

# *The Research and Reform on the Defects of WTO Panel Procedure*

Yuhao Guan<sup>1,a,\*</sup>

<sup>1</sup>Law School, Ocean University of China, Qingdao, 266100, China  
a. 1521392482@qq.com

\*corresponding author

**Abstract:** The WTO panel procedure is integral to the WTO dispute settlement mechanism. While playing its unique role, the panel procedure of WTO also faces many challenges and needs to be reformed to adapt to the development of economic society. To consolidate its legitimacy and improve the authority of the panel procedure in the dispute settlement mechanism, active adjustments, and reforms should be made in the selection of panel members and the transparency of the panel procedure. And we need to properly handle the relationship between the panel procedure and Appellate body, which is embodied in the fact that we can set up a standing panel to solve various contradictions in reality. Through reform, the WTO panel procedure can play its unique role in a more scientific and sustainable state, maintain fairness and promote cooperation to a large extent.

**Keywords:** WTO, dispute settlement mechanism, panel, transparency

## 1. Introduction

As one of the important ways of global governance, the WTO, with its numerous members and high credibility, has played an irreplaceable role in resolving international disputes and promoting exchanges and cooperation between countries. The logical operation of the multilateral trading system benefits from the WTO dispute settlement mechanism.[1]

With economic and social globalization development, the WTO has also exposed its related problems. There are inefficiencies and severe delays in the dispute settlement mechanism. There are also problems in the operation of various links of the WTO, such as poor operation and difficulty in playing its role. These problems are particularly prominent in the dispute settlement mechanism. Therefore, the international community's expectations for its reform are increasingly urgent.

Although WTO members have put forward different suggestions from various aspects, the aim is to improve the mechanism. However, multiple proposals failed to reach an agreement and recognition, which led to the lag and difficulty of reform. Among them, the problems in the panel procedure are one of the focuses of attention.[2]

As the center of the WTO dispute settlement procedure, reforming the panel procedure will make the WTO dispute settlement mechanism operate more scientifically and rationally.

## 2. Overview of Panel Procedure

A relatively complete dispute settlement process usually includes three stages: consultation stage, panel stage, and appeal review stage. Consultation is the starting procedure of the WTO dispute settlement procedure. The panel stage is when the dispute settlement body conducts substantive hearings of the case. The establishment of the panel is closely linked to the consultation process. According to the regulations, if the consultation and mediation are unsuccessful, the prosecution may directly request the dispute settlement body to establish a panel, which will be automatically based upon request.

An appeal review is a remedy when the parties do not recognize the Panel's report. As a quasi-judicial institution, the panel can be seen as a tribunal whose duty is to adjudicate disputes arising in the first instance. As the core of the WTO dispute settlement mechanism, the panel's establishment indicates that international trade disputes have entered the trial stage.

## 3. Crisis of Panel Procedure

### 3.1. Transparency

With the growing development of economic globalization, more and more people are directly affected by the resolution and calls for transparency, openness, and private participation are growing. Considering the independence and impartiality of the case, panel hearings, written materials, panel deliberations, panel reports, etc., are confidential.[3] The trial process of the matter is not open to the public, and the written adjudication report can be made public only after the approval of DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes).[4] This kind of relationship often makes it difficult for NGOs and the general public to understand how the parties to the dispute negotiate through transparent official channels and how the panel reaches relevant conclusions through hearing cases.

The way for the public to understand the case mainly depends on the detailed report issued by the panel after the dispute is settled or on the government's initiative to disclose relevant information. Public participation in the panel process is far from sufficient. Closed dispute settlement procedures will inevitably reduce the public's trust and support for the dispute settlement mechanism and question whether the decisions of the Panel and the Appellate body are fair. In particular, this will cause dissatisfaction among the losing country and the public because they do not know how to decide.

This opaque solution has dramatically reduced the credibility of the institutions involved in the case trial process, which often makes the final decision's reliability challenging to convince. Such distrust will make it difficult for the public to trust and adopt the dispute settlement mechanism. Due to transparency issues, the judgment of the Panel and the Appellate body may not be entirely fair.

A more open and transparent panel procedure is a convenient condition that WTO should create for the international community. The influence of WTO can be further strengthened through a transparent panel procedure [5].

While the panel must be allowed to discuss the case in an undisturbed environment, the panel procedure should also be allowed to accept and consider the suggestions made in good faith to minimize the improper interference of private participation in the panel's work. Make the case viewed by the panel public to a certain extent. Add the rules of the open court hearing procedure and establish the arrangement of the audience system. The procedural rules of available courts should be appropriately increased to enable the public and NGOs to participate in the trial process of some cases. On the premise of not infringing the security of the participating countries and keeping relevant trade secrets, the written materials submitted by the parties to the dispute and the reports made by the panel shall be published so that the public and non-governmental organizations can consult them promptly.

