

Possible Alternative Dispute Resolution Processes to Prevent Trade Wars in the WTO Appellate Body: Issues and Challenges

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Abstract: *The 2018 US-China trade war and the escalating 2023 trade war between the two major actors, the US and China, are just two examples of the numerous trade crises the globe is currently experiencing. The trade war has left the entire world in doubt. The GATT/WTO attempts to control these trade conflicts continuously, but without a suitable dispute settlement forum, it is impossible to regulate these arbitrary trade conflicts effectively. The World Trade Organisation (WTO) has a dedicated dispute resolution forum. The issue is that the US has been utilising the positive consensus requirement to prevent the appointment of judges to the Appellate Body for the previous few years. The problem is that, although there is an appellate body, no one is present to make a decision. The losing party, therefore, can appeal against the panel's decision and leave the fate of the dispute uncertain forever. Therefore, WTO members, aware of this crisis, take the greatest unfair advantage of it. The research, therefore, argues that the crisis is there, but there are several alternatives through which it is possible to regulate trade wars. To this purpose, it attempts to argue that there are sufficient incentives which will, in the end, compel the states to cooperate amid the alternative approaches.*

1. Introduction

The objective of GATT/WTO rules is to ensure that retaliation by one country against the unilateral action of another is proportionate, thereby minimising the chance of arbitrary trade or trade wars, and promoting free trade. Although trade wars are not a new addition to the global economy, history shows that it is trade that has always been targeted to gain the highest benefit out of the existing system, often leading the players to be arbitrary, and if there were no regulatory factors, the powerful actors would take the highest unfair advantage. Therefore, without a properly functioning DSB, the world trade system would face hardship, and the GATT/WTO would deviate from achieving its objectives. The US-China trade war of 2018 and the AB crisis can be referred to here.

The US has, since 2020, taken a unique strategy of blocking the AB composition using its veto right. The main fear is that without the AB, the WTO dispute settlement system will lose much of its predictability and may eventually collapse. Although no other WTO Member agrees with the US's strategy of preventing new appointments to the AB to address a deemed institutional

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imbalance, the survey results show that the US is not the only one that believes the AB has exceeded its authority. The wider membership now buys the argument that the Appellate Body is broken, but when they ask Washington how it should be fixed, they are greeted with stony silence.¹

The US is more concerned with taking advantage of its position than with reforming the WTO mechanisms.² However, blocking the process of settling disputes by bringing them to a paralysed body, knowing that the very country has a dissatisfaction with its functions, is not a solution; rather, it expresses a mala fide notion, since when a case is under an appeal, without a decision from it, the panel decision cannot be enforced. Therefore, the party against whom the decision is taken by the panel can indeed appeal, which can lead to the dispute remaining pending. The Appellate Body is there, but there are no members in it. It is not possible, therefore, to take the final decision without the members. The prospect of losing importance for the dispute settlement body, which has been the cornerstone of WTO success for the past 20 years, is the next most urgent threat. If members wish to survive the current and upcoming trade wars, they must safeguard, modernise, and revitalise the DSB.³

Ujal Singh Bhatia, an ambassador, is the Appellate Body's 2018 Chair. Every minute without a properly operating DSS is a minute where WTO-inconsistent measures stay in effect, trade flows are impeded, and businesses around the world lose valuable business possibilities.⁴ Consequently, an immediate solution is essential.

The first section of this article will briefly address how trade wars are waged and how member states of the WTO can use these tactics arbitrarily in the absence of an appropriate forum. The AB blockade gives states the option to initiate arbitrary trade, and as trade wars have major negative economic and environmental effects,⁵ they must be lifted, or alternative solutions must be

¹ Keith Rockwell, 'Recent WTO Ruling Against the United States Highlights Challenges in Dispute Resolution' (*Wilson Center*, 15 December 2022) <<https://www.wilsoncenter.org/blog-post/recent-wto-ruling-against-united-states-highlights-challenges-dispute-resolution>> accessed 20 February 2025.

² Chiara Giuliani, 'Multilateral Trade in Crisis: The WTO's Appellate Body and the Risk of Paralysis' (*IAI Istituto Affari Internazionali*, 12 September 2019) <<https://www.iai.it/en/publicazioni/c05/multilateral-trade-crisis-wtos-appellate-body-and-risk-paralysis>> accessed 19 February 2025.

³ 'The dispute settlement crisis in the World Trade Organization: Issues, challenges and directions' (*Research Outreach*, 27 March 2020) <<https://researchoutreach.org/articles/dispute-settlement-crisis-world-trade-organization-issues-challenges-directions>> accessed 31 January 2023.

⁴ Third World Network, 'AB crisis is a crisis of trade multilateralism, says 2018 AB chair' (*SUNS*, 2019) <<https://www.twm.my/title2/wto.info/2019/ti190602.htm>> accessed 09 January 2023.

⁵ Rachel Cooper, 'Climate Leader Papers' (*Climate Action*, 2018) <<https://www.climateaction.org/climate-leader-papers/environmental-implications-of-the-us-china-trade-wa>> accessed 19 February 2025.

explored. The options that are being used or could be utilised will be described in the later part. The possibility of a US response or the potential for cooperation under those alternative approaches will be discussed because the US is the cause of both the US-China Trade War and the AB blockade. Also, it is likely that the US will compromise and comply with at least one of the alternatives because if it refuses to do so, two situations can come forth: a WTO without the US or a global economy without the WTO.⁶

While trade can be a benefit, it can also be a curse; hence, any obstacle that could prevent free trade is not anticipated. To find a better solution, it is therefore necessary to be aware of the alternatives and prospects. The goal of this article is to comprehend how the AB blockade and trade conflicts are related. This article attempts to discover potential solutions to the AB problem because there is an explicit relationship between the two. The research, however, has been designed to learn more about the possibility of a state reaction intended to obstruct AB, notably the potential US reaction to the alternatives. However, it is not much focused on evaluating the alternatives. While conducting the study, since it is based on mostly contemporary incidents, comparatively more online data and journal references have been used. Quantitative methods, journal articles, have been used for data collection. Also, to analyse the reasons and methods of trade wars and the ways of blocking the Appellate Body of DSB, a historical perspective has been shown as well. Moreover, theoretical aspects have been discussed while studying the alternative methods and prospects of those methods to analyse the prospect of regulating trade wars using those alternative methods. The research is mainly based on the WTO regime and different trade aspects. In this article, it has been made to find out why trade wars have been identified as a curse. Also, alternative approaches are legally taken through different provisions within the WTO regime itself. However, to understand the prospect of US compromise, many economic theories and practical situations have been considered.

