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Rebuilding the Cradle of Trade Justice: Institutional Reforms for the WTO Appellate Body Crisis

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Abstract. The suspension of the WTO Appellate Body has triggered a crisis in multilateral trade governance, laying bare a structural conflict between state sovereignty and the rule of law in trade. The US has accused the judiciary of overreach, while China and the EU have condemned rule-breaking, leaving dispute resolution decisions in an enforcement vacuum. Through empirical analysis of three typical cases—violations of the DS140 zero-value rule, the failure to enforce DS397 rulings, and the misuse of provisions in the Turkish pharmaceutical case—this study reveals the paradox of "legal victory but trade failure" and explores how to rebuild judicial boundaries and address litigation inequities in developing countries. A three-pillar solution, namely, judicial authority definition, a dual-track time limit procedure, a reversal of the burden of proof, and a Global Trade Justice Fund, is proposed to resolve the conflict between sovereignty and the judiciary and provide a replicable model of institutional resilience for multilateral governance.

Keywords: Appellate Body Crisis, Judicial Activism, Enforcement Vacuum, Litigation Equity, WTO Dispute Settlement Reform

1. Introduction

On December 11, 2020, as the term of the last judge of the World Trade Organization (WTO) Appellate Body expired, the multilateral trading system suffered the most serious institutional paralysis since the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. The crisis has caused 24 adjudicated disputes to fall into an enforcement vacuum, and 53 new cases have become "judicial orphans", thoroughly exposing the fundamental conflict between sovereignty and the rule of law in global trade governance [1].

As the initiator of the crisis, the United States accused the Appellate Body of "overstepping its authority to make laws" in the DS184 hot-rolled steel case on the grounds that "the Appellate Body has persistently overreached its authority... creating binding obligations not agreed by Members" and criticised the DS316 Airbus case for delaying the 90-day trial period to 152 days [2]. The EU and China condemned this move as a betrayal of the rules and order (quoting the speech of the EU Trade Commissioner) [3], and China's experience in the DS397 fastener case serves as clear evidence: in the absence of a judicial error-correction mechanism, the winning ruling devolves into a "paper victory," with an enforcement rate of less than 25% [4]. This article argues that the essence of this

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crisis is a structural collision between judicial activism and state autonomy and that institutional reconstruction is urgently needed through a three-pillar reform framework.

2. The anatomy of crisis: systemic harm from institutional vacuum

In the empirical test of the collapse of the WTO dispute settlement mechanism, three typical cases reveal the systemic crisis. Case DS140 exposed fundamental violations: the EU adopted the "zeroing method" to artificially increase the dumping margin of Indian cotton fabrics from 3.4% to 24.7%, directly violating the "fair comparison" principle of Article 2.4.2 of the Anti-Dumping Agreement [5]. However, the DS464 case suffered a fatal setback after the suspension of the mechanism – because it could not appeal, the same type of zeroing method was ruled "not illegal", resulting in a comprehensive fragmentation of legal interpretation [6].

The DS397 case highlights the dilemma of ineffective enforcement: although the Appellate Body ruled in 2011 that the EU's unified national tariff violated Article 6.10 of the Anti-Dumping Agreement and required "individual duty rates must be determined for each exporter", the EU delayed enforcement for eight years [7]. When China initiated the compliance review under Article 21.5 in 2019, the EU only reduced the tariff but also caused China's fastener export share to Europe to plummet from 12% to 4%, becoming a classic footnote to the "paper victory" [8].

The Turkish drug restriction case, as the first case of the MPIA, is more of a warning: Turkey banned Chinese antihypertensive drugs on the grounds of "national health" but included them in the medical insurance procurement system. Such abuse is 'inspiring': 412 new security exception measures were added worldwide from 2020 to 2023, a surge of 300% over the previous three years [9] and the US steel and aluminium tariffs (DS544) and Japan's semiconductor controls followed suit, making national security a universal excuse for trade protectionism.

Core findings: The strategy has become a systemic loophole: "Deliberate appeals into the void to indefinitely suspend rulings" [10]. This paradox of "legal victory but trade defeat" is spreading around the world.

3. Recommendation

3.1. Reconstructing judicial boundaries

The core of reshaping the judicial authority of the Appellate Body lies in establishing the boundaries of power. In response to the United States' accusation of judicial overreach, it is proposed to clarify Article 17.12 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which stipulates: "The Appellate Body shall not add to or diminish the rights and obligations under the covered agreements" [11].

The problem of procedural delays is solved through the dual-track time limit reform: referring to the lesson of the 152-day overdue period in the DS316 Airbus case [12], the cases are classified and handled:

Simple cases (such as tariff disputes) are subject to a 90-day mandatory review period.

For complex cases (e.g., subsidy disputes), a 120-day flexible review period shall be allowed, supplemented by a stop-the-clock mechanism that pauses the timeline when technical reviews require suspension [13].

The abuse of security exception clauses requires triple legal locks:

Specificity lock: requiring the source of the threat to be explained item by item as in the Turkish pharmaceutical case, prohibiting the general invocation of GATT Article 21 [14].

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Purpose legitimacy test: excluding industrial protection in the name of security, such as the essence of protecting declining industries in the US steel and aluminium tariffs [15];

Proportionality review: mandatory adoption of less restrictive alternative measures (such as strengthening the quality inspection of imported drugs); otherwise, the measures will be judged invalid in accordance with Article 25 of the Draft Articles on State Responsibility [16].