For the rationality of dispute settlement, enhancing the transparency of the WTO panel procedure is an improvement of the importance of dispute settlement, which also practically points out that the parties and third parties can be given greater rights. States and individuals can influence the public part of the panel procedure, which also provides the panel with an Appellate body the power to check and balance so that they can make certain restrictions on the opening to the public at appropriate times, especially when dealing with trade secrets. A more open and transparent procedure will profoundly improve the WTO dispute settlement mechanism. According to the principle of equal rights and obligations, while gradually establishing the participation mechanism, the public and NGOs should also be considered to undertake corresponding duties, which should not only be expressed through some abstract political declarations but should establish a set of detailed and precise legal provisions.

The information about the disputing parties' selection of panel members can be disclosed to some extent. This is to solve the disputing parties' requirements on the panel establishment and the open section of panels. Dispute settlement body can continuously disclose information about the parties' selection of panel members. This will, to a certain extent, provide an atmosphere of impartial international supervision and can also essentially prevent the parties to the dispute from maliciously using the right to choose the expert group to delay time and shelve the disagreement.

Such a case hearing process not only makes the public understand the operation process of dispute settlement but also helps to monitor the performance of panels. It is also conducive to the smooth settlement of multi-party disputes and further improves the public's credibility of the dispute adjudication results.

### **3.2. Selection of Panels**

The WTO panel is not a Permanent body but is temporarily selected according to needs. To maintain fairness, the panel members shall serve in their capacity, neither as government representatives nor as representatives of any organization. Members shall not give instructions to them or try to influence them personally on the matters considered by the panel but shall carry out the work to ensure their independence, completely different backgrounds, and rich experience.

In case of a dispute, the parties to the conflict can choose the panels through consultation; The committee is composed of senior talents with high reputations and relevant professional skills, including individuals with governmental or non-governmental backgrounds. But this is only theoretical because it is difficult to reach an agreement in practice for various reasons. If the parties to the dispute insist on their conditions when choosing the panel members, it will also cause excellent resistance to establishing the expert panel.

The secretariat usually nominates panel members from the list of experts of the parties to the dispute. For some compelling reasons, candidates recommended by the administration are often rejected. Considering the difference between experience and knowledge fields, although team members are outstanding talents in various fields, it cannot be ruled out that members may make wrong decisions. Even the choice of members will be limited by nationality. The level of the rule of law and the knowledge conditions of developing and developed countries are bound to lead to different weights of the right to speak, which also leads to the emergence of hidden unfairness.

### **3.3. Appellate Body and Panel Stage**

Under this organization, although the panel is ad hoc and supported by the WTO Secretariat, Appellate body is permanent [6]. Appellate body comprises experienced diplomats, lawyers, and judges with high reputations and abilities. Unlike panels, Appellate body is a permanent body consisting of seven members responsible for reviewing the legal aspects of the report issued by the boards [7]. However, in recent years, Appellate body appeared in WTO laws and other related fields,

often using narrow and difficult literal interpretations to overturn the conclusions of the expert group. According to Figure 1, 68% of all panel reports have been appealed and cross-appealed by the parties since 1995, which is far higher than any other appeal system [8].

Year of adoption	All Panel Reports			Reports of Panels other than those established pursuant to DSU Article 21.5 <sup>b</sup>			Reports of Panels established pursuant to DSU Article 21.5		
	Panel Reports adopted <sup>c</sup>	Panel Reports appealed <sup>d</sup>	Percentage of Panel Reports appealed <sup>e</sup>	Panel Reports adopted	Panel Reports appealed	Percentage of Panel Reports appealed	Panel Reports adopted	Panel Reports appealed	Percentage of Panel Reports appealed
1996	2	2	100%	2	2	100%	0	0	-
1997	5	5	100%	5	5	100%	0	0	-
1998	12	9	75%	12	9	75%	0	0	-
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	0%
2005	20	12	60%	17	11	65%	3	1	33%
2006	7	6	86%	4	3	75%	3	3	100%
2007	10	5	50%	6	3	50%	4	2	50%
2008	11	9	82%	8	6	75%	3	3	100%
2009	8	6	75%	6	4	67%	2	2	100%
2010	5	2	40%	5	2	40%	0	0	-
2011	5	5	63%	8	5	63%	0	0	-
2012	18	11	61%	18	11	61%	0	0	-
2013	4	2	50%	4	2	50%	0	0	-
2014	15	13	87%	13	11	85%	2	2	100%
Total	201	136	68%	172	115	67%	29	21	72%

a No panel reports were adopted in 1995.

b Under Article 21.5 of the DSU, a panel may be established to hear a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB upon the adoption of a previous panel or Appellate Body report.

c The Panel Reports in EC – Bananas III (Ecuador), EC – Bananas III (Guatemala and Honduras), EC – Bananas III (Mexico), and EC – Bananas III (US) are counted as a single panel report. The Panel Reports in US – Steel Safeguards, in EC – Export Subsidies on Sugar, and in EC – Chicken Cuts, are also counted as single panel reports in each of those disputes.

d Panel reports are counted as having been appealed where they are adopted as upheld, modified, or reversed by an Appellate Body report. The number of panel reports appealed may differ from the number of Appellate Body reports because some Appellate Body reports address more than one panel report.

e Percentages are rounded to the nearest whole number.

