

Analysis Of the Suspension of WTO Dispute Resolution Mechanism

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Abstract. The WTO dispute resolution mechanism, established in 1971, has been instrumental in resolving trade disputes and protecting parties' interests. However, since December 11, 2019, the mechanism has been suspended due to the United States' obstruction of new judge appointments. With only one judge remaining in the Dispute Settlement Body (DSB), the mechanism's effectiveness is at risk. This paper explores the reasons for the suspension and its implications on the international trade environment. It also examines the proposed Multi-Party Interim Arrangement (MPIA) as an alternative dispute resolution mechanism. The aim of this paper is to shed light on the importance of effective dispute resolution mechanisms within the WTO system and to explore potential solutions to maintain stability and predictability in international trade relations.

Keywords: WTO; dispute resolution; suspension; MPIA.

1. Introduction

The World Trade Organization (WTO), often referred to as the 'Economic United Nations', has seen remarkable growth, with 164 members currently and over 20 countries in the process of joining. Over the past 28 years, the WTO has played a crucial role in formulating international multilateral trade rules, organizing negotiations, and resolving disputes among members through its Dispute Resolution Mechanism (DSB). This mechanism, characterized by a four-stage process, has successfully resolved nearly 600 trade disputes, maintaining stability and predictability in the global trade environment.

The DSB's dispute settlement mechanism operates through a dual trial system involving an expert panel and the Appellate Body. The expert panel, consisting of three members randomly selected from a qualified pool, provides the initial judgment, while the Appellate Body issues the final judgment. Notably, the DSB operates on the principle of "reverse consensus," requiring agreement from just one party for the judgment result to pass. This feature has earned it the reputation of being "the pearl on the crown of WTO" [1].

Both developed (58%) and developing (42%) countries have utilized the DSB to resolve disputes, showcasing its accessibility and equal opportunity for all WTO members to protect their rights and interests. The DSB's implementation of punitive measures allows the injured party to retaliate against non-compliance with the final judgment. However, despite its achievements, the WTO dispute resolution mechanism faces challenges that have led to its current state of impasse. The United States' opposition to the appointment of Appellate Body members and other international political factors have disrupted its functioning, raising concerns about the stability of the international trading system and the effectiveness of dispute resolution processes.

This paper aims to analyze the reasons behind the DSB's suspension, assess its implications and consequences, and propose strategies to strengthen its effectiveness and sustainability. By examining the factors contributing to the impasse and its impact on the international trade system, this study seeks to highlight the importance of addressing the challenges faced by the WTO Dispute Resolution Mechanism.

2. Suspension of WTO Dispute Resolution Mechanism

2.1. Background and Circumstances of the DSB Suspension

The selection process for judges in the WTO dispute resolution mechanism operates under the principle of consensus, requiring the unanimous agreement of all 164 WTO members. This "one vote veto" principle ensures that the selection proceeds smoothly only when all members are in agreement.

From December 11 of 2017, the Appellate Body of the WTO faced a critical situation as it was forced to cease functioning due to the lack of a sufficient number of judges. With only one judge, Zhao Hong, remaining, the Appellate Body fell short of the basic requirement of three judges to effectively operate.

The suspension of the Appellate Body was the result of the United States' opposition to the appointment of new Appellate Body members. Utilizing the "national security exception" clause and exploiting the appeal procedure in the WTO trade dispute settlement mechanism, the United States rejected the proposal to open the WTO Appellate Body judge selection procedure for the 62nd time.

Specifically, at the meeting held on January 27 of 2023, five members, China, Norway, Switzerland, Turkey and Hong Kong, China, set eight topics, requiring DSB to pass five rulings of the expert group on the violation of the new regulations of the United States on the imposition of tariffs on imported steel and aluminum products under the "Article 232" and the United States on the origin marking of goods in Hong Kong, China, and to request the United States to revoke the violation measures. The United States appealed all five rulings before the meeting.

2.2. Opposition of the United States to the Appointment of Appellate Body Members

The United States' complaints against the WTO Appellate Body in the dispute settlement mechanism have been ongoing since the early 21st century, spanning across different administrations, including the George W. Bush and Obama administrations. Some of these complaints are reasonable, such as concerns about extended hearing deadlines, which could be addressed by increasing the number of Appellate Body members and extending their term of office. However, certain complaints have been more challenging to substantiate, such as the accusation that the Appellate Body has overstepped its authority and disregarded domestic or regional laws of WTO members.