2. Recent Trends of Trade Wars

The trade conflict between the United States and China began in 2018 and has never formally concluded. Which party has been “winning” it, then? The conclusion of the recent study is clear- neither. The US-China trade war has caused the rise in the price of aluminium, steel and related products. The tariffs “raise vehicle prices for all customers, limit consumer choice, and invite retaliatory action by our trading partners.”⁷ Also, this causes the economic growth

⁶ *ibid.*

⁷ Kimberly Amadeo, ‘Why Trade Wars Are Bad and Nobody Wins’ (*The Balance*, 5 March 2018) <<https://www.thebalancemoney.com/trade-wars-definition-how-it-affects-you-4159973>> accessed 19 February 2025.

to be slower. Trade wars diminish the domestic industry's protection over time. The gap in trade between the two countries can allow other countries to fill the gap as well.⁸ However, 2023 is potentially escalating into a new trade war between the US and China. The US has imposed a ban along with Japan, the Netherlands, and Taiwan. It is trying to export control of semiconductors to China. Then again, China restricts rare materials— gallium and germanium, which are indeed key components for semiconductors.⁹ An important Chinese trade policy expert told Reuters that the first US chipmaker to receive restrictions from China, and the controls on the export of gallium and germanium components are “just a start”.¹⁰ These are indeed vital for the semiconductor industry. Beijing will not stand by idly much longer while the US slaps. “Countermeasures will intensify if restrictions aimed at China's high-tech industry persist.” The tit-for-tat tech war is predicted to continue unless there is a settlement between these two nations shortly.¹¹

The US trade battle has escalated not just with China but also with Canada, Mexico, the European Union, and others. To impose 10% duties on all imports from China and 25% duties on goods from Mexico and Canada, President Trump declared an economic emergency.¹² Without mentioning whether European goods would be affected, the US president declared on Sunday that he would apply a 25% tariff to all steel and aluminium entering the US. If the US tariffs on steel and aluminium are verified, the European executive has declared that it will retaliate. Given the highly linked production chains that the US and EU created through transatlantic trade and investment, imposing tariffs would be illegal and detrimental to the economy.¹³

⁸ *ibid.*

⁹ Danny D'Cruze, 'Explainer: What Are 'Germanium' and 'Gallium' and Why Is China Trying to Restrict Its Export' *Business Today* (India, 10 July 2023) <<https://www.businesstoday.in/technology/news/story/explainer-what-are-germanium-and-gallium-and-why-is-china-trying-to-restrict-its-export-388280-2023-07-10>> accessed 20 February 2025.

¹⁰ Dashveenjit Kaur, 'Cloud Computing Will Be the next Frontier in the US-China Tech War' (*Tech Wire Asia*, 07 July 2023) <<https://techwireasia.com/2023/07/china-will-soon-be-restricted-from-cloud-computing-services-in-the-us/>> accessed 20 February 20, 2025.

¹¹ *ibid.*

¹² Euronews, 'Trump postpones Mexico and Canada tariffs to negotiate border security measures' (*Euronews*, 03 February 2025) <<https://www.euronews.com/2025/02/03/trump-agrees-to-pause-tariffs-on-canada-and-mexico-after-they-pledge-to-boost-border-security>> accessed 17 February 2025.

¹³ Peggy Corlin, 'EU will react against 'unlawful' US tariffs, says European Commission' (*Euronews*, 10 February 2025) <<https://www.euronews.com/my-europe/2025/02/10/eu-will-react-against-unlawful-us-tariffs-says-european-commission>> accessed 17 February 2025.

2.1 Understanding Trade Wars

Trade wars are by-products of protectionism, usually the government's actions and policies that hinder international trade. Protectionism refers to government policies that restrict international trade to help domestic industries. When countries implement laws and measures that limit trade, protectionism sparks a trade conflict. The government of a country implements protectionist actions to intentionally shield domestic jobs and businesses from foreign competition. A nation may also use protectionism to close a trade gap created when its imports surpass its exports. When one nation discovers that its rival is engaging in unfair trade practices, trade wars intensify. If that is the case, the state will enact regulations that will reduce consumer interest in imported products. Such measures might result in a commercial conflict between the two nations.

2.2 Methods Used in Trade Wars

It can be said that the most popular tactic for conducting a trade war is increasing tariffs, imposing duties, imposing embargoes on the grounds of security issues, etc. Imposing additional tariffs is the most commonly used tactic. There have been other factors as well. Now, with the development of the WTO DSB, these barriers have been covered by regulation. However, without an adjudicating body or in the absence of that body, it is not possible to regulate or cross-check whether the standards are being followed properly, and if they are not, it is not possible to make the contracting parties comply with the standards set by the WTO.

2.3 Adverse Impact of Trade Wars

Trade wars have serious consequences for the economy as well as the environment. Environmental concerns are one of the tools used in a trade war to put a nation in a position where it is cornered in the world of commerce and gets a policy that is favourable to it. The three major environmental issues in a trade conflict are environmental harm, product safety regulations, and human rights concerns.¹⁴

Potential environmental consequences driven by the US-China crop trade tension are considerable and could spill over to other countries, especially Brazil and other South American countries, through international trade. Such consequences are predominantly driven by China's proposed retaliation on US soybeans. Overall, however, the modelled effects of tariffs resulted in increased

¹⁴ Husnul Isa Harahap, 'Environmental Issues in Trade War: A Political Economy Perspective' (2019) 98 Proceedings of the International Conference on Trade 2019 <<https://www.atlantispress.com/proceedings/icot-19/125918427>> accessed 20 February 2024.

global environmental stress.¹⁵ It is not only trade war that affects the environment. The case can be reversed. Countries, in the name of climate change policies, are getting involved in trade battles. The United States and Europe have recently proposed or implemented subsidies, tariffs, and other policies targeted at accelerating the switch to green energy. Governments are clashing because of the drastic differences in industrial and trade policies adopted by nations around the globe to combat climate change.¹⁶

While making a discussion on the adverse impact of trade tensions, developing countries become a crucial point of discussion because it is interesting to note that developed countries appear to be getting benefitted out of such trade wars, and it is often seen as statistical indicators show that trade wars—for example, China’s diversification program—have benefited many developing countries.¹⁷

Notably, South Asia has been directly impacted by China. Bangladesh, Sri Lanka, and numerous other nations have been able to increase their profits. For instance, Bangladesh’s exports to China have surged because China raised its animal meat tariffs on the United States. Sri Lanka is a significant supplier of tea, t-shirts, and women’s undergarments; thus, it benefits from the trade war between the United States and China. Sri Lanka thus imports these goods at low prices from China and exports them to the United States. The South Asian economy may benefit from the current trade war between the United States and China, but the region’s biodiversity and environment are harmed.¹⁸ The basic conclusion is that there is no true victor in a trade war, even if developing nations have short-term advantages.

The prospect of a conclusion to the negotiations between the two heavyweights is a good development for the US, China, and developing nations. All nations may best utilise their comparative advantages to boost growth and

¹⁵ Guolin Yao and others, “The Increasing Global Environmental Consequences of a Weakening US–China Crop Trade Relationship” (2021) 2 *Nature Food* 578 <<https://www.nature.com/articles/s43016-021-00338-1#citeas>> accessed 20 February 2024.

¹⁶ Ana Swanson, ‘Climate Change May Usher in a New Era of Trade Wars’ *The New York Times* (New York, 25 January 2023) <<https://www.nytimes.com/2023/01/25/business/economy/climate-change-global-trade.html>> accessed 14 July 2023.

¹⁷ Murad Aghayev, ‘The Effects of the US-China Trade Wars on the Global Economy’ (*CESD Press*, January 2025) <<https://cesd.az/y/panel/uploads/96211895835-TheEffectsoftheUS-ChinaTradeWarsontheGlobalEconomy.pdf>> accessed 20 February 2025.

¹⁸ Ravi Kumar, ‘US-China Trade War: Impact on Sustainable Development in Developing Nations with Particular Reference to South Asia’ in Sunita Singh and others (eds) *Smart Environmental Science Technology and Management: Lecture Notes on Environment Conservation and Enrichment* (Technoarete Publishers 2021) vol 1 <<https://doi.org/10.36647/978-93-92106-02-6.10>> accessed 17 February 2025.

combat poverty through an open, rules-based trading system.¹⁹ Trade wars are usually interpreted as a prisoner's dilemma, that is, harmful outcomes brought about by individually rational behaviour. Engaging in trade wars is harmful for all participating countries, and this harm will ultimately be felt by their citizens. With these adverse impacts of trade wars, multilateral trade is left in a severe crisis. If the US strategy is taken here, Chow points out that the United States' key strategic stances in the power-based approach to international trade are shown by the US-China Trade War.

