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RESEARCH ARTICLE

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WTO disputes settlement
—China's performance and proposals on its improvement*

Abstract How to understand China's policies and practices on the WTO dispute settlement since its accession to WTO and conduct objective and reasonable assessment on its performance and achievements in WTO dispute settlement is currently an important issue of concerns. By analyzing China's performance in the WTO dispute settlement in the broad environment of the WTO dispute settlement activities over the past thirteen years, this paper holds that the WTO dispute settlement mechanism has made remarkable achievements over the past 13 years, strongly promoted the trade relationship of the WTO members and settled tough and complicated trade disputes in a timely, effective and proper manner; and over the past seven years after China's accession to WTO, China's practice in WTO dispute settlement mechanism has rendered the following initial impression: High-profile positive policies and low-profile moderate acts; not hesitate to file complaints but be good at responding to complaints in participating in the WTO dispute settlement activities; more consultations should be made with less litigations; diligent in participation and strict in implementation; and handling trade disputes related to the WTO rules in a reasonable, effective and moderate manner.

Keywords WTO dispute settlement mechanism, China's practices, WTO laws

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摘要 如何认识中国入世以来参与 WTO 争端解决活动的政策与实践，并对中国在 WTO 争端解决活动中的表现及其成效进行客观合理的评价，是当前值得关注的问题。从中国在 WTO 争端解决中的表现放在 WTO 十三年争端解决活动的大环境中，可见 WTO 争端解决机制十三年的运作成效显著，有力地促进了 WTO 成员之间的贸易关系，及时有效稳妥地解决了棘手而复杂的贸易纠纷；加入 WTO 七年来，中国在 WTO 争端解决机制方面的实践给人的初步印象是：政策高调积极、行事低调节制；在今后参与 WTO 争端解决活动中应勇于投诉，善于应诉；勤参与，严执行；有理、有力、有节地处理与 WTO 规则有关的贸易争端。

关键词 WTO 争端解决机制，中国实践，WTO 法律

In the recent two years, faced with increasing trade frictions, some people think Chinese Government is weak and dare not initiate the WTO dispute settlement mechanism, and some people even say jokingly that they would mail calcium tablets to the competent departments of the government to make them stronger; in the situation where the EC, the USA and other countries frequently initiated the WTO dispute settlement mechanism against China, especially when the preliminary investigation results adverse to China in the report of the WTO panel on "Chinese measures affecting import of auto parts and components" has been reported by the media recently, the public has made strong responses. Some people believe "such preliminary ruling by the WTO is unfair for China since it has implemented double standards between developed and developing countries"; some people believe "such ruling by the WTO is partially favorable to developed countries including the EC, the USA and Canada, attempting to force China to make concessions under the pressure of international organizations so as to maintain the vested interests of multinational enterprises in China"; some people criticize that "such ruling by the WTO is completely unfair, and obviously partially favorable to developed countries, and consequently it is unnecessary for China to bear any responsibility"; and even some people point out that "The naked intervention in China's internal affairs is an unacceptable insult in nature, and thus we must throw away the idea, saying and practice that domestic 'reforms' must rely on external forces."

How to understand the policies on and practices of China's participation in the WTO dispute settlement since her accession to the WTO and conduct objective and reasonable assessment on her performance and achievements in the WTO dispute settlement is currently an important issue of concerns. This paper firstly analyses the WTO dispute settlement activities over the past 13 years, on the basis of which comments will be made on China's performance and achievements in the WTO dispute settlement activities, followed by several proposals to facilitate China's further participation in WTO dispute

settlement activities.

1 WTO dispute settlement activities over the past 13 years

1.1 Large number of cases accepted

Generally speaking, when a WTO member (sometimes two members or more) charges another WTO member of violating a WTO rule or breaking a commitment and makes a request of consultation based on the relevant provisions of the DSU, complaints[1] occur to the WTO. In accordance with the report of the WTO, over the past 13 years from the beginning of 1995 to the end of 2007, the WTO Dispute Settlement Body (DSB) had totally accepted and heard 369 complaints.[2] (Leitner, Lester, 2008) Among them, 24 complaints were subject to Article 21.5 of the DSU, 127 complaints reviewed by panels and the Appellate Body (including 20 reviewed and reported by panels and the Appellate Body under the procedures of Article 21.5 of the DSU and 107 reviewed and reported by panels and the Appellate Body under other procedures) and 91 complaints settled or concluded (among which 60 concluded by mutual consent and 31 by other means).

Divided by year,[3] there were 25 complaints in 1995, 39 in 1996, 50 in 1997, 41 in 1998, 30 in 1999, 34 in 2000, 23 in 2001, 37 in 2002, 26 in 2003, 19 in 2004, 12 in 2005, 20 in 2006 and 13 in 2007. Thus, it can be seen that in the first three years complaints with WTO drastically increased with peak in 1997, a slight drop occurred in several of the following years, complaints increased again in 2000 and 2002, the smallest number of new complaints (only 12) appeared in the year 2005 for 12 years, while the number of complaints rebounded up again in 2006 (20 in total), less than the annual average of the first ten years, and a decline in 2007 occurred (only 13 complaints).

The number of accepted new complaints was the smallest in 2005 from the establishment of WTO allegedly because of the following three reasons: Firstly, most of the backlogged problems in the age of GATT had been completed;

[1] Though the disputes accepted and heard by the WTO dispute settlement mechanism include "violation complaints", "non-violation complaints" and "situation complaints", actually they are mainly "violation complaints".

[2] WTO: WT/DS/OV/32, January 24, 2008. Secretariat of the WTO assigns a separate serial number of dispute settlement (DS) to each consultation request (generally called complaint or appeal), but for the separate complaints by two members of WTO or above about the same government measures of the same member, separate dispute settlement serial numbers will be assigned. For example, the complaint of eight members of WTO about the USA steel safeguards in 2008 was assigned 8 DS numbers. As far as the dispute issues is concerned, based on analysis, 369 complaints roughly involved 273 dispute issues.

[3] The year distribution of accepted cases (January 1, 1995–April 20, 2008).

secondly, Doha Round might lead to delay of complaints in agriculture; and thirdly, most of the challenges against the implementing measures of Uruguay Round Agreements had ended.[4] The panels established in 2005 and 2006 were fewer (7 panels a year compared with the annual average of 10 in the first ten years). However, the year 2005 witnessed the largest number of activities of the Appellate Body (11 appeals, 2 appeals under Article 21.5 and 4 arbitrations of "reasonable period of time" for implementation) and the largest number of activities of compliance panels (5 compliance panels). Though appeals in 2006 dramatically declined, compliance disputes reached the peak in the 13 years (6 compliance complaints), compliance panels remained active (3 compliance panels) and no new trade retaliations and arbitrations occurred. Currently, as many cases involve disputes at the stages of either litigation or implementation, there are more follow-up litigations in such cases (such as Upland Cotton, Sugar, Airbus and Boeing Subsidies, Internet Gambling and GMO cases). In 2007, compliance panels still remained active (3 compliance panels).

In number, the WTO dispute settlement mechanism made remarkable achievements. Comparatively, GATT accepted and heard total 300 complaints during 48 years (WTO, 1995);[5] there were 136 accepted and heard cases for more than 60 years from May 22, 1947 in UN International Court of Justice when the first litigation was accepted to July 27, 2007,[6] and up to July 13, the court had made 93 rulings and published 25 advisory opinions;[7] there were total 222 accepted and heard investment disputes in ICSID from its establishment in 1965 to the end of 2006,[8] and up to July 30, 2007, 125 cases were concluded,[9] with 111 pending cases;[10] while the WTO dispute settlement mechanism had accepted and heard 324 complaints in the first ten years, passed 115 panel reports and 73 Appellate Body reports and made 42 arbitrations. (Hughes, 2006)

1.2 Outstanding performance of panels and the Appellate Body

1.2.1 Panels

As far as the source of panelists is concerned, according to the provisions of

[4] http://www.Wita.org/index.Php?tg=fileman&idx=get&id=4&gr=Y&path=&file=WITA+Presentation+-+November+2006.PPT.
[5] According to the data released by WTO, GATT had accepted and heard nearly 300 disputes and passed 101 dispute settlement reports within 48 years.
[6] http://www.icj-cij.org/docket/index.php?p1=3.
[7] http://www.icj-cij.org/presscom/en/inotification.pdf.
[8] http://www.worldbank.org/icsid/news/ICSIDNews_Winter06_CRA.pdf.
[9] http://www.worldbank.org/icsid/cases/conclude.htm.
[10] http://www.worldbank.org/icsid/cases/pending.htm.

