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Article 25 as an Alternate Way to Resolve the Crisis of the WTO Dispute Settlement Mechanism: A Chinese Perspective

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The primary purpose of this research is to propose the solution to the current crisis of the WTO dispute settlement system focusing on Article 25 of the WTO Agreement. The Dispute Settlement Understanding is one of the significant *successes of the WTO. Recent years, however, have witnessed the difficulties and challenges facing the multilateral trading system along with rising anti-globalization and trade protectionism. The Appellate Body (AB) has been experiencing an unprecedented crisis of dysfunction mainly due to the US's boycott of appointing the new members. The WTO Members, including China, have thus proposed various reforms in response to the crisis. However, they have not touched the core demands of the US. Because of the imminent crisis that the AB is about to stop operating, China should take urgent action with other WTO members, consider launching a majority voting program, design and use alternative appeal arbitration, and combine international rules with domestic deepening reforms.*

Keywords: Article 25, WTO Agreement, Appellate Body, Dispute Settlement Understanding, GATT, WTO Reform

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1. Introduction

Today, the World Trade Organization (WTO) Agreement faced a major "administration emergency." Since early 2017, the US has fully banned the filling of the Appellate Body (AB) members.[1] Such an unthinkable crisis of the WTO is due to the Doha Development Round's failure, the Trump administration's trade protectionism, and the increasing number of despots of popular regimes that have undermined constitutional democracy and principle-based pluralism.[2]

Since 2018, the US-China trade war has exacerbated the AB crisis. The financial and sovereign debt crisis can be repeated like protectionism in 1930 when the great crash led to the collapse of the financial, commercial, and trading organization, production decrease, colossal unemployment, reciprocal trade protectionism, political conflicts, and war. The criticism generally reflects that the US attempts to provide more supervision and control over the AB. The US believes that the AB and the WTO members have long ignored its opinions so that it is time for all members to be responsible for solving the problems.[3] The US emphasizes that both collective and individual actions require an acceptable solution to the balance between the WTO member control and the independent referee of the AB.[4]

However, some WTO members hold different views, regarding the AB as an independent World Trade Court.[5] These members have the power to control the procedures themselves, deliver the additional opinions in the AB report to a certain extent, and clarify the treaty vague provisions. If the AB reports can be a precedent, they can provide certain predictability for dispute settlement. This group of the WTO Members accuse the US of destabilizing the constitutional freedom of the AB and the rule-based trading system.[6] These different perspectives also reflect the different understandings of the nature of the WTO Dispute Settlement Mechanism (DSM). The US believes that the DSM is similar to contractual arbitration that demonstrates the supremacy of the members' will,[7] while some other WTO members (including the AB itself) consider dispute settlement an "evolutionary approach to trade governance."[8]

The primary purpose of this research is to propose the solution to the current crisis of the WTO dispute settlement system focusing on Article 25 of the WTO Agreement. This paper is composed of six parts, including Introduction and Conclusion. Part two will discuss the US's attack on the AB. Part three will

examine the transitional rules for the continued trial of outgoing members of the AB. Part four will search for the crisis response. Part five will analyze the arbitration as a way for trade dispute settlement.

2. The US's Attack on the Appellate Body and Dispute Settlement System

A. The US Concern on the AB

The WTO Members have acknowledged this mandatory and compulsory jurisdiction as inevitable parts of their accession to the WTO agreements. At the same time, however, the US has raised substantive concerns about Appellee's reports in specific cases. The "2018 Presidential Trade Policy Agenda" systematically summarizes the US criticism of the AB, focusing on these three aspects:[9]

1. The Appellate Body did not comply with the procedural requirements of the Understanding. ... In case a member decides to leave within the trial period, which is 90-days, it can continue to hear the case. In the US view, the Appellate Body has no power to resolve these issues, and the dispute settlement body can only decide these issues.
2. The AB's substantive interpretation of the WTO coverage agreement in specific cases has an excess of power, thereby increasing or reducing WTO members' trade rights or obligations. That involves the interpretation of the "public institutions" in the Agreement on Subsidies and Countervailing, the non-discrimination obligations under Article 2.1 of the Agreement on Technical Barriers to Trade, and the "unforeseen developments" in the Safeguards Agreement.
3. There are too many problems in the Appellate Body's report not related to the case itself, or the parties have not appealed. For example, the advisory opinions or accompanying opinions contained in the report are not necessary for the dispute resolution itself.[10]

B. The WTO Members' Response to Reform

There should be a reliance on equally efficient rule-making DSM for the multilateral trading system to function correctly. So far, several reform programs in various forms were proposed including China's three principles and five proposals for

