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The Dilemma and Innovation of the Selection Rules of Appeal Body in WTO Dispute Resolution

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Abstract. In the global trade governance system, the WTO dispute settlement mechanism is the core pillar of maintaining the multilateral trade order, and the effective operation of its Appellate Body is crucial. However, the United States has been continuously obstructing the appointment of new members of the Appellate Body since 2017, resulting in the agency's suspension due to insufficient quorum in December 2019 and exposing the institutional flaws of the selection rules amid political games. This article focuses on the dilemmas and innovations of selection rules, employing normative analysis, case-based empirical research, and comparative research methods to examine the structural loopholes in the rules and the impact of political intervention. The study finds that the ambiguity of the consensus voting mechanism and qualification standards is the root cause of the problem. It proposes an innovative pathway centered on clarifying professional qualifications, introducing majority decision-making procedures, and strengthening independent evaluation, providing a theoretical reference for revitalizing the dispute resolution mechanism.

Keywords: WTO dispute settlement mechanism, Appeal body, Selection rules, Consensus voting, Institutional innovation

1. Introduction

The World Trade Organization (WTO) dispute settlement mechanism is the "judicial pillar" of the multilateral trading system, and the Appellate Body, as its core component, assumes the key function of rendering final decisions on trade disputes, and its effective operation is directly linked to the stability of the global trade order. However, since 2017, the United States has continued to obstruct the appointment of new members of the Appellate Body on various grounds, resulting in the agency's suspension in December 2019 due to insufficient quorum. This situation has left many international trade disputes—such as the DS379 China-US anti-dumping case—unresolved, fully exposing the institutional fragility of the Appellate Body selection rules amid international political games.

Existing research focuses on the interpretation of the rules text of the WTO dispute settlement mechanism, such as the analysis of the provisions of the Understanding on Dispute Settlement Rules and Procedures [1]; focusing on the political motivations of the United States to obstruct the appointment of the Appellate Body; and analyzing the impact of the appellate body shutdown on the global trade order [2]. However, these studies have failed to systematically analyze the internal

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connections between legal procedures, political intervention methods, and global governance crises, lack in-depth research from the holistic perspective of "legal procedures - political intervention - global governance", and struggle to propose systematic reform plans. This article integrates typical cases such as DS379 and DS27, and employs normative analysis, case-based empirical research, and comparative research methods to deconstruct Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. It focuses on institutional loopholes in the consensus voting principle, the impact of ambiguous professional qualification standards, and the balance between professionalism and representativeness in global governance. It aims to propose a reform framework of "procedure optimization - standard quantification - mechanism checks and balances", providing a theoretical reference for resuming the operation of the Appellate Body and rebuilding the legitimacy of the WTO dispute resolution mechanism, and is of great practical significance for maintaining the global trade order in the post-pandemic era.

2. The institutional background and real dilemma of the selection rules of the Appeal Body

2.1. Legal framework for institutional design

The selection rules for the WTO Appellate Body are mainly constructed in accordance with Article 17 of the Understanding on Dispute Settlement Rules and Procedures (DSU), and their core clauses include:

Membership requirements: Article 17.3 of the DSU stipulates that Appellate Body members must possess "recognized authority" and "expertise in the fields of law, international trade, and related agreements" and must be "independent of any government" [1]. However, these provisions do not define specific standards for "recognized authority" or "specialized knowledge," leaving room for subjective judgments in practice.

Selection procedure: According to Article 17.2 of the DSU, the Appellate Body comprises 7 members, each serving a four-year term with the possibility of one reappointment. Members are appointed "by consensus" by the WTO Dispute Settlement Body (DSB). "Consensus" usually refers to "no member formal objection" in the WTO context, which means that any member's objection can prevent the appointment process from advancing.

Operating mechanism: Appeal cases are heard by three members, and members rotation must ensure "coherence", but no substitute mechanism is specified when members are vacant.

