Proceedings of the 4th International Conference on Educational Innovation and Philosophical Inquiries
DOI: 10.54254/2753-7048/14/20230999

Unleashing the WTO Appellate Body: Strategies for Resolving the Deadlock

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Abstract: The suspension of the Appellate Body has plunged the WTO dispute settlement mechanism into a crisis, and the time and cost for countries to participate in dispute settlement have increased significantly. This paper aims at finding ways to mitigate shocks from the shutdown of Appellate Body. This paper analyzes the reasons for the suspension of the Appellate Body from the attitude of developed countries led by the United States. Then it analyzes the challenges faced by developing countries and Least Developed Countries (LDCs) due to the U.S. concerns about the status of developing countries. Lastly, the WTO Secretariat is compared with the IACHR Secretariat to find out the special status of the WTO Secretariat and its problems. Finally, this paper suggests that the voting mechanism should be used to facilitate the selection of Appellate Body members and clarify WTO agreements. In addition, the accountability of the Secretariat should be strengthened. Finally, the WTO should give more support to developing countries and LDCs such as establishing a fund to help them participate more effectively in dispute settlement.

Keywords: WTO, the appellate body, the secretariat, less developed country

1. Introduction

Compared to the former General Agreement on Tariffs and Trade (GATT) and other international legal mechanisms, the Dispute Settlement Mechanism (DSM) has been effective in terms of the frequency of use of dispute settlement mechanisms by member countries. To date, the DSM has handled over 600 cases, which is a high frequency of use compared to GATT and other international dispute systems [1]. It has the advantages of security and predictability, but it has the disadvantages of being time-consuming and costly, over-interpretation, unsatisfactory compliance and implementation by member countries, and the disadvantageous position of developing countries, which needs to be improved.

From the perspective of mechanism operation, World Trade Organization (WTO) has not only failed to effectively curb trade protectionism caused by economic globalization but also faced a series of problems such as stagnant dispute settlement mechanism and inefficient supervision. Therefore, many studies have discussed the institutional design flaws of the WTO from the institutional level [2,3]. Some studies focus on the analysis of member state games and internal factors of them [2]. In addition, some studies have argued that from the US perspective, the WTO suffers from

DOI: 10.54254/2753-7048/14/20230999

problems such as the overreach of the dispute settlement mechanism, which requires a disruptive reform [2,4].

In response to the problems of the dispute settlement mechanism, some studies focus on analyzing the reasons for the suspension of the dispute settlement mechanism, especially the Appellate Body, mainly due to the existence of the policy and institutional deficiencies, and therefore should study how to go about improving the efficiency accessibility as well as the cost of the Appellate Body [5]. However, less research has been conducted to analyze the impact of the rise of trade protectionism in the globalized economy in the US on its impediment to the appointment of the Appellate Body, the role played by the Secretariat in dispute settlement, and the inability of the dispute settlement mechanism to largely resolve trade disputes in developing and least developed countries.

This paper therefore discusses the problems of the dispute settlement mechanism and explores how to reform it effectively. The analysis finds that the damage caused by economic globalization within the US has prompted its proposals and desire for a thorough reform of the dispute settlement mechanism. The Secretariat does have problems filling gaps in the interpretation of rules and overstepping its authority in the exercise of its functions. Developing countries as well as Least Developed Countries (LDCs), still face challenges such as a lack of legal and financial resources and limited influence of retaliation. It is then proposed that the Appellate Body should be restored by using the voting mechanism to complete the appointment of Appellate Body members and clarify the WTO agreement. Increasing the transparency of the Secretariat to prevent the expansion of judicial activism. In addition, institutions such as the Advisory Centre on WTO Law (ACWL) should be actively used to encourage developing countries and LDCs to participate in dispute resolution, and a fund should be established to provide them with financial assistance.

In the next section, the paper discusses the current situation and problems of dispute settlement mechanisms. It focuses on three problems with the dispute settlement mechanism, including the reasons why the US led to the suspension of the Appellate Body, the low level of participation of developing countries and LDCs in dispute settlement, and the Secretariat's overreaching judicial activism. Finally, this paper will propose responses to these three problems.

