

# G2 HACKATHON CHALLENGE

How to Make the WTO  
Fit for Future Trade



INSTITUTE OF INTERNATIONAL  
ECONOMIC LAW  
GEORGETOWN UNIVERSITY LAW CENTER



**Akin Gump**  
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# 2021 Hackathon Submission

## Reform of the Appellate Body

### Team New Trade Generation

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## Question #1

Define the substantive issue that your team is addressing, why it's a problem, and why your team believes the WTO is the right forum to address it.

The global trading environment has been severely affected by the dual strains of a pandemic and trade protectionism, with the World Trade Organization (WTO) facing an unprecedented challenge of its disputes settlement mechanism (DSM) appellate body suspension, due to the United States' (U.S.) obstruction. The WTO is in a state of flux, and if major changes are not decided upon, it will rapidly lose importance.

States have long relied on the WTO to settle their trade disputes. More than 570 disputes have been taken to the WTO by member states since its inception in 1995. Cases are heard by a separate conflict resolution panel for each dispute, and panel rulings may be appealed to a standing Appellate Body. Compliance with DSB rulings is generally high, and the WTO framework provides clear remedies if a respondent fails to comply with the rulings of the DSB. This successful track record, along with its unique institutional features, has contributed to the dispute settlement system's reputation as the "crown jewel" of the international trade regime.

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Its crown, however, is weakening. The U.S. has been outspoken in its opposition to certain aspects of the WTO's dispute resolution structure, especially the AB, for many years, vetoing certain nominations as early as 2011. The AB is planned to provide a standing roster of seven serving members as the ultimate adjudicator of WTO trade disputes. From 2020 on only one member left, the current AB is incapable of writing reports, which legally means that no decisions can be delivered. Since the AB currently lacks sufficient members, a WTO member state that receives an adverse panel decision may file an appeal to prevent the decision from being adopted (and thus being binding), secure in the knowledge that the AB may not hear the case. The long-term stability of the WTO dispute settlement mechanism depends on all WTO Members' full confidence and support, including major players like the United States.

Regardless of who is to blame, the WTO is in disarray, and pressure for significant change is needed before the system becomes useless. It is important to note that any successful WTO reform initiative would necessitate greater cooperation and coordination between the U.S. and the European Union. Although the Biden administration has stated its strong support for reforming the body and collaborating with other WTO members, its precise positions and priorities regarding the institution have remained ambiguous thus far. The journey ahead is likely to be difficult and lengthy, and despite its shortcomings, the WTO has achieved a lot over the years, losing it will be a huge loss for the world.

The WTO's ability to survive this storm will be determined over time. Caving in to the demands of one member to save an Appellate Body could set a dangerous precedent. This may be the "do or die" moment for the WTO's membership.

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## Question #2

Propose a specific treaty text, or more informal commitment/declaration text, that addresses either the concern or a particular, detailed aspect of it.

Reverse consensus method for nominating new Appellate Body members: Any WTO Member who wants to prevent the appointment must convince all other WTO Members (including the adversarial party in the case) to join its opposition or at the very least remain passive.

An enforcement of the 90-day timeframe for appeals: The strategy that the Appellate Body asked disputing parties for permission to go beyond the DSU's 90-day deadline, should be revived and made mandatory. WTO Members should consider making the 90-day deadline jurisdictional, meaning that if the Appellate Body extends the 90-day timeframe without the parties' consent or a decision of the WTO's Dispute Settlement Body, the Appellate Body will lose jurisdiction to hear the appeal.

A clarification that DSU Article 3.2 does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage: WTO Members should consider offering clarification on the interpretation of Article 3.2 in order to explain that it does not warrant extending or restricting the scope of WTO provisions or filling gaps.

Short-term adoption of an AB resurrection: Allowing the simple one member to deliver binding appellate body reports.

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### Question #3

Suggest a legal/technical or institutional way to implement your textual proposal within the broader WTO framework (500 words)

First of all it is important to note that none of the necessary changes will be feasible unless the United States (U.S.) and the European Union (EU) can come to an agreement. The U.S. and the EU share similar principles and co-founded the World Trade Organization. If they can't agree about how to fix the WTO, it's unthinkable that the rest of the world will be willing to.

Several solutions to the issue are at hand. Firstly, the reverse consensus method for nominating new Appellate Body (AB) members can be implemented through a change of article 2.4 DSU: "Any WTO Member who wants to prevent the appointment must convince all other WTO Members (including the adversarial party in the case) to join its opposition or at the very least remain passive." However, amendments to the DSU would entail the approval of all 164 WTO member states, which will be difficult. Nevertheless, WTO members have a shared responsibility to resolve this issue as soon as possible, and to fill the outstanding vacancies as required by Article 17.2 of the DSU. Thus, the WTO could use the latter article as an incentive for adopting the above-mentioned change of article 2.4 DSU.

Secondly, allowing the simple one member of the AB to deliver binding AB reports. The AB can make changes to the Working Procedures itself. On the surface, this seems to be a much easier job than adopting the reverse consensu method.

Thirdly, the enforcement of the 90-day timeframe for appeals can be made jurisdictional through the adoption of a new article in the DSU which would again require the approval of all 164 members.

And finally, the clarification that Article 3.2 DSU does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage can be made by the Ministerial Conference and the General Council.

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