

# THE APPELLATE BODY IMPASSE: HOW TO MAKE THE WTO GREAT AGAIN?

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*The World Trade Organization's Appellate Body has been deadlocked for over four years. This means that decisions by the highest "trade court" have been relegated to hold merely symbolic significance. The United States has played a central role in creating this WTO crisis, a position that has remained consistent across recent administrations due to bipartisan agreement on the foundations of U.S. trade policy. No doubt, the impact of a non-functional dispute settlement system could be severe for international trade. Amidst this critical juncture and with the 2024 U.S. presidential elections approaching, it is about time to really address this issue and make the WTO great again.*

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## I. INTRODUCTION

International trade, once a powerhouse of global prosperity, is currently facing significant challenges. The United States' threat to render the World Trade Organization (WTO) inoperative has left the foundations of the global trading system hanging in the balance, with implications now reaching a critical juncture.

This is not an exaggeration and bears utmost significance, given that, at its core and at its best, trade yields tangible rewards. It lowers the prices of everyday goods through tariff reductions, introduces a dazzling array of products through imports, and increases companies' revenue, jobs, and salaries through exports.<sup>1</sup> Beyond these immediate benefits, the aspiration to penetrate overseas markets also fuels innovation and drives technological advances. In essence, trade fosters expansive economic growth. World Bank data is self-explanatory: better trade practices have lifted over a billion people out of poverty since 1990.<sup>2</sup>

However, the present outlook is far from encouraging with the WTO, the central institution responsible for promoting and overseeing multilateral trade,<sup>3</sup> undergoing its most severe crisis. Moreover, the United States, paradoxically one of the world's largest trading nations,<sup>4</sup> is not solely responsible for the downfall of the WTO. Since its creation in January 1995, the organization has faced recurring threats that have jeopardized its longevity. But among the various factors contributing to the WTO crisis, perhaps none has been as debilitating

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1. THE HERITAGE FOUNDATION, *The Importance of Trade*, <https://www.heritage.org/trade/heritage-explains/the-importance-trade> (last visited Aug. 11, 2024).

2. WORLD BANK GROUP, *Understanding Poverty – Trade Overview*, <https://www.worldbank.org/en/topic/trade/overview#%3A~%3Atext%3DTrade%20is%20an%20engine%20of%2Cparticipation%20in%20the%20world%20economy> (last visited Aug. 11, 2024).

3. *See* WORLD TRADE ORGANIZATION, *What is the WTO?*, [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited Aug. 11, 2024) (explaining the functions, founding principles, and overview of the WTO and its main trade rules).

4. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *About Us – Benefits of Trade*, <https://ustr.gov/about-us/benefits-trade#%3A~%3Atext%3DTrade%20keeps%20our%20economy%20open%2Cthe%20world%20to%20do%20business> (last visited Aug. 11, 2024).

as the absence of a functioning Appellate Body. Actions taken by recent U.S. administrations have resulted in the depletion of adjudicators within the Appellate Body, leaving it without a quorum to make decisions on trade disputes among member states.<sup>5</sup>

This situation is worthy of attention considering that, while the WTO's main objective might seem singular—boosting imports and exports—its significance spans much wider. The happenings within the grand corridors of its Geneva headquarters, stretching over more than 2.2 kilometers,<sup>6</sup> extend far beyond those walls, shaping economies and lives.

The WTO has three main functions: negotiating and crafting multilateral trade agreements, ensuring transparency in trade policies, and settling state disputes.<sup>7</sup> Rooted in “non-discrimination” principles,<sup>8</sup> the WTO upholds that international trade should develop under equal conditions and tariffs, so that products originating in one country are not favored over those originating in another. In practice, WTO members should grant equal tariff treatment to all other members, unless a separate trade agreement dictates otherwise.<sup>9</sup> Also, these non-discrimination rules demand that once products are imported into a given market, foreign and domestic goods are treated equally.<sup>10</sup>

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5. See Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?*, 6 SUI GENERIS (2019) (detailing the actions taken by the United States leading to the WTO crisis, and including the chronology of the Appellate Body blockage, as well as the justifications proposed by the United States to that end).