WTO reform.[11] The WTO members have submitted the documents on reforms to the Ministerial Council and the Dispute Settlement Body (DSB). The documents include:

1. Documents submitted by Honduras to the Dispute Settlement Body and the Ministerial Council, respectively, on how to resolve the issue of continuing appeals by members of the Appellate Body and five aspects of reform proposals, including mandatory judicial restraint, accompanying opinions, review criteria, treaty interpretation methods, and possible external review.[12]
2. Documents submitted to the General Council by 12 members of the European Union, China (later increased to 14) involving five aspects of procedural reforms, China, Canada (joined by the Republic of Montenegro) to submit to the General Council documents, including the enhancement of the independence of the Appellate Body.[13]
3. Australia and Singapore (Costa Rica, Canada, and Switzerland joined) submitted documents to the General Council that how to deal with the WTO judiciary.[14]
4. Two documents submitted by Durres to the General Council relate to the time limit for the appeal, appeals process's efficiency, and how to deal with it.[15]

These reforms have been proposed in the following context. First, they are mainly responses to the US concerns, hoping to resolve the AB crisis and restore it to regular operation. Second, they incorporate some appeals to guarantee the AB's independence and efficiency.

C. 90-day Trial Limit on Appeals

Article 17, paragraph 5 of the Dispute Settlement Understanding (DSU) provides a 90-day trial of an appeal. According to figures, in the 139 ruling reports made by the AB, the average time from the date the party notified the appeal decision to that of the AB report was 118 days, of which 70 reports exceeded the 90 days specified in the DSU.[16] The US criticized the AB for failing to comply with the requirements of the trial limit, which was not only inconsistent with the provision of "Dissolve the Trade Dispute between Members" in the Understanding but also led to the uncertainty of the effectiveness of the report after the expiration of the trial.[17] The WTO members, including China, proposed to amend the 90-day trial limit as follows.

1. If the parties agree, the report can create over 90 days, and the AB should strengthen the consultation and transparency obligations with the parties.
2. If the report is expected to take over 90 days, the AB may consult with the parties early in the process and even before the appeal is filed.
3. Suppose the parties have not yet agreed on an overtime plan, consideration should be given to establishing a procedure to change the operational structure of the appeal process or case, for example, by recommending that the parties jointly focus on the appeal's nature and set a time limit for the proceedings. Furthermore, reasonable measures should be taken to shorten the length of the report or publish the report.[18]

These changes should not affect the effectiveness of existing rules regarding the reporting of over ninety days and report adoption. Another option is to consider revising the current 90-day trial period, extending it to 120 days, or allowing the AB to determine the case duration on its own.[19]

3. Transitional Rules for the Continued Trial of Outgoing Members of the Appellate Body

A. Article 15

Considering Article 15 of the appeals review procedures, the WTO members may continue to complete their assigned cases after they authorize the AB and notify the DSB. According to the provisions of the DSU, the US believes that the AB does not have the right to treat members whose term of office expires as members. Only the DSB has the power to decide whether the expiring members should continue to hear the case.[20] The WTO members' proposed reforms involve the allocation of cases when the AB members are about to expire, the conditions for the extension of the term of outgoing members who have the task of the case, and the restrictions on the expansion of members' involvement in unallocated cases.[21] To ensure an orderly transition between the outgoing and new members of the AB, the WTO members, including China and European countries, proposed that the transitional rules of the departing members of the AB should be stipulated by amending the DSU.[22] A member shall complete a case that has been assigned during his/her term of office.[23]

B. Honduras' Recommendations

The recommendations made by Honduras include: (1) Outgoing members should continue to complete cases that have already been open, and (2) No new cases assigned to them within 60 days of the members' expiration.[24] On the one hand, these proposals try to shorten the time for the AB members to continue to adjudicate the case as soon as possible. In contrast, on the other, whether the case has been open as a standard helps to avoid waste of resources and facilitates the resolution of disputes as soon as possible.[25] However, these recommendations can only work if the AB is functioning accurately.

C. Amendment of Article 17.2

The US pointed out that AB members used to comment on the issues unnecessary to resolve disputes and those that the parties have not appealed.[26] The US quoted the AB report in *Argentina - Measures relating to Trade in Goods and Services* and maintained that more than 2/3 of the AB analysis, which consists of 46 pages, was like "obiter dicta."[27] The US proposed advisory opinions related to "making law" outside the mandate and scope of the AB.[28]

So, the WTO Members proposed to amend the provisions of Article 17.2 of the DSU as follows.

