

Reform of the WTO Appellate Body: Inspiration from the MPIA Practice Trial

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Abstract: As a brilliant innovation of WTO, the Appellate Body has dealt with a number of international trade disputes since its establishment, which is of special reference significance to the dispute settlement mechanism. When the Appellate Body was paralyzed and suspended for more than three years, the MPIA emerged as an appellate arbitration mechanism to replace the appellate process temporarily. The MPIA rules mainly based on the appellate process and have been improved and practically tested in the more consensual aspects of the Appellate Body's reform program, such as trial limit management and focus on necessity disputes, which can provide reference for the future reform of the Appellate body.

1. Introduction

The WTO Appellate Body has dealt with a number of international trade disputes and made an important contribution to the maintenance of the multilateral system for the development of international trade since its establishment in 1995. Due to its own shortcomings and pressure from some countries, the reform has been stalled. Since 2016, the United States has not only obstructed the appointment of the members of the Appellate Body, but also interfered with the procedures for the selection of members, paralyzing it since December 11, 2019, which has been suspended for more than three years.^[1] The paralysis of the Appellate Body has dealt a severe blow to the authority and enforceability of the WTO's regulatory system, as well as to the multilateral trading system. We can get inspiration from creation and practice of the MPIA for the reform of the existing appellate mechanism, with a view to revitalizing the appellate body.

2. History and function of the Appeals Body

2.1. History of the Appeals Body

2.1.1. The GATT consensus principle delays the negotiation process

After the Second World War, people's livelihoods have been depleted, they are eager to return to the pre-war economic prosperity, which makes it particularly important to rebuild the development

of trade on global. In order to avoid repeating the mistakes of the pre-war period, articles 22 and 23 of the General Agreement on Tariffs and Trade (GATT) agreement signed in 1947, specifically provided for the rules and procedures in the settlement of trade disputes, which also meant that the settlement of international trade disputes moved away from the traditional power-oriented approach towards the direction of regularization and legalization. However, the biggest drawback arising from this rule is that the principle of consensus in the determination of the panel of experts and the use of the arbitration report, it is easy to result in the losing party to use its veto power to delay the progress of the dispute settlement, which greatly undermines the trust of the dispute settlement mechanism (DSB).^[2]

2.1.2. New dispute settlement mechanisms have emerged

To avoid repeating the mistakes, the new dispute settlement mechanism has expanded Articles 22 and 23 of the GATT into the Understanding on Dispute Settlement Rules and Procedures (DSU) agreement and established an appellate body, abandoning the drawbacks of the GATT and replacing the principle of consensus with reverse consensus.

The establishment of the Appellate Body is one of the highlights of the most creative design of the WTO dispute settlement mechanism, which is mainly due to the fact that it has created a precedent of two final cases in international dispute settlement. It has innovated the mode of DSB of the international community, strongly reduced the errors in the report of the panel of experts, and provided an important guarantee for the security and predictability of the multilateral trading system. It has innovated the model of the international community's DSB, effectively reduced the errors in the Panel's report, and provided an important guarantee for the security and predictability of the multilateral trading system.^[3]

2.2. Functions of the appellate body

2.2.1. Preventing wrongful convictions and maintaining justice justice

The appellate body's secondary review of appeal cases to ensure the legitimacy of the panel's report and gives the parties an avenue for secondary relief.

As a permanent body, the restrictions on interim group of experts are mainly reflected in two aspects: on the one hand, the oppressive force of the second review can form an invisible binding force on the panel of experts in the first trial case, reducing errors in interpreting the law; on the other hand, the appeal procedure is mainly conducted by independent legal experts to make objective and neutral judgments, which makes the dispute settlement more fair and reasonable.

2.2.2. Improving the operational efficiency of WTO DSB

DSB does not reduce its efficiency with the establishment of the appellate body. On the contrary, it is a booster to improve the efficiency of dispute settlement. This is because the appeal procedure is not mandatory for DSB: the procedure is only initiated by one of the parties to the dispute. Even though a party to the dispute has initiated the appeal process, the DSU has made corresponding provisions on its hearing period, and if an extension of time is applied for, the time limit for the issuance of the report should not exceed 90 days.

2.2.3. Ensure the uniformity of WTO judicial interpretation

The Appellate Body conducts a comprehensive review of the legal issues of the panel to avoid the instability of it, and the permanent nature of the appellate body can ensure the accuracy of the

application of law in the WTO and the consistency of judicial interpretation, coupled with the permanent character of the Appellate Body, ensures the WTO's accuracy in the application of the law and the consistency of judicial interpretation. This gives the appellate body the power to clarify WTO regulations in specific case practice, compensating for the lack of specific provisions on many issues in the dispute settlement mechanism.

