

Overview of the Issues that WTO Dispute Settlement Faces

JEF Secretariat

Significance of the “AB Crisis”

The so-called AB (Appellate Body) Crisis is the result of the United States’ consistent opposition to the Dispute Settlement Body’s (DSB) proceeding to fill vacancies on the AB, triggered by US statements at the DSB on Aug. 31, 2017 that ultimately led to the expiry of the terms of all AB members on Nov. 30, 2020. This refers to the situation in which the AB is effectively forced to cease its activities.

Unfortunately, there have been many cases in the WTO in recent years that have been abandoned due to a lack of agreement among the parties, and at first glance this AB Crisis appears to be a case in the same vein. However, the AB Crisis is deeply related to the theme of this project: “Restructuring the International Trading System”. The WTO’s dispute settlement system is unique in the history of public international law, but the AB Crisis is partly eliminating such unique characteristics.

The WTO agreements, including the “Understanding on Rules and Procedures for the Settlement of Disputes” (DSU), are classified as a type of public international law. If you open any standard textbook on public international law (including those outside Japan), you will always find the following statements.

“The international community does not have a unified legislative body like national societies. International law is created based on the consensus of the nations that are members of the society. The international community has no mechanism for the compulsory settlement of disputes by international tribunals. ... International tribunals cannot take place without the consent of the parties to the dispute.”¹

Dispute settlement procedures in the WTO present a much different aspect from this description. (Conversely, there is a persistent argument that this is why the WTO (panels and ABs) are not

¹ Yuji Iwasawa, *International Law*, University of Tokyo Press, 2020, pp. 16-17.

international “tribunals”.) Some specific examples of the features of dispute settlement procedures in the WTO are as follows.

1. A panel (first trial, so to speak)² will be established unless it is decided by consensus at a meeting of the DSB that no panel should be established. (DSU Article 6.1)
2. The report of the panel (the draft judgment of the first trial, so to speak) shall be adopted at a meeting of the DSB unless a party to the dispute formally notifies the DSB of its intention to petition the AB or the DSB decides by consensus not to adopt such report. (DSU Article 16.4)
3. The report of the AB (the draft judgment of the second trial, so to speak) shall be adopted within 30 days after its transmission to the member states, unless the DSB decides by consensus not to adopt the report. (Article 17, paragraph 14)
4. If the losing party fails to implement the panel report or the AB report, the prevailing party may apply to the losing party to impose sanctions, which shall be approved unless the DSB decides by consensus to reject them. (DSU Article 22)

The method whereby a proposal is agreed upon except in the case of a “consensus decision not to do something” is commonly referred to as negative consensus. Specifically, in the case of Article 6.1, for example, even if the respondent country opposes the establishment of a panel, the panel will be established unless there is a consensus – that is, an agreement by all countries, including the respondent country – that the panel should not be established. The panels will be installed unless there is a consensus – i.e., an agreement by all countries, including the respondent country – that the panels should not be installed. Since it is unlikely that the complaining party would normally oppose the installation of the panels, this negative consensus would, in effect, amount to an automatic agreement. Conversely, even if the other party explicitly objects, things will proceed against the wishes of that other party.

This seems to contradict the common sense of international public law, as stated at the beginning of this article, that “the international community does not have a mechanism for forcibly settling disputes by international tribunals.” At first glance, this seems to contradict the common sense of public international law, which states that “an international tribunal cannot take action unless the parties to the dispute agree to it.” Although there are various arguments that address this point from an academic perspective, it is not the purpose of this paper to discuss this point.

In this chapter, we will attempt to provide an overview of the AB Crisis from the perspective of the larger question of in what direction it can be resolved. In other words, this chapter will attempt

² The terms “first instance” and “second instance” are not formal terms in the WTO, but will be used in this paper as a simplified way of referring to the panel and AB stages.

to provide an overview of possible positions on the recent malfunctioning of the WTO's dispute settlement system, which occupies a unique position in the history of public international law, as described above.

