

*

* *

THE PARALYSIS OF THE WTO APPELLATE BODY:

THE GEOPOLITICAL MANIPULATION OF A LEGAL PRINCIPLE

Adrien PRADELS¹ | September 7, 2026

* *

*

§ABSTRACT. The Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).² The latter provides that the Appellate Body is composed of seven members serving staggered four-year terms, three of whom sit on any given appeal.³ Because three members constitute the absolute minimum quorum to hear a case, the Appellate Body has been completely non-functional since December 2019: ‘On 10 December the Appellate Body was reduced to one member after the second terms for two of the remaining three members expired’.⁴ Indeed, the United States (US) has continuously blocked the appointment of new judges since 2016,⁵ citing concerns over judicial overreach.⁶

¹ TOULOUSE CAPITOLE UNIVERSITY & EUROPEAN HORIZONS TOULOUSE, ADRIEN.PRADELS@GMAIL.COM, [LINKEDIN](#). EHT is a global think tank founded in Toulouse in 2019 in order to promote reflection and dialogue on the future of the European project, European integration, and the European Union. The mission of this policy incubator is to raise awareness, spark debate, and bring European youth closer to the European project. To this end, EHT seeks to promote dialogue and exchange among European students, and is committed to enabling all students interested in the future of Europe to express their opinions.

² Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1869 UNTS 401, art 17(1): ‘A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from Panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.’

³ ‘Appellate Body Members’ WTO <wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 30 August 2026.

⁴ ‘Members urge continued engagement on resolving Appellate Body issues’ (WTO, 18 December 2019) <wto.org/english/news_e/news19_e/dsb_18dec19_e.htm> accessed 30 August 2026.

⁵ Brandon J. Murrill, ‘The WTO’s Appellate Body Loses Its Quorum: Is This the Beginning of the End for the “Rules-Based Trading System”?’ (Congress.gov, 16 December 2019) <congress.gov/crs-product/LSB10385> accessed 30 August 2026.

⁶ ‘Crisis in WTO’s Appellate Body’ (Shankar IAS Parliament, 20 May 2019) <shankariaspriamnet.com/current-affairs/economy/crisis-in-wtos-appellate-body> accessed 30 August 2026.

§1. A DE FACTO ‘PROCEDURAL VETO’. The dispute originated in the United States’ condemnation of the ‘zeroing’ methodology⁷ used by its Department of Commerce to calculate anti-dumping margins.⁸ The Appellate Body would thus undermine US practice in the field of trade remedies by ruling against a long-standing practice authorised by the Anti-Dumping Agreement.⁹ The 2020 US Report strongly condemns the development of a resistant institutional culture,¹⁰ aimed at broadening the scope of WTO obligations.¹¹ Thus, without a functional ‘supreme court of world trade’ (i.e., the WTO Appellate Body),¹² countries may increasingly resort to unilateral tariffs and trade wars. As Roberto CARVALHO DE AZEVEDO, former WTO Director-General (2013–2020), observed in 2019: ‘A well-functioning, impartial and binding dispute settlement system is a core pillar of the WTO system. [...] Rules-based dispute resolution prevents trade conflicts from ending up in escalating tit-for-tat retaliation [...] or becoming intractable political quagmires’.¹³ Three major issues arise from this deadlock: **(i)** the accumulation of pending appeals; **(ii)** the absence of any obligation to comply with WTO law, since appeals can no longer be adjudicated;¹⁴ and **(iii)** the risk that disputing parties exploit an ‘appeal into the void’. To illustrate this last point, this paper focuses on the case of Indonesia and its stranglehold on nickel exports.

§2. AN APPEAL ‘INTO THE VOID’. Through a succession of policies implemented between 2009 and 2019, the Indonesian government has banned the export of nickel ore by April 2022,¹⁵ while requiring that it be processed within the country.¹⁶ On 22 November 2019, the European Union (EU) requested consultations with Indonesia regarding a ‘cross-sectoral import duty exemption scheme conditional upon the use of

⁷ Zeroing involves treating negative dumping margins as zero rather than as negative when calculating an overall margin, while positive margins are retained at their actual values, thereby artificially inflating the anti-dumping duties imposed.

