

25 Years of the WTO Dispute Settlement Mechanism — Glory, Dilemma, and Way Out

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The year 2020 marked the 25th anniversary of the WTO's foundation. Due to the outbreak of the COVID-19 pandemic, we could only organize an online commemorative activity today. In the context of the rapidly spreading pandemic, this meeting seems even more important. From the perspectives of maintaining mankind's public health, recovering economic lifestyles as soon as possible, and various aspects of the multilateral trading system, we have deeply sensed the importance of strengthening international cooperation. Today's discussion will mainly center on the WTO dispute settlement mechanism.

I. HISTORICAL GLORY

The WTO dispute settlement mechanism is a significant institutional innovation for the peaceful settlement of international disputes. Having made major contributions to maintaining the peaceful and prosperous international trade order, it has been honored as the “crown jewel” of the multilateral trading system and is an important achievement of a civilized and advanced human society. It has attained remarkable achievements during its 25-year history.

A. The Dispute Settlement Mechanism's Institutional Innovation

The modes of inter-country dispute settlement have developed from wars to

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diplomacy, from bilateral settlement to third-party ruling, from individual case ruling to institutional arbitration, and from first-instance final ruling to two-tier ruling. The dispute settlement mechanism comprising the panel and the Appellate Body as established by the WTO has initiated and set an example of the two-tier ruling system. It has successfully operated for 25 years, and is the world's only operating multilateral ruling mechanism for dispute settlement with appeal functions. Hence, this mechanism is a major institutional innovation of the international dispute ruling mechanism and is historically significant. When conducting a general survey of this mechanism's design and operation, we can find some of its unique characteristics. Today, I will mainly discuss its multiple inherent check-and-balance systems.

First of all, the WTO's highest authority, the Ministerial Conference, checks and balances the Dispute Settlement Body (DSB). In a sense, the WTO DSB empowers the panels and the Appellate Body, which are affiliated to and responsible for the DSB. Whether the WTO system of agreements are considered constitutional or contractual, the dispute settlement mechanism is one of the three functions of the Ministerial Conference and the General Council acting on behalf of the Ministerial Conference, i.e. the WTO's three pillars. According to the Marrakech Agreement, the Ministerial Conference (including the General Council acting on behalf of the Ministerial Conference during its adjournment) is entitled to revise rules for the operation of the DSB, and to discuss and make decisions regarding issues arising during the implementation of this mechanism. The highest authority and highest decision-making institution in charge of this mechanism is the WTO DSB, which comprises all WTO Members and holds a monthly meeting. The DSB establishes individual case panels, and also selects and appoints the Appellate Body members. Ruling reports of the panels and the Appellate Body regarding dispute cases are designed to assist the DSB in making rulings and recommendations for settling WTO Members' trade disputes. The DSB must adopt reports of the panels and the Appellate Body to make them effective. Meanwhile, the permanent Appellate Body is an institution established under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) specially in charge of appeals and has a certain level of independence granted by this treaty. Therefore,

the Ministerial Conference checks and balances the DSB. In a sense, the DSB empowers the panels and the Appellate Body while the latter is affiliated to the former.

Second, the checking and balancing mechanism is embodied by the DSB's internal decision-making mechanism. The WTO DSB implements two decision-making procedures, i.e. automatic (negative consensus) and non-automatic (positive consensus) regarding different dispute settlement matters. The DSB relies on negative consensus to adopt ruling reports of the panels and the Appellate Body regarding dispute cases, i.e. the reports will be adopted unless all Members object to them. This is the so-called automatic adopting mechanism of ruling reports. The DSB relies on positive consensus to adopt its conference agenda, the selection and appointment of the Appellate Body members, and the nomination, addition, and supplement of the list of panel members, i.e. all Members reach a consensus. The current Appellate Body crisis has been triggered by the non-automatic decision-making procedure for selecting the Appellate Body members. WTO Members can control the selection and appointment of the Appellate Body members based on the positive consensus decision-making procedure, in the same way that they control the adoption of panel lists and the DSB conference agenda. Therefore, despite the automatic adoption effectiveness of panel and Appellate Body reports using the negative consensus after the Uruguay Round, i.e. the so-called quasi-judicial effect, the DSB still reserves the highest decision-making power over other dispute settlement matters. That is, the WTO Members control matters of the dispute settlement mechanism except for adopting panel and Appellate Body reports. In other words, where no consensus is reached during negotiation regarding the above matters, WTO Members can exercise their veto power.