First, undermine the WTO dispute settlement process to render WTO obligations unenforceable. Second, in violation of WTO regulations and in the face of the Appellate Body's inability to act, impose unilateral trade sanctions on American trading partners. Third, establish a parallel dispute resolution mechanism in a bilateral agreement that is entirely controlled by the United States.
20

Therefore, there is certainly a connection between the paralysis of DSB by Appellate Body appointment and this blockage, and states like the US, which has a huge economic role in international trade as well as economic dependence on multilateral trade, are taking a sort of unfair advantage and therefore need to be reconsidered.

3. Relation between the US-China 2018 trade war and the Blockade in DSB

Being a powerful player, the US has taken a few significant approaches under Trump's administration against China, and this is not going to end soon since the US has, whatever the party might be, both economic interests and political gain. Discussing how the US benefited economically is not the end of this paper; rather, it intends to state that since trade war and appellate body paralysis—both phenomena and strategies taken and the US benefited out of them—there is a direct link between the two, as has already been mentioned. On 12 May 2016, President Barack Obama made the unprecedented decision to block the appointment of new panelist replacements to the WTO Appellate Body. This approach was maintained by the Trump administration. By strangling the World Trade Organization's appellate body, Washington is effectively hamstringing the

¹⁹ Caroline Freund, Maryla Maliszewska and Cristina Constantinescu, 'How Are Trade Tensions Affecting Developing Countries?' (*World Bank*, 08 March 2019) <<https://blogs.worldbank.org/en/trade/how-are-trade-tensions-affecting-developing-countries>> accessed 20 February 2025.

²⁰ Daniel CK Chow, 'A New and Controversial Approach to Dispute Resolution under the 2020 United States-China Trade Agreement' (2020) 26(31) *Harvard Negotiation Law Review* <<https://journals.law.harvard.edu/hnlr/wp-content/uploads/sites/91/31-chow.pdf>> accessed 20 February 2024.

trade organisation's ability to resolve disputes.²¹ The WTO rules provide that once an appeal has been filed, the WTO decision cannot become binding or implemented. The appeal must be resolved; the Appellate Body cannot meet to hear the appeal. On January 14, 2020, just one month after the WTO was rendered inoperable, the US and China signed the USCTA, completing the United States' intention to take control of the WTO's dispute resolution process for China-related disputes.²² But it is interesting enough to state that the power-based strategy is most effective when applied to nations that lack the political will or financial resources to engage the US in a standoff. When employed against nations like China that feel they must stand up to the US for political and economic reasons and engage the United States in an extended standoff, the power-based approach carries a higher risk. The power-based strategy might backfire against these nations by producing less unpredictable economic and political outcomes and more uncertainty overall.²³ In essence, the US's power-based negotiating strategy has failed in that it has moved the bilateral relationship with China closer to the higher tariff, non-cooperative Nash equilibrium, endangering the multilateral trade system.²⁴ It keeps GATT/WTO far from achieving its objectives.

The US blocking AB is successful in initiating a trade war, triggering the WTO. The US has been able to excuse its new tariffs by triggering the WTO's national security exception. Moreover, the US administration has argued that this exception is "self-judging" or "non-justiciable,"²⁵ implying that those cannot be questioned, as Roger P. Alford in 2011 stated that members assume that these are self-judging. However, he also implies that those need to be exercised with wisdom and good faith. According to Adam Smith, there is only one exception to be justified since defence is more important than free trade. Nonetheless, exceptions exist, although self-judging cannot be exercised without wisdom and good faith. Lack of these considerations, according to John Jackson, leads to dangerous political abuse. In the *Russia-Ukraine case*, concerning measures on 'Traffic in Transit' implies two landmark rulings: one implies that the panel has the jurisdiction to determine the objectives of security exceptions and another is

²¹ Keith Johnson, 'Trump Puts WTO Appellate Body in Life or Death Moment' (*Foreign Policy*, 09 December 2019) <<https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization>> accessed 20 February 2025.

²² Daniel CK Chow and Ian M Sheldon, 'Understanding the Economic and Political Effects of Trump's China Tariffs' (2021) 12 William & Mary Business Law Review 273.

²³ *ibid* 279.

²⁴ Aaditya Mattoo and Robert W Staiger, 'Trade Wars: What Do They Mean? Why Are They Happening Now? What Are the Costs' (2019) 35 Economic Policy 561.

²⁵ Iryna Bogdanova, 'Adjudication of the GATT Security Clause: To Be or Not to Be, This Is the Question' (WTI Working Paper No 01/2019, World Trade Institute and University of Bern March 2024) <www.ilsa.org/Jessup/Jessup2020/Basic%20Materials/Bogdanova%2C%20WTI%201-2019.pdf> accessed 20 February 2025.

to review the standard; alternatively, the objective review is to determine the relationship between the ends and means subject to war times or emergencies in international relations (armed conflict or similar situations).²⁶

But if this DSB is paralysed by one of the contracting parties or many others in the future, what would be next? Who is going to decide these, or determine these rules or standards to review if they appear? Security exception is one of the issues that can be subject to disputes, and there are many others on which disputes may take place. Who is going to adjudicate if it is blocked or paralysed? Being a legal rational organisation, the WTO uses adjudication procedures where convincing evidence, compulsion, and punishments are separated from actors' political fighting and concentrated on an independent determination of whether the legal breach happened, if it requires sanctions, and to what extent.²⁷

3.1 How and Why the US Has Blocked AB

A positive consensus is required to appoint the judges to the appellate body. Positive consensus is something that all the members are required to give consent²⁸ to appoint the judges. Therefore, no one should object to making the decision. An Appellate Body needs seven judges to be constituted.²⁹ If even one country denies doing so, the consent is not there, and no judge can be appointed. Currently, there has been no member in the Appellate Body since 2020.³⁰ This is why the Appellate Body is not functioning, and the crisis arises. However, the persistent practice of the US creating the blockade makes it clear that there is a clear end and some justified reasoning for the US. Judicial activism, or judicial overreach, is the reason the US opposes a properly functioning DSB or more specifically, AB.

²⁶ Viktoriia Lapa, 'The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?' (*Questions of International Law*, 12 May 2020) <<https://www.qil-qdi.org/the-wto-panel-report-in-russia-traffic-in-transit-cutting-the-gordian-knot-of-the-gatt-security-exception/>> accessed 20 February 2025; Keith Rockwell, 'Recent WTO Ruling Against the United States Highlights Challenges in Dispute Resolution' (*Wilson Center*, 15 December 2022) <<https://www.wilsoncenter.org/blog-post/recent-wto-ruling-against-united-states-highlights-challenges-dispute-resolution>> accessed 20 February 2025.

²⁷ Christopher Balding and Daniel Wehrenfennig, 'Theorizing International Organizations: An Organizational Theory of International Institutions' (2011) 2(1) *Journal of International Organizations Studies* 7.

²⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, art 2.4.

²⁹ *ibid* art 17.1.

³⁰ 'Dispute Settlement - Appellate Body Members' (*Dispute settlement - Appellate Body Members*) <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 20 February 2025.

