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Christine McDaniel
Yeutter Institute, cmcdaniel5@unl.edu

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Reviving Trade Justice: How Arbitration is Saving WTO Dispute Resolution (For Now)

Christine McDaniel
Non-Resident Fellow, Yeutter Institute
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The dispute mechanism and the appeal process are not fully functioning

The World Trade Organization's (WTO) dispute settlement mechanism has not been fully functioning since December 2019. A viable alternative has emerged, but it will need more countries to sign on to help prevent cycles of tariffs and retaliation.

The United States started blocking the appointment of new judges to the WTO Appellate Body in 2017. Once the Appellate Body fell below three members in December 2019 it could no longer hear new appeals. The United States has cited concerns regarding judicial activism and sovereignty as reasons for the block. With no functioning appeals process, decisions can be appealed without resolution, making it difficult for WTO members to resolve disputes.

A temporary solution has emerged: arbitration and a speedy appeals process

Simple arbitration has always been an option. Article 25 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes allows WTO members to use arbitration if the parties agree to a set of rules. But the case record shows that most countries have preferred the full dispute and appeal process. In fact, before the Appellate Body collapsed, the arbitration option was only used once and that was for an EU copyright case against the US involving Irish country music.

In April 2020, once it became clear the Appellate Body was no longer functional, the European Union led an effort to set up an alternative system called the Multi-Party Interim Appeal-Arbitration Arrangement (MPIA). The agreement offers members access to an independent arbitration and appeal process for dispute settlement once the panel report is complete. So far 53 members have signed up, including Australia, Brazil, Canada, China, Japan, Mexico, and New Zealand, among others. The United States is noticeably absent.

To use the MPIA process, the parties must agree to utilize that appellate arbitration process before they know the panel's ruling. This is necessary otherwise the losing party can appeal into the void leaving the other party with no resolution. In other words, the parties either agree to accept the panel's ruling and not appeal or they agree to an arbitration and appeals process within the MPIA framework.

The MPIA arbitration process operates under a strict 90-day deadline, which is shorter than the traditional appeals process. It is possible, however, that MPIA cases could drag on during the implementation or negotiated solution phase. There have been 13 cases so far. Of these, two have been completed, three have been resolved without appeal, and eight are ongoing.

James Bacchus and Simon Lester found that the WTO appeals process in cases between 2015 and 2019 took 117 to 170 days. The entire dispute process however includes extensive panel meetings and reviews and cases can drag on for several years. The European Commission's regime for importing bananas was challenged by the United States and several other countries—the case began in 1996 and was not settled until 2012. Another well-known dispute involved government subsidies for large civil aircraft (namely, Boeing and Airbus). The US initiated a case against the EU in 2004, and that same year the EU initiated a case against the US. Both cases were resolved 17 years later with a 2021 agreement.

Recent cases

The first case to use Article 25 arbitration since the Appellate Body collapse was the EU case against Turkey regarding its discriminatory practices in pharmaceuticals. Initial consultations were requested in 2019, but the panel was not composed until 2020 and by that time the Appellate Body has stopped fully functioning. At issue was Turkey's "localization requirement" that forced foreign pharmaceutical companies to produce their products in Turkey to qualify for reimbursement under Turkish social security schemes. The EU argued that these measures discriminated against foreign pharmaceutical products and were incompatible with Turkey's WTO commitments. The WTO panel ruled in favor of the EU. Turkey wanted to appeal but since it was not a member of MPIA, both parties agreed to send the case to non-WTO arbitrators and abide by their findings. (MPIA members agreed to a pool of 10 standing arbitrators and for each case three are randomly selected). This was the first time a WTO dispute appeal had been resolved in this way. The arbitrators supported some of Turkey's arguments but agreed with the main WTO panel's key finding that the localization requirement breached global trading rules. They advised Turkey to adjust its measures accordingly and a status report by Turkey indicates they are doing so.

