

From “Contractual” to “Quasi-judicial” — The Progressive Approach of International Dispute Settlement and Mechanism Reform of WTO Dispute Settlement

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Abstract: The international dispute settlement mechanism has experienced a process of progress from war to peace, from diplomacy to law. In the path of resolving international dispute through legal methods, is there a development path from international arbitration (“contractual”) to international judicial adjudication (“quasi-judicial”)? This paper discusses this topic, answers whether this path means fairness and progress of the international dispute settlement system, compares the similarities and differences between this path and arbitration and judicial awards within domestic legal system. At the same time, this paper points out that in addition to the development path from “contractual” to “quasi-judicial”, the legal path of international dispute settlement also has the characteristics of “pluralistic symbiosis”, “inclusive coexistence” and even “mutual convergence”. Meanwhile, under such circumstances as a background and reference, this paper discusses the characteristics, crisis and reform of the WTO’s dispute settlement and puts forward some thoughts on the reform of this mechanism.

Keywords: International Dispute Settlement Mechanism, Contractual, Quasi-judicial, International Law, Mechanism Reform of WTO Dispute Settlement

The progress of human civilization is not only a history of creating material and spiritual civilization, but also a history of constantly resolving conflicts and disputes. Since the beginning of ancient civilization, human beings had begun to resolve disputes.¹ Ancient Egypt, Mesopotamia, China, and India all

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1 It is believed that the treaty signed between the city-state Lagash in Mesopotamia and the rulers of Umma in 3100 BC is considered the earliest record of an international treaty to resolve disputes. In 1296 BC, the Hittite Hattusil III and the Egyptian Pharaoh Ramesses II signed a treaty of peace and friendship, which is the oldest treaty preserved so far: the two parties promised not to fight each other, to fulfill the obligations of previous treaties, and to fulfill mutual obligations to assist each other, to extradite fugitives, etc.

had early practices of dispute settlement between dynasties. Since the birth of the nations in the modern sense, contradictions, frictions and conflicts between nations have been frequent, resulting in multiple ways of settling international disputes and complicated international legal practices.² Customs and treaty rules for the settlement of international dispute constitute an important part of international law, which has gradually separated from the substantive rule systems of international law and become an independent procedural rule system, including international dispute settlement treaties, statutes, agreements, and special chapters of treaties, customs and other rules as well as international dispute settlement mechanisms and institutions that implement and apply these rules, and thus derive case law in related fields and the theory and practice of treaty interpretation. Therefore, international dispute settlement is an important way to maintain and promote the adjustment of international order and to generate and develop international law. The nature of international law as “law” is also closely related to whether international disputes are resolved through legal means and whether the adjudications are legally binding. From John Austin’s view of international law as “positive morality”³ to Herbert L. A. Hart’s primary defense of international law, that is to say, international law, “even if it is a binding rule”, is at best “elementary” “primitive” law.⁴ Up to now, international law scholars still believe that the international community and its organizational rules are at a low level,⁵ which, in a certain sense, is closely related to whether the dispute settlement system in the international

2 International dispute settlement in this paper means dispute settlement between nations, or at least one party is a sovereign state, such as investment dispute settlement between a host country and foreign investments. The settlement of international commercial disputes between both parties as private entities is not the object of this paper’s investigation.

3 John Austin, *The Province of Jurisprudence Determined*, Weidenfeld & Nicolson, 1998, pp. 127, 140–142.

4 Although Hart does not agree that international law is a non-binding rule, he admits that international law lacks “certain characteristics” of domestic law, “that is, the validity of individual rules can be proved based on a certain ultimate rule of the system”, and also points out that international law may simply be “primary rules about obligations” and cannot make all the rules constitute a single system, and international law may be “just a set of customary rules, and the rules that give treaties binding force are this set of customary rules”. See Herbert L. A. Hart, *The Concept of Law*, Clarendon Press, 1961, Chapter 10, Chinese text, see Hart: *The Concept of Law* (3rd Edition), Translated by Jiaxin Xu and Guanyi Li, Law Press 2018 Edition (June 2021 Reprinted), pp. 300–305.

5 Antonio Cassese: *International Law* (2nd Edition), Translated by Congyan Cai et al., Law Press, 1st Edition, October 2009, pp. 6–7.

legal system has a certain degree of “judicial” and “binding” effect.⁶ To put it bluntly, compared with the existence of judicial adjudication institutions backed by national credibility in the domestic legal system, whether there is a judicial adjudication mechanism that is independent, fair, and enforceable in the international legal system becomes an important measurement of whether international law has “law” characteristics at certain points. However, international law, based on the consent of sovereign states, has characteristics that are different from domestic law. Thus, exploring the “judicial” or “quasi-judicial” of international dispute adjudication within the scope of international law naturally requires placing this exploration within the macro-framework of international law with “contractual attributes”;⁷ and this kind of exploration is also of great theoretical and practical significance for an in-depth understanding of the nature and evolution of international law.

Due to space limitation, this paper does not intend to discuss the entire international dispute settlement system, but only chooses the paths, means, and methods of dispute settlement within the scope of international law as the objects of investigation. From a historical perspective, this paper explores whether there is a general historical approach from war to peace and from diplomacy to law in the multiple paths of international dispute settlement, whether there is a general historical approach from “legal approach” as a way to resolve international disputes, and whether there is special approach from “contractual” to “quasi-judicial”, especially focusing on the development approach in modern times from the settlement of disputes between nations based on contracts through third-party arbitration to resolve disputes, to through judicial or quasi-judicial mechanisms to resolve disputes, as well as is this approach an improvement? In addition to the “progressive” narrative about international dispute settlement, this paper also explores other characteristics

⁶ Cesare P. R. Romano, Karen J. Alter and Yuval Shanyeds, *The Oxford Handbook of International Adjudication*, Oxford University Press, 2014, p. 41.

⁷ Whether the rules of international law are regarded as a contract between nations on specific rules or practices (consensus) or a consent to specific obligations (consent), an express contract based on a treaty, or a pattern of recognition and compliance based on international customs, the binding nature of international law comes from national consent. It has contract attributes and is a classic theory in a certain sense. See Malcolm N. Shaw, *The International Law*, Cambridge University Press, 2017, pp. 4–8.

of the development path of international dispute settlement such as “pluralistic symbiosis”, “inclusive coexistence” and even “mutual convergence”. Meantime, using this as a background and reference, this paper focuses on studying the characteristics, crisis, and reform of the World Trade Organization (WTO) dispute settlement, and puts forward some thoughts on the reform of this mechanism.

I. INTRODUCTION: THREE MAJOR THREADS OF APPROACHES TO INTERNATIONAL DISPUTE SETTLEMENT

“In relations between nations, the progress of civilization may be seen as movement from force to diplomacy, and from diplomacy to law”,⁸ the famous assertion by American international law scholar Louis Henkin brilliantly expounds an overall and universal approach to the process of human civilization from a legal perspective, which can also be described as a highly condensed and generalized approach to resolve human disputes at certain points.⁹ According to the author’s opinion, following the historical context of the development of international dispute settlement, this conclusion can also be said to include three major threads of approaches of dispute settlement paths between nations. The first major thread is from war to peace, that is, from the use of force and war as the major way to resolve disputes between nations to the context in which war and force are generally restrained; The second major thread is from diplomacy to law, that is, from the rise of professional diplomats and international law lawyers and the widespread use of diplomatic channels such as negotiation, good offices, and mediation to the use of legal channels such as arbitration and judiciary; The third major thread is from contractual to quasi-judicial or

⁸ Louis Henkin, *How Nations Behave: Law and Foreign Policy*, Praeger, 1968, p. 3.