Third, there is also a reviewing, mutually influential, and balancing relationship between the two-tier review mechanisms of panels and the Appellate Body. The Appellate Body can correct appealed legal matters of the panel reports. Regarding the same legal issues, whether subsequent panels can rely upon or simply refer to rulings made by the Appellate Body in previous cases is also an issue of universal concern to WTO Members and international trade. As such, objectively speaking, a mutually influential and balancing relationship

exists between the two-tier review institutions of the Appellate Body and panels.

Additionally, there is a guiding, mutually balancing, and restraining relationship between the Appellate Body, panels, and the WTO Secretariat's legal team. Pursuant to the DSU, the WTO Secretariat's legal team provides legal assistance to the Appellate Body, while the Appellate Body provides the Secretariat's legal team with general guidance and specific instructions in individual cases. The legal teams of the WTO Secretariat's Rules Division and Legal Affairs Division provide panels with legal assistance, and panels only instruct assisting legal teams wherever they work on individual panels. Hence, the Appellate Body and panels maintain a guiding, collaborative, supervisory, mutually balancing, and restraining relationship with the legal and secretary teams assisting them.

In short, there exist the multiple check-and-balance mechanisms in the design and operation of the dispute settlement mechanism. Objectively speaking, the WTO dispute settlement mechanism's teamwork and internal check-and-balance helps to safeguard fair rulings of cases. The feature and characteristics of its operations are worth in-depth research.

B. The Dispute Settlement Mechanism's Operation Efficiency

The WTO dispute settlement mechanism is known for its operation efficiency and has effectively contributed to settling trade disputes among WTO Members. It has distinguished itself from other dispute settlement mechanisms regarding the number of cases accepted and heard, case ruling time, and case implementation efficiency. It has accepted and settled over 600 cases, among which 164 Appellate Body reports and over 200 panel reports were adopted and circulated by DSB. So far, no WTO Member has claimed at a Dispute Settlement Body meeting their intention of not implementing ruling reports of panels or the Appellate Body. During the dispute settlement mechanism's 25 years of existence, except for limited cases, Members have fully or partly fulfilled the vast majority of their obligations under the ruling and recommendation of DSB with a quite high implementation rate. This demonstrates WTO Members' trust and confidence in the dispute settlement mechanism as well as

their respect for and support of peaceful settlement of international disputes. Though it does not indicate that there is no room to improve, in particular in the time span for settle a dispute, Members' general positive evaluation of this mechanism's effectiveness can't be disregarded.

C. The Dispute Settlement Mechanism's Ruling Stability

Within the past 25 years, the WTO dispute settlement mechanism has successfully operated with a remarkable reputation, which is related to its consistent and stable rulings regarding the same legal issues. Article 3.2 of the DSU, the legal basis of this mechanism's operation, expressly stipulates that this mechanism is at a central place of providing security and predictability to the multilateral trading system. Rulings and recommendations by the panels and the Appellate Body are only binding in individual cases, but consistent ruling on identical issues is an important safeguard for the fair operation of this mechanism and its reputation which constitutes a fundamental concern on dispute settlement for the WTO Members.

II. DILEMMA AND CRISIS

The Appellate Body has faced a crisis since June 2017, when the United States denied the launch of its member selection procedure at the DSB regular meeting. By December 10, 2019, only one Chinese adjudicator (myself) was still in office. The Appellate Body could no longer hear cases and could not maintain its routine work as a statutory institution. The last Appellate Body Member left office on November 30, 2020, and the Appellate Body came to a complete standstill. The crisis confronting the Appellate Body has still not been settled. Shortly after the Biden Administration began, it appointed Katherine Tai as the US Trade Representative. So far, the United States has rejected over 120 WTO Members' continual motion for the past three years proposed at the regular DSB meetings to launch the Appellate Body Member selection process. This crisis is ongoing. The question is how to interpret the current dilemma and crisis?