6. WORLD TRADE ORGANIZATION, *The WTO: The WTO Building*, [https://www.wto.org/english/thewto\\_e/cwr\\_e/cwr\\_welcome\\_e.htm](https://www.wto.org/english/thewto_e/cwr_e/cwr_welcome_e.htm) (last visited Aug. 11, 2024).

7. Amrita Narlikar, *How Not to Negotiate: The Case of Trade Multilateralism*, 98 INT'L AFF'R. 1553, 1555 (2022).

8. See WORLD TRADE ORGANIZATION, *Principles of the Trading System*, Understanding the WTO, [%3B](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#%3A~%3Atext%3Dwithout%20discrimination%20—%20a%20country%20should%2Cgiving%20them%20national%20treatment) (last visited Aug. 11, 2024) (describing each of the principles of the multilateral trading system).

9. James McBride and Anshu Siripurapu, *What's Next for the WTO?*, (June 10, 2022, 10:10 AM), <https://www.cfr.org/background/whats-next-wto#chapter-title-0-6>.

10. *Principles of the Trading System*, *supra* note 8.

Similarly, the 164 members of the WTO (representing a staggering 98% of the world's trade volume)<sup>11</sup> have agreed to set ceiling or maximum tariffs for every commodity.<sup>12</sup> Deviations from these predetermined caps are permissible only under exceptional circumstances.

The WTO parties have also negotiated multilateral trade agreements on myriad issues ranging from agriculture to intellectual property.<sup>13</sup> In general, this set of rules answer globalization's call to promote economic interdependence between nations. In simple terms, trade is not altruistic: a nation can penetrate foreign markets only if it reciprocally opens its own. After all, trade builds upon mutual concessions, fairness, and reciprocity.

But what happens when a trading country disregards these premises? Dissatisfied parties can turn to the WTO Dispute Settlement Mechanism.<sup>14</sup> As an initial position, this mechanism encourages amicable negotiations between disputing countries. If an agreement is not reached, a panel of experts will adjudicate the issue. Parties discontent with the verdict can then appeal to the WTO's Appellate Body. Pretty simple.

So, what is at stake in the absence of a functional Appellate Body? The dispute settlement system lies at the center of the worldwide trading system. Without effective WTO oversight, enforcing WTO basic rules and principles becomes nearly impossible. Countries would lack the institutional means to resolve their international trade conflicts, potentially resulting in disputes escalating into "mini-trade wars"<sup>15</sup> and widespread

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11. WORLD TRADE ORGANIZATION, *Members and Observers*, Understanding the WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Aug. 11, 2024).

12. See WORLD TRADE ORGANIZATION, *Consolidated Tariff Schedules Database*, Tariffs, [https://www.wto.org/english/tratop\\_e/tariffs\\_e/cts\\_e.htm](https://www.wto.org/english/tratop_e/tariffs_e/cts_e.htm) (last visited Aug. 11, 2024) (explaining the contents of the consolidated tariff schedules database and the latest approved schedules of concessions).

13. See ORGANIZATION OF AMERICAN STATES, *SICE – Multilateral Agreements: The WTO*, [http://www.sice.oas.org/agreements/wto\\_e.asp](http://www.sice.oas.org/agreements/wto_e.asp) (last visited Aug. 11, 2024) (listing all WTO agreements).

14. See WORLD TRADE ORGANIZATION, *A Unique Contribution, Understanding the WTO: Settling Disputes*, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Aug. 11, 2024) (describing in detail the different stages of the dispute settlement system).

15. Jennifer Hillman, *A Reset of the World Trade Organization's Appellate Body*, <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> (last visited Aug. 11, 2024).

unfair trade practices which in turn may impact prices, jobs, and countries' overall economic growth.<sup>16</sup>

To delve into the complexities surrounding this issue, this Commentary first analyzes the series of events leading to a crisis in the WTO, with a particular focus on the U.S. Appellate Body blockage. Subsequently, it outlines the dispute settlement alternatives that members states have implemented to address the Appellate Body's impasse, alongside informal discussions concerning a potential WTO reform. Ultimately, the piece concludes by anticipating future prospects for the dispute settlement system and, consequently, for the WTO in general.

