the failure of internal reform efforts.

3.6 Institutional Vulnerability and Failed Reform

At bottom, this crisis is about politics-who calls the shots in the WTO. Pollack puts it bluntly: the US strategy is a rare and consequential case of a major power using procedural consensus rules to neuter an international tribunal, without even bothering to go through formal treaty amendment [8]. It exposes a deep structural weakness-a mechanism meant to constrain unilateralism turned out to be vulnerable to a single Member's veto. Other Members have not mounted a unified response either. The EU, China, India, and others proposed reforms on *obiter dicta*, transitional arrangements, and the 90-day deadline. But the US brushed them aside as far from sufficient, without specifying what it would accept [11]. So, the stalemate drags on. This is not really a procedural dispute anymore-it is a fundamental political conflict over competing visions of global economic governance.

4. Consequences for the WTO Dispute Settlement System

4.1 Reduced Effectiveness and Procedural Deadlock

The Appellate Body's collapse has hit the WTO dispute settlement system hard and in multiple ways. McRae gave us a useful way to think about this-looking at whether remedies are adequate, whether Members can access the system, and whether adjudicators can handle complex evidence [3]. Measure the Appellate Body's paralysis against those benchmarks, and the damage shows up everywhere. Without appellate review, a losing party just files an appeal, and the case hangs in limbo-because the Appellate Body cannot form a panel to hear it. Since December 2019, the United States has used this trick repeatedly: lose at panel, appeal, case stuck. The whole point of reverse consensus was to make rulings automatically binding. Now that's been bypassed completely. The system's binding force is gone, and the efficiency the DSU was supposed to deliver has evaporated.

4.2 Diminished Legal Certainty and Predictability

Over fifteen years, the Appellate Body built a coherent body of case law that gave Members a reliable way to interpret WTO rules [6]. Gerhart and Kella describe the Appellate Body as a system stabilizer-through steady interpretation, it kept diverse Members on board, including developing countries with limited market power [7]. Now that stabilizer is gone. Future panel rulings will rule however they see fit, with no authoritative review. Fragmentation and inconsistency are a real risk. The predictability Members counted on is seriously undermined.

4.3 Weakened Enforcement Mechanisms

McRea points out that even when the system worked, enforcement was widely considered inadequate [3]. Compensation under the DSU does not apply retroactively-it does not fix past harm, just encourages future compliance. Retaliation is economically impractical for small economies and politically complicated for large ones. The Appellate Body's paralysis did not create this weakness, but it made it worse. Without a final binding ruling to confirm a panel's findings, the enforcement phase-flawed as it was-cannot even get started. The whole compliance mechanism depends on a conclusive ruling. Without it, the process stalls before it begins.

4.4 Disproportionate Impact on Developing Countries

The consequences hit them hardest. McRea documented the barriers they face: high costs, limited legal expertise, weak retaliation capacity. Even when they win, remedies do not do much for them [7]. Gerhart and Kella go further: the Appellate Body played a crucial role in protecting developing countries by constraining the conditions developed countries attach to preferential treatment [7]. The EC-tariff Preferences case is the classic example-the Appellate Body insisted preferential schemes must meet the non-discrimination requirement under the Enabling Clause. That oversight is now gone. Developing countries are more exposed to unilateral pressure from larger trading partners. An already uneven playing field just got more tilted.

4.5 Damage to Institutional Credibility

Beyond all this, the paralysis has done more serious damage to the system's credibility. When a rules-based adjudication system can be paralyzed by one Member's procedural veto, the whole thing's legitimacy comes into question. Members that once relied on the system now face uncertainty-not because the rules changed, but because the mechanism for enforcing them has been hollowed out from inside.

5. The Path Forward: Reimagining WTO Dispute Settlement

5.1 Short-Term Solutions: The MPIA

Restoring the WTO dispute settlement system requires more than simply filling vacant Appellate Body positions and awarding automatic improvement. The crisis has exposed problems at three levels-technical, political, and structural-and any credible solution must deal with all of them. A sustainable reform must pursue two objectives at the same time: keeping the independence and authority that impartial adjudication requires, while also addressing legitimate Member concerns about the scope, efficiency, and accountability of appellate review. In the short term, Members have responded through alternative appellate arrangements. The most significant of these is the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), established under DSU Article 25 by a group of WTO Members. The MPIA is designed to prevent the appeal into the void problem by providing participating Members with an alternative review process for legal issues in panel reports. The arrangement demonstrates that many Members remain committed to rules-based dispute settlement and appellate review. However, its limitations are obvious. It applies only between participating Members and does not bind non-participants, including the United States. It is therefore a temporary mechanism that alleviates the impact of paralysis, rather than a full substitute for a universally applicable Appellate Body [8]. Beyond this interim arrangement, a lasting resolution of the crisis requires systematic long-term reform covering the appointment process, judicial independence, the scope of appellate review and the revitalization of the WTO's negotiating function.

5.2 Redesigning the Appointment Process

Long-term reform should address several procedural issues that have emerged during the crisis. First, the appointment process for members should be redesigned to reduce the risk of a single Member blocking appointments indefinitely. The current consensus requirement has enabled the United States to prevent successors from being appointed to departing members, thereby disabling the appellate function without formally amending the DSU. Pollack characterizes this development as a *de facto* delegation reversal: authority originally delegated to an international adjudicative body was withdrawn not through treaty amendment, but in practice through the appointment veto [8]. Reforms could therefore include automatically triggering the selection process before a term expires or establishing alternative decision-making rules for appointments when consensus cannot be reached [8].