Article 8.3 of the DSU, citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned, unless otherwise agreed by the parties to the dispute. Thus, citizens from the USA and EC members generally shall not serve as panelist for disputes concerning the USA and the EC, and accordingly panelists tend to be the WTO members who are comparatively active in the affairs of the WTO but not the main users of the WTO dispute settlement mechanism. As far as the panel reports released during 1995–2007 are concerned, by source of experts, Top 10 members of the WTO are as follows: 36 panelists from New Zealand, 34 from Australia, 32 from Switzerland, 20 from Brazil, 19 from Canada, 17 from Hong Kong, 16 from India, 14 from Poland (before accession to EC in 2004), 14 from South Africa, 13 from Chile and 13 from Germany.

Among 399 panelists, 157 came from 6 members of the WTO: Namely, New Zealand, Australia, Switzerland, Brazil, Canada and Hong Kong China. Among them, at the top five places were such countries as Switzerland, New Zealand, Australia, Brazil, South Africa during 1995–2000, and New Zealand, Australia, South Africa, India and Uruguay during 2002–2006. On the contrary, merely 11 panelists came from the USA, but the situation was comparatively complex for EC since many countries have joined EU in the recent several years.

Alternatively, according to the introduction by Bruce Wilson, Director of Legal Affairs Division of WTO Secretariat on November 16, 2006, up to the middle of November 2006, more than 190 persons from 47 members of WTO were appointed as experts in 123 panels.[11] Among them, those with official backgrounds accounted for around 75% (84% during 1995–2000 and 78% during 2002–2006) and those without official backgrounds about 25%. In terms of experiences in GATT/WTO dispute settlement, two of three experts had experiences in GATT/WTO dispute settlement, accounting for 45% during 1995–2000, and 78% during 2001–2005.[12] Director-general of the WTO participated in the establishment of 69 of 123 panels, accounting for 56% of the total, and the percentage was higher in recent years, accounting for 79% during 2003–2006.

The time from the establishment of a panel to its release of reports according to the provisions of the DSU should not exceed 9 months in principle while as an actual circumstance, 11 months and 2 days were spent during 1996–1999, 12 months and 6 days during 2000–2002 and 13 months and 27 days during

[11] http://www.wita.org/index.php?tg=fileman&idx=get&id=4&gr=Y&path=&file=WITA +Presentation+-+November +2006.PPT.
[12] http://www.sipa.columbia.edu/wto/pdfs/DaveyWorkingPaper.pdf.

2003–2006 (50% longer than the prescribed target time specified by DSU).[13] One of the reasons is that numerous WTO cases were extremely complicated and fact-intensive and that increasing business secrets submitted to panels increased additional burden to panelists and assisting officials from the WTO Secretariat (such as Upland Cotton, Sugar, Airbus and Boeing Subsidies, Internet Gambling and GMO cases).

On September 12, 2005, the panel procedures opened to the public in the case of the USA and Canada retaliating the EC in beef trade dispute for the first time, but WTO members still universally opposed improvement of transparency of the WTO proceedings, and even all the main parties concerned were unwilling to broadcast those litigations on Internet.

Panels and the Appellate Body played an important role in the WTO dispute settlement activities. In the first ten years from the beginning of 1995 to the end of 2004, 324 complaints had been filed with the WTO DSB, of which 159 had been resulted in panels.[14] By the end of 2007, 220 of 369 cases entered into the panel proceedings, accounting for 60% of the total, among which 132 panel reports were passed by DSB (including 22 under Article 21.5 of the DSU and 110 other panel reports), and 88 were appealed (including 14 compliance panel reports and 74 original panel reports), at the appealing rate of 67%.[15]

1.2.2 The Appellate Body

By the end of 2007, the Appellate Body had received 86 appeal notifications, timely conducted strict reviews on the appealed panel reports, completed reviews on time, released 84 reports of the Appellate Body and submitted reports to DSB.

1.3 Members from developed countries as main users and those from developing countries taking initiative to participate

1.3.1 General situation

Over the 13 years from the beginning of 1995 to the end of 2007, among 369 consultation requests accepted by DSB, 222 were complaints filed by members from developed countries, among which 136 concerned the members from

[13] Idem.
[14] See: WTO: Annual Report 2005, p. 144.
[15] WTO: Appellate Body Annual Report for 2007 Annex 4, WT/AB/9 January 30, 2008. There were no panel reports passed in 1995.

developed countries as responding party, and 86 concerned the members from developing countries as responding party; 141 were complaints filed by members from developing countries, among which 83 concerned the members from developed countries as responding party, and 58 concerned the members from developing countries as responding party; and there were 6 complaints jointly filed by the members from both developed countries and developing countries, involving the members from developed countries as responding party. Members from developed countries as complainants and responding parties accounted for slightly more than 60% while members from developing countries as complainants and responding parties accounted for nearly 40%.[16]

The US and the EC are the largest users of the WTO dispute settlement mechanism, with the cases involving the USA or the EC as complainants totaling 164, accounting for 44% of the total over the 13 years; similarly, with the cases involving the USA or the EC as responding parties totaling 158, accounting for 43% of the total over the 13 years; moreover, there were as many as 48 trade cases directly between the USA and the EC,[17] accounting for 13% of the total over the 13 years. In general, members from developed countries were the main users of the WTO dispute settlement mechanism, and members from developing countries, of course, also proactively employed the WTO dispute settlement mechanism in the trend of rise in recent years. Though complaints of the USA and the EC have slightly fallen in recent years, other members of the WTO have been active in the WTO dispute settlement activities.

According to the introduction by Bruce Wilson, Director of the Legal Affairs Division of the WTO Secretariat on November 16, 2006,[18] there were 40 WTO members who had filed complaints under DSU, and there were 45 WTO members being the targets of complaints by other members; 30 WTO members requesting to set up panels, and 25 WTO members being the objects investigated by the above-mentioned panels; 65 WTO members participating in consultation as a third party, and 71 WTO members participating in the panel proceedings as a third party; 29 WTO members taking part in appeal activities as complainants or the appealed parties, and more than half of 149 WTO members had participated in appeal activities as “a third participant”.

Based on the latest data of the WTO, from the beginning of 1995 to April 18, 2008, Top 10 members participating WTO dispute settlement activities as the dispute party concerned and the third party were as follows: The USA, the EC,

[16] http://www.wto.org/english/tratop_e/dispu_status_e.htm.
[17] Some disputes also concerned other members of WTO.
[18] http://www.wita.org/index.php?tg=fileman&idx=get&id=4&gr=Y&path=&file=WITA+Presentation+-+November+2006.PPT.

Japan, Canada, India, Brazil, Mexico, China, South Korea, and Australia.

Top 10 members by the number of complaints were as follows: The USA, the EC, Canada, Brazil, India and Mexico (same at the fifth place), Argentina, South Korea, Japan and Thailand (same at the eighth place), Chile and Australia.

Top 10 members by the number of responding complaints were as follows: The USA, the EC, India, Argentina, Japan and Canada (same at the fifth place), Mexico and Brazil (same at the sixth place), South Korea, Chile, Australia and China.

Top 10 members by the number of complaints as the third party were as follows: Japan, the EC, the USA, Canada, China, India, Brazil, Australia, Mexico and South Korea.

Among the members from developed countries, the largest users of the WTO dispute settlement mechanism were as follows: The USA, the EC, Japan, and Canada, with the trade disputes between the USA and the EC accounting for about 17% of the total cases accepted by the WTO in the first ten years. Among the members from developing countries, the largest users of the WTO dispute settlement mechanism were as follows: India, Brazil and Mexico. The Least-developed Countries (LDCs) had, in general, not used the dispute settlement mechanism although a number had participated as third parties in disputes; Bangladesh was the first LDC to request consultations under the mechanism in January 2004.[19]

1.3.2 Participation by the USA and the EC

As mentioned above, the USA is the most active member of the WTO dispute settlement activities, especially at the stages of consultation, panel and appeal. Among the 369 complaints WTO has accepted so far, the complaints by the USA amounted to 89 ones,[20] accounting for 24% of the total, and the complaints responded by the USA reached 99, accounting for 27% of total complaints. The US had filed complaints with DSB against 27 WTO members (including 9 members of the EC), and it was, of course, complained by 26 WTO members. The consultations participated by the USA as the complainant or responding party accounted for 51% of the total cases accepted, the panel proceedings involved accounting for 61% of all the panel activities, the appeals (exclusive of

[19] See WTO: Annual Report 2005, p. 145.