## II. THE ROADMAP TO A WTO CRISIS

Shortly after the organization's establishment, WTO foundations felt tremors. Preferential trade agreements threatened to replace the WTO's multilateral trade agreements and, thus, its ideas of openness and reciprocity.<sup>17</sup> These agreements provide tariff preferences only to the countries that signed them, granting them a competitive edge over other WTO members. The rise of these side agreements was largely due to developed states leveraging regional conventions to negotiate measures that had failed to obtain approval from all WTO members.<sup>18</sup> As of August 2024, 369 regional trade agreements were in force.<sup>19</sup>

The 2008 financial crisis<sup>20</sup> coupled with trade tensions between global superpowers (mainly the United States and China) reduced international sales, to the point that the wave of globalization—once buoyed by optimism—was replaced by unilateral protectionist measures. Donald Trump's "America

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16. Geoffrey J. Bannister and Kamau Thugge, *International Trade and Poverty Alleviation*, 38 FINANCE & DEV. No.4 (2001).

17. SEE GABRIEL IBARRA PARDO, LAS GRANDES CONTROVERSIAS DEL MULTILATERALISMO, (1st ed. Editorial Legis 2018) (explaining the tensions between both, the international trade trends of multilateralism and bilateralism).

18. *Id.*

19. WORLD TRADE ORGANIZATION, *Regional Trade Agreements*, [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm#:~:text=back%20to%20top-,Facts%20and%20figures,goods%2C%20services%20and%20accessions%20separately](https://www.wto.org/english/tratop_e/region_e/region_e.htm#:~:text=back%20to%20top-,Facts%20and%20figures,goods%2C%20services%20and%20accessions%20separately) (last visited Aug. 11, 2024).

20. SEE EUROPEAN CENTRAL BANK, *Monthly Bulletin October 2010*, (describing the effects in the trading system following the 2008 financial crisis) [https://www.ecb.europa.eu/pub/pdf/other/mb201010\\_focus02.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/mb201010_focus02.en.pdf), (last visited Aug. 11, 2024).

First” trade policy, prioritizing American interests and shutting the door to some of its former trading allies, exacerbated this trend.<sup>21</sup> In its report on trade with China, the Trump administration asserted that the WTO was incapable of tackling Beijing’s noncompliance with WTO rules<sup>22</sup> and, hence, it aimed to directly challenge China, sidestepping the organization.<sup>23</sup>

The Covid-19 pandemic further limited trade exchanges<sup>24</sup> with most countries restricting exports of inputs needed to address the health emergency. Even in the post-pandemic world, the Biden administration has, to some surprise, perpetuated the protectionist strategies defended by Trump.<sup>25</sup> Biden has not revoked the WTO-illegal tariffs imposed by Trump on a long list of Chinese imports.<sup>26</sup> Imports from China in the United States are now at their lowest in two decades.<sup>27</sup> U.S. trade relations with China are, simply put, not close to improving. To this extent, some of the major economies have gravitated toward protectionism over cooperation and free trade.

As bilateral relations and unilateral measures emerge as the new backbone of trade dynamics, the WTO’s guarantees of transparency and publicity have been undermined. Recently, the refusal of members to comply with reporting and transparency

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21. David Lawder, *Trump Changed How the U.S. Trades – Not Necessarily as Intended*, (Nov. 2, 2020, 7:53 AM), <https://www.reuters.com/article/us-usa-election-trump-trade-analysis/analysis-trump-changed-how-the-u-s-trades-not-necessarily-as-intended-idUSKBN27I16Y/>.

22. See UNITED STATES TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf> (last visited Aug. 11, 2024) (reporting thoroughly China’s WTO compliance).

23. Hillman, *supra* note 15.

24. McBride and Siripurapu, *supra* note 9.

25. Stuart Malawer, *Biden’s and Trump’s Trade Policies – Same as Trump’s? More Aggressive?*, (Jan. 29, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3991157&%3A~%3Atext=There%20has%20not%20been%20much%2Cwith%20Europe%20and%20the%20OECD](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3991157&%3A~%3Atext=There%20has%20not%20been%20much%2Cwith%20Europe%20and%20the%20OECD;); Kristen Hopewell, *EU the New Kingpin in Global Trade Order*, (July 15, 2021), <https://www.lowyinstitute.org/the-interpreter/eu-new-kingpin-global-trade-order>.