Under the Trump administration, these complaints escalated, reflecting the administration's determination to impede the selection of new Appellate Body members. This approach aligned with the administration's overall strategy of withdrawing from or obstructing any organization or mechanism that it perceived as conflicting with the interests of the United States. As a result, the Trump administration adopted a strategy of using its withdrawal as leverage to push for reforms that would align with its own interests.

2.3. Background, Motives, and Domestic Transformation of the U.S. Opposition

The United States' opposition to the WTO Appellate Body in the dispute settlement mechanism stems from various factors that have shaped its stance over time. One major concern for the United States is how the Appellate Body has handled trade disputes involving trade subsidies. Since 1995, the United States' trade partners have challenged its trade subsidy practices, and the decisions of the Appellate Body have not always aligned with the expectations of the United States. This has led to instances of embarrassment for the U.S. government, leading to its opposition to certain aspects of the Anti-dumping Agreement, such as Article 17.6, and accusing the Appellate Body of exceeding its authority. Similarly, in the area of safeguard measures, the Appellate Body has not always shown sufficient respect for the claims of member countries, leading to legal and regulatory challenges to trade protection measures implemented by the United States.

Furthermore, there have been significant changes in domestic politics in the United States regarding its attitude towards the multilateral trading system. The domestic emphasis on the multilateral system has decreased, and there is a reduced interest in adhering to multilateral rules. Instead, the United States is more inclined to use policy tools to consolidate and enhance its

hegemonic power, and to engage in strategic competition and containment against China. These shifts in the United States' approach have exhibited unilateral and inward-looking tendencies, which are not in line with global interests and multilateralism. Despite facing criticism and opposition at the international level and within the United States, the overall political direction in the country remains largely unchanged, particularly concerning economic and trade issues related to China.

Moreover, the United States reduced active promotion of trade liberalization through market opening and its diminished leadership role in the WTO's functioning have resulted in decreased interest in the development of the WTO and the resolution of its issues. Consequently, the United States appears less engaged in addressing the challenges faced by the WTO, with a decline in its political will and allocation of resources to tackle these matters. This overall stance has further contributed to the disruption of the WTO dispute resolution mechanism, including the suspension of the Appellate Body and the current state of affairs in the WTO.

2.4. Criticism of the WTO Dispute Resolution Mechanism

While the opposition from the United States has played a significant role in the suspension of the WTO dispute resolution mechanism, it is essential to recognize that the mechanism itself has faced criticism for certain inherent issues. These concerns have contributed to the challenges faced by the mechanism and have further compounded the situation leading to its current suspension.

2.4.1 Regulatory defects

One significant criticism of the WTO dispute resolution mechanism is its lack of provisions on competition policy and labor standards, which creates an unreliable situation for disputes related to these aspects, making fair judgments challenging. Additionally, the lengthy execution deadline within the WTO dispute settlement mechanism, which may take nearly 30 months, lacks a binding mechanism for timely enforcement, leading to potential impacts on the exports of the concerned countries.

The DSB should consider both the trade coverage and the economic impact on developing country Members when determining appropriate actions for cases brought by them. Compensation and the suspension of concessions are temporary measures if recommendations and rulings are not implemented promptly, but full implementation of recommendations is preferred over these measures [2].

2.4.2 Structural defects

The WTO exhibits structural defects concerning the challenges developing countries encounter in getting their proposals approved. To enhance operational efficiency, developing countries have suggested various improvement measures, such as extending reasonable implementation deadlines and improving the technical assistance system. Unfortunately, these reform proposals face resistance from developed countries, who prioritize their own interests, and the relatively weaker power of developing countries further hinders the approval and implementation of these measures.

3. Impact of the Suspension of the WTO Dispute Resolution Mechanism

The suspension of the WTO Dispute Settlement Body (DSB) Appellate Body has significant consequences for the international trade landscape, affecting both the long-term outlook and the procedural aspects of the DSB. Furthermore, its impact extends to the WTO trading system, potentially leading to shifts in trade dynamics and the global multilateral trading system.

3.1. Long-term Effects of the Suspension of DSB

The long-term suspension of the DSB Appellate Body poses the risk of international trade descending into a state of "jungle law." The inability to address appeals due to the Appellate Body's paralysis jeopardizes the interests of winning parties, as they cannot ensure timely realization of their benefits based on the initial panel decisions. Conversely, losing parties may exploit the situation by

rejecting the Expert Group's reports with little accountability. This lack of timely and effective enforcement of trade rules may lead to an increase in solipsistic and egoistic practices, fostering an environment where trade protectionism and unilateralism flourish, thus adversely impacting the global trade ecosystem.

