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2 DSU 17 1 7 3  
3 2020 2 6 “

DSU 17

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Communication from the United States United States – Countervailing Measures on Supercalendered Paper from Canada, WT/DS505/12, 22 April 2020.

4 DSU 16 4 DSB 60

“ ”

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“

”

DSB

2019 12 18 DSB

Joint Communication from India and the United States, United States-Countervailing Measures on Certain Hot-Rolled Steel Flat Products from India: Recourse to Article 21.5 of the DSU by India, WT/DS436/22, 16 January 2020.

<sup>5</sup> 2019 12 11

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Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

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181-182

20 India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted on 16 January 1998, para.65.

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2.“ ”

WTO

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“ ” WTO

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“ ” “ ”

21 Tania Voon & Alan Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, 40 *Journal of World Trade* 239, 239–242 (2006) .

22 Giorgio Sacerdoti, *The WTO Dispute Settlement System and the Challenges to Multilateralism: Consolidating a Common Global Good*, in Denise Prévost, Iveta Alexovicova & Jens Hillebrand Pohl eds., *Restoring Trust in Trade-Liber Amicorum for Peter Van den Bossche*, Hart Publishing, 2018, p.90–91.

23 Henry Gao, *Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis*, in Chang-fa Lo, Jinji Nakagawa & Tsai-yu Lin eds., *The Appellate Body of the WTO and Its Reform*, Springer, 2020, p.233 Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 *Journal of World Trade* 867, 868 2018 .

24 USTR, *Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union*, USTR (20 January 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union>.





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27 WTO “ ” 2020 11 15

7 13 “ ”

28 WTO 1A

WTO 10 9 2014 11 2 2017 2

22 Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940, 28 November 2014.

29 2005 12 6 2017 1 23 *Amendment to the TRIPS Agreement*, WTO (10 January 2021), [https://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm).

30 WTO WTO 9 10 12 DSU 6

16 17

31 Lorand Bartles, *The Separation of Powers in the WTO: How to avoid Judicial Activism*, 53 International and Comparatively Law Quarterly 861, 865–866 2004 .

32 . 2000

33–34

---

WTO

1995 5

WTO

12 2

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33

“ ”

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34

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35

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33 General Council, Minutes of Meeting Held on 31 July 1995, WT/GC/M/6, 20 September 1995.

34

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3 WTO

4

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“ ” “ ”

” “ ” 41 DSU

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DSB DSU

“ ” “ ” “ ” “ ”

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42 “

” 43

DSB

“ ”

DSU

44

“ ”

---

39 WTO “ ” Jennifer Hillman, *Three Approaches To Fixing The World Trade Organization’s Appellate Body: The Good, The Bad and The Ugly?*, Georgetown Law (30 January 2021), <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>.

40 2020 6  
4

41 Mitsuo Matsushita, *Reforming the Appellate Body*, in Chang-fa Lo, Jinji Nakagawa & Tsai-yu Lin eds., *The Appellate Body of the WTO and Its Reform*, Springer, 2020, p.43 – 52.

42 Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 *Journal of World Trade* 867, 874 (2018) .

43 WTO 2004 161

44 Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 *Journal of World Trade* 867, 875 (2018) .



WTO “ ”

WTO

“ ” “ ”

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“ ” “ ” 45

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<sup>46</sup> DSU

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“ ” “ ”

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1.

1

“ ” WTO

GATT 1994 6

“ ”

“ ”

GATT 1994

6 5

“ ”

---

45 Ernst-Ulrich Petersmann, *Between “Member-Driven” WTO Governance and “Constitutional Justice”: Judicial Dilemmas in GATT/WTO Dispute Settlement*, 21 *Journal of International Economic Law* 103 (2018) .

46 WTO 2005 4 66–71

47 Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 *Journal of World Trade* 867, 878–880 (2018) .