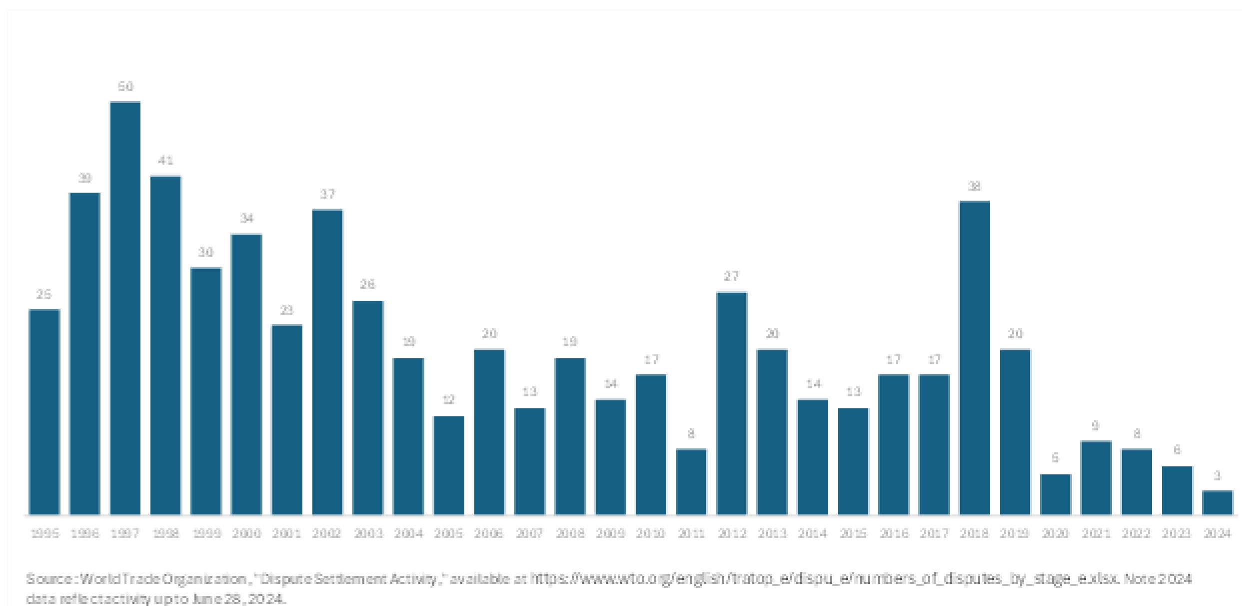
The first MPIA case was the EU case against Colombia and its antidumping duties on frozen fries. The initial ruling was in favor of the EU and Colombia appealed. Within 90 days, the MPIA panel found in favor of the EU and determined that Colombia's duties violated WTO rules and unfairly restricted access to the Colombian market.

Options facing WTO members that have a complaint

Even without a fully functioning appellate body, WTO members still have options to resolve disputes. One option is simple arbitration under Article 25 and remains available to all WTO members. A second option is arbitration and appeals under MPIA for parties that have signed onto that agreement. Even if all the parties in a dispute have not signed on, it is still possible to use MPIA as long as everyone agrees to a clearly defined set of issues to be resolved and a set of rules and procedures for arbitration. A third option is to go through with consultations and a panel report and hope a resolution can be achieved.

Requests for WTO DSU consultations have dropped off substantially since 2019 (figure 1). A few countries have filed even in the absence of a fully functioning appeals process. There have been some cases that have been resolved (e.g., Australia's cases against China over duties on wine and barley) and others appealed into the void (e.g., India appealed a ruling against its tariffs on mobile phones; the United States appealed a ruling against its section 301 tariffs on imports from China).

Figure 1. Requests for WTO DSU consultations



Absent a shared interest in resolution, there is little recourse for complainants even with a panel report in their favor. The complainant could choose to impose retaliatory tariffs but that can lead to a tit-for-tat tariff war with no resolution. For instance, China imposed retaliatory tariffs against the United States in response to the 301 tariffs.

A large country may be willing to risk this, but smaller countries tend to be more exposed with less leverage regarding retaliation. Large countries can also be vulnerable though, especially exporters that are heavily reliant on WTO rules. US agricultural exporters are exposed because their market access abroad is heavily reliant on WTO rules like the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) agreements.

Still working it out

Countries need ways to resolve grievances. Otherwise, there is little use of having trade rules. That is why the dispute settlement mechanism has long been considered the crown jewel of the multilateral trading system. When it stopped fully functioning in 2020, some characterized the moment as an "existential crisis."

The EU-led effort on an interim appeal-arbitration process appears to be working well so far, at least as a temporary fix while WTO members discuss broader reform options. But the United States has not signed on, which leaves many in the lurch.

Experts have suggested other alternatives. For instance, the WTO could pursue a stronger monitoring role or use the "specific trade concerns process" in the WTO TBT and SPS committees to head off disputes before they are filed. Also, regional trade agreements such as USMCA and CPTPP have their own dispute resolution mechanisms.

U.S. objectives for reform were circulated in July 2023 and include a streamlined dispute settlement process and ending judicial overreach. In September 2023, U.S. Trade Representative Katherine Tai said it is not the Biden Administration's goal to restore the Appellate Body although recently Deputy USTR Maria Pagan indicated the U.S. is open to a focused appeals process, presumably to avoid judicial overreach. Technical talks for how to reform the dispute settlement process are underway and expected to finish by the end of the year.

Opinions expressed are solely those of the author and not the Yeutter Institute or the University of Nebraska-Lincoln.