WTO Appellate Body Crisis: Who Really Loses?

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Introduction

In December 2019, the WTO's Appellate Body, often described as the crown jewel of the rules-based trading system, was officially paralysed. The reason was a long-standing American bipartisan frustration with its rulings, leading the United States to block new judicial appointments. The EU-led Multi-Party Interim Appeal Arbitration Arrangement (MPIA) has emerged as a stop-gap solution, and bilateral settlements have filled some of the void. The fact that the rules-based trading system has had to adapt to a new order in which power increasingly determines outcomes means that smaller

members, who depended on binding multilateral enforcement precisely because they lack political and economic leverage, are the primary losers. With the WTO's dispute settlement mechanism severely impaired, states have been left with two options: settling disputes bilaterally or appealing through the MPIA. Both require legal capacity and bilateral leverage that smaller states often lack. And since the US is not a member of the MPIA, weaker states with a grievance against the world's largest economy have nowhere to go.

Background

The Uruguay Round in 1994 saw the General Agreement on Tariffs and Trade (GATT) transform into a full-blown international organisation — the World Trade Organisation. With this came a more complex and precise dispute settlement mechanism. Dispute settlement at the WTO is more automatic than under the GATT — whereas under the former, a consensus is required to block the formation of a panel, under the latter, a consensus was required to simply move through each judicial stage. Another significant change was the creation of a body in which countries could appeal panel reports (Barton et al., 2008). The Appellate Body (AB) consists of seven judges who hear appeals from reports issued by panels in WTO disputes. Its mandate allows it to uphold, modify or reverse a panel's findings and conclusions. Its reports are adopted by the Dispute Settlement Body unless all members decide otherwise.

Prior to its paralysis, the Appellate Body was crucial for dispute resolution at the WTO, ensuring legal certainty and enforceability. Its review mechanism made the system more predictable, ensuring consistent interpretation across cases, while the binding two-tier process meant rulings could not be blocked by a losing party. For smaller WTO members, this was of particular significance. Lacking the power to threaten trade wars or apply political pressure, the AB provided a legal route to enforce their rights regardless of economic weight. This was by design. As Goldstein (2022) argues, the WTO worked precisely because it was self-enforcing – members found it in their interest to follow the rules. The AB was the mechanism that made that self-enforcement credible, providing the legal certainty that convinced smaller members to invest in the system at all

The Appellate Body crisis

While the American grievances underpinning its frustration with the WTO's dispute settlement date far back in time, its first formal expression was in 2011, when the Obama administration refused, for the first time, to reappoint an AB member (Hufbauer, 2011) The administration did not provide reasons for the refusal, but many commentators started speculating that it was related to U.S discontent with AB rulings on US trade remedy laws. Following Donald Trump's entry into the White House, blockage continued and intensified. This tendency continued under Biden, and in December 2019, the AB fell below the minimum three members required to hear cases and gradually ceased to function as the remaining members'

terms expired. In the Report on the Appellate Body published the following year, Washington's main frustrations were laid bare (EPRS, 2024). The concerns were both procedural and substantive. Procedurally, the AB frequently missed its 90-day deadline for deciding appeals, and outgoing members continued issuing reports up to 16 months beyond their terms. Substantively, the US accused the AB of judicial overreach — making findings unnecessary to the resolution of disputes, issuing advisory opinions beyond its mandate, and effectively establishing binding precedent despite the DSU explicitly prohibiting this (USTR, 2020).

It is worth acknowledging that some of these frustrations were legitimate. Goldstein and Sykes (2025) argue that the WTO's institutional rigidity — its consensus-based decision-making, single undertaking, and increasingly activist AB — made it difficult for members to respond to political and economic pressures while respecting their treaty commitments. The problem, however, is that removing an imperfect system does not make the playing field fairer. It just removes the rules that were keeping power in check.

The consequences of the paralysis are far-reaching. Appeals have nowhere to go but 'into the void' without a functioning AB. Many states, including the U.S, have used the void strategically in order to escape compliance. When a state appeals today, the panel report is never formally adopted as binding, the winning party cannot enforce their rights, and the case sits in legal limbo indefinitely. The U.S did this explicitly with four cases challenging its Section 232 steel and aluminium tariffs, brought by Norway, Switzerland, Turkey and China – losing all four on the merits but maintaining the tariffs regardless (EPRS, 2024).

