The Current Dilemmas in the Reform of the WTO Dispute Settlement Mechanism and China's Response

Dilemas atuais da reforma do mecanismo de Resolução de Controvérsias da OMC e resposta da China

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ABSTRACT

The WTO dispute settlement mechanism provides a fair, transparent, and effective means of dispute resolution for international trade. In the current reform of the dispute settlement mechanism, the "paralysis" crisis of the Appellate Body is a core issue, which poses severe challenges to the authority and stability of the global multilateral trading system. The European Union, Japan, and other countries have chosen a temporary appellate arbitration body as a transitional solution, which has limitations while playing a role in resolving disputes. As a responsible major country, China suggests that WTO members enhance the flexibility of negotiations, choose a compromise solution characterized by parallel coexistence, and build a mechanism of "selective appeal procedures" within the existing framework, which not only conforms to the multilateralist strategy but also takes into account global political constraints, providing new ideas for breaking the deadlock of the WTO dispute settlement mechanism.

Keywords: WTO Dispute Settlement Mechanism; Appellate Body; Multilateral Trading System

RESUMO

O mecanismo de resolução de litígios da OMC constitui um meio justo, transparente e eficaz de resolução de litígios no domínio do comércio internacional. Na atual reforma do mecanismo de resolução de litígios, a crise de "paralisia" do Órgão de Recurso é uma questão central, que coloca sérios desafios à autoridade e à estabilidade do sistema comercial multilateral global. A União Europeia, o Japão e outros países optaram por um órgão de arbitragem de recurso temporário como solução transitória, que tem limitações, embora desempenhe um papel na resolução de litígios. Como grande país responsável, a China sugere que os membros da OMC reforcem a flexibilidade das negociações, escolham uma solução de compromisso caracterizada pela coexistência paralela e criem um mecanismo de "procedimentos de recurso seletivo" no âmbito do quadro existente, que não só esteja em conformidade com a estratégia multilateralista, mas também tenha em conta as restrições políticas globais, fornecendo novas ideias para ultrapassar o impasse do mecanismo de resolução de litígios da OMC.

Palavras-chave: Mecanismo de Resolução de Controvérsias da OMC; Órgão de Recurso; Sistema Comercial Multilateral

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SUMMARY:

1. INTRODUCTION

The WTO dispute settlement mechanism is the "heart" of the WTO system and is known as the "jewel in the crown" of the multilateral trading system(Song Caifa, 2001). It is characterized by judicial content such as the "reverse consensus" principle and a two-tiered review system (Expert Panels and the Appellate Body), making a series of targeted corrections to the original *General Agreement on Tariffs and Trade* (GATT) system and constructing a set of rules with greater compulsion and authority. However, since 2017, the mechanism has been functionally paralyzed due to the United States' obstruction of the selection of Appellate Body members. As of December 2023, 29 appeal cases have been suspended due to the absence of judges. In this context, the research value of this paper is reflected in three dimensions: first, to reveal the deep-seated drivers of the Appellate Body crisis and break through the interpretive boundaries of traditional institutionalist research; second, to systematically evaluate the practical effectiveness of the *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA), clarifying its institutional innovation and inherent limitations; and third, to explore the strategic space for developing countries to participate in the reconstruction of global economic and trade rules, taking China's proposed "selective appeal procedure" as the entry point. In terms of research methods, a combination of normative analysis and empirical research is adopted, paying attention to the legal hermeneutic examination of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and also by the *EU v. Turkey Measures on*

the Production, Import and Sale of Pharmaceuticals case (DS583) and other typical cases to verify theoretical assumptions.[2]

2. RESEARCH BASIS: THE CONNOTATION AND EXTENSION OF THE WTO DISPUTE SETTLEMENT MECHANISM

The WTO dispute settlement mechanism was officially established in 1995, and it is a revolutionary continuation of Articles 22 and 23 of the GATT of the and development.[3] Later, after the Uruguay Round negotiations, the DSU was reached, and systematic provisions were made for the WTO dispute settlement mechanism. (Tu Xinquan & Shi Xiaojing, 2020)

2.1 From Consultation to the Introduction of Third-Party Dispute Resolution

Article 22 of GATT requires the contracting parties to provide sufficient There were opportunities for consultation, but no direct consequences were prescribed. To meet the need for disputing parties to effectively resolve disputes, the expert group model for resolving disputes was introduced in the 1950s. The expert group consisted of individuals who were not representatives of the state. This shows that GATT gradually emphasized independent decision-makers for adjudication, rather than relying on state representatives for consultation. (John Jackson, William Davey & Alan Sykes, 2002). In the WTO era, the introduction of third-party dispute resolution was more favored, especially the expert rulings composed of members of the expert group and the appellate body. In addition to consultation, mediation, conciliation and arbitration, the DSU also details the rules and procedures for the expert group and the appellate body to hear disputes. With the establishment of the third-party dispute resolution mechanism, the number of WTO dispute resolution cases has also risen rapidly.

2.2 From "Consensus" to "Reverse Consensus"

GATT's "consensus" principle requires that the establishment of the expert group, the selection of members and the entry into force of the report must be subject to the "consensus" of the

[2] In https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm. Last access: May 13, 2025.
[3] In https://www.wto.org/english/docs_e/gattdocs_e.htm. Last access: May 13, 2025.

General Council. As the General Council is composed of representatives of the member parties, from the 1980s, the frequency of the defendant obstructing the establishment of the expert group and the losing party obstructing the passage of the report has increased. In the WTO agreement, the mechanism for the establishment of the expert group and the passage of the expert group's report has been changed from "consensus" to "reverse consensus", i.e., unless all the contracting parties decide not to establish or pass, the expert group will be established or the expert group report will be passed. In other words, on the specific matter of voting, the DSB has obtained the power of almost automatic passage. (Zhang Yuejiao, 2023)

2.3 From a Final Ruling to Appeal Review

Under the principle of "reverse consensus", the expert group report can be quickly passed and put into effect, but in order to avoid and correct possible legal errors in the expert group report, the WTO has established an Appellate Body to construct a two-tier dispute resolution mechanism in which the expert group and the Appellate Body play a role together, the two of which check and balance each other to ensure the legality, accuracy and consistency of the results of dispute resolution. Dispute resolution from the early GATT era was reflected in power or diplomatic solutions. From the formulaic, to the first-instance mechanism similar to arbitration, and then to the quasi-judicial two-instance mechanism during the WTO period, this gradual and inclusive historical process is unique and distinctive in the field of international dispute resolution. (Zhao Hong, 2023)

3. THE ORIGIN OF THE DILEMMA: THE DEADLOCK OVER THE EXISTENCE OF THE APPELLATE BODY IS DIFFICULT TO RESOLVE

In the reform of the WTO dispute settlement mechanism, the "paralysis" of the Appellate Body has triggered a serious institutional crisis. Therefore, the study of the deadlock over the existence of the Appellate Body has always been a priority issue, by sorting out the reasons for the suspension of the Appellate Body, the impact and future prospects, to gain insight into the difficulties faced by the WTO dispute settlement mechanism.

3.1 Analysis of the Reasons for the Suspension of the Appellate Body

The United States first clarified the fact of the rigid judicial nature of the Appellate Body, and then pointed out that the panels and the Appellate Body in the rulings The DSU will not be able to restrict inappropriate interpretative methods or legal reasoning adopted in the process, nor will members be able to be bound by it, which will undermine members' rights, or in some cases be counterproductive to dispute settlement, and then, under the pretext that the WTO is a "member-driven" organization, seek a comprehensive de-judicialization of the WTO dispute settlement mechanism. Reform proposals. However, existing reform proposals from other countries do not intend to change the existing quasi-judicial functions and attributes of the WTO dispute settlement mechanism, but instead hope to keep up with the times by modifying, interpreting, or supplementing rules, etc., to achieve WTO modernization. There are fundamental differences between the two sides, leading to a deadlock in the reform of the WTO Appellate Body.

The decision-making logic of the United States' continued obstruction of the selection of judges is rooted in its strategy of maintaining its dominant position in global economic governance Considerations. Since the end of the Cold War, the WTO dispute settlement mechanism has long served the US-style liberal economic order, but the rise of emerging economies has broken the traditional balance of power. Data show that the proportion of dispute cases brought by developing countries increased from 18% to 47% between 2001 and 2023, with a particularly significant increase in lawsuits against the United States. This structural change has led the United States to view the Appellate Body as a tool to restrict its unilateral actions, rather than a neutral arbiter to maintain multilateral rules.

Specifically, the US accusations against the Appellate Body have a double paradox. On the one hand, its criticism focuses on the issue of judicial overreach, such as in the *US-Countervailing Measures* Case (DS437), the Appellate Body's expansive interpretation of the definition of "public body" in Article 1.1 of the Agreement on Subsidies and Countervailing Measures is regarded by the US as interference in domestic industrial policy.[4] But on the other hand, the United States itself is the biggest beneficiary of judicial activism—in the *EU-Hormone Beef* Case (DS26), the Appellate Body supports the US's restrictive interpretation of the precautionary principle, clearing the way for its

[4] In https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds437_e.htm. Last access: May 13, 2025.

agricultural exports.[5] This pragmatic stance reveals the essence of power politics: when the service object of the dispute settlement mechanism shifts from traditional hegemonic countries to emerging economies, the system itself becomes the target of deconstruction.

The differing stances of developing countries in this process are worth noting. Countries like India and South Africa support reforms to the appellate mechanism but oppose any plan that weakens judicial independence; while agricultural exporting countries like Brazil and Mexico pay more attention to the efficiency of ruling enforcement. This divergence of interests is evident in the *India-Sugar Subsidies* Case (DS581): When India's sugar subsidies were ruled to be in violation, the G77 proposed an enforcement exemption, revealing cracks within the Southern countries' camp.[6] This divergence makes it difficult for the reform process to form a unified developing country agenda, objectively providing operational space for the US's "divide and conquer" strategy.

The introduction of the institutional competition theory provides a new perspective for understanding the current stalemate. The "Plurilateral Agreements" promoted by the US and the MPIA are essentially a competition and cooperation between different governance paradigms. The former weakens the central status of the WTO by constructing exclusive rules, while the latter attempts to repair the multilateral system within the existing framework. This inter-institutional competition leads to the fragmentation of rule-making power; in 2023, 358 regional trade agreements came into effect globally, 87% of which contain independent dispute resolution clauses. Against this backdrop, The suspension of the Appellate Body is not just a technical failure, but also a phased manifestation of the paradigm shift in the global economic and trade governance system.

3.2 Negative Impacts of the Appellate Body Suspension

After the Appellate Body's suspension, the United States has continuously submitted cases in which it lost to the Appellate Body in order to prevent unfavorable rulings from taking effect. (Gao Shenjie & Xiao Bing, 2023) This approach undoubtedly puts the expert group reports in a state of de facto ineffectiveness, and the WTO dispute settlement mechanism has begun to regress historically, going back to the GATT era.

[5] In https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm. Last access: May 13, 2025.
[6] In https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds581_e.htm. Last access: May 13, 2025.

Firstly, since the suspension of the Appellate Body, the efficiency of dispute resolution has been severely affected. (Peng Delei, Zhou Weihuan & Hu Jiaxiang, 2023). Up to now, a total of 29 cases have been appealed and are in a state of suspended review. Due to the absence of Appellate Body judges, the cases cannot be heard temporarily. In practice, if one party continues to appeal, it will lead to the legal effect of the first-instance expert group ruling report being "undecided", and even the losing party will not implement it, which is not conducive to the final resolution of the dispute and may even lead to the escalation of the dispute. Secondly, the confidence of member states in the expert group rulings has been weakened, leading some member states to gradually turn to bilateral or regional trade agreements, and no longer rely on the WTO, which weakens the WTO as a core platform for global trade governance This severely affects the authority and enforcement of the WTO rule system and poses a serious challenge to the legitimacy and stability of the global multilateral trading system.

3.3 Future Prospects for Restoring the Appellate Body

Starting in 2022, negotiations to reform the WTO dispute settlement mechanism have been launched, and certain achievements were made before the 13th Ministerial Conference, forming a negotiating text. The negotiations were led by the United States, and the core of the negotiating text is to respond to the United States' concerns. However, the United States still disagrees with the restoration of the Appellate Body, resulting in a gap in the appeal/review section of the negotiating text (Yang Guohua, 2024). It can be seen that the negotiations were aimed at exchanging reforms in other aspects of dispute settlement for the support of the United States for the Appellate Body, but this goal was not achieved. In view of this, coupled with the divergence of opinions among members and Trump's victory in this US election, the prospects for dispute settlement reform negotiations are not optimistic. WTO members should consider more paths, including the use of appeal arbitration and the establishment of a new appellate body.

4. INSTITUTIONAL RESPONSE: ATTEMPTS BY THE INTERIM APPEAL ARBITRATION MECHANISM

4.1 The Practical Significance of the Interim Appeal Arbitration Mechanism

In March 2020, members such as the European Union and China, in accordance with Article 25 of the DSU, established the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), to temporarily provide a substitute channel for "appeal review" for cases between some members with an interim appeal arbitration mechanism.[7]As an alternative mechanism during the suspension of the Appellate Body, the institutional innovation of MPIA is reflected in three aspects: First, By invoking Article 25 of the DSU7arbitration procedures to continue dispute resolution without amending the articles of organization;[8] secondly, establishing a permanent pool of 10 arbitrators to ensure the professionalism and stability of the rulings; and finally, introducing a 90-day expedited arbitration procedure, which compresses the traditional appeal review cycle by 40%. In July 2022, the DS583 appellate arbitration ruling was released, formally putting this mechanism of appellate arbitration into practice.

This case provides a path for dispute resolution for the MPIA members. First, the case achieved an efficient selection of arbitrators; secondly, online hearings were adopted based on practical needs, which brought some convenience to the third-party members of the case and some members from developing countries. Thirdly, the ruling report was released as scheduled within 90 days as required, and the report content was accurate and concise.

4.2 Disadvantages of the Temporary Appellate Arbitration Mechanism

However, the transitional nature of MPIA determines its limitations. In terms of participation, the 53 contracting parties only cover 32% of WTO members, and the participation rate of African countries is less than 15%. This selective participation leads to limited application of the mechanism, and enforcement difficulties still exist when disputes involve non-contracting parties. For example, in the *Australia-Plain Tobacco* Case (DS591), because Honduras did not join the MPIA, the case had to revert to the traditional panel procedure, and it took 31 months to complete the ruling.[9]

[7] In https://wtoplurilaterals.info/plural_initiative/the-mpia/. Last access: May 13, 2025.
[8] In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: May 13, 2025.
[9] In https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm. Last access: May 13, 2025.

In addition, the effectiveness of the arbitration ruling is in doubt—Article 12 of the MPIA document clearly states that the arbitration result "shall not be used as a precedent," which provides a buffer to avoid rule conflicts, but weakens the normative construction function of the ruling.

A deeper contradiction lies in the compatibility of MPIA with the WTO rule system. According to Article 3.2 of the DSU,[10] the goals of the dispute settlement mechanism include "providing security and predictability for the multilateral trading system." However, the interpretative differences that have emerged in the practice of MPIA have endangered this goal: in the DS583 and DS591 cases, the arbitration tribunal Article 20 of GATT made different interpretations of the applicable standards of the "public health exception,"[11] the former adopting a strict necessity test, while the latter allows for more flexible discretion. If this inconsistency in legal principles continues to expand, it may trigger the phenomenon of "forum shopping," further exacerbating the fragmentation of rules.

Resource constraints are another real challenge. Although the MPIA operates independently, it still relies on the WTO Secretariat for legal support and administrative services. In 2023, the U.S. rejected the MPIA's special allocation proposal in the Budget Committee, forcing the EU and other contracting parties such as China to establish alternative financing channels. This systemic exclusion reflects the continuation of power games—even in technical fields, major members are still vying for control of the mechanism. Developing countries face a double dilemma: they lack professional legal teams to participate in MPIA arbitration, and they bear financial pressure in budget allocation that does not match their trade share.

5. SCHEME CONSTRUCTION: CHINA'S CHOICE OF A COMPROMISE SOLUTION

The reform of the dispute settlement mechanism lacks strong leadership, and the current temporary appeal arrangements have failed to fundamentally solve the problem. Given the lack of enthusiasm of the United States and European countries for WTO reform and India's negative attitude, China should assume the special responsibility of a major power commensurate with its scale and strength, actively organize reform dialogues, and actively propose reform plans, so as to activate

[10] In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: May 13, 2025.
[11] In https://www.wto.org/english/docs_e/gattdocs_e.htm. Last access: May 13, 2025.

the vitality of the multilateral trading system and promote its development towards a more equal, just, cooperative and win-win direction.

5.1 Main Content of the Compromise Solution

In the field of multilateral trade negotiations, when there are fundamental cognitive differences between the negotiating parties, simply relying on persuasion strategies or confrontational games is difficult to reach a consensus. This assertion has been verified by international law practice (Ji Wenhua, 2023). Based on a systematic analysis of the core demands of all parties and the causes of the negotiating deadlock, this paper proposes to construct an inclusive compromise solution in the reform of the dispute settlement mechanism. Specifically, it can be in the current DSU Article 17 framework,[12] establish the institutional arrangement of "selective appeal procedures" to break the deadlock through flexible mechanism design.

The appellate review mechanism established in DSU Article 17 is essentially a non-compulsory discretionary procedure, which provides a normative basis for institutional innovation. If all members establish supplementary rules through consensus, that is, allow members to choose not to initiate the appeal procedure through implied statements under specific circumstances, and at the same time ensure that the rulings of the expert group are based on DSU Article 16 automatically come into effect,[13] then a compromise mechanism with both legitimacy and feasibility can be formed. In form, it is recommended to refer to the agreement paradigm of MPIA, and the WTO members should conclude the *Multilateral Agreement on the Flexibility of the Application of Article 17 of the DSU* (hereinafter referred to as the *Flexibility Agreement*), and formally notify the WTO Dispute Settlement Body (DSB).

5.2 Feasibility of the Compromise Solution

First, the advantages of procedural compatibility are significant. The scheme is fully embedded within the existing DSU institutional framework, which neither needs to break through the mandatory binding force of the two-tier final adjudication system, nor does it change the nature of the Appellate Body as a common judicial body. The consensus-based requirement for all members to

[12] In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: May 13, 2025.
[13] In https://www.wto.org/english/docs_e/legal_e/dsu_e.htm. Last access: May 13, 2025.

take effect ensures its legal nature distinct from plurilateral agreements, which makes the WTO dispute settlement mechanism still have the characteristics of mandatory, automatic, and binding.

Second, the openness of the institution is effectively guaranteed. Members who choose not to initiate the appeal process can still participate in the selection process of the Appellate Body members. This institutional design eliminates the reasonable concerns of member parties about the marginalization of the institution. By retaining the right to substantial participation, it can provide necessary administrative resource support for the Appellate Body and ensure that the nature of the institution as a common judicial platform for all members is not weakened.

Third, the risk of rule modification is controllable. By avoiding the DSU text revision procedures, the difficulties of approval by domestic legislative bodies of member parties are effectively resolved, and policy maneuvering space is reserved for members with reservations. According to the conversion clause design of the Certainty, and also fits the inherent laws of the progressive development of the international rule of law system.

6. CONCLUSION

Currently, the reform of the WTO dispute settlement mechanism is underway, and the deadlock in the existence or abolition of the appellate body is difficult to change for a while. It can be determined that future negotiations still face many difficulties, and there is great uncertainty as to whether a comprehensive solution can be reached as scheduled, and the crisis of the dispute settlement mechanism will continue to exist. The temporary appellate arbitration body at least provides a reasonable channel for resolving trade disputes among members. In order to maintain the multilateral trading system and international economic and trade rule of law, it is also necessary to prepare for a rainy day and explore new solutions. This article suggests that WTO members consider strategic adjustments and institutional innovation, explore a path characterized by parallel coexistence, and put forward a compromise solution. The core of this solution is to build a mechanism within the current DSU framework to "recognize and respect the non-use of the appeal procedure". Such an arrangement has strong problem-orientedness and implementation convenience, is connected with the current dispute settlement mechanism, has little modification of the existing rules, and takes into account the positions of all parties, and can play a positive role in promoting the normal operation of the WTO dispute settlement mechanism and resolving the negotiation dilemma.

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