⁹ Hong Zhao, Development and Challenges of the WTO Appellate Body in 2018, *Journal of International Economic Law*, No. 4, 2019; Hong Zhao, Judicial Equality under Treaties, *Journal of International Economic Law*, No. 2, 2021; China World Trade Organization Research Association, *China World Trade Organization Yearbook 2018*, China Commerce Press, 2019.

judicial dispute settlement, that is, from third-party arbitration awards based on consensus between nations to the resolution of international disputes by judicial or quasi-judicial institutions such as specialized international courts. These three major threads basically constitute a general approach to resolve disputes between nations. From the time when Hume de Groot published *War and Peace*, to sum up, the history of the development of international dispute settlement generally has three major threads (main lines).

A. First Thread: The Law of War and Peace

In the long history of mankind, for a long period of time, military conquest has been the organizational structure of human society, including the ultimate way to resolve contradictions and conflicts among tribes, ethnic groups, dynasties, and nations. Even in the early days of human society, there was the practice of resolving and easing conflicts through consultation, negotiation, good offices, and other means. Resorting to force and war is still often considered as the ultimate approach to resolve major disputes.

The Peace of Westphalia concluded in 1648 has reached an important consensus among the European warring parties involved in the Thirty Years War on recognizing and respecting their respective sovereignty, peacefully resolving international disputes, and not resorting to force and adopting the commitment to collective defense, but its binding force on wars between European nations is limited. From the signing of the Peace of Westphalia to the World War I, that is, the so-called “Traditional International Law” period, war and resorting to force were still generally considered as “to realize certain rights, protect political, economic and other interests, a legitimate means of resolving disputes between nations”.¹⁰ At this time, the nation was already bound by *jus ad bellum* and *jus in bello*. The *jus ad bellum* system is the law that determines when a nation can go to war, while legal scholars have begun to distinguish between just and unjust wars. *Jus in bello* is a legal system about how a nation must behave during war, including the identification of warring parties, the treatment of the wounded and prisoners of war and other humanitarian laws. In the eighteenth-century Europe,

¹⁰ *Supra* n. 5, p. 7.

various wars occurred frequently, and wars were even used as a legal procedure to resolve disputes between countries.¹¹ According to James Q. Whitman, an expert on European law of war and a professor at Yale University in the United States, “As late as the nineteenth century, legal scholars still maintained that war was a contractual dispute settlement process, a legal means of resolving international disputes through unanimously agreed collective violence”.¹² According to his research, war was even considered a kind of verdict of battle during that period. It is believed that this may come from the ancient concept and tradition of “pitched battle” as the judgment of God in the European Middle Ages.¹³ From the perspective of China’s traditional anti-war values, such a war-related legal concept is of course very backward and anti-civilized. It will inevitably be abandoned as time goes by.

It should be pointed out that although the wars before the World War I could be used as an expedient and legal way to resolve disputes between nations, due to the birth of traditional international law and the widespread dissemination of classics by international law scholars such as Grotius, the warring parties had begun to abide by the laws of war and international practices that are part of international law. The two world wars caused tens of millions of human lives to be paid, making the human of the world firmer in their anti-war stance. On this basis, the United Nations Charter, born in 1945, clearly stipulates that member states are prohibited from using force or the threat of force except to exercise the right of self-defense and with authorization from the Security Council. Although after the World War II, there were still many cases of militants invading and attacking other nations and regions, it should be acknowledged that war and force are no longer the main ways to resolve disputes between nations. This is undoubtedly a huge milestone in the progress of human history.

11 James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War*, Translated by Junnan Lai, China University of Political Science and Law Press, 2015.

12 *Ibid.* In the perspective of jurists in the eighteenth century, battle was a dispute settlement process launched under the “tacit contract of chance”. In this procedure, two countries in a conflict agree to resolve their dispute through the “luck of force”.

13 *Ibid.* A battle is particularly described as an important trial or legal proceeding, a legal way for competing parties to resolve their differences through a single day of planned, staged collective violence. For example, in the Middle Ages, battles were viewed as judgments from God. Waging a battle is similar to initiating a divine judgment. When humans are unable to resolve their own disputes, they call upon God to play the role of judge.

B. Second Thread: Professional Diplomatic Teams and Professional Lawyers in International Law Assist in Resolving Disputes between Nations and Promoting Peace through Diplomatic Channels

Since ancient times, diplomacy and international law have played a special role as lubricants in mediating the relations between ethnic groups, dynasties and nations. Especially in modern times, diplomacy has played a mediating and balancing role in the competition for national hegemony. Due to the development of international law education in Europe, a group of professional international lawyers and professional diplomacy teams have been cultivated. They used good offices, mediation, negotiation, etc. to assist and promote the resolution of disputes between nations through diplomacy. From the Institute of International Law’s first compilation of the Cambridge Rules on diplomatic practice in 1895 to the birth of the Vienna Convention on Diplomatic Relations, the activities of diplomatic missions and diplomats themselves not only constitute the practice of international law, but also promote the maintenance and development of relations between nations, which played a positive role in the settlement of international disputes.¹⁴ The activities themselves are directly protected by international law in international relations.

C. Third Thread: Legal Approaches Are Increasingly Used to Adjudicate International Disputes

The so-called legal channels include binding third-party mediation, international arbitration (especially institutional third-party arbitration) and judicial rulings by international courts, such as the Permanent Court of Arbitration (PCA) in the Hague established in 1899, the Permanent Court of International Justice (PCIJ) established by the League of Nations in 1922, and the International Court of Justice (ICJ) established by the United Nations in 1945. In 1995, the WTO established a two-level dispute settlement body consisting of an expert panel and an Appellate Body, making international arbitration and international judicial awards appear on the historical stage as legal approaches

¹⁴ Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law*, Translated by Mingqian Li et al., Shanghai SDX Joint Publishing Company, 1st Edition, May 2020, pp. 797–826.

for international dispute settlement.

Among these three major threads, first of all, there is no doubt that war has been criticized and spurned by civilized society for its inhumanity and cruelty. Thus, moving from war to resolving international disputes through peaceful means is a qualitative leap in the process of human civilization. Secondly, diplomacy is widely welcomed because of its peaceful nature, which uses professionals to help both parties reach an agreement to resolve disputes. This method includes direct negotiation between two parties, as well as investigation, good offices, or conciliation. The Hague Convention for the Peaceful Settlement of International Disputes (revised in 1907) reached in 1899 stipulates “investigation” as a way to resolve international disputes. Good offices, conciliation, and mediation are distinguished by the degree of third-party participation. As three ways to facilitate consensus among disputing parties, it is generally achieved through the deep participation and suggestions of senior diplomats from powerful or influential countries or senior officials from international organizations, so as to resolve disputes. The advantage of diplomatic solution is that it takes into account the friendship between nations and the interests of all parties, but the disadvantage is that it is difficult to determine the applicable rules. If it is just a negotiation between the two parties, it will be difficult to avoid the strong nation suppressing the weak nation, and even the result will be biased towards the interests of the powerful nation, which is unfair. Thus, with the in-depth development of international relations, especially the increasing acceptance of international rules by members of the international community, channels such as third-party international arbitration and international judicial awards have become more generally important for resolving international disputes. This paper will focus on the latter.

To sum up, we can say that although “from war to peace, from diplomacy to law” represents a basic approach to the development of human civilization and international dispute settlement, it does not mean that the approach to human civilization and international dispute settlement is the straight-line movement from one end to the other. On the contrary, facts show that war and peace, diplomacy and law, as means and ways of settling international disputes, have generally experienced “staged evolution” and “symbiosis” in the historical process.

