

An Analysis of the Challenge Facing WTO Panels in the Context of MPIA

Ruyi Pei^{1,a,*}

¹*School of Law, Wuhan University, Wuhan, 430000, China*

a. pry0420@163.com

**corresponding author*

Abstract: Since the Appellate Body came to a complete standstill, the DSB in WTO has been stuck in an intractable situation, where many disputes are still in the appeals process and cannot be appropriately resolved. Whatever the disputing parties chose, the Panel's reports could not be adopted by the DSB. As a result, the Appellate Body and the Panel process are facing an unprecedented crisis. As a contingency to preserve the multilateralism of WTO, MPIA was established as an interim replacement by 19 WTO members in 2020. In the context of MPIA, this paper will analyze the necessity of reformation for the dispute settlement system, especially the Panel. Furthermore, this paper will provide workable solutions by examining the ad hoc Panel's crisis and shortcomings.

Keywords: WTO, Panel, Dispute Settlement, MPIA

1. Introduction

As is pointed out in the legal texts of WTO, panels are quasi-judicial bodies. In the Dispute Settlement System, tribunals are in charge of adjudicating disputes between Members in the first instance. There is no permanent panel, while the panel is established on request. The Panel Report only becomes binding upon its adoption by the DSB (Dispute Settlement Body).

On 30 November 2020, the term of the last sitting member, Hong Zhao, expired, and the Appellate Body came to a complete "standstill" due to a vacancy [1]. As the first process in the dispute settlement system, the panel can still function. However, as seen from recent cases, like DS436 and DS533, if the disputing parties decide to pursue a diplomatic approach or appeal their cases to the Appellate Body, the panel reports will not be adopted by DSB, making it difficult for the dispute settlement mechanism to function. At the same time, without the Appellate Body, the disputing party cannot get the appeal relief, and the panel's rule interpretation and ruling results also runs without the supervision and corrective mechanism, which could harm the consistency of the entire DSS (Disputing Settlement System).

In seeking to resume the functioning of the appeals mechanism, plenty of proposals have been brought up, among which the most feasible one must be the arbitration under DSU 25. On 30 April 2020, a group of 19 WTO members notified the WTO of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). MPIA is widely considered to fill the gap of the Appellate Body and help the DSS get back on track. Nevertheless, MPIA has its disadvantages.

This paper will examine the crisis the Panel in WTO confronted with and seek feasible solutions for it in the context of MPIA.

2. Shortcomings of panels in the context of MPIA

As Annex 12 of the Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, issued by Canada in 2016, MPIA could not be taken as an international treaty or multilateral trade agreement. Instead, it was born to be a political commitment, according to its text phrasing and procedural rules [2]. Technically, it is open to all WTO members, and even the members who have joined MPIA could express whether they are willing to use this process in each case, which means that MPIA is of great flexibility. However, it also grants MPIA instability when it comes to actual operation. Meanwhile, only 53 out of 164 WTO members are participating in MPIA, less than half of the total. That could make a double-standard situation, where participating members settle disputes abided by the complete DSS with MPIA filling the gap. In contrast, other members could take advantage of the standstill Appellate Body and stay out of the ruling.

Based on this background, the Panel, as the first stage of DSS, is at the point where it should reflect and change the situation.

2.1. The panels' role in dispute settlement systems

The role of the panel process has changed now compared with the early days of the WTO. For the Members, the expectations of the panel have also shifted considerably.

In the General Agreement on Tariffs and Trade (GATT) era, dispute resolution was characterized by "power orientation" and a strong diplomatic tone [3]. In the early days of the WTO, the use of experts was adopted by many countries as a more flexible form of dispute resolution compared to the real judicial process. To be precise, some countries found it necessary to take a step back from the cases that received most of the attention [4]. However, in recent decades, this is not the case: oftentimes, parties skip the consultation stage and jump straight to the panel processes as a first resort. More scholars and practitioners are beginning to discuss the laws governing the operation of expert panels at the jurisprudential level and are looking to them to make objective assessments and give more predictable decisions [5]. These imply that the judicial nature of dispute resolution mechanisms is gradually increasing, and the "depoliticization" of dispute resolution has become one of the trends.

In recent years, both the standstill Appellate Body and MPIA surfaced that the panel needs to improve in practice. The crisis that WTO confronted could be directly attributed to some diplomatic factors, though it also indicated that the multilateralism of WTO has not fulfilled its mission. However, since the DSS was stuck in the crisis, the panels' shortcomings have gradually emerged, which could be grouped into two aspects: the lack of experience and the lack of authority.

2.2. Lack of experience

As of 31 December 2021, a panel had been established in respect of 365 disputes (that is, in 60% of all disputes initiated), which led to panel reports in 277 of these disputes [6]. Although a large number of disputes have been referred to panels and received relatively positive results, this does not mean that all WTO members or panels have accumulated sufficient experience for this procedure.