1. The Appellate bodies "should deal with each of the issues raised by the parties in the appeal process," however, resolve the necessary degree or limitation of the dispute.
2. Honduras suggested considering whether mandatory judicial temperance could be imposed on the Appellate Body and prohibiting the Appellate Body from additional comments in its report, abstract discussions, or providing advisory opinions on WTO law. That will resolve issues related to the Appellate Body unnecessary, lengthy "consultative opinions" or "collateral judgments" on dispute resolution and indirectly help meet the 90-day trial deadline.[29]

D. The "Precedent "Status of the AB Report

The AB stated that its report could serve as a precedent.[30] Absent "cogent reasons," the subsequent panel's report should follow the prior decisions of the AB. The US believes this approach lacks the legal basis of the WTO Agreement. Although the AB report can clarify the WTO Agreement, the report itself is not a text of the WTO members' agreement and cannot be used as a substitute.[31]

In this regard, the WTO members proposed that the AB and the WTO members communicate through annual meetings, which are not related to the specific report of the case.[32] The WTO members can express concerns about the methods used by AB members to hear cases. This communication requires "transparency rules" to prevent the WTO members from exerting unnecessary pressure on the AB members.[33]

4. The Crisis Response: The WTO Members Start Vote or Arbitration to Resolve Disputes

In a full WTO membership meeting held on December 9, 2019,[34] the Director-General Roberto Azevedo provided ways to solve the longstanding impasse over the AB members' appointment through more intensive and higher-level consultations.

A. Initiating the Voting for the Election of the AB Members

The current AB crisis is subject to the WTO's approach in decision-making at the permitted level. Under Article 17, paragraph 2 of the DSU, the AB members are appointed by the DSB, which represents all WTO Members. Article 2, paragraph 4 of the WTO Agreement provides that "where the rules and procedures provide for a decision of the DSB, the Body shall determine by consensus." Where applicable, if the terms of the Understanding are to be revised, the amendments shall be made by consensus of the WTO members under Article 10, paragraph 8, of the WTO Agreement.[35]

B. Problems of the Consensus Decision-Making Method

The consensus decision-making method has been in use since the GATT period. Its fundamental nature reflects the uniqueness of decision-making in the course of diplomatic means. Decision-making by consensus has its merits and standards: it helps guide the WTO members to make decisions democratically, and developed members respect developing members' needs.[36]

The present crisis in the AB highlights the problems that may be caused by a consensus decision-making method. In this crisis, as long as the US persists in

disagreement, it cannot begin selecting the AB members or modifying the WTO Agreement. This is a flaw in the consensus decision-making method. Even though it reflects the WTO members' organizational individuality, it also objectively gives the US veto power, preventing the selection of the AB members.[37]

There is no precedent for voting practices in the GATT/WTO history. Article 9, paragraph 1 of the WTO Agreement, however, provides the possibility of initiating a member vote stipulating:

> [u]nless otherwise specified, if the decision cannot be reached by consensus, the matters in the dispute shall be decided by voting. At the ministerial meeting and the general council meeting, each member of the WTO has one vote. A simple majority shall make the decisions of the Ministerial Conference and the General Council of the votes cast unless otherwise provided in this agreement or the relevant multilateral trade agreement.

The legal obstacle here is that, under Note 3 to this paragraph, the General Council Assembly's decision as a DSB shall be setup according to Article 2, paragraph 4 of the DSU, that is, by consensus. According to Article 16, paragraph 3 of the WTO Agreement, when the said provision conflict with the terms of any trade agreement, this Agreement's provisions shall reign. However, "any multilateral trade agreement" mentioned here should generally be understood as the 'Agreement' in Annex I of the WTO Agreement, or include the Understanding as Annex II.[38]

The authors believe that Article 17 of the DSU - "Vacancies shall be filled as they arise - is to ensure the existence and operation of the AB. To save the existence of the AB is a collective obligation of the WTO members. Due to any obstacle, however, this collective obligation cannot be fulfilled. Especially in emergencies, the WTO members may need to take extraordinary measures to fulfill this collective obligation. In a strategic distance from the AB crisis that is currently forcing the cessation of its activities, it would be wise to start putting a more effective voting method for the WTO members with vital and legitimate support.[39] An emergency would justify the adoption of special measures by the members under abnormal circumstances in an international organization.

The US's extraordinary act continuously undermining the AB operation is not a "normal situation." Article 62 of the Vienna Convention on the Law of Treaties 1969 provides that the state may also invoke the "condition change clause" to

suspend the application of treaty obligations temporarily.[40] To respond promptly to the current AB crisis and maintain the integrity of the WTO DSM, this temporary abandonment of the consensus obligation and the initiation of member voting is appropriate, urgent, and necessary to safeguard all WTO members' trade interests.