[20] Member of the USA House of Representatives Sander M. Levin (D-MI) pointed out on August 2, 2007 that during President Clinton administration, the USA government totally filed 68 complaints with WTO within six years while 20 complaints were filed in seven years during President George W. Bush administration (averagely less than 3 complaints a year). Levin Opening Statement on China Trade. http://waysandmeans.house.gov/News.asp?FormMode=print&ID=553.

those under Article 21.5 of the DSU) participated by it as the complainant or the appealed party accounted for almost 66% of all the appeal activities, and the USA as the third party participated in nearly every dispute to which it is not a party.

In addition, according to the data released by the Office of the USA Trade Representative on October 18, 2006,[21] among the 79 complaints filed by the USA (73 original complaints and 6 compliance complaints), 54 (including 2 partially concluded) had been concluded, 3 were combined with other complaints, 5 were in the litigation stage and 19 were either at the consultation stage or at a standstill. Among them, 24 were settled to the satisfaction of the USA before the actions ended, the USA won in 26 cases over core issues and failed in 4 cases on core issues, and one case was at the appeal stage, 4 at the stage of panels, 5 at the consultation stage and 14 in the state under supervision or standstill state. Among 115 complaints responded by the USA (including 103 original complaints and 12 compliance complaints), 61 had been concluded, 22 were combined with other complaints, 10 were in the litigation stage and 22 were either at the consultation stage or at a standstill stage. Among them, there were 17 cases that had been settled to the satisfaction of the USA before the actions ended, the USA won in 14 cases over core issues and failed in 30 cases over core issues, one was at the appeal stage, 9 at the panel stage, 14 at the consultation stage and 8 in the state under supervision or standstill state.

In the WTO dispute settlement activities, the EC and the USA are mutual opponents. The US filed 34 complaints against the EC (including complaints against 9 member countries of the EC), while the EC filed 31 ones against the USA. In addition, the EC has required the DSB to set up 15 panels[22] against the USA, while the USA required the DSB to establish 7 panels[23] against the EC. Still more, the USA filed 8 complaints against India, 6 complaints respectively against Japan, South Korea and Mexico, 6 complaints respectively against Canada and China, and 4 complaints respectively against Argentina, Brazil and Australia. Of course, 14 complaints were filed by Canada against the USA, 8 by Japan, 9 by Brazil, and 7 respectively by India, Mexico and South Korea. Some of them were settled through bilateral channels while the majority entered into the panel proceedings.

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[21] http://www.ustr.gov/assets/TradeAgreements/Monitoring_Enforceemnt/Dispute_Settlement/WTO/asset_upload_file962_5696.pdf.

[22] For example, FSC, 1916 Act, Lead and Bismuth, Section 301, Irish Sound Recordings, Subsidy privatization, Wheat Gluten safeguards, Havana Club, Certain CVMs, Carbon Steel antidumping duties, Steel Safeguards, Byrd Amendment, Zeroing, Hormones Retaliation, Aircraft Subsidies.

[23] For example, Beef Hormones, Bananas, Computer Equipment, GIS/Trademarks, GMOs, Customs practices, Aircraft Subsidies.

At the stages of consultation, panels and appeal, the EC is only second to the USA as the participant of the WTO dispute settlement activities. Of 369 complaints accepted by the WTO over the past 13 years, 76 were the complaints filed by the EC, accounting for 20% of the total, 59 were responded by the EC, accounting for 16% of the total. In addition, the EC is the most active third party second only to Japan.

1.3.3 Participation by developing countries

Compared with members from developed countries, members from developing countries are at the secondary position in the WTO dispute settlement activities. In accordance with the research by the relevant experts (Horn, Mavroidis, 2006) of the World Bank on the cases involved in the 311 officially accepted consultation notifications from the beginning of 1995 to the end of July 2004, members of the WTO participating in the WTO dispute settlement activities might be divided into four groups, namely, the first group of the USA and the EC, the second group of members from other industrialized countries and regions (including South Korea, Singapore, Mexico, Turkey and Hong Kong), the third group of members from developing countries and the fourth group of members from the least-developed countries. The statuses of participation in the WTO dispute settlement activities include complainant, responding party and the third party. In view of the status of complainant, members from other industrialized countries and regions accounted for 39%, members from developing countries 31.8%, members from the USA and the EC 28.3% and members from the least-developed countries 0.9%. In view of the status of the responding party, the USA and the EC accounted for 56.2%, members from developing countries 26.4%, members from other industrialized countries and regions 17.4% and members from the least-developed countries have never acted as the responding party. In view of the status of the third party, members from developing countries accounted for 48.8%, members from other industrialized countries and regions 35.8%, the USA and the EC 13.9%, and members from the least-developed countries 1.5%. What is interesting is that there were 72 WTO members participating in dispute settlement activities as the third party while only 67 WTO members participated as complainant, and thus the former is 5 more than the latter. More interestingly, there were 12 WTO members who participated in dispute settlement activities as the third party rather than complainant, while all of them came from developing countries and the least-developed countries. More members from developing and the least-developed countries participated in the WTO dispute settlement activities as the third party than those as complainant.

To sum up, the USA and the EC are more often likely to initiate litigations as complainant while members from other industrialized countries and regions and

developing countries tend to follow suit, though the complaints (56.2%) against the USA and the EC are far more than those (28.3%) filed by them. Contrary to nearly vacancy of members from the least-developed countries (Sub-Saharan Africa have not used the WTO dispute settlement mechanism so far), the high participation rate of members from developing countries is unexpected, mainly such countries as Latin America (for example, Argentina, Brazil, Chile and Mexico) and Asian developing countries (incl. South Korea, India, Thailand and China). As Director-General of WTO, Pascal Lamy, pointed out in the foreword to WTO Annual Report 2006: "The growing role of developing countries in the WTO dispute settlement process is another indication of how developing countries are participating in the global system. In 2005, developing countries brought 64% of the complaints to the WTO Dispute Settlement Body, which compares with only 20% in 1997 and just 12% in 1998. Many of the cases brought have been high profile and there is increasing recognition among developing country officials that use of the dispute settlement system can be a highly effective way to enforce their rights."[24]

1.4 Wide coverage of disputes and numerous concentrated agreements involved

According to statistics, during 1995–2007, the cases accepted by the WTO dispute settlement mechanism involved the following agreements of WTO:

Name of agreements	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
GATT 1994	24	25	33	24	19	23	19	3	23	16	12	20	9	281
SCM	0	7	10	11	3	7	4	7	6	6	2	9	5	78
Anti-Dumping Agreement	1	3	3	6	8	11	6	6	7	8	4	8	1	72
Agreement on Agriculture	4	5	13	5	6	5	2	7	6	2	1	1	2	59
Agreement on Import Licensing	2	1	13	5	4	1	2	3	1	1	1	0	0	34
TBT	8	5	4	5	0	2	3	2	4	0	0	0	1	34
Agreement on Safeguards	0	0	2	2	5	3	7	10	1	0	2	2	0	33
SPS	5	3	3	5	0	2	1	5	6	0	0	0	1	31
TRIPS	0	6	5	4	5	3	1	0	1	0	0	0	1	26
TRIMS	0	6	5	3	1	1	1	2	0	0	1	3	2	25
GATS	1	3	2	3	1	2	1	0	1	1	0	0	1	16

(*To be continued*)

[24] WTO: Annual Report 2006. http://www.wto.org/english/_e/booksp__e/anrep_e/anrep06_e.pdf.

