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On the Reform of WTO Dispute Settlement Mechanism and Suggestions

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Abstract: WTO dispute settlement is a very important mechanism for settling international trade disputes, which plays an important role in promoting the stable development of international trade and creating a fair and just international trade environment. However, with the change of political and economic situations, dispute settlement mechanism has appeared more and more malpractice, including the lengthy and inefficient procedures, the unreasonable regulation of implementation and so on. The dispute settlement mechanism is now facing a crisis as a result of the closure of the Appellate Body. Expediting the process of reforming the dispute settlement mechanism is necessary so as to make sure that the dispute settlement mechanism remains effective in facilitating international trade. Although countries have made some suggestions, it has not reached agreement on the specific scheme of the reform. This article focuses on the issue of dispute settlement mechanism analysis and puts forward reform proposals so as to promote the further improvement of the dispute settlement mechanism.

Keywords: World Trade Organization, transparency, the Appellate Body, dispute settlement mechanism

1. Introduction

With the continuous heating-up of the economic globalization, the trade between different countries is becoming more and more frequent. With the expansion of the trade volume and the complexity of the practice condition, the WTO dispute settlement mechanism has exposed more and more defects on the basis of its original defects. Nevertheless, the WTO dispute settlement mechanism remains the best method for resolving international trade disputes. The practice of WTO for more than 20 years has proved that it plays a significant role in resolving trade issues, regulating the behaviors that are not in accordance with the WTO rules and maintaining a fair and just international trade order. It is an unwise manner to abandon the dispute settlement mechanism, only by reforming can it better serve the development of international trade. The dispute settlement mechanism will not be abandoned even if the Appellate Body is currently paralyzed. On the contrary, the paralysis of the Appellate Body could serve as a trigger for reforming the dispute settlement mechanism and speed up the process of reworking dispute resolution mechanism. At present, a few scholars think that the dispute settlement mechanism is not in line with the development of the times and should be abandoned to establish a new mechanism, but most scholars still think that the dispute settlement mechanism is the best way

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to resolve international trade disputes. Most countries have also reached consensus on the necessity and urgency of reforming the dispute settlement mechanism, but there are still different views between different countries on how to reform the dispute settlement mechanism, and the proposed reforms are not detailed enough.

This article discusses on the improvement of the dispute settlement mechanism in detail. Firstly, `this article elaborates the role of the dispute settlement mechanism in international trade, the mode of operation and the course of reform in a general way. Then it studies the malpractice of the dispute settlement mechanism from four aspects: efficiency in handling cases, transparency, the structure of the Appellate Body and the unreasonably established enforcement procedure. Finally, it proposes feasible suggestions on the reform. On the whole, this article looks forward to clarifying the necessity of the existence of the dispute settlement mechanism and determining concrete reform scheme by analyzing the shortcomings about the dispute settlement mechanism in order to supplement the existing reform scheme and promote early launch of the reform of the dispute settlement mechanism.

2. Overview of the reform of the WTO dispute settlement mechanism

2.1. The important role in the WTO dispute settlement mechanism

The dispute settlement mechanism provides a set of resolution system that can be applied to all kinds of conflicts arising in the process of international trade development, which helps finally resolve conflicts and disputes, maintain fair and just international economic and trade order, known as the “The Crown Jewels” [1].

The WTO dispute settlement mechanism originates from Generic Attribute Profile, which inherits and innovates GATT. Because GATT cannot satisfy the increasingly complicated international trade practice, after several rounds of Uruguay Round multilateral trade negotiations, the Understanding on Rules and Procedures Governing the Settlement of Disputes eventually replaced GATT.

2.2. The operation of the WTO dispute settlement mechanism

2.2.1. Consultation

DSU encourages to resolve disputes friendly by way of consultation, which is embodied and specified in Article 4 of the DSU.When a WTO member thinks that its rights have been violated in trade with another member, it can file a complaint with the DSB, asking the other party to consult with it. DSU sets a series of time limits requests on matters related to the consultation. Requests for consultation should be responded to within ten days of receipt by the party required to consult. Consultations shall commence within 30 days after receipt of the request for consultations and end within 60 days of receiving the consultation request.