Judicial activism is a term that refers to situations where the judiciary takes a broader view, even beyond the applicable law, a philosophy that is mostly debated. This creates a new WTO regime with a sophisticated adjudicatory culture, perhaps, but different from the ends of the creators of the WTO. Apart from reasoning, which is even supported by some other WTO members, it can be said that the WTO has, perhaps for the last 70 years, imposed so many obligations,³¹ on the USA that were not expected and cannot be accepted by the US. Even the US could not win in dozens of cases, even with solid reasons in a few of them. Even in a few cases, environmental concerns were invoked by the WTO but rejected by the WTO, which indeed makes the whole process frustrating for the US, although the WTO, in its preamble, has invoked sustainability issues. In the *Tuna-Dolphin (Mexico-USA) 1988/GATT*, a ruling was held- the US cannot take the measure it has taken, putting pressure on countries to enact laws. The same goes for the *Thailand-USA 1998 dispute*. This has even severely crippled the authenticity of the judicial authority of the WTO. Without a well-functioning adjudicating body, it is not possible to regulate trade wars, whatever their method might be. Several issues have been brought up by the US³²-

- a. Judicial activism: the argument that the Appellate Body exceeded its power by passing laws that were not approved by WTO members;
- b. The Appellate Body's requirement that lower panels abide by its decisions unless there is a "cogent reason" creates a de facto precedent system;
- c. Issuing an advisory opinion is not required to settle disputes;
- d. Review of factual problems, while it is supposed only to review legal issues;
- e. Failure to resolve complaints within the required 90-day window.

However, doubt remains whether the US is the sole interested party in reforming the DSB. All the members of the WTO should come forward to decide the issues, as the blockage of a whole system is not a solution. If the fact is that, then it is not only the US, but all the losing parties also abusing the positive veto right would block the appellate body. Since there are other powerful players in the market, for example, the EU, China, and Japan, their responses to the unilateral actions taken by the US can open a new front in the trade war if the WTO dispute settlement mechanism is crippled.

³¹ Bown, 'The 2018 Trade War and the End of Dispute Settlement as We Knew It' (CEPR, 19 June 2019) <<https://cepr.org/voxeu/columns/2018-trade-war-and-end-dispute-settlement-we-knew-it>> accessed 20 February 2025.

³² 'The World Trade Organization: The Appellate Body Crisis' (CSIS) <<https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis>> accessed 20 February 2025.

Judicial overreach or activism is not an ignorable issue since other members have also supported the claim, but it is only the US that is playing a role in obstructing the process of composing the Appellate Body. Then again, it cannot be said that since no other member has obstructed or been a cause for the AB crisis, the situation will be the same in the future as well. Therefore, it is needed to analyse the fact that what is the statutory provision that is allowing the members so that those members can take unfair advantage of it? Positive consensus is an evil that was used in the GATT as well. Establishing panels, adopting panel reports, etc., require this positive consensus requirement. It has so many success stories, although many contracting parties blocked the process from functioning, and therefore, in the Uruguay Round, both the developing and developed countries took the matter seriously and attempted to strengthen the dispute settlement mechanisms.³³

3.2 Appellate Body Blockage: An Anticipated Statutory Defect

According to the “An Organizational Theory of International Institutions”, it is the internal structure that determines the prospects of an organisation.³⁴ The blockage is indeed an unfair advantage of the positive consensus requirement. Therefore, it cannot be said that it was not predictable; rather, if this theory is considered as to why the League of Nations failed, it can be interpreted as it could indeed be presumed through the analysis of the League Covenant that it would not work. The evil of the positive consensus had an example even before the WTO regime, so nothing new; rather, this unfair advantage could easily be presumed even before the emergence of the US blockage strategy.

Indeed, the AB is not functioning largely because of Washington’s single-handed refusal to accept new members for it. The question should be Why has the US got the scope of using positive veto rights? While making the DSU statute, several examples were there before the world on the odd of the WTO. Not only the League of Nations, but even if the Russia-Ukraine situation is considered, the Security Council cannot do much in this regard because of the veto right of Russia. Perhaps it is the Kosovo crisis where all the permanent members of the Security Council refused to use their veto right and all gave consent, and therefore could make successful attempts. Also, GATT itself has faced the evil of veto right in case of the panel establishment or taking the panel report since the respondent could block the whole mechanism using the positive consensus requirement, and therefore it can be said that there is no room for taking the defence that the current

³³ WTO, ‘Historic development of the WTO dispute settlement system’ (Dispute Settlement System Training Module: Chapter 2, WTO) 1 <https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm> accessed 20 February 2025.

³⁴ Balding and Wehrenfenning (n 27).

crisis could not be assumed; rather, it can be said easily that the whole situation could easily be anticipated reading the provisions alone.

4. Available Alternative Approaches to DSB Paralysis

Even with so many scarcities, the world has perhaps been so generous that it keeps or creates multiple options for a problem. So, every problem has one or several solutions and alternatives. The WTO's existence is at stake without a properly functioning DSB—this is not the sole reality; rather, it is also true that the WTO regime, including the GATT and the annexes to it, has kept the option of solutions or alternative approaches. Therefore, the WTO regime is not over yet; rather, it is the WTO regime that is in a problematic situation, and it is again the WTO that can renovate it. The crippled DSB may lead to "retaliation and counter retaliation without the normal DSU controls and, ultimately, escalating 'trade wars'" if the disputants are both strong Members.³⁵ These are the currently available alternative approaches discussed below:

4.1 Consensual Agreement Not to Appeal

One solution can be that reaching an agreement between the parties not to appeal can be a method of not abusing the right to appeal. It is a kind of bilateral solution. But in the multilateral trading system, bilateral agreements will not help at large. Moreover, since bilateral systems were not that worthy, the multilateral trading system was introduced, and the WTO member states came together. If bilateral trade were adequate, multilateral trading systems would not be possible.

A Consensual Agreement on Not to Appeal is a practical short-term approach for ensuring that the WTO dispute settlement system functions properly. However, issues such as inconsistency, enforcement gaps, power disparities, and political influence must be addressed. Strengthening peer review, giving legal assistance to developing countries, and improving compliance processes can all help to limit these risks while WTO members work on long-term institutional reform.

4.2 Amending the Positive Veto or Consensus Mechanism

Every state has a positive veto when it affirms; it is unanimity when every state does so. Rethinking this is necessary. Under the WTO, decisions are made only through "consensus", and that a body "shall be deemed to have decided by

³⁵ Weihuan Zhou, 'Alternatives to the WTO Appellate Body' (*Hinrich Foundation*, 30 January 2020) <<https://www.hinrichfoundation.com/research/article/wto/phase-one-settlement-poor-alternative-to-wto-appellate-body>> accessed 20 February 2025.

consensus if no Member, present at the meeting when the decision is taken, formally objects” (footnote 1 to the Marrakesh Agreement).³⁶

WTO, being a legal, rational organisation utilises adjudication procedures to be independent and impartial, not considering any political or other influences. It should keep itself confined to the laws and regulations. It will decide whether a breach occurred and what decision should be taken against the breach, but that must be within the law, not anything *ultra vires*. The USA is using basically this positive consensus requirement in blocking the appointment. Through Christopher’s theory as discussed previously, an organisational system’s success or failure can be assumed through the charter forming it; it can be said that the crisis could have been assumed while making this, since the multilateral trade system has already faced these sorts of crises even before. This positive consensus caused a blockage of panels forming before 1995.

Lesson from GATT- The key GATT distinction was that countries could veto the dispute at any stage. This included a veto from the defendant before the dispute began or right before the adoption of a legal rule. Because the resulting legal process was uncertain, disputes were addressed through negotiation or not at all. And it was also a system that benefited those with power. In the early years of the GATT dispute settlement process, cases were submitted to working groups made up of a group of five to seven contracting party members, with one as chairperson, a representative. Representatives from the parties in conflict were also included in these initial working groups. Contracting parties started referring conflicts to panels later, in the 1950s, and after the 1970s, they largely took over the adjudicating role. Panels were made up of representatives from the contractual parties— not the disputed parties— and sporadically from non-governmental organisations, including academics or former judges from the local jurisdictions of the contracting parties.