(*Continued*)

Name of agreements	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
Agreement on Textile and Clothing	1	6	2	1	1	4	0	0	1	0	0	0	0	16
Agreement on Customs Valuation	3	1	0	1	1	3	1	0	1	0	0	1	1	13
Agreement on Rules of Origin	0	0	2	1	0	0	0	1	0	0	0	1	0	5
Agreement on Government Procurement	0	0	3	0	1	0	0	0	0	0	0	0	0	4

Among the multilateral trade agreements and plurilateral trade agreements administered by the WTO, the application and interpretation of each of fifteen agreements triggers trade disputes among the members of WTO. In terms of the main fields of disputes, at the first place is the GATT 1994 (281 complaints). It was held that many complaints involved other specific substantive agreements and the general principle regulations of GATT (such as most favored nation treatment, national treatment and quantitative restrictions).[25] At the second place are trade remedy complaints (total of 183 complaints, among which are 78 complaints under the Agreement on Subsidies and Countervailing Measures, 72 complaints under the Anti-Dumping Agreement and 33 complaints under the Agreement on Safeguards). At the third place are complaints relating to the Agreement on Agriculture (59), and at the fourth place are complaints under the Agreement on Import Licensing (34), the Agreement on Technical Barriers to Trade (34) and the Agreement on the Application of Sanitary and Phytosanitary Measures (31). With respect to the new agreements incorporated by the Uruguay Round, there are few complaints, except those under the Agreement on Agriculture; there are 16 complaints under the General Agreement on Trade in Services, 25 under the Agreement on Trade-Related Investment Measures, 26 under TRIPS Agreement and 16 under the Agreement on Textile and Clothing.

Of course, the agreements involved in the WTO dispute settlement activities are not limited to the above-mentioned 15 agreements, which extend to the WTO Agreement and the DSU. According to the Appellate Body Annual Report for 2007, in view of the relevant agreements involved in 84 reports released by the

[25] In accordance with WTO Annual Report 2005, in 324 complaints accepted by WTO DSB in the first ten years from January 1, 1995 to December 31, 2004 and in 230 complaints under GATT 1994, 89 concerned national treatment, 80 concerned the most favored nation treatment and 71 concerned quantitative restriction. http://www.wto.org/english/rese/booksp_e/anrep_e/anrep05_e.pdf.

Appellate Body from 1996 to 2007, there are 66 reports under the DSU, 49 under the GATT 1994, 21 under the SCM (Agreement on Subsidies and Countervailing Measures), 21 under the Anti-Dumping Agreement, 12 under the Agreement on Agriculture, 9 under the WTO Agreement, 7 under the Agreement on Safeguards, 4 respectively under the GATS and the SPS, 3 respectively under the TRIPS and ATC (Agreement on Textiles and Clothing) and 2 respectively under the TBT and the Agreement on Import Licensing.[26]

In addition, based on the introduction by Bruce Wilson, Director of the Legal Affairs Division of the WTO Secretariat on November 16, 2006,[27] among 102 reports of panels (exclusive of panels under Article 21.5 of DSU)/the Appellate Body passed by DSB from the beginning of 1995 to the end of October 2006, there were slightly less than 50% of cases concerning trade remedies and slightly more than 50% of cases concerning non-trade remedies. However, in 2005 and 2006, cases involving trade remedies greatly rose, with almost two thirds of the complaints filed since 2005 involving trade remedies and the cases being handled at the stages of original panels, compliance panels and appeals that were involved in trade remedies almost accounted for two thirds, and 5 of 8 complaints at the stage of consultation were also cases of trade remedies. In the nature of the cases in which the USA participated at the stage of panels, 70% of the panels with the USA as the responding party were of trade remedies. On the contrary, merely 15% of the panels with the USA as complainant concerned trade remedies, and almost 50% of the cases concerned the relatively traditional GATT disputes (especially the national treatment).

In terms of the three largest substantive fields of trade in goods, trade in services and trade-related intellectual property rights administered by WTO, based on the research on the cases involved in the officially accepted 311 consultation notifications made by the relevant expert of the World Bank from the beginning of 1995 to the end of July 2004, approximately 94% were cases relating to trade in goods (concerning disputes of GATT 1994 and its annexes), and 4% intellectual property right cases (concerning disputes of TRIPS) and about 2% cases relating to trade in services (concerning disputes of GATS and its annexes). (Horn, Mavroidis, 2006) Of course, some cases were inherent difficult trade disputes that had not been settled by GATT, such as EC Banana, EC Beef Import, United States-Tax Treatment for “Foreign Sales Corporation”, Section 337 of US Tariff Act and its Amendment, United States－Import Prohibition of Certain Shrimp and Shrimp Products, Canadian Softwood and Japan Imported Film.

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[26] WT/AB/9, January 30, 2008.

[27] http://www.wita.org/index.php?tg=fileman&idx=get&id=4&gr=Y&path=&file=WITA +Presentation+-+November+2006.PPT.

In accordance with the research by the relevant experts (Horn, Mavroidis, 2006) of the World Bank, in the aspect of trade in goods, the USA and the EC were the main targets of complaints on trade in goods, and the complaints against them were 4 times those against other developed countries and twice those against developing countries (exclusive of the least-developed countries), among which approximately 43.8% of complaints from developing countries (exclusive of the least-developed countries) were against the USA and the EC, approximately 24.8% of complaints from other developed countries were against the USA and the EC, approximately 66.7% of anti-dumping complaints were against the USA and the EC, and approximately 72.4% of subsidy and countervailing complaints were against the USA and the EC (among which complaints from other developed countries accounted for about 34.8% and those from developing countries about 37.2%). Though the cases concerning trade in services were fewer, the complaints against developed countries accounted for about 85% of the total complaints about trade in services.

Among the aforesaid 26 complaints under TRIPS, 17 were filed by the USA, 6 by the EC, one by Australia and Canada respectively, and one by Brazil. In view of responding parties, they were mainly the USA, the EC and part of developing countries (Argentina, Brazil, Pakistan, India and China). There were 17 disputes among the members of developed countries, accounting for 75% of the total, especially between the EC and its member countries and the USA, and 9 between members from developed countries and members from developing countries, exceeding 25% of the total, among which 8 were filed by developed countries against developing countries. The US was the first complainant by number of complaints filed, complaining members of other developed countries ten times and members of developing countries 7 times. Among the developed countries complained by the USA, the EC and its member countries were complained 8 times, and Canada and Japan once respectively; and among the members of developing countries complained by the USA, only Argentina was complained twice. The EC is the second complainant by number of complaints filed, complaining other developed countries 4 times and developing countries twice. In the developed countries complained by the EC, the USA was complained twice, and Japan and Canada once respectively. Canada and Australia complained the EC once respectively. In view of the concluded complaints, in all the cases where developing countries were complained of, including the USA v. Argentina relating to patent and data test (DS196), the USA v. Argentina relating to patent and test data protection measures (DS171), the USA v. Brazil relating to patent protection, the USA v. India relating to patent protection of drugs and chemicals for agricultural use, the EC v. India relating to patent protection of drugs and chemicals for agriculture use, and the USA v. Pakistan relating to patent protection of drugs and chemicals for agriculture use, developing

countries ultimately failed in the action or made a compromise. Of course, the USA v. China relating to intellectual property right enforcement is presently in the process of the WTO dispute settlement. On the contrary, the only case filed by a developing country, Brazil v. the USA relating to the Patent Code, has not been settled up till now.

1.5 The record of compliance

1.5.1 General situation

Based on the relevant researches by the experts of the World Bank on the WTO dispute settlement activities from 1995 to 2002, 88% of the complainants won the cases. (Holmes, 2003) So far as the results of consultation are concerned, during 1995–2002, 46% of the disputes accepted by the DSB were settled at the stage of consultation, at least three quarters of which were achieved through partial concession of responding parties. (Busch, Reinhardt, 2003) With respect to the compliance status of panel/Appellate Body reports, as of November 2006, in the panel and Appellate Body reports passed by the DSB, the cases failed by responding parties as ruled by panels and the Appellate Body (i.e. violating one or more duties of WTO agreements) accounted for about 90%.[28] In general, for adverse panel/AB reports, the compliance records of WTO members have been good. Almost in every case where it was ruled that WTO members violated duties of WTO agreements, the losing parties expressed the willingness to implement the rulings and recommendations of the panels and the Appellate Body and the rulings and recommendations of the overwhelming majority of cases have been carried out. Based on the analysis of Sharyn O'Halloran in April 2006, in general, approximately 80% of the rulings of the WTO DSB were implemented, higher than 63% of the rulings implemented under GATT. (O'Halloran, 2006) In addition, according to the analysis of Professor William J. Davey of the School of Law, Illinois University on the panel reports passed and implemented up to September 2005, 53 of 63 panel reports involved in disputes were implemented at the successful execution rate of 83%, which is quite successful in the aspect of disputes between nations, while the execution rate of rulings of the International Court of Justice was only 68%. (Davey, William, 2005) Comparatively speaking, the specific situations are complicated, where substantial compliance accounted for about 60%, some compliance about 13%, and no compliance about 21%, and the compliance recorded of rich nations (with GDP per capita higher than USD13,000) was approximately 68% and that of

[28] http://www.wita.org/index.php?tg=fileman&idx=get&id=4&gr=Y&path=&file=WITA +Presentation+-+November+2006.ppt.

poor countries about 81%. (O'Halloran, 2006)

It should be noted that when violation of the obligations of WTO agreements may be remedied through administrative acts rather than legislative acts, compliance will be faster. For the panel/Appellate Body reported that had been passed, there were total 36 compliance disputes under Article 21.5 of the DSU arising from whether compliance measures were sufficient during the 13 years from 1995 to 2007, for all of which compliance panels were established, and even 14 compliance panel reports had been appealed. The overwhelming majority of such compliance disputes concerned the Agreement on Agriculture, the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Sanitary and Phytosanitary Measures.

