

Several International Law Issues Related to the WTO's Future

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Abstract: The WTO is facing an unprecedented crisis of existence. Considering the root causes of the crisis and its international relation background, it is necessary to explore international law issues related to the WTO's future, the first issue being in respect of treaty law, the second issue concerning the laws on peaceful settlement of international disputes and the last one regarding the laws on international organizations. Based on the WTO rule system and dispute settlement mechanism as well as organizational reform tendency, China should be aware of its special status, support the existing multilateral trade rules and the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) as the link maintaining the existence of the WTO multilateral trading system, advance the formulation of new rules by means of plurilateral agreements under the multilateral framework, and insist on this organization's future reform towards the principle of institutional inclusiveness under the *Charter of the United Nations*.

Keywords: WTO's future, International law, Reform, China's coping measures

INTRODUCTION

It is well known that the World Trade Organization (WTO) had once made brilliant achievements since it was founded in 1995. Particularly, it had expanded from the 123 original Members to a real-sense “United Nations” of world trade constituting 164 Members including China and Russia. However, the WTO is currently undergoing an unprecedented survival crisis so those who are concerned about the multilateral trading system have to consider this organization's future destiny. The WTO Director-General Roberto Azevêdo expressed his concerns at the 25th anniversary of this organization's foundation on January 1, 2020. “Despite these considerable achievements, it is no exaggeration to say that the WTO faces challenges today that are unmatched in our relatively short

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history. Over the past two years, governments have introduced trade restrictions covering a substantial amount of international trade — affecting \$747 billion in global imports in 2019 alone.”¹ This is a consequence of the United States adopting unilateralism in foreign economic and trade relations. As a result, WTO dispute cases have sharply risen to as many as 57 ones in these years, wherein 31 dispute cases occurred between the United States and other WTO Members.² However, in order to evade possible disadvantageous rulings and authorized revenges arising from dispute settlement, disregarding the vast majority of WTO Members’ firm objection, the United States has stubbornly obstructed the selection of members of the dispute settling Appellate Body, thus causing the fall thereof which was once accredited “jewel in the crown” of the WTO.³ Currently, this Body has been paralyzed with no member remaining on duty.⁴ In addition, as for the WTO multilateral trade negotiations (Doha development agenda) launched in 2001,⁵ except for the *Agreement on Trade Facilitation* reached in 2013, other issues have had no substantial gains. The WTO’s multilateral negotiations and dispute settlement functions have been severely damaged. If the situation continues, the WTO’s future will be worrisome.

Despite domestic and international academic circles’ many researches on

1 The WTO at 25: A Message from the Director-General, WTO official website, https://www.wto.org/english/news_e/news20_e/dgra_01jan20_e.htm (Last Visited on March 2, 2020).

2 Chronological List of Disputes Cases, WTO official website, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last Visited on March 2, 2020).

3 John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge: Cambridge University Press, 2006, p. 82.

4 The WTO Director-General stressed: “A well-functioning, impartial and binding dispute settlement system is a core pillar of the WTO system ... Obviously the paralysis of the Appellate Body does not mean that rules-based dispute settlement has stopped at the WTO ... but we cannot abandon what must be our priority, namely finding a permanent solution for normal operation of the Appellate Body.” See DG Azevêdo to Launch Intensive Consultations on Resolving Appellate Body Impasse, WTO official website, https://www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm (Last Visited on March 2, 2020).

5 Doha development agenda includes 18 issues, i.e. agriculture, services, market access of non-agricultural products, trade-related aspects of intellectual property rights, the relationship between trade and investment, the interaction between trade and competition policy, transparency of governmental procurement, trade facilitation, WTO rules, understanding of dispute settlement, trade and environment, electronic commerce, small economies, trade and debts and finance, trade and technology transfer, technical cooperation and capacity building, least developed countries, and special and differential treatment. See *Doha WTO Ministerial 2001: Ministerial Declaration*, WT/MIN (01)/DEC/1, November 20, 2001.

the WTO's existence crisis,⁶ there have been few prospective discussions on relevant international law issues as to how to overcome the crisis and embrace the future. It should be noted that under the cumulated influence of the ongoing global pandemic, the WTO's future is even more uncertain and prospective research has become even more necessary. Hence, this paper will focus on the WTO's future development, and upon briefly reviewing the WTO crisis and its international relationship background, mainly discuss three international law issues closely related to the future WTO as an intergovernmental international organization based on treaty law, the first being the future applicability and binding force of the whole set of WTO substantial and procedural rules at the treaty law level, the second being the future operation mode of the WTO's dispute settlement mechanism at the level of peaceful settlement of international disputes, and the third being the WTO's future organizational reform at the level of the law of international organizations. For a relatively long period of time in the future, the WTO may struggle to transcend existing rules following some Members' path of plurilateral consultation and consensus or plurilateral acceptance under the multilateral framework based on existing rules, so as to maintain low-level existence. Lastly, in the conclusion part, this paper looks forward to China's relevant coping measures. Based on the WTO rule system and dispute settlement mechanism as well as organizational reform tendency, China should be aware of its special status, advance the formulation of new rules by means of plurilateral agreements under the multilateral framework, and insist on this organization's future reform towards the principle of institutional inclusiveness under the *Charter of the United Nations*.

I. THE WTO'S STATUS QUO AND INTERNATIONAL RELATION DEVELOPMENT BACKGROUND

The current WTO system is a product of the multilateral trade negotiation package agreements achieved at the Uruguay Round. This multilateral trading system is a whole set of treaty law system covering substantial law agreements regarding

⁶ Joost Pauwelyn, WTO Dispute Settlement Post 2019: What to Expect? *Journal of International Economic Law*, Vol. 22, 2019, p. 297; Ernst Ulrich Petersmann, How Should WTO Members React to Their WTO Crises? *World Trade Review*, Vol. 18, 2019, p. 503; Weihuan ZHOU, In Defence of the WTO: Why Do We Need a Multilateral Trading System? *Legal Issues of Economic Integration*, Vol. 47, 2020, p. 9; Yang Guohua, Legal Issues during the Crisis of the WTO Appellate Body, *Journal of International Law* (Initial Issue), No. 1, 2019; Shi Jingxia, The Crisis and Reform of the WTO Appellate Body, *The ZUEL Law Journal*, No. 3, 2019; Zuo Haicong, The Status Quo and Future of the WTO, *Chinese Review of International Law*, No. 5, 2015.

trade in goods, trade in services and trade-related aspects of intellectual property rights as well as two procedural law agreements, the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and the *Trade Policy Review Mechanism*. It plays an indispensable role in adjusting the economic and trade relations between various countries or regions and settling various disputes arising from economic and trade frictions in the context of global economic integration. However, along with the rapid development in science and technologies, the increase of WTO Members and the change to international relations, this organization's current system can hardly adapt to the development needs of the times and has gradually fallen into a crisis dilemma beyond control. Specifically, the strategic changes in the United States' foreign economic and trade relations in recent years have accelerated the crisis formation and cast a deep shadow over the WTO's future.

Reviewing the international relations built and developed by the WTO and its predecessor the *General Agreement on Tariffs and Trade* (GATT), it is apparent that the United States is changing its long-term multilateralism stance. The United States once proposed five guiding principles regarding foreign economic and trade relations: "1) Current international trade barriers should be substantially reduced; 2) International trade should be multilateral rather than bilateral; 3) International trade should be non-discriminatory; 4) Internally related industrial and agricultural stabilization policies should be aligned and coordinated with international trade policies; 5) International commercial rules should be developed for equal and just application to all countries' foreign trade whether or not the organization of their internal economy is based on individualism, collectivism or a combination of both."⁷ These principles run through the Preface and all provisions of GATT with multilateralism at the core, which is fully embodied in the General Most-Favored-Nation (MFN) Treatment principle in Article I, Part I of GATT. Professor Jackson once commented: "The United States used to support the multilateralism and non-discrimination principles contained in the GATT's unconditional MFN provision. At the GATT drafting and preliminary stages, these principles were the pillar of US policies."⁸ They totally suited the United States' interest demands for thoroughly exploring overseas markets after World War II.

7 U.N. Doc. EPCT/PV.2 (1946), p. 5. Quoted from John H. Jackson, *World Trade and the Law of GATT*, New York: the Bobbs-Merrill Company, Inc., 1969, p. 54.

8 [US] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Translated by Zhang Naigen, Fudan University Press, 2001 Edition, p. 190.