II. FROM “ARBITRATION” TO “QUASI-JUDICIAL”: THE LEGAL APPROACH TO INTERNATIONAL DISPUTE SETTLEMENT

As mentioned before, if the paths from “war to peace” and from “diplomacy to law” constitute the overall approach to international dispute settlement, then in the legal approach to international dispute settlement, whether there is a development path from international arbitration awards based on the consensus of sovereign states to awards through international judicial institutions. Furthermore, does the birth of international “judicial” or “quasi-judicial” adjudication mechanisms such as the Permanent Court of International Justice of the League of Nations in 1922, the International Court of Justice of the United Nations in 1945, and the Appellate Body of the WTO Dispute Settlement in 1995 mean that the settlement of human disputes has changed from “arbitration” to the advancement of “judicial” or “quasi-judicial”? From the settlement of disputes between nations, is international judicial means better than international arbitration? Discussion of this issue may be valuable for the current reform negotiations of the WTO dispute settlement, because the primary and core dispute in the reform of the WTO dispute settlement focuses on whether to restore the WTO’s Appellate Body. This paper aims to explore the value and significance of judicial mechanisms as a way to resolve international disputes from theoretical and practical perspectives, with a view to providing theoretical thinking on international law for the reform of the WTO dispute settlement, especially the resumption of operation of the Appellate Body and its future direction.

A. Is There a Path from “Arbitration” to “Judicial” (or “Quasi-judicial”) International Dispute Resolution?

In the perspective of the historical development context, “international arbitration” based on agreements (consensus) between nations does indeed precede the birth of the first International Court of Justice. The emergence of arbitration can be traced back to a very long history, in particular, research by western international law scholars shows that in the ancient Greek and Roman times, Greek city-states used a large number of third-party arbitrations as a

formal way to resolve disputes between city-states. Early international law scholars, such as Grotius and Switzerland's Emer de Vattel, fully affirmed the effectiveness of international arbitration as a way to resolve international disputes.¹⁵ This paper will not discuss ancient and medieval history for the time being. It is generally believed that the first international arbitration treaty in modern times occurred between the United States, which had just become independent from the United Kingdom, and the United Kingdom, namely the Jay Treaty signed in 1794 between the United States and the United Kingdom. It stipulated that arbitration should be used to resolve disputes left over between the United States and the United Kingdom during the American Revolutionary War period, and established a special committee, which is considered as the earliest prototype of institutional arbitration. Between 1794 and 1804, under the auspices of the committee established by the Jay Treaty, a total of 536 arbitration awards were reached, including the famous 1798 Saint Croix River arbitration award.¹⁶ In order to facilitate the development of international arbitration and provide it with a reliable international rules framework, two international peace conferences were held in Hague, Netherlands, in 1899 and 1907, and the two The Hague Convention for the Pacific Settlement of International Disputes were adopted, which can be said to be the earliest multilateral conventions on international arbitration. On this basis, after the first Hague Peace Conference in 1899, the Permanent Court of Arbitration (PCA), which is still in operation today, was born. Although it is called a court and titled "permanent", it is not a court, but an institution that can form an arbitral tribunal once called upon. Its permanent establishment is only the Administrative Council and the International Affairs Bureau as the arbitral tribunal established. The secretariat or registry is essentially what we today usually call an international institutional arbitration. Therefore, the PCA is also regarded as the originator of international institutional arbitration. This may be the reason why many international arbitration courts in the world later

15 Cesare P. R. Romano, Karen J. Alter and Yuval Shany (Eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, 2013, p. 42; E. de Vattel, *The Law of Nations or the Principles of Natural Law*, Carnegie Institute of Washington, 1916, pp. 193–194.

16 Barry E. Carter and Allen S. Weiner, *International Law*, Translated by Jiehan Feng, Commercial Press, 2015, pp. 482–485.

named the Court of Arbitration. For example, the English names of the Hong Kong Court of Arbitration in China and the Singapore Court of International Arbitration all used “Court”. It was not until 1922 that the PCIJ, affiliated with the League of Nations, was established with the strong support of the United States. It was the first international judicial institution to handle disputes between nations, and gave birth to the PCIJ Statute, which was later almost fully accepted by the United Nations ICJ as the first international judicial institution. As the first international judicial institution, PCIJ made many useful attempts and explorations in international judicial adjudication, including the election of judges, until it was replaced by the ICJ established in accordance with the Charter of the United Nations in 1945. Therefore, from a time series perspective, the international arbitration method for resolving disputes between nations was born earlier than the “judicial” (or “quasi-judicial”) international court. We understand that arbitration as a method of dispute resolution, whether domestic arbitration or international arbitration, is based on the consensus of the parties (including the nation as a party) or is expressed as a separate arbitration agreement or as an arbitration clause in a treaty, and the binding force of the award on both parties to the dispute is also based on this ex-ante agreement. For this reason, international arbitration has contractual attributes, which is recognized by academic community. The judicial attributes of the ICJ are clearly assigned according to the charter of its establishment. For example, Article 92 of the Charter of the United Nations clearly stipulates that the ICJ is the “principal judicial institution of the United Nations”. It must be pointed out that the Charter of the United Nations was created based on the consensus of the United Nations member states. Therefore, it also has contractual attributes. The judicial attributes of the ICJ are based on the common will of sovereign states. Based on the contractual attributes of international law, the common basis of international arbitration and international judicial adjudication is state consent, and the only difference lies in the attributes and procedures of state consent as a dispute settlement mechanism. And this kind of international judicial institutions, such as the United Nations International Tribunal for the Law of the Sea (ITLOS, a special court established in accordance with the United Nations Convention on the Law of the Sea), the United Nations International Criminal Tribunal for the Former Yugoslavia, and the European

Court of Justice, European Court of Human Rights, International Center for Settlement of Investment Disputes (ICSID), International Criminal Court (ICC), etc., are empowered based on state consent. Their scope of application, functions, operating procedures, and adjudication effectiveness are all based on specific treaties reached by participating nations after World War II or the end of the Cold War in 1990, and they have their own characteristics and differences. Thus, just from the perspective of time, the birth of international arbitration based on the “consensus of the parties” and the many international courts or tribunals with nominal judicial attributes are sequential. Therefore, at least in terms of temporal sequence, it can be said that international dispute settlement has a development path from international “arbitration” to international “judicial” or “quasi-judicial”.

B. Criteria for Determining the “Judicial” of International Judicial Institutions

Since both arbitration and judiciary have the attributes of legal awards, under international law, both arbitration and judicial are based on the consent of the nation — the contract, and the procedures and operating rules established by different international arbitration institutions, arbitral tribunals or international courts are different. Then at the level of international law, how to measure the “judicial attributes” of an adjudication system? We need to establish a standard to measure and determine the “judicial” or “quasi-judicial” nature of international dispute adjudication; at the same time, we need to answer the question of the relationship between the “judicial” and fairness of international dispute settlement, that is, whether and how resolving international disputes through judicial means can lead to a fairer result in dispute settlement.

As a method of dispute resolution, apart from the formal difference between arbitration and judicial, the substantive difference lies in the degree of judicial. From the perspective of domestic law, the so-called “judicial” means having judicial attributes. In modern society, according to the provisions of a nation’s constitution, judicature is a judicial activity that is guaranteed by the national public power, is conducted through court trials to make independent, fair, and final judgments on disputes over the rights and obligations of

the parties and is implemented by the nation’s compulsory force. While “arbitration” is a dispute resolution method that combines contractual nature, party autonomy, and quasi-judicial nature. In many modern and contemporary countries, arbitral awards that comply with a nation’s Arbitration Law can apply for enforcement by a nation’s courts. Therefore, it can be said that “arbitration” has a “quasi-judicial” attribute.

