

Suggestions Regarding the WTO Dispute Settlement Mechanism in Strengthening Multilateralism

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Abstract: Amid the outbreak of the US-China trade war from March 22, 2018, to July 6, 2018, the United States government announced trade enforcement actions against China. This was based on an investigation conducted following Section 301 of US Trade Law. Responding to the announcement, the Chinese government retorted with claims of possible countermeasures against the US, citing the Foreign Trade Law of China. At the beginning 74 days of the trade war, the US and China filed three motions for negotiations with the WTO Settlement Body over intellectual property and tariff issues before the US imposed an additional import tariff on China officially. From the start to now, the United States and China have filed eight consultations with the WTO dispute settlement body (DSB). However, no applications have yet provided effective legal support to resolve the trade dispute between these two nations or succeeded to uphold multilateralism. This reflects the weakness of the WTO Settlement Mechanism in upholding multilateralism. With analysis and comparison of the occurrence of the US-China trade war and the eight cases brought by China and the US to the WTO DSB during the trade war easily, two shortcomings of the WTO dispute resolution process in upholding multilateralism and the reasons for them are revealed. Based on this, relevant solutions are proposed.

Keywords: US-China trade war, Multilateralism, WTO

1. Introduction

On the 22nd of March 2018, Donald Trump, to reverse the trade deficit and protect US Intellectual Property (IP), required the United States trade representative (USTR) to unilaterally look into \$50–60 billions of Chinese imports, according to Section 301 of the Trade Act of 1974 [1]. In the same vein, on the 3rd of April, US import tariffs of more than 25% were levied on \$50 billion in Chinese products. The following day, China imposed the same tariff on imports from the US in retaliation, igniting the US-China trade conflict [2]. In the wake of this trade battle, to foster "multilateralism", the US needed to have a firm grip on the power of rules-ensuring its global competitive edge [3]. after the tenure of the final three justices of the appellate panel had been completed on December 11 in 2019, which caused the quorum to be lower than the minimum number, the United States used its veto right to unilaterally oppose the beginning of choosing new judges, rendering the WTO unable to fulfill its duty of hearing new cases [4]. To explore more efficient and effective trade cooperation, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Regional

Comprehensive Economic Partnership (RCEP)-new multilateral organizations, -and the United States-Mexico-Canada Agreement (USMCA)-a minilateral organization- set up their dispute settlement segment.

To make the multilateral trading system stronger, Article 23.1 of the Agreement on the Rules and Procedures Governing the Settlement of Disputes (DSU), was enacted. It required WTO members to address obligations that had been broken, benefits that had been canceled, and benefits that had been diminished. Members are granted recourse to a dispute settlement mechanism within the WTO. This article is geared toward eliminating trade wars by sustaining a multilateral trading system. Hence, the exorbitant tariffs imposed on China by the US outlined in the unilateral 301 investigation report, and China's retaliatory actions against the US, without recourse to the rules and procedure of DSU, violated Article 23 of DSU. By analyzing legal actions taken by both parties, this Article explores the deficiencies of the WTO dispute settlement mechanism. To probe further solutions to uphold multilateralism, and reform the WTO appeals body and dispute resolution process, this paper compared the features of the dispute Settlement Mechanisms of CPTPP, RCEP, and USMCA. Finally, it listed feasible and timely solutions to these issues in this paper.

2. The Flaws of The DSU Mechanism

Table 1: The timeline of the US-China trade war (major events) [5] (continue).

US actions	Time	China actions
1, The US proposed excess tariffs on certain China products and other measures under the "section 301 investigation" 2, The US submitted a request for talks with China. DS542 China- IP Rights II (Complainant: US)	March 23, 2018	
	April 4, 2018	China responded with tariffs on \$50b of US exports. Consultations with the United States were requested by China. DS543 US-Tariff Measures (Complainant: China)
Trump threatened an additional \$100b in tariffs on Chinese goods.	April 5, 2018	Requested for consultations DS544 (Complainant: China)
An additional 25% tax will be applied to US\$34 billion.	July 6, 2018	China issued a notice concerning additional tariffs on the U.S. \$ 50 billion of goods imported from the United States (US).
Imposed tariffs on \$50b of Chinese goods.	May 29, 2018	

Table 1		
DS558 China-Additional Duties (Complainant: US) As part of China - Additional Duties on Certain Products from the United States, the United States has requested discussions.	July 16, 2018	
	14 August 2018	DS562 US-Safeguard Measure on PV Products (Complainant: China) DS563 US-Certain Measures Related to Renewable Energy (Complainant: China)
the tariffs measure \$16 billion in goods originating from China.	23 August 2018	DS565 US-Tariff Measures on Goods from China (Complainant: China)
China agreed to the United States' request on 3 June 2019, and the panel suspend its proceedings. DS542	June 12, 2019	
Notification of an appeal of the panel report of DS543.	October 10, 2020	
	30 October 2020	DS597 consultation with the US. (Complainant: Hong Kong, China)

