

The Expectation of the WTO Dispute Settlement Mechanism after the "Paralysis"

Yuxin Song

Law of school, University of Leeds, LS2 9JT, England

Abstract

WTO dispute settlement mechanism since its birth has been known for its efficiency and fairness and is an important force to maintain the multilateral trading system, the appellate body is more known as the "Supreme Court" in the dispute settlement mechanism, but as the American impact of the appellate body and eventually lead to the lockout, the problem of the appellate agency also exposed. While the shutdown of the appellate body will not directly lead to the collapse of the existing multilateral trading system, the appellate body shutdown will create significant uncertainty for the WTO. How to survive this shutdown and restore the appellate body through the necessary innovation and improvements is not only an important task for WTO members but also the need to curb unilateralism and fight trade protectionism.

Keywords

Appellate Body; Dispute Settlement Mechanism; Lockdown; World Trade Organization.

1. Foreword

World Trade Organization (WTO) since its inception, to promote the development of world trade and global economic contribution is indelible, but in recent years the United States out of its interests frequently obstruct the development of the appellate agency (AB), 2013 the appeal agency failed to comply with the agreed rules concerns prevented Kenya law professor James tier (James Gathii) become a member of the appellate body[1]. In 2016, the United States blocked the re-election of South Korean law professor Zhang (Seung Wha Chang) for the same reason [2] The United States has since opened Pandora's box, and the appellate agency became paralyzed and died when the last member expired in December 2020. Initially, American criticism of appellate agencies focused on procedural conflicts between members of specific appellate agencies and has evolved into broader attacks on substantive precedents and judicial approaches to appellate agencies, and more serious systemic attacks. Appellate agency, the suspension does not necessarily mean the collapse of the entire DSM, because the appellate agency's task is only to evaluate the legal facts of the appeal report and the jury's legal settlement of it. Moreover, the appellate agency's decision needs approval by the dispute resolution agency to take effect. Nevertheless, this important judiciary collapsed as if the gem on the crown of the dispute settlement mechanism had been removed from the top of the crown, leaving it significantly empty. Indeed, the suspension of the WTO's appellate body will mean that the current and future settlement of the WTO disputes, particularly in the handling of its panel reports, will not be addressed fixedly and uniformly, but through a more diverse and decentralized model.

After the shutdown of the appellate body, all parties proposed new plans to try to restart the appellate body. The WTO's DDG Ellard notes that if the WTO rules cannot be implemented, no matter how old or how new they are, then their effectiveness is limited. In the long run, WTO members will continue to deal with trade frictions through WTO rules because they do not trust the WTO's dispute settlement capabilities, which will lose the meaning and purpose of its

establishment[3]. True, enforcement is important, but it ignores the particularity of the appellate body. The WTO cannot fundamentally change the outcome of negotiations and negotiations between sovereign states, because its binding force depends entirely on the support of member states for each agreement, which often depends on careful political balance[4]. This paper will analyze the causes of the crisis in appellate agencies while discussing the possible ways to restore the reopening of appellate agencies and the transition plan during the shutdown.

2. Cause of the Appellate Agency Crisis

The development of global trade is accompanied by an increase in trade friction, leading to a higher incidence of trade disputes among member states. When disputes arise, the WTO's dispute settlement mechanism (DSM) is particularly important. The world trade dispute settlement mechanism is an important pillar of the multilateral trading system and a unique contribution of the WTO to the stability and development of the global economy. The DSM is considered one of the most comprehensive international dispute resolution mechanisms ever established, and is known as the "jewel in the crown". The appellate body is part of the DSM and is known as the Supreme Court of International Trade for its ultimate power to adjudicate international trade disputes. The appeal body is the body that appeals when a party to the dispute disagrees with the dispute settlement body's decision and formally notifies the dispute settlement body that it will appeal. The dispute settlement will then enter the appeal stage. The appellate body was originally set up to provide guarantees of dispute resolution to prevent "wrong situations" or "rogue teams". But with the growing differences between different members and their flaws exposed, the Supreme Court still faces a temporary shutdown.

(1) Differences between the member states

The breadth of the scope of the WTO members has doomed the difference between the member states, and when the appellate body is in crisis, the defects of the differences are infinitely magnified. It is mainly manifested in four aspects.