Domestic and foreign scholars have done extensive research and put forward many opinions on the measurement standard of the “judicial” of international dispute adjudication. For example, Professor Tomuschat proposed five basic conditions for how to determine whether a dispute resolution institution is judicial: i) Permanent nature means that the existence of relevant institutions does not depend on individual cases and is independent; ii) The establishment of institutions must be based on international legal documents such as international treaties; iii) Institutions must adjudicate cases in accordance with international law; iv) Cases must be adjudicated pursuant to certain legal rules and procedures, and these rules have already existed before the dispute arose and cannot be modified according to the wishes of the parties involved; v) The results of the adjudication are legally binding.¹⁷ The first four conditions mentioned above distinguish judicial institutions from arbitral tribunals and institutional arbitration, because usually international arbitration can be established on a case-by-case basis, and the parties to the arbitration can agree on the applicable laws and arbitration procedures. The legal binding force of the fifth condition is divided into two stages, adjudication and execution. The execution of the ruling is usually a function of the administrative agency and is a political act rather than a judicial act.¹⁸ Professor Romano emphasized two additional conditions based on the five conditions proposed by Tomuschat: i) The institution that adjudicates the case must select the referee in an objective and fair manner, rather than by the parties; ii) At least one party to the case is

17 Christian Tomuschat, *International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction*, In Hermann Mosler and Roger Bernard (Eds.), *Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation*, Springer Berlin, 1974; Christian Tomuschat, *International Courts and Tribunals*, In Rüdiger Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law: Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, 2013.

18 These five conditions proposed by Tomuschat have been recognized by many scholars.

a sovereign state or international organization.¹⁹ These two conditions once again distinguish judicial institutions from international commercial arbitration, which clearly excludes commercial arbitration managed by arbitration institutions represented by the International Court of Arbitration. Romano's views have also been recognized and cited by many scholars.²⁰

Some scholars believe that Tomuschat and Romano's conditions for the establishment of judicial institutions were too harsh, resulting in some newly emerging judicial institutions being excluded, because they failed to meet the conditions they set. For example, according to the chart of international institutions released by the Project on International Courts and Tribunals (hereinafter "PICT"), some judicial institutions do not fully meet all the elements listed by Tomuschat and Romano, and the standards set by PICT, an international judicial institution should: i) be a permanent institution; ii) consist of independent judges; iii) at least one of the parties is a sovereign state or an international organization; iv) operate based on pre-set rules; and v) make decisions that are legally binding.²¹ Alter, Hafner-Burton and Helfer defined judicial institutions as a body that established by nations authorized by international treaties, adjudicating cases in accordance with international law, and making legally binding decisions or opinions.

Although these standards for measuring the judicial of international dispute settlement institutions are expressed differently, the basic essence is the same, that is, such institutions should be durable and independent. Judges are often elected through strict selection procedures and their independence and impartiality is guaranteed. They should follow the procedural rules for resolving disputes established in advance and use the rules and principles of international law to make judgments. The award is binding and enforceable

¹⁹ *Supra* n. 15.

²⁰ In addition, other scholars have also put forward their own understandings on this issue. Shapiro believes that the characteristics of international judicial institutions should include: i) independence of judges; ii) compliance with clear pre-established trial rules and procedures; iii) adversarial; and iv) dichotomous rulings. Kassis proposed that the judicial decision-making process should be made independently by the referee without any interference or intervention.

²¹ The Project on International Courts and Tribunals, *International Judiciary in Context: A Synoptic Chart*, PICT (November 2004), http://cesareromano.com/wp-content/uploads/2015/06/synop_c4.pdf (Last Visited on May 28, 2024).

against the parties. International judicial adjudication institutions are different from international arbitration procedures based on party autonomy in terms of whether they only handle individual cases on a temporary basis, whether the parties can choose judges or arbitrators, and whether the rules of adjudication procedures can be modified. Therefore, the core element to measure the judicial nature of international judicial adjudication institutions is whether these adjudication institutions and adjudicators are independent and impartial, which is reflected in the organizational structure of the institution, its duration, the selection method of judges or adjudicators, and the binding nature of the ruling and many other aspects. Compared with international commercial arbitration dominated by party autonomy, in the international judicial adjudication mechanism, parties have relatively weak control over international judicial adjudication procedures.

C. Does the Move from “Arbitration” (Contractual) to “Quasi-judicial” Constitute an Advancement in International Dispute Adjudication?

First of all, as a legal way to peacefully resolve disputes between nations, arbitration has been regarded as a qualitative progress since its birth. Because resolving disputes between nations through arbitration is no longer just to maintain peaceful relations between conflict parties, but to adjudicate the interests of both parties based on international treaties, customs, and other international law rules and principles mutually accepted by both parties. Usually, arbitration institutions must thoroughly investigate the facts of the dispute between the two parties and adjust the legal relationship between these facts, and make a binding award based on fair procedures and the application of substantive rules accepted by both parties.

For Europe, except for the period of the unification of the Roman Empire, arbitration has always been relatively active as a way to adjudicate disputes between small nations. It even preceded the court systems of some nations, and the birth of the royal judicial system once replaced the once prosperous arbitration. Due to the popularity of Christianity in Europe, Christian clergy were often the arbiters in early arbitrations, so that in the Middle Ages the

Pope played the role of the so-called “European Arbiter” for a long time. Even for the newly independent United States, the practice of the Jay Treaty, the first arbitration treaty, concluded between the United Kingdom and the United States, preceded the birth of the US Supreme Court. Therefore, arbitration, as a way to peacefully resolve disputes, has played an important role in the formation of international law and in the history of Europe and the US.²²

Within the domestic legal system, judicial channels are guaranteed by state coercion. No matter in civil or criminal cases, the court’s jurisdiction over the plaintiff’s prosecution does not depend on the defendant’s consent, that is, the party whose interests have been infringed will not be unable to obtain a fair and enforceable judicial decision due to the obstruction of the infringing party. Therefore, as a way to resolve disputes, from arbitration (contractual) to judicial, it is regarded as a progress of the legal system. Providing trial justice through the judiciary is the basic institutional guarantee provided to the public by a civilized country.

However, for sovereign states, they only have the obligation to resolve disputes peacefully, but they do not have to resolve disputes through some legal means, let alone accept some kind of judicial trial, unless they agree. To put it bluntly, the judicial adjudication system in the international legal system is different from the domestic legal system. For sovereign states, both judicial and arbitration jurisdictions originate from contracts — that is, state consent. The difference is that to what extent the state agrees to cede its authority to resolve international disputes to a third-party mechanism. For example, based on whether the third-party mechanism belongs to an independent institution with quasi-judicial powers, the authorization given by the state to it often varies in terms of jurisdiction, selection of judges and control over the adjudication process, and effectiveness of the adjudication. The jurisdiction, trial procedures and effectiveness of rulings of international judicial institutions depend on the scope of transfer of power by sovereign states, which is different from the comprehensive judicial attributes enjoyed by judicial institutions of sovereign states in accordance with the constitution and law. Therefore, it is

²² *Supra* n. 14, pp. 149–164.

more appropriate to judge that international judicial institutions established on the basis of the consent of sovereign states have the attributes of “partial” or “quasi” judicial. Compared with international arbitration, international courts or tribunals are established according to strict procedures. In particular, the selection conditions for judges are higher than those for *ad hoc* arbitrators and institutional arbitrators, and they often have to undergo more stringent multilateral selection procedure; compared with *ad hoc* arbitration, judicial institutions such as international courts and tribunals can also establish legal principles and develop international law through precedents. It is believed that after the League of Nations established the Permanent Court of Arbitration, the purpose of establishing the Permanent Court of International Justice was to develop jurisprudence through case law. Hersch Lauterpacht, a well-known British international law scholar, spoke highly of the ICJ’s contribution to international law through the development of case law. In this sense, the birth of international judicial institutions such as the International Court of Justice not only promotes the progress and development of international law, but also represents, to a certain extent, the partial realization of the ideal of international rule of law.