This is particularly evident in the participation of developing country members and LDC members. In practice, some limitations are set in the selection of the members of the Panel, which resulted in the opinions of the Panel members not expressing the interests of the majority of the member states. Taking China as an example, although China is one of the three primary users of the WTO dispute settlement mechanism, only Mr. Zhang Yuqing has actually heard a case in the indicative list of panelists [7]. In fact, many WTO members (especially developing country members and LDC members) still need to be deeply involved in WTO dispute settlement and often learn from existing mechanisms as third parties to disputes [8]. Although some Members appear to participate deeply in

dispute settlement, litigation, and judication, resources still concentrate on minor members, especially the qualified lawyer teams with sufficient practice experience. Not the domestic resources but the DSS itself could solve this problem indeed.

Since the MPIA is criticized for its lack of representativeness, the panel should hold the stand firmly that litigation and judication resources are evenly distributed in the WTO. If the panel does not struggle for a more diverse membership structure, the members concerned will only get less experience and practice opportunities.

2.3. Lack of authority

Scholars and practitioners have examined the lack of authority for years, manifesting as an impairment of efficiency and legitimacy.

Regarding the time-efficiency, the panel can only sometimes give a good answer. The statutory deadline for panel proceedings is six months, but the average length of a panel process is around 15 months, leading to a great deal of economic loss. In the case of the Korean anti-dumping dispute (DS488), the proceedings caused by the additional nine months are added to an additional loss of 90 million US dollars [9].

What counts more than that is the legitimacy issue, which reflects the structural problem of the panel in WTO. Firstly, because of the non-permanent feature of the panel, the consistency of its decisions from case to case has been questioned. The Panel relies more on Secretariat staff to conduct the case proceedings (including the nomination of Panel members) and draft the Panel's report. These staff members are from a single source and cannot guarantee complete independence and fairness. Around 66% of all panels between 1995–2014 have actually been composed by the Director-General (DG) together with the Secretariat. This implies that it is hard to maintain the consistency of all the decisions made by the panels composed of different panelists since they rely on the Secretariat to push the procedure smoothly.

Secondly, under the relevant interpretation and application of treaty law, panels and the Appellate Body are not considered to have the authority to "make law" and the previous Appellate Body interpretation was not authoritative [10]. According to the DSU, the panel is responsible for factual and legal review, but it does not set a clear line for the responsibility of the functions of the panels. Ensuring that all the panels concerned with different disputes function consistently is always difficult. In some cases, the political background is sometimes also taken into consideration. This undermines the authority of the panels as well.

According to Annex 1 of MPIA, the parties to the dispute shall request the panel suspend the panel proceedings and cooperate with parties to complete a series of procedural issues, such as lifting confidentiality and transmitting the final panel report. In other words, the cooperation of the panel is essential for the initiation of MPIA proceedings. While the panel is established on request, as well as the shortcomings mentioned, the function of MPIA could be undermined.

Moreover, in the context of MPIA, members of WTO are entitled to choose to use the MPIA procedure or not, which grants the MPIA unprecedented flexibility. As stated above, the flexibility could lead to the double-standard when it comes to DSS. In the case of this situation, the panel should struggle to improve its stability and consistency, during which panelists' independence and representativeness are too crucial to be ignored.

3. Proposals for reform - Permanent panels

For the sake of its shortcomings, the reformation of the WTO dispute settlement system has been voiced for a long time. One of the measures discussed most is to establish a permanent panel. It is believed to be an effective way to fix the existing problems, while some argue that it is unnecessary

and that more attention should be paid to re-designing the Appellate Body. Though the permanent panel cannot solve all the problems, it could still contribute to a more efficient and fair dispute settlement system to deal with the MPIA and the potential absence of Appellate Body for a long time to come.

First of all, the most obvious benefit can be that the consistency of the decisions is improved. With a permanent panel, the composition of panelists would be fixed, making the decision more predictable and consistent. The previous decision could be seen as a special kind of customs in international law, and in this way, it may avoid the question of whether it has the right or power to make laws.

Also, there could be more chances for those panelists to practice and get involved in the dispute settlement. The opponents hold that no empirical evidence indicates that experience yields higher quality rulings that stand up better under appellate review. However, it should be pointed out that mere participation in the panel does not mean experience. What matters is that the panelists are involved in the case with proper composition procedure, and political factors are ensured to be excluded. This requires a correspondingly better design of the procedural system, especially for the composition of panels. When the permanent panel is established, the panelists should represent the majority of the Member countries instead of relying on the Secretariat. Panelists from developing countries and LDC should be given special opportunities to weigh those parties' interests. In this way, both those panelists and the countries they are from could accumulate effective and beneficial experiences. Therefore, the efficiency of the whole procedure may be improved.

4. Conclusion

Confronted by the crisis of the Appellate Body, some WTO members sought a new avenue for the DSS, the MPIA. In the context of MPIA, the panel should not step back and maintain the flawed structure and operation. The panel should firmly hold its stand for WTO multilateralism and make up for the uncertainty of MPIA, especially when MPIA has yet to win wide acclaim now. However, MPIA is believed to become a key to dealing with the absence of an Appellate Body, so will a better-reformed panel.

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