48 WTO 2019 6 84

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“ ” “ ”

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“ ”

“ ” “ ” 49

“ ” 50

3

GATT 1994 19 2

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GATT 1994 19

“ ” 52 “ ”

” WT/DS98 “ ” WT/DS121 “

” WT/DS177 WT/DS178

2.

1

DSU 3 2 “

---

49 United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011, paras.310–318.

50 “ ” 2019 10 62–65

51 WTO 2 2 “ 1 2 3 “ ” WTO

GATT 1994 19 1

52 GATT 1947 GATT 1994

GATT 1947 “ ” GATT 1947

GATT 1994 See Rudiger Wolfrum, *WTO-Trade Remedies*, Martinus Nijhoff Publishers, 2008, p.260–261.

” “ ” “  
 ” WT/DS2 “ ” WT/DS8  
 31 32  
 31 WTO WTO  
 “ WTO ” 53  
 31  
 “ ”  
 “ ” “ ”  
 “ 31 ” 54  
 “ ” 55  
 32 31 31  
 “ ” “ ”  
 31 32  
 “ ” WT/DS394 395 398  
 GATT 1994 20 11 3  
 11 3  
 WTO 11 3  
 WTO GATT 1994 “ ” 11  
 3 GATT 1994 20  
 WTO WTO

---

53 Pascal Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 *European Journal of International Law* 969, 979 (2006) .

54 2003 351

55 2003 351

“ ”  
56

“ ” 57

“ ” “ ”  
WTO “ ” GATT 1994  
20 g GATT 1994 20 g “ ”

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20 g “ ”  
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“ ” 59

“ ” “ ”

“ ” “ ” 60

2

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DSB

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56 WTO 2014 110–115

2015 72–75

57 Mitsuo Matsushita, *Reforming the Appellate Body*, in Chang-fa Lo, Jinji Nakagawa & Tsai-yu Lin eds., *The Appellate Body of the WTO and Its Reform*, Springer, 2020, p.44.

58 United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/ABR, adopted on 6 November 1998, paras.127–134.

59 WTO 2019 6 85

60 “ ” “ ” Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26 *European Journal of International Law* 169 (2015) .

2010<sup>62</sup> WTO DSB DSB

15 WTO  
“ ”

DSB 63  
“ ” *amicus curiae* briefs  
“ ”  
“ ”  
“ ”  
“ ”

64  
“ ”

DSB  
DSU 19 7  
“ ” 65  
WTO “ ”

66 “ ”

---

61 Working Procedures for Appellate Review, WT/AB/WP/1, 15 February 1996.

62 Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

63 16 1

DSU

64 Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34 ICSID Review 626 (2019).

65 European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, Communication from the Appellate Body, WT/DS135/9, 8 November 2000.

66 Decision by the Appellate Body Concerning *amicus curiae* Briefs, Statement by Uruguay at the General Council on 22 November 2000, WT/GC/38, 4 December 2000.



---

13 DSU DSU DSU

WTO WTO 5

NGO

“ ” WTO

“ ” 67

“ ” “ ”

16 1

“ ” DSU “ ”

“ ” “ ”

68 “ ”

“ ”

GATT 1994 20 “ ” “ ”

“ ” “ ” 69

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25 MPIA DSU 25 MPIA DSU

70 71 MPIA

WTO “ ” “ ” WTO “ ”

---

67 General Council, Minutes of Meeting Held in the Centre William Rappard on 22 November 2000, WT/GC/M/60, 23 January 2001.

68 General Council, Minutes of Meeting Held in the Centre William Rappard on 22 November 2000, WT/GC/M/60, 23 January 2001.

69 WT/DS58/ABR, paras.79 – 110.

70 MPIA

WTO MPIA MPIA MPIA “ ”

Xiaoling Li, *DSU Article 25 Appeal Arbitration: A Viable Interim Alternative to the WTO Appellate Body?*, 15 *Global Trade and Customs Journal* 461 (2020).