The dilemma and crisis confronting the dispute settlement mechanism is

sad and very unfortunate. In order to overcome the dilemma and embrace “hope”, WTO Members must unite and face the challenge.

First, this is a crisis confronting the entire dispute settlement mechanism rather than just the Appellate Body.

The number of cases that were submitted to panels is still increasing, which seems to show that the first instance dispute ruling mechanism still functions. However, since December 10, 2019, the Appellate Body has still been receiving new appeals by WTO Members, and there had been at least 4 new appeal notices by late November 2020. It is likely that more new appeal cases will be coming in the future. If the circumstances continue, this means that more panel reports cannot be settled, and the Appellate Body’s suspension will result in a crisis for the entire dispute settlement mechanism. As a result, this mechanism will return to the GATT era when, as is well known, it had no binding effect and the defendant had a one-vote veto. This will greatly weaken the negative consensus and quasi-judicial effect that the WTO has gradually established. This is the crucial point of the current crisis.

Second, this will lead to a crisis confronting the entire WTO rather than just the dispute settlement mechanism.

The crisis confronting the dispute settlement mechanism will threaten the WTO’s negotiation functions and Members’ confidence in the rules-oriented multilateral trading system.

Even though there has been the interim appeal mechanism arrangement, it is a plurilateral rather than a multilateral solution. The best solution is to seek a scheme to rely on multilateral means to recover the operation of the Appellate Body.

Some have said that the unexpected excessive use of the dispute settlement mechanism by the WTO Members has caused the WTO’s negotiation functions being stagnated. However, I believe the cause of this crisis is the other way around: as negotiations cannot progress and advance successfully, by contrast, the use of the DSB mechanism is evidently increasing. For example, as negotiations in agricultural products fail to make meaningful progress, thereby Members wish to settle problems in agriculture by initiating dispute settlement. However, I cannot deny that dispute settlement and legislation function

currently as two unbalanced pillars of the WTO, and can only argue that we cannot hastily and irresponsibly cut off the dispute settlement pillar and its Appellate Body, as this is definitely irrational.

Regarding the recovery or reconstruction of the Appellate Body, we must be clear about the crucial issues leading to WTO Members' differences. What kind of Appellate Body do WTO Members need? What kinds of idea and rational of adjudication do they expect the Appellate Body to maintain? In my opinion, WTO Members' in-depth conflicts regarding the Appellate Body are based on whether the Appellate Body should pursue a pro-active judicial ruling style or a restrained one. To answer this question, I would like to attract everybody's attention to the first and third sentences of Article 3.2 of the DSU. Members who criticize the Appellate Body may have excessively stressed the third sentence, i.e. dispute rulings cannot add to or diminish Members' rights and obligations. However, the first sentence provides that the dispute settlement mechanism should provide security and predictability to the multilateral trading system. How to objectively interpret Article 3.2 of the DSU? To decide whether the Appellate Body has exceeded its mandate and authority, i.e. "overreached", we should first check with the treaty languages. According to the DSU, i.e. the treaty, in individual cases, customary rules of treaty interpretation of public international law should apply to the treaty interpretation at the WTO dispute Settlement. Then what kinds of treaty interpretations may add to or diminish Members' rights and obligations? What are necessary interpretations for the rulings in order to settle the disputes of WTO Members? How to draw the line between a proper treaty interpretation for settling a dispute and an overly excessive interpretation that adds or diminishes the rights and obligations of Member? In the meantime, Article 3.2 of the DSU indeed underlines security and predictability as the function that Dispute Settlement should provide. Hence, I think the most crucial problem except for arguments over specific issues is concentrated here. Here is the focal point of different positions of Members. If the treaty is designed to maintain security and predictability of dispute settlement, panels and the Appellate Body are obliged to do this, because this is the purpose and objective stipulated in the treaty. Thus panels and the Appellate Body should endeavor to fulfill it. As such, panels and the Appellate Body

ruling on identical cases in the same way are exercising rather than exceeding their responsibilities. It is difficult to imagine how the dispute settlement mechanism can preserve its credibility and maintain security and predictability if it will render rulings on identical cases in different ways. This is an issue that concerns many WTO Members and truly requires serious reflection.

Everyone knows that during the past several years, WTO Members have been actively negotiating over how to address the Appellate Body issue. As the initiator, New Zealand Ambassador David Walker has delivered several documents, including No. DS 222 of the joint proposing party, No. 768 Document submitted by Australia and Japan, and Chinese Taipei's document. Each Member has stressed the issue on security and predictability of the WTO dispute settlement, which matters the Appellate Body's nature, function and operation. I can only hint that Article 3.2 of the DSU has provided with two goals that require much job of treaty interpretations. Treaty interpretation is an indispensable method to settle the dispute.

I think there is another even more crucial issue here. Why does today's crisis exist? How do WTO Members, who are Sovereigns in public international law, recognize and appreciate their relationships with this quasi-judicial ruling institutions? This is an in-depth cause of the current dilemma confronting the Appellate Body crisis. This is also a traditional long lasting paradox confronted by many Sovereign States in the history of international law. Sovereign states have negotiated and undersigned the treaty. How do they deal with the situation when an disagreement arises during the implementation of the treaty obligation, in particular, when it occurs with the ruling of an adjudicating body which it acceded with consent? Through unilateral means or through negotiations, how to address the disagreement it has? Can we require arbiters to give up their responsibilities by not rendering a necessary decision or ruling to ingratiate themselves with sovereign states that criticize them? It is widely known that in any international adjudicating mechanism, the adjudicators' basic duty and responsibility is to maintain independence and impartiality, which is also required by the WTO Appellate Body's working procedure. In all dispute rulings, an adjudicator has autonomy in rendering his or her decision independently and impartially. They must handle cases according to rules and

procedures they consider correct objectively which, as mentioned above, is a collective decision-making process within the Appellate Body. How to decide between the adjudicator's duty of maintaining impartiality and independence and the WTO Members' upfront criticism? What standards serve to judge right and wrong? In my view, the treaty should govern the rights and obligations in all cases.

I want to mention another issue for your attention. In my opinion, Members are currently participating in dispute settlement at different stages, so they perceive the dispute settlement mechanism at different levels and from different perspectives. In the first ten years of this mechanism, developed countries such as the United States and those in the EU frequently used it. In recent years, increasingly more developing countries, including richer small-scale economies, have been actively participating in this mechanism while actively using the rules to maintain their rights and interests as well as accumulating experience. They have great expectations for this mechanism's normal operation. It is challenging to reconcile the differences among Members. In the most recent dispute settlement meeting from August, 121 WTO Members continually proposed to immediately launch the appointment procedure of 6 new Appellate Body judges while I was still there in Geneva. Therefore, Members have expressed varied values and views of this mechanism and appreciate its operation in different ways.

The limited amount of time prevents me from discussing specific issues. After my term of office expires in the future, I will have many opportunities to explain my understanding of and thoughts about this issue, particularly during out-of-office speeches.

Moreover, I want to mention an issue worth reflecting. How should an independent and impartial adjudicating body cope with an external criticism? The Appellate Body is designed as a standing body, but its Members work part-time rather than full-time. How should they coordinate and implement this mechanism? According to treaty regulations, the Appellate Body should obtain effective administrative support, but so far no clear rules have indicated how to more effectively coordinate the relationship between the Appellate Body Members and the Secretariat. I provided suggestions and comments on this type of

internal reform so that the Appellate Body could operate more transparently. I wish to promote this reforms, but owing to constant and unprecedented external pressure since 2018, this reform has not been thoroughly implemented. Certainly, when I served as Chairman, I drafted the procedural rule of the Appellate Body Chairperson instructing the Appellate Body to work by holding regular Appellate Body meetings, which can be considered as an initial step.

In the end, I want to emphasize again that the most important issue currently seems to focus on what kind of Appellate Body that Members need: one that only addresses individual cases, or one that follows the jurisprudence.

III. SUGGESTIONS AND WAY OUT

Historically speaking, the reform of the dispute settlement mechanism was put on the agenda in 1996. A small problem's evolution into a big crisis is an inevitable result of Members' changing trade policies. In the 1980s, this mechanism was founded precisely because a more binding mechanism was needed to safeguard the operation of rules as they were expanded into the trade in services and intellectual property sectors. Today, it is like we are in a new version of the 1980s. In the 1980s, unilateralism was also increasing, but that crisis was settled by introducing the package agreements during the Uruguay Round. Twenty-five years later, it is time to make another crucial change. It is a new crucial historical moment. Mankind still needs peaceful settlement of international disputes. What should we do? How do we reshape dispute settlement in international trade? In order to resume the Appellate Body's operation, reforming the dispute settlement mechanism is unavoidable. In an effort to settle the crisis confronting the Appellate Body and this mechanism, I would like to briefly propose several preliminary reform suggestions for WTO Members' reference.

First, to resume the Appellate Body's normal operation as soon as possible: In the first place, the individual-case ruling nature of dispute settlement and the dispute settlement mechanism's core task of "not adding to or diminishing Members' rights and obligations" should be confirmed. Panels and the Appellate Body merely make legal interpretations and rulings within the necessary limit of settling trade disputes. Meanwhile, this mechanism's fundamental

tenet and goal of maintaining the multilateral trading system's stability and predictability should be confirmed. Ruling identical cases in the same way aligns with WTO Members' fundamental interests. The Appellate Body should be encouraged to maintain its restrained and rational ruling style. This mechanism should not have gap filling and law-making functions, and should avoid making advisory opinions. Moreover, the 90-day ruling deadline should be clarified. When the hearing of a complicated case cannot be completed before the deadline, the Appellate Body should communicate with involved Members in advance. Article 15 of the Appellate Body's working procedures should be clarified. If it takes at least two months for any Appellate Body member who is about to leave office to complete a case after their term of office expires, the Dispute Settlement Body should be notified in advance. It is advisable to establish an Appellate Body with 7 to 9 members whose term of office lasts for 7 to 9 years and is not renewable upon expiration. It is also advisable to support establishing a fixed term of office as well as working rules with a rotation mechanism for the Secretariat staff of panels and the Appellate Body. Before the Appellate Body's operation is resumed, Members should participate in the multi-party interim appeal arrangement established under Article 25 of the DSU.

Second, to reform the panel mechanism: It is advisable to build a permanent panelist pool comprising 21 to 30 people who have a fixed term of office of 5 to 6 years and work full-time with a capacity of concurrently hearing 7 to 10 cases. A mechanism of full-time panel members randomly shifting to form panels to hear cases should be established.

Third, to improve the dispute settlement implementation mechanism: Currently, many cases have frequently entered into compliance panel proceedings that extend a case to 3 to 5 years or even longer, e.g. the Boeing and Airbus cases both lasted over 10 years. Members should consider how to improve dispute settlement efficiency and ensure the compliance of the defending party's implementation of rulings.

Fourth, to reform the dispute settlement mechanism's transparency rule: The General Council should be encouraged to clarify or revise the rules. When the claiming and defending parties both expressly agree, panels and the Appellate Body can hold real-time or deferred public hearings, and Members can

disclose written and oral statements on their websites. If Members reach a consensus, it is advisable to disclose their written and oral statements on the WTO website.

Fifth, to establish a two-tier hearing WTO court as a long-term goal.

Sixth, to enhance capacity building and bridge legal gaps among WTO Members.

Seventh, to achieve judicial equality by allowing Members to participate in the dispute settlement mechanism in their native languages.