The Cold War ended in the early 1990s, and GATT developed into the WTO. First, it reflected that international economic and trade relations entered a higher-level multilateralism stage from post-WWII to post-Cold-War. GATT had 23 original parties,⁹ excluding defeated countries such as Germany, Japan and Italy as well as the former Soviet Union and major Eastern European countries. Hence, it was a relatively small-scale multilateral trading system mainly dominated by the United States and Britain. In the 1980s, when West Europe consisting of Germany, France, Britain and Italy developed into the customs-union-based European Economic Community (EEC) together with North Europe,¹⁰ Japan's economic strength increased and was second only to that of the United State,¹¹ and a large number of non-colonized developing countries joined GATT, a new larger-scale multilateral trading system was objectively required for adapting to the development of economic globalization. Second, judging from the negotiation issues at the Uruguay Round and its package achievements, not only trade in goods under GATT has expanded to cover trade in services and trade-related aspects of intellectual property rights but also GATT has expanded from a singular general agreement to 12 multilateral agreements on trade in goods including agricultural goods. More importantly, "a more powerful and more explicit legal system is adopted for the purpose of international trade, including a more effective and more reliable dispute settlement mechanism".¹² Third, the establishment of the WTO showed that the international community had realized that it was crucial to "establish an intact, more feasible and durable multilateral trading system" so as to "maintain basic principles of the multilateral trading system and facilitate realization of the system's goal".¹³ Adhering to the multilateralism principle was a high-degree

9 As for GATT original parties, See Paragraph 1 of the Preface of the *General Agreement on Tariffs and Trade*, Quoted from *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (In both Chinese and English), Law Press China, 2000 Edition, p. 424.

10 In June 1985, as Portugal and Spain joined the EEC, this regional economic community had 12 members: Germany, France, Italy, Belgium, Netherlands, Luxembourg, Britain, Denmark, Ireland, Greece, Portugal and Spain. See Zeng Lingliang, *Overview of European Union Law*, Wuhan University Press, 2007 Edition, p. 11.

11 Of the world gross output in 1980, the United States occupied 22.9% and Japan 10.2%. See Fang Lianqing (ed.), *The Post-war History of International Relations (1945-1995)*, Peking University Press, 1999 Edition, pp. 522-523.

12 Marrakesh Declaration of April 15, 1994, Quoted from *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, See *supra* n. 9, p. iii.

13 Agreement Establishing the World Trade Organization, Quoted from *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, See *supra* n. 9, p. 4. This Agreement is quoted below, with the reference omitted.

consensus reached then by all WTO members including the United States.

However, in the new century, because of the September 11 attacks and the subsequent wars against Afghanistan and Iraq successively initiated by the United States, the WTO multilateral trade negotiations which had just started were in a difficult situation. Restricted by the authorization on package negotiation time limits under the Trade Act of 2002 of the United States,¹⁴ the original schedule of ending the multilateral trade negotiations before January 1, 2005 under the WTO Doha *Ministerial Declaration* failed. Later, the US president requested an extension of the negotiation authorization which was not vetoed by the congress, the House of Representatives or the Senate, so the deadline was postponed until July 30, 2007. It was decided at the WTO Hong Kong Ministerial Conference to end all negotiations in 2006.¹⁵ Notwithstanding, the negotiations fell apart in July 2006, and the United States Congress was no longer willing to continue the authorization. Afterwards, the negotiations were limited to individual issues. For example, the *Agreement on Trade Facilitation* reached in 2013 has been the only negotiation achievement so far which exclusively applies to WTO Members having joined this Agreement rather than restraining all WTO Members as a package agreement.¹⁶ While multilateral trade negotiations halted, the United States turned to plurilateral regional trade negotiations, including the *Trans-Pacific Partnership Agreement (TPP)*¹⁷ and the *Trans-Atlantic Trade and Investment Partnership Agreement (TTIP)*.¹⁸

In recent years, the United States has turned to bilateral economic and trade negotiations oriented by unilateralism, reaching the first-stage economic

14 *Trade Act of 2002*, secs. 2103-2105, 19 U.S.C. secs. 3803-3805. This Act carries on the "fast track" mode under the *Trade Act of 1974*, i.e. the Congress authorizes the US president to negotiate with other countries regarding non-tariff barrier issues and decides whether or not to adopt the negotiation resulting bill within 90 days upon submission by the president without making any revision. See John H. Jackson, etc., *Legal Problems of International Economic Relations*, St. Paul: Thomas/West, Fifth Edition, 2008, pp. 85-86.

15 Hong Kong WTO Ministerial 2005: *Doha Work Programme, Ministerial Declaration*, WT/MIN(05)/DEC/1, December 22, 2005.

16 The *Agreement on Trade Facilitation* was adopted pursuant to Article X:3 of the *Marrakesh Agreement Establishing the World Trade Organization* and applies to joining Members only pursuant thereto. This type of agreements under the multilateral framework has a new plurilateral nature compared with previous plurilateral agreements.

17 *Trans-Pacific Partnership Agreement*, See Han Liyu (ed.), *A Guide to the Cover-to-Cover Translation of the Trans-Pacific Partnership Agreement* (Volumes I and II), Peking University Press, 2018 Edition. TPP did not come into effect because of the withdrawal of the Trump Administration.

18 *Trans-Atlantic Trade and Investment Partnership Agreement*, the United States and the EU launched negotiations in 2013, which halted before long.

and trade agreement with China in the context of the China-US trade war.¹⁹ This highlights the change in the United States' foreign economic and trade strategy. That is to say, the United States has reexamined its policy in the past 20 years. "This policy is based on the assumption of contacting competitors and including them in the international system and global trade so as to make them mild actors and reliable partners. Such an assumption has basically failed."²⁰ Therefore, the strategy of "America First" should be adopted in the United States' foreign economic and trade relations and even the entire international relations, a part of which is the so-called "sticking to economic relations based on fairness and reciprocity so as to address trade imbalance."²¹ This strategic change has shifted the focus of the United States' foreign economic and trade relations from multilateralism which had lasted for over 70 years in the past to non-multilateralism (including unilateralism in regional plurilateral and bilateral relations).

To sum up, the WTO's crisis roots in the change to the United States' foreign strategy, particularly its turning to non-multilateralism regarding international economic and trade relations. We should discuss international law issues related to the WTO's future in such an international relation context. As for the so-called "future", there is great uncertainty, in respect of change of the WTO, which may refer to the recent future in two or three years or the farther future. It depends on when WTO Members reach a consensus on restoring this organization's normal functions. Whereas the WTO is an intergovernmental international organization generated based on treaty law and has the attribute of an international law system, this paper focuses on researching international law issues related to the WTO's future, for the purpose of prospectively discussing the treaty law rule applicability and dispute settlement mechanism operation in the future given the persistent state of materially damaged multilateral functions of the WTO. Can this organization restore due vitality through reforms? As far as the WTO's future is concerned, treaty law issues are the fundamental, the laws on peaceful settlement of international disputes are the key, and reform feasibility under the laws on international organizations is the premise. The three aspects are closely related.

19 *Economic and Trade Agreement between the Government of the People's Republic of China and the Government of the United States of America*, Text Source: Notice on Promulgating the China-US First-Stage Economic and Trade Agreement, Ministry of Commerce website, <http://www.mofcom.gov.cn/article/ae/ai/202001/20200102930845.shtml> (Last Visited on March 2, 2020).

20 The white house, *National Security Strategy of the United States of America*, December 2017, p. 3.

21 *Ibid.*, p. 4.

II. TREATY LAW ISSUES RELATED TO THE WTO'S FUTURE

A. The WTO Treaty Law Rule System

From the treaty law perspective, the WTO package agreements are a huge treaty rule system. Specifically, the *Marrakesh Agreement Establishing the World Trade Organization* is a basic agreement, in nature of which is a charter. According to Article II:2 of this Agreement, the package agreements with totally over 460 pages including the *Multilateral Agreements on Trade in Goods* which consists of GATT 1994 and its 12 agreements,²² the *General Agreement on Trade in Services*, the *Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPS), the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and the *Trade Policy Review Mechanism* (TPRM) all constitute annexes to the *Marrakesh Agreement Establishing the World Trade Organization* with binding effect on all Members. In addition, the schedule of tariff concession with tens of thousands of pages was reached during multilateral trade negotiations at the Uruguay Round, which in accordance with Article II:7 of GATT constitutes a part of Part I thereof, i.e. General Most-Favored-Nation Treatment. Therefore, the package agreements can be said to be the largest-volume single treaty law system compiled or formulated at peaceful times in history.²³

However, the question is that in the future when the WTO's multilateral functions are materially damaged, will its current treaty rules still have binding effects? This is a basis of the prospective research on this organization's future. Only after objectively assessing their future applicability is it realistic to discuss this organization's future and other international law issues. For analyzing

22 According to Article 9 of the *Agreement on Textiles and Clothing*, this Agreement was terminated on January 1, 2005. According to the *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization* of 2014, the *Agreement on Trade Facilitation* which is to take effect on February 22, 2017 is to be incorporated into the *Multilateral Agreements on Trade in Goods*. Hence, the *Multilateral Agreements* still include 12 agreements, but the *Agreement on Trade Facilitation* is binding merely on Members accepting this Agreement. See WTO, *The WTO Agreements: The Marrakesh Agreement Establishing the World Trade Organization and Its Annexes* (Updated Edition of the Legal Texts), Cambridge: Cambridge University Press, 2017, p. 321, Editorial Note.