5.3 Reinforcing Judicial Independence

Second, the independence of Appellate Body members must be reinforced. A single, non-renewable term would reduce the possibility of political pressure on members seeking reappointment. This is particularly important because the credibility of international adjudication depends on whether adjudicators are perceived as deciding according to the law, rather than according to the preferences of powerful Members. As Wagner observes, criticizing individual members for ruling can undermine the impartial independence on which the WTO dispute settlement system relies [5].

5.4 Clarifying the Scope of Appellate Review

Third, reforms should clarify the scope and method of appellate review. The United States has objected to the Appellate Body reviewing factual issues as legal questions, using *obiter dicta*, and failing to respect the 90-day deadline. These concerns should not become grounds for eliminating meaningful appellate review, but they do support clearer procedural constraints. Adjudicators should limit themselves to what is strictly necessary to resolve the dispute, avoid advisory statements not essential to the decision, and provide transparent explanations when case complexity prevents compliance with the 90-day deadline. Hoekman and Mavroidis argue that many of the US concerns could be addressed by clarifying the Appellate Body's original mandate, rather than by destroying the appellate system [2].

5.5 Reviving the WTO's Legislative Function

Finally, dispute settlement reform must be linked to a revival of the WTO's negotiating function. The Appellate Body gained increasing influence partly because Members failed to update WTO rules through negotiation. This left panels and the Appellate Body to interpret ambiguous provisions in areas such as trade remedies, subsidies, and state intervention. As Wagner observes, the imbalance between a weak legislative branch and an active judicial branch directly contributed to the current crisis [5]. Accordingly, WTO Members should address their substantive disagreements over trade rules through negotiation, rather than through blocking appointments. An effective multilateral system requires both independent adjudication and meaningful political legislation.

6. Conclusion

The paralysis of the Appellate Body is, at its core, a crisis of institutional legitimacy with consequences that reach far beyond any individual dispute. This paper has argued that the Appellate Body's disablement has substantially weakened the effectiveness, predictability, and credibility of the WTO dispute settlement system. It has undermined the finality of rulings, eroded legal certainty, and disproportionately exposed developing and smaller economies to the direct exercise of economic power by larger trading partners. The crisis stems from interwoven factors. The consensus-based appointment rule embedded in the institutional design can be exploited by individual Members; deep-seated divergences exist over the positioning of WTO adjudication; the long-term stagnation of WTO legislative negotiation has overburdened the appellate organ's interpretive function; and great-power politics has further magnified these institutional defects. Technical adjustments and clarification of the appellate review scope are therefore necessary yet insufficient. A real resolution requires revitalizing the WTO's negotiating function and easing the structural imbalance between the judicial and legislative branches. Although transitional tools such as the MPIA can partially remedy practical difficulties,

they cannot replace a universal Appellate Body. The future of the WTO dispute settlement system ultimately depends on whether major powers, especially the United States, can reach a good-faith political consensus on the proper scope of international trade adjudication. That question is political, not legal, and the answer remains open.

References

- [1] Van den Bossche, P. (2006). Is there a future for the WTO Appellate Body dispute settlement? In G. Sacerdoti, A. Yanovich, & J. Bohannes (Eds.), *The WTO at ten: The contribution of the dispute settlement system* (pp. 289-312). Cambridge University Press.
- [2] Hoekman, B., & Mavroidis, P. C. (2019). *Burning down the house? The Appellate Body in the centre of the WTO crisis*. RSCAS Working Paper 2019/56. European University Institute.
- [3] McRea, D. (2008). Measuring the effectiveness of the WTO dispute settlement system. *Asian Journal of WTO & International Health Law and Policy*, 3(1), 1-19.
- [4] Schott, J. J., & Jung, E. (2019). *The WTO's existential crisis: How to salvage its ability to settle trade disputes*. Peterson Institute for International Economics Policy Brief, PB 19-19.
- [5] Wagner, M. (2020). *The WTO Appellate Body: From centrepiece to existential crisis*. SSRN Electronic Journal.
- [6] Van Damme, I. (2010). Treaty interpretation by the WTO Appellate Body. *European Journal of International Law*, 21(3), 605-648.
- [7] Gerhart, P. M., & Kella, A. S. (2005). Power and preferences: Developing countries and the role of the WTO Appellate Body. *North Carolina Journal of International Law and Commercial Regulation*, 30, 515-576.
- [8] Pollack, M. A. (2021). *International court-curbing in Geneva: Lessons from the paralysis of the WTO Appellate Body*. Temple University.
- [9] USTR. (2020). *Report on the Appellate Body of the World Trade Organization*. Office of the United States Trade Representative.
- [10] Howse, R. (2016). The World Trade Organization 20 year on: Global governance by judiciary. *European Journal of International Law*, 27(1), 9-77.
- [11] Van den Bossche, P. (2020). *Is there a future for the WTO Appellate Body and WTO dispute settlement?* WTO Working Paper 01/2022. World Trade Institute.

Funding

This research received no external funding.

Conflicts of Interest

The authors declare no conflict of interest.

Acknowledgment

This paper is an output of the science project.

Open Access

This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