To prevent the US from opposing the initiation of voting procedures, under Article 9(2) of the WTO Agreement, the WTO members may confirm an "authoritative interpretation" by the General Council based on the consent of an absolute majority (3/4) of the members. It is a collective obligation of the WTO members to maintain the existence and regular operation of the AB and the power to initiate the selection process for the AB following the currently valid rules.[41]

5. Promoting the Settlement of Trade Disputes by Arbitration: Article 25

A. Arbitration as an Alternative Dispute Resolution

During the Uruguay Round negotiations, the US and other parties proposed "constrained arbitration" as an alternative to the DSM's general procedure. Finally, they laid it down at Article 25 of the DSU. The arbitration provided in Article 25 of the DSU is an alternative dispute resolution method parallel with the Expert Group and the AB procedures to facilitate the resolution of certain disputes clearly defined by the parties. In practice, the arbitration provided for Article 25 of the Understanding has been partially applied only in the *US-Section 110(5) Copyright Act* since 1995.[42]

The WTO's efficient operation of the Panel and the AB procedure has met the WTO members' dispute resolution needs. Also, the DSB has adopted the arbitration method of submitting trade disputes between countries or independent customs zones to a final decision. Article 25 of the DSU specifies the arbitration agreement's necessary provisions, the initiation of procedures, and arbitration award's enforcement. Based on the principle of party autonomy of arbitration itself, the arbitration agreement is the ground for drawing arbitration under Article 25.

Unlike the Panel procedure, the arbitration process' initiation does not depend on any conduct of the DSB, but it must notify other WTO members. Only the 'certain'

disputes that are "clearly defined" by the parties can be submitted to arbitration for settlement.[43]Along with the Panel and AB procedures, the substantive and procedural laws applicable to arbitration are WTO coverage agreements, including the DSU.[44]

In particular, Articles 21 and 22 of the DSU regarding the Enforcement of Arbitral Awards by Appeal Bodies virtually guarantee the enforcement of arbitration awards within the Understanding framework.[45] If the AB ceases to operate, it is a relatively pragmatic choice to use the arbitration provided in Article 25.[46]

B. Designing the Initiation of Appellate Arbitration Proceedings

The arbitral procedure stipulated in Article 25 can be called "appeal arbitration" or "arbitral appeal."[47] This appeal arbitration has changed to some extent the nature of the alternative dispute settlement method provided in Article 25. Therefore, the WTO members' needs to appeal are different from the original intention of the arbitration mechanism set up in Article 25. The arbitration mechanism is feasible and can be activated and appealed in a relatively short period.[48]

C. Initiating the Appeal Arbitral Procedure

First, a party with an appeal request shall enter into an appeal arbitration agreement. The appeal arbitration agreement is best signed in the early stages of the panel process. It should not exceed the time when the Panel issues the interim report not to affect the parties' decision to appeal to the arbitration.[49]

Second, regarding the arbitral tribunal's composition, the dispute may stipulate the arbitral tribunal's formation, the applicable procedures, and the arbitration rules in the appeal arbitration agreement.[50] The parties may choose three arbitrators to form an appeals arbitral tribunal from a list of agreed individuals (including members of existing AB and some outgoing members, who should have a broad representation of the WTO members).[51] The WTO Secretariat is required to screen ex-members of the AB; identify outgoing members who can continue to provide arbitration services; and form a list for the parties to choose the arbitrator. Both parties to the dispute may choose one arbitrator, respectively, and select the third arbitrator. If no agreement can grasp, the third arbitrator shall be nominated by the WTO Director-General. [52]

Third, in terms of the appeal arbitral tribunal's scope and the applicable law, the parties may agree on the broader jurisdiction of the arbitral tribunal as needed, including hearing legal and factual issues.[53]

Finally, concerning the binding force of the Panel report and the arbitral appeal award, the authors suggest that after the report of the panel is complete, the parties shall file the arbitration through the appeal arbitration agreement within the agreed time limit and per Article 12, paragraph 12 of the DSU. It is stipulated to suspend the adoption of the Panel report by the DSB. The party's appeal arbitration application shall include the report of the Panel as an annex. The Panel report formally forms part of the appeal arbitral award and is thus binding on the parties. The appeal arbitral award is automatically binding on the parties and does not require notice of the DSB meeting. However, it must pass through the Body and the relevant councils and committees. The appeals arbitration award should be implemented in the same manner like that of the Panel and the AB report, including applying the procedures, set out in Articles 21 and 22 of the DSU. Besides, the appeal arbitration mechanism includes the modification of the notice of appeal arbitration, the determination of the appeal arbitration procedure and the timetable, the participation of the non-disputing parties in the appeal arbitration proceedings, the rules of conduct of the arbitrators, the exchange of documents, the prohibition of unilateral exchanges, and the provisions of trial.[54] In the withdrawal of appeals, the WTO members may refer to Article 17 of the DSU and the Procedures for Reviewing Appeals. The arbitration under Article 25 of the DSU has only used "appeal arbitration" with similar functions to the AB, which appears to have narrowed the scope of Article25. However, it is targeted at responding to the current AB crisis.