2.2.2. Expert panel

If there is no agreement reached between the disputing parties within the 60-day consultation period, the applicant has the right to apply to the Dispute Settlement Body (DSB) to set up an expert panel to adjudicate the dispute. The expert panel, with the assistance of the secretariat, discusses the disputed issues with the disputing parties and shall rule on the cases under consideration within the six-month trial period and produce the report of the expert panel. In special circumstances, the period may be extended to nine months, and in emergent cases the panel's report shall be made within three months [1].

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2.2.3. Appeal

If one of the disputing parties has an objection to the panel's report, they can appeal to the DSB and defend their legal rights through ruling of the Appellate Body. The Appellate Body should complete trial of the appeal case, make a ruling and issue an appeal report within sixty days, which can be extended to ninety days in special circumstances. Three judges are responsible for trial each case in the Appellate Body, which is made up of seven fixed members. The appellate trial's scope is defined by the legal issues included in the report of expert group as well as interpretations of the law [1].

2.2.4. Implementation

Following the approval of the panel's report and appeal report, the disputing parties should implement it and demonstrate to DSB their determination to perform. However, due to the complexity of the realities faced by states, some countries may not be able to perform on time within the prescribed time limit, then DSU gives them a reasonable period to perform. If the defendant has not performed within the reasonable period, the applicant can seek for relief by negotiating appropriate compensation with the defendant.

2.2.5. Retaliation

According to the Article 22 of DSU, if the parties involved in the dispute fail to reach an agreement on compensation within 20-day of the reasonable time limit expiring, the DSB can authorize retaliation or cross-retaliation against the defendant by suspending concessions or other obligations, as requested by the applicant.

2.3. The reform of the WTO dispute settlement mechanism

2.3.1. The reform of WTO dispute settlement mechanism has a long history

The issues of WTO mainly stem from the general decline of multilateralism and structural changes of the world economy. The necessary transformation has not been made by the dispute settlement mechanism, causing that it is not able to adjust to the power structure of today's world.[2].

When the WTO was first established in 1994, Marrakesh Council of Ministers of Bosnia and Herzegovina passed the DSU and asked for a comprehensive review to the operation of the dispute settlement mechanism within four years, which is the embryo of the reform of the dispute settlement mechanism. Since then, DSB has begun a series of discussions. The United States proposed to improve the WTO dispute settlement mechanism many years ago. At the same time, China, the European Union, India and other countries have also put forward a series of schemes for modernization of the dispute settlement mechanism.

2.3.2. The relationship between the reform of the WTO dispute settlement mechanism and the closure of the Appellate Body

According to the provisions of the DSU, the Appellate Body has seven permanent judges, who serve for four-year of each term and may be re-elected for one term. Judges are elected on the basis of the principle of consensus and only if all member countries agree can decisions be adopted. In May 2016, the United States improperly used the vote power to prevent Seung Wha Chang, a Korean judge of the Appellate Body, from being reappointed, due to the fact that he made a decision that was outside his authority. Subsequently, the terms of other judges also expired in succession. With the United States continuing to block the election process for Appellate Body judges, until December 2019, Chinese Judge Zhao Hong became the only judge of the Appellate Body, since then the Appellate

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Body went into lockout. Then the term of office of Chinese Judge Zhao Hong expired on 30 November 2020, the Appellate Body went into thorough paralysis.

Most countries have reached an agreement on the importance of the existence and reform of dispute settlement mechanism. Concerning the significant impact of WTO, resolving international trade issues with this method remains the most effective option. Implementation is an important link in the dispute settlement mechanism, and member states must strictly abide by the prescriptions of DSU on the implementation process. However, a growing number of members of the WTO have violated the DSU enforcement code unilaterally imposing and counter-imposing sanctions with the lockout of the Appellate Body, which results in the outbreak of the trade war[3]. Therefore, only by resolving disputes under the WTO mechanism can reach the ideal effect of effectively constraining and regulating trade activities of each member state. It is precisely because member states are aware of this fact that, in the event of the shutdown of the dispute settlement mechanism, the pace of reform may be sped up.