This framework was regarded as a "product of careful balancing" at its inception: consensus voting aims to safeguard members' control over the judiciary, while ambiguous qualification standards leave room for flexible selection. However, with the changes in the global trade pattern and the intensification of geopolitical game, the elasticity of rules gradually evolved into institutional loopholes.

2.2. The real dilemma of rules operation

2.2.1. Institutional shutdown and dispute resolution paralyzed

After the Appellate Body suspended operations in 2019, the WTO dispute settlement mechanism fell into a dilemma of "partial justice." After the report of the expert group was made, the loser was unable to appeal, and the winning party was unable to ensure the implementation of the ruling. Taking the DS379 case (China v. US anti-dumping measures case) as an example, in 2019, the expert group ruled that the United States' anti-dumping calculation method for Chinese products

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violated WTO rules, but the United States refused to implement it on the grounds that "the ruling was incorrect in law." Due to the Appellate Body's suspension, China has been unable to obtain a final legal determination through appeal and has only been able to exert pressure through bilateral negotiations, leaving the dispute pending for several years [2]. According to WTO statistics, as of 2023, there have been 27 similar pending cases, involving agricultural products, intellectual property rights and other fields, directly affecting global trade volume exceeding 100 billion US dollars.

The chain reaction of institutional shutdowns is also reflected in the sharp drop in the ruling execution rate. During the period of normal operation of the Appellate Body (2000-2018), the average execution rate of dispute rulings was 78%; after the shutdown (2019-2023), the execution rate dropped to 41%, and the coercive power of multilateral trade rules was severely weakened [3].

2.2.2. The double imbalance between professionalism and representation

The professional standards are vague, and DSU has not clarified the specific scope of "international trade expertise", which has led to the phenomenon of "qualification generalization" in the selection practice. For instance, a candidate nominated by a member in 2016, who only had experience in domestic tax law, was included in the shortlist on the grounds of "legal relevance," triggering doubts from other members regarding their ability to handle trade remedy cases [4]. This ambiguity directly leads to significant differences in professional backgrounds among the Appellate Body members. Some members are good at treaty interpretation, while some focus on domestic law, which in turn leads to differences in rulings in similar cases.

There is a lack of regional representation. Since the establishment of the Appellate Body (1995-2019), a total of 22 members have been appointed, of which 68% are from North America and Europe, only 9% are from Africa, and none of the Caribbean and Pacific island countries have been selected [5]. Geographic imbalances often lead to injustice in disputes involving developing members due to the lack of "situational understanding". For example, in DS466 (India v. US solar Measures), the appellate body's determination of "renewable energy subsidies" did not fully consider the energy transformation needs of developing countries, which caused dissatisfaction among countries such as India and others to "the bias in the application of rules".

3. Analysis of the causes of selection rule failure

3.1. Procedural loopholes and political intervention

Unilateral Veto Risks of the Consensus Voting Principle: The principle of "consensus appointment" in Article 17.2 of the DSU has been alienated into a "one-vote veto system" in practice. According to WTO practice, 'consensus' means 'no explicit opposition from members' rather than 'unanimous agreement'. This means that any member (even a small trading nation) can block the appointment by submitting a statement of opposition. The United States has taken advantage of this rule by voting against all new member nominations since 2017 on the grounds that 'the Appellate Body exceeded its authority in interpreting the rules' and that 'the extension of a member's term of office violates the DSU'. For example, in 2018, the Brazilian candidate Garcia (former Director of the WTO's Legal Department) failed to be appointed because he was 'challenged by the United States as being biased in favour of developing countries' [6].