2.1. Inability of The WTO to Resolve Multinational Trade Conflicts

It can be seen in Table 1, despite US and China's submission for a request for three consultations with the WTO (documented in Case DS543, DS543, and DS544), before gaining support from the panel report of DSU, the US imposed a 25 percent additional import tariffs on \$34 billion worth of Chinese exports on 6 July 2018, a fact outlined under section 301 investigation [6,7]. The following day, China announced imposing similar tariffs on US imports. From 22nd March to 6 July in the same year, there were 74 days left for the WTO dispute settlement body to stop the US-China trade war. If the WTO organization could provide an effective solution report that is accepted by both the US and China. Up to now, eight disputes resulted from "the US-China trade war", generating two-panel reports. Because of trade-restrictive measures by the US, mainland China retaliated with equal countermeasures. This happened despite Article 23 of DSU, requiring that multilateral trade conflicts among WTO members be resolved to strengthen the multilateral system. Members are expressly forbidden by Article 23 of the DSU from engaging in any unilateral actions and must instead "attempt to address WTO infractions" through the WTO's dispute settlement process. However, The evidence indicates that the WTO dispute settlement process is not sufficiently capable to deal with trade disputes quickly.

2.2. The Real Function of Solving the WTO Dispute Settlement in Dealing with Multilateral Disputes has Failed

Table 2: Legal grounds and present stations of cases related to the US-China trade war.

Cases	Present station
DS542	9 June 2021, the panel has lapsed.
DS543	15 September 2020, Final Report, and appeal on October 10, 2020
DS544	The Panel now anticipates releasing its final report to the parties no earlier than the last quarter of 2022 due to the intricacy of the dispute.
DS558	considering the current uncertainty about the pandemic's evolution into 2022 and restrictions to travel and in-person meetings caused, the panel will tentatively arrange further meetings with the parties by virtual means. No sooner than the second half of 2022, the panel hopes to deliver its final report to the parties.
DS562	2 September 2021, the conclusion When the division is eventually assembled, or the appellate body, China will wait for additional instructions before taking any further action in this appeal.
DS563	No dispute panel was created, and neither a withdrawal nor a mutually agreed-upon resolution was announced.
DS565	No dispute panel was created, and no mutually agreed-upon withdrawal or solution was announced.
DS597	Given the intricacy of the dispute, the panel now anticipates providing the parties with its final report in the fourth quarter of 2022.

Table 2 shows that after China and US are engaged in a trade war, the said nations applied for consultation with the WTO. There are eight such cases from 2018 to the present. But so far, only two-panel reports have been circulated: namely cases DS543 and DS562. Because of the suspension of the appellate body, the panel report of these two cases cannot be used as international legal support for governments to act on. The reports of cases DS544, DS597, and SD558 were postponed from being issued considering the complexity of the cases and the uncertainty wrought by the pandemic. Panels of the rest of the cases lapsed or were suspended.

Briefly, judging from those eight cases, no useful solution has been reached according to the WTO dispute resolution mechanisms. It indicates the dysfunction of the WTO dispute resolution process to deal with multilateral disputes.

3. Why Dispute Resolution Mechanism of the WTO is Bogged Down

The dilemma the WTO dispute resolution process faces is exacerbated by the outbreak of COVID-19. The pandemic caused governments to impose travel bans and restrict in-person interactions. This aggravated the problems of addressing multinational disputes under the current WTO dispute resolution mechanism. To make matters worse, malfunctions in the inner dispute resolution mechanism affect the WTO carrying out its normal functions in upholding multilateralism.

3.1. The Procedure of WTO Dispute Resolution Process is Too Long

Table 3: These times are rough timelines for each phase of a dispute resolution process.

Process	Normal Time	DS542	DS543	DS544	DS558	DS562	DS563	DS565	DS597
Consultations, mediation, etc	60days	205ds	242ds	192ds	92ds	332ds	-	55ds	74ds
Panel set up and panelists appointed	45days	33ds	52ds	45ds	33ds	34ds	-	-	38ds
Final panel report to parties	6months	-	About 2ys 592ds	More than 2ys	More than 2ys	More than 2ys 747ds	-	-	About 2ys

Despite Article 23.1 of DSU, exhorting the panel to uphold the principle of multilateralism, a unilateral approach as a substitute for the multilateral dispute settlement is still in play. Analyzing Table 3, the rationale behind China's countermeasure to the US's infringement in the "US-China trade conflict" becomes apparent. Since the legal procedure of the DSU is sluggish, the United States may have acted without waiting for legal backing from the WTO dispute resolution board. This is inferred from the panel report that not only shows how the WTO resolves international disputes but also outlines the legal basis for WTO members to act.