Firstly, is the influence of the world, especially the United States superpower. As the world's only remaining superpower, the United States has never hesitated to demonstrate its "strength" in various international organizations. As previously noted, the United States prevented the appointment of members of the appellate agency. It also magnifies the other issues of the fact that you cannot supervise a janitor. Like when the United Nations accused the United States of using a veto. When great powers are reluctant to follow existing rules, it is difficult for the WTO to impose responsibilities and obligations on them. At this point, the WTO wants a miracle to happen, meaning that after a two-year recess, the United States will take the initiative to break the deadlock and reappoint the appellate body. But the US is unlikely to do so again because it believes its systemic concerns have not been addressed[5]. The United States focuses its systemic concerns on the appellate body and disregards rules set by WTO members. The United States' charge against the appellate body is largely unfounded and methodologically erroneous, and expecting the United States to relaunch the appointment amounts to wanting the United States to recognize its prior conduct as erroneous. Therefore, the expectation that the United States will abandon its claims and restart the appointment mechanism is very slim.

Secondly, is the relationship between the use of dispute resolution mechanisms and the level of economic development[6]. The level of economic development of member states has long restricted their use of dispute settlement mechanisms. Most developing countries do not effectively use the mechanism. This phenomenon somehow affects the overall DSM use rate, such as insufficient legal capacity, the exchange of interests with developed countries, and the fear of economic sanctions and retaliation. As a result, developing countries are far less concerned about appellate agencies than developed countries about whether to recover.

Thirdly, stems is distrust among the Member States. As Ambassador Batia said, 'The crisis of the appellate body is not limited to that, it is also a crisis of multilateral trade.' The deadlock of the appellate body could lead to distrust among WTO member states[7]. When WTO members do not trust the DSM, they will not choose the DSM as a means of resolving trade frictions. Distrust among the Member States is also part of the shutdown. It is worth mentioning that when the member states do not trust the WTO rules and are not willing to use them, then no matter how advanced or how scientific and accurate the new WTO rules are, they will not be supported and well implemented by the Member States. The impasse in WTO implementation can only be alleviated if the WTO members restore mutual trust, reach new trade relations or political compromises, and negotiate the structure of the WTO negotiating body or system.

Fourth, developed countries may refuse to implement WTO rulings to protect their national interests. When the economic strength gap between the two sides is too large, even if the plaintiff is to accept the relevant retaliation measures is not willing to implement the ruling because the retaliation strength of the vulnerable side can be ignored. For example, in *Antigua v. United States Limit of Online Gambling*, the appellate body finally confirmed that the United States trade restrictions violated the WTO agreement and ruled that the United States must amend legislation to meet its international obligations. However, the United States refused to enforce the ruling and claimed its legislation was necessary to protect public morality and order. Thus, the successful plaintiff Antigua acquired the right to enforce its successful ruling through retaliation and suspended its commitment to protecting intellectual property, but the economic losses suffered by the United States were almost negligible[8]. Although assuming that without the WTO, Antigua may not have equal opportunities for trade negotiations and consultations with the United States, it is only given a formal opportunity, and the final result of the consultation has not changed significantly because of this opportunity. This case clearly shows that a successful decision is worthless if it is not unenforceable. However, the lack of implementation does not largely depend much on the implementation mechanism itself, but on differences in economic and political development and the strength of countries. This suggests that dispute resolution bodies can better support developing countries by providing more protection and legal support. At the same time, the developed countries should also be correspondingly restricted, to prevent them from abusing their predominance in the world economy and society.

(2) The institutional defects of the DSM itself

From a cost-benefit analysis, the WTO dispute process is lengthy and costly, and the decisions of expert panels and appellate bodies and the uncertainty in their implementation sometimes prevent effective and prompt remediation of the victimised industry. Because of the uncertainty in the implementation of these provisions and their sometimes providing the most effective and prompt remedy to the damaged industries, member governments are increasingly reluctant to resolve disputes through the DSM. There is also a lack of sufficient transparency, which is also a matter of concern. Although DSM clearly stated that the panel should assess the matters, including the facts of the case and the application of the relevant agreement. Although the appellate body has repeatedly explained the panel's criteria, the lack of clear standards still fills the review process of the panel and the appellate body with uncertainty.