1.5.2 Compliance performance of WTO members

According to the analysis of Bruce Wilson, Director of the Legal Affairs Division of the WTO Secretariat,[29] by November 2006, 42 (when EC was counted as 25 members) or 17 (when EC was counted as one member) of 151 WTO members[30] were subject to panel/Appellate Body reports adverse or partially adverse, and consequently the WTO members subject to adverse WTO rulings in WTO dispute settlements were less than 30% of the existing WTO members. Among the 17 WTO members subject to adverse WTO rulings, 7 were subject to only one WTO ruling adverse or partially adverse, namely: Turkey, Thailand, Egypt, Dominican Republic, Indonesia, Guatemala and Brazil. Ten members were subject to multiple WTO rulings adverse or partially adverse: The USA subject to 31 adverse rulings, the EC 14 rulings, Canada 8 rulings, Argentina 6 rulings, Mexico 4 rulings, India 4 rulings, South Korea 4 rulings, Japan 3 rulings, Chile 2 rulings and Australia 2 rulings.

1.5.2.1 Compliance performance of the USA and the EC

As mentioned above, the USA and the EC are the two WTO members with the largest number of complaints and responses to complaints. Almost half of the adverse WTO rulings were against the USA and the EC. By November 2006, the USA had been ruled to have fully or partly violated obligations in 31 responding complaints and in 4 responding complaints it had not been ruled to have violated obligations. Among the 31 responding cases in violation of obligations, there

[29] http://www.wita.org/index.php?tg=fileman&idx=get&id=4&gr=Y&path=&file=WITA+Presentation+-+November+2006.PPT.

[30] Tonga became the 151st member of WTO on July 27, 2007. http://www.wto.org/english/thewto_e/acc_e/a1_tonga_e.htm.

were 23 complaints the USA administrations could implement or were implementing or had implemented through bilateral agreements (such as the recent softwood dispute settlement agreement between the USA and Canada). Among such 23 complaints, 14 were anti-dumping or countervailing cases, 3 textile cases, 4 cases under safeguard measures (incl. the cases of steel safeguards) and 2 mainly involving violation of the provisions of GATT (Venezuela and Brazil *v.* US-standards for reformulated and conventional gasoline and United States—Import Prohibition of Certain Shrimp and Shrimp Products). For four of seven cases requiring the USA to implement the DSB rulings through legislative acts, the USA Congress has passed corrective legislation (i.e. 1916 Act, FSC/FSC grandfathering, Byrd, the second stage of cotton subsidies), while for the other 3 cases (namely, Havana Club, Copyright Act Section 110 and Japanese Hot-Rolled Steel Antidumping), the USA Government was seeking for corrective legislation by the Congress. In addition, the compliance issue related to the case of Cotton Subsidies had been submitted to the WTO compliance panel for hearing. The parties had different opinions on whether and how the USA should implement the DSB ruling in the case of Internet Gambling and had delivered the dispute to the WTO compliance panel for hearing, and then on May 22, 2007 DSB passed the compliance panel review report,[31] ruling that the USA had not implemented the DSB ruling. It should be noted that the legislative acts by the USA Congress to implement the DSB rulings during 2004–2006 is one of the positive developments of high concerns for the WTO dispute settlement system. It should, of course, be admitted that there still exists transition in Byrd Amendment, and the cases of Cotton Subsidy and the Internet Gambling have not been settled finally. To be sure, in recent years, the legislative acts of the USA Congress are of great significance, which has sent a strong signal: The Congress reaffirms that it generally supports the WTO system, especially the WTO dispute settlement system.

In 14 of 17 responding cases it was ruled by DSB that the EC has fully or partly violated obligations, though 3 cases had been settled before panels issued final reports. The EC had made commitments to implementing DSB rulings in all those cases, and actually its specific compliance acts were also quite good, though the administrative/legislative procedures of the EC were quite different from those of the USA. In such cases as Bed Linen, GSP, Sardines, Trademarks/GIS and Sugar, the EC had implemented the DSB rulings, while, of course, the compliance issue of the cases of Bananas and Beef remained to be settled.

Generally speaking, though the USA and the EC had universally implemented the overwhelming majority of rulings successfully, the USA, the EC and

[31] http://www.wto.org/english/news_e/news07_e/dsb_22may07_e.htm.

members from other developed countries had encountered compliance difficulty by in a minority of cases, which demonstrated the following judgment of William Davey: "Non-implementation is mainly a problem of the USA while delayed implementation is mainly a problem of four giants (the USA, the EC, Japan and Canada) and Australia." (Davey, William, 2005)

1.5.2.2 Compliance performance of developing countries

As mentioned above, the performance of members from developing countries as responding party was better than that of members from developed countries in implementing adverse WTO dispute settlement rulings. According to the research of William Davey, by the end of November 2005, developing countries usually completed implementing the DSB decisions within the originally fixed reasonable period of time. Developing countries became the responding party of the compliance panel procedures under Article 21.5 only twice (cases of Mexico HFCS and Brazil-Aircraft), and there was only one case (Brazil-Export Financing Program for Aircraft) where a developing country failed to implement the ruling.

1.5.3 The implementation record for disputes brought under the WTO on an agreement-by-agreement basis

Generally, in more than ten years of WTO dispute settlement activities, the implementation records of WTO dispute settlement rulings differ not only with members of WTO but also with the agreements involved in disputes. According to the research of William Davey, by the end of November 2005, in terms of the difficulty of implementation, the first difficult dispute settlement rulings to implement were the cases concerning subsidies. In the five subsidies cases, two had not been implemented at all (Canada–Export Credits and Loan Guarantees for Regional Aircraft and Brazil–Export Financing Program for Aircraft), one was implemented 49 months after the expiry of the originally fixed reasonable period of time when the winning party had adopted retaliation measures (United States–Tax Treatment for "Foreign Sales Corporation"), one was implemented ten months after the expiry of the originally fixed reasonable period of time (Australian leather manufacturers and exporters subsidies case), and one was a subsidy case under the Agreement on Agriculture (Canada–Measures affecting dairy exports), which was implemented 28 months after the expiry of the originally fixed reasonable period of time. Thus, the implementation of the rulings of the five subsidies cases were as follows: Two of them had not been implemented at all and it took average 29 months (almost two years and a half) to implement the other three.

The second difficult dispute settlement rulings to implement were the cases related to SPS Agreement (Agreement on Sanitary and Phytosanitary Measures). For example, the implementation of the ruling of the EC Beef case was started 59 months after the expiry of the originally fixed reasonable period of time, and still worse, new disputes were triggered by implementing measures. At present, the USA and Canada kept retaliating against the EC. In addition, the implementation measures for Japan–Measures Affecting the Importation of Apples also triggered new disputes, the ruling for Australia–Measures Affecting Importation of Salmon was implemented 23 months later after the expiry of the originally fixed reasonable period of time and the ruling for Japan–Measures Affecting Agricultural Products was implemented 20 months after the expiry of the originally fixed reasonable period of time.

The third difficult dispute settlement rulings to implement were the cases related to trade remedies (anti-dumping, countervailing and safeguards). The implementation in such aspect was mainly related to the USA. In seven trade remedy cases with the USA as responding party, three required the Congress to take action, the implementation measures of two were questioned and the implementation measures of the other two were delayed. Of course, in terms of implementation, safeguard cases were quite different from anti-dumping and countervailing cases. For implementation of safeguard cases, typically, the measures in violation of the WTO Agreement on Safeguards were repealed, while as a matter of fact, the time spent on the WTO dispute settlement procedures meant that the responding party has quite a long time to realize its purpose of protection, and thus the implementation of safeguard cases can be effected by the expiry of the reasonable period of time. By comparison, the typical results of anti-dumping and countervailing cases were to revise or abolish the allegedly violating measures, which did not lessen the impacts of such measures on trade to a big extent in most cases. For example, by the end of November 2005, among 17 cases successfully challenging anti-dumping and countervailing, the allegedly violating measures were abolished in four cases, in three cases, only after the procedures under Article 21.5 were initiated to challenge the implementation measures were the allegedly violating measures abolished, there were 3 cases where the allegedly violating measures drastically reduced the impacts on trade, while there were 7 cases where the allegedly violating measures had not greatly reduced the impacts on trade.