D. Negotiating the Signing of the Arbitral "Arbitration Agreement"

The use of arbitration to resolve trade disputes requires arbitration agreements between the WTO members, including arbitration agreements on either a case-by-case basis, or a general arbitration agreement between relevant WTO members. Compared with international commercial arbitration, the WTO DSM involves trade disputes between members of public law nature.

Regarding the systematic application of the arbitration mechanism, a more ideal way is to conclude a plurilateral Arbitration Agreement (including appellate

arbitration) between the WTO members of the same will, stipulating the matters that can be submitted to arbitration, the rules and procedures applicable to arbitration, the composition of the arbitral tribunal, and the validity and enforcement of the award.[55] The plurilateral "Arbitration Agreement" binds the WTO members who have joined the agreement. It has stability and institutional advantages over the arbitration agreements signed between individual members.[56]

When a dispute arises, one or both parties can initiate arbitration by performing relevant procedures. Suppose the current AB crisis is not alleviated for a long time. In that case, the Arbitration Agreement will have a longer-term significance for resolving trade disputes among the WTO members and attract more members to join in the gradual multilateral situation when conditions are ripe to invite more members to join in order to achieve progressively multilateralization effect.

E. Arbitration Award and Its Implementation

Under Article 25 (3) of the DSU, the award will be final and inevitably mandatory to disputing parties. Unlike the Panel and AB reports, arbitral awards neither require to be adopted at DSB meetings nor ask the DSB to take any actions. The arbitral award is automatically binding on the parties. However, the ruling must be notified to the DSB and the relevant WTO Board and Committee so that other members can comment or question the ruling. This prerequisite of notice does not fulfill the formal arbitration confidentiality requirements, but rather the necessity of the WTO DSM's multilateral nature.[57]

While the confidentiality of arbitration is typically the cause or contemplation of the parties resorting to arbitration, the DSU notification requirements allow the undisputed members of the WTO to understand the progress and outcome of the arbitration process. Hence, the arbitration complies with Article 3.2 of the WTO DSU, which provides: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."[58]

In *US-Section 110(5) Copyright Act*, the US, and the European Communities notified the DSB of the recourse to arbitration. They explained that the decision or awards would be final, and the parties will accept the compensation determined by the arbitral tribunal.[59]

In general, once it notifies the award parties, they form final and compulsory

solutions for the dispute settlement, which bind the parties. In the *US-Section 110(5) Copyright Act*, the arbitral tribunal cited that the arbitration, according to Article 25 of the DSU, was a way to resolving disputes as an alternative to the Panel procedures, which likewise mentioned in paragraph 4.[60]

Under Article 25.4 of the DSU, Articles 21 and 22 of the DSU shall apply *vice versa* to arbitral awards. It means that concerning enforcement, arbitral awards may use the same monitoring mechanism as the Panel report and the AB Report. Suppose the losing side is unwilling to enforce the arbitral award, the complainant side may take necessary retaliatory actions or request compensation and the suspension of commercial and trade privileges. It is a reliable guarantee for the WTO members to enforce and monitor the arbitration mechanism of the DSU.[61]

6. Conclusion

The deadlock at the WTO demands the safeguarding of the AB autonomy. The most significant possibility of the protection of a binding, two-tire DSS is the appeal of arbitration under Article 25. This approach would be not only the closest to the existing AB mechanism, but could also draw upon the resources of the AB Secretariat at the WTO. Since many members favor a two stage DSS, they would likely agree to binding arbitration at the appellate stage even before the Panel proceedings begin.[62] This alternative option ensures that the WTO DSS does not regress to that of the GATT, where even the losing member could block acceptance of the finding under the positive consensus rule. Last, it ensures effective enforcement of arbitration awards. Perceptions differ on whether the WTO is at a crossroads, dire straits, or a full-blown crisis. The coming months will be crucial in deciding whether the WTO is sustaining as the global forum for trade dispute solution or shrinking back to an organization that cannot enforce its rules.

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