26. McBride and Siripurapu, *supra* note 9.

27. Anthony DeBarros and Yuka Hayashi, *How U.S. and China are Breaking Up, in Charts*, (Aug. 12, 2023, 12:00 AM), <https://www.wsj.com/articles/how-u-s-and-china-are-breaking-up-in-charts-282bd878>.

requirements has been notorious, with fewer nations reporting their trade measures to the organization.<sup>28</sup>

Yet, more troubling is the fact that the WTO Appellate Body has remained “deadlocked” for almost five years.<sup>29</sup> This is the result of stances defended by the current and most recent U.S. administrations,<sup>30</sup> leading to a non-operational Appellate Body: with not enough Appellate Body members to solve disputes, decisions are currently “appealed into the void,”<sup>31</sup> meaning that panel determinations cannot be formally enforced, even if they hold diplomatic or symbolic relevance.

### A. *Appellate Body: Creation, Composition, and Blockage*

Emerging from the Uruguay Trade Round, the Dispute Settlement Understanding (DSU), in which all member states are represented, established a quasi-automatic adoption of panel reports.<sup>32</sup> Decisions would be binding unless the Dispute Settlement Body (DSB)—composed of representatives of all WTO members—determined by consensus not to adopt the report (i.e., reached negative consensus).<sup>33</sup> Given this almost immediate adoption of reports, the United States strongly advocated for the creation of an Appellate Body<sup>34</sup> to hear appeals from controverted cases and review the panel’s legal interpretations.<sup>35</sup>

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28. See WORLD TRADE ORGANIZATION, REPORT ON G20 TRADE MEASURES (MID-OCTOBER 2022 TO MID-MAY 2023), (July 4, 2023), [https://www.wto.org/english/news\\_e/news23\\_e/trdev\\_04jul23\\_wto\\_report\\_e.pdf](https://www.wto.org/english/news_e/news23_e/trdev_04jul23_wto_report_e.pdf) (summarizing recent economic and trade developments, trade and trade-related policy developments, policy developments in trade in services, and policy developments in trade and intellectual property).

29. BERKELEY J. OF INT’L. L., *The WTO Appellate Body Deadlock and the Way Ahead*, (Oct. 10, 2021), <https://www.berkeleyjournalofinternationalallaw.com/post/the-wto-appellate-body-deadlock-and-the-way-ahead>.

30. Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to from Here?*, (March 2, 2022), <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis>.

31. *Id.*

32. Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?*, 2 (2021), [https://www.wti.org/media/filer\\_public/c2/ef/c2efc2de-ce85-45c7-9512-9286e14fca47/wti\\_working\\_paper\\_02\\_2021.pdf](https://www.wti.org/media/filer_public/c2/ef/c2efc2de-ce85-45c7-9512-9286e14fca47/wti_working_paper_02_2021.pdf).

33. *Id.*; Dispute Settlement Understanding (DSU), Art. 16.4.

34. Hillman, *supra* note 15.

35. Dispute Settlement Understanding (DSU), Art. 17.6.

The WTO Appellate Body consists of seven members, with a minimum of three required to decide on the appeal.<sup>36</sup> Members serve a four-year term, with the possibility of one reappointment, and vacancies should theoretically be filled as they arise.<sup>37</sup>

Since its creation, WTO members have filed over five hundred disputes under the WTO framework.<sup>38</sup> Historically, the United States has been the most active user of the system, filing 124 complaints and serving as a defendant in 156 cases,<sup>39</sup> ultimately prevailing in 91% of them.<sup>40</sup>

However, the once-strong U.S. support and sympathy for the WTO dispute settlement system has significantly changed. During the Obama era, the United States chose not to renew the U.S. Appellate Body member for a second term and blocked the reappointment of a South Korean judge—this was the first time a member state prevented the appointment of another country's judge.<sup>41</sup> Taking the objections even further, the Trump administration continue to block new appointments and refused to endorse the selection of Appellate Body members after their initial terms expired.<sup>42</sup> As a result, on December 10, 2019, the Appellate Body dropped below three members, thus becoming unable to hear appeals.<sup>43</sup> Despite expectations,<sup>44</sup> the Biden team has done nothing different to revive the trade court.