Finally, the cases easy to implement were those in violation of the TRIPS Agreement. Basically, as long as the responding party wanted to implement the rulings, the measures in violation of the TRIPS Agreement could be abolished by the expiry of the reasonable period of time. For example, in the aforesaid 26 intellectual property rights disputes, there were 14 case with mutually satisfying settlement reached through consultation, and 6 cases where DSB rulings and

recommendations had or were being implemented. The cases being immediately implemented were Canada-Patent Protection of Pharmaceutical Products, Canada-Term of Patent Protection, and India-Patent Protection for Pharmaceutical and Agricultural Chemical. However, United States-Section 110(5) of the USA copyright act[32] and United States—Section 211 Omnibus Appropriations Act of 1998[33] had extended their reasonable period of time many times for it was required that the USA Congress revise the relevant legal clauses.

1.5.4 Trade retaliation authorized by WTO

Though the WTO dispute settlement mechanism is established on the compliance—compensation—retaliation model, in practice there was only one US copyright case where cash compensation was rendered. Therefore, the WTO dispute settlement mechanism operates on a compliance-retaliation model. So far, with universally good compliance history of WTO members, though there had been 15 authorized decisions on suspension of tariff concessions by the DSB in accordance with Article 22.7 of the DSU and Article 4.10 of the Agreement on Subsidies and Countervailing, there were only the following 6 cases where retaliation application was filed and authorized, four of which actually adopted retaliation measures:

(1) European Communities-Regime for the Importation, Sale and Distribution of Bananas. The US and Ecuador were authorized to take retaliations against the EC, and only the USA took and consequently withdrew retaliation measures.

(2) EC Measures Concerning Meat and Meat Products. The US and Canada were authorized to take retaliations against the EC, and they took retaliation measures against the EC and still maintained retaliations against the EC, but the case remained pending and at the stage of hearing.

(3) Brazil–Export Financing Program for Aircraft. Canada was authorized to

[32] According to such section, the USA allows broadcasting radio and television music in public places (pubs, stores and restaurants) without payment of royalties. The case of Section 110(5) of the USA Copyright Act has gone through more than a decade from consultation up to now, and the USA still fails to implement the panel rulings mainly because on the one hand, the Congress could not pass the amendment to Section 110 (5) of the Copyright Act, and on the other hand, it is related to the difficulty in intellectual property rights enforcement in public spaces.

[33] The case, United States—Section 211 Omnibus Appropriations Act of 1998 had also gone through all the procedures of WTO dispute settlement, and the USA and Europe extended the reasonable period of time decided in the arbitration for four times through agreements, with the last extension to June 30, 2005. Up to now, the USA failed to implement the rulings and recommendations of DSB and the EU seemed helpless. What the USA does is to report the status of its implementation of the rulings and recommendations of the DSB to the WTO DSB every six months in accordance with THE provisions of DSU.

take retaliations against Brazil but no implementation was made.

(4) Canada–Export Credits and Loan Guarantees for Regional Aircraft. Brazil was authorized to take retaliations against Canada but no implementation was made.

(5) United States–Tax Treatment for "Foreign Sales Corporation". The EC was authorized to take retaliations against the USA and upon taking retaliation measures, the EC stopped retaliations after the USA withdrew its illegal measures.

(6) Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment), in September 2004, DSB authorized 8 members (Brazil, Canada, Chile, the EC, India, Japan, South Korea and Mexico) to take retaliations against the USA, but only the EC, Canada, Japan and Mexico adopted retaliation measures.

Currently, only Canada and the USA maintained retaliations against the EC (meat case) and the EC, Canada, Japan and Mexico also maintained the retaliation measures against the USA (Continued Dumping and Subsidy Offset Act of 2000).

There are another 7 cases (such as US lumber cases, Canadian dairy, Australian salmon, Japan apples and US 1916 Act) where the request for retaliation was filed, the disputed problems had been satisfyingly settled by a bilateral was before DSB authorized retaliation. In the USA cotton subsidy case, the possible retaliation was stopped before the end of the compliance panel.

To sum up, there are very few cases where WTO members seek for and are authorized to adopt retaliation measures, which show that the general records of WTO members on the implementation of adverse WTO dispute settlement rulings are positive.

1.5.5 Arbitration plays a unique role at the stage of implementation

According to the DSU, in the WTO dispute settlement mechanism, arbitration may be used for different purposes and at different dispute settlement stages. Arbitration may be taken as an optional dispute settlement approach (Article 25 of the DSU), or the method for determining the period of time for the parties to disputes to implement DSB rulings or recommendations (Article 21.3 of the DSU),[34] determining the level of tariff concession or other obligations (Article 22.6 of the DSU) or determining whether the winning party has followed the principles and procedures guiding consideration of tariff concessions or other obligations. In such aspects as appointment of arbitrators, scope of arbitration

[34] In the 13 years from 1995–2007, there was only one arbitration under Article 25 of DSU, whereby in the case of the USA Copyright dispute, arbitration was made on the level of damage or loss of interests caused by the violations ruled by the panel of the case.

agreements, applicable laws and implementation of arbitration awards, the arbitration in the WTO dispute settlement mechanism is of features obviously different from those of international arbitration. In practice, arbitration is mainly used to determine of the period of time for the parties to disputes to implement DSB rulings or recommendations and the level of tariff concessions or other obligations.

In the first decade, the WTO dispute settlement mechanism made total 42 decisions of arbitration, most of which aimed at the issues at the stage of implementation. Up to now, except for several exceptional cases, though the WTO members did not turn to mediation/arbitration, there were total 21 arbitrations for determining the reasonable period of time to implement DSB decisions under Article 21.3 and total 17 arbitrations for determining the appropriate retaliation level under Article 22.6. What deserves mentioning is an *ad hoc* arbitration concerning banana trade under Doha waiver agreement in 2005. The arbitration consisted of two members of the Appellate Body and the former Canadian ambassador to WTO who acted as the chief arbitrator. To be sure, the impact of such arbitration on the application and interpretation of the DSU in the future remains to be seen.

In general, the effect of implementation of the DSB rulings is good. Why is the WTO dispute settlement mechanism of such high success rate and implementation rate? Based on analysis, the reason is the normative pressure from other member governments of the WTO and the enlightened self-interest of the parties to disputes. Such normative pressure comes from the fact that the majority of rulings recognized as violation are those on violation of obligations by a member government of WTO. Other member governments of WTO benefiting from maintenance of the integrity of legal obligations are willing to conduct quite long and strong criticisms and denouncements against a defendant member government for its violation of obligations. And the officials from the defendant member government are quite sensitive to such pressure and even cannot tolerate such humiliation. The enlightened self-interest came from the same consideration. The defendant member government took the first to make compliments for it hoped to benefit from the corresponding acts from other members of WTO. Such return is mainly in the form of the long-term interests from the actual equivalent trade opportunity committed by other members of WTO and the free trade order. To be caught not performing one's own obligations is to lose the right to enforce the obligations of others, thereby losing specific trade opportunities as well as imperiling the liberal entire trading system. (Hudec, 1998)

1.6 The entire time of dispute settlement exceeding the statutory period of time

In accordance with the research of the relevant experts of the World Bank (Horn,

Mavroidis, 2006), in the WTO dispute settlement activities from 1995 to 2004, the average consultation time was 221.76 days, the average time of panel proceedings 386.89 days (nearly 13 months), the average time of appeal 88.73 days, the average reasonable period of time (RPT) determined by arbitration 12.13 months, the average RPT agreed by both parties through consultation 9.18 months, the average time of the compliance panel 208.62 days and the average time of compliance appeal 83 days. To sum up, besides the appeal and RPT, each of other stages has exceeded the time schedule specified by the DSU, and thus the WTO dispute settlement mechanism cost excessively long time. If the delay at the stage of implementation is calculated, time would be even longer.