When contracting parties couldn’t agree to form a working group or a panel, particularly in the 1940s and 1950s, the issue was occasionally settled directly by the contracting parties or all GATT contracting parties acting together. One dispute was still before the GATT Council, but because the conflicting parties had reached an agreement, it was not necessary for them to decide it. The Decision of 5 April 1966 on Procedures under Article XXIII included the possibility to request the “good offices of the Director-General of the GATT” acting *ex officio* in cases of conciliation and dispute settlement where the complainant was a developing country. In addition, the good offices of the GATT Director-General were sometimes requested as an informal means to resolve a dispute between contracting parties. Finally, there was one dispute where the parties jointly

³⁶ Joost Pauwelyn, ‘The WTO in Crisis: Five Fundamentals Reconsidered (*WTO*)’ <https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art9.htm> accessed 20 February 2025.

requested an arbitrator under the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures to respond to interpretive questions submitted by the parties.

It was the US that became increasingly frustrated with GATT's ineffectiveness in the 1980s. It turned out to be "aggressively unilateral". Growing concerns with US unilateralism at the time helped lead to the Uruguay Round agreement and the creation of the WTO dispute settlement system. While no major trade wars may have erupted, the GATT was never forced to confront today's trade tensions between market-oriented and state-driven economies. The WTO dispute settlement is not over yet, nor is the 2018 trade war. But if it goes, an evaluation of the effectiveness of the US strategy will also require a thorough assessment of the new dispute settlement system that replaces it. And that will require grappling with what the WTO system provided, wars and all.

However, the question is whether a majority voting system is still possible or if there is still room for improvement. Even though it's a contentious matter, there is still some optimism.

In order to prevent any unnecessary interpretation contradiction between these provisions, Articles 2.4 and 17.2 of the DSU (i.e., the "relevant MTA") may be read "holistically" alongside Articles IV:1 and IX:1 of the Marrakesh Agreement, as well as footnote 3 to Article IX:1. According to such a comprehensive interpretation, the MC does not use the consensus rule of Article 2.4 of the DSU when performing the role of selecting AB members.³⁷

According to the more accurate interpretation of the pertinent treaty clauses, the MC has the power to decide whether to nominate AB members by majority vote since under Art ix of the Marrakesh Agreement it is said, Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast where decision cannot be arrived at by consensus. The WTO is experiencing an existential crisis as a result of the Appellate Body's apathy, which is transcending the dispute resolution process. Here, the whole interpretation is to be made based on articles 31-32 of the Vienna Convention on the Law of Treaties. Also, the objective and purpose of GATT/WTO must be read together as *US-Shrimp* holds: "The Preamble must add colour, texture and shading to the interpretation of the agreements." Although not a single participant interpreted. The real question is why would the WTO members give the US the benefit of the doubt on this interpretation matter, since the US stance practically prevents the

³⁷ Matthew Yeo and others, 'Tensions Between Consensus and Voting in WTO Decision-Making – Part I: Appointing Appellate Body Members' (*Steptoe LLP*, 31 August 2021) <<https://www.steptoelaw.com/en/news-publications/global-trade-and-investment-law-blog/tensions-between-consensus-and-voting-in-wto-decision-making-part-i-appointing-appellate-body-members.html>> accessed 20 February 2025.

WTO's dispute settlement mechanism from operating?³⁸ The WTO is its member. So, if the members deny questioning or invoking this interpretation, the possible solution, even without amending, cannot be brought into light.

4.3 Recourse under Art. 25

The EU, Canada, and Norway have agreed to establish an interim appeal arbitration procedure under Article 25 of the DSU and are currently testing an alternative “interim” strategy. Article 25 offers an alternative method for WTO Members to quickly settle disputes based on established processes that may or may not adhere to the DSU procedures.³⁹ Consolidating its Dispute Settlement Body, which has the authority to decide on trade disputes and implement its rulings, is one of the WTO's most significant successes. Japan and China notified the DSB that they have agreed to the Procedures for Arbitration under Article 25 in the *DS601* dispute to handle any appeal.⁴⁰ The panel in *DS601* recently updated its schedule to say that it “now expects to issue its final report to the parties in May 2023.”

Based on predetermined rules, this dispute resolution procedure enables WTO members to file complaints about alleged violations of WTO rules and seek reparation, independent of their political influence or economic strength. This approach has reduced the use of unilateral defence measures, which some nations had previously taken and which frequently sparked responses by the nations targeted, occasionally resulting in full-fledged trade wars. The WTO dispute settlement process has so far ensured that stronger members do not outweigh weaker ones, and it has established clear guidelines for retaliatory actions.⁴¹

The effective use of Article 25 arbitration for appellate review in *Turkey-Pharmaceutical Products* has given rise to a new possibility: Article 25 arbitration might be set up permanently for WTO appellate review rather than just as an interim solution. Notably, the United States appears to be openly supporting this third option. As stated by the US, which was quoted in this blog, “If a member supports dispute settlement reform, then a bilateral arrangement presents a unique

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Simon Lester ‘China and Japan Agree To Use MPIA for DS601 Dispute’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2023/04/china-and-japan-agree-to-use-mpia-for-ds601-dispute.html>> accessed 20 February 2025.

⁴¹ Rasma Kaskina ‘The European Union and the World Trade Organization’ (*European Parliament*, April 2025) <<https://www.europarl.europa.eu/factsheets/en/sheet/161/the-european-union-and-the-world-trade-organization>> accessed 20 February 2025.

opportunity to explore alternative approaches.⁴² Adjustment could be made by adding a simple footnote to Article 16.4, so the provision would read as follows:

Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report. The appeal of a panel report may be made via arbitration under DSU Article 25.⁴³ Since any panel report not submitted to appeal arbitration would be automatically adopted by the DSB, it would not matter whether a specific member, such as the United States, would ever choose to invoke Article 25 arbitration itself.⁴⁴

Now the question arises: how to amend the DSU? Any member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such a proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annexe 2 shall be made by consensus, and these amendments shall take effect for all Members upon approval by the Ministerial Conference.⁴⁵ Now, doubt remains whether the US or the ultimate gainers would be positive enough to give consent to amend this provision. Although the Ministerial Conference can play a ‘game-changer’ role here, it can be an issue to discuss as well. As Article X of the Marrakesh Agreement specifies, “Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such a proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annexe 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) shall be made by consensus. Therefore, to amend any provision related to DSU to be made by all members’ consent. Again, as was being mentioned before, as per Art. ix (1), “Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting, and decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast.” So, the veto right in amending DSU or Annexe 2 should not be kept—this question can be subject to the MC decision, and that decision can be taken by the MC by majority vote. Thus, it is likely that it would be possible to reform the DSU by amending Article X, Paragraph 8, of the Marrakesh Agreement since Art. X (1)

⁴² Julia Qin, ‘DSU Article 25 Arbitration: A Long-Term Solution for the Appellate Body Crisis?’ (*International Economic Law and Policy Blog*, 25 September 2022) <<https://ielp.worldtradelaw.net/2022/09/dsu-article-25-arbitration-a-long-term-solution-for-the-appellate-body-crisis.ht>> accessed 20 February 2025.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Marrakesh Agreement (n 28) art x (8).

explicitly permits amendment of the agreement itself by majority vote if consensus cannot be made within a specified time.

This has the potential to dramatically assist the global trade system, as previously stated. The difficulty is that, despite being a good alternative within the WTO framework, it is not applicable! It needs to be evaluated and reconsidered as soon as possible.

