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Legal Interpretation Issues Involving Dispute Settlement Body in the World Trade Organization

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Abstract: The article attempts to explore the background of the establishment of the dispute settlement body under the World Trade Organization's dispute settlement system, and analyze whether the existing legal interpretation power of the dispute settlement body is suspected of exceeding its authority through the legal interpretation disputes arising out of the DS379 case and the laws of relevant countries. Simultaneously, in analyzing the interpretations of the panel and the Appellate Body in the DS379 case report, possible solutions are proposed for the current legal interpretation issues of the dispute settlement body and the current status of the suspension of the Appellate Body. The Appellate Body has been shut down for several years until now, making it impossible to deal with the appeals and fulfil the mandate of the WTO in facilitating inter-member trade disputes. Trade turmoil now is darkening the world horizon, seeking new solutions within the structure of the past mechanisms is infinitely more possible than the restoration of the old ones. Through the analysis of the DS379 case, it is not only to explore whether the DSB is suspected of overstepping its authority, but also to seek how to leverage the advantages of the existing dispute resolution mechanism in the current context of global conflicts.

Keywords: Dispute Settlement Body, WTO, Legal Interpretation

1. Introduction

International trade rules have always regulated trade between countries and promoted economic cooperation between different countries. In-depth exploration and improvement of international trade rules on addressing subsidies and compensatory duties have become the top priority of economic cooperation among countries in today's global collective, because the maintenance of the shared multilateral trade structure requires its participation. In the World Trade Organization (WTO) cases on subsidies, "public body" is usually the main body of subsidies. Therefore, how to identify "public body" has become a core part of whether subsidies are constituted. At the same time, in practice, who can explain the use of subsidy provisions also affects the results achieved by WTO member countries in trade disputes.

The definition and subject of subsidies in the WTO are stipulated in *Agreement on Subsidies and Countervailing Measures* [1], where "public body" is mentioned in article 1 (a) [1], there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") [1]. The clause does not give a detailed type, but only roughly mentions the possible types.

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However, the aforementioned provisions have produced drastically different results in practical cases, which has led to the USA's dissatisfaction with some of the rulings made by the Appellate Body. It believes that the trade appeals body had overreached its legitimacy and made "legal interpretations" when exercising its powers, which had become one of the triggers for the suspension of the Appellate Body.

By analyzing relevant occurrences and the guidelines for establishing identification of "public body" used by different entities, this article explores the suspected "overstepping of authority" by the Appellate Body and provides possible solutions to the restart of the trade appeals body.

2. Relevant case--DS379

As the WTO's dispute settlement body (DSB), the DSB has had completely different results in hearing cases involving the classification of "public body", which had caused disputes over the identification of "public body". The DSB is assembled from panel and the Appellate Body. When the disputing member states are dissatisfied with the results of the panel's deliberations, they could seek recourse to final arbiter in WTO dispute settlement. According to regulations, the Appellate Body only examines legal issues involved in the expert report.

The most famous controversy regarding “public body” began with the DS379 case: the Sino-US anti-dumping and countervailing duty case.

2.1. Case introduction

China initiated a dispute against the USA using the WTO's system for resolving disputes in 2008. The case centered on the decision and final duty order issued by the U.S. Department of Commerce, which imposed anti-dumping and countervailing measures on four Chinese export goods. The consultation phase began in November that year, but no resolution was reached. Consequently, on December 9, 2008, China requested the WTO Dispute Settlement Body to form a panel. In July 2010, the panel issued a report that ruled against China. Dissatisfied with the outcome, China filed an appeal on December 1, 2010. Subsequently, on March 11, 2011, the Appellate Body released a report reversing the panel’s conclusion regarding the definition of "public body" [2].

2.2. Focus of controversy in the case

Because the DS379 case caused controversy after the Appellate Body overturned the panel's views, America has until now disagreed with the Higher Dispute Settlement Body's determination of "public body". In 2020, the United States even issued a "Joint Statement" with Japan and the European Union, stating that the Appellate Body's construction of the term "public body" in the ruling undermined threatened the enforceability of the WTO provisions governing subsidies, denied the identification standards proposed by the Appellate Body in the DS379 case, and demanded that the characterization of "public body" be further clarified.

Within the DS379 Case, the Appellate Body reversed the panel’s decision on what constitutes “public body” in Article 1.1(a) [1] of *the Agreement on Subsidies and Countervailing Measures* [1]. The panel held “public body” is anybody directed by governmental authority, but the Appellate Body held that “public body” is an organization equipped with and exercising or is granted government power. Prior to this, cases involving “public body” had not been appealed, but had followed the determination of the panel.