⁸ Appellate Body Report, *United States: Laws, Regulations and Methodology for Calculating Dumping Margins* (‘Zeroing’) (18 April 2006) WT/DS294/AB/R; Appellate Body Report, *United States: Measures Relating to Zeroing and Sunset Reviews* (9 January 2007) WT/DS322/AB/R; Appellate Body Report, *United States: Continued Existence and Application of Zeroing Methodology* (4 February 2009) WT/DS350/AB/R.

⁹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1868 UNTS 201.

¹⁰ Office of the United States Trade Representative, *2020 Report on the Appellate Body of the World Trade Organization* (February 2020) 81: ‘In addition to failing to follow the rules that WTO Members have adopted, the Appellate Body has erroneously interpreted and applied numerous important WTO agreements. The Appellate Body has overreached on substantive issues, engaged in impermissible gap-filling, and read into the WTO agreements rights or obligations that are not there.’

¹¹ WTO General Council, *An Underdiscussed Aspect of the Appellate Body Crisis: Systemic Implications for the Dispute Settlement System. Communication from the United States*, WT/GC/W/753 (26 February 2019).

¹² Tom Miles, ‘WTO permits US to use long-outlawed policy to calculate anti-dumping tariffs on softwood lumber’ (*The Globe and Mail*, 9 April 2019) <theglobeandmail.com/business/article-wto-permits-us-to-use-zeroing-to-calculate-anti-dumping-tariffs-on/> accessed 30 August 2026. The term appears to have been adopted, perhaps surreptitiously, by the 2020 USTR Report, which accused the Appellate Body of ‘holding itself out as an ersatz “Supreme Court of International Trade” that creates “WTO law”’.

¹³ ‘DG AZEVEDO to launch intensive consultations on resolving appellate body impasse’ (*Wto*, 9 December 2019) <wto.org/english/news_e/news19_e/gc_09dec19_e.htm> accessed 30 August 2026.

¹⁴ WTO Appellate Body, *Annual Report for 2022* (2023) WT/AB/27.

¹⁵ Natural Resources Canada, ‘Faits sur le nickel (Facts about nickel)’ (*Government of Canada*, 5 January 2026) <ressources-naturelles.canada.ca/mineraux-exploitation-miniére/donnees-statistiques-analyses-exploitation-miniére/faits-mineraux-x-metiaux/faits-nickel> accessed 30 August 2026 (Indonesia accounts for over 61% of global nickel ore production).

¹⁶ ‘Prohibition of the export of nickel ore’ (*International Energy Agency*, 19 March 2024) <iea.org/policies/16084-prohibition-of-the-export-of-nickel-ore> accessed 30 August 2026.

domestic over imported goods'.¹⁷ On 6 December 2019, the US requested to join the consultations; unsurprisingly, given its own economic interest in nickel as an input for longer-lasting batteries. According to the EU, Indonesia's export restrictions on nickel were inconsistent with (i) Article XI:1 of the GATT 1994¹⁸ and (ii) Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures.¹⁹ Indonesia responded that the measures were temporary and intended to address a critical shortage of an essential product within the meaning of Article XI:2(a) of the GATT 1994. The WTO Panel's report, circulated on 30 November 2022,²⁰ found that Article XI:1 applies to domestic regulations and that measures restricting export sales fall within its scope.²¹ Because Indonesia had argued that low-grade ore was not economically viable, the Panel declined to treat it as an essential product. Furthermore, given the duration of the export ban and the Domestic Processing Requirement (seven and nine years respectively), it concluded that Indonesia had not shown these measures to be strictly necessary to prevent an imminent shortage. The Panel accordingly recommended that Indonesia bring its measures into conformity with its obligations under the GATT 1994. On 8 December 2022, Indonesia notified its decision to appeal 'into the void' (i.e., to the non-functioning Appellate Body), blocking the final and binding resolution of the dispute.²² This therefore raises a significant difficulty: while the right to appeal is recognised under Articles 16.4 and 17 of the DSU and Rule 20(1) of the Working Procedures for Appellate Review, Article 17.5 of the DSU also requires that appeals be resolved within 90 days. In order to enforce the EU's rights,²³ the European Commission relied on Articles 4 and 9 of the amended Enforcement Regulation No 654/2014.²⁴

§3. AN ALTERNATIVE SOLUTION: THE MPIA. 'The Europeans are working hard to find an interim solution,' declared Cecilia MALMSTRÖM, the EU's Trade Commissioner at the time.²⁵ By April 2020, 18 WTO

¹⁷ 'Indonesia – Measures Relating to Raw Materials (DS592)' WTO <wto.org/english/tratop_e/dispu_e/cases_e/ds592_e.htm> accessed 30 August 2026.