Second, in terms of remedial procedures, there appears to be a lack of remedies other than requiring the breaching party to remove relevant measures in violation of WTO rules. Although the injured party can claim retaliation because the defaulting party does not implement the decisions under the WTO dispute settlement mechanism, its role is still limited, and cross-retaliation can only theoretically improve the effectiveness of the procedure, but it is very effective in practice. Even if cross retaliation can be widely used, small nations can be very vulnerable when fighting against great powers. At the same time, retaliatory measures not only harm the interests of Member States' governments but all stakeholders such as exporters,

importers and domestic consumers. Countries are therefore cautious about retaliation because it could lead to a lose-lose situation. On the other hand, the simple logic is: if the retaliation allowed by WTO rules is useful, then why implement it through WTO rules? Member States are fully capable of bypassing WTO rules and retaliating on their own against countries where they have trade disputes. This will make the WTO rules completely invalid, and it will also be the beginning of unilateral trade, trade protection and even a trade war. The Member States, therefore, want more scientific and effective remedies under the WTO rules to avoid "barbaric" retaliation. Finally, the WTO M rules are the product of the final phase of the Uruguay Round negotiations, with substantial generalisation and vague wording on the adoption of an early agenda on dispute settlement mechanisms. This also lays the foundation for the inherent defects of the DSM. The DSM is an improvement of the GATT dispute settlement mechanism, but many problems remain. For example, the DSM time limit was not strictly followed, and the intermediate steps were reinforced by the plaintiff's delaying behaviour. The DSM also has relatively high legal and technical requirements, making it difficult for small developing countries to apply this legal system. Therefore, improving the WTO's institutional weaknesses will increase the Member States' trust in the WTO rules and make them more willing to use them, thus addressing the current crisis of the appellate body. By improving the WTO system, curbing the trend of unilateralism, and re-integrating multilateralism into the WTO system.

3. Possible Solutions after Lockouts

(1) Multi-party temporary appeal arbitration arrangements

Multiple provisional appeal arbitration arrangements (MPIA) have been implemented method, on January 24, 2020, the EU and 16 WTO members announced that they will begin to develop emergency measures, according to the WTO dispute settlement understanding article 25, in the form of the WTO panel report appeal in our disputes, this arrangement in place only after the reformed WTO appeal body[9]. This is a way to reconstruct the system. But this approach can only be temporary and transitional, because in the long run, the same dilemma as DSM, namely, when a major country in MPIA (such as China or the EU) wants to follow the US, must other countries start to build the next new system again? A better way to do this is to impose penalties on countries or organizations that arbitrarily default or withdraw, which is difficult to implement because, unlike national organizations, international organizations lack agencies that can enforce these penalties, and they are mostly the product of political agreements or international treaties. It remains to be seen how many other WTO members decide to sign the proposal. However, the MPIA interim solution will not cover all pending and new WTO cases. It is hard to imagine the United States agreeing to the proposal (though possible in certain circumstances). However, as detailed below, the United States is a major party (claimant or defendant) in all WTO disputes filed to date. To use arbitration to replace an appeal is helpless. Although the signed member states such as the European Union, Canada and China are all important members of the WTO, the MPIA will still have less influence compared with the 164 members that the WTO originally had[10]. In addition, the other WTO members have questions about the interim appellate arbitration. Some worry that this "temporary solution" could become permanent solutions and could eventually evolve into a DSU minus the United States scenario.

(2) "Floating" to adopt the expert group report

During the suspension of the appellate body, there is strong resistance to whether the direct adoption of the panel report or the suspended panel report waits for the recovery of the appellate body. Issue panel reports (provisional or final reports) with neither appeal nor adoption. Instead, they simply "float" with no technical constraints or hindrance[11], Continuous negotiations used only between the parties to the dispute have become a new

possibility. It is essentially just an element, and the panel report remains the basis for political negotiations to resolve trade disputes.

In a highly controversial case on China's market economy status, the EU — Price Comparison Method (EU — price Comparison methodology), the panel released a highly anticipated interim report in April 2019, which reportedly favoured the defendant, the EU. In response, losing China demanded a suspension of the lawsuit, and the panel agreed in June 2019. However, the confidential interim report may play a role in continuing EU negotiations with China on the issue. Imagine, in general, the defendant winning (reportedly happening in the EU price comparison methodology). In this case, the losing claimant is interested in requesting the panel to suspend the proceedings to avoid the panel's final report exposure, not to mention the dispute resolution body adopted this report to make it binding. Conversely, if the claimant generally wins and the expert panel finds a violation of the WTO treaty, the losing defendant may have difficulty stopping the report, but also wants to avoid the appeal (reputation and other) costs described as "going into an invalid state." Such an appeal "going into a vacuum" is also a suboptimal outcome for the prevailing plaintiff. Given the balance of power between the parties, and the credibility of the defendant's threat to file an invalid appeal, the resulting compromise is likely that the prevailing plaintiff did not insist on a panel report approved by the body within 60 days of the denial of the consensus rule in section 16.4 of the Dispute Settlement Understanding. In this case, the panel report will neither be passed, appealed, or formally blocked (for the interim report, the report will not even be published), but only float, while still may play a useful role in continuing the negotiations.

