

皇冠之珠的悲歌：論上訴機構的危機、改革、與前景

楊光華*

摘要

爭端解決機制向來被視為世界貿易組織的「皇冠之珠」，然而隨著制衡此「準司法功能」的其他政治機構的效能不彰，上訴機構對於曖昧不明協定條款的解釋努力，常被質疑為「司法積極主義」。其中抨擊最烈之美國，以杯葛上訴機構成員之補實案為手段，力圖改變這種權力失衡現象，結果導致上訴機構於 2019 年 12 月後因成員不足而停擺。面臨此空前危機，學界與實務界紛紛提出各種救亡圖存方案，會員也針對美國關切之六大問題，或重申既有規範、或釐清程序性規定，但改革之力道卻遠不及美國之期待，以致僵局難解。在失去上訴機構後，如何確保小組程序不致也一同陪葬，所謂「複邊之不上訴協議」、與「暫行上訴仲裁」，已成為會員目前努力的目標。只是這些暫時性的措施，皆需當事國之合意，後者甚至還需要 WTO 秘書處之協助，未來究竟能否有效保全小組裁決解決爭端之功效，尚待觀察。不過可預見的是在第 12 屆部長會議前，由於美國總統大選的變數，上訴機構停擺的困境難以見到轉機，皇冠之珠的前景依舊黯淡。

關鍵字：上訴機構、司法積極主義、司法越權、權力分立、(再)任命程序、不上訴協議、暫行上訴仲裁。

Abstract

The dispute settlement system is widely considered to be the “jewel in the crown” of the World Trade Organization. Along with the decision-making inefficiency of the political organs, which are supposed to check and balance the quasi-judicial power, the efforts made by the Appellate Body to interpret deliberately ambiguous treaty provisions have often been criticized as judicial activism. The United States, who criticized the Appellate Body most, sought to re-balance the quasi-judicial power by blocking the (re)appointment of the Appellate Body Members. As a result, the

* 作者現為國立政治大學國際經營與貿易學系教授。

Appellate Body ceased to operate after December 2019 for lack of members. Facing such unprecedented WTO crisis, academic and practitioners suggested various solutions. Members also restated and clarified the WTO provisions specific to the six categories of concerns raised by the United States. However, these reform efforts were far below level expected by the U.S., and therefore the impasse continued. For the moment, how to secure the panel report and prevent it from being the collateral damage of the loss of the Appellate Body caught most attention of Members. There were two approaches being suggested, one was plurilateral non-appeal agreement, and the other was (multilateral) interim-appeal arbitration. Both needs Members' consent and the latter even requires the WTO Secretariat's assistance for operation. Whether they will be able to preserve the function of panel reports from being collateral damages of the Appellate Body remains to be seen. It is for sure that before the 12th Ministerial Conference, due to the Presidential Election of the United States, there is no way to see any breakthrough in the negotiation on the reform of the Appellate Body. The jewel of the crown still looks dim in the near future.

Keywords: Appellate Body, Judicial Activism, Judicial Overreach, Separation of Powers, (Re)appointment Process, Non-appeal Agreement, Interim-Appeal Arbitration