2. Analysis on Internal Problems of the DSM

2.1. Background Information

In recent years, with the tendency of trade protectionism around the world, the WTO dispute settlement mechanism, which plays an important role in maintaining the multilateral trading system, has faced an unprecedented crisis. The US side fears that the judicial independence of the dispute settlement mechanism will limit its national sovereignty. It vetoed a number of proposals on the grounds that the Appellate Body had "overstayed its judges" and "exceeded its authority to review domestic laws", and prevented the appointment of WTO Appellate Body judges [2]. Although the Doha Round of special negotiations on the reform of the WTO dispute settlement mechanism has been held, and various reform proposals have been put forward by member states, the US is still opposed to the reform proposal [2].

The WTO dispute settlement mechanism has not been able to function properly since 2019, and then its high cost and long-term characteristics have gradually weakened the function of the WTO. At the same time, the US actively promotes bilateral trade agreements as well as multilateral trade agreement negotiations, further weakening the function of the WTO, making it urgent for the dispute settlement mechanism to resume operation as soon as possible [5].

Currently, scholars believe that the dispute settlement mechanism suffers from problems such as being time-consuming and costly, excessive interpretation, and inadequate implementation of member states' compliance. Meanwhile, the US concerns about the Appellate Body, the excessive influ-

DOI: 10.54254/2753-7048/14/20230999

ence of the Secretariat, and the low participation of developing countries remain highly controversial areas. First, the US has raised the issue of the Appellate Body being overstayed its time to hear cases [2]. According to Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), in general, the entire duration of proceedings should not normally exceed 60 days, and without exception, all cases should not be heard for more than 90 days [6]. However, the Office of the United States Trade Representative (USTR) reports that the average length of appeals has increased, with individual cases taking a year or even years [7]. For example, between 1996 and 2017, the average length of appeals since 2011 was 133 days, which far exceeds the time set by the DSU, and argues that its contention that it is impossible to circulate reports within the 90-day deadline is not supported by objective evidence [7].

According to Figure 1[1], the number of cases in which developing countries are complainants and responders is 155, of which the number of cases in which they are complainants is 103, while the number of cases in which they are responders is 52. Of these, roughly 23 developing countries are complainants and 15 developing countries are responders [8]. In addition, the participation of LDCs is 0. The lower activity of developing countries and LDCs reflects their difficulties in dispute resolution. For some developing countries and LDCs, the core challenges they face remain the lack of resources such as human and knowledge resources, which can reduce the number of appeals they make and the number of cases they win. In fact, they have very limited national legal and financial expertise at their disposal and have difficulties in litigating or defending cases before the DSB, so they have to rely on expensive third-party experts (WTO legal advice centers). However, developing countries may be left in the lurch by devoting their scarce resources to international lawyers and failing to achieve the desired results [8].

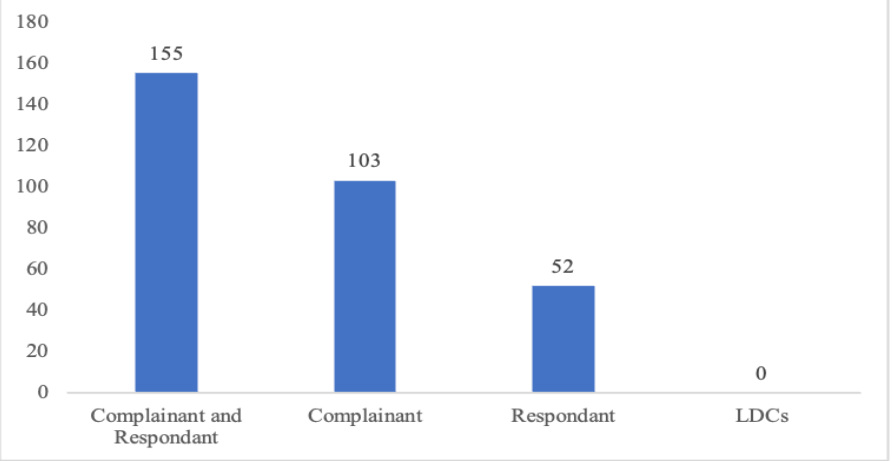

Figure 1: Participation of developing countries and LDCs in panel report-based dispute resolution over 1995 to 2021 (Source: WTO dispute settlement: One page case summaries – 1995-2020).

On the issue of the excessive influence of the Secretariat, studies have shown that in the vast majority of cases, the staff of the Secretariat has more influence than the adjudicators themselves.