D. Does Judicial Attribute Mean Impartiality?

Does the judicial nature of international dispute adjudication mechanisms/institutions — the independence of judges and institutions, and the minimal interference and control of parties in the adjudication procedures and entities, mean the consequent impartiality? This is what we want to know more. In addition to being guaranteed by independent and impartial adjudication procedures, the fairness of the results of the International Court of Justice is inseparable to a large extent from whether it has high-quality, authoritative, independent and impartial judges. For example, the drafters of the Statue of the Permanent Court of International Justice of the League of Nations believed that the Permanent Court of International Justice had four major advantages: i) because it is composed of a “fixed set of judges”, “the parties can no longer choose the judge”; ii) since “these judges have long been in contact with each

other in their common work and, except in rare cases, have acted as judges in different case”, the court can “establish a tradition of continuity and guarantee the harmonization and logical development of international law”; iii) in the Permanent Court of Arbitration, arbitrators may tend to consider cases “from a political standpoint”, whereas in the Permanent Court of International Justice, “the law is certainly more authoritative and possibly more stringent”; iv) the Permanent Court of Arbitration may “include politicians in addition to jurists”, while the Permanent Court of International Justice “includes not only jurists but also great judges”.²³ This may indicate that the international law scholars and lawyers who drafted the Statute of the International Court of Justice had higher respect for the judges of the Permanent Court of International Justice than for the arbitrators of the Permanent Court of Arbitration. Stephen M. Schwebel, a US citizen and the former President of the International Court of Justice, spoke highly of the Permanent Court of International Justice. “It is obvious that although the Permanent Court of International Justice did not prevent the World War II or the other smaller wars, however, international lawyers, diplomats and politicians all treat it as a remarkable success”. From 1922 to 1940, the Permanent Court of International Justice handled 29 highly controversial cases among member states and provided a number of advisory opinions to the international labor organization and other international organizations. Although these cases are almost without exception not about war issues, the legal issues dealt with by the Permanent Court of International Justice are not only related to the substantive issues of peace treaties, but also have significance for the progress and development of international law due to the high quality of the judgments of the Permanent Court of International Justice. Of course, this does not mean that the rulings of international judicial institutions are perfect and satisfy all member states. On the contrary, after his retirement, Justice Stephen M. Schwebel, the former President of the United Nations International Court of Justice (ICJ) who is an American, made a quite candid and objective evaluation of the rulings of the United Nations International

23 Advisory Committee of Jurists, *Entraide Judiciaire*, Conférence de la Haye de Droit International Privé, 1980, p. 659; *Supra* n. 5, pp. 373–374.

Court of Justice where he worked: “The ICJ’s rulings and advice are sound and of high quality, despite some extreme exceptions ... It has been criticized for its vague conclusions, which are sometimes not supported by sufficient reasons and do not have sufficient authoritative citations ... but as a whole, the ICJ’s record of procedural and substantive decisions over the past few years has been of high quality”.²⁴ It is for this reason, and especially in view of the indispensable contribution that courts have made to the development of law in the common law system, that Justice Lord Lauterbach, former President of the International Court of Justice, has written a book to systematically elaborate on the significant contribution made by international judicial institutions to the development of international law, in which he not only fully affirmed it, but also spoke conclusively.²⁵

From the perspective of international law scholars and international judges, perhaps sovereign states should submit more inter-state disputes to international judicial adjudication institutions. However, whether it is the Permanent Court of International Justice of the League of Nations or its successor, the International Court of Justice of the United Nations, there are imperfections or even flaws in various aspects such as jurisdiction, adjudication procedures, award quality, binding force and enforceability.²⁶ But it not only resolves many disputes between nations, but also makes a vital contribution to the development of international law, which is unmatched by any international arbitration institution and is also recognized by the international legal community.

To sum up, in a certain sense, the development of the path of international dispute settlement from “international arbitration” to “international judicial adjudication” can be said to be of symbolic progress.²⁷

24 Stephen M. Schwabel, *Justice in International Law*, Cambridge University Press, 1994, p. 6.

25 Hersch Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press, 1982.

26 *Supra* n. 24, pp. 6–13.

27 James Crawford, *Brownlie’s Principles of Public International Law*, Cambridge University Press, 2019, p. 709. Arbitration is also favored by some parties to disputes as a method of dispute resolution due to its convenience, speed, confidentiality, and the influence of the parties on the formation of the arbitration tribunal. For example, the arbitration procedures listed in Annex 7 in the United Nations Convention on the Law of the Sea fall into this category.

III. THE “PLURALISM” AND “DIVERSITY” OF LEGAL APPROACHES TO INTERNATIONAL DISPUTE SETTLEMENT

A. Pluralistic and Diverse Legal Approaches to International Dispute Settlement

Although we can argue that in the development process of legal approaches to international dispute settlement, there is an approach from arbitration to “judicial” or “quasi-judicial”, which does not mean that since the birth of the “judicial” or “quasi-judicial” approach to dispute settlement, the “judicial” or “quasi-judicial” approach has completely replaced the use of other approaches in the process of international dispute settlement. In fact, since the establishment of the United Nations after the World War II, the United Nations Charter has clearly prohibited the use of force or the threat of force to resolve disputes among member states. Article 2, Paragraph 3 and Article 33 of the Charter of the United Nations promotes the establishment of a universal obligation to peacefully resolve legal and political disputes. Therefore, the use of traditional dispute resolution methods, such as negotiation, mediation, and coordination, among countries is constantly increasing. In other words, as a method of dispute settlement, diplomacy and legal channels coexist and interoperate. Then, the number of international arbitration institutions and judicial and “quasi-judicial” institutions established between countries to resolve disputes through legal channels has also continued to increase, covering almost all fields of the international community. That is to say, although looking at the overall trend, human dispute settlement approaches continue to develop from diplomacy to law, from arbitration (contractual) to judicial and “quasi-judicial”, it does not mean that there is only one linear path for the settlement of international disputes. In the path of legal settlement of international disputes, there is a situation where diversified paths such as mediation, arbitration, and judicial adjudication coexist. As the saying goes, all roads lead to Rome, and various methods jointly construct and form a diversified pattern of international dispute settlement paths. Different international dispute settlement mechanisms often contain a variety of different settlement methods, and there are even

cases where one method is embedded or grafted onto other methods, such as the WTO’s interim appeal arbitration mechanism, which embeds an appeal function on the basis of arbitration clauses, fully demonstrates the flexibility and diversity of the international dispute settlement mechanism in different periods and different fields, and embodies the innovative spirit of international dispute procedural law. Looking at the post-war international system, the paths of international dispute settlement have always been diversified. At the same period, there are often situations where multiple dispute settlement paths coexist. The dispute settlement path presents “pluralistic symbiosis”, “diversity” and “inclusive coexistence” status.

As mentioned above, we have demonstrated that the legal path of international dispute settlement has achieved judicial or “quasi-judicial” status and has achieved a more just and civilized approach to human dispute settlement, especially reflected in the establishment of “judicial” or “quasi-judicial” adjudication mechanisms by the United Nations International Court of Justice, WTO Dispute Settlement as well as the Court of Justice of the European Union. In several areas, we have also observed that the international dispute settlement mechanism has chosen “arbitration” based on individual cases established by conventions as its chosen method of dispute settlement, instead of establishing a more judicial permanent court or appointing a judge with fixed terms. International investment arbitration is one such field.