23 *Supra* n. 8, p. 51. Compared with the *United Nations Convention on the Law of the Sea* of 1982 and its 9 annexes in totally 446 articles, the WTO package agreements and schedules of tariff concessions have a much larger volume than this Convention.

convenience, these rules can be classified into substantial and procedural rules. Substantial rules can be further divided into three types of rules, i.e. rules regarding trade in goods, trade in services and trade-related aspects of intellectual property rights. Specifically, rules regarding trade in goods comprise tariff barrier rules and non-tariff barrier rules. Analysis will show that different types of rules have different binding effects.

B. The WTO's Tariff Barrier Rules

The MFN-treatment-based tariff barrier rules under the WTO's current *Multi-lateral Agreements on Trade in Goods* only apply to import and export trade with non-RTA Members before the formation of various Regional Trade Arrangements (RTAs). Part I of GATT 1994 contains tariff barrier rules, including Article I General Most-Favoured-Nation Treatment and Article II Schedules of Concessions. The Schedules of Tariff Concessions reached through multilateral negotiations (e.g. the Uruguay Round) are the basis of applying MFN treatment. Nowadays, hundreds of RTAs do not apply this Article I according to Article XXIV of GATT which serves as an exception of MFN treatment. For instance, provisions on import and export of goods under recent RTAs — the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP)²⁴ and the *Agreement between the United States of America, the United Mexican States, and Canada* (USMCA)²⁵ (Chapter II National Treatment and Market Access for Goods in both cases) only stipulate that imported products should enjoy national treatment accorded to local products without mentioning MFN. Pursuant to Paragraph 5(b) of Article XXIV of GATT, as far as RTA is concerned, “the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of

24 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, official website of New Zealand Government, <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf> (Last Visited on March 2, 2020). This Agreement was amended based on TPP and officially took effect on December 30, 2018.

25 *Agreement between the United States of America, the United Mexican States, and Canada*, official website of the United States Government, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (Last Visited on March 2, 2020). It was signed as law by US president on January 29, 2020 and has now taken effect having completed its domestic contracting procedures.

commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be.”²⁶ Article V:4 of GATS contains similar regulations.²⁷ In other words, even though a RTA is an exception of the General MFN Treatment under Article I of GATT and Article V of GATS, MFN treatment already given to non-RTA members previously should not be damaged. For example, there is no RTA between the United States and China, so both parties should offer to each other the MFN “bound rates” both parties offered to other WTO Members when China joined the WTO. However, since April 2018, the United States has continually unilaterally collected additional 10% to 25% tariffs on Chinese products exported to the United States, largely exceeding the MFN “bound rates” stipulated in the schedule of tariff concessions it attached under Article II:7 of GATT 1994 and totally breaching Article I:1 and Articles II:1(a) and (b) of GATT. China has requested dispute settlement with the WTO for several times as a result thereof.²⁸ Apparently, before normal trade in goods is restored between China and the United States, both parties offering each other MFN treatment due to a non-RTA member does not apply. Judging from the cause of action of WTO dispute settlement cases in the past two years, besides the China-US trade disputes which involved tariff MFN treatment, the EU and Chinese Taipei (the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu) accused India of breaching MFN treatment because tariffs on certain technology information products exceeded zero tariff on its schedule of concessions.²⁹ Moreover, in the dispute cases of the United States versus China, the EU, Turkey, Russia and India, the United States unilaterally collected additional import tariffs on steel and aluminum products on the ground of national security exceptions which had led to other Members’ countermeasures involved tariff MFN treatment.³⁰

26 The General Agreement on Tariffs and Trade, Quoted from *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, *Supra* n. 9, pp. 458-459. This General Agreement is quoted below, with the reference omitted.

27 In the context of economic integration, “any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement”, the *General Agreement on Trade in Services*, Quoted from *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, *Supra* n. 9, p. 290. This General Agreement is quoted below, with the reference omitted.

28 US — *Tariff Measures on Certain Goods from China*/II/III, DS543, DS565, DS587.

29 India — *Tariff Treatment on Certain Goods in the Information and Communication Technology Sector*, DS582, DS588.

30 China — *Additional Duties on Certain Products from US*, DS588, US vs. the EU, Turkey, Russia and India, DS559, DS561, DS566, DS585.

There was no RTA between any of the parties involved in these cases, so the MFN treatment which had become an “exception” in the crack of numerous RTAs still applied to these WTO Members. These cases were mostly resulted by abnormal trade relations such as trade war or one party imposing economic sanctions on another party. In some cases, one party believed that the other party’s trade relief measures such as anti-dumping and safeguard measures breached tariff MFN treatment.³¹

C. The WTO’s Non-tariff Barrier Rules

The non-tariff barrier rules under the *Multilateral Agreements on Trade in Goods* such as national treatment of imported products, trade relief measures, sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT) measures and customs valuation still apply to all WTO Members. In Part II of GATT 1994, except for Article III National Treatment on Internal Taxation and Regulation and Article IV Special Provisions relating to Cinematograph Films, most other provisions as fundamental regulations have supportive agreements for implementation, e.g. the *Anti-dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on Safeguards*, the *Agreement on the Application of Sanitary and Phytosanitary Measures*, the *Agreement on Technical Barriers to Trade* and the *Agreement on Customs Valuation*. Although nowadays MFN tariff treatment only applies to import and export trade with non-RTA members prior to the formation of various RTAs, whether or not there is a RTA between WTO Members, once imported products enter a Member’s “customs territory”, they should enjoy strict national treatment. In other words, “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products” (Article III:2 of GATT). Moreover, “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin

31 For example, *Venezuela vs. US trade disputes arising from sanction measures*, *US — Measures Relating to Trade in Goods and Services*, DS574; For another example, *Thailand vs. Turkey safeguard measures against imports of air conditioning machines from Thailand breaching tariff MFN*, *Turkey — Additional Duties on Imports of Air Conditioning Machines from Thailand*, DS573.

in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use” (Article III:4 of GATT). The rules on trade in goods under this treaty are designed to “prevent protectionism measures utilizing internal taxes and regulation policies to make tariff restraint lose its due effect”.³² Hence, this complements the general MFN tariff treatment. Despite that MFN treatment has currently become an actual exception losing its generally applicable binding force, national treatment shall be still applied with MFN treatment “with respect to all matters referred to in paragraphs 2 and 4 of Article III” under Article I:1 of GATT. In the future, this will remain a treaty obligation.

Just like any WTO Member should impose internal taxes on imported products according to national treatment, domestic law such as trade relief measures should also conform to the WTO’s relevant treaty regulations on non-tariff barriers. Since the WTO’s foundation, most trade dispute cases have been related to these non-tariff barrier measures. In recent two years, relevant dispute cases have sharply increased due to the United States’ tariff measures which have initiated trade wars, but non-tariff barrier cases still occupy roughly a half.³³

D. The WTO’s Rules on Trade in Services

Article II:1 of GATS stipulates on similar obligations to tariff MFN treatment regarding trade in goods: “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.” However, this rule on MFN treatment is also exceptionally non-applicable due to FTAs between Members (Article V:1 of GATS). Nowadays and even in the future, it is also in the dilemma of exclusive application to trade in services with non-RTA Members referring their MFN treatment prior to the formation of various RTAs. Schedules of concession regarding trade in services are committed respectively by WTO Members but are annexed to GATS and “form an integral part thereof” (Article XX:3 of GATS) with the nature of a multilateral treaty. Regarding national treatment, “each Member shall accord services and

32 John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge: The MIT Press, Second Edition, 1997, p. 213.

33 Taking the 53 WTO dispute settlement cases since March 2018 (DS542-595) as an example, there are 27 cases relating to non-tariff barrier measures. See *Supra* n. 2.

service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule” (Article XVI:1 of GATS). Moreover, national treatment regarding trade in services can be “formally identical or formally different” as long as it is substantially identical (Article XVII:1 of GATS). Even though GATS doesn’t contain the requirement of national treatment applying MFN treatment as provided for in Article I:1 of GATT, according to the GATS negotiation group’s statement at the Uruguay Round, national treatment applied in service market access as committed by WTO Members should also be equally accorded to all other Members without discrimination.³⁴ These rules on trade in services have binding force on WTO members now and in the future. Other general treaty obligations under GATS, including transparency (Article III) and reasonable, objective and impartial implementation of domestic regulation (Article VI), have binding force on all WTO members now and in the future.