Figure 1: All panel reports.

In the operation stage of the panel procedure, the panels are ad hoc. It usually consists of three experts selected temporarily and, in exceptional cases, five experts. The panel members must be supported and recommended by the WTO Secretariat [9]. In contrast, Appellate body is permanent. The two have led to institutional imbalance because there is no continuous relationship between the Appeals Board and a panel that provides information on the cases and issues under consideration, leading to members not fully trusting the forum [10]. In this case, they will adhere to their views and may appeal against the trial and related procedures. And because of the opposition of interests, it is difficult for the parties to the dispute to reach a consensus on the choice of team members.

### **3.4. Reform - Establishment of a Standing Panel**

The European Community first proposed the establishment of a standing group in the 1998 DSU reform program.[11] However, this proposal has not been discussed in detail and seriously. If we set up a vertical panel, we can ensure the continuity and dignity of justice. Establishing a standing committee will not take too much time to select members. This panel can pay more attention to the consideration and settlement of disputes, thus improving its efficiency. This will benefit the evidence handling in the dispute settlement process because the full-time panel members can focus on running a large amount of evidence and information in the dispute and overcome the shortcomings of scattered members of the temporary panel.

Moreover, establishing the vertical panel does not require much time to select its members because the board members must be recognized experts with good experience and knowledge, which overcomes the mobility of the group members.

Another advantage of the standing group is that it can improve the quality of the work of the panel group and the consistency of the decisions. Because the fixed group has more time to deal with matters related to the case and can concentrate on the causes and consequences of the case and the legal debate, which can significantly improve the scientific and legitimacy of the case review, at this stage, there have been many ad hoc expert group judgments, which make the case more complicated to solve. The experts of the standing group have more selfless professional ethics and profound professional background, which is also incomparable to the interim group.

Today, with the rapid development of global trade and economy, such a knowledgeable and experienced team can focus more on considering and resolving disputes, which undoubtedly improves work efficiency and contributes to the consistency of decision-making. The standing group can prevent the panel members from receiving the subjective will of the dispute members and being affected by individual interests when determining their conclusions and making their judgments, which will lead to the unfairness of the decisions.

A permanent panel can also get higher treatment and respect and have a more critical voice and decision-making power; this is conducive to the handling of evidence in the dispute settlement process because full-time panels can focus on handling a large amount of evidence and information in the dispute, which is a significant change.

## **4. Conclusion**

The WTO dispute settlement mechanism is irreplaceable in the international economy and trade. With the deepening of international cooperation among countries in all aspects and the diversified development of problem-solving methods. To maintain the authority and scientific nature of the dispute settlement mechanism, it is particularly essential to reasonably solve the problems at this stage and carry out reforms that keep pace with the times. The transparency of the panel procedure, the selection of the panel members, and the relationship with Appellate body are very noticeable, which

are also the goals of urgent reform. Further reform of the panel procedure will also better safeguard the state's power, reflect the verdict's fairness on a deeper level, and improve the system. The current crisis of the WTO is unprecedented. Members should actively negotiate and consult with each other on the focus of the dispute to promote the reform. The reform should be carried out based on fully developing the advantages of the dispute settlement mechanism so that it can better adapt to the development needs of all members and continue contributing to global governance.

## References

- [1] Sarooshi. (2005). *The Future of the WTO and Its Dispute Settlement System*. *International Organizations Law Review*, 2(1), 129–152.
- [2] YU Peng. (2019). *WTO Dispute Settlement Mechanism Crisis: Reasons, Progress and Prospects*. *Intertrade* (05), 10–18.
- [3] Chen. (2015). *WTO's Transparency Principle and China's Value Orientation of E-Government*. *Transnational Corporations Review*, 7(2), 223–231.
- [4] Zhang Xianglan & Tian Liao. (2013). *A Study on the Transparency in the Dispute Settlement System of WTO*. *Wuhan University Journal (Philosophy and Social Sciences)* (03), 47–52+128.
- [5] Fudali. (2002). *A Critical Analysis of the WTO Dispute Settlement Mechanism: Its temporary Functionality and Prospects*. *Netherlands International Law Review*, 49(1), 39–80.
- [6] Cottier. (2020). *Recalibrating the WTO Dispute Settlement System: Strengthening the Panel Stage*. <https://www.cigionline.org/articles/recalibrating-wto-dispute-settlement-system-strengthening-panel-stage/>
- [7] WTO, 'WTO Bodies involved in the dispute settlement process 3.4 Appellate Body', [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s4p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm)
- [8] WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm)
- [9] WTO, 'WTO Bodies involved in the dispute settlement process 3.3 Panels', [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm)
- [10] Cottier. (2003). *The WTO Permanent Panel Body: a Bridge Too Far?* *Journal of International Economic Law*, 6(1), 187–202.
- [11] *Commission of the European Communities, Discussion Paper: Review of the Dispute Settlement Understanding*, 21 October 1998, issue 9.