

# ***Reforms on the WTO Dispute Settlement System from the Perspective of the Appellate Body***

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**Abstract:** With the deepening of the trade distribution between great powers, such as the US-China trade war, there are a lot of problems with the system of the WTO. The WTO should be reformed to address these problems. This paper specifies the reforms of the WTO Dispute Settlement System from the perspective of the Appellate Body. It expounds on the background of the suspension of the Appellate Body, the US's claims on the Appellate Body, and the necessity to function the Appellate Body. Finally, several measures to reform the Appellate Body, such as establishing the compliance committee and the vote selection system, monetary compensation, and recovering credibility, are put forward in this paper.

**Keywords:** Dispute Settlement System, Appellate Body, Reform

## **1. Introduction**

Generally, the World Trade Organization (WTO) should adjudicate cases between countries to resolve trade disputes. However, due to the suspension of the WTO Appellate Body, the WTO was unable to function. The WTO should be reformed to address better trade disputes between great powers, such as the US-China trade war.

### **1.1. Dispute Settlement Mechanism**

According to the principle of the WTO agreement, the WTO was set up to facilitate trade worldwide. Firstly, it should supply an organized stage for all of the WTO members to negotiate and resolve their differences in the field of work. Secondly, it should ensure the guarantee of trading opportunities equal to that accorded to the most-favored countries. Thus, to achieve its goals, the WTO should arrange an available adjudicatory order to make possible the settlement of potential trade disputes and the forestall of trade wars.

For a long time, the Dispute settlement system (DSS) has been regarded as the central pillar of the multilateral trading system of WTO. Article 23 of Dispute Settlement Understanding addresses the function of the DSS. It allows the members to resort to the rules and the procedures of this Understanding when they seek the redress of a violation of obligations or the impairment of the benefits under the covered agreements. DSS tries to establish mechanisms to resolve trade disputes, which plays a vital role in bolstering the multilateral trading system.

## **1.2. US-China Trade Disputes**

In recent years, the United States and China, the two biggest economies in the world, have been caught in ongoing economic conflicts, such as the impositions of the high duties, the different countermeasures, and so on, which results in considerable losses to the trade.

However, these two countries have resolved these disputes and conflicts by themselves rather than relying on the WTO DSS, defying the WTO as the adjudicator of the trade disputes and disregarding Article 23 of DSU. Although both the United States and China filed complaints with the WTO, they proceeded with unilateral measures without using the rules and procedures of the multilateral trading system under WTO.

China and the US may have to resort to unilateral measures due to the shortcomings of the WTO DSS. Therefore, improving the efficiency and effectiveness of the DSS is an urgent problem we face. Meanwhile, the Appellate Body is a significant key to it.

## **2. The Suspension of the Appellate Body**

The appellate body, the WTO's Supreme Court, faces an existential crisis due to the blockade by U.S. former President Donald J. Trump.

### **2.1. The Introduction to the Appellate Body**

The Appellate Body is a core body to resolve trade disputes under the WTO framework. Panel and the Appellate Body have adjudicated more than 200 disputes in the past years, most of which have been smoothly resolved. With the help of the Appellate Body, the WTO operated a stable and fair system in the past years. If a government believes another government has violated the WTO rules, it can file a complaint to the WTO. The members can appeal to the Appellate Body if no reasonable settlements are achieved during the first round of independent arbitrators. The Appellate Body will make the decision. Therefore, the Appellate body was an effective mechanism for resolving trade disputes in the past.

But now, the Appellate Body has been suspended, and every future trade dispute has the potential to turn into a trade war.

### **2.2. US's Claims on the Appellate Body**

The United States of America set out several reasons for its blockage of the Appellate Body, pointing out what it saw as flaws in the Appellate Body and why the US was reluctant to trust the Appellate Body.

#### **2.2.1. The Judicial Activism**

The main accusation made by the United States is that it has exceeded its jurisdiction by creating law and indulging in "judicial activism". Judicial Activism refers to exercising the power of judicial review to set aside government action. It generally refers to the irregular movement of that power and means creating new rights and obligations without the consensus of all WTO members. Thus, when Appeals Committee members adopt a "common law trend", it can be seen as an infringement of the legislative powers of the members. The United States has repeatedly stated that the Appellate Body's attempts to fill gaps in the WTO Agreements violate Article 3.2 of the DSU.

However, it is also found that the U.S.A did not avoid proposing a broad common law-like interpretation in this case. The United States needs to be careful to hold itself and others to the same standards [1].

### 2.2.2. The Creation of persuasive precedents

The concept of precedent is widely understood to be a distinctive feature of the common law tradition. Precedent refers to previous cases which can guide the resolution of similar disputes in the future. Precedents can be binding and persuasive.

Judicial precedent allows the legal system to gain consistency and predictability. It also helps the court system to save time in future decisions. On the contrary, judicial precedent can create rigidity in a system when it needs flexibility. It forces the judicial system to look backward rather than forward [2].

Another issue that the United States has raised with the Appellate Body is that it sets a persuasive precedent. But this is problematic because the value of being "persuasive" differs significantly from being "binding". Notably, there has not been a single case decided by the Appellate Body where its decision should be regarded as a binding precedent for resolving future disputes.

If the reasoning of past reports is *persuasive* to the Appellate Body in the case at hand, the Appellate Body would have added them to the DSS to improve the predictability of the trading system according to *Article 3.2 of DSU*. However, the DSS doesn't need to use the interpretation with its persuasive value [1].

### 2.2.3. Objections to the Working Procedures

The United States also objects to some working procedures of the Appellate Body, especially the provisions set out in *Article 15 of the Working Procedures of the Appellate Body*. The United States objection suggested that WTO members should not accept any new cases, as there may be a backlog of patients that have not been completed, which sometimes inevitably leads to delays in reporting beyond the period set out in the rule [3].

For the above reasons, the United States thinks the mechanism of the Appellate Body should be reformed and block the proper functioning of this body.

## 3. Reforms on the WTO Dispute Settlement System

The necessity to reform the WTO DSS has existed for many years. Firstly and most importantly, it is necessary to improve the appellate body to function again.

### 3.1. The Walker Principles

New Zealand's Ambassador to the WTO, David Walker, was once appointed by the President of the General Council as a facilitator to improve the functioning of the Appellate Body. He has proposed the famous principles, i.e., the Walker Principles, which include empowering the Appellate Body to make decisions within 90 days, that Appellate Body members leave at the end of their second term, the Appellate Body only address those issues specifically raised by the parties to a dispute, and panel reports are considered when necessary [4].

These Walker principles nearly address all of the concerns put forward by the United States. They can minimize precedents and provide fresh perspectives on judgment and solutions for each case without dwelling on experience. Implementing the Walker Principles can address some of the United States concerns and create greater possibilities for the re-run of the Body.

### 3.2. Vote Selection System

Vacancies in the Appellate Body are a significant cause of the Appellate Body's stagnation, and some researchers have suggested initiating a voting system to select qualified members to fill the vacancies of Appellate Body judges effectively. A method of selection by voting would protect the interests of

the majority of members, and it could be used as an interim measure for the appointment of AB Justices to re-establish and repair the operation of the AB at short notice [5].

### **3.3. Solutions to Recover the Credibility**

There is usually the dilemma of "fair trial" faced by the WTO DSS mechanism. To judge the disputes between the parties, the reliance on economics and statistics to make decisions is increasing. Using these technical terms in conjunction with economics and statistics in the final decision would be highly authoritative since the judges have discretion regarding how to interpret them.

These initiatives can make dispute resolution mechanisms more trustworthy and objective, with a high degree of authority. Parties could retain their discretion regarding the definition of language or specialized terms in the ruling. In contrast, in the Appellate Body's adjudication process, they only present relatively accurate statistics and data. At the same time, increasing the transparency and fairness of the dispute settlement process could allow WTO members, including the US, to increase their confidence in the DSS significantly [3].

Additionally, enhancing the trustworthiness of the WTO DSS in hearing cases is also essential. It is suggested to amend the confidential treatment of the DSU to permit the parties to undergo the dispute settlement process first-hand to make it more procedurally unbiased and enhance its trustworthiness [5].

### **3.4. Establishment of the Compliance Committee**

Another measure to enhance the functioning of the Appellate Body is to establish a compliance committee to oversee the operation of it. To ascertain that other members have confidence in the functions of the Appellate Body, the WTO could and should set up an annual compliance committee to conduct an audit of the Body's work. A compliance committee would be composed of the representatives of all the central WTO committees. The tasks assigned to this committee should be to assess whether the Appellate Body is following its principles and what appropriate measures should be taken when it doesn't do it [3].

A reasonable and Impartial monitoring system will enable the Appellate Body to be reviewed effectively, identify any adverse gaps or pitfalls that have arisen or are about to emerge, and effectively avoid the following breakdown of the Appellate Body. It can also reshape trust in the Appellate Body, which is an efficient way to reform the Body.

### **3.5. Monetary Compensation**

Monetary compensation is an effective measure to resolve trade disputes and would be an additional measure to the operation of the Appellate Body. If the losing party cannot abide by the standards proposed by the DSB, the prevailing party may choose to get compensation from the losing party. There have been arguments that monetary compensation will act as a disincentive to the losing party in trade disputes, increasing members' confidence in seeking trade dispute settlement at the WTO and the Appellate Body. Monetary compensation can be achieved to compensate the successful party for the financial losses incurred while taking the case to the Appellate Body. In the meantime, it is a punitive measure for the inconsistency with the WTO, making the losing party more apprehensive about violating the rules and effectively reducing future parties' infringement of WTO principles.

As monetary compensation would retroactively consider damages awarded to the successful party for the harm caused by the losing party, the remedy aligns with the time-honored principle of law that "where there is a right, there is a remedy". The successful party always suffers substantial economic losses from those cases not in line with WTO rules, which should be compensated. At the same time, monetary compensation act as an effective remedy for trade disputes between different parties, would

decrease the cases of disputes and therefore help to solve the problems during the trade war[6].

#### 4. Conclusions

The article is about how the WTO and the dispute settlement mechanism behaved and performed in the framework of the US-China trade war. The article refers to the suspension of the Appellate Body, which was the primary reason that neither the US nor China was consistent with the WTO and its multilateral trade doctrine. The paper explores some more hotly debated DSS reform measures, including Walker's Principle, the voting selection mechanism, the supervisory committee, and the monetary compensation mechanism.

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