From Graph 3, only two of the eight cases have received panel reports, both over two years after the dispute had been submitted to the panel. This, although a trade war could incur huge financial losses for governments involved. China and the USA may have been presented with no choice but to resort to unilateral measures due to the deficiencies in the WTO dispute resolution process. This is because the WTO's mechanism for resolving disputes does not provide effective methods and procedures to handle emergency trade disputes. The maxim, "If you want something right, do it yourself" was held at that time.

3.2. The Flawed System for Selecting Judges

The Appeals body for the WTO is suspended primarily because of its shortage of specific procedural regulations in the judge's selection. According to the article 2.4 of DSU, The DSB shall decide by consensus where required to do so by the norms and procedures of this Understanding. The appellate body has seven permanent judges. The selection process for judges follows the consensus principle of WTO members, which states that judges can be elected only until all 164 members agree. If any member objects, the appointment cannot be approved. In 2020, when Chinese judge Zhao Hong's term in the appeals council ended, the appeals court became a shell. As the appellate body failed to perform its function, the panel report lost its legal support. It cannot become the legal action base for any multilateral trade conflict if any parties expressed their disagreement opinion and appeal.

On June 30, the WTO held its first regular dispute resolution meeting after the the 12th Ministerial Conference of the WTO (MC12). The related proposal to reopen the selection process for the appellate body was rejected 55 times [8]. The resumption of the appellate body's normal function became unpredictable again.

3.3. WTO Inadequacy in Rulemaking and Updating

Not only must the appointment of judges gain consensus, but also making decisions, rectification, amendments, and modifications of WTO's agreements and regulations must be insured. According to Article X of the Marrakesh agreement establishing the WTO, The WTO shall retain the GATT 1947-established practice of consensus decision-making. When a decision cannot be made by consensus, unless otherwise specified, the matter at hand will be determined by a vote. However, Since the launch of the Doha Round of negotiations, Significant changes have been made to the global commerce system. China, India, and other emerging economies have increased their power in deciding the result of multilateral negotiations. Under the circumstances, it is tricky for all members to agree on all issues by "consensus". That's why after 25 years after the establishment of WTO, only two multilateral agreements were adopted at the Ministerial Conference. Understandably, some regulations of the WTO and DSU cannot deal with multilateral conflicts.

4. The Necessity of Formulating New Rules in the DSC

4.1. The Essential Role of the WTO Dispute Resolution Mechanism

With 164 members, the multilateral trading system is supported by the WTO's dispute settlement mechanism, which also makes a distinctive contribution to the stability of the global economy [9]. Maintaining the effectiveness of multilateral trade depends on the WTO's process for resolving trade disputes under the DSU. When governments believe their rights under WTO accords are being violated, they file complaints with the WTO. Since the establishment of the WTO 25 years ago, 607 disputes were requested for consultation, 365 adjudicated by the panel, over 200 cases in the appellate body were resolved, and many successful dispute cases have been recorded. The effects of closing the appellate body are already clear. Every appeal to the appellate authority has been put on hold as of December 2020. The multilateral trading system has been undermined. What's more, after the suspension of the appellate body, the Arrangement for Multiparty Interim Appeal Arbitration (MPIA) was established by 6 WTO members, known as the MPIA, In the absence of a fully operational and staffed WTO appellate body, it serves as an alternate procedure for resolving WTO disputes that are appealed by members [11]. This further reflects the importance and indispensability of the WTO dispute resolution procedures.

4.2. It is The Right Time to Reform

On June 17, 2020, the MC12 was held in Geneva, and the agreement on fisheries subsidies was adopted successfully at this meeting. This is the WTO's first-ever multinational agreement in the past nine years, which followed the first multinational pact, the trade facilitation agreement, initiated by WTO in 2013 at the 9th Ministerial Conference of (MC9) [10]. the reaching of the agreement on fisheries subsidies means that "multilateralism" is still in the common interest of the world's nations and the WTO is the crucially implacable multinational organization for solving global difficulties of all parties. As Director-General Okonjo-Iweala of WTO said in the interview: to meet the needs of the future world, ensure put international agreements into action, and solve the conflicts in multinational trade, as a primary objective of the WTO, it is the right time to reform the procedure for resolving disputes and appeals court [11]. What's more, on the MC12, Mexico, on behalf of 123 members of WTO, presented a proposal to initiate a selection process to fill the vacant posts of judges on the appellate body, which means most countries of WTO have the vision of resuming the appellate body's role. On the MC12, the WTO parties reached the "MC12 outcome document", The parties reiterated their commitment to the WTO's strengthening as the centerpiece of the multilateral trade

system. To promote the needed reform of the WTO, the parties pledge to have a full and well-functioning dispute settlement mechanism available to all members before 2024.