Three Possible Positions

The first possible position is that “the existing system under the DSU should be restored as it is.” In other words, by restoring the function of the AB, the functions of the DSU's two-trial system (the functions of both the panel as the first trial and the AB) would be restored, and appeals (so-called appeals into the void) would not become de facto denials of judgments.³ For the sake of simplicity, this position will be referred to as the “revival theory”.

The second possible position is that the operation of the WTO's dispute settlement system, which occupies a special place in the history of public international law, should be reviewed – or ultimately the DSU should be amended – so that parties dissatisfied with the first trial (panel report) can be brought to arbitration or mediation. The position is that the parties should pursue arbitration or mediation rather than continue “litigation”. For simplicity's sake, we will refer to this position as the “arbitration theory”.

The third possible position is that if the WTO is not bound by the two-trial system, its special dispute settlement function can be utilized even in the current situation where the AB is not functioning. The mechanism whereby a panel report is adopted by negative consensus even if one party disagrees with it is still functioning. In other words, all negative consensus systems in the DSU are still in effect if each country considers the first trial to be the final trial (i.e., if it agrees not to appeal). For simplicity, we will refer to this position as the “first trial theory”.

Before commenting on the above three positions, we would like to make a comment on the argument that the WTO is no longer useful in the first place, apart from the above three positions.⁴ There are certainly many theories about a kind of flow perspective on how much value the WTO organization currently adds (in terms of dispute settlement and agreement on agreements). On the other hand, there is no fundamental doubt that the rules embodied in the WTO agreements support enormous value in the modern world – a stock perspective, if you will. It is impossible to argue

³ Under the current DSU, if there is an appeal, the panel report is not discussed in the DSB and thus there is no room for negative consensus. On the other hand, since the AB is not active when an appeal is filed, the appeal is effectively the same as the act of “storing away” the panel report. This is why it is commonly referred to as an “appeal into the void”.

⁴ e.g., Associated Press report, Feb. 16, 2024, <https://apnews.com/article/trump-ngozi-okonjoiweala-world-trade-organization-ecommerce-fishing-agriculture-d9fdf07379820f25c4308af9fd2750ae> (accessed July 11, 2024.)

that we should return to the world before the 20th century, when there were no international rules of most-favored-nation or national treatment, and countries traded according to their own interests and convenience. Of course, it is common nowadays to argue that some inconvenient rules should be shelved for the sake of one's own interests (the so-called economic security argument is often used as such), but we do not see any argument that not only one's own country but all countries in the world should abandon all trade rules and allow everyone to trade and manage their trade as they wish. We don't see any argument that says that all countries in the world, not just our own, should abandon all trade rules and manage trade as they wish. The absurdity of such an argument will require no lengthy discussion. The main focus of this project, "Restructuring the International Trading System", is on the latter (the value that the rules embodied in the WTO agreements support in the modern world).

The first theory of revival is one that is advocated in official forums by a very large number of WTO members. For example, in the DSB, since the October 2017 meeting⁵ and in each of the 87 meetings so far,⁶ 102 co-sponsors have argued that the appointment of AB members should be made at the earliest possible date. In response, the US, while emphasizing its concerns about the WTO's dispute settlement system, has repeatedly stated its position that fundamental reform is first necessary for the WTO's dispute settlement system to function properly.⁷

It is the legal obligation of member states under the DSU to fill the vacancies of AB members whose terms have expired.⁸ Therefore, for the DSB not to fill the AB vacancy, or more precisely, for the US to oppose the initiation of the process to fill the vacancy, would be an act of disobedience to the DSU, even without waiting for elaborate legal analysis and argument. Moreover, as discussed at the beginning, this case is not just about a single agenda item, but about the ups and downs of a procedure that has resulted in a kind of revolutionary development in international law.

On the other hand, unlike the dispute settlement procedure explained above, the DSB's decisions related to the reappointment of AB members are made by ordinary consensus (no opposition) and not by negative consensus. In other words, what this revival theory faces is a political reality. The press reports in the US indicate that there has been strong opposition to the free trade philosophy of the American people in general in recent years, and reflecting that public sentiment, there appears to be bipartisan support for restricting free trade (e.g., in the name of economic security). The backlash and alarm over China is further fueling this momentum.⁹ Japan suffered from so-

⁵ See WT/DSB/M/404 (Agenda Item 7) for the minutes.