The principle of consensus voting was originally designed to safeguard members' checks and balances on the judiciary, but in the context of prevailing unilateralism, it has become a tool for individual countries to pursue trade hegemony. As Horn and Mavroidis noted, "When 'consensus' is

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reduced to a veil for the 'veto', the survival of the Appellate Body no longer depends on professionalism but is the result of political games." [5]

The lack of an emergency mechanism has paralysed the body: the DSU does not provide for emergency replacements when member vacancies occur, merely requiring that vacancies be "filled as soon as possible." Appellate Body members are appointed for four-year terms, with a maximum of one reappointment. Between 2017 and 2019, six of the original seven members departed due to term expiration or resignation, while the appointment of new members was blocked by the United States. This ultimately led to the body's shutdown, as it lacked a quorum of three members. This 'procedural paralysis' reveals the inadequacy of the rules in anticipation of 'political deadlock' - there is neither a system of temporary membership nor an exception for term extension, which makes normal turnover a crisis for the survival of the institution. The absence of a temporary membership system or an exception for extension of the term of office has turned a normal turnover into a crisis of institutional survival.

3.2. Lack of clearly defined professional qualification criteria for members

The DS27 case (EU Banana Import Regime case) is a typical example of how ambiguity in professional criteria can lead to divergent rulings. In 1997, the United States of America, Ecuador and others sued the European Union for violating the Most Favoured Nation (MFN) principle with respect to banana import quotas for African and Caribbean countries. During the Appellate Body's review, the three members were deeply divided on whether quota allocation constituted discrimination: the European member argued that "the quotas were consistent with GSP exceptions," while the North American member contended that "exceptions should not apply to competing products." The decision was narrowly passed by a 2:1 vote in favor of the EU [7].

The root of the disagreement lies in the differences in the professional backgrounds of the members. European members are good at 'special and differential treatment' provisions in international treaties, while North American members are more familiar with the principle of non-discrimination in the field of trade remedies. As the DSU has not provided a uniform definition of 'international trade expertise', the selection process fails to ensure the homogeneity of members' specialisation in core legal areas, leading to a decline in the consistency of decisions in similar cases. Statistics show that between 2010 and 2019, the dissent rate in Appellate Body rulings increased from 12% to 34%, directly undermining the predictability of rule application [8].

4. Paths to innovation in selection rules

4.1. Technical improvements to procedural mechanisms

4.1.1. Majority voting replaces the principle of consensus

Replacing "consensus appointment" with "reverse consensus" (i.e., appointments are approved unless a majority of DSB members object) can effectively curb unilateral vetoes. This mechanism has been successfully applied in WTO trade policy reviews and other areas, as it ensures the will of the majority while preserving space for minority members to voice dissent. In terms of specific operation, it can be stipulated that the nomination of a new member shall be voted by DSB members, and can be adopted by a simple majority (50% + 1). In order to balance the interests of small and medium-sized members, a 'pre-consultation procedure' can be set up in parallel, requiring

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the nominating party to consult with at least three members of different geographical groups before voting, so as to reduce the voting confrontation [9].

4.1.2. Establish an emergency replacement mechanism

Drawing on the International Court of Justice's "ad hoc judge" system, a "standby member pool" for the Appellate Body should be established: 10–15 qualified standby members would be pre-appointed by the DSB for two-year terms, and when regular members are unable to serve, standby members would be selected randomly. If a regular member is unable to serve for any reason, a randomly selected standby member would temporarily replace them until the case is concluded. The standby members are required to have the same qualifications as the regular members and to sign a declaration of independence. This mechanism can avoid the backlog of cases caused by vacancies and ensure the continuity of dispute resolution [10].

4.2. Quantification and transparency of professional qualifications

4.2.1. Formulate a mandatory qualification list

To clarify the 'hard indicators' that members of the Appellate Body must meet, such as at least 10 years of experience in international trade law practice or teaching; participation in more than five WTO or similar international dispute cases; proficiency in at least two official WTO languages (English, French, Spanish); no part-time jobs (e.g., government advisor) that may affect independence; and the ability of the members of the Appellate Body to work in the WTO and the WTO. No part-time jobs (e.g., government counsellor, legal affairs of multinational enterprises) that may affect independence.

The list of qualifications is regularly updated by the WTO Secretariat. Candidates are required to submit supporting documents (e.g., records of case representation, academic achievements), and nominations that do not meet the standards will automatically expire.