E. The WTO’s Rules on Trade-related Aspects of Intellectual Property Rights

According to Article 1.1 of TRIPS, Members shall effectively implement minimum intellectual property protection under this Agreement by means of appropriate methods.³⁵ This involves copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, and undisclosed information covered in Part II thereof, intellectual property protection under substantial provisions of the *Paris Convention for the Protection of Industrial Property* and the *Berne Convention for the Protection of Literary and Artistic Works* which are incorporated therein to,³⁶ as well as rules on the enforcement of intellectual property rights in Part III and protection rules on intellectual property themes already existing at the

34 Petros C. Mavroidis and Mark Wu, *The Law of the WTO*, St. Paul: West Academic Publishing, Second Edition, 2013, p. 753. This statement does not have the binding effect of a treaty but can serve as supplementary data interpreting national treatment under GATS. However, dispute settlement cases regarding GATS so far haven’t quoted this statement as supplementary data for interpreting purposes. See Zhang Naigen, *International Law of Treaty Interpretation* (Volume II), Shanghai People’s Publishing House, 2019 Edition, pp. 753-765.

35 Zhang Naigen, *On Obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPS), *Zhejiang Social Sciences*, 2002, No. 5, p. 70.

36 According to the interpretation of the WTO dispute settlement Appellate Body, this protection scope also includes trade names stipulated in Article 8 of the *Paris Convention for the Protection of Industrial Property*. US — Section 211 Appropriations Act, DS176/AB/R, para. 338; See also Zhang Naigen (ed.), *The Agreement on Trade-related Aspects of Intellectual Property Rights*, Peking University Press, 2018 Edition, pp. 162-164.

time of WTO foundation in Part VII. These rules on intellectual property protection have binding force on all WTO Members now and in the future, except that pursuant to Article 66 thereof, least-developed countries can enjoy the transitional arrangement of temporary non-application.³⁷ National Treatment (Article 3) and Most-Favoured-Nation Treatment (Article 4) thereunder require that the non-discrimination rule regarding intellectual property protection should benefit all Members and have binding force now and in the future. Unlike the general MFN tariff treatment and service market access which are restricted by RTA, MFN treatment regarding intellectual property protection under TRIPS is not restricted by RTA exceptions which come into force after it takes effect.³⁸ RTAs reached by developed countries and regions following the WTO's foundation feature many new rules on intellectual property rights, i.e. "TRIPS-plus" provisions.³⁹ That being said, these RTAs are based on applying existing rules under TRIPS. For example, the intellectual property provision structure of USMCA, the recent RTA, refers roughly to TRIPS and is basically an upgraded edition. Moreover, as long as this type of RTAs come into force after January 1, 1995, preferential treatments thereunder which are higher than TRIPS standard should be applied to other non-RTA WTO Members pursuant to MFN treatment.⁴⁰

In short, regarding the WTO's substantial rules, the cornerstone general MFN treatment respecting tariff concession and service market access under multilateral agreements has actually become an exception with materially

37 The transitional period for least-developed countries is extended until July 1, 2021. See Extension of the Transitional Period under Article 66.1 for Least Developed Countries Members, IP/C/64, June 12, 2013. Specifically, the transitional period regarding pharmaceutical patent protection is extended until January 1, 2033. Extension of the Transitional Period under Article 66.1 for Least Developed Countries Members, IP/C/73, November 6, 2015.

38 It is stipulated in Paragraph (d), Article 4 of TRIPS as follows: preferential treatment "deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement" can be exempted from the obligation. This is different from Article XXIV of GATT and Article V of GATS which allow any subsequent RTA preference to exceptionally not apply MFN treatment. Therefore, the MFN treatment under TRIPS features limited exceptions. See International Trade and Sustainable Development Center of the United Nations Conference on Trade and Development (UNCTD), *Resource Book on TRIPS and Development*, China Commerce and Trade Press, 2013 Edition, p. 98.

39 Pedro Roffe, Intellectual Property Chapters in Free Trade Agreements: Their Significance and Systemic Implications, In Josef Drexler, et al. (eds.), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* Heidelberg: Springer, 2014, pp. 17-38. This article comparatively researched "TRIPS-plus" provisions contained in RTAs signed by the US and the EU respectively with developing countries since 2000.

40 Antony Taubman et al. (eds.), *A Handbook on the WTO TRIPS Agreement*, Cambridge: Cambridge University Press, 2012, p. 18.

weakened binding force due to hundreds of RTAs. However, various other rules on non-tariff barriers and general obligations and rules on service in trade still pervasively apply to all WTO Members now and in the future, so do existing rules under TRIPS. In other words, the WTO's existing rules will generally continue to pervasively apply to WTO Members in the future. This is the author's basic evaluation of the future applicability of the WTO treaty law rule system.

III. ISSUES CONCERNING THE LAWS ON PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES RELATED TO THE WTO'S FUTURE

A. The WTO's Dispute Settlement Mechanism

Judging from the historical development of the laws on peaceful settlement of international disputes, the WTO's unique dispute settlement mechanism, particularly the appellate mechanism which is dedicated to reviewing legal issues and interpreting laws, cannot be found with other international adjudication institutions.⁴¹ It plays a pillar role in peacefully settling trade frictions between Members and maintaining the "tower" of the multilateral trade rule system. Notwithstanding, this mechanism has been paralyzed due to the United States' intentional behaviors and the "tower" is endangered. A preliminary conclusion of the research above points out that in general, the WTO's current rules will still continue to universally apply to WTO Members in the future. According to WTO procedural rules⁴² — Article 3.2 of DSU, once Member disputes involve an application of these rules, the WTO dispute settlement panel and the Appellate Body should clarify their meaning "in accordance with customary

41 The said review mechanism is not found with the Permanent Court of Arbitration (PCA) established according to the *Convention on the Peaceful Settlement of International Disputes* adopted at the first Hague Peace Conference in 1900, the Permanent Court of International Justice (PCIJ) established in 1920 and the subsequent International Court of Justice (ICJ) established in 1946, or the International Tribunal for the Law of the Sea established in 1996. The International Criminal Tribunal for the former Yugoslavia and the International Tribunal for Rwanda specially established by the United Nations share an appellate tribunal, but it reviews legal errors and factual errors resulting in miscarriage of justice.

42 According to another procedural rule — TRPM, all Members' trade policies and practices should be regularly reviewed. Members being reviewed should submit a thorough report, and the review records and the reports of the WTO Secretary-General will be announced after the review and submitted to WTO ministerial conferences for attention. This system will be continually implemented in the future. Due to limited length, it is not elaborated in this paper.

rules of interpretation of public international law”, while “recommendations and rulings” in the dispute settlement reports adopted by the Dispute Settlement Body (DSB) “cannot add to or diminish the rights and obligations” provided in applicable rules with clarified meaning. As discussed above, this type of dispute cases reached as many as 57 ones in these two years, which involved various WTO substantial rules. Here is the question: With a non-operable Appellate Body, how will the WTO settle disputes and implement Members’ rights and obligations in the future?

The WTO dispute settlement mechanism emerged from the mixed-type adjudication mode formed in practice in the GATT period, i.e. combining the diplomatic mode (current consultations between disputing parties) and the arbitration mode (three-person panel, Article XXIII of GATT corresponds to an arbitration provision⁴³) and the judicial mode (for example, the complaining party should present preliminary evidence of the defending party’s breach, and the latter should put to proof to refute, or else the breach will count).⁴⁴ In particular, this mode inevitably develops towards interpreting more often the defending party’s treaty obligations, thus providing a “adjudicative jurisprudence” basis for the Appellate Body’s dispute settlement at the core of treaty interpretation following the WTO’s establishment. The customary practice of compiling treaty interpretation adjudicative jurisprudence in adjudication reports had been developed in the GATT period.⁴⁵ Carrying on this practice, the WTO

43 Article XXIII:2 of GATT: If the contracting parties’ consultation over a disputed matter fails, “the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.” This is a fundamental clause of the dispute settlement mechanism of GATT and of the WTO. The *Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance* adopted by the CONTRACTING PARTIES to GATT in November 1979 is a “definition” interpretation of Articles XXII and XXIII of GATT and constitutes the “constitutional framework” for dispute settlement under GATT until the WTO was established. See *Supra* n. 3, pp. 140-141.

44 Regarding GATT/WTO judicial procedures, the burden of proving a *prima facie* case is included. See David Palmer and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, Cambridge: Cambridge University Press, Second Edition, 2004, pp. 143-148. Following the WTO’s establishment, its dispute settlement reports are automatically adopted in the principle of “negative consensus” and are more judicial.

45 GATT once published an “Amendment” to the *Analytical Index: Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement on Tariffs and Trade* respectively in 1959 and 1969. The *Analytical Index* used in 1986 when GATT negotiations at the Uruguay Round were launched was the 1985-1986 “loose-leaf edition”. See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge: The MIT Press, 1989, p. 336, Endnote 15.

regularly compiles the *WTO Analytical Index: Guide to WTO Law and Practice*.⁴⁶ According to Article XVI:1 of the *Marrakesh Agreement Establishing the World Trade Organization*, the WTO's dispute settlement shall be guided by the customary practices followed by the bodies established in the framework of GATT 1947. Such customary practices include relevant treaty interpretation. Hence, when the WTO dispute settlement Appellate Body reviewed the first *US — Gasoline* case, it quoted relevant panel reports and compiled adjudicative jurisprudence in the GATT period as guidance at the introduction interpreting general exception provisions.⁴⁷ Such a practice is of extreme importance to providing the multilateral trading system with reliability and predictability.⁴⁸

But in the past two years, the United States repeatedly accused the Appellate Body of counting interpretations clarifying treaty meaning as “precedents”, thus obstructing the selection of members thereof and leading to its paralysis.⁴⁹ The vast majority of WTO Members do not agree with such arguments,⁵⁰ but due to the United States' pushiness, this institution being paralyzed has become a reality. The WTO's future dispute settlement procedures and relevant issues under such circumstances will be analyzed below.

46 The *Analytical Index* has always taken the interpretation of treaty provisions involved in all dispute settlement reports as “adjudicative jurisprudence” at the title of jurisprudence, thus making agreement-by-agreement and article-by-article classification and providing guideline for relevant treaty interpretation subsequently.

47 Panel Report on *US — Imports of Certain Automotive Spring Assemblies*, BISD 30S/170; *Analytical Index: Guide to GATT Law and Practice*, Vol. I, see *US — Gasoline*, DS2/AB/R, footnote 44.

48 The Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Geneva: WTO, 2004, para. 231.

49 See the US recent reports on the Appellate Body, *USTR Report on the Appellate Body of World Trade Organization*, Office of the USTR Ambassador Robert E. Lighthizer, February 2020. Its accusations include the previously repeated so-called “overriding”: “the review period exceeds the stipulated 90 days”, “members with expiring term of office continue to hear cases”, “domestic law under which inappropriate investigations serve as facts”, “adjudications counted as precedents”, “advisory opinions are provided” and “erroneous treaty interpretation” (particularly relevant “public institutions” regarding anti-subsidy and “zeroing” relating to anti-dumping).

50 WTO Members such as China, the EU, Japan, Canada, Australia, New Zealand, Singapore, Mexico, Brazil, Chile, Columbia and the Philippines commented on the US accusations, holding that DSU and the WTO Agreement indeed do not authorize the said institutions to make rulings with precedent binding force, but they also doubted whether the Appellate Body had actually sought this power and deemed that the US accusing the Appellate Body of maintaining the precedential value of its previous reports on “convincing grounds” taking the example of “Stainless steel case (Mexico)” was not truthful. See Statement by the United States on the Precedential Value of Panel or Appellate Body Reports, WTO official website, https://www.wto.org/english/news_e/news18_e/dsb_18dec18_e.htm (Last Visited on March 14, 2020).

B. The WTO's Future Dispute Settlement Panel Procedures

Where the WTO's dispute settlement Appellate Body is paralyzed, according to Article 6 of DSU, if the disputing parties fail to reach a solution through consultation, the complaining party may still request to establish a panel for hearing and settling the dispute. Moreover, pursuant to Article 16.4 of DSU, if the panel issues a ruling report regarding dispute settlement, the report shall be automatically adopted by the DSB if no party to the dispute appeals, unless the DSB decides by consensus not to adopt the report (the winning party is unlikely to agree not to adopt the report, so this is impossible).

In fact, since the United States prevented the Appellate Body from selecting new members, the Body suffered from a severe shortage of members starting from June 2018 which led to the backlogging of appealed cases to be reviewed. As a result, regarding the disputing parties' appeals regarding panel reports, pursuant to Article 16.4 of DSU, the DSB will not review and adopt such reports before the appeals are completed. Accordingly, for as long as the Appellate Body is paralyzed, such reports will be infinitely suspended.⁵¹ In other words, panel procedures are not entirely ended. In the future, if the panels continue to hear cases, it is predictable that more appealed cases will be suspended. Additionally, according to Article 21.5 of DSU, whether the panel reports are adopted without being appealed or adopted together with the appeal reports upon appealing and reviewing, the relevant dispute settlement will enter the ruling execution procedures. Once the parties concerned have disputes over the execution, the disputes should be submitted to the original panel (usually referred to as the "21.5 panel") for reviewing and ruling purposes. Such panel reports can likewise be appealed again and are now likely to become suspended cases so that the execution is rendered impossible, not to mention possible authorized revenge.⁵² It can be seen that the paralyzed Appellate Body has severe impact on the operation of the entire WTO dispute settlement mechanism.

51 So far there have been totally 7 such "suspending cases" (including the same cause of action): *Australia — Tobacco Plain Packaging* (Honduras, Dominican), DS435,441/R, July 19 and August 23, 2018; *EU — Energy Package*, DS476/R, September 21, 2018; *India — Iron and Steel Products*, DS518/R, December 14, 2018; *US — Pipe and Tube Products* (Turkey), DS523/R, January 25, 2019; *US — Differential Pricing Methodology*, DS534/R, June 4, 2019; *US — Renewable Energy*, DS510/R, August 15, 2019; *India — Export Measures*, DS541/R, November 19, 2019.

52 So far there have been 3 such cases (including the same cause of action): *Colombia — Textiles*, DS461/R (21.5), November 20, 2018; *Thailand — Cigarettes (Philippines I and II)*, DS371/RW and RW2 (21.5), January 9 and September 9, 2019; *EU — Larger Civil Aircraft*, DS316/RW2 (21.5), December 6, 2019.

Even if some WTO Members reach temporarily alternative appeal procedures, massive suspending cases will still exist.

In the context of the Appellate Body being unable to review, it is also worth discussing whether or not adopted panel reports can guide subsequent hearing of like cases besides their direct binding force upon the parties concerned. Taking for example the first non-appealed and adopted panel report after the Body was paralyzed regarding the case of *Australia — Anti-Dumping Measures on A4 Copy Paper*,⁵³ This case involved the interpretation of “the particular market situation” in Article 2.2 of the *Anti-dumping Agreement*. Whereas no panel or Appellate Body report has made any interpretation in this regard since the WTO’s establishment, the panel of this case quoted relevant interpretation in the *EC — Cotton* case in the GATT period: “‘the particular market situation’ is relevant only when it has the effect of making sale itself not suitable for appropriate comparison”⁵⁴. It explicitly expressed its acceptance and further explained: “The term ‘the particular market situation’ itself did not predict the definitions of various circumstances so that the investigation authorities may allow ‘appropriate comparison’”. We believe that the drafter intentionally selected this term. As such, the term “the particular market situation” is restricted by “particular” and “market”. However, this cannot be interpreted as covering all circumstances or ways so that the investigation authorities may base on conditions which have to be considered.”⁵⁵ In brief, such market situation is special and individual corresponding to individual cases but not necessarily exceptional. Apparently, even panel reports in the GATT period play the role of guiding subsequent dispute settlement involving the same matters, not to mention relevant panel reports in the WTO period. This is the requirement under Article XVI:1 of the *Marrakesh Agreement Establishing the World Trade Organization*. Therefore, while the Appellate Body is paralyzed, high importance should be attached to the guiding role played by adopted panel reports. Certainly, ruling reports made before the Body was paralyzed still bear guiding functions. Nothing but during the period when the Body is paralyzed,

⁵³ *Australia — Anti-Dumping Measures on A4 Copy Paper*, DS529/R, adopted on January 27, 2020. The parties agree not to appeal.

⁵⁴ *EC — Cotton*, ADP/137, adopted on October 10, 1995, para. 478. The WTO had been established then, but this case was filed in November 1991 and a panel was formed in April 1994 to hear it. So Article 2.4 of the *Anti-dumping Agreement* (1979) in the GATT period still applied, which included “the particular market situation” in Article 2.2 of the WTO *Anti-dumping Agreement*.

⁵⁵ *Supra* n. 53, para. 7.21.

panel reports may play more important guiding roles respecting matters not handled by the Body.

C. The WTO's Future Dispute Settlement Appeal Substitutive Procedures

The only substitutive procedure currently is to replace appeal with arbitration pursuant to Article 25 of DSU. On January 24, 2020, ministers of trade and commerce from 17 WTO Members including the EU and China issued a joint statement: "We are committed to seeking, together with all WTO Members, a permanent scheme designed to improve relevant circumstances of the WTO Appellate Body. We are convinced that a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features. In the meantime, we will endeavor to adopt interim measures so as to allow appeal for review of WTO panel reports regarding disputes between us, i.e. multi-party interim appeal arrangement based on Article 25 of DSU, which will be adopted only before the reformed WTO Appellate Body restores operation completely. Such arrangement is open to any WTO Members willing to join."⁵⁶ The subsequently reached *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA) had been promulgated on March 27, 2020.⁵⁷ The MPIA accepted by major WTO Members apart from the United States has certain universality and is anticipated to embrace more Members. It is temporarily applicable to appeals between MPIA participating Members while the Appellate Body is paralyzed. Meanwhile, the EU, China and other WTO Members will make continual efforts to facilitate the Appellate Body's reform so that its operation can be resumed as early as possible.

⁵⁶ Statement by Ministers, Davos, Switzerland, January 24, 2020. WTO Members signing this Statement by Ministers included the EU, China, Canada, Australia, Brazil, South Korea, Mexico, New Zealand, Chile, Guatemala, Columbia, Costa Rica, Norway, Panama, Singapore, Uruguay and Switzerland. Before that, the EU had successively reached a consensus with Canada and with Norway regarding the adoption of the arbitration mode under Article 25 of DSU as an interim substitution of the appeal scheme for settlement of mutual disputes.

⁵⁷ Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, March 27, 2020. Annex 1 of the MPIA is the Agreed Procedures for Arbitration under Article 25 of the DSU. It serves as a template arbitration agreement for MPIA participating Members adopting interim arbitration appeal. Only the specific Case No. (DS) needs to be added to the template. Annex 2 is the procedures for appointing 10 members of the permanent "Pool of Arbitrators". Compared with the statement by ministers dated January 24, 2020, participating Members of the MPIA included Hong Kong Special Administrative Region, China and excluded South Korea and Panama. <http://tfs.mofcom.gov.cn/article/ztxx/202004/20200402953356.shtml> (Last Visited on April 4, 2020).

Arbitration as a dispute settlement mode under the multilateral trading system originated from the decision on improving dispute settlement rules in 1989.⁵⁸ Back then, negotiations at the Uruguay Round entered the mid-term evaluation stage. The said decision incorporated arbitration which had once existed in the GATT period into dispute settlement procedures, actually as a part of this round of negotiations including DSU. However, there had been no practice regarding the arbitration rules before the WTO was established.⁵⁹ So far there has been only one arbitration case under Article 25 of DSU, i.e. *US — Copyright* case (arbitration).⁶⁰ It was an arbitration case where the United States voluntarily provided compensation to the EU for failing to perform panel ruling. The arbitration was essentially the same as the ruling authorizing retaliation level under Article 22.6 of DSU. The difference was that the level of voluntary compensation made by the United States ruled in this case did not involve any review of panel reports. Currently, there are many new issues for arbitration temporarily substituting appeal. Generally, the MPIA is based on Article 25 of DSU, with specific procedures referring to the current appellate mechanism. In accordance with the MPIA and its annexes Agreed Procedures for Arbitration and Composition of the Pool of Arbitrators,⁶¹ MPIA participating Members no longer appeal to the Appellate Body while it is paralyzed so as to avoid possibly infinite suspension of panel reports to be reviewed. The MPIA applies to future disputes between two or more participating parties, including the execution stage of the disputes, as well as any such type of disputes to be reviewed on the effective day of the MPIA, unless panel reports under the interim review stage of such disputes have been issued on that date.⁶² The MPIA takes effect on the day participating parties officially notify DSB,

58 1989 Improvements to the GATT Dispute Settlement Rules and Procedures, 36th Supp. BISD 61(1990).

59 Regarding general researches on Article 25 of DSU, see Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System*, London: Kluwer Law, 1997, pp. 193-194; Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement*, London: Cameron May Ltd., 2002, pp. 236-238.

60 *US — Section 110(5) Copyright Act* (Recourse to Arbitration under Art. 25 of DSU), DS160/ARB25/1, Award of the Arbitrators, November 9, 2001. In this case, the EU and the United States firstly reached an agreement on resorting to arbitration. For relevant researches, see *supra* n. 34, Petros C. Mavroidis and Mark Wu (2013), pp. 1009-1014.

61 Annex 1 Agreed Procedures for Arbitration under Article 25 the DSU in Dispute DS X, Annex 2 Composition of the Pool of Arbitrators Pursuant to Paragraph 4 of Communication JOB/DSB/1/ADD.12.

62 Considering that MPIA takes effect on the day of notification to the DSB, MPIA may be applicable to some cases filed in recent years, e.g. the case of anti-dumping EU vs. Columbia (DS591, consultation), the case of candy Brazil vs. China (DS568, consultation), the case of technology transfer EU vs. China (DS549, consultation), and the case of alcohol Australia vs. Canada (DS537, a panel formed).

and participating parties will review the MPIA within one year thereafter. It means that the MPIA will be operated for at least one year after taking effect, or perhaps two to three years, or even longer.

In short, while the WTO dispute settlement Appellate Body is paralyzed, in order to prevent the “jungle rules” of one country’s paramount interest or strength prevailing from dominating international economic and trade relations, peaceful settlement of international economic and trade disputes oriented by WTO rules should be adhered to, the current panel mode should be continually adopted, and the WTO institutional reform and restoration of the Appellate Body’s normal operation should be dedicated to while implementing the MPIA. In the context of WTO treaty law rules remaining universally applicable to WTO Members in the future, only through the dispute settlement modes of panel and the MPIA can its treaty orders be somewhat maintained and developed. The reform of the Appellate Body is not discussed above due to limited length, because it belongs to issues concerning the laws on international organizations to be elaborated below.

IV. ISSUES CONCERNING THE LAWS ON INTERNATIONAL ORGANIZATIONS RELATED TO THE WTO’S FUTURE

Reflections on international law issues regarding the WTO’s future organizational reform cannot be separated from this organization’s legal features, particularly understanding of the “consensus” decision-making customary practice which originated from the GATT period and took shape in practices.

A. Legal Features of the WTO as an Intergovernmental International Organization

It is explicitly stipulated in Article IX:1 of the *Marrakesh Agreement Establishing the World Trade Organization*: “The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.” The footnote to this provision provides as follows: “The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” On the contrary, if any Member objects, the decision won’t be taken, so such objection equals to one-vote veto. Article X:1 also

provides for consensus when it comes to amending this Agreement and its package agreements. Even though this Agreement regulates on decision-making and amendment procedures by means of voting, it has never been put into practice. Such “customary practice” has become a notable legal feature of this intergovernmental international organization. In other words, despite voting regulations, the WTO prefers the decision-making customary practice of consensus. Tracing back to the GATT period, the multilateral treaty which came into force on a temporary basis has gradually evolved into an international organization mainly due to dispute settlement needs. In this process, the decision-making by means of voting as explicitly stipulated under Article XXV of GATT has been laid aside and neglected, and instead the customary practice of consensus has been actually adopted under which any contracting party can one-vote veto.⁶³

The WTO’s explicit regulation on decision-making by consensus as well as its customary decision-making practice of never adopting the voting mechanism which is also an explicit stipulation have generated highly negative consequences, including the United States obstructing normal selection of Appellate Body members abusing such a customary practice.

B. International Law Issues Regarding the WTO’s Future Organizational Reform

Any future organizational reform of the WTO cannot be promoted without its Members’ decision-making, and the regulation on decision-making by consensus as well as the customary practice of never adopting the voting mechanism will hinder any reform. It seems that “under whatever circumstances, the concept of weighted voting does not have sufficient appeal to all WTO Members. Hence, this is a so-called ‘non-starter’”.⁶⁴ The question is: How to break through the WTO’s plight arising from such a special institutional reality and promote its future organizational reform?

First, reflecting from the perspective of the laws on international organizations, the first issue is the relationship between WTO Members’ rights and this organization’s due power in order to play its roles. “Based on the views of a

⁶³ Based on existing researches, the contracting parties to GATT once discussed issues by means of voting in early 1950s, and hasn’t done it since then. See *supra* n. 34, Petros C. Mavroidis and Mark Wu (2013), p. 27.

⁶⁴ [US] John H. Jackson. *Sovereignty, the WTO and Changing Fundamentals of International Law*, Translated by Zhao Longyue, etc. Social Sciences Academic Press, 2009 Edition, p. 138.

vast majority of analysts and world politics practitioners, an international organization is understood as exercising its functions within national systems.”⁶⁵ Any intergovernmental international organization’s member rights and such organization’s power are stipulated under the institutional basic law in the treaty form, which demonstrates contracting parties’ common will as sovereign countries, particularly the will of contracting parties playing leading roles in the multilateral international organization. The WTO had evolved into a *de facto* international organization from its predecessor, the GATT, which was a multilateral treaty. Despite the existence of voting provisions, contracting parties’ decision-making matters in practice mainly involved negotiations regarding tariff or non-tariff matters as well as diplomacy-oriented dispute settlements. Therefore, the customary practice of consensus had been developed and was explicitly provided under the basic law when the WTO was established as an official international organization. It showed that its contracting parties all expected to continue to have the one-vote veto right. “The decision-making rules under the WTO Charter have substantially reinforced protection of national sovereignty”,⁶⁶ so that the members-driven⁶⁷ WTO only has relatively weak power, and even the dispute settlement Appellate Body which enjoyed stronger power ended up paralyzed.

Second, judging from the reality facing the WTO as an international organization, since its Members are unwilling to give up the decision-making mechanism of consensus which is essentially one-vote veto, this organization’s future largely depends on its Members reaching various forms of or actual plurilateral agreements by means of “non-all” consensus (consensus among or acceptance by some Members). This includes:

1. Various RTAs under Article XXIV of GATT and Plurilateral Implementation Agreements under Multilateral Agreements

RTAs are products of existing rules, but considering that it is difficult to reach package multilateral agreements similar to those previously reached at the Uruguay Round under the decision-making customary practice of “consensus”,

65 A. LeRoy Bennet and James K. Oliver, *International Organizations: Principles and Issues*, New Jersey: Pearson Education, Inc., 2002, p. 3.

66 John H. Jackson, *The Jurisprudence of GATT and WTO*, Higher Education Press, 2002 English Edition, p. 405.

67 Pursuant to WTO functions stipulated under Article III of the Marrakesh Agreement Establishing the World Trade Organization, the WTO shall mainly provide the forum for negotiations among its Members concerning their multilateral trade relations, and provide a panel, the Appellate Body and a forum when its Members require dispute settlement. Trade negotiations and dispute settlement both depend on Members’ “launch”.

the plurilateral RTAs may become a feasible further development path under the WTO organization law. All “like-minded” Members can reach a RTA regarding trade in goods, trade in services and trade-related aspects of intellectual property rights based on WTO package agreements so as to respectively enjoy new, more preferential treatment, as long as the existing most-favoured-nation treatment accorded to other Members before the RTA is not damaged. As a matter of fact, while multilateral trade negotiations almost end up in vain following the WTO’s establishment, hundreds of RTAs have long since been reached. In the predictable future, this trend will continue to develop. Meanwhile, as mentioned before, the *Agreement on Trade Facilitation* is an implementation agreement under the *Multilateral Agreements on Trade in Goods*, but even if it is reached upon consensus, its entry into force depends on “non-all” Members accepting its binding effect, so it is actually a plurilateral agreement. Though the increasing RTAs have materially weakened the cornerstone role of the world trade multilateral system, considering that multilateral trade agreements cannot be reached upon consensus by all WTO Members with binding effect thereupon without any exception, various RTAs and multilateral trade implementation agreements which are actually plurilateral agreements are a kind of “second best” arrangement reflecting Members’ will.

2. The MPIA under Article 25 of DSU

It is an open-type interim appeal arbitration arrangement initiated by the EU and reached with China and some other WTO Members. Even though plurilateral consensus under the MPIA is expressed in the form of a statement by ministers of participating Members rather than an official agreement, the MPIA standardizes and plurilateralizes the mutual arbitration agreements under Article 25 of DSU through the annex on arbitration procedures, so that it becomes a substantial plurilateral agreement with certain binding force on participating Members.

It can be seen that in the context of the failing decision-making mechanism of consensus by all WTO Members, RTAs, the MPIA or other plurilateral agreements under the WTO framework⁶⁸ are substantial or procedural new

68 For example, the *Information Technology Agreement* adopted at the WTO Singapore Ministerial Conference in 1996 constitutes an “open-type plurilateral agreement” which is participated by some Members and open to any other Member while entitling non-Members to the Most-Favoured-Nation treatment thereunder. See Gong Baihua, On the Plurilateral Mode of WTO Rules during the Modernization Reform, *Shanghai Legal Studies Collected Papers*, Vol. 4, 2019.

rules reached by some Members based on existing rules by means of plurilateral consensus or plurilateral acceptance, so as to maintain the low-level existence of the WTO as an international organization. If such plurilateral agreements transcend the WTO's existing rules to different extents, it may as well be a direction of the WTO's future organizational reform. Particularly, some Members' common will is embodied within the "members-driven" organization, which conforms to the "common accord" cornerstone principle of international law.⁶⁹

V. CONCLUSION AND OUTLOOK

This paper has made a preliminary judgment from the aspects of treaty law, laws on peaceful settlement of international disputes and laws on international organizations that the WTO's existing rules generally still pervasively apply to all WTO Members, and disputes arising therefrom will be settled by means of panel and the MPIA which features some participating Members to appeal for review of the panel report. Considering that the WTO's decision-making mechanism of consensus by all Members has failed, this organization's future development and reform has demonstrated characteristics of plurilateral arrangements under the multilateral framework. It is necessary for China to adopt realistic and feasible coping measures and make the best effort during the crisis to maintain the low-level existence of the WTO multilateral system so as to overcome the plight as soon as possible and facilitate the development of a higher-level institutionally inclusive global multilateral economic and trade system during the reform.

First, when considering its stance towards and measures for coping with the WTO's crisis and future reform and development, China should understand its special position. China has gradually marched towards a medium-level largest developing country from relatively low per capita income, with a gross domestic product (GDP) second only to that of the United States.⁷⁰ China also boasts the largest country regarding trade in goods. Recently, the global

69 [US] Louis Henkin, *International Law: Politics and Values*, Translated by Zhang Naigen, etc., China University of Political Science and Law Press, 2005 Edition, p. 36.

70 China's per capita GDP in 2019 was RMB 70,892 Yuan (approximately USD 10,000), with the GDP amounting to RMB 99.0865 trillion Yuan (approximately USD 14 trillion). See the *Statistical Communiqué of the People's Republic of China on the 2019 National Economic and Social Development*, February 28, 2020.

pandemic has greatly influenced various countries or regions' economic development,⁷¹ but China experienced and soon controlled the epidemic and is expected to embrace continual economic development. China should be able to play certain roles in the WTO's future. It has promulgated documents on its stance towards WTO reform, stressing that the reform should maintain the core value of the multilateral trading system, safeguard developing Members' development interests, and follow the decision-making mechanism of consensus. It has also made corresponding reform proposals, including concrete action plans.⁷² However, judging from recent changes to the WTO's crisis and the material impact of the global pandemic, such proposals and plans should be urgently adjusted as the case may be. Particularly, the WTO's future rule application, dispute settlement and organizational reform during the crisis should be further studied and judged thoroughly so as to act correspondingly, including but not limited to the followings: 1) The universal applicability of the WTO's existing rules among all Members without discrimination should be firmly advocated. As long as existing rules are not replaced by new rules, the fundamental stance of handling economic and trade relations among WTO Members according to existing rules must be adhered to, and any unilateral behaviors vandalizing existing rules should be resolutely opposed to. Meanwhile, it should be emphasized that once the certain special regulations China committed to accept when joining the WTO expire, all parties should abide by the international law principle of *Pacta Sunt Servanda* and cancel all measures against the non-discrimination principle followed by currently universally applicable WTO rules. 2) Joint efforts should be made together with the EU and other WTO Members so as to resume the WTO Appellate Body's normal operation as soon as possible. In the meantime, "like-minded" Members as many as possible should be united pursuant to the reached and effective MPIA, with a view to generally maintaining the existing rule-oriented WTO dispute settlement mechanism on the one hand, and promoting the future reform towards a fair,

71 The total import and export value of China and the United States were respectively USD 4.576 trillion and USD 4.214 trillion in 2019. Global trade in goods was expected to fall by 13%-32% in 2020 due to the pandemic impact on economy in various countries or regions. See WTO, Trade Set to Plunge as Covid-19 Pandemic Upends Global Economy, Press/855, April 8, 2020, https://www.wto.org/english/news_e/news20_e/news20_e.htm (Last Visited on April 10, 2020).

72 Ministry of Commerce, *China's Position Paper on WTO Reform*, November 23, 2018, <http://sms.mofcom.gov.cn/article/cbw/201812/20181202817611.shtml>; *China's Proposal on WTO Reform*, May 14, 2019, <http://sms.mofcom.gov.cn/article/cbw/201905/20190502862614.shtml> (Both Last Visited on March 2, 2020).

impartial, rational and efficient multilateral system for the settlement of international economic and trade disputes on the other. 3) While sticking to the decision-making mechanism of consensus by WTO Members, full consideration should be given to the reality of this mechanism frequently failing and leading to the difficulty in reaching a consensus, and attempts should be made to reach plurilateral consensuses under the multilateral framework so as to actively facilitate RTAs with more WTO Members as well as new implementation plurilateral agreements under the multilateral trade agreements by progressive means of small steps accumulating into a big step, thus creating conditions for the WTO's future reform and improvement towards a higher-level multilateral governance system.

Second, regarding the WTO's future rule reform, it should be clearly perceived that reform schemes concerning WTO rules as proposed by developed Members at the lead of the United States feature a confrontation against China. For instance, trade ministers of the United States, the EU and Japan once made a series of joint statements,⁷³ proposing to: 1) formulate fair competition rules against non-market economy, particularly rules regulating industrial subsidies and state-owned enterprises as well as identifying "public bodies"; 2) forbid rules on forced technology transfer by means of joint venture requirements, foreign capital shareholding restrictions, administrative approval and licensing procedures; 3) strengthen transparency and notification obligations. The USMCA dominated by the United States provides in detail for the so-called "Non-Commercial Assistance" to state-owned enterprises, and regulates under the provision of "Non-Market Country FTA" that a Party shall inform in advance the other Parties of its intention to commence free trade agreement (FTA) negotiations with a non-market country, and other Parties can terminate the FTA with such Party.⁷⁴ This is actually an effort of the United States to prevent Mexico and Canada from developing economic and trade relations with

⁷³ The United States initiated a trade war against China in March 2018, attempting to impose pressure on China regarding the WTO's reform by means of joining hands with the EU and Japan and issuing a series of trilateral joint statements. The latest one is made on January 14, 2020. See USTR, Joint Statement of the Trilateral Meeting of Trade Ministers of Japan, the United States and the European Union, January 14, 2020. This Statement further proposes to reform the rules under the WTO's *Agreement on Subsidies and Countervailing Measures*, e.g. rules on prohibiting subsidies under Article 3.1, rules on subsidies causing serious prejudice under Article 6.3, the notification obligation under Article 25, external benchmark for calculating subsidy benefits under Article 14 and rules on identifying public bodies under Article 1.

⁷⁴ Agreement between the United States of America, the United Mexican States, and Canada, Articles 22.6 and 32.10.

China. Considering that the United States has been promulgating new rules to contain China by all means by virtue of the WTO's reform or RTAs, China proposes to "respect the diversity of development modes among Members, strengthen the inclusiveness of the multilateral trading system and promote fair competition in the fields of trade and investment" and that "during discussions on subsidy disciplines, no special or discriminatory disciplines should be instituted on state-owned enterprises in the name of WTO reform."⁷⁵

It goes without saying that there are many differences between socialist market economy with Chinese characteristics and traditional market economy, particularly the dominance of state-owned enterprises in the entire national economy. China needs to further deepen its economic system reform following its accession to the WTO, so as to comprehensively integrate into the global multilateral economic and trade system. However, the WTO's future rule reform is not due to "Chinese problems" but an urgent need to adjust international economic and trade relations under the new circumstances. The modernization of WTO rules is urgently required to cope with the series of new conditions and new issues brought by the rapid development of contemporary science and technology which did not exist when the WTO was established. China should accelerate the deepened reform of the domestic economic system while firmly opposing to any so-called WTO rule reform discriminately treating the Chinese economic system.

Moreover, in the face of the unprecedented WTO crisis and the global pandemic, China's proposals on the WTO's future organizational reform should be based on the reality, i.e. the WTO's existing rules will generally continue to universally apply to all its Members, the dispute settlement mode of panel will be continually adopted, and WTO Members will be devoted to resuming the Appellate Body's normal operation while implementing the MPIA since they are unwilling to give up the decision-making mechanism of consensus which is essentially one-vote veto. Hence, taking the existing multilateral trade rules as a link to sustain the existence of the WTO multilateral trading system, China should facilitate the formulation of new rules (RTAs or plurilateral implementation agreements under multilateral agreements such as the *Agreement on Trade Facilitation*) or retain original rules (e.g. the MPIA which carries on appeal rules) through various plurilateral agreements under the multilateral

⁷⁵ *Supra* n. 75, *China's Proposal on WTO Reform*.

framework, so as to create certain conditions for the emergence of new multi-lateral agreements in the future.

Last, China should propose that the WTO's future organizational reform marches towards the principles under the *Charter of the United Nations*. The multilateral trading system established after WWII features the original intention of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods"⁷⁶ This also embodies the purpose of "promoting economic and social progress of all people" under the foreword of the *Charter of the United Nations*. Even though neither the GATT as a *de facto* international trade organization nor the WTO is a specialized agency of the United Nations⁷⁷ but a related organization,⁷⁸ the basic principles under the *Charter of the United Nations* apply to all intergovernmental international organizations including the WTO,⁷⁹ particularly the institutional inclusiveness embodied by the exclusive condition of membership, i.e. "peace loving", which is based on the principle of all Member Parties enjoying sovereign equality.⁸⁰ The WTO has become totally different from the GATT over 70 years ago. It now comprises 164 Members with various political and economic systems. A relatively fair "playing field" should be discussed, created and shared on the premise of institutional inclusiveness.⁸¹ This is the correct approach to update the rules of subsidies and other WTO trade relief rules.

76 Paragraph 2 of the Foreword of the *General Agreement on Tariffs and Trade*, Quoted from *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, see *supra* n. 9, p. 424.

77 Existing specialized agencies of the United Nations: the Food and Agriculture Organization of the United Nations (FAO), the International Civil Aviation Organization (ICAO), the International Fund for Agricultural Development (IFAD), the International Labour Organization (ILO), the International Maritime Organization (IMO), the International Monetary Fund (IMF), the International Telecommunication Union (ITU), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Industrial Development Organization (UNIDO), the Universal Postal Union (UPU), the World Bank Group, the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), the World Meteorological Organization (WMO), and the World Tourism Organization (UNWTO).

78 The United Nations System Structure Drawing, https://www.un.org/en/pdfs/un_system_chart.pdf (Last Visited on April 14, 2020).

79 According to the Explanatory Notes under the *Marrakesh Agreement Establishing the World Trade Organization*, the WTO comprises "separate customs territory Members" of non-sovereign countries.

80 Zhang Naigen, On the "Inclusiveness" of International Law and International Orders — Based on the Perspective of the *Charter of the United Nations*, *Journal of Jinan University*, No. 9, 2015.

81 *Supra* n. 32, John H. Jackson, p. 248. This book holds that fairness is relative and proposes to develop an "interface mechanism" among WTO Members' different systems.

In short, the WTO is facing a significant crisis due to the material damage to the WTO's two organization functions in recent years, i.e. multilateral trade negotiations and the dispute settlement mechanism, in addition to the shift of the United States' focus of external economic and trade relations from multilateralism which had lasted for over 70 years to unilateralism or non-multilateralism. Considering that maintaining and developing the multilateral trading system is still the choice of the vast majority of WTO Members, it is necessary to discuss several basic international law issues related to this organization's future development based on understanding its past, status quo and dilemma. This paper holds that the first issue concerns the future binding force of the whole set of substantial and procedural rules related to treaty law. Generally these rules will continue to universally apply to all WTO Members in the future. The second issue concerns laws on peaceful settlement of international disputes. This paper asserts that while the WTO dispute settlement Appellate Body is paralyzed, dispute settlement will be continually handled by panels, and that the MPIA jointly reached by China, the EU, etc. as a substitutive arrangement is of extreme importance to maintaining and developing the multilateral trade rule system. The last issue concerns laws on international organizations. This paper argues that the WTO's customary practice of "decision-making by consensus" is essentially each Member's one-vote veto right which no Member is willing to give up.

The WTO's future reform may follow the difficult path of some Members transcending existing rules to different extents by means of plurilateral consensus or acceptance based on existing rules, so as to maintain the WTO's low-level existence at the three levels of international laws, i.e. treaty law, laws on peaceful settlement of international disputes and laws on international organizations. As such, based on the WTO's status quo, future rule system and dispute settlement mechanism as well as organizational reform tendency, China should be aware of its special status and the special external environment, support the existing multilateral trade rules as the link maintaining the existence of the WTO multilateral trading system, advance the formulation of new rules by means of various plurilateral agreements under the multilateral framework, and adhere to institutional inclusiveness under the international law basic principle of the *Charter of the United Nations*, thus playing its due roles during the WTO's future development.