⁶ Counted up to the May 2024 meeting, for which the minutes are available at the time of this writing.

⁷ See, for example, the exchange in WT/DSB/M/486 Agenda Item 8.

⁸ Article 12, paragraphs 1 and 2 of the DSU.

⁹ See, for example, Reuters report of Dec. 23, 2023, "US committee offers 2024 legislative

called trade friction with the US in the 1980s, and there were calls in the US Congress for Japan to drop some of its free trade principles and to demand managed trade (so-called numerical targets, etc.). At that time, however, although there were differences of opinion within the US Congress and, more specifically, among US business and the American public about the nature of trade with Japan, there were few voices that fundamentally questioned the significance of “free trade” itself. In this sense, the profound shift in public opinion in the US over the past decade or so has been remarkable.¹⁰ In order for the revival theory to be realized, it will require a grand political action plan to successfully turn this huge trend in the US – and the recent transition to similar thinking in other countries – on its head.

The second theory of arbitration is the area in which WTO members and scholars have so far been most wisely engaged. For example, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), which was agreed among some members in 2020 with the EU taking the lead, cleverly utilizes the arbitration system of Article 25 of the current DSU to allow parties dissatisfied with the panel report (first trial) to file an appeal into the void and in order to prevent the DSU from malfunctioning altogether and bringing the process to a standstill, parties dissatisfied with the panel report, instead of appealing (to the now-defunct AB), agree to a de facto second trial utilizing the current DSU Article 25 arbitration system and, if necessary, bring the arbitration results further back into the DSU process. This is the wisdom of the situation. Alternatively, a proposal has been made to use an arbitration-like process instead of the usual DSU procedure for disputes related to GATT Article 21 (security exception), the most politically difficult of the recent disputes. The DSU reform proposal circulated to the WTO’s General Council just prior to the 13th Ministerial Conference also devoted many pages to proposing ideas related to arbitration.

The current lack of functioning of the AB is obviously a deplorable situation, but ironically, the current situation is a return to the normal state of international public law. In other words, “the international community has no mechanism for forcibly settling disputes through international tribunals.” An international tribunal cannot be established without the consent of the parties to the dispute. This is the normal state of affairs. Unlike the WTO dispute settlement procedure, which is debatable whether or not it is a “court” in the academic sense, the International Court of Justice (ICJ), as its name implies, is a UN court. At the ICJ, a trial cannot take place unless the parties to the dispute agree to it. (The ICJ has no jurisdiction without the consent of the parties, including a

‘blueprint’ for countering China.”

<https://www.reuters.com/world/us/us-committee-offers-2024-legislative-blueprint-countering-china-2023-12-12/> (accessed July 10, 2024)

¹⁰ The opposition to free trade extends far beyond the trade arena. For example, *The Economist* magazine titled its March 1, 2018 issue “How the West got China Wrong”, in which it argued that the then-US administration’s notion that bringing China into the WTO and promoting free trade would promote democracy in China was ultimately wrong.

declaration of acceptance of the so-called Optional Clause.) Nor can the ICJ's decision be effectively enforced by sanctions by the prevailing state, WTO-style. The aim of those who argue for arbitration is to weaken some of the strengths of the WTO that triggered the AB Crisis, namely the de facto enforceability of the WTO dispute settlement system, or more precisely, a system that can overcome the opposition of one party in accordance with the negative consensus procedure. This is understood to avoid a situation in which a WTO member country stops using the WTO dispute settlement system altogether (i.e., including the panel as the first trial).¹¹

Many of the proponents of the arbitration theory propose an arbitration-like system, focusing on the treatment of disputes concerning the economic security exception. This is because the handling of disputes in which a disputing party brings up GATT Article 21 (the economic security exception clause) as a defense is politically most difficult. Even putting aside the legal interpretation of this proposal, it is not easy to imagine that once a party to the dispute recognizes that "this case (the case in question) concerns the economic security of our country" and publicly declares so, it is not easy for that country to withdraw or change its position just because it receives objections from the WTO's dispute settlement system. This is true even in normal times, but it is especially true in light of the current international political situation where economic security becomes crucial in trade disputes.. It can be said that the arbitration theory is a position that attempts to rescue the WTO dispute settlement system, which is unique in the history of international law, by making the most difficult part of the system separate (and restoring this part to the normal state of international law).