2.2. Analysis of Member States and the Secretariat

US-Led Trade Protectionism among Developed Countries. The economies of developed nations have suffered significant damage since the 2008 global economic crisis, causing the United States' dominant position to decline and trade advantages to vanish. As a result, the balance of global eco-

[1] Data extracted from a study of Challenges for the Developing Countries and the LDCs in the DSU: Strengthening the Dispute Settlement System of the WTO, see [8] in reference list.

DOI: 10.54254/2753-7048/14/20230999

nomic power is gradually shifting towards equilibrium. This transformation has altered the pattern of world economic strength, which is evolving towards a state of gradual balance. The gap between the economic power of emerging countries and that of developed countries has narrowed. The World Bank reported that the proportion of international trade represented by emerging and other developing countries increased from 30% in 1995 to roughly 45% in 2010, which has caused a certain degree of anxiety within the US, because in fact the lower and middle classes in developed countries such as Europe and the US are important victims of economic globalization [9]. One reason for this is that economic globalization can make industries more competitive. In the manufacturing industry, for example, when cheaper labor is available on the international market to produce lower-priced products of similar quality, the income of the lower and middle classes in these developed countries will decrease accordingly in order to better keep their factories running, and they may even lose their jobs as a result. In order to maintain the advantage, the US may choose to take certain trade protection measures such as the imposition of high tariffs.

As emerging economies become more active in using the WTO dispute settlement mechanism, the rate at which the US is sued and loses cases is gradually increasing [4]. However, the Appellate Body will limit US trade protection measures in order to achieve fairness, which may lead to US dissatisfaction with the Appellate Body and thus want to take steps to reshape the WTO Appellate Body [4]. Other developed countries will also act like the US because of the damage to the rights of economic globalization.

Low Participation of Developing Countries. Although some scholars argue that developing countries have been able to use DSU proactively and flexibly, there are still many developing countries and LDCs that cannot fully utilize DSU due to a lack of legal capacity and resources, lack of financial resources, and fear of developed country power. therefore, although DSU provides special and preferential treatment for developing countries, developing countries are still disadvantaged in reality. Some developing countries believe that they still receive fewer benefits compared to developed countries and are not the most beneficiary group specified among Special and Differential treatment (S&D) [8].

Due to the lack of their own capacity, developing countries have a low level of participation in dispute resolution. First, in terms of legal development, developing countries are lacking. As the legal system of DSM was created by developed countries, they are the creators, rulers, and maintainers of the system, while the legal system of developing countries and LDCs is far behind that of developed countries [10]. Facing the powerful developed countries, they do not have enough legal knowledge, especially international trade law knowledge, to participate in dispute settlement, which will not only discourage them from participating in dispute settlement but also affect their ability to enforce the ruling.

Although the assistance provided by the establishment of ACWL for these countries has somewhat alleviated their lack of relevant legal knowledge, developing countries and LDCs may choose not to file lawsuits in the face of political and economic pressure from developed countries. The impact of any retaliatory action taken by developing countries and LDCs under the DSU is limited because of their limited financial resources smaller share in world trade and dependence on the GSP and other special regimes [11]. Thus, it is the small economies that actually suffer when they choose to retaliate. The US and India are a case in point. In 2019, the US removed India’s GSP preferential treatment, although India imposed tariffs on some US imports, and India ended up losing more than the US Although India is a larger economy that also plays an important role in international trade and suffers in the face of the power of a developed country like the US, such retaliation would be more pronounced in smaller developing countries and LDCs.

Overextended Application of Judicial Activism. Judicial activism in WTO dispute settlement refers to situations where the panel or the Appellate Body exceeds its authority by going beyond the

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provisions of the relevant agreements involved in the WTO [4]. This is often done in order to address current international issues, resolve disputes, and achieve value objectives, but can result in the creation or reduction of obligations for members [4]. Essentially, the concern is that the Secretariat are overstepping their boundaries and taking actions that are not explicitly authorized by the agreements they are supposed to be interpreting. The Secretariat, because of its excessive influence, has influenced legal outcomes in terms of raising precedent status, prolonging litigation, and expanding the scope of decisions [12, 13]. However, the important role played by the Secretariat in the dispute resolution process is often overlooked.