1.7 Brief evaluation

Generally speaking, over the past 13 years, the WTO dispute settlement mechanism was under general and strong support from members of WTO, who observed the rules of the DSU and proactively pushed the progress and creative development of the WTO dispute settlement mechanism as time passed by. Most of the members of WTO kept confident in the WTO dispute settlement mechanism and respected the decisions made under it, even in the situation where they strongly objected to the aforesaid decisions, which generally reflected that the confidence of WTO members in WTO is on a sharp rise. Obviously, WTO members believe that in the aspect of facilitating trade relationship and timely, effectively and properly settling specific trade issues, the WTO dispute settlement mechanism is a quite useful tool.

2 Preliminary evaluation on China's participation in the WTO dispute settlement activities

Before China's accession to WTO on December 11, 2001, Chinese officials and scholars almost unanimously believed that one of the advantages of China's accession to WTO was as follows: The WTO dispute settlement mechanism can be used to improve China's position of negotiation and trade treatment, counterattack various unfair practices suffered by China's export and alleviate or avoid the threatened unilateral trade retaliation or trade retaliation in a bid to create a peaceful, stable and safe environment for China's foreign economy and trade.

So far as complaints are concerned, over the past seven years, China filed two complaints under the WTO dispute settlement mechanism. On March 22, 2002, less than half year after China's accession to WTO, China (DS252) and seven other WTO members simultaneously filed complaints in WTO on the safeguard

measures for the USA steel products, which was the first complaint China filed in WTO. In the circumstance where the problem remained unsettled after consultation with the USA, China went through the stages of panel and appeal and eventually won its first complaint case in WTO: On November 10, 2003, the WTO Appellate Body ruled that the USA safeguard measures violated the rules of WTO and consequently the USA revoked the safeguard measures on December 4 the same year. On September 14, 2007, China made a request for consultation (DS368) on the preliminary ruling by the USA Department of Commerce on levy of both anti-dumping duty and countervailing duty on coated free sheet paper imported from China under the WTO dispute settlement mechanism, and initiated the procedures of the WTO dispute settlement, the complaint filed independently by China for the first time under the WTO dispute settlement mechanism since China's accession to WTO.

With respect to responses to complaints, according to the statistics from the WTO Secretariat, over the past seven years, China had responded to total 10 complaints under the WTO dispute settlement mechanism, ranking at the tenth place among 151 members of WTO. On March 18, 2004, the USA made a request for consultation on Chinese policies for integrated circuit VAT rebates under the WTO dispute settlement mechanism and initiated the procedures of the WTO dispute settlement, which was the first case responded (DS309) by China with the WTO. The Ministry of Commerce conducted talks with the USA jointly with the relevant departments. On July 14, both parties of China and the USA officially signed a "memorandum of understanding" in Geneva, whereby the USA party expressed to revoke the application under the WTO dispute settlement mechanism and the dispute between China and the USA on integrated circuit VAT under the WTO dispute settlement mechanism was settled. On March 30, 2006 the EC (DS339) and the USA (DS340) and on April 13 Canada (DS342) successively filed requests for consultation under the WTO dispute settlement mechanism on China's measures affecting import of auto parts and components and initiated the procedures of the WTO dispute settlement.

With the end of the five-year transition period and the adjustment of the USA and European trade policies for China, a drastically growing number of complaints were filed against China since 2007, on February 2 the USA (DS358)[35] and on February 26 Mexico (DS359) successively made requests for consultation on the measures of Chinese government for enterprise tax rebate or reduction and exemption under the WTO dispute settlement mechanism and initiated the procedure of WTO dispute settlement. On April 10, the USA made requests for consultation under the WTO dispute settlement mechanism

[35] On December 19, 2007, China and the USA informed DSB that both parties had reached an agreement (Memorandum of Understanding) on the dispute.

respectively on China's intellectual property right law (DS362) and the measures (DS363) for trading rights and distribution services of some publications and audio-visual entertainment products and initiated the WTO dispute settlement procedures. On March 3, 2008, the EC (DS372) and the USA (DS373) simultaneously made requests for consultation under the WTO dispute settlement mechanism on China's measures for financial information services and providers and initiated the WTO dispute settlement procedures.

Over the past seven years, China's complaints, responses to complaints and participation as the third party in the WTO dispute settlement activities were of the following features:

2.1 China is one of the most active third parties, though not an active complainant

China participated in the dispute settlement of 62 complaints as the third party, ranking at the fifth place among 151 WTO members. With the "third party" system of the WTO dispute settlement mechanism, not only the substantive interests of the third party may be protected from being harmed but also special experience may be rendered with on-site investigation on the strategies and tactics of the parties to disputes to settle trade disputes in a bid to gain experience and learn lessons from other WTO members; not only the normal operation of the WTO dispute settlement mechanism may be overseen but also the multilateral features of the WTO dispute settlement mechanism may be maintained; and there is no bitterness to bear the pressure and risk of losing litigation but happiness in affecting the dispute settlement process. Apart from the above-mentioned advantages of the "third party" system, China participated extensively in the WTO dispute settlement activities as the third party especially for the following reasons:

(1) China has extensive trade interests as a trade power. In recent years, Chinese import and export trade ranked the third in the world. Thus, China has substantive trade interests in the disputes concerning the trading system of Chinese trade partners. In view of maintaining Chinese trading interests, China should extensively participate in the hearing of WTO cases as the third party.

(2) Large amount of international trade information may be acquired. Through participation as the third party, China may generally understand a large amount of information and trade systems concerning the trading system of the parties to the disputes from the WTO members, including their laws and regulations and actual operations. Such information is of great value for trade of China in the future with those members of WTO and for formulation of China's own trade system by reference. In the process of participation as the third party, the competent authorities of Chinese government pay special attentions to

maintaining close cooperation with other relevant departments of the State Council, import and export chambers of commerce, trade associations and large-sized enterprises, jointly research and decide Chinese position in participating in those cases and simultaneously cause the relevant industries to keep track of the latest development of international trading system.

(3) China may participate in the formulation and development of the WTO rules as the third party. In the hearing process of cases, WTO dispute settlement panels and the Appellate Body may give creative interpretation on and develop WTO rules so as to enrich and perfect the WTO rules. In addition, some dispute settlement cases occurred in the background where WTO multilateral negotiations could not settle the problems in question. For example, the case concerning agricultural product subsidy between the EC and the USA aimed at seeking for negotiation breakthrough via WTO dispute settlement. In those cases, China elaborated on its understanding of the WTO rules by submitting written documents and participating in hearing sessions so as to exert influence on the formulation and development of WTO rules.

(4) As a new member of WTO upon accession to it, China is still at the stage of learning and is badly required to foster and cultivate profession teams of Chinese government for handling WTO dispute settlement activities. Though Chinese government has set up a relatively stable team participating in dispute settlement, WTO dispute settlement is a legal job of high techniques, calling for both in-depth understanding of WTO rules and excellent skills of actions, and only by participation in hearing of a large number of WTO cases can the business level of the professional team of China engaged in handling WTO dispute settlement activities be constantly improved to better maintain Chinese trade interests.

2.2 Wide coverage of responses to complaints and numerous WTO members involved, directly aiming at the crucial points of Chinese governmental trade policies and legal measures

As far as 10 responses of complaints are concerned, trade in goods, intellectual property rights and trade in services were involved, which indicated that, on the one hand, as a trade power, China is of specially significant international influence on the development of world trade with governmental measures for trade in goods, intellectual property right and trade in services, and on the other hand, and the WTO members, especially major members and China's important trade partners (the USA, the EC, Canada and Mexico) pay special attentions to Chinese governmental trade administration and control. In such 10 responses to complaints, there were numerous complainants and participants as the third party, and all the measures under complaints directly concerned the acts of Chinese

government in such sensitive areas as fiscal subsidy, intellectual property right protection and enforcement, trade and distribution service of publications and entertainment products, financial information service and its providers.

2.3 Complaints against China are on the increase, which is contrary to the overall decline of WTO complaints

In 2007, complaints against China drastically rose (four complaints), and in the recent two years (two complaints in 2008), China has become the main responding party in the WTO (with 6 complaints by the USA, 2 by the EC, one by Canada and one by Mexico), which not only renders an acid test to China's responding capability but also offers China unprecedented opportunities to further participate in the WTO dispute settlement activities.

To sum up, over the past seven years after China's accession to WTO, the preliminary impression China left in the practice of the WTO dispute settlement mechanism is: High-profile and positive policies with low-profile and moderate acts.