Looking back at the history of the establishment of ICSID, which is affiliated with the World Bank, we find that investment disputes between foreign investors and host countries have historically been based on the protection of foreign nationals and have also experienced development from “Gunboat policy” to diplomatic channels to legal settlement. The history of the negotiations on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States from 1961 to 1964 shows that the drafters of the Convention were aware that individual arbitral awards could lead to inconsistent award results, but the contracting parties accepted this prospect and rejected proposals to establish a permanent tribunal and a series of appeal mechanisms aimed at correcting errors of law or substantive factual errors that may arise in arbitration. Instead, it retains the revocation mechanisms based on limited matters, serious procedural problems, and lack of grounds

for adjudication.²⁸ In the decades of practice under the ICSID Convention, the inconsistent and even contradictory investment arbitration awards that had been foreseen before between investors and host states have emerged, which have caused a lot of dissatisfaction among members, which has also led to the fact that in the current negotiations of the Working Group III of the United Nations Commission on International Trade Law on the reform of the investor-state dispute settlement mechanism, the issue of inconsistencies in arbitral awards has once again become the focus of some members and an important matter in the negotiations.²⁹ This also shows that for international investment arbitration, ICSID negotiators intentionally chose a “weak” judicial dispute settlement path. Moreover, there are many different methods and conditions for the recognition, enforcement and revocation procedures of ICSID awards between ICSID members and non-members, as well as between members and non-members of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration within ICSID members. Its dispute resolution channels and execution procedures are significantly more diverse. Since a unified single convention system for international investment protection has not been formed so far, thousands of bilateral and regional investment agreements constitute a complex “spaghetti bowl” network, and there are questions about whether and how investment disputes between investors and host countries can be submitted to international arbitration. The diversified dispute resolution paths make the resolution of international investment disputes in a more complex legal environment and have more uncertainties than international trade disputes. But up to this time, there are still some members who believe that one-time arbitration awards should be maintained as the core method of resolving investment disputes between investors and host countries, and do not support the establishment of an appeal mechanism for the settlement of investment disputes between investors and host countries, while during the negotiations, some other members emphasized that in addition to the arbitration practice provided by ICSID, multiple

28 Christopher Thomas and Harpreet Kaur Dhillon, *Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and Review of Arbitration Awards*, ICSID Review, Vol. 32, No. 3, 2017, pp. 459–502.

29 Jane Kelsey and Kinda Mohamadieh, *UNCITRAL Fiddles While Countries Burn*, Friedrich Ebert Stiftung, 2021, pp. 20–24.

resolution methods such as “mediation”, “conciliation” and even the domestic court systems of member states should be encouraged for investment disputes between investors and host countries.

In fact, it has become normal for the dispute settlement mechanism under the same international convention to include multiple dispute resolution paths such as mediation, arbitration, and judiciary.

For many international conventions, the current common situation is that dispute settlement procedures often include international “courts” with relatively formal jurisdiction and adjudication procedures, while retaining the possibility of arbitration under special circumstances. For example, the United Nations Convention on the Law of the Sea has established the International Tribunal for the Law of Sea (ITLOS) composed of 21 judges, and there are arbitration procedures in Annex 7 of the United Nations Convention on the Law of the Sea (UNCLOS). At the same time, Paragraph 1 of Article 288 of the United Nations Convention on the Law of the Sea also provides for the jurisdiction of tribunals arising from disputes caused by the interpretation of the Law of the Sea; while Paragraph 2 of Article 288 of the United Nations Convention on the Law of the Sea provides tribunal jurisdiction over disputes arising from divergent legal interpretations of several international conventions related to the United Nations Convention on the Law of the Sea. There is no doubt that the WTO’s dispute settlement mechanism also contains a variety of legal ways to resolve disputes, including mediation, good offices, arbitration and trials by expert panels and the Appellate Body. An *ad hoc* multilateral appeal arbitration process involving the participation of some members has also been established.

B. The Interaction between International Arbitration and International Judicial Adjudication Mechanisms and the Relative Nature of Their Differences

1. Nature Differences between International Arbitration and International Judicial Adjudication Are Relative

As mentioned before, there are differences in the judicial nature of the rulings

of international arbitration institutions and international judicial institutions. The latter's rulings are more judicial, which to some extent also means that the latter are more impartial and can even be said to represent humankind's progress in resolving international disputes and achieving international rule of law. However, we have to admit that the differences in the attributes of international arbitration (especially institutional arbitration) and international judicial institutions are only relative, and the two are not absolutely opposite.

For example, the International Court of Justice, as the main judicial institution of the United Nations, has the clear functions conferred on the International Court of Justice by the Charter of the United Nations, as well as the permanence of the court, the openness of its procedures, the inalienability of its statutes, and the possibility of intervention by third countries in the proceedings, which makes it different from international arbitration procedures.³⁰ However, the consent-based voluntary jurisdiction over disputed cases, as well as the selection of judge *ad hoc* and the formation of special case tribunals (the parties can each designate judges to form a three-member special tribunal) have caused widespread controversy, which makes it different from the arbitral tribunal and the difference is not so significant.³¹ As Stephen M. Schwebel, the US citizen and former Justice of the International Court of Justice, said after his emeritus, "The compulsory jurisdiction of the International Court of Justice is not universal and has not been strengthened but continues to be challenged ... In some cases, the Court clearly has jurisdiction or even if the jurisdiction of some cases is disputed, some defendant member states still refuse to appear in court". Ian Brownlie, a renowned British professor of international law, also pointed out in his widely cited works on public international law that "since modern times, there has been no clear boundary between arbitration and judicial adjudication in international dispute resolution. Any dispute resolution involving the application of international law by a state and other parties belongs to international judicial adjudication, and these permanent institutions are often developed based on historical arbitration

30 Serena Forlati, *The International Court of Justice – An Arbitral Tribunal or a Judicial Body?* Springer International Publishing House, 2014, pp. 31–49.

31 *Supra* n. 24, p. 9.

experience”.³² Therefore, in terms of voluntary jurisdiction based on the consent of the parties, the differences in nature between international arbitration and international judicial awards are indeed not obvious.

2. The Mutual Influence of Different International Dispute Settlement Mechanisms and the Tortuous Nature of Their Development Paths

As mentioned above, the current dispute settlement mechanisms of many international conventions usually include multiple dispute settlement methods, and their development does not go hand in hand. For example, ICSID international investment disputes are mainly based on case-by-case arbitration, combined with certain revocable procedures for qualified awards, while many other dispute resolution mechanisms include not only judicial adjudication paths, but also arbitration mechanisms. Some not only have first-instance mechanism, but also review mechanism. Meantime, we have seen that some international dispute settlement mechanisms have experienced a significant increase in the number of cases received and are facing development opportunities, such as the increasing cases received by ICSID since this century, while the cases of some other mechanisms, such as the International Tribunal for the Law of the Sea, are stagnating. Some mechanisms have experienced vigorous development and are facing serious difficulties and are in a tortuous stage, such as the WTO Dispute Settlement. It should be said that mutual learning, reference, and taking examples among various international dispute settlement mechanisms have never stopped. For example, during the negotiations on the reform of investment dispute settlement in ICSID by UNCITRAL Working Group III, many members cited the experience of the WTO Appellate Body in establishing unified jurisprudence, hoping to achieve a greater degree of legal consistency in ICSID investment arbitration. Meanwhile, we have also seen that although dispute settlement mechanisms in different fields may encounter difficulties and setbacks, the international community has never stopped exploring paths for international judicial adjudication in different fields. For example, although the Appellate Body of the WTO Dispute Settlement has encountered a shutdown crisis, some WTO members have

³² *Supra* n. 27, p. 694.

established multilateral *ad hoc* appeal arbitration mechanisms to continue the practice of resolving trade disputes through appeals. The Comprehensive Economic and Trade Agreement (CETA) signed by the EU and Canada in 2016 established an investment court with a two-level hearing mechanism (including the Investment Appeal Tribunal), and in 2021 also adopted specific rules for the operation of the court, although the treaty has not yet come into effect without ratification by the parties.³³ All these show that mankind's exploration of international dispute settlement mechanisms is still in progress and has never stopped.