Since then, the WTO Appellate Body has been paralyzed, meaning that any disputing party adversely affected by a panel report can block the enforcement of the decision by filing a

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36. *Id.* at Art. 17.1.

37. *Id.* at Art. 17.2.

38. McBride and Siripurapu, *supra* note 9.

39. See WORLD TRADE ORGANIZATION, *Disputes by Member, Dispute Settlement: The Disputes*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Aug. 11, 2024) (including tables and references of WTO disputes corresponding to each WTO member).

40. Hillman, *supra* note 15.

41. McBride and Siripurapu, *supra* note 9; Minutes of the DSB meeting of 25 November 2015 [WT/DSB/M/ 370], ¶¶ 7.3-7.4; Minutes of the DSB meeting of 23 November 2016 [WT/ DSB/M/389], ¶¶ 13.3-13.4.

42. McBride and Siripurapu, *supra* note 9.

43. *Id.*

44. Simon Schropp, *Biden and Trade: No Trade Policy, No-Trade Policy or Both?*, 57 *INTERECONOMICS* 399, 399-400 (2022), <https://www.intereconomics.eu/contents/year/2022/number/6/article/biden-and-trade-no-trade-policy-no-trade-policy-or-both.html>.



notice of appeal. According to the DSU, if a party has notified its decision to appeal, the panel's report shall not be considered for adoption by the DSB until after completion of the appeal.<sup>45</sup> In this way, absent a functional Appellate Body, a party could suspend dispute settlement proceedings indefinitely.<sup>46</sup>

### B. *U.S. Role and Impact*

Over the years, the United States has maintained that it will continue the blockage until its concerns with the WTO dispute settlement system are addressed. However, even though it has thoroughly articulated its objections,<sup>47</sup> the United States has failed to propose concrete solutions to resolve the issue.<sup>48</sup>

In particular, the United States has referred to six distinct concerns.<sup>49</sup> First, it objects to Appellate Body members working on appeals even after their terms have expired.<sup>50</sup> Second, it underscores the Appellate Body's continuous noncompliance with the 90-day rule, which requires decisions to be made within this timeframe.<sup>51</sup> Third, the United States also contends that the Appellate Body has exceeded its authority by reviewing the panels' factual findings instead of limiting its assessment to issues of law.<sup>52</sup> Fourth, it protests the issuance of advisory opinions, which are not necessary to solve disputes but could be perceived as law-making in the abstract.<sup>53</sup> Fifth, it disagrees with the Appellate Body treating past decisions as nearly binding precedents.<sup>54</sup> Sixth, it believes that the Appellate Body has

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45. Dispute Settlement Understanding (DSU), Art. 16.4.

46. Lehne, *supra* note 5.

47. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *U.S. Views on the Functioning of the WTO Dispute Settlement System, Issue Areas – Enforcement*, <https://ustr.gov/issue-areas/enforcement/us-views-functioning-wto-dispute-settlement-system> (last visited Aug. 11, 2024); See UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION, <https://ustr.gov/sites/default/files/enforcement/DS/USTR.Appellate.Body.Rpt.Feb2020.pdf>. (last visited Aug. 11, 2024) (detailing the objections and concerns of the United States with regards to the WTO's Appellate Body).

48. Lehne, *supra* note 5.

49. Hillman, *supra* note 15.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

transcended the explicit language of the WTO agreements, by diminishing rights or imposing additional obligations.<sup>55</sup>

Still, U.S. criticism extends beyond the trade court to all three main functions of the WTO.<sup>56</sup> Regarding the negotiation of multilateral trade agreements, the United States rejects the system's incapability to update the regulatory framework and address environmental and labor issues, as well as China's non-market economy practices.<sup>57</sup> Concerning transparency in trade policies, many countries have neglected their most basic reporting obligations, thus undermining business certainty in international trade flows.<sup>58</sup> On dispute settlement, the United States objects to the system's lack of efficiency and points out mistakes when adjudicating trade remedy cases.<sup>59</sup>