3. The problems of the WTO dispute settlement mechanism

3.1. The procedures of the dispute settlement mechanism are lengthy and inefficient

With the popularization of the network and the development of science and technology, there is a clear reduction in the time spent on a process, consultation and trials could be completed more quickly, in which case it is necessary to consider whether there is a suspicion that those periods are too lengthy. It may result in the delay of business opportunities. The current world is changing rapidly and business is unpredictable, business opportunities are urgent and fleeting, missing business opportunities will not only result in loss of profits but also lead to other losses.

For example, under the provisions of DSU dispute settlement mechanism at each stage, the prerequisite for the application of retaliation is the implementation and negotiation of compensation. If no agreement on compensation is reached within 20-day after the expiration of a reasonable period, the winning party can seek for redress by means of retaliation. The stipulation would undoubtedly add to the already lengthy procedure, and it would be too late to take retaliatory measures if negotiations on compensation fail eventually, and the winning party has long since lost its business opportunities and interests. It can be seen from the EC banana case that the total dispute settlement process was extremely time-consuming because of the complexity of the procedure and the twists and turns of the case. Although Ecuador finally obtained the authorization of DSB for retaliation, they also suffered from a huge loss of interest due to the procedural delay.

At the same time, the composition of the panel also has an impact on the efficiency of the dispute settlement mechanism. The DSU prescribes that there are seven judges in the Appellate Body who are fixed, but members of panel are not full-time and fixed, who will result in the inefficiency in handling cases because they are not proficient in certain professional issues. Moreover, it is also difficult for panel members to efficiently balance their work and dispute settlement when they are dealing with dispute settlement issues in addition to their own work, and the efficiency of hearing cases is bound to be greatly compromised [4].

3.2. The dispute settlement mechanism lacks of transparency

DSU has a great number of confidentiality requirements on the trial process of the case, which to some extent leads to the characteristic of closeness of the dispute settlement mechanism. Paragraph 6 of Article 4 of the DSU provides that consultations shall keep secret, and the Article 14 also provides that the the deliberations of the panel and the materials drafted by the panel should maintain confidential.

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The confidentiality of dispute settlement mechanism originates from the nature of issues it deals with. Both parties to the dispute are WTO members, and the issues involved in the disputes base on the state, not just at the individual level, which definitely involves national interests and even state-confidential documents that certain disputing parties are reluctant to disclose. Therefore, the disputing parties are normally unwilling to make the trail process public in order to avoid unnecessary injury to national interests.

Such full confidentiality restricts the access of other WTO members to information on related strategies and other discussion details [4], thus resulting in the unequal distribution of information resources. At the same time, public confidence and support for the dispute settlement mechanism are undoubtedly reduced due to the lack of transparency, which also creates obstacles to the neutrality of decisions [5].

3.3. The number of judges of Appellate Body are too few

With the frequent trade exchanges between various countries and transformation of trading methods, the number of trade dispute cases is increasing, demanding urgently a great number of judges with specialized expertise to deal with the backlog of appeal cases. However, DSU stipulates that the Appellate Body has only seven judges, and three of them will hear the case each time, and the four remaining judges also need to hear the case to a certain extent, which will no doubt make the already scarce human resources become more scarce and lead to the waste of resources.

3.4. The irrationality of the set-up of the implementation process

3.4.1. The analysis on the Article 21.5 of the DSU

The Article 21.5 of the DSU prescribes the objection procedure of implementation whereby a party to a dispute can ask for panel to submit reports in order to determine whether the implementation accord with the WTO rules. The provision conceals a dilemma in the DSU implementation procedure, where the panel issues its report within 90-day after one party has submitted objections, if the other party is not satisfied with the panel's decision and submits to the Appellate Body, the Appellate Body needed to take another 45 days to reach its decision, and the same process could be recycled several times as a result of objections to implementation, thus causing the problem of litigation cycles. Although the implementation is deemed to be non-compliant when the review is completed, the reasonable period of 20-day following the winning party's request for retaliation under DSU article 22.2 may be overdue [6]. The application of the regulation also hides the shortcomings that the losing party maliciously delays the implementation period. Since the ultimate remedy of retaliation is forward-looking, there is a high risk that the losing state would delay the liquidation time through the constant utilization of the review procedures to damage the legitimate interests of the winning states [7].