IV. CHARACTERISTICS, CRISIS, AND REFORM OF THE WTO DISPUTE SETTLEMENT

As a unique legal system of the WTO in the field of international law, its dispute settlement has experienced international dispute settlement paths from the 1947 General Agreement on Tariffs and Trade (GATT) to the 1995 WTO, from diplomacy to law, from the first-instance mechanism similar to arbitration during the GATT period to the “quasi-judicial” second-instance mechanism (including the Appellate Body) during the WTO period, and the additional mechanism of the Multi-Party Interim Arbitration Appeal Mechanism (MPIA), which is based on arbitration provisions, with the participation of some members, and is operating during the difficult period of the Appellate Body. Such a gradual and inclusive historical process is unique and distinctive in the field of international dispute settlement. In the past few decades, it has made

³³ Negotiations on the CETA text were completed in 2016, and some provisions temporarily taken effect on September 21, 2017, but they do not include investment protection provisions and investor-state dispute settlement (ISDS) provisions. The Court of Justice of the European Union pointed out in Opinion 1/17 on April 30, 2018 that the investor-state dispute settlement mechanism stipulated in CETA is consistent with EU law. On January 29, 2021, the EU and Canada jointly adopted four specific rules to implement the Investment Court System agreed in CETA. The four rules regarding the investment court system are: the functioning of the appellate tribunal, the code of conduct for investment court members, the rules for mediation, and the rules for binding interpretations. The basic principles of the investment court system have been established in CETA, and the specific rules this time are the result of the two parties reaching an agreement on the detailed rules, procedures, and structure for the operation of the investment court system. These four rules, as well as the investment protection provisions of CETA, must be approved by all 27 EU member states before they can be applied. Currently, some EU members have not completed the approval process.

outstanding contributions to the peaceful settlement of international trade disputes among GATT/WTO members. From the GATT to the WTO, it has settled nearly a thousand international trade dispute cases, making important contributions to world economic growth and global poverty reduction.

Different from the international investment field, when the Uruguay Round negotiations were coming to an end, the core negotiating members at that time, including the United States, Europe, Canada, and Japan (QUAT), wanted to change the GATT period that defendants could single-handedly block the dispute settlement mechanism approved by the panel report, and they looked forward to establish a binding two-level dispute settlement mechanism that will be heard by the panel and the Appellate Body. To this end, members invented a reverse consensus decision-making mechanism for the Dispute Settlement Body (DSB), which makes the decision reports of the panel and the Appellate Body pass automatically, and add a compliance review mechanism at the stage of implementing the dispute results. That is to say, the plaintiff can review the consistency of the defendant’s execution of the dispute award by appealing to the original panel and is allowed to appeal. Once it is ruled that the defendant’s performance is not in compliance with the rulings of the original panel and the Appellate Body, the Dispute Settlement Body can authorize the plaintiff to retaliate against the defendant through reverse unanimous decision-making. As a result, the WTO dispute settlement has gained a title of “with teeth” dispute settlement mechanism. Due to the 25 years of dedicated operation of the permanent Appellate Body, the WTO dispute settlement has passed more than 200 adjudication reports and formed a relatively rigorous set of legal principles around the covered agreements, winning the trust of most members and being known as the WTO’s “crown jewel”.

From the General Agreement on Tariffs and Trade period in which diplomats from various delegations were mainly involved in dispute settlement to the hiring of the first professional lawyer in the 1980s, to the establishment of a legal department composed of a number of trade lawyers to assist in resolving international trade disputes among members, and then to the establishment of a two-level trial system composed of panels and Appellate Body, the WTO dispute settlement has gone through a process from diplomacy to law, and from law to “quasi” judicature.

The reason why the WTO's Dispute Settlement Body is different from the United Nations International Court of Justice is that its dispute settlement mechanism is not a "court" in name, but another brand of the General Council composed of all members — the Dispute Settlement Body. Judging from the organizational structure of the WTO, the highest authority is the Ministerial Conference, which enjoys the highest decision-making power and authoritative interpretation of treaties. Decision-making is generally made through positive consensus, but treaty rules clearly allow the exercise of decision-making power through voting. The Ministerial Conference is held every two years, and during its intersession, the General Council, composed of all members, exercises power. The General Council is also the dispute settlement body, which convenes a dispute settlement body meeting every month to review the dispute ruling reports made by the panels and the Appellate Body through positive consensus, and adopts decision-making on other matters through positive consensus, including the appointment of members of the Appellate Body. Therefore, from a nature point of view, the panels and the Appellate Body assist the General Council in exercising the function of dispute adjudication. The panel's ruling is similar to arbitration, while the Appellate Body's ruling is more judicial, and the conclusion reached by its ruling is of a mixed nature of "ruling and recommendation". "Ruling" is more judicial, while "recommendation" is the opposite. The adjudication report made by it will only have adjudicative effect and be binding on the parties to the dispute if approved by the General Council in the name of the Dispute Settlement Body. Due to reverse consensus, the ruling reports of the panels and the Appellate Body are almost impossible to be rejected by the WTO Dispute Settlement Body, that is, unless all members object, the report will be automatically adopted. This also reflects that the reports of the panels and the Appellate Body do not themselves have adjudicative effect but must be adopted by the Dispute Settlement Body. This is probably the biggest difference from the ruling of the United Nations International Court of Justice. The rulings, temporary injunctions and advisory opinions issued by the United Nations International Court of Justice have "judicial" effect in themselves and do not formally need to be adopted by the United Nations General Assembly. Although the implementation of the International Court of Justice's ruling must rely on the voluntary

implementation of the parties, the International Court of Justice itself has no authority to impose any sanctions or authorize the plaintiff to retaliate against the defendant member's failure to perform the ruling, which is different from the WTO. Therefore, in fact, the rulings of the WTO Dispute Settlement Body have quasi-judicial enforcement effect, but judging from its name and operating procedures, all members still assist it in completing dispute settlement through two-level review by the panels and the Appellate Body. Although the WTO permanent Appellate Body is not the Permanent Court of Appeal, except for its different name, it is essentially the same. As Mitsuo Matsushita, a former and initial Japanese member of the Appellate Body, pointed out, “The function of the WTO dispute settlement is very similar to an international trade court”.³⁴

If we apply the criteria for the “judicial” of international adjudication institutions proposed by the aforementioned international law scholars, although the WTO dispute settlement does not have the name of a court, its “judicial” even exceeds that of the United Nations International Court of Justice in some factors, especially in terms of “jurisdiction”, permanent Appellate Body and binding enforcement mechanism. Unlike the United Nations International Court of Justice, which only has “selective” and “consensual” jurisdiction over disputed matters, the WTO dispute settlement has jurisdiction over all disputes between WTO members based on covered agreements, which many WTO scholars call “mandatory” or “exclusive” jurisdiction, at least jurisdiction with some “automatic” nature.³⁵ There is no doubt that this kind of “mandatory”, “exclusive” or “automatic” jurisdiction strengthens the “judicial dimension” of the WTO dispute settlement.³⁶

These comparisons help us understand the special nature of the dispute settlement mechanism created by the WTO in the field of international trade.

34 Mitsuo Matsushita et al., *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, 2017, p. 83.

35 There have been only a handful of disputes over the jurisdiction of the panels and the Appellate Body over the covered agreements, such as the DS512 *Russian Federation – Measures Concerning Traffic in Transit*, where the United States has questioned whether the panel has jurisdiction over the security exceptions to Article XXI of GATT.

36 The WTO dispute settlement mechanism is a milestone in terms of mechanism innovation, the number and efficiency of dispute settlement cases, and the establishment of unified adjudication. See WTO, *World Trade Organization Appellate Body Annual Report 2019–2020*, Peng Zhao, Edited and Checked by Hong Zhao, Translated by Delei Peng, Shanghai People's Press, First Edition, August 2022, Chinese Version Preface, p. 3.

That is, although it does not have the name of “judicial”, it is almost of the highest level that an international dispute settlement mechanism can achieve so far. The judicial nature (the reality of judicial nature) has led different observers to interpret the nature of the mechanism differently, and this may be the result of the creative compromise reached by the Uruguay Round negotiators.