4.2.2. Establishment of an independent evaluation committee

Establish a "Qualification Review Committee" and a "Competence Assessment Committee": the former comprises three law professors (representing developing countries, developed countries, and international organizations) tasked with verifying that candidates meet the three-dimensional criteria; the latter consists of two former Appellate Body members and one senior trade arbitrator responsible for assessing the latter consists of two law professors (from developing countries, developed countries and international organisations) who are responsible for verifying that the candidates meet the three-dimensional criteria. The former is composed of three law professors (from developing countries, developed countries and international organisations), who check whether the candidates meet the three-dimensional criteria; the latter is composed of two former members of the Appellate Body and a senior trade arbitrator, who examine the candidates' substantive competence and neutral thinking through the Mock Adjudication Test (a time-limited analysis of a complex trade dispute case) and the Intercultural Communication Evaluation (a defence in two official languages). Practical ability and neutral thinking. The results of both phases of the assessment were based on a percentage system, with a score of 60 or above being required to enter the nomination process, and the entire assessment was recorded and archived for random checks by the WTO Integrity Office.

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4.3. System design for representative balance

4.3.1. Dynamic quotas and rotation mechanism

Allocate the seven member seats based on the principle of "trade weight + geographical equity": 2 seats for Europe, 2 for the Americas (1 for North America and 1 for Latin America), 2 for Asia (1 for South Asia and 1 for East/Southeast Asia), and 1 for Africa. Additionally, stipulate that each seat should incorporate a "developed-developing country" rotation (e.g., one member from a Central and Eastern European developing country per term for the European seat). A ‘developed-developing country’ rotation is required for each seat (e.g. for the European seat, one developing member from Central and Eastern Europe is required for each term). The term of office will be based on a ‘4+2 flexible system’, with a base term of four years, which can be extended by two years if assessed as ‘excellent’ for two consecutive terms, but with a total term of no more than six years, in order to avoid the stereotyping of mindsets that would result from long term tenure.

4.3.2. Add support channels for developing members

To enhance the competitiveness of candidates from developing members, a "Capacity Building Fund" should be established to provide support such as WTO law training and mock case exercises; additionally, "relative criteria" should be adopted in the selection process, with qualification requirements appropriately relaxed for candidates from LDCs. At the same time, ‘relative criteria’ should be adopted in the selection process, and the qualification requirements should be appropriately relaxed for candidates from LDCs (e.g., lowering ‘10 years of experience’ to 8 years). In addition, it could be made mandatory for at least one of the standby members to be from a least developed country in order to provide him or her with the opportunity to participate in practical exercises.

5. Conclusion

The failure of the WTO Appellate Body selection rules is essentially a disconnect between the system design and the reality of global governance: the principle of consensus voting has been alienated into a ‘one-vote veto’ tool in the context of the prevalence of unilateralism, which makes the political game override the professional judgement; the ambiguity of professional qualification standards has led to uneven professional backgrounds among members, weakening the consistency and authority of rulings; the imbalance in geographical representation has prompted developing members to question the fairness of the rules, shaking the legitimacy of the system’s foundation. The long delay in the DS379 case confirms the danger of procedural flaws, while the divergence in the DS27 case exposes the deeper impact of ambiguous professional standards, which together highlight the urgency of reform.

The proposed "Procedure-Entity-Representation" trinity reform framework does not negate the original rule design; instead, it seeks to enhance the system’s adaptability to the complex global governance landscape while preserving the core value of judicial independence.Subsequent research can further expand in three directions: first, to analyse the significance of the selection rules of regional trade agreements (e.g. DEPA) for the WTO in light of their dispute settlement practices; second, to explore the challenges of new topics such as digital trade and climate policy to the professional capacity of the appellate body, and study how to incorporate the requirements of knowledge in related fields into the qualification standards; third, quantitatively assessing the

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feasibility of the reform proposal and verifying the new mechanism's impact on enhancing dispute settlement efficiency through simulated voting and case simulations.

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