Nevertheless, action has been taken to attempt to solve the crisis. On 30 April 2020, the EU and 15 other WTO members, including China but excluding the U.S, launched the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). The MPIA is based on Article 25 of the Dispute Settlement Understanding, which outlines the possibility for members to use voluntary arbitration as an alternative way to resolve disputes (EPRS, 2024). Members who join commit to not appealing cases into the void among themselves, providing a degree of legal certainty, but only when both parties to a dispute are members. Crucially, the MPIA was always intended as a temporary bridge, not a formal replacement. Its own members, in addition to WTO's Director-General Ngozi Okonjo-Iweala, reaffirmed that restoring a fully functioning AB remains the priority (WTO, 2026). Today, the MPIA has 61 members – roughly 35% of WTO membership. One significant weakness of the MPIA is that the U.S.– still the world's largest economy in GDP terms, and the respondent in many major trade disputes – is absent from the arrangement. Other major traders such as India, the UK, and South Korea are also missing. Moreover, six years after its creation, the MPIA had resolved just one case – Colombia's anti-dumping dispute with the EU over frozen fries (DS591) – with a second, the EU-China Intellectual Property Rights (IPR) enforcement case (DS611), concluded in July 2025 (EPRS,2024;

WTO, 2026). Crucially, the commitment to not appeal into the void only applies between participating members. The MPIA therefore preserves legal certainty selectively rather than universally. Thus, dispute settlement at the WTO today depends not only on WTO membership, but on political alignment of the parties involved.

Power shift

The Appellate Body crisis is not simply a dispute between the U.S. and the WTO. It is a structural failure with distributional consequences, and the burden has not fallen equally. What has emerged is a shift from a system in which rules constrained power to one in which power increasingly determines outcomes. Those who depended most on legal equality are the ones who have lost the most. Larger economies have generally proven more capable of adapting to the post-Appellate Body order. The EU, China, Canada, and Australia possess the legal capacity, institutional resources and political leverage necessary to navigate alternative arrangements such as the MPIA. They are also better positioned to absorb prolonged uncertainty or negotiate bilateral settlements outside formal adjudication. In this sense, the paralysis of the AB has not removed dispute settlement.

Smaller and developing members face a very different situation. WTO litigation has always been expensive and technically demanding, but the weakening of enforcement mechanisms further reduces incentives for weaker states to initiate disputes. New consultation requests dropped from 20 in 2019 to just 6 in 2023, suggesting members have little incentive to litigate when winning a case no longer guarantees enforcement (EPRS, 2024). The pattern of who is actually filing disputes against the US is telling — the complainants are almost exclusively larger or emerging economies. Argentina's anti-dumping case against the US (DS617) has been stuck in legal limbo since 2023, with no appeal mechanism available. Brazil's challenge to Trump-era tariffs (DS640) remains at the consultation stage, with the US arguing its measures fall outside WTO jurisdiction entirely on national security grounds (WTO, 2025). Smaller members appear to have quietly concluded that filing is not worth the effort, not because they have no grievances, but because the system can no longer guarantee them anything. The MPIA has been described as an "exclusionary enforcement club" — one that any country can technically join, but whose benefits accrue disproportionately to those with the capacity and leverage to use it (EPRS, 2024). The result is a two-tier trading system: one in which legal protection depends not on the rules, but on who you are and who you are disputing with.

Reform prospects

Reform efforts have so far yielded little. The WTO's self-imposed 2024 deadline for a fully functioning dispute settlement system passed without agreement. The so-called Molina Process, which brought the US back to the table for the first time, stalled when its convener was unexpectedly dismissed by the Guatemalan government ahead of MC13 in Abu Dhabi. The US position remains that appeal reviews should be optional and mutual,

effectively a return to a single-tier system (EPRS, 2024). With the second Trump administration showing no signs of softening its position, a restored Appellate Body appears unlikely in the near term. The MPIA will continue to serve those within it, but without universal membership and without the US, it cannot substitute for what has been lost.

Conclusion

The WTO's dispute settlement crisis is not simply a story of institutional failure. It is a story of who bears the cost of that failure. The Appellate Body was imperfect – its judicial overreach frustrated powerful members, and the rigidity of the WTO's institutional design made reform difficult (Goldstein & Sykes, 2025). But the consequence of its removal has fallen disproportionately on those least able to absorb it. The MPIA provides a partial fix for those with the capacity and alignment to use it. For the rest, the system has quietly hollowed out. As Dunoff and Pollack (2025) observe, the US has not formally withdrawn from the WTO, but it has effectively liberated itself from the rules-based constraints it once championed. What remains is a zombie institution: formally alive, increasingly irrelevant to the behaviour of the states that matter most. For smaller members who depended on legal equality, the system has not adapted; it has rather left them behind.

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