Amidst the various critiques by the United States, a significant common thread revolves around complaints of judicial activism, which the United States sees as implicating its sovereignty. Notably, the United States has recently expressed strong disagreement over the interpretation of GATT Article XXI, which allows noncompliance with trade treaty obligations to safeguard essential "national security" interests. The United States advocates for a complete deference with regards to Article XXI, going so far as to argue that the provision is "self-judging" and "non-justiciable".<sup>60</sup> However, the WTO has claimed substantive jurisdiction in determining whether a measure or violation of a treaty provision was adequately justified under the Article XXI exception, resulting in the United States losing cases on these grounds and others.<sup>61</sup>

During the Biden administration, the United States Trade Representative spokesperson asserted that the country will not relinquish decision-making over its essential security to WTO panels.<sup>62</sup> In its commitment to preserve U.S. national security,

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55. *Id.*

56. Clete R. Willems, *Revitalizing the World Trade Organization*, (Nov. 9, 2020), <https://www.wita.org/atp-research/revitalizing-the-wto/>.

57. *Id.*

58. *Id.*

59. *Id.*

60. WORLD TRADE ORGANIZATION, *US-Steel and Aluminum (China)*, 68; WORLD TRADE ORGANIZATION, *US-Origin Marking*, ¶¶ 7.101-7.103.

61. *See id.* (concerning the WTO's jurisdiction with regards to GATT Article XXI).

62. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Statement from USTR Spokesperson Adam Hodge, (Dec. 9, 2022), <https://ustr.gov/>

the United States does not intend to remove measures adopted under the national security exception, regardless of the WTO disputes' outcomes.<sup>63</sup>

In this context, it appears that legally binding dispute settlement is no longer in the interest of the United States, possibly influenced by the mercantilist but mistaken belief that powerful countries could gain more if unrestrained by international trade law.<sup>64</sup>

### III. DISPUTE SETTLEMENT ALTERNATIVES IN ABSENCE OF A FUNCTIONAL APPELLATE BODY

The United States seems reluctant to lift the dispute settlement blockage, but what about the rest of the world? Are other WTO members merely standing on the sidelines? At least three alternatives have already been implemented or are in the pipeline to deal with the absence of the Appellate Body.

#### A. MPIA

In response to U.S. actions to dismantle the WTO dispute settlement system, in April 2020 the European Union led the establishment of a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) with the objective of having an arbitration panel (three private arbitrators, randomly selected from a pool of ten arbitrators agreed by the parties<sup>65</sup>) decide on the appeals.<sup>66</sup> MPIA is an independent appeal process, which is likely to remain in place for as long as the WTO Appellate Body is blocked.<sup>67</sup>

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statement-ustr-spokesperson-adam-hodge.

63. *Id.*

64. Lehne, *supra* note 5, at 136.

65. See World Trade Law, *Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU*, Annex 2, <https://www.worldtradelaw.net/document.php?id=misc/MPIA.pdf> (last visited Aug. 11, 2024) (setting out the procedures for selecting MPIA arbitrators).

66. Geneva Trade Platform, *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA), [https://wtoplurilaterals.info/plural\\_initiative/the-mpia/](https://wtoplurilaterals.info/plural_initiative/the-mpia/) (last visited Aug. 11, 2024); Hopewell, *supra* note 25.

67. Geneva Trade Platform, *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA), [https://wtoplurilaterals.info/plural\\_initiative/the-mpia/](https://wtoplurilaterals.info/plural_initiative/the-mpia/) (last

Encompassing fifty-four out of 164 WTO members (including two major economies like the European Union and China),<sup>68</sup> the MPIA is deemed as an “Appellate Body minus the United States.”<sup>69</sup> Under the authorization enshrined in Article 25 of the DSU, it seeks to preserve the multilateral trading system’s “binding character and two levels of adjudication.”<sup>70</sup> However, it is not a treaty and is not universally binding; it must be voluntarily invoked by WTO members that have previously joined.<sup>71</sup>

To initiate arbitration through the MPIA, parties must suspend panel proceedings according to Article 12.12 of the DSU. Subsequently, they are required to submit a notice of appeal to the WTO secretariat within twenty days following the suspension of panel proceedings.<sup>72</sup>

Likewise, this innovative scheme could be used to test reforms that could potentially enhance the WTO dispute settlement system, particularly focusing on the “procedural efficiency of appeal proceedings.”<sup>73</sup> In this sense, MPIA arbitrators should take appropriate organizational measures to streamline the proceedings, including adhering to page limits, time constraints, deadlines, and the length and number of required hearings.<sup>74</sup> Also, different from the Appellate Body’s requirement to address all issues raised in a dispute, MPIA arbitrators can exercise judicial economy, limiting appellate review to only those issues necessary for dispute resolution and specifically raised by the parties.<sup>75</sup>

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visited Aug. 11, 2024).