5. The Suggestions for Resuming the Function of The DSU Mechanism

To strengthen the functions of the WTO dispute settlement body to avoid a trade war and to uphold the multilateral trade system to perform smoothly. Due to the shortcomings of the WTO dispute resolution procedure described in this study, several corresponding solutions are given below.

5.1. Set Up Network Dispute Settlement Center

As a famous legal maxim states “Justice delayed is justice denied”. To facilitate litigation, in 2018, the Beijing internet court was established. According to the “Notice of the Supreme People’s Court on the Publication of the Plan to Establish the Beijing Internet Court and the Guangzhou Internet Court”. The “24-hour open” policy was implemented in the internet court. Litigants can apply for filing at any time and in any place by computer or mobile phone. Litigants can participate in litigation through online operations even if they are not in court or during non-working hours. Furthermore, Online trials, automatic generation of the trial record and remote electronic seal, and other technologies have been adopted. Both parties can participate in the litigation through remote login to the electronic litigation platform, and the whole process of the trial is recorded by an automatic voice recognition system, which not only saves the litigation cost of the parties but also improves the efficiency of the trial. Referring to the Beijing internet court, it seems logical to build up a comparable online dispute resolution center within the WTO dispute resolution process. It can facilitate disputes addressing in time and can solve the disputes timely. It is also useful for dealing with emergency trade cases, to give both parties a legal foundation on which to act. The internet dispute settlement center can meet the challenge which results from entry restrictions and distance measures caused by COVID-19.

5.2. Resume the Function of the Appellate Body

According to the article17.2 of DSU: “Vacancies shall be filled as they occur”, and the article2.4 of DSU: “The DSU shall decide by consensus when required to do so by the norms and processes of this Understanding”. However, under the current situation, reaching a consensus by all WTO is impossible.

It is assumed that article 2.4 of the Marrakesh Agreement may provide possible legal support for updating the DSU. This rule is about the Plurilateral trade agreement, the Plurilateral trade agreement is an attempt by some members to make rules for specific issues, which reflects the double limitation of the issues and the number of members. According to Article 2.4 of the Marrakesh Agreement--The “Plurilateral Trade Agreements” included in Annex 4 (“Plurilateral Trade Agreements”), which are enforceable by the countries who have accepted them, are also a part of this agreement and are binding on those members. Members who have not ratified the plurilateral trade agreements are not given any obligations or privileges. As at the MC12, Mexico, on behalf of 123 members, presented a proposal to initiate a selection process to fill the vacant posts of judges on the appellate body, which means three forth of the WTO members support selecting new judges to resume the appellate body. Those 123 members could reach a Plurilateral agreement that regulates. Using the new Plurilateral agreement to reform the process of selecting judges. It appears to be a practical strategy. The multilateral trade agreement has the potential to influence changes to the WTO's trade rule-making process.

5.3. Adding the “Sunset Clause”

If the DSU could be reformed by a new Plurilateral trade agreement or other methods a “sunset clause” could be added to the new agreement to ensure that members could update the agreement provisions. Once the sunset date is reached, a sunset provision ensures that the entire law-or certain elements of it-are automatically repealed. To extend the duration for which a provision subject to a sunset clause is in effect after the sunset date, the Agreement shall be revised. Like the “sunset clause” of The USMCA - unless both Parties agree to a new 16-year term, the agreement expires 16 years after it first came into effect. It is a long-term “Review Clause”. The first joint review will be in the 6th year after the signature of the agreement and the next one will be 6 years later. The agreement's untimely demise was prevented by a review and term extension mechanism, which also allowed it to be updated frequently to accommodate new political and economic difficulties. This clause could make the whole agreement and even related issues have certain timeliness and flexibility.

6. Conclusions

Little has been done by the WTO dispute body to ease trade tensions between the US and China. The US and China both had filed several complaints with the WTO dispute resolution body. But with no useful support from it, they had to “self-help”. The WTO’s process for resolving disputes is indispensable for members to maintain a multilateral trade system. To restore the appellate body’s function, revamping the DSU is necessary. This paper analyzed the reasons the WTO dispute resolution body failed to deal with multilateral trade conflicts efficiently and effectively, and based on those reasons, several suggestions are thus provided.

To enable the WTO dispute settlement body to resume its regular operations, further research must be conducted to holistically explore the reasons behind the appellate body’s suspension. Such investigation should encompass not only the legal aspect of the issue but also view matters from a political and economic standpoint. Globalized trade is the norm nowadays. Given this, multilateral trade disputes are inevitable. If trade conflicts are promptly ironed out by the WTO dispute resolution body, the ongoing trade war would ameliorate.

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