

On the Predicament and Future Reform Path of the Dispute Settlement System of the WTO

Jiaying Liu¹

¹ Henan University of Technology, Zhengzhou, Henan, China

Correspondence: Jiaying Liu, Henan University of Technology, No. 100, Lianhua Street, Fengyang Street, High Tech Development Zone, Zhengzhou, Henan, China.

Received: March 28, 2022

Accepted: April 25, 2022

Online Published: April 28, 2022

doi:10.20849/ajsss.v7i4.1107

URL: <https://doi.org/10.20849/ajsss.v7i4.1107>

Abstract

The dispute settlement system of the WTO has made great contributions to international trade, but its defects are becoming more and more obvious after practical development. Coupled with the obstruction of some members to the normal operation of the dispute settlement system of the WTO, the Appellate Body is now lockout, and the WTO is in a deep crisis. The emergence of MPIA alleviates this crisis to a certain extent and has certain feasibility at the same time. However, MPIA cannot be used as a long-term solution to the dilemma of the WTO. Therefore, it is still necessary to explore the future reform of the dispute settlement system of the WTO.

Keywords: the dispute settlement system of the WTO, MPIA, selection of members, making law by unauthorized, transparency

1. Introduction

The dispute settlement system of the WTO plays an important role in international trade disputes. It has made great contributions to maintaining the international trade order and is known as “the pearl on the crown of WTO”. However, since 2017, the selection of members of the Appellate Body, one of the most important components of the Dispute Settlement Body, has been blocked by the United States, resulting in the gradual reduction of the number of members of the Appellate Body. Until November 30, 2020, the last justice of the Appellate Body left office, the Appellate Body was completely lockout, and the dispute settlement system of the WTO was in a deep crisis of survival.

To break the deadlock of the dispute settlement system of the WTO and maintain the more mature system formed by the WTO through years of practice, some members actively promoted the reform of the WTO but without success. Then the EU began to look for alternative solutions and actively promoted the establishment of MPIA. At present, a more balanced interim dispute settlement system has been formed. Though the interim arrangement can alleviate the current difficulties faced by the WTO, it is not a long-term solution. Article 15 of the MPIA also reflects the idea that it is an interim arrangement rather than a long-term solution. Therefore, it is still of great practical significance to explore the future reform direction of the dispute settlement system of the WTO.

2. Analysis of the Dispute Settlement System of the WTO

2.1 “Member Selection” Dilemma

The main reason for the suspension of the Appellate Body is that the United States has interfered with the selection of the Appellate Body members since 2017, which interfered with the selection of the Appellate Body members by using the consensus of the WTO and pushed the Appellate Body to the suspension step by step. As an important part of the dispute settlement system of the WTO, the Appellate Body is an innovative provision of “the system of the court of second instance being the court of last instance” for international trade disputes, which creates a fair and accurate dispute settlement environment for WTO members. However, for the selection of members of the Appellate Body, DSU only stipulates the term of office and qualification, and does not specify how to select. In practice, the WTO nominates candidates, establishes a selection committee for interviews and other inspections, which is finally passed by consensus in the DSB meeting, leaving room for political intervention for members. The vacancy of the Appellate Body members is the direct cause of its suspension. Therefore, whether and how to reform the selection rules of the Appellate Body members to prevent some

countries from obstructing the normal and effective operation of the Appellate Body is one of the main dilemmas facing WTO at present.

2.2 Dilemma of "Making Law by Unauthorized"

The issue of "Making law by unauthorized" of the Appellate Body has been discussed for a long time in the international community. The main question is whether the dispute settlement body has carried out "law making" and whether it has the right to "law making". Scholars in various countries almost have the same view on whether the dispute settlement body has carried out "law making" behavior, that is, they all believe that the WTO dispute settlement body has "law making" behavior, but scholars hold different views on whether this "law making" behavior is legitimate.

Scholars who support the dispute settlement body's "law making" believe that: first, there are defects in the WTO rules themselves, and their provisions are more principled. It is necessary for the dispute settlement body to carry out the so-called "law making" behavior in practical application; Secondly, the "law making" behavior of the dispute settlement body has better maintained the WTO legal system and brought its function into full play; Finally, the dispute settlement system can not only improve the WTO legal system, but also provide reliable ideas for the domestic legislation of members. Scholars who oppose the "law making" of the dispute settlement body believe that giving the Appellate Body the power to create constitutional norms and structures will lead to the imbalance of judicial power, legislative power and administrative power, and this behavior may lead to the excessive judicialization of the WTO. In addition, the "law making" behavior of the dispute settlement body will break the balance reached by members after multiple rounds of negotiations. This time, the United States also obstructed the normal operation of the Panel and the Appellate Body by accusing that they increased the rights and obligations of its members and made laws, which eventually led to the suspension of the Appellate Body.

2.3 Dilemma of "Referee Fairness"

The dilemma of "fair judgment" in the dispute settlement system of the WTO is mainly reflected in the fact that the time limit for hearing cases exceeds the legal time limit and transparency. According to the practice of hearing cases in the dispute settlement system of the WTO, it takes a long time to hear cases and there is a serious delay. The DSU stipulates that the time for hearing a case is expected to be 9 months, but in practice, the average time for the dispute settlement system of the WTO to hear a case can be up to 13 months. This phenomenon may cause some members to miss excellent business opportunities, but also affect the nature of some goods. At the same time, it provided the chance for some countries to maliciously delay the trial time provides loopholes. In addition, the issue of transparency of dispute settlement system has also been discussed for a long time. In consideration of the independence and impartiality of the case trial, most of the process of the case trial in DSU has confidentiality measures. Until the judgment result is announced, the whole case is in a strict state of confidentiality. This has caused some members to question the reliability of the trial of the case, and reduced the credibility of the judgment of the dispute settlement system of the WTO to a certain extent.