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3. Different rulings from dispute settlement body

According to Article 3 (ii) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) [3], recommendations and rulings of the DSB shall not increase or reduce the rights and obligations provided for in the covered agreements…; Article 19 of the DSU also reiterates that: (ii) ... the panel and Appellate Body cannot add to or diminish the rights and mandates prescribed in the covered agreements. These rules all emphasize that the rights or obligations of WTO participating states are obligated to avoid to be increased or reduced by the DSB [3].

At the same time, it can be seen from the provisions that the DSB has the right to clarify from the beginning to the end, and has no legal interpretation power beyond the provisions. Whether it is the panel or the Appellate Body, when using the clarification of stipulations in controversial cases, they all combine different angles such as literal interpretation, purpose interpretation, and purpose interpretation.

3.1. The panel

According to the regulations, the disputed terms shall first be interpreted literally.

The panel first used *the Concise Oxford English Dictionary* for searching, and tried to find separated meaning of the whole words. Appearing in it, the characterization of "public" from reading "associated with the populace as a whole; of, impacting or involving social dynamics or the state". Afterwards, in defining "body", the panel used the free online dictionary, which defines it as "an organization formed by a collective of individuals or recognized as a corporation", "a number of individuals with a collective will, usually integrated by certain ordinary ties or assembled for a particular mission" and "a whole or body, an enterprise, a lawmaking institution or an office". Taking these explanations into account, the panel considered how "public body" is interpreted that contains "corporations" that are "pertaining to the general public or the state" [4].

The panel also pointed out that the conjunction "or" is used between the words "government" and "public body" in Article 1.1 of the *Agreement on Subsidies and Countervailing Measures*, and the article before "government" is "a" and the article before "public body" is "any", which is enough to show that the two words have different meanings, among which "public body" has a broader meaning [5]. The antithesis of "public body" is "private body", and the biggest difference between the two is whether they are controlled by the state.

Over and above that, the panel highlighted the reasoning as well in DS273 case Korea—Rules Affecting Trade in Commercial Vessels. It is defensible to understand "any public body" as "any organization subject to government authority", which guarantees that whatever form a public body might take, the government administering the entity is fully responsible for its activities [6].

3.2. The appellate body

But a completely different determination was made in the case DS379, in this case the panel held that Chinese SOEs were "public body" under the SMG Agreement. Nevertheless, the Appellate Body believed that "exercise of government authority" should be used. The Appellate Body explained that the notion "government" invoke the essence of the terminology "public body". Then "the execution of government functions or the authority to perform them, as vested in and exercised by the public body" [7].

The Appellate Body held that the lexeme "public body" is broad and covers a wide range of organizations, particularly those that are vested with or exercise governmental functions, as well as organizations that are owned by the public or the state.

Thus, the Appellate Body believes that the *Agreement on Subsidies and Countervailing Measures* Article 1 puts the narrow "government" and "public body" together under the collective term

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"government", indicating that there is a certain commonality between the narrow "government" and "public body " and that there is a certain connection between the two, or that their fundamental characteristics intersect, meaning the entity in question can be accurately recognized as having a governmental nature, and when its behavior overlaps with the range under the article, the behavior constitutes "financial assistance".

Furthermore, the Appellate Body also defined the counterpart of "public body" as "private agency". The meaning of the word "private" in the dictionary includes "regarding services, commerce, etc.: by individuals rather than the state or the public provided or owned by an institution" and "About the person: not employed by a public agency or official body". Using it as a foundation, the Appellate Body maintains that the cornerstone of differentiating the two words is rooted in the entities that hold power or control. In specific disputes, the provisions cannot be copied literally, but must be combined with the actual situation to determine if the public body is charged with the function of delegation or instruction; only then can we conduct additional analysis to ascertain the existence of a private institution that accepts such an assignment or order, and then examine whether financial support is included [8].

The Appellate Body convinces when a public body conducts normal commercial market activities, it cannot be considered that it is exercising a delegated function. Moreover, whether the economic backing is provided by the government or the enterprise has little to do with determining whether it is a "public body" in the Agreement on Subsidies and Countervailing Measures. Consequently, the Appellate Body believes that a "public body" means an entity that is granted certain governmental responsibilities or a body tasked with fulfilling them.

4. Different practice regulations and realities

4.1. The practice of WTO's supreme right of interpretation

The Marrakesh Agreement Establishing the World Trade Organization stipulates who has the authority to interpret, