

Exploration on the Solution of Paralysis Crisis of WTO Dispute Resolution Appellate Body

Yujia Guo

Shandong University School of Law Weihai, Shandong 264209, China

Abstract

The United States maliciously obstructed the selection of the Appellate Body's judges, which paralyzed the Appellate Body, thus causing the WTO dispute settlement mechanism to stall. Academic circles and WTO members have proposed corresponding solutions. The suggestions proposed by the academic community include the signing of a non-appeal agreement between the two parties of the dispute, the WTO members voting to select members of the Appellate Body, using of arbitration, the establishment of an appellate arbitration mechanism or an open Appellate Body; Among the WTO members, the European Union, China and many other members have all expressed their wishes to resolve this crisis as soon as possible and have discussed the establishment of an open appellate arbitration mechanism. In response to the crisis of the paralysis of the Appellate Body, an open-type Appellate Body can be established as a current emergency plan. As for permanent settlement of the problem, the establishment of a regional trade dispute settlement mechanism may be considered. In this context, China should make contributions to China's wisdom, grasp the opportunities under the crisis, and contribute to China's economic development.

Keywords

WTO; Appellate Body; Paralysis Crisis; Solutions of WTO Appellate Body Paralysis Crisis.

1. Introduction

The WTO dispute resolution mechanism, which is hailed as "crown jewel", plays an active role in resolving the international trade disputes among the member countries. In particular, the Appellate Body, as the initiate measure to make WTO differ from GATT dispute resolution mechanism, has realized the system where the second instance is the final instance in the international trade disputes, which finally enhances the fairness and justice of dispute resolution. However, the Appellate Body was paralyzed on December 11, 2019. The academic circles and WTO members brought forth some reform and alternative solutions against the situation above, in hope for minimizing the adverse influence on WTO dispute resolution mechanism and international trade. On the basis of sorting and analyzing the solutions that the academic circles and WTO members proposed, this paper tries to put forward the path selection solution in the face of the paralysis crisis of the Appellate Body and discuss China's opportunities from the crisis.

2. Sorting and Feasibility Analysis of Academia's Solution

2.1. Both Parties of the Dispute Sign Non-Appeal Agreement

According to the principle of "negative consensus" in Article 16 of DSU, if both parties of the dispute who do not sign a non-appeal agreement neither make an appeal nor raise an objection, then the report made by the expert group will take effect. However, the WTO dispute solution mechanism is applicable to the trade dispute between countries, and WTO members generally use very cautious diplomatic ways when defining their positions and showing their attitude.

Signing an agreement is undoubtedly the diplomatic way that is used for most of the time. Therefore, both parties of the dispute can choose to accept the expert group's report by signing a non-appeal agreement.

Scholars show different attitudes towards the plan above. Some believe that the plan is the most ideal solution after the paralysis of the Appellate Body and could improve the efficiency of dispute resolution while the dispute resolution becomes uncertain after the paralysis of the Appellate Body. However, some others think that the plan puts an end to the system where the second instance is the final instance, making the dispute of international trade back to GATT era essentially.

Despite the different attitudes towards the plan, all scholars believe that a big problem will happen to the actual operation process. In the face of the trade friction, both parties of the dispute all expect to resolve the dispute through all ways possible on the basis of ensuring fairness as much as possible. If both parties of dispute agree to take the first instance as the final one, then two parties are more apt to choose arbitration within a broader range of self-control. Therefore, it is not realistic enough for both parties to sign a non-appeal agreement.

2.2. WTO Members Voting to Select Members of the Appellate Body

As specified in Paragraph 1, Article 9 of WTO Agreement, if both parties of dispute cannot reach consensus via amicable consultation, the procedure of member voting then will be launched. The term above makes it possible to launch voting procedure by the member countries. Although the above is possible theoretically, the case of launching the procedure never occurred in the history of GATT and WTO. Furthermore, the mechanism is also subject to certain legal barriers. Although WTO Agreement is superior to other multilateral trade agreement in terms of application according to the provisions of Article 16 of WTO Agreement, consensus on whether "the multilateral trade agreement" in the term includes DSU contained in Annex 2 has not been made yet. Some scholars believe that the Appellate Body paralysis caused by the United States' unilateral measures of preventing the election of the Appellate Body members has modified Article 2 of DSU illegally. The actual illegal practice has led to the conflict between DSU and WTO Agreement. In consideration of the above, the reality complies with the provisions of Article 16 of WTO Agreement which is applied in priority. Therefore, it is just and necessary to launch the voting procedure according to WTO Agreement.

The author believes that the mechanism can serve as an alternative option under a special case but cannot be the prime one, because the plan has some legal defects above. More importantly, the voting of the plan should be agreed by all parties except for the United States in order to avoid the legality issue.

2.3. Dispute Resolution by Arbitration

The arbitration for solving international trade dispute as specified in Article 25 of DSU and the procedure of expert group and Appellate Body actually belong to the parallel mode of dispute resolution.

Compared with the procedure of expert group and Appellate Body, the arbitration has the following exclusive merits: The launch of arbitration does not depend on DSB's behaviors. The dispute is resolved finally after the parties concerned are informed of the validity of the arbitration award. At the same time, arbitration award is applicable to the supervision mechanism, which is identical to the report of expert group and Appellate Body. The above could ensure the compulsory execution and supervision mechanism of WTO members for the arbitration award under DSU framework.

However, arbitration also has some congenital defects, the most prominent one of which is that arbitration cannot replace the Appellate Body that has been paralyzed. It is actually an alternative method for resolving dispute in the two instances of the whole expert group and

Appellate Body. Nevertheless, the author still believes that, as the arbitration has been included under DSU rule and has relatively complete and sound mechanism, to solve the trade dispute between WTO members by using DSU arbitration terms is a relatively practical choice.

2.4. Establishment of An Appellate Arbitration Mechanism

The appellate arbitration refers to the method of dispute resolution via arbitration in the stage of appealing as expected by the parties of dispute after the procedure of expert group procedure. The arbitration above is based on Article 25 of DSU and was modified on the basis of Article 17 of DSU and the core contents of WTO's Working Procedure of Appeal Deliberation.

Although some scholars doubt both parties of arbitration may submit the entire dispute to the arbitral tribunal in virtue of the autonomy of will of arbitration, to attempt to ignore the report of the expert group in order to avoid the judgment results that are not beneficial to them, it cannot be denied that the appellate arbitration mechanism is targeted when dealing with the paralysis crisis of the Appellate Body. With the provisions above together with the restrictions of Article 25 of DSU, the effective connection with the procedure of expert group can be realized. Therefore, it is of realistic feasibility in terms of technology and law.

2.5. Establishment of an Open Appellate Body

The open Appellate Body means the new body duly set up based on the multilateral agreement concluded by the intending WTO members via negotiation by avoiding the existing framework. Neither WTO Agreement nor DSU contains relevant provisions, according to which, any member is forbidden to conclude any agreement that is applicable to them only. In fact, some WTO members have signed the regional trade agreement mutually, such as USMCA agreement which has specified its independent dispute resolution plan. It can be seen from the above to set up a new Appellate Body beyond WTO's framework having no legal barriers under the provisions of WTO Agreement and DSU.

The plan also has certain problems, which mainly include the treatment of some special cases. For instance, if a dispute involves several parties as well as the members that have joined the Appellate Body and that haven't, it would be troublesome to decide whether the new or the former Appellate Body is responsible for hearing the case.

3. Overview of WTO Members' Solutions and Comparative Analysis

3.1. WTO Members' Solution

3.1.1. EU Plan

As pointed out by the EU in the proposal issued on September 18, 2018, it is imperative to prepare a plan in order to maintain the independence and fairness of the Appellate Body members. The EU suggested adjusting the principle of consensus so as to enable all members to get access to the multilateral negotiation, the progress of which has been made, in the field where consensus is not made. In 2019, the EU actually signed bilateral appeal agreement with Norway and Canada, both of which agreed to resolve trade dispute by launching temporary "appellate arbitration" as per Article 25 of DSU. Once the Appellate Body is paralyzed, the plan will be used as the temporary alternative organization of the Appellate Body so as to shoulder the appeal final instance function of the trade dispute between two parties. The arbitration award will be used as the final judgment.

3.1.2. Plurilateral proposal of Ottawa Conference

The minister of Canadian Department of Foreign Affairs and International Trade (DFAIT) convened the 12 WTO members besides China and the United States to hold a meeting in Ottawa on October 24-25, 2018, in order to discuss the way of reforming WTO to make it modern. As for the reform of dispute resolution mechanism, great concern should be paid to

the vacancy of the Appellate Body and the barriers hindering the election of Appellate Body members should be eliminated urgently according to the joint declaration of the meeting.

3.1.3. China's Plan

One of the main contents specified in China's Proposal on WTO Reform issued on May 11, 2019, mainly is to elaborate the Appellate Body. Based on the document above, China proposed to launch the procedure of Appellate Body member selection as soon as possible to fill in the gap of position in order to safeguard the multilateral trade system. China also suggested restricting the unilateral measures dissatisfying WTO's rules strictly in order to prevent the unilateralism from expanding within the system.

3.1.4. Plan of World Economic Forum

17 member countries of WTO issued a joint declaration during the World Economic Forum held in Switzerland on January 21-24, 2020, claiming the negotiation on the "emergency measures for the temporary multilateral appeal procedure". According to the consensus having been reached with the attending members so far, the emergency plan would be preliminary operated as per the arbitration terms in Article 25 of DSU. The EU has made effort in boosting such procedure actively and has signed an appeal agreement with the main markets such as China, Brazil and Canada. The other 10 countries declaring their involvement include Chile, New Zealand, Switzerland, Norway and Singapore. The plan is still under discussion and there is no sign implying its implementation.

3.2. WTO Members' Solution and Comparative Analysis

According to the plan above, the WTO members except for the United States would give priority to the Appellate Body reform, in hope for solving the paralysis crisis of Appellate Body within the shortest time possible and seeking for a permanent solution.

The author believes that the "emergency measures for the temporary multilateral appeal procedure" concluded in the World Economic Forum is a relatively feasible one among all the plans available at present. First of all, the operation mode of the Appellate Body serves as the basis according to the plan, providing clearer and more feasible operation plan for the multilateral appeal agreement. Second, the agreement is an open agreement which does not set threshold for the members' involvement. Many countries have already expressed their willingness to join the agreement. A higher number of involving countries means a better effect that this agreement will bring. Third, the appellate arbitration mode used in this agreement could make dispute resolution faster and more efficient. As the arbitration entails the consensus of the two parties of dispute, all parties are more motivated to execute the judgment. However, there are also some dissenting voices for the plan. The prominent one is that the plan cannot be called Appellate Body reform in real sense, because the reform entails the involvement of the United States, the world's strongest economy in the world at present. According to the response of the Trump administration at present, the United States has no idea of reconsidering its status in the Appellate Body and would rather maintain the current status. Therefore, it is an urgent and key task to conclude a temporary multilateral agreement and establish the temporary alternative measure of Appellate Body under the current situation.

4. Selection of Path Against the Paralysis Crisis of Appellate Body of WTO Dispute Resolution

4.1. Alternative Solution for the Appellate Body Paralysis of WTO Dispute Resolution

It becomes more difficult to bring forth a permanent solution against the Appellate Body paralysis within WTO's original framework, for the United States is reluctant to offer

collaborative services. Therefore, the top priority nowadays is to find an organization to replace the Appellate Body in order to safeguard the stability of WTO's dispute resolution mechanism and international trade. Recently several WTO member countries were negotiating on "temporary multilateral appeal procedure" in hope for concluding an open multilateral appellate arbitration agreement. For the issue above, the author believes that the form of such an agreement is feasible for the time being. With the hindrance set by the United States, the DSB which mainly makes voting via negotiation could hardly make an inch forward. In consideration of the situation above, it seems impossible to find an alternative solution after the Appellate Body paralysis within WTO's original system within a short time. Therefore, the only way to stay ahead is to seek for a solution beyond the system, such as signing an open multilateral appeal agreement, which is the first choice for concluding the open multilateral appeal agreement. However, for the mode of constructing the temporary appeal mechanism either by litigation or arbitration, the author insists on the litigation mode that the original Appellate Body uses.

If the litigation mode is used, the mode must be improved on the basis of Article 25 of DSU. Furthermore, improvement means negotiating on relevant matters. As negotiation may cost a long period of time but the task of seeking for an alternative organization is urgent, a faster solution is required. If the litigation mode of the original Appellate Body is used, the relevant provisions of the original Appellate Body can be used directly. The Appellate Body can run as long as the United States can be avoided and other countries are willing to join the new Appellate Body to reach an agreement. This is the simplest and most convenient method. The Appellate Body remains open so as to welcome all the parties willing to join it.

4.2. Permanent Solution of Paralysis of Appellate Body of WTO Dispute Resolution

The participation of the United States is required if solving the problem of the Appellate Body paralysis permanently within WTO framework. If the United States is avoided, the plan of WTO members voting to select members of the Appellate Body can be adopted only. As the plan has legal defects, dispute occurs inevitably if launching the voting procedure by avoiding the United States. If other WTO member countries cannot reach a consensus on the issue besides the United States, the plan then has to be delayed within an infinite time.

For the issue above, the author believes that it is necessary to wait for the involvement of the United States which claims free trade and the change of the international trade situation in order to solve the Appellate Body paralysis crisis within WTO system permanently. Besides the above, the solution beyond WTO system may be the other choice. According to the author, the establishment of a regional trade dispute resolution mechanism could relieve the panic of international trade dispute resolution caused by the paralysis of WTO Appellate Body effectively. In consideration of the geopolitical similarity, the countries in the same region are also similar in terms of their legal system, political tradition and cultural concept so they could reach a consensus easily on the establishment of dispute resolution mechanism. Together with geopolitical advantages and the prosperous border import and export trade, the establishment of a multilateral regional trade dispute resolution mechanism could boost the economic and trade exchange and economic development. Of course, it cannot be denied that such mechanism cannot cover the countries beyond the region and therefore its applicability cannot be the same with the WTO dispute resolution mechanism, letting alone the WTO dispute resolution mechanism. Nevertheless, the author does not believe regionalization reflects the reverse globalization and both could serve as the key power safeguarding multilateralism for the current dispute resolution mechanism at present at least. It is inadvisable to refuse the regional trade dispute resolution mechanism by blindly insisting on the globalization. Therefore, it is a good choice to establish a regional trade dispute resolution mechanism at present.

5. China's Opportunities under the Paralysis Crisis of Appellate Body of WTO Dispute Resolution

As the world's second largest economy and the first largest country of trade in goods, China plays a crucial role in WTO and is indispensable in WTO's any negotiation. With the United States not caring about the paralysis of the Appellate Body, many WTO members expect China would play a leading role in the issue. It can be said that the paralysis crisis of the Appellate Body of WTO dispute resolution means both challenge and opportunity to China, which should seize this golden chance to shoulder its holy responsibilities as a great power and participate in the global governance.

WTO members are trying hard to solve the paralysis crisis of Appellate Body. As the WTO member and the supporter of multilateral trade system and free trade, China should contribute its wisdom actively and work together with other WTO members seamlessly to launch the emergency alternative plan within the shortest time so as to help WTO break through the current deadlock, enter an effective working status and safeguard the orderly international trade activities.

In consideration of the abnormal operation of WTO dispute resolution mechanism, the current deadlock can be effectively relieved by establishing the regional trade dispute resolution mechanism. For China, the dispute resolution mechanism of "the Belt and Road" is of great importance to maintaining the healthy development of China's foreign trade. We should also learn lessons from WTO dispute resolution mechanism and establish a powerful execution body so as to ensure the effective execution of judgment.

6. Conclusion

The academic circles and WTO members proposed their respective plans for coping with the paralysis crisis of the Appellate Body respectively. It can be found through plan analysis and comparison that to conclude a multilateral appeal agreement and establish an open Appellate Body without the involvement of the United States, as the alternative body for the Appellate Body of WTO dispute resolution mechanism is the relatively feasible plan with high recognition and participation degree of all member countries.

For China, the paralysis of the Appellate Body for WTO dispute resolution means both challenge and opportunity for China. China should, in partnership with other WTO member countries to crack the nut, play a positive role in WTO reform and take the lead in solving the crisis of the WTO Appellate Body. By following the steps above, China could enhance its speaking right in the field of international trade and boost its further economic development.

References

- [1] HU Jiayang. How will the WTO Dispute Settlement Mechanism Evolve after the Appellate Body Ceases to Function[J]. *International Economics and Trade Research*. 2020(01)
- [2] Pieter J. Kuijper, From the Board: The U.S. Attack on the WTO Appellate Body, 45 *Legal Issues of Economic Integration*, 2-3 (2018).
- [3] Jaime Tijmes Lhl, Consensus and Majority Voting in the WTO, *World Trade Review*, Vol. 8, 2009.
- [4] SHI Jingxia BAI Fangyan. A Practical Response to the WTO Appellate Body Crisis: Utilizing Arbitration to Resolve Trade Disputes[J]. *Journal of International Trade*. 2019(04)
- [5] Jens H. Pohl, Blueprint for a Plurilateral WTO Arbitration Agreement under Article 25 of the Dispute Settlement Understanding, in Denise Prevost, et. al. ed. *Restoring Trust in Trade*, Hart Publishing, 2018.

- [6] Scott Andersen et. al., Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals, Centre for Trade and Economic Integration (CTEI) Working Paper, CTEI-2017-17.
- [7] Kong Qingjiang.An Idea for Resolving the Deadlock in the WTO Appellate Body[J].Tsinghua University Law Journal.2019(04).
- [8] Fang Dong.Resolving the WTO Appellate Body Crisis: Preliminary Ideas for Initiating a Voting System[J]. Journal of International Economic Law.2019(04).
- [9] Shi Yang.The European Union Promotes WTO Reform: Proposition, Path and Influence [J]. International Studies. 2019(02).
- [10]Quan Yi. Comparison of WTO Reform Schemes of Different Countries and China's Response Strategies[J].Asia-pacific Economic Review.2019(06).
- [11]Kong Qingjiang.A Comparison between the US'and EU's Visions on WTO Reform and Those of China[J]. Chinese Journal of European Studies.2019(03).
- [12]Lu Xiankun.China will Play an Important Role in the WTO Reform[N].The 21st Century Business Herald. 2019-6-13.
- [13]Li Zhongzhou.The WTO Ministerial Conference Still be Expected under Dual Crises[J].China Sustainability Tribune.2020(03).
- [14]He Fen.Explore the Establishment of International Trade Dispute Settlement Mechanism under the Background of "One Belt And One Road" Strategy[J]. Technology Wind. 2018(33).
- [15]Su Qingyi.Can the WTO break the Deadlock Over the Appellate Body[J].The Journal of World Economy. 2020(01).