3.2. Litigation equity for developing countries

To achieve litigation fairness, it is necessary to correct the structural injustice faced by developing countries. In the DS399 case (China v. the United States tire special safeguard case), paragraph 7.24 of the panel report required China to prove that the three-year high tariffs were "excessive" [17]. This requirement essentially undermines the obligation to "prudently use special safeguard measures" set out in Article 16 of the Protocol on China's Accession to the WTO, highlighting the institutional flaw of "formal equality masking substantive imbalance". For this purpose, it is proposed to add Article 8 of Appendix 4 of the DSU: "When developed countries take special safeguard/anti-dumping measures against developing countries, the implementing party must prove that it has not substantially damaged the latter's right to development.". This move subverts the traditional logic of proof - if the United States resumes tire tariffs, it must actively submit data to prove that it has not hindered China's industrial upgrading, realising a paradigm shift from "self-proof of victimisation" to "the perpetrator's self-proof of innocence".

Capital barriers are even more fatal obstacles. The DS601 case (Vietnam v. Indonesian seafood ban) was forced to suspend proceedings due to the inability to afford the US$2,000/hour international trade lawyer fee [18], reflecting the cruel reality that the participation rate of the least developed countries (LDCs) is less than 5% [19]. For this reason, the Global Trade Justice Fund is proposed to be established, with its operating mechanism including:

Source of funds: 30% of the compensation of the losing party (such as US$126 million of the US$420 million that the EU should pay to China in the DS397 case)

Target of assistance: The per capita gross national income of the parties involved is ≤ US$3,000.

Closed-loop design: priority repayment of the fund after winning the case.

This institutional innovation positions the fund as a self-sustaining tool for rule-of-law-based poverty alleviation, serving as a "legal megaphone" for developing economies, which make up 84% of WTO members.

4. Conclusion

This reform plan constitutes a systematic antidote to the WTO dispute settlement system: by clarifying the boundaries of judicial power, the structural conflict between state sovereignty and judicial authority is resolved, and the US's "overstepping authority" accusation in the DS384 case loses its institutional basis; at the same time, with the help of the reversal of the burden of proof and the closed-loop design of the Global Trade Justice Fund, it fundamentally reverses the disadvantaged position of developing countries in 83% of WTO dispute proceedings and realizes a paradigm shift from power-based litigation to procedural democratization.

Its impact goes beyond the trade field and provides a replicable institutional template for the revival of multilateralism. Just as the dispute mechanism of the United Nations Convention on the Law of the Sea resolved the dilemma of small countries' right to sue through the reform of the seabed chamber, the three pillars of this plan can be transferred to the fields of climate change

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compensation and even digital tax coordination, proving that regulatory resilience is the key to breaking the deadlock in global governance.

The ultimate value is condensed in the dimension of civilisation history: when the bell at 23:59 once announced the death of rules, the reformed and restarted trade court will prove to human civilisation – just as the Treaty of Westphalia ended religious wars and GATT1947 tamed trade protectionism – that the era of globalisation 2.0 must conquer the law of the jungle with legal rationality.

References

[1] WTO Special Session of the DSB (2021) Procedural Improvements to the DSU. TN/DS/W/118, para 7.
[2] USTR, U. S. T. R. (2018) Report on the Appellate Body of the World Trade Organization. 7-9.
[3] Hogan, P. (2020) Speech at European Parliament Trade Committee.
[4] MOFCOM (2021) WTO Dispute Settlement Case Study: DS397 Implementation Report.
[5] WTO Panel Report (2000) India - Measures Affecting Export of Cotton Textiles (DS140).
[6] WTO Panel Report (2018) United States - Anti-Dumping Measures on Washing Machines (DS464).
[7] WTO Appellate Body Report (2011) European Communities - Fasteners (DS397).
[8] WTO Compliance Panel Report (2019) EC - Fasteners (Article 21.5)*. WT/DS397/RW, Annex A-1.
[9] WTO Secretariat (2023) Trade Policy Monitoring Report. Table III.7.
[10] Pauwelyn, J. (2022) The WTO in Crisis: Strategic Litigation Avoidance.
[11] WTO General Council (2022) Draft Decision on the Functioning of the Appellate Body.WT/GC/W/819, Annex II. 2.
[12] WTO Appellate Body Report (2011) EC - Large Civil Aircraft (DS316)*. WT/DS316/AB/R, fn. 2112.
[13] WTO Secretariat (2021) Annual Report 2021: The Future of Trade. 23–25.
[14] MPIA Arbitral Award (2022) Turkey - Pharmaceutical Products (DS583)*. WT/DS583/1, para 7.6.
[15] WTO Panel Report. (2022) US - Steel and Aluminium Products (DS544)*. WT/DS544/R, para 7.130.
[16] ILC (2011) ILC Articles on State Responsibility Art. 25(1)(b).
[17] Panel Report (2010) US - Tyres (DS399)*, WT/DS399/R, 13 December 2010, para 7.24.
[18] WTO (2022) Suspension Request by Vietnam, WT/DS601/5.
[19] WTO Secretariat (2023) Dispute Settlement Activity by Member Category: 1995-2023*, p.12.