3.4.2. The inapplicability of retaliation mechanisms to small and weak states

On one hand, small developing countries normally have no advantages over developed countries in many aspects and their ability to withstand risks is relatively weak, tending to not dare to retaliate for fear of being bullied resulting from the application of retaliation. On the other hand, many consumer goods of small developing countries are imported from developed countries, and retaliatory measures to suspend concessions could lead to the loss of suppliers that cannot meet the consumption demands of domestic consumers [8].

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4. Proposals on the reform of the WTO dispute settlement mechanism

4.1. Raising efficiency of case hearing

4.1.1. Raising the number and quality of staffs of panel and Appellate Body

Firstly, raising the number of staff is a direct method to improve inefficiency. It is necessary to enhance the number of panel's members and Appellate Body's judges for the sake of meeting the need of trial.

Secondly, improving the quality of staff is also an effective way to enhance efficiency of case hearing. With the development of science, technology and society, artificial intelligence, 3D printing, blockchain and other digital technology gradually rise, the content and ways of transaction become more colorful, and the scope of transaction practice in the field of international trade has also gradually expanded. With many issues of extremely high specialization and exceeding complex handling process emerging, these complex cases will not be dealt with efficiently if panel's members and Appellate Body's judges do not possess specialized skills and extensive knowledge. Accordingly, it is essential that regular training and examination of members in the panel and Appellate Body's judges are carried out, generalizing expertise involved in frequent and potential cases of disputes in the field of international trade.

4.1.2. Shortening period of case hearing

The time limit of DSU for case hearing was set directed at the backward traffic and other conditions at that time. With the gradual improvement of conditions in various aspects, these periods are no longer suitable for the current realities and must be changed. By shortening the period and increasing flexibility of case hearing, appropriately extending in exceptional circumstances or complicated cases, the trial efficiency of cases can be improved and the rational allocation of resources can be promoted. It can also reduce the possibility to some extent that one of the disputing parties may damage the interests of the other party by maliciously delaying time.

4.2. Increasing transparency of procedure

Firstly, it can be ruled that all written statements and other documents made by panel and Appellate Body during trails, other than those involving national or commercial secretes, should be made public on the relevant websites. Secondly, the application of amicus curiae system should be promoted to enhance the scrutiny of case trial through participation of non-interested third parties. Lastly, the system of hearing should be improved by making it clear in the rules that, with the consent of the parties, the panel or Appellate Body could hold hearing meetings and encourage the publication of oral or written statements [9].

4.3. Promoting the application of the compensation system

William J. Davey, an well-known American professor, put forward that the right to obtain relief for weak countries can be protected by expanding compensation. Mexico initially put forward transforming the rights to suspend concessions and other obligations into something that could be negotiated between litigants, namely compensation [10]. On one hand, compensation can play its traceability and compensate for damages incurred prior to the gain of the authorization. On the other hand, it can avoid adverse effects of retaliation by weak countries. Moreover, for the economically developed states, they normally have many trading countries, and the weak countries may only be a tiny part of them, so the suspension of concession by weak winning states will not have significant impact on the lost developed countries and cannot reach desired effect of implementation, but the

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application of compensation can make losing strong countries compensate their own fault by currency practically, and the cost they pay can balance with the benefit they obtain by currency. Such implementation is more effective and more capable of achieving the aims of regulating non-compliant trade activities and creating a fair international trading environment.

5. Conclusion

With the development of emerging technology and economic globalization, the shortcomings of dispute settlement mechanism is becoming increasingly obvious, which includes: inefficiency, lack of transparency, etc. Directed at above-mentioned malpractice, this article believes that these problems can be settled by shortening period of trail, enhancing procedural transparency. Measures in this article help broaden path of dispute settlement mechanism reform and provide more powerful theoretical argument for dispute settlement mechanism reform and promote the reform process of dispute settlement mechanism.

At present, there is a general agreement on the necessity of the dispute settlement mechanism reform, but there is no consensus on the concrete measures of the reform. In the future, the reform programme should be detailed on the basis of a firm multilateral trading stance. At the same time, we should consider the reform program from many angles and promote the diversification of the reform program.

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