¹⁸ General Agreement on Tariffs and Trade 1947 (GATT) 55 UNTS 194, as incorporated into GATT 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994).

¹⁹ Agreement on Subsidies and Countervailing Measures, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 14.

²⁰ Panel Report, *Indonesia – Measures Relating to Raw Materials* (30 November 2022) WT/DS592/R.

²¹ 'Indonesia – Raw Materials (DS592)' in WTO, *Dispute Settlement: One-Page Case Summaries* (2023 edn) 259.

²² Indonesia, Notification of an Appeal by Indonesia under Article 16.4 and Article 17 of the DSU, and under Rule 20(1) of the Working Procedures for Appellate Review, in *Indonesia – Measures Relating to Raw Materials* (8 December 2022) WT/DS592/6.

²³ 'Information gathering on the Indonesian export ban and Domestic Processing Requirement (DPR) on nickel ore' (*European Commission | Trade and Economic Security*, 1 September 2023) <policy.trade.ec.europa.eu/consultations/information-gathering-indonesian-export-ban-and-domestic-processing-requirement-nickel-ore_en> accessed 30 August 2026.

²⁴ Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules [2014] OJ L189/50, arts 4 and 9, as amended by Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 [2021] OJ L49/1.

²⁵ Rayan Djoulait, 'Quel rôle joue l'Union européenne face à la paralysie de l'OMC ? (What Role is the European Union Playing in the Face of the WTO's Paralysis?)' (*Le Taurillon*, 10 April 2020) <taurillon.org/quel-role-joue-l-union-europeenne-face-a-la-paralysie-de-l-omc> accessed 30 August 2026.

members agreed to set up the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).²⁶ Acting under Article 25 of the DSU, they became parties to this alternative mechanism designed to allow the review of Panel reports in the absence of a functioning Appellate Body. ‘The multilateral appeal arbitration arrangement will [...] provide access to a mutually agreed dispute settlement system that is binding, impartial and of high quality,’ said Phil HOGAN, Commissioner for Trade.²⁷ In March 2026, the MPIA counted 61 members.²⁸ As the WTO’s current Director-General, Ngozi OKONJO-IWEALA, pointed out at the fourteenth WTO Ministerial Conference, the ‘real success of the MPIA should not be judged just by the number of appeals it handles [...]. Rather, it lies in the commitment of members that have chosen to join it to refrain from appealing cases into the void, and to bring any dispute with another MPIA participant to a timely and binding resolution’.²⁹

* *

*

²⁶ Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc JOB/DSB/1/Add.12 (30 April 2020): Australia, Brazil, Canada, Chile, China, Colombia, Costa Rica, the EU, Guatemala, Hong Kong, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, and Uruguay.

²⁷ Djoulait (n 25).

²⁸ ‘Alternative Dispute Resolution Procedures’ WTO <wto.org/english/tratop_e/dispu_e/altds_e.htm> accessed 30 August 2026. See also ‘WTO Multi-Party Interim Appeal Arbitration (MPIA): Shrinking the Void?’ (*Aceris Law*, 26 July 2025) <acerislaw.com/wto-multi-party-interim-appeal-arbitration-mpia-shrinking-the-void/> accessed 30 August 2026.

²⁹ ‘DG cites MPIA as “Practical, Confidence-Building Bridge” pending dispute reform deal’ (*WTO*, 28 March 2026) <wto.org/english/news_e/news26_e/mc14_28mar26_350_e.htm> accessed 30 August 2026. See also Baig Khurram and others, ‘Appellate Body of the World Trade Organization Crisis: Consequences and Pathways to Reform’ (2026) 4(2) *International Premier Journal of Languages & Literature* 645.