Objectively speaking, the WTO’s dispute settlement mechanism is an institutional innovation in international dispute settlement procedures, which provides WTO members with diversified dispute settlement methods covering almost all types of international trade disputes, and is highly comprehensive, inclusive and flexible. For example, the WTO dispute settlement has always encouraged parties to resolve trade disputes through negotiation to reach mutually satisfactory results (i.e., Mutually Agreed Solutions, referred to as “MAS”). Its dispute settlement procedures include not only consultations and negotiations that are necessary for both parties to the dispute as a pre-diplomatic procedure, but also include dispute settlement procedures in which a mutually satisfactory solution is reached through friendly consultations such as good offices by the Director General and a third party, conciliation, and mediation; meantime, an independent arbitration process has also been established.³⁷ Of course, in the past 28 years, WTO members have still used the two-level quasi-judicial process that is ruled by panels and Appellate Body, including the two-level compliance review used in the implementation stage and the reverse consensus process and multilateral authorization mechanism for trade retaliation. The amount of trade retaliation was also determined by the panel without the need for appeal. In addition, a specific implementation period is specified for each program to ensure its efficient and good operation.

As we all know, the current WTO dispute settlement is facing the difficult situation of its Appellate Body being unable to decide cases because there are no referees. There are currently 29 cases that have been appealed to the empty Appellate Body.³⁸ So, how to understand the underlying reasons why the WTO dispute settlement is currently facing difficulties? Although there are different opinions, the current actual situation may profoundly reflect the

³⁷ DSU, Article 25.

³⁸ WTO | Dispute Settlement – Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (Last Visited on May 20, 2024).

different understandings and expectations of different WTO members for such a complex WTO dispute settlement. For example, WTO members still have profound differences on whether the mechanism has “judicial” or “quasi-judicial” attributes, the number of cases accepted by its Appellate Body, and whether or how a series of precedents produced by the mechanism should be maintained. To a certain extent, this situation also reflects the differences in dispute settlement between the different legal traditions of the two major legal systems in the world.

Therefore, WTO members’ ongoing discussion on reform of the mechanism and its future direction may be determined by the following aspects:

i) In terms of interpretation and implementation of the purposes and objectives of the WTO, the WTO has always regarded maintaining free trade and promoting the growth of human welfare through expanding trade as its fundamental and unwavering goals. Then, under the new situation and environment currently faced by WTO members, what kind of balance should WTO members maintain in free trade and fair trade, trade defense measures, environmental protection and low-carbon goals, national security, and other non-trade goals, that is, how to achieve coordination of trade policy, industrial policy, environmental policy and innovation, human health and national security policy within the existing rules system. This is the fundamental issue that determines the reform of the WTO and is also the inevitable prepositive to the reform of the WTO dispute settlement mechanism. That is, how the dispute settlement will implement and how to implement the purposes and objectives of the multilateral trade rules system maintained by the WTO.

ii) Whether WTO members can form a unified understanding of the original intention of the existing Dispute Settlement Understanding (DSU) rules and their respective expectations for the operation of the dispute settlement procedural rules, including the goals and results that need to be achieved, is a question for dispute settlement. The key issue is whether all parties can reach consensus on the nature, tasks and objectives of the procedural rules themselves of the mechanism. In the context of an era in which international geopolitical and economic contradictions and conflicts have not been alleviated, members’ attention to non-trade issues such as national security, environment and sustainable development continues to rise. So, under this situation, what

kind of nature and function of the WTO dispute settlement mechanism is most conducive to the efficient and peaceful resolution of trade disputes among WTO members is the core issue that WTO members need to resolve in the negotiations on the reform of the dispute settlement mechanism. The top priority is, of course, to restore the normal operation of the WTO dispute settlement mechanism, especially its Appellate Body. Currently, nearly 30 cases are piling up in the stalled Appellate Body and cannot be resolved, which is not in the interest of any member.

iii) As an important and influential international dispute settlement mechanism in the world, the reform of the WTO dispute settlement mechanism includes how to ultimately interpret and grasp the role of dispute adjudicators in objectively and faithfully performing their duties of treaty interpretation and the balance between the judicial initiative and discretion that it should have as an adjudicator, as well as for the judgment of previous rulings that have been produced in history, to what extent and how it is allowed to play its role, and all of these will inevitably have a global impact on other international dispute settlement mechanisms.

The 12th Ministerial Conference of the WTO gave an authorization with clear deadline for the reform of the dispute settlement mechanism. Currently, WTO members are making every effort and actively participating in intensive consultations and negotiations on the reform of the dispute settlement mechanism. The Chinese government attaches great importance to WTO reform. Recently, Chinese leaders have given specific instructions for China to actively participate in WTO reform, including restoring the normal operation of the dispute settlement mechanism. We have reason to believe that with the firm support and active efforts of many members, the outstanding leadership of the WTO Director-General and the strong technical support of the Secretariat, the difficulties faced by the WTO dispute settlement mechanism will achieve a breakthrough and progress can be expected.

V. CONCLUSION

The development of human dispute settlement mechanisms has gone through many twists and turns. The creation of such diverse and multiplex dispute

settlement mechanisms today is the result of the unremitting efforts of governments, diplomatic community, and legal community around the world. It is also the result of the efforts of members of the international community in the unremitting innovation and exploration of the systems and rules of dispute settlement mechanism over the past century. Any progress in the peaceful settlement of disputes by mankind is hard-won.

At the level of domestic law, whether it is arbitration or justice, the essence is a strong guarantee for the implementation of dispute adjudication results by state power agencies. When arbitration, based on party autonomy and freedom of agreement, complies with the arbitration law of a country, the arbitration award can apply for enforcement by the court of that country. Therefore, arbitration has both “autonomy” and “quasi” judicial nature. At the level of international law, even if a “judicial” dispute settlement mechanism (such as the United Nations International Court of Justice) established by a treaty is reached with the consensus (agreement) of member states, the implementation of its rulings can only rely on voluntary implementation by states. The international dispute settlement mechanism itself has no enforcement power. The multilateral retaliation mechanism created by the WTO dispute settlement mechanism through “suspension of concessions” against members that violate the ruling results is a special institutional design and is not universal in the international dispute settlement mechanism. Therefore, at the level of international law, whether it is “contractual” arbitration or an international judicial adjudication mechanism with “judicial” or “quasi-judicial” attributes, the cornerstone is member consensus (contract), and the adjudication results require the voluntary implementation of members participating in the dispute; If the results of international commercial arbitration with private law attributes and international investment arbitration with semi-public and semi-private law attributes can be recognized and enforced by domestic courts, their effectiveness can be basically equivalent to domestic arbitration and judicial awards.

To sum up, the development path of international dispute settlement mechanisms from “contractual” to “quasi-judicial” constitutes the progressive direction of mankind’s peaceful settlement of international disputes. However, in practice, for a long historical period, the diversity of various international dispute settlement mechanisms and the coexistence of multiple legal paths

to dispute settlement will be a long-term phenomenon. Of course, mankind's efforts to explore a more fair, just, and judicial international dispute settlement mechanism will not stagnate. However, the "contractual" and "quasi-judicial" nature of international dispute adjudication is still based on the "contract" at the level of international law. In an era when sovereign states constitute the main body of mainstream international law, the so-called constitutionalization, legalization, and institutionalization of international law will inevitably be restricted and affected by the nature of sovereign states, and this impact will still exist for a long time. In any case, the ideal of building a higher unity and higher level of international rule of law is still the goal pursued by mankind. Especially in the process of exploring the grand ideal of building a community with a shared future for mankind, the pursuit of establishing an independent and impartial international judicial adjudication mechanism is an inevitable ideal goal for the reform of the international dispute settlement mechanism. In short, we not only focus on the actual construction of international rule of law, but also have the goal of expanding international rule of law in the future. We firmly believe that from a long-term perspective, the future of mankind's peaceful settlement of international disputes is bright.