68. *Id.*

69. Hopewell, *supra* note 25.

70. Joost Pauwelyn, *The WTO’s Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What’s New?*, (June 14, 2023), <https://www.cambridge.org/core/journals/world-trade-review/article/wtos-multiparty-interim-appeal-arbitration-arrangement-mpia-whats-new/B279E8A106380A510AAA28F4E1A4130F>.

71. Bashar H. Malkawi, *New Trade Appeals Venue Won’t Permanently Fix WTO Issues*, May 2020.

72. World Trade Law, *Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU*, Annex 1 ¶ 5, <https://www.worldtradelaw.net/document.php?id=misc/MPIA.pdf> (last visited Aug. 11, 2024).

73. *Id.* at #3.

74. *Id.* at ¶ 12.

75. *Id.* at ¶ 10.

To date, only one case has been solved and finalized through this mechanism,<sup>76</sup> and eight more disputes are currently in the process of adjudication.<sup>77</sup>

### B. *Dispute Resolution Mechanism in Regional Trade Agreements*

The increasing prevalence of bilateralism and regionalism (the formation of trade agreements involving two or more trading partners) has often been viewed as conflicting with and divergent from the foundational principle of multilateralism upon which the WTO is established.<sup>78</sup> Nevertheless, amid the Appellate Body blockage, bilateral and regional trade agreements' adjudication has partially and paradoxically filled the void created by the challenges faced by the WTO.

While nearly all interstate trade disputes were resolved through the WTO dispute settlement system from 2007 to 2017, since 2018 countries have turned to the dispute resolution mechanisms contemplated in Regional Trade Agreements (RTAs).<sup>79</sup> Between 2018 and 2022, states invoked the dispute settlement provisions of RTAs seventeen times.<sup>80</sup>

Although this mechanism serves the purpose of adjudicating trade disputes between parties of an RTA, it operates outside the scope of the WTO, and therefore does not contribute to the institutional strengthening of the organization.

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76. DS591: Colombia – Anti-Dumping on Frozen Fries from Belgium, Germany, and the Netherlands.

77. DS601: China – Anti-Dumping Measures on Stainless Steel Products from Japan, DS589: China – Measures Concerning the Importation of Canola Seed from Canada, DS598: China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia, DS602: China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia, DS603: Australia – Anti-Dumping and Countervailing Duty Measures on Certain Products from China, DS607: European Union – Measures Concerning the Importation of Certain Poultry Meat Preparations from Brazil, DS610 China – Alleged Chinese Restrictions on the Import and Export of Goods, and the Supply of Services, to and from Lithuania, DS611 China – Enforcement of Intellectual Property Rights.

78. Ibarra Pardo, *supra* note 17.

79. GERALDO VIDIGAL, REGIONAL TRADE ADJUDICATION AND THE RISE OF SUSTAINABILITY DISPUTES: KOREA – LABOR COMMITMENTS AND UKRAINE – WOOD EXPORT BANS (2022).

80. *Id.*

C. *A Glimmer of Hope Amidst WTO Uncertainty: Informal Discussions on Dispute Settlement Reform*

In 2022, the United States initiated informal discussions to reform the WTO dispute settlement system, offering a glimmer of hope to a persistently declining system. However, contrary to statements by the facilitator of the talks, Guatemalan Deputy Permanent Representative Marco Molina, the finish line is not yet within reach.<sup>81</sup> The draft reform text does not include a solution for the “big elephant in the room”: the Appellate Body issue.<sup>82</sup> Although the goal is to supposedly have a “fully and well-functioning dispute settlement system” by the end of 2024,<sup>83</sup> Molina noted that, as of November 2023, discussions on the matter were still in the “conceptual phase” and remained without concrete ideas or specific solutions.<sup>84</sup> At the time, the reform text allegedly incorporated options to prevent disputes, simplified procedures, provisions to reduce costs and enhance transparency, guidance on rules’ interpretation, limitations on decisions’ length and proceedings’ duration, and an accountability mechanism to evaluate the system and intervene when necessary.<sup>85</sup>