3. Successful practices in appellate arbitration can provide reference for the reform of appellate institutions

3.1. MPIA born out of adversity

With the increase of WTO members, it is difficult to coordinate the diversified interests among members, which makes the DSB, which has not yet been established as a rule-oriented mechanism, more constrained, and the Appellate Body, which has become the arena for the main interests of many countries, has been caught in the focus of controversy. The current crisis facing the WTO Appellate Body is the result of a variety of complex factors, including trade deficit and the lack of momentum of the multilateral trading system, its own internal defects and the political and economic competition among members.^[4]

Although the Appellate Body has been suspended, it is undeniable that the Appellate Body still has an irreplaceable role to play in clarifying WTO regulations, ensuring consistency in the interpretation of WTO regulations, and thus maintaining the security and certainty of the WTO system.^[5]

Currently, even though the Appeals Body has been paralyzed, some members, in their quest for a just decision, are still filing appeals, with a total of 24 cases in the appeals process. In order to address the concern that the WTO dispute settlement mechanism will revert to the GATT era, 18 WTO members, including China and the European Union, agreed on a transitional arrangement on April 30, 2020. It is Multi-Party Interim Appeal Arbitration Arrangement Pursuant To Article 25 of the DSU (MPIA). During the suspension of the Appellate Body, MPIA temporarily substitutes to deal with the appeal issues raised by the disputing parties.

3.2. The MPIA closely interrelated to the WTO Appellate Body

MPIA is not a substitute for or contrary to the appellate body, on the contrary, the creation of MPIA is a full affirmation of the significance and value of the WTO appellate procedure. MPIA adheres to the two core features of the WTO's dispute settlement mechanism—two instances of final adjudication and ensuring that binding appellate decisions can be enforced,^[6] and in the second paragraph of the preamble to the text, it clearly expresses its determination to preserve the Appellate Body, and in the sixth paragraph, it calls for the interim appellate arbitral awards to be interpreted in the WTO Agreement in such a way as to maintain, as far as possible, consistency with the rulings of the DSB in its existing reports, and in many parts of the document it cites the DSU, the Appellate Review Procedures and the Appellate Body's Code of Conduct. This suggests that MPIA's appellate arbitration process draws heavily on the deliberative process of the Appellate Body, and that the creation itself is a full recognition of the value and significance of the appellate process.

In July 2022, the release of the decision in the case of EU v. Turkey on measures relating to the production, import and sale of medicines, known as the first case of WTO appellate arbitration, meant that the mechanism of appellate arbitration was formally put into practice. The trial practice is an attempt to optimize the settlement procedure of economic and trade disputes, from which we can get some enlightenment for the reform of the appellate body.

3.3. Inspiration from the practice of MPIA to the reform of the WTO Appellate Body

3.3.1. Efficient selection of members of the appeals body

The Appeals Body has long been criticized for having insufficient time for hearings due to the complexity of its membership. The DSU does not require members of the Appellate Body to be resident in Geneva, and for permanent Appellate Body members from other countries and regions outside Geneva, there may be insufficient time, especially for disputes involving anti-dumping, countervailing and other technical, and there are more contentious complaints.

The mechanism for the rapid generation of arbitrators could provide a reference for the adjudication of cases by subsequent appellate bodies. Compared to the DSU, which is composed of seven civil judges, the MPIA selects 10 permanent arbitrators, reduces the number of deliberators who are of the same nationality as the country in question, provides flexibility in the selection of arbitrators, and improves efficiency. In terms of the conditions and selection methods of arbitrators, MPIA reflects the efficient selection of arbitrators on the basis of comparing the qualification conditions and selection methods of the appellate body and taking into account the overall balance of the composition of arbitrators. That is, in accordance with the parties' arbitration agreement, a random selection of arbitrators is made after the filing of the notice of appeal, and the arbitrators, the parties and third parties are notified of the result.

3.3.2. Multi-pronged approach to shorten the trial time, and reports regular

Since Article 17 (10) of the DSU provides for the confidential handling of appeal proceedings, non-transparent and non-public handling undermines the legitimacy and credibility of the appellate body.

In recent years, the reports of the Appellate Body have begun to become very lengthy. On the one hand, due to the increasing number of explanations and elucidations required by the complexity of national trade cases, and on the other hand, it cannot be ruled out that it is facing politically sensitive issues in a roundabout way, and that long and obscure reports not only affect the public's understanding and study of the mechanism, but also lengthen the trial time.