4.4 Arbitration under MPIA—The last hope!

Under Article 25 of the Dispute Settlement Understanding, when a case involving two MPIA parties occurs at the WTO, the parties notify the WTO's Dispute Settlement Body jointly. This expresses the formal intent of the parties to resolve the dispute through MPIA procedures should it proceed to the appellate stage and outlines the steps they plan to take in this respect. Until March 2023, it had 53 members among the 164 members. Consistent with Article 25, the arbitration awards will be automatically binding on the disputing parties (based on their agreement to invoke Article 25) and will be subject to the same DSU rules on enforcement.

However, being a political agreement, members have a promise to take it as a temporary solution strategy until the problem is resolved. As has been discussed already, the MPIA is a multi-party arrangement to avoid the appeal blockage made by the USA. Notably, it is not an alternative of the WTO DSB appeal; rather, it is also within the Dispute Settlement Understanding, Art. 25.1, "Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed"—so the MPIA is simply an arbitration as per the direction of DSU. Also, as required under Art. 25.3 of DSU, "The parties to the proceeding shall agree to abide by the arbitration award"—so as in all the other arbitrations, the award is indeed binding on all the parties subject to the arbitration. The main goal was to prevent "appeals into the void," that is, blocking the dispute resolution process by appealing a panel report to an Appellate Body that no longer functions. Instead, MPIA participants committed ex ante "not to pursue appeals under Articles 16.4 and 17 of the Dispute Settlement Understanding" and to use the alternative of appeal arbitration, explicitly foreseen in Article 25 of the DSU, to complete possible appeals in disputes between MPIA participants.⁴⁶

⁴⁶ Joost Pauwelyn, 'The MPIA: What's New? (Part I)' (*International Economic Law and Policy Blog*, 21 February 2023) <<https://ielp.worldtradelaw.net/2023/02/the-mpia-whats-new-part-i.html>> accessed 23 April 2023.

1. The main goal was to prevent “appeals into the void”.
2. MPIA’s primary objective is, therefore, to preserve the system’s “binding character and two levels of adjudication” and enhance “the procedural efficiency of appeal proceedings”.
3. Taking appropriate organisational measures to streamline the proceedings, including “decisions on page limits, time limits, and deadlines as well as on the length and number of hearings required,” allowed arbitrators to “propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU”.

The MPIA worked in the sense that it enabled the completion of the *EU-Colombia frozen fries dispute* without blockage, thereby preserving the system’s “binding character and two levels of adjudication.”⁴⁷ It is asserted that MPIA has two important advantages over AB under the WTO. First, as seen in the *Frozen Fries case*, MPIA offers flexibility that enables parties to create a solution targeted to their unique problems and interests. Second, as the *Pharmaceutical Products case* demonstrates, MPIA promotes higher efficiency and cooperation among stakeholders, which improves participation and mutual understanding. As a result, trust can grow, and conflicts can be avoided in the future.

Now, doesn't the US worry about its bad name? During this time, governments have shown a predisposition for settlement before a panel ruling by making higher concessions (Busch and Rienhardt 2001). Katherine Tai says, “The WTO dispute settlement system reform is tied to the WTO consensus that the entire WTO ought to be reformed to reflect the economy that we're living in today.”⁴⁸ Instead of potential economic harm, nations' unwillingness to accept a negative decision and the ensuing loss of prestige appear to be the key drivers of settlement. In other words, states feared the loss of reputation more than the apparent economic harm brought on by an unfavourable decision. The World Trade Organization (WTO) aims for conditional membership rather than full inclusion. This guarantees that even the most different actors within the GATT/WTO system are held to the same standards and ensures that the internal democratic process is not dependent on the member states' democratic understanding of themselves but rather on the established “rules of the game” that are upheld by an impartial third party.⁴⁹

⁴⁷ Joost Pauwelyn, ‘The MPIA: What’s New? (Part II)’ (*International Economic Law and Policy Blog*, 27 February 2023) <<https://ielp.worldtradelaw.net/2023/02/the-mpia-whats-new-part-ii.html>> accessed 23 April 2023.

⁴⁸ Simon Lester, ‘The Latest from Katherine Tai on WTO Dispute Settlement Reform’ (*International Economic Law and Policy Blog*, 26 March 2023) <<https://ielp.worldtradelaw.net/2023/03/the-latest-from-katherine-tai-on-wto-dispute-settlement.html>> accessed 23 April 2023.

⁴⁹ Balding and Wehrenfenning (n 27).

Although this system allows developing countries to obtain enforceable rulings against trade barriers because powerful countries cannot unfairly exploit the Appellate Body Crisis, the challenge with this alternative approach is that the United States and many other countries are not parties, and there is no institutionalisation of MPIA. Formalising this MPIA can be beneficial and increase participation.

5. Positive Impacts of Alternative Approaches

A more stable and predictable global trading system is essential for promoting economic growth and ensuring fairness. The WTO Appellate Body crisis has weakened the organisation's ability to enforce trade rules, rendering it more symbolic than effective. This dysfunction disproportionately affects poorer countries, exposing them to the risks of power politics and unfair trade practices. Implementing and promoting alternative approaches can lead to a range of positive outcomes-

1. Alternative methods, such as the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), provide a structured approach to settling trade disputes. This ensures that international trade operates within a predictable and enforceable legal framework, reducing the likelihood of stronger economies imposing unilateral restrictions. As a result, it strengthens a rules-based trading system.
2. Without a functioning Appellate Body, developing countries are more vulnerable to coercive trade policies imposed by wealthier economies. Alternative approaches allow them to challenge discriminatory trade restrictions and maintain market access without fear of retaliation. A revised and diversified dispute resolution system prevents powerful countries from maintaining prolonged dominance. Furthermore, alternative methods give developing nations a stronger voice in shaping trade law and protecting their economic interests from unjustified trade barriers. Since developing countries often lack economic leverage to engage in prolonged trade disputes, these alternative mechanisms enable smaller economies to resolve disputes efficiently while avoiding the high legal and financial costs of WTO litigation.
3. By adopting alternative approaches, the WTO can restore confidence and legitimacy in its dispute settlement system. The Appellate Body crisis has paralysed the WTO's dispute resolution process, causing significant disruptions in the global trading system. If alternative mechanisms prove effective, they could help rebuild trust in the WTO's ability to enforce trade rules and resolve disputes fairly.

To summarise, alternative ways can positively improve the global trading system, restore the WTO's effectiveness, and bring major benefits to the developing nations by assuring fairer and more efficient dispute resolution.

6. Prospect of States' Cooperation under Alternative Approaches

The new emerging economies, if they work together to compel the players to follow the rules of the game, can nonetheless be an optimistic one. According to the regime theory, working together can result in overall better outcomes than working alone. Or, to put it another way, if sharing makes the cake bigger, an equal share of cake as before will nonetheless yield a bigger slice.⁵⁰ With this, basically, the question arises whether these countries with an emerging authority in economics and trade have the capacity to compel the largest economies with powerful political histories. Although emerging-market economies are not to blame for the Appellate Body crisis, they might have the key to solving it. To protect their business interests, Brazil, Mexico, India, China, Korea, Thailand, Indonesia, and, to a lesser extent, Vietnam and Turkey, have actively and successfully used the dispute resolution process. At the DSB meeting on September 25, 2009, Brazil reported, with satisfaction, its full compliance with the recommendations and rulings of the DSB.⁵¹ Their interest in an efficient, mandatory, and binding procedure for resolving disputes, upholding the rules, and maintaining access to foreign markets grows as their involvement in global trade expands. These economies might be a driving force behind a potential agreement to save the appeals system since they have a substantial investment in maintaining a two-step, rules-based mechanism for resolving trade disputes.⁵²

The unjust treatment of larger economies with special but different treatment outraged the Trump administration. These nations can bargain to give up their special status for a greater benefit during the negotiations. States cannot unilaterally decide or unilaterally take actions without recourse under the DSB.⁵³ This is undoubtedly true that the USA or such big economies are not the sole players in the market; whatever the trade war is, however larger the trade crisis might be, countries are indeed dependent on each other, and therefore, today or tomorrow, the market itself will balance any sort of imbalance created through the market players' notion of the game of the rules. It can be MPIA or any other alternative that can compel the USA or the countries or ensure cooperation from the actors, intending or not intending to block the dispute settlement, or it can be something else, but the blockage of settling disputes or any such non-cooperation won't sustain, definitely not. To understand this reasoning, it would be more

⁵⁰ Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, CUP 2015) 109.

⁵¹ Brazil — *Measures Affecting Imports of Retreaded Tyres* (Status Report by Brazil) WT/DS332/19/Add.6 (15 September 2009) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm> accessed 30 April 2023.

⁵² Euijin Jung and Anabel González, 'Developing Countries Can Help Restore the WTO's Dispute Settlement System' (CEPR, 27 January 2020) <<https://cepr.org/voxeu/blogs-and-reviews/developing-countries-can-help-restore-wtos-dispute-settlement-system>> accessed 20 February 2024.

⁵³ WTO, 'Historic development of the WTO dispute settlement system' (n 33).

efficient if the answer could be found in the question, ‘Why do nations trade, cooperate, and comply or compromise?’ Answering this question would require a brief discussion based on classical and contemporary national-level explanations.

6.1 Reasons behind the State's Accountability towards the International Community

External political pressure is one of the reasons for compliance.⁵⁴ A state’s desire to be within an international community compels them to cooperate in either form of cooperation or compliance. States find it more efficient to operate within a multilateral system rather than bilateral agreements, according to the rationalist regime theory. Many nations must maintain their image in international affairs. The pressure on the state to comply can be more specific in some circumstances, particularly those where noncompliance is implied or anticipated. Reputational costs encourage compliance, similarly to global organisations’ presence and pressure from the global community.

Participating actively in international organisations raises the reputational cost of breaking the law, which enhances the likelihood that compliance will occur. The recently resolved conflict between Malaysia and Singapore over ownership of Pedra demonstrates how reputation costs encourage compliance even when the outcome is seen negatively by one or both parties.⁵⁵ States are more likely to abide by international laws that are not in their immediate best interests than would be predicted by a realist perspective because they anticipate losing future profits.⁵⁶

6.2 Theoretical Incentives behind Multilateral Trade

One of the very recent studies that has aimed to explain the trade relationship between the US and Bangladesh shows that it follows H-O and Rybczynski’s trade predictions. Since Bangladesh has a plentiful labour sector, the US has a higher import need for this factor.⁵⁷ Now, although due to unskilled labour, the import has decreased, it is not the case that the need for US labour has decreased; rather, the need has perhaps shifted to another country, but it has not indeed been eliminated. According to the quasi-Heckscher-Ohlin model, US capital-based import industries import commodities from countries whose production and exports are capital-intensive, just as US labour-intensive import industries import

⁵⁴ Heather L Jones, ‘Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice Since Nicaragua’ (2012) 12(1) *Chicago-Kent Journal of International and Comparative Law* 57.

⁵⁵ Anne Van Aaken, ‘Behavioral International Law and Economics’ (2014) 55 (2) *Harvard International Law Journal* 421.

⁵⁶ *ibid.*

⁵⁷ Tanjina Akther, Liton Chandra Voumik and Md Hasanur Rahman, ‘The Pattern of International Trade between Bangladesh and USA: Heckscher–Ohlin and Rybczynski Analysis’ (2022) 4(3) *Modern Supply Chain Research and Applications* 162–176.

more commodities from countries with labour-intensive production and exports. If all nations employ the same manufacturing technique, the main driver of product differentiation is a variation in the cost of factors (labour/capital; wages/rent).

Countries create and export more items as a result, which heavily utilise their comparatively cheap production factors. Again, if we consider this contention of absolute advantage theory, a nation should only create goods in which it has an edge or can do so with fewer resources than another nation. Each state now experiences some kind of scarcity. For instance, a country's soil is suitable for growing wheat but not rice. By this hypothesis, the nation would more effectively cultivate wheat, but it must import rice due to demand, even though the quantity is small. This also forces the nation to participate in the multilateral trading system.

6.3 Incentives Facilitating Cooperation

Humans show reciprocal norms, not always for external sanctions but for internal norms such as naming and shaming games. Since states are made up of people and collective actions, reciprocity exists. Rationalists do not expect costly punishment. Being excluded from the alternative settlement mechanism is also a form of punishment, and perhaps the US would not take it easily. Excluding defects from club goods is a cheap and impactful sanctioning device.⁵⁸ Because even narrow, self-interested free riders are not willing to cooperate until others exploit them. But the free rider problem is morally blameworthy, and therefore, if others start the naming and shaming game and other mechanisms, the scenario can be expected to change. Technically, it is not possible to invoke state responsibility for AB blockage since the US is lawfully doing so. To make a state responsible, it is necessary to establish a breach and the attribution of the state.

However, since there is no obligation to give consent to an AB judge's appointment, countermeasures, even in the form of economic sanctions or other sanctions that are given under DARSIIWA, are lawful only in cases of wrongful acts that cannot be invoked here since that is being lawfully taken by the US and the US is taking unfair advantage of it. So, legal sanctions are not possible under DARSIIWA (Draft articles on Responsibility of States for Internationally Wrongful Acts), but naming and shaming may be there by other states. Even simple symbolic sanctions, such as verbal or written condemnations or sectors of disapproval, might encourage collaboration. As a result of triggers related to guilt and shame, experiments have shown that people are sensitive to how others are

⁵⁸ Anne van Aaken, 'Effectuating Public International Law through Market Mechanisms' (2009) 165(1) *Journal of Institutional and Theoretical Economics* 33–57.

perceived.⁵⁹ Here, the states are indeed ruled by human conduct. Even without the possibility of a material payment reduction, if symbolic sanctions are imposed, that will still be effective. Most actors, or so-called conditional cooperators, who are prepared to invest in trust, are anticipated to cooperate if there are enough players "in" and a realistic assumption that other states will comply. This is true even if some players are resistant.⁶⁰

If the case of the US withdrawing from the Paris Agreement is taken, the question may arise: will other nations maintain their commitment to combating climate change despite the key country, the USA, withdrawing from the Paris Agreement? Even if it is a large country, the one that refuses to abide by the Paris Agreement shouldn't matter if other nations continue to reaffirm their commitment to it. Following the statement by the Trump administration, China and the EU swiftly reaffirmed their commitment and expanded their collaboration. Particularly, the MPIA provides the same indication through the AB alternatives. The US is excluded in this case due to its actions, not those of others.

6.4 Current US Diplomacy and Economy are at stake

Moreover, the US economy is already under threat. With analysts disputing whether it may threaten the dollar's hegemony, it's still unclear how a new BRICS currency might affect the US dollar. The de-dollarisation moment might finally be there.⁶¹ However, if a new BRICS currency were to stabilise versus the dollar, it may lessen the impact of US sanctions, which would cause the dollar's value to drop even further. Indeed, firstly, as the West predicted, the Western sanctions on Russia would cause a lot of harm to Russia; things really did not work out.⁶² Rather, after the Ukraine invasion, the de-dollarisation process has been accelerated.⁶³ Additionally, American households may experience an economic catastrophe as a result. As a result, investors would need to adjust their tactics. If

⁵⁹ Anne van Aaken, 'Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources' (2018) 112(1) *American Journal of International Law* 67–79.