3.2. Harms to the Procedure of the Suspended DSB

The suspended DSB Appellate Body may become an instrument of abuse. With a large number of expert panel rulings deemed "invalid" due to difficulties in entering the appeal procedure, the DSB Appellate Body, unable to fulfill its intended role, can easily become a talisman or shield for trade violations. For instance, in the US steel-aluminum dispute case heard by the DSB, the expert panel ruled that the US's imposition of tariffs violated WTO rules and called for corrective actions. However, with the Appellate Body paralyzed, the US ignored the appeal and even challenged the panel's ruling report, effectively undermining the authority of the ruling [3].

3.3. Impairment on the WTO Trading System from the Suspension of the DSB

The suspension of the DSB Appellate Body poses risks of fracturing and neglecting the global multilateral trading system. The paralysis of the Appellate Body disrupts the implementation of multilateral trade principles, prompting WTO members to seek alternative options like bilateral free trade agreements (FTA). In the past decade, bilateral FTAs have constituted as much as 90% of effective regional trade agreements (RTA) according to WTO statistics. While bilateral FTAs offer flexibility and ease of operation, they lead to the fragmentation of world trade, disrupting the division of labor and cooperation in the global value chain, ultimately resulting in a rise in the total cost of international trade.

4. Temporary Dispute Resolution Mechanism: MPIA

To address this impasse, a group of WTO members, including China, established the Multi Party Interim Appeal Arbitration Arrangement (MPIA) on March 27, 2020, as a temporary alternative to the Appellate Body, offering new opportunities to tackle the existing crisis.

4.1. The Establishment of MPIA

The Appellate Body's inability to hear and decide new appeals has deprived the WTO dispute settlement mechanism of its appeal function, leaving parties without relief for potential errors in the panel's reports. To address this issue, a group of WTO members, motivated by major players like China and the European Union, issued a joint statement in January 2020, advancing the negotiation of interim measures in the form of MPIA. On March 27, 2020, 16 WTO members officially announced the text and technical solutions of the MPIA [4]. The participants emphasized that this arrangement is temporary, and their ultimate priority is to restore the normal operation of the Appellate Body through the selection mechanism for its members.

4.2. The Legal Accordance of the MPIA

MPIA serves as a temporary arrangement, as emphasized in its preamble and article 1, aiming to provide an interim appeal arbitration procedure under Article 25 of the DSU when the Appellate Body is unable to hear disputes due to insufficient members. The MPIA Agreement's Article 15 reaffirms the commitment of participants to prioritize resolving the appointment of Appellate Body members and states that the MPIA will remain effective until the Appellate Body is fully operational again. The effective period of MPIA is contingent on the Appellate Body's restoration, and it replaces the appeal originally filed pursuant to Article 16, paragraph 4, and Article 17 of the DSU during the period when the Appellate Body is suspended [5].

Secondly, MPIA maintains stability while seeking change in its content design. It does not break through the DSU but rather introduces flexible and subtle adjustments that comply with the DSU. For

instance, Article 1 of the MPIA Agreement establishes arbitration in accordance with Article 25(2) of the DSU, which allows for arbitration between parties by reaching an arbitration agreement with full notification to all WTO Members before the actual arbitration procedure. The MPIA agreement aligns with Article 3 and Article 10, requiring all parties to reach the appeal arbitration agreement specified in Annex 1, to be announced within 60 days after the establishment of the expert group following Article 25, Paragraph 2 of DSU. Additionally, Annex 1 contains expressions such as "based on a certain clause of the DSU," "constituting a certain clause of the DSU," and "appropriate adjustments should be made to a certain clause of the DSU (or a certain clause of the Appeal Review Procedure Rules)" [6], indicating that many regulations in MPIA are grounded in the DSU and the Rules for the Procedure of Appeal Review. MPIA, therefore, serves as a temporary alternative arrangement within the scope allowed by the DSU.