Arbitral tribunal takes multiple steps to meet limit of trial time.^[7] In the case of MPIA, firstly, the arbitrator sent a list of issues to the parties and third parties prior to the hearing to enable them to focus on the issues; further, without prejudice to the procedural rights and obligations of the parties, appropriate measures were taken to simplify the procedure so as to efficiently manage the time frame, including writing descriptions of partial awards in advance and establishing timetables for arbitrators, limiting pages, time, and deadlines for submissions.^[8] The significant streamlining of the awards in the first and second appellate arbitration cases not only shortened the time limit, but also improved efficiency and transparency of the case. These practical attempts to meet the requirements of the time limit could provide lessons for future reforms of the Appellate Body.^[9]

3.3.3. Examination only of necessary question for the settlement of disputes

The purpose of DSB is to resolve trade disputes in an efficient manner, but in practice the report of the Appellate Body use large expositions of non-required legal explanations, which are often criticized as inefficient during appellate disputes. For example, the 2016 Argentine financial services case, the Appellate Body, after hearing the Argentine Government's appeal, reversed the Panel's findings and ruled that there had been no violation of WTO rules in its report, but it redundantly considered the relevant decision on unfavorable treatment. The disadvantages of an unnecessary award are clear, which not only against the principle of Article 2 (3) of the DSU, but also effect rights or obligations of the parties. It should focus on necessary dispute settlement issues,

rather than non-essential matters, which has basically become the consensus of WTO members.

The MPIA's obligatory provision in Annex I, paragraph 10, to consider only those issues raised by the disputing parties that are necessary for the dispute is its particular response to the Appellate Body's proposed reforms, significantly shortens the time of trials.^[10]

4. Conclusion

The WTO Appellate Body has been suspended for more than three years now, causing a major impact on its rules system and enforcement. Appellate arbitration is the result of multiple parties actively seeking interim solutions, and 26 WTO member states have joined MPIA. There are some regional and country studies advocating that corresponding WTO members should join it, which gives us more hope.^[11] However, MPIA only plays a temporary role and cannot replace the WTO Appellate Body. There is still a long way to go to reform the Appellate Body in order to revitalize it in the future, and the practice of the MPIA can provide reference for it.

References

- [1] Song, Y. P., (2019) *Research on the establishment of international investment dispute settlement appeal mechanism*. East China University of Political Science and Law. DOI:10. 27150/d. cnki. ghzc. 2019. 000852.
- [2] Yang, G. H., (2018) *Causes of the WTO Appellate Body Crisis*. *Peking University Law Review*, 19:217-234. <https://kns.cnki.net/kcms/detail/detail.aspx?FileName=BDFL201802010&DbName=CCJDTEMP>
- [3] Zhang, Z. Z., (2020) *Study on the WTO Appellate Mechanism and its Reform*. Nanchang University. DOI: 10. 27232/d. cnki. gnchu. 2020. 003400.
- [4] Robert, H., (2016) *The world Trade Organization 20 Years on: Global Governance by Judiciary*. *European Journal of International Law*, 01:9-77. DOI:10. 1093/ejil/chw011.
- [5] Thomas, C., Marina, F. (2006) *Constitutional Functions of the WTO and Regional Trade Agreements*. Oxford University Press, Oxford. pp. 59-60. <https://boris.unibe.ch/id/eprint/20288>.
- [6] Song, G. (2021) *Re-establishing a regular WTO Appellate Body: Taking the Implementation of the Multi-party Interim Appellate Arrangement as an Opportunity*. *Commercial arbitration and conciliation*, 06:22-38. <https://kns.cnki.net/kcms/detail/detail.aspx?FileName=SZTK202106002&DbName=CJFQ2021>.
- [7] Yang, G. H., (2022) *First WTO Appellate Arbitration - "Turkish Medicines Case"*. *Journal of Shanghai University of International Business and Economics*, 06:5-17. DOI:10. 16060/j. cnki. issn2095-8072. 2022. 06. 001.
- [8] Andersen, S., Friedbacher, T. Lau, C., (2017) *Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals*. *The Graduate Institute of International and Development Studies, Geneva*, <https://api.semanticscholar.org/CorpusID:191769226>.
- [9] Peng, D. L., Zhou, W. H., Hu, J. X., (2023) *The New Practice of International Economic and Trade Dispute Settlement Path and Its Value in the Era - An Examination Based on the First WTO Appellate Arbitration Case*. *International Trade*, 05:38-47. DOI: 10. 14114/j. cnki. itrade. 2023. 05. 006.
- [10] Liu, Y., (2023) *MPIA: An Experiment in Rules and Practice for the Reform of the WTO Appellate Review Mechanism*. *Law Review*, 03:174-186. DOI:10. 13415/j. cnki. fxpl. 2023. 03. 017.
- [11] Mohan, M. P. R., Raj, V., (2021) *Appellate Body Crisis at the World Trade Organization: View from India*. *Journal of World Trade*, 55:850-852. DOI:10. 54648/TRAD2021035.