The third theory of first trial is not so much a position on reform as it is a position on how to assess the current situation. For example, in a speech at the Peterson Institute for International Economics (PIIE) on April 16, 2023, WTO Secretary General Ngozi Okonjo-Iweala noted that too much attention has been paid to the AB Crisis and stressed that in the first instance the panel

¹¹ It should be noted that a dispute settlement system also existed during the GATT era, but at that time there was neither the Appellate Body nor a negative consensus system. In other words, the adoption of the GATT panel report was not easy, since the panel report was referred to the GATT Council and could not be appealed, and this report could not be adopted without the consent of all member states. When the panel's report was tabled, it was often stated that "the parties to the dispute are currently discussing remedial measures, so we cannot make clear our approval or disapproval of the report at today's meeting." In some cases, the panel report was not adopted in the end. However, this was not always the case. Satisfactory conclusions were reached in "more than a sufficient majority" of cases. At the time of adoption of the panel report, the losing respondent stated, for example, "I do not oppose the adoption of the panel report, but I oppose some of the conclusions reached by the panel ... we have a number of problems and reservations with some of the conclusions reached by the panel ... Japan has reservations about the interpretation given by the panel." (Excerpt from the minutes of the GATT Council meeting C/M/246 (Nov. 7, 1990 meeting), Agenda Item 10.)

is functioning normally.¹²

The point that the dispute settlement system under international law must be a two-trial system is not what is written in the UN Charter. In fact, the ICJ is a one-trial system (there is no higher tribunal). On the other hand, there does not seem to be much disagreement with the logic that a two-trial system is more secure than a one-trial system in correcting legal mistakes. Therefore, whether or not things will proceed in the future with the idea of the one-trial theory involves the following issues. First, as we wrote in the section on the revival theory, an assessment of the prospects for an operation that will continue to resolutely pursue the point that not filling the vacancy of the AB members is clearly a violation of the DSU. Second, the question of whether the country will be able to abandon the traditional stereotype of appealing when its arguments are not accepted. The second point is particularly profound. From the viewpoint of the normal state of affairs under public international law, which states that “an international tribunal cannot be held without the consent of the parties to the dispute,” it is natural for a country to raise an objection if its claim is not accepted, and it is not its fault that the AB is not functioning as it should, and therefore, if its appeal is ultimately rejected (an appeal into the void), that is not its fault either. Therefore, the logic goes that even if one’s appeal is rejected (appeal into the void), it is not the responsibility of one’s country. In other words, in order for the situation to develop in the future as described in the first trial, WTO members must understand that the thesis that “international trials cannot take place unless the parties to the dispute agree” is not valid in the 21st century, at least with regard to trade, and that they will voluntarily follow the judgment of the panel without being compelled to do so by treaty (DSU, etc.). In other words, it is necessary to consider that the “consent of the parties to the dispute” is necessary and not to abuse this point.

Conclusion

From the traditional viewpoint that international law is established by the consent of sovereign states and that the international community has no mechanism for forcibly settling disputes through “judicial decisions”, the WTO dispute settlement system, based on the negative consensus system, can be considered a kind of revolution in international law. This “revolutionary” system is currently being put to the test. The question now is how the international community can overcome this crisis in international law. In many ways, the present era is a chaotic time of fundamental change within each country and within the international community, and it is our sincere hope that the international community will move in the right direction in resolving trade disputes.

¹² <https://www.ppie.com/events/2024/renewal-global-trading-system-wto-30> (accessed July 8, 2024.)