(3) Repair of the defects in the system itself

First, the restored appellate body takes a substantial tilt toward developing countries. The rise of emerging economies is a feature of today's international economic environment, and their participation, most of which are led, is essential to be better implemented and governed by developing countries. Developing countries hope that the DSM will become a "protection umbrella" in the era of economic globalization. Therefore, if the WTO rules are to be better implemented, the demands of these emerging economies cannot be ignored, and the participation in developing countries needs to be stimulated. As Shaffer points out, if developing countries are to be more meaningfully involved in the WTO's demand-side management, they need to continue building institutional capacity and multi-level trade policy coordination, and such capacity-building needs to penetrate more widely into institutions and society [12]

Secondly, it is also urgent to restore trust among the Member States. When Member States distrust and are unwilling to continue to use WTO rules, no matter how advanced and scientific the new rules adopt, they will not receive support or have the desired effect. The impasse in WTO implementation will only slowly be resolved if the WTO members slowly restore mutual trust and find new trade relations or new political compromises in the appellate body or the new system. To achieve this goal, the member states need to put aside the trading bias and unilateral trade and trade protection strategies and return to the multilateral trade model.

Third, the WTO appropriately enhances the coercive force of the organization, such as forcing a decision on the appointment of the appellate body with a majority vote on the General Council. However, as the WTO Member States remain reluctant to consider voting, this option has proven to be quite unpopular. But the appropriate coercive force can break the ice in the face of the impasse. The longer the WTO member states sit in the appellate body deadlock without taking any practical action, the more each member will get used to the illegal and malicious blockade of the United States. As a Western proverb says, if a broken window is not fixed at the right time, many more stones are thrown into the house.

4. Conclusion

At present, the trends of unilateralism, trade protectionism and anti-globalization are looming, and the multilateral trading system at the core of the WTO is being subjected to unprecedented tests. The existing WTO system is in urgent need of change, but they do not require the "American approach" to destroying the appellate body to achieve "breaking." A good dispute settlement mechanism can continue to shine as the pearl of the WTO. When the appellate body was forced to shut down, the WTO's "final review" function was forced to stop, and many pending cases fell at risk of uncertainty. Neither the temporary multilateral appellate body nor rethink the effectiveness of the panel's report is only temporary and does not serve as a permanent alternative to the WTO appellate body. A better settlement of disputes requires serious thinking about the relations between the Member States. Consensus is the core and soul of the WTO. To restore past successes, in addition to cooking, we must restore trust among the Member States, promote multilateralism and resist trade protection and unilateralism. The WTO should play a better supervisory role and stricter law enforcement methods to solve the current dilemma.

References

- [1] Gao H, 'Finding A Rule-Based Solution To The Appellate Body Crisis: Looking Beyond The Multiparty Interim Appeal Arbitration Arrangement' (2021) 24 Journal of International Economic Law 2.
- [2] Debate Erupts Over U. S. Blocking Korean Appellate Body Reappointment Insidetrade.Com' (Insidetrade.com, 2016).
- [3] DDG Ellard Stresses Need to Maintain WTO Momentum, Importance Of Dispute Settlement Reform.
- [4] HAN Y, 'The Legal Nature Of WTO Enforcement revisited: Compliance Or rebalancing' (2014) 36 International and Comparative Law Forum.
- [5] Pauwelyn J, 'WTO Dispute Settlement Post 2019: What To Expect? What Choice To Make?' [2019] SSRN Electronic Journal.
- [6] Chen. WTO award enforcement and national interest realization of the potential deviation study [J]. Global Law Review, 2017,39 (05).
- [7] WTO | Farewell Speech Of Appellate Body Member Peter Van Den Bossche' (Wto.org, 2019).
- [8] HAN Y, 'The Legal Nature Of WTO Enforcement revisited: Compliance Or rebalancing' (2014) 36 International and Comparative Law Forum.
- [9] du bo. Appellate Body Shutdown after WTO Dispute Settlement [J]. NTU Law, 2021 (01).
- [10] Hu Jiaxiang. The enforceability of the Multiparty Interim Appeal Arbitration Arrangement from the WTO Dispute Settlement Procedure [J]. International Economic and Trade Exploration, 2021,37 (02): 99-112.
- [11] Hu Jiaxiang. What is the WTO dispute settlement mechanism after the "shutdown" of the appellate agency [J]. International Economic and Trade Exploration, 2020,36 (01).
- [12] Shaffer. (2009). Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed. In Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment.