

# FROM CHINA'S PERSPECTIVE: THE WAY TO GET OUT OF THE DILEMMA AFTER WTO DISPUTE SETTLEMENT BODY REACHING AN IMPASSE

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## ABSTRACT

The Multilateral Trading System WTO is faced with the challenge of new rules for regional international trade and investment and is in a marginalization crisis. The United States has blocked the selection of judges in WTO Appellate Body, which put the WTO in a standstill. The United States, the European Union, Japan and China and other countries were putting forward their own WTO reform programs. There are great differences in these reform programs, and they have become a new area of the game between countries, especially China and the United States.

**Keywords:** WTO, Dispute Settlement Mechanism, Reform, Dilemma

## INTRODUCTION

The WTO dispute settlement body held its monthly meeting in Geneva on 22 November, which, as a result of the obstruction of the United States, was ultimately unable to initiate the selection process for the new members of the Appellate Body. On 30 September 2018, with the expiry of the term of office of members of the Appellate Body from Mauritius, there will be only three members left in the Appellate Body. Two of its remaining three members' term of office will expire<sup>i</sup> on 10 December 2019, and the next regular meeting of the dispute settlement body will not be held very soon, and thus, a technical "suspension" of the appellate body is inevitable.

The WTO dispute settlement mechanism, known as the "pillar of the multilateral trading mechanism", plays a key role in ensuring the stability and predictability of global trade rules and the peaceful settlement of trade disputes. Once the mechanism fails, international trade policy may fall into the danger of disorderly and vicious competition. As a strong dispute settlement mechanism for the multilateral trade pillar, which has been playing a role in maintaining the rules and stability of multilateral trade for more than 20 years, its failure means that international trade will slip back into the unpredictable strain and even be re-dominated by the "jungle law". Despite the general trend of economic globalization, the reason why the United States is trying to return to bilateral solutions is that it is confident in its own economic strength. The U.S. believes that no matter what kinds of trade disputes occur, it can always win without lose. However, trade disputes are exacerbating weak economic growth against a backdrop of tight global trade and weak economic growth. The U.S. economy has also been affected, manufacturing has fallen into recession and factory activity has contracted for months, so the U.S. is not always a beneficiary of the "jungle rule", which harms other without benefiting itself.

## SOURCES OF CRISIS OF WTO

- (i) Crisis in the background of the times

The World Trade Organization, as the successor to the General Agreement on Tariffs and Trade, was built on the era of multilateralism. In recent years, however, many countries or

governments have been openly skeptical and sometimes completely hostile to the rules-based international order, including the multilateral trading system. Some of the most typical examples are Brexit and the election of Donald Trump as president of the United States and so on. Series of international events revealed that unilateral trade is becoming popular again. Since Mr. Trump's presidency, unilateralism, protectionism and isolationism have become the main "labels" of his international trade strategy. By imposing tariffs on imported steel and aluminum products,<sup>ii</sup> the Trump administration has provoked a global trade war, which has a serious impact on the multilateral trading system with the WTO at its core. U.S. was also attempting to block the appointment of members of the appellate body, which might directly lead to a paralysis of the WTO.

With the rise of China, the practical practitioner of multilateral trade, China's role in the World Trade Organization is becoming more and more important. Countries led by the United States are beginning to advocate against globalization, thereby curbing China's rapid growth momentum. In response, the U.S. listed many concerns about China's policies, which it said unfairly hurt U.S.'s interests, or at least other countries have the same concern. These include mandatory technology transfer, discriminatory licensing requirements, investment restrictions, infringement of intellectual property rights, industry support through state-owned enterprises, government subsidies for industries with excess production capacity and lack of transparency in management<sup>iii</sup>. While some of China's practices may already be covered by existing World Trade Organization rules and can therefore be enforced through the World Trade Organization dispute settlement mechanism, others are not subject to trade rules. The U.S. also points out that China has heavily subsidized businesses, which are usually achieved through state-owned enterprises. The existence of the World Trade Organization's dispute settlement mechanism limits its ability to counter China's policies through trade measures.

(ii) The Deficiencies of the WTO Legal framework itself

Since the rules of the World Trade Organization were inherited from the General Agreement on Tariffs and Trade, important rules of appeal were born after the Uruguay Round negotiations. These rules are used to prevent panel of experts from making unfair decisions. The Understanding on Rules and Procedures for Dispute Settlement (DSU), the most fundamental document on dispute settlement in the World Trade Organization, embodies the spirit of the General Agreement on Tariffs and Trade. The core rule of the World Trade

Organization dispute settlement is that under the request of a complaining party, an interim panel of experts is established to rule on the matter at issue. If one of the complaining parties appeal the report made by the panel to the Appellate Body, then the Appellate Body will uphold, modify or reverse the report. The Appellate Body clarifies the existing provisions<sup>iv</sup> of the Agreement in accordance with customary rules of interpretation of public international law. Vienna Convention on the Law of Treaties<sup>v</sup> is the most commonly used treaties in interpretation of law. The Dispute Settlement Body (DSB) have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. It is because of this judicial structure that the purpose of DSU conflicts with the priorities of the dispute settlement system. According to various sub-provisions of article 3, the system is expected to provide “security and predictability” to the multilateral trading system, “clarify the existing provisions” of the WTO Agreement, deliver “prompt,” “satisfactory” and “positive” settlement of disputes, and maintain “a proper balance of rights and obligations.”

Second, like many international agreements, the Marrakesh Agreement and the GATT contain text that is imprecise and indeterminate, including gaps, overlaps and even conflicts.<sup>vi</sup> There may be several reasons for this, including, for example, intentionally negotiated constructive ambiguity, insufficient legal review and parallel negotiations over similar types of obligations. Under the principle of "reverse consensus", a report given by a dispute settlement body, although opposed by the majority of members, would take effect provided that one member agreed to pass it. And no other WTO body can overturn it in the future. This is one of the reasons why the US is denouncing WTO, because there are no checks and balances of power. Furthermore, appellate bodies enjoy more immunity powers than the judicial bodies in any country.

## **REFORM PROPOSALS FOR THE WORLD TRADE ORGANIZATION**

### **(i) American proposals**

The 2018 President's Trade Policy Agenda<sup>vii</sup> systematically summarizes the U.S. criticism of the Appellate Body, focusing on three areas: (1) The Appellate Body's failure to

comply with the procedural requirements set out in DSU. (2) The appellate body's overstepping of the substantive interpretation of WTO-covered agreements in specific cases increases or reduces the trade rights or obligations of WTO members. This relates to the interpretation of "public institutions" in the Agreement on Subsidies and Countervailing Measures, non-discrimination obligations under article 2.1 of the Agreement on Technical Barriers to Trade, and "unforeseen developments" in the Safeguards Agreement. (3) There are too many issues in the Appellate body's report that are not relevant to the case itself or that the parties have not appealed.

(ii) European Union proposals

As of September 2019, several members have submitted reform proposals or opinions on WTO dispute settlement mechanism, including the EU's concept paper on WTO Modernization, the EU, China and other 14-member programs, the EU, China, India and Montenegro Quartet, the African Group Program, the Canadian WTO Ministerial Conference Joint Communiqué, the Honduran Appellate Body Reform Program, India and other developing countries' reform opinions on WTO's development and inclusiveness.<sup>viii</sup> These proposals respond to questions from the United States on the following issues. First, with regards to the transitional rules for the continuation of trials by the outgoing members of the Appellate Body. The EU and other 14-member program consider that, in accordance with Article 15 of the Appellate Review Procedure, the outgoing members of the Appellate Body have the right to complete the pending appeals cases that have been heard during their term of office. The concern of the United States was that it should be the dispute settlement body, not the appellate body, that had the power to make a decision to continue the trial by the members of the outgoing appellate body. The 14-member program therefore suggested that detailed rules on the issue could be added through the revision of the Understanding. The African Group program recommended that Article 15 of the Appellate Review Procedure should allow the outgoing members of the Appellate Body to continue to hear cases until the vacancy was filled, but not for more than two years. The Honduran program recommended that outgoing members of the Appellate Body should continue to complete the cases before they had been heard, but that no new cases should be assigned to members within 60 days of the expiration of their terms of office. With regard to the decision power on this issue, Honduras proposed three methods, one being that the appellate body decides that the outgoing member should continue to hear the case but to notify the dispute settlement body, the other is that the dispute settlement body takes the "reverse

consensus" principle to make its decision, and the third is that the dispute settlement body takes the "positive and unanimous" principle of making decisions, excluding the parties to the dispute. Second, with regards to the 90-day trial period of the Appellate Body. The EU and other 14 members' option recommended that the proceedings not exceed 90 days unless the parties agreed to an extension, and that if the parties did not agree to the extension, the appellate body could negotiate with the parties to simplify the procedure to meet the 90-day time limit. For example, the Appellate Body may recommend that the parties voluntarily focus on the scope of the appeal request, set a page limit on the number of submissions submitted by the parties, reduce the length of the report, etc. The African Group and Honduras program further recommend that the Appellate Body continue to comply with the 90-day trial period, which may be appropriately extended in exceptional circumstances, but not exceeding 120 days, while weekends and holidays should not be counted, etc.

(iii) China's version of the WTO reform plan

In November 2018, the Ministry of Commerce of China issued the China Position<sup>ix</sup> Paper on WTO Reform, setting out China's three principles and five suggestions on WTO reform. Three principles: First, the WTO reform shall preserve the core values, non-discrimination and openness values, of the multilateral trading system; Second, the WTO reform shall safeguard the development interests of developing members; Third, the WTO reform shall follow the practice of decision-making by consensus. Among them, the core principle is non-discrimination, and the reform programme is not targeted at any specific country. Five suggestions are: First, the WTO reform should uphold the primacy of the multilateral trading system. Second, the priority of the reform is to address the existential problems faced by the WTO. Third, the reform should address the imbalance of trade rules and respond to the latest developments of our time. Fourth, the reform should safeguard the special and differential treatment for developing members. Finally, the reform should respect members' development models.

China's Proposal Paper on WTO Reform, issued on May 11, 2019<sup>x</sup>, sets out four reform proposals on the basis of the position paper: First, addressing the key urgency that threatens the survival of the WTO. A joint proposal on reform of the dispute settlement appellate procedure will be discussed as soon as possible to break the deadlock in the selection of members of the Appellate Body. Strengthen the discipline of members' abuse of national

security exceptions and unilateral measures in violation of WTO rules; To solve the unfairness of rules in the agricultural field, improve the relevant rules in the field of trade relief, complete the negotiation of fisheries subsidy agreements, and promote negotiations on new issues such as e-commerce issues and regulatory consistency; Strengthen the obligation of trade policy notification, enhance the transparency of trade policies and improve the review mechanism; Respect for the special and differential treatment of developing members. Adhering to the principle of fair competition in trade and investment, opposing the establishment of additional transparency and discipline on state-owned enterprises, and discriminating against state-owned enterprises in investment safety reviews, and ensuring a level playing field for different ownership in conducting commercial activities.

## **CONCLUSION**

The current WTO reform is facing a very complex situation, the topic involves many areas, including the strengthening and consolidation of the multilateral trading system, the function of WTO, especially how to improve the functions and functions of dispute settlement mechanism, the dispute over special and differential treatment in developing countries, and how to regulate the use of industrial policies and subsidies. In particular, some bilateral issues related to China's economic system policy in the Sino-US trade dispute are turning to multilateral forums, such as the US.'s emphasis that China can no longer enjoy the treatment of developing countries and that China is a non-market-oriented country. This means that some characteristics of China's economic system policy will be questioned by multilateral occasions, the WTO will become the main battleground of the Sino-US game. However, at present, the dominant power of international economic and trade rules is still in the hands of developed countries, and China's ability to plan international rules is still weak and in a passive position. This is a challenge that China must face in multilateral trade system negotiations.

China should guide the reform issue and influence the WTO reform process. Prioritization needs to be made during the discussion and discussion. China should go the other way and expand its circle of mutual friends in response to U.S. pressure on China by its allies in the international multilateral system and restrictions on China's international space. China should establish a multilateral strategy for governance in global governance so as not to become

isolated. Mr. Chen Mingde believes that the current pressing problem of globalization is to revise or improve international multilateral rules with the times, and behind this urgent problem, the more pressing issue is how to build a new type of great power relations, in order to seek consensus and can cooperate. If relations between major powers remain in the dis-relationship of the world, the new multilateral rules will be difficult to see, and regional trade agreements will continue to develop. Therefore, in participating in global governance, China should establish a strategy and strategy for multilateral co-governance. Therefore, it is important to use the Sino-US trade negotiations as an opportunity to reach some kind of consensus on China's structural reforms, especially on trade balance, state-owned enterprises and industrial policy issues, such as the principle of competitiveness, the principle of ownership neutrality and other institutional issues to reach consensus. This will lay the foundation for China and the United States to reach a consensus on multilateral trade system reforms such as the WTO. Secondly, we should strive to coordinate our position with other countries and groups in the European Union and reach a consensus on reforming the WTO. India, South Africa, Russia and other developing countries in particular, cooperate in reaching consensus on the criteria for the identification of developing countries and safeguarding the special and differential treatment of developing countries. In the absence of some consensus in the Sino-US trade war, allowing the European Union and others to lead WTO reforms can avoid the situation of China being isolated.

## REFERENCES

<sup>i</sup> See WTO Annual Report 2019, Page 123.

<sup>ii</sup> See WTO Dispute Settlement Mechanism Crisis: U.S. Position and Prospects for Reform Zhang Yuhuan

<sup>iii</sup> See Robert McDougall, Crisis in the WTO: Restoring the WTO Dispute Settlement Function

<sup>iv</sup> See WTO, "Understanding on rules and procedures governing the settlement of the settlement of the settlement of the disputes", Annex 2 of the Marrakesh Agreement (DSU), online: [www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm). Art 3.2

<sup>v</sup> See Debra Steger, "The Founding of The Appellate Body", in Gabrielle Marceau, ed, A History of Lawyers in the GATT/WTO: The Development of The Rule of Law in The World Trade Strading System (Cambridge, UK: Cambridge University Press, 2015); Peter Van den Bossche, "From Afterthought to Centrepiece: The Appellate Body and Its Rise to The World Trading System, in Giorgio Sacerdoti, Alan Yanovich SJan Bohanes, eds, The WTO at Ten: The Contribution of The Settlement Settlement System (Cambridge, UK: Cambridge University Press, 2006) at 201.



<sup>vi</sup> Judith Goldstein and Richard Steinberg, "Regulatory Shift: The Rise of Judicial of The WTO" in *The Politics Of Global Regulation*, Walter Mattli & Ngaire Woods, eds (Princeton, NJ: Princeton University) Press, 2009) at 211.

<sup>vii</sup> See USTR the president's 2018 Trade Policy Agenda

<sup>viii</sup> WTO Reforms to the dispute settlement mechanism include: EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Korea, Iceland, Singapore, Mexico, Costa Rica, Montenegro, etc. 14 Membership program, which is more comprehensive and covers the Appellate Body's 90 days' time limit for the trial, the transition rules of the outgoing members of the appellate body, the decisions unrelated to dispute settlement, the rules of precedent for the decisions of the appellate bodies, etc. WTO, "Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and The General Council, " WT/GC/W/752/Rev.2, WTO Documents Online, December 12-13, 2018. EU, China, India, Montenegro, etc. 4 Members programmed, which emphasizes the increased independence of the Appellate Body and the improvement of the efficiency and capacity of the Appellate Body. WTO "Communication from the European Union, China, India Ando to The General Council, "WT/GC/W/753/Rev.1, WTO Documents Online, December 12-13, 2018. The African Group program addresses the terms of office of the Appellate Body, transition rules for outgoing members and the selection process, 90 Day review time limit, etc. WTO "Appellate Body Impasse Communication from the African Group," WT/GC/W/776, WTO Documents Online, June 26, 2019. The Honduran Appellator Reform Program also provides a more comprehensive transition rules for outgoing members and Selection process, Comment on the duration of the day trial, decisions unrelated to dispute settlement, etc. WTO "Fostering A Discussion on the Functioning of the Appellate Body-Communication from Honduras, "WT/GC/W/758, WT/GC/W/759, WT/GC// W/760, WTO Documents Online, January 2019. For reform opinions in countries such as India, see WTO, "Strengthening the WTO to Promote Development and Inclusivity — Communication from Pluractional State of Bolivia, Cuba, Ecuador, India, Malawi, South Africa, Tunisia, Uganda and Zimb abwe," WT/GC/W/778, WTO Documents Online, July 11, 2019. Canada, etc. 13 countries and India, etc. Developing countries have mainly expressed the necessity of WTO's dispute settlement mechanism to function properly, and emphasized the reform of the Appellate Body as a priority options for WTO reform, but no specific reform measures were proposed.

<sup>ix</sup> See China's Position Paper on WTO Reform, <http://sms.mofcom.gov.cn/article/cbw/201812>

<sup>x</sup>See <http://www.Mofcom.gov.cn/article/jiguanzx/201905/20190502862614.shtml>