71 WTO 2019 4 203 – 207

WTO

WTO

WTO 9 2

3/4

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DSU 17

9

90

“

”

WTO

72 Weihuan Zhou & Henry Gao, "Overreaching" or "Overreacting"? Reflections on the Judicial Function and Approaches of WTO Appellate Body, 53 Journal of World Trade 951, 972 (2019).

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“ ” “ ”  
73 2012 30 1

2015 — 9 19

• Jennifer Hillman WTO

74 WTO

“ ”

20 WTO

WTO

75 “ ”

2015 Bilateral Investment Treaty BIT

---

73 2015 6 162–169

2016 5 132–142

74 Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization’s Appellate Body: The Good, The Bad and The Ugly?*, Georgetown Law (20 January 2021), <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>.

75 “ ” “ ” 2018 4 6–7

Investor state dispute settlement ISDS

<sup>76</sup> 2015

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<sup>78</sup> WTO

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<sup>80</sup>

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<sup>81</sup>

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<sup>76</sup> Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?* 19 *Journal of World Investment & Trade*, 2018, No.3, p.241 – 250.

<sup>77</sup> Kabir A. N. Duggal & Laurens H. van de Ven, *The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves*, 35 *Arbitration International* 347 (2019).

<sup>78</sup> Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, WT/GC/W/752/Rev.2, 11 December 2018 (General Council, Functioning of the Appellate Body (Draft Decision), WT/GC/W/791, 28 November 2019).

<sup>79</sup> DSU 12 1 3

<sup>80</sup> WTO 2019 4 197–207

<sup>81</sup> WTO 2019 1 112

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WTO

WTO 4

WTO

“ ” WTO “ ”

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127 83

WTO 9

WTO

10

WTO 9

2014 11 27

WTO

WTO 1A 84

2017 2 22

127

WTO

“ ” 85

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82 Marco Bronckers, *Trade Conflicts: Whither the WTO?*, 47 *Legal Issues of Economic Integration* 221, 234–236 (2020).

83 27 *Members Accepting the Protocol of Amendment to Insert the WTO Trade Facilitation Agreement into Annex IA of the WTO Agreement*, WTO (31 January 2021), [https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_agreeacc\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm).

84 Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, General Council Decision of 27 November 2014, WT/L/940.

85 Alex Ansong, *Single Undertaking, Different Speeds: Pliable Models for Decision-making in the WTO*, 21 *Journal of International Economic Law* 395 (2018).

---

WTO

86

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<sup>87</sup> 2019 1 25

76 WTO

<sup>88</sup>

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86

2019 3 179–192

87 WTO

2019 2 13–23

2019 9 95–104

88

WTO

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170–184

<sup>89</sup> Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law*, Hart Publishing, 2017, p.125–127.

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90

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## The Predicament and Solution of WTO Multilateral Trade System —Starting from USTR’s Appellate Body Report

LIU Yong KE Huanyi

**Abstract:** Under the continuous obstruction of the United States, the members of the World Trade Organization (WTO) could not reach a consensus on the successor of the Appellate Body members for a long time, which eventually led to the complete cessation of the work of the appellate body due to the lack of a quorum on December 10, 2019. The US trade representative's report on the Appellate Body reflects that the deliberate obstruction of the United States is only the superficial reason for the suspension of the appellate body, while the institutional problems and institutional deficiencies of the WTO are the deep-seated factors leading to the suspension of the appellate body, such as the shrinking law making function of the WTO, the inadequacy of both substantive and procedural rules, and the unclear positioning of the dispute settlement procedure. Therefore, WTO should repair its law making function appropriately, speed up the adoption of legislative interpretation, reform the working procedures of the panel of experts and the appellate body, appropriately limit their right of review, establish a reasonable boundary between member driven and rule oriented, and promote the implementation of the multilateral negotiation mechanism.

**Keywords:** WTO; USTR; Appellate Body; Member-Driven; Rule-Oriented