The situation remains unchanged as of August 2024. The WTO’s 13th Ministerial Conference took place from 26 February to 2 March 2024 in Abu Dhabi, United Arab Emirates, and other than a wordy reaffirmation of the WTO members’ commitment to work towards the organization’s reform, no substantial outcome resulted from the meeting.<sup>86</sup> Rather, around the same time the U.S. Trade Representative blocked a 73<sup>rd</sup> attempt of launching a selection process of WTO Appellate Body members.<sup>87</sup>

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81. WORLD TRADE ONLINE, *WTO Dispute Settlement Reform Text Nearly Final, Sans Appeals Stage*, (Dec. 19, 2023).

82. WORLD TRADE ONLINE, *Members Hope WTO Dispute Settlement Reform Text will ‘Change the Incentives’*, (Nov. 13, 2023).

83. World Trade Online, *WTO Dispute Settlement Reform is Progressing—Will it Go all the Way in 2024?*, (Dec. 27, 2023).

84. *Supra* note 82.

85. *Id.*

86. WORLD TRADE ORGANIZATION, *WTO Reform*, 13<sup>th</sup> Ministerial Conference: Briefing Note, (April 2024), [https://www.wto.org/english/thewto\\_e/minist\\_e/mc13\\_e/briefing\\_notes\\_e/reform\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/reform_e.htm).

87. WORLD TRADE ORGANIZATION, *Members Updated on Progress in Dispute Settlement Reform Talks in Run-Up to MC13*, (Jan. 26, 2024), [https://www.wto.org/english/news\\_e/news24\\_e/dsb\\_26jan24\\_e.htm](https://www.wto.org/english/news_e/news24_e/dsb_26jan24_e.htm).

In this way, despite calls from developing countries for formalizing discussions under the auspices of the WTO, the United States has consistently advocated for informal talks, outside the framework of a WTO body. The U.S. rejection of the WTO is pervasive, so what does the future hold for the global trading system? After almost five years of the Appellate Body blockage, a nearly consistent position adopted by the last U.S. administrations, and an upcoming U.S. presidential election in November 2024, the clock is ticking and time is running out.

#### IV. CONCLUSION

Because the United States has been at the forefront of the Appellate Body blockage for the past four and a half years, it is crucial for its representatives to propose concrete reforms. While it is natural and understandable for one of the largest trading nations to harbor concerns about the system governing international trade disputes, refraining from suggesting substantial solutions is inadmissible.

Furthermore, the U.S. position violates Article 17.2 of the DSU—demanding that vacancies be filled promptly once they arise—and detrimentally affects all parties, including the United States. By distancing itself from the WTO, the United States could end up charting its own economic isolation.<sup>88</sup> While other WTO member states advance in their international trade ties, the U.S. risks becoming a more peripheral player. Some even argue that such stances could leave a vacuum for China to fill, weakening America's influence.<sup>89</sup>

Also, the Appellate Body's demise may lead to forum shopping, with WTO members choosing between a WTO panel, MPIA arbitration<sup>90</sup> or an RTA dispute resolution mechanism. At the same time, the MPIA could serve as a laboratory to explore and test potential WTO dispute settlement reforms.<sup>91</sup>

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88. Lester, *supra* note 30.

89. U.S. CHAMBER OF COMMERCE, *Setting the Record Straight on the World Trade Organization (WTO) and the United States*, (May 20, 2020), <https://www.uschamber.com/international/setting-the-record-straight-on-the-world-trade-organization-wto-and-the-united-states>.

90. Malkawi, *supra* note 71.

91. Pauwelyn, *supra* note 70.

Every crisis provides opportunity for improvement, but the United States must first recognize its critical position in preserving trade regimes and, on the other hand, the rest of the WTO membership must necessarily heed U.S. concerns and find a new balance. Though informal discussions among member countries are a step forward, making the creation or restoration of an effective dispute settlement body a priority is essential for the WTO and the multilateral trading system to thrive. Only then will the WTO be great again.