3 Several proposals on China's further participation in WTO dispute settlement activities

Based on the aforesaid analysis on the operation of the WTO dispute settlement system over the past 13 years, the author puts forward the following proposals on China's further participation in WTO dispute settlement activities:

3.1 Rational treatment of trade frictions and sticking to the "rules orientation" of dispute settlement for ensuring the depoliticization of trade disputes

The importance of trade disputes shall be fully recognized. On the one hand, as the position of China is rising in the world trade, its trade frictions and disputes with other countries are unavoidable. Trade friction and dispute is an unavoidable phenomenon in the development of China's foreign trade relationship in the age of economic globalization as well as a "growth pain" and "annoyance in growth" of China's trade development. On the other hand, trade dispute or conflict involves national interests and people's welfare. Once such dispute of conflict is inappropriately handled, a country may not only loss its corresponding market share but amend its laws for further opening its market, hence affecting the political friendships with trade partners and national security relations; with respect to individuals and companies, employment, income and even survival will be affected, let alone competitiveness. In terms of disputes under the WTO

dispute settlement mechanism, complaints often mean mandatory enforcement of the rights and interests of members of WTO in overseas markets while responses to complaints mean safeguard and protection of legitimacy and validity of governmental acts in domestic market via the WTO dispute settlement mechanism.

When handling with trade disputes, as a full member of WTO, China will naturally become "plaintiff" or "defendant" in the WTO dispute settlement mechanism. Only by sticking to dispute settlement under the framework of WTO rules can China ensure depoliticization of trade disputes and confront unilateralism of other countries with multilateralism for better maintaining China's economic interests.

3.2 Proactive utilization of the WTO dispute settlement mechanism

China's accession to WTO not only broadens the international legal environment for China's trade development but also provides a new policy tool and legal resource for Chinese government to cope with trade frictions with trade partners. To make use of the WTO dispute settlement mechanism for settling the frictions caused by application of rules is rather an effective way to alleviate the adverse effects of trade frictions and control the quantity of trade frictions. However, China prefers diplomatic solutions including consultations and negotiations, which are more suitable to settle the trade frictions of significant political influence beyond the WTO system. Thus, in handling trade frictions, Chinese government should proactively utilize the WTO dispute settlement mechanism besides strengthening and perfecting such diplomatic approaches as consultations and negotiations.

Firstly, since its accession to WTO, the trade frictions that China has encountered are mainly the protective trade remedies including anti-dumping, safeguards and countervailing as well as technical trade barrier rules by WTO members to restrict or prevent the import of Chinese products. The implementation of such measures is based on the WTO related rules. For the disputes due to improper application of those rules, the most direct and effective way is to use the WTO dispute settlement mechanism.

Secondly, the issue concerning the non-market economy status of China in the WTO anti-dumping and countervailing system is highly complicated, and for revocation of the non-market economy status and prevention of the utilization of special safeguards against Chinese products, a "time-consuming war" is required in diplomacy. Due to the slow progress of negotiations and consultations on reforming the WTO trade remedy system, initiative efforts shall be made to use the WTO dispute settlement mechanism so as to control the abuse by other WTO members of the non-market economic rules and other unreasonable factors in

anti-dumping investigation as well as the unreasonable utilization of special safeguard measures.

The WTO dispute settlement mechanism is the central pillar of the multilateral trading system in providing security and predictability for the multilateral trade system as well as a very useful tool in promoting trade relations and timely, effectively and properly settling specific trade issues. China shall learn from the experience of other WTO members and proactively utilize such mechanism, for which the following specific proposals are put forward:

(1) China shall pay high attention to the development trend of the WTO dispute settlement mechanism so as to make good preparation for handling trade frictions in a reasonable, powerful and effective manner. In view of the cases accepted by WTO in the past thirteen years, trade in goods cases are dominant, followed by cases of intellectual property rights, and then by trade in service cases. Among them, trade remedy cases are always at the top place, and trade cases related to SPS, TBT and other relevant quality, health and safety standards are on the increase, which coincides with the trade frictions encountered by China.

(2) China shall adopt proactive policies and take initiatives to initiate the WTO dispute settlement procedures against trade policies and measures of other WTO members to the detriment of China's trade rights and interests; when forced to respond, China shall make more use of the procedures of consultations and cautiously consider entry of panels and the Appellate Body stages. According to the relevant research of the experts of the World Bank on the WTO dispute settlement activities during 1995–2002, the winning rate of the complainant is 88%. In terms of the results of consultations, during 1995–2002, 46% of the disputes accepted by DSB were settled at the stage of consultation, at least three quarters of which were achieved through partial concession of responding parties. With respect to the compliance status of panel/Appellate Body reports, as of November 2006, in the panel and Appellate Body reports passed by DSB, the cases failed by responding parties as ruled by panels and the Appellate Body (i.e. violating one or more duties of WTO agreements) accounted for about 90%.

(3) While handling with trade remedy cases and intellectual property right cases through the WTO dispute settlement mechanism, China shall more often be "plaintiff", seldom or never "defendant". In the practice of the WTO dispute settlement, in the cases related to trade remedy and intellectual property right, usually the winning rate of the complainant is almost 100% while nearly no responding party may be a winner.

(4) In terms of institutional construction, a complete and powerful mechanism under public and private partnership shall be set up to handle with WTO trade litigation. According to the researches of the USA scholars, the reason why the USA and the EC make aggressive stances and remarkable achievements in

utilizing the WTO dispute settlement mechanism is mainly that the USA and the EC have established a complete and powerful mechanism under public-private partnerships to handle with WTO trade litigation apart from their absolute dominant positions in trade strength, manpower, financial resources and intelligence. (Shaffer, 2003) This is an internalized institutional arrangement China should learn from and use by reference.

(5) China shall have an objective and realistic recognition of the WTO and its dispute settlement mechanism and cautiously treat their comparative advantages and limitations, neither having unpractical fear nor neglecting their unique roles.

In a word, Chinese government shall be bold to make complaints and good at responding; make more consultations and less litigation; proactively participate and ensure strict enforcement; and handle with trade disputes related to WTO rules in a reasonable, powerful and moderate way.

3.3 Strengthening the national capacity-building for administration of trade frictions and dispute settlement

As the settlement of world trade disputes increasingly develops from "power-oriented" to "rule-oriented", the possession of sufficient legal means and the skill of using various legal means are increasingly critical to effectively handle with international trade frictions. The current Chinese researches on WTO have shifted from the introduction to pure rules and theories to the exploration of WTO practices. However, in view of the aforesaid analysis, the strength of the current Chinese on the WTO dispute settlement mechanism is obviously insufficient and inter-disciplinary talents of law and economy are badly needed. Thus, the Central Government shall focus on the national capacity-building for settlement of Chinese international trade frictions and disputes at the overall and strategic level, which shall be put on an important and urgent agenda. In this regard, special emphasis shall be put on the following four aspects:

(1) Establish and cultivate a professional team well versed in international trade law and practice by various approaches.

(2) Keep on pushing forward the education and training on Chinese foreign trade laws and policies, WTO laws and other international trade laws.

(3) Establish a national advanced research and development fund of international trade, carry out systematic and in-depth research on international trade policies and laws through competitive bids of scientific and research projects nationwide and even worldwide, pay attention to the researches on the interactions and coordination of foreign trade laws and policies with those of other areas, and conduct researches on all kinds of elements affecting foreign trade policies and laws in the age of globalization and their interactions, hence providing high-quality intellectual support for the formulation and operation of

China's global trade strategies and policies and laws.

(4) Consolidate and improve the core position and guiding role of the Central Government in trade control and administration, strengthen the construction of trade enforcement capacity and improve the overall national trade management level.

The practice of the reforms and opening up over the past 30 years indicates that Chinese legal system and society have developed with handling of various international frictions, and thus, the process of overcoming of frictions is just the process where Chinese economy constantly develops and grows and its competitiveness is strengthened progressively. However, faced with the challenges of increasing politicization of trade frictions, China shall adhere to "the scientific outlook on development, an approach that places people first," and the idea of building a "harmonious world", take steps to establish appropriately interactive relations with the world and corresponding institutional framework in the process of coping with trade frictions, push the policies on reforms and opening up from China to the world and from the economic field to such fields as society, culture and politics, take steps to perfect and develop the national legal system and trade governance structure through theory and practice, and settle various trade frictions in a rapid, timely and effective way in a bid to establish and maintain the peaceful, stable and sustainable trade relations between China and her trade partners.

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