⁶⁰ *ibid.*

⁶¹ Joe Sullivan, 'BRICS Currency Could End Dollar Dominance' (*Foreign Policy*, 24 April 2023) <<https://foreignpolicy.com/2023/04/24/brics-currency-end-dollar-dominance-united-states-russia-china/>> accessed 20 February 2025.

⁶² 'What Are the Sanctions on Russia and Have They Affected Its Economy?' (*BBC News*, 27 January 2022) <<https://www.bbc.com/news/world-europe-60125659>> accessed 20 February 2025.

⁶³ Mihaela Papa and The Conversation, 'How Long Will the Dollar Last as the World's Default Currency? The BRICS Nations Are Gathering in South Africa This August with It on the Agenda' (*Fortune*, 25 June 2023) <<https://fortune.com/2023/06/25/dollar-reserve-currency-brics-brazil-russia-india-china-south-africa>> accessed 20 February 2025.

introduced, a new BRICS currency would also bring about new trading pairings, change currency correlations, and affect market volatility.⁶⁴

The CEO and creator of the investing website Bull and Bear Profits is Wolfenbarger. The war between Russia and Ukraine and China's ongoing economic growth, he claimed, are accelerating the BRICS' efforts to overthrow the United States.⁶⁵ The former investment banker at JPMorgan made the following statement regarding the economic and political effects of a BRICS currency on the United States and the USD: "If the BRICS are successful and the United States does not change its policies to focus on a stronger dollar, less spending and peace instead of war, the dollar may gradually lose its 'reserve currency' status." Also, JP Morgan flags some signs of emerging de-dollarisation⁶⁶. It is assumed that by the year 2050, while maintaining economic dynamics, the total GDP of the BRICS countries will be 2.4 times higher (or 46.2% of the world GDP) than that of the developed countries—members of the G7.⁶⁷

Besides, the loss of US influence in comparison to Chinese involvement in almost every continent. In most of Africa and Southeast Asia, Chinese influence is greater than US influence, and it has grown in the former Soviet Union. The US advantages in South America, Western Europe, and East Asia have also been weakened by Chinese influence. China's state-owned companies are significant investors in Latin America's energy, infrastructure, and space sectors, and the nation has eclipsed the United States as South America's top trading partner.⁶⁸ In addition, it is safe to say that the United States' reputation abroad has suffered. The United States' withdrawal from Afghanistan is part of a broader inward shift, or the United States may soon reassert itself somewhere else to demonstrate to the

⁶⁴ Melissa Pistilli, 'How Would a New BRICS Currency Affect the US Dollar? (Updated 2025)' (*Investing News Network*, 06 January 2025) <<https://investingnews.com/brics-currency>> accessed 20 February 2025.

⁶⁵ Kevin Helms, 'Investment Analyst Warns Successful BRICS Currency Could Hurt US Living Standards – Bitcoin News' (*Bitcoin News*, 11 May 2023) <<https://news.bitcoin.com/investment-analyst-warns-successful-brics-currency-could-hurt-us-living-standards>> accessed 20 February 2025.

⁶⁶ Marc Jones, 'JPMorgan Flags Some Signs of Emerging De-Dollarisation' *Reuters* (London, 05 June 2023) <<https://www.reuters.com/markets/signs-de-dollarisation-emerge-dollar-top-currency-jpmorgan-2023-06-05/>> accessed 20 February 2025.

⁶⁷ D I Kondratov, 'Internationalization of the Currencies of BRICS Countries' (2021) 91 *Herald of the Russian Academy of Sciences* 37.

⁶⁸ Diana Roy, 'China's Growing Influence in Latin America' (*Council on Foreign Relations*, 6 April 2022) <<https://www.cfr.org/background/china-influence-latin-america-argentina-brazil-venezuela-security-energy-bri>> accessed 20 February 2025.

world that it still has strength.⁶⁹ The American era doesn't seem to be nearly over yet, but it also doesn't seem to be what it once was.⁷⁰

7. Conclusion

It has been decided to develop a "fully and well-functioning dispute settlement system" by 2024 at the 12th WTO Ministerial Conference in June 2022. Although the US does not support their proposal to initiate the selection process of AB judges.⁷¹ Mexico, on behalf of 123 proponents, has mentioned current blockage in selection has no legal justification.⁷² Nonetheless, it is a good indication that many members have taken it as a common concern; at least long silence is broken. However, the course of Appellate Body reforms has not yet been decided, and it is not clear if members, including the United States, can come to an agreement. The US presidential election in 2024 may also harden the nation's stance on dispute settlement reform.⁷³ However, joining the alternative forum of big economies like China, Japan, the EU, etc., in a sense, makes the US indeed kind of left alone. The involvement of Japan may encourage additional non-MPIA members to sign up.⁷⁴ The MPIA's worth rises in direct proportion to the number of WTO participants.

On the other hand, it is uncertain whether the MPIA's expansion will be an obstacle or a step toward WTO dispute settlement reform, even if it happens. It might cause the US to distance itself even more from the WTO, losing enthusiasm for reform. The international order based on rules might then be further threatened. However, it might also force the United States to reconsider its ability to exert pressure on WTO members to adopt its reform model and the benefits of leaving behind a system that is still functional in practice.⁷⁵ When a state infringes international law, it gains a negative image that causes nations to bar it from future cooperative opportunities. States will often abide by international laws that are not in their immediate best interests, contrary to what a realist perspective would predict, because they anticipate losing out on future rewards.⁷⁶ So, as per the dependence discussed above, along with all other factors in theory and practice,

⁶⁹ Jon Lee Anderson, 'Is the U.S. Withdrawal from Afghanistan the End of the American Empire?' (*The New Yorker*, 01 September 2021) <<https://www.newyorker.com/news/daily-comment/is-the-us-withdrawal-from-afghanistan-the-end-of-the-american-empire>> accessed 20 February 2025.

⁷⁰ *ibid.*

⁷¹ 'Members Welcome MC12 Commitment to Address Dispute Settlement' (*WTO*, 2022) <https://www.wto.org/english/news_e/news22_e/dsb_30jun22_e.htm> accessed 20 February 2025.

⁷² *ibid.*

⁷³ Arata Kuno, 'Japan's Joining MPIA an Outside Chance to Boost Momentum for WTO Reform' (*East Asia Forum*, 14 May 2023) <<https://www.eastasiaforum.org/2023/05/14/japans-joining-mpia-an-outside-chance-to-boost-momentum-for-wto-reform>> accessed 20 February 2025.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Aaken (n 55).

it can be said undoubtedly that each nation therefore depends in some way on another and therefore gets itself involved in the trading system. Being one of the most important actors in trading, the US is not only dependent on other countries like China or others, but China, along with many other states, has a severe dependence on trading and diplomacy that cannot be denied even for a while.

To prove that trade war prevention is important and that arbitrary trade conflicts may necessitate a substantial role for dispute settlement, the study has made the effort to analyse various trade war strategies. But AB obstructions make it difficult to get the right treatment for the arbitrary trade. However, states have a variety of options for dealing with the AB blockade, and acting under those options has been briefly reviewed with the drawbacks and potential of those other techniques. Many states are recently trading and trying to settle disputes, which can indeed lead the US to compromise its position. Since multilateral trade is purely dependent on each other and no country can go a day without trading with others, it is most likely that the US would compromise soon anyway. However, a WTO without the US, a US without WTO or a global economy without WTO—no situation is much more feasible. Because there is direct dependence. Therefore, the study's conclusion examines several theoretical aspects to help readers understand the motivation that would force them to concede if the US or any other country sought to hinder AB. The likelihood of compromise is great, but only time can tell us what exactly will happen.