4.3. The Characteristic of the MPIA

MPIA introduces some differential adjustments without violating DSU regulations. For MPIA temporary arbitration, appeals are reviewed by three arbitrators selected from a pool of 10 permanent appeal arbitrators, which differs from the Appellate Body's seven-member composition in the DSU. Additionally, the time frame for filing appeals under MPIA is before the date of circulation of the expert group report to other members, unlike the original DSU regulation, which allows appeals to be filed after the date of dissemination. These differences set MPIA apart from the Appellate Body's processes while still adhering to the DSU's principles.

5. Enhancing and Overcoming Challenges in the Dispute Resolution Mechanism

The establishment of the MPIA has provided a temporary solution to the suspension of the WTO Appellate Body, addressing some of the immediate challenges in the dispute resolution mechanism. However, to ensure the effectiveness and sustainability of the MPIA and overcome the broader challenges posed by the dispute settlement mechanism's paralysis, further optimizations and reforms are needed.

5.1. Strengthening the MPIA

While the MPIA offers a crucial interim mechanism, its effectiveness can be enhanced through several key strategies. First, widening participation is crucial to encourage more WTO members to join the MPIA, creating a broader coalition for dispute resolution. A larger and more diverse participant base will lend greater legitimacy and credibility to the MPIA's decisions. Second, establishing clear timelines for appeal proceedings will expedite the resolution of disputes. Time-bound processes will help prevent delays and ensure timely decisions. Third, ensuring a transparent and fair selection process for appeal arbitrators is essential to foster trust and confidence in the MPIA's decision-making process. Lastly, implementing an effective compliance mechanism is necessary to ensure that parties abide by the MPIA's rulings. This could involve the adoption of sanctions or penalties for non-compliance, reinforcing the enforcement of dispute settlement outcomes. These strategies, if effectively executed, will strengthen the MPIA's role as a temporary dispute resolution mechanism while the WTO works towards resolving broader challenges in its dispute settlement system.

5.2. Addressing Broader WTO Dispute Settlement Challenges

Beyond the MPIA, the WTO's dispute settlement mechanism itself requires comprehensive reforms to address longstanding issues. Firstly, revisiting the Appellate Body member selection process is essential to overcome the "one vote veto" principle. Exploring alternative selection methods, such as qualified majority voting, can help prevent single-country obstruction and ensure a smoother selection process. Secondly, considering term extensions for Appellate Body members can prevent

frequent vacancies and ensure a functioning panel that is equipped to handle disputes effectively. Thirdly, enhancing transparency and outreach efforts will foster a better understanding of the WTO dispute resolution mechanism's importance and benefits among the public and stakeholders. Addressing regulatory gaps, particularly in areas such as competition policy and labor standards, is crucial to ensuring a comprehensive and fair resolution of disputes. Lastly, implementing structural reforms that encourage more inclusive and representative participation in WTO reform discussions is vital [7]. This approach will address existing structural defects and foster greater engagement from developing countries, promoting a more balanced and equitable dispute settlement mechanism. By implementing these key recommendations, the WTO can strengthen its dispute settlement system, ensuring its long-term effectiveness and sustainability in resolving international trade disputes.

6. Conclusion

The WTO dispute resolution mechanism has played a crucial role in resolving disputes among WTO members in recent years, contributing significantly to the functioning of the organization. However, this mechanism has encountered various challenges and deficiencies, leading to long-standing discontent from the United States, which eventually opposed the selection process of judges. Consequently, the dispute settlement mechanism, known as the DSB, was suspended due to insufficient members. Fortunately, in response to this suspension, proactive steps have been taken by WTO members, including China and the European Union, to establish the MPIA [8]. Despite the existence of procedural issues between WTO members, the creation of the MPIA marks a notable progress towards rebuilding the WTO dispute resolution mechanism.

The suspension of the DSB has significantly disrupted the proper functioning of the WTO mechanism and poses a substantial threat to the integrity of the global trading system. The inability to address disputes through the DSB has left numerous issues unresolved, impeding the effective operation of the WTO. Therefore, the reconstruction of the WTO dispute resolution mechanism becomes a matter of utmost importance. While it may not immediately resolve all political disputes and challenges, the establishment of an effective and sustainable dispute settlement mechanism is imperative for reinstating the fundamental regulations of the WTO.

In conclusion, it is essential for all WTO members to work together to overcome the challenges and procedural issues, and to re-establish a robust dispute resolution mechanism that can effectively address trade disputes and uphold the principles of the multilateral trading system [9]. Only through such collective efforts can the WTO restore its role as a vital platform for promoting fair and rules-based international trade, benefitting all member countries and fostering global economic prosperity.

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