3. Feasibility Analysis of MPIA

3.1 MPIA Has Legal Legitimacy

MPIA is established in accordance with the Article 25 of DSU and has legal legitimacy. The members participating in MPIA shall, in accordance with the requirements of Article 25 of DSU and based on the provisions of Article 17 of DSU on the substantive and procedural aspects of appeal review, negotiate and formulate the temporary arrangement. In this way, a unified arbitration procedure has been established among the willing members, and the consistency and predictability of the award have been guaranteed. While maintaining the system of second instance and final instance of the dispute settlement system of the WTO, it also safeguarded the legitimate rights and interests of all members, and it still maintained the authority and stability of the dispute settlement system of the WTO. Therefore, the formulation of MPIA conforms to the provisions of WTO in terms of procedure and substantive rules, and it has legal legitimacy.

3.2 MPIA Is the Optimal Solution of the Provisional Appellate Body

Although MPIA cannot completely replace the Appellate Body, it must be a suboptimal solution outside the Appellate Body. Since the Appellate Body was unable to operate normally, some Panel Reports were still submitted to the Appellate Body. Because they could not operate normally for a long time, these cases became "pending cases" for indefinite trial. As an interim appeal arbitration, MPIA can make the cases that these members intend to appeal get a fair and just decision, rather than shelving indefinitely. In addition to being an emergency measure to replace the Appellate Body, MPIA is also the embodiment of the efforts of all members to

promote the reform of the dispute settlement system of the WTO. Its temporary and open nature also provides a long and stable transition stage for the dispute settlement system of the WTO.

4. Analysis on the Future Path of the Dispute Settlement System of the WTO

4.1 Temporarily Launch the "Voting Selection" System

The vacancy of members of the Appellate Body is the main reason for the suspension of the Appellate Body, so filling the vacancy of justices of the Appellate Body is an urgent problem to be solved. For the selection of members of the Appellate Body, some scholars have long proposed to reform the selection system and start the "voting selection" system. The voting and selection system protect the rights and interests of most members and will not damage the overall interests due to the opposition of individual countries. However, it is worth noting that whether the voting selection system has legal legitimacy or not, it breaks the tradition of using the WTO consensus principle, undermines the independence and impartiality of the appeal procedure, and may force some members to choose to "stand in line" or "stand aside", which is a great risk and cannot be used rashly. Therefore, the system of "voting selection" can only be used in some special circumstances, not as a long-term plan, but also to meet the legitimacy of the law. In this way, we can better safeguard the interests of all members, maintain the integrity of the dispute settlement system of the WTO, and get rid of the dilemma of the suspension of the Appellate Body, which is in line with the purpose of the WTO, it meets the common interests of all members.

4.2 Appropriate Restrictions Shall Be Imposed on the "Law Making" Behavior of the Appellate Body

At present, part of the reason for the suspension of the Appellate Body is that it "increases or reduces the rights and obligations of members" to a certain extent. The Appellate Body believes that the DSU also stipulates that the dispute settlement personnel need to maintain "security and predictability" in the settlement of disputes. The balance of the two clauses has led to different understanding of whether the Appellate Body can make law at this stage. According to the current situation, to restore the normal operation of the Appellate Body, appropriate restrictions must be imposed on its "law making" behavior, which meets the needs of some members led by the United States, and there is the possibility of continuing the normal selection of members of the Appellate Body. However, if the "law making" behavior of the Appellate Body is completely restricted, it will affect the normal adjudication of the cases by the Appellate Body, resulting in no legal basis. Therefore, the "law making" behavior of the Appellate Body needs to be appropriately restricted.

4.3 Improve Trial Efficiency and Transparency

In view of the dilemma of "fair judgment" faced by the dispute settlement system of the WTO, we can solve it by increasing the members of the Appellate Body, formulating a better consensual system of the Appellate Body and making some contents of the trial of the case public with the permission of the members. The Appellate Body has a limitation for hearing cases which is difficult for them. This is mainly due to the difficulty of hearing the case itself, the insufficient distribution of personnel, and the inability of members of the Appellate Body to reach an agreement on the case in a short time, which takes a long time. Therefore, increasing the number of members of the Appellate Body and formulating and improving the internal system of the Appellate Body are conducive to improving the trial efficiency. In addition, in order to improve the credibility of the dispute settlement system of the WTO in hearing cases, the confidentiality treatments of DSU can be modified to allow the parties to experience the dispute settlement procedure in person, so as to make it more just in procedure and improve the credibility.

References

- Fu, R. (2021). Study on the reform of the dispute settlement system of the WTO. *Yunnan University of Finance and Economics*.
- Lai, S.-J. (2021). Study on mechanism of MPIA. *Jiangxi University of Finance and Economics*. <https://doi.org/10.27175/d.cnki.gjxcu.2021.001130>.
- Song, G. (2021). Rebuilding the regular WTO Appellate Body: Taking the Implementation of MPIA as an opportunity. *Commercial Arbitration and Mediation*, (6), 22-38.
- Sun, J.-X. (2022). The dilemma of "making law" of the dispute settlement system of the WTO. *International Law Research*, (2), 113-128.
- Zeng, Y.-Q. (2021). The crisis and reform of WTO Appellate Body. *Guangdong University of Foreign Studies*. <https://doi.org/10.27032/d.cnki.ggdwu.2021.000309>
- Zhao, H. (2021). Twenty-five Years of the dispute settlement system of the WTO: Glory, Dilemma and Way out. *International Trade*, (12), 4-8. <https://doi.org/10.14114/j.cnki.itrade.2021.12.001>

Notes

Note 1. Consensus: The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

Note 2. MPIA: Multi-Party Interim Appeal Arbitration Arrangement.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).