The Secretariat can appoint panelists, summarize the facts of the dispute, and provide the adjudicator with workable solutions [12]. Indeed, the Secretariat has been considered from the beginning as an agent of the state and a way for the government to achieve a certain balance [12]. As such, it has a large role, unlike other permanent domestic staff of international tribunals. Similar to the WTO Secretariat, the staff of the Inter-American Court of Human Rights (IACHR) Secretariat is involved in the preparation of draft resolutions and also attends most hearings and rulings conducted by judges, but the IACHR Secretariat does not influence the selection of judges nor their compensation, unlike the WTO Secretariat, which has a broad range of functions [14].

Over the course of its development, the Secretariat has gradually become independent, largely free from the oversight of its members and with its own preferences and ideas, which has led to protracted adjudication and litigation, elevated the status of precedent, and allowed for reporting beyond what is necessary for dispute resolution [12, 13]. Moreover, because Secretariat staff are so concerned with consistency and less focused on resolving the dispute at hand, this gives them more incentive to complete their legal reasoning, making them more likely to overstep their authority to make consensus decisions [13]. In response to such problems, the Secretariat should become more transparent and its functions should be limited, thus limiting the expansion of judicial activism.

3. Suggestions

The rise of domestic trade protectionism in the US has prompted the reshaping of the WTO Appellate Body as a matter of urgency, as the US has blocked the appointment of Appellate Body personnel on multiple grounds leading to the suspension of the Appellate Body [4]. Despite the availability of a temporary option, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), it has its own restrictions. Moreover, since the United States and other major powers have declined to participate in the MPIA, the mechanism for settling disputes is unlikely to function properly due to the significant number of cases involving these countries [5, 15]. Therefore, it is important to restore the normal operation of the Appellate Body.

The first suggestion to improve the selection process for Appellate Body members is to implement a voting mechanism that would allow for direct appointments. However, this approach should only be considered as an exceptional measure in response to the risk of the Appellate Body becoming dysfunctional, and it should be done in accordance with the rules outlined in the WTO agreement [4]. To address the concerns raised by the US regarding the ambiguity in the interpretation of WTO agreements, it is recommended that the WTO takes proactive measures to clarify the agreements. This will ensure that the interpretations provided by the Appellate Body are reasonable and fall within an acceptable range. It is possible to propose that the exclusive power of the Ministerial Conference and General Council to interpret WTO agreements and multilateral trade agreements be exercised in relevant cases, in order to provide legal interpretation [4].

For the important challenges faced by developing countries and LDCs, they should be encouraged to use ACWL as it has proven to be of great help to them in filling the gaps in their knowledge of international trade law. In addition, since these countries lack certain financial resources, some funds can be set up for them to provide assistance. For the limited retaliation arising from develop-

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ing countries as well as LDCs, developed countries should be made responsible for these countries to make timely compensation when there is indeed a problem.

In the face of the Secretariat's lack of transparency and excessive functions and influence, accountability, clarity and transparency of its functions should be enhanced to prevent the expansion of judicial activism. For example, documents and related information could be made available to the public, as appropriate [12, 13].

4. Conclusion

This paper analyzes the reasons for the suspension of the Appellate Body and the problems of the Appellate Body from the perspective of the attitude of the developed countries, led by the US, toward the Appellate Body. First, the paper analyzes that the gap between the developed countries, led by the US, and the developing countries is narrowing due to economic globalization and has caused dissatisfaction among the middle and lower classes in the developed countries to a certain extent. The dissatisfaction of developed countries with the appellate body is gradually increasing as the rate of being sued and losing cases increases. The paper then uses the cases of India and the United States to analyze the significant challenges of low dispute resolution capacity and low retaliatory impact that developing countries and LDCs still face. Furthermore, by comparing the functions of the IACHR Secretariat, this paper highlights that the Secretariat's great influence has led to an expansion of judicial activism and thus longer dispute resolution, elevated precedent status, and judicial overreach. Finally, the adoption of a voting system to restore the operation of the Appellate Body, clarification of the WTO agreement, strengthening the accountability of the Secretariat, and encouraging developing countries and LDCs to use the ACWL and establishing a fund for them are suggested.

This paper does not analyze the problems within the Appellate Body at the procedural level. Therefore, the proposals made do not address well the inefficiency of the dispute resolution mechanism after the resumption of the Appellate Body, which is a direction that needs to be studied in the future. This paper believes that the most urgent task is to restore the normal operation of the permanent Appellate Body because the MPIA can only pray for emergency purposes. In addition, the feasibility of using a voting mechanism to restore the Appellate Body needs to be further explored, especially the possible adverse effects of defining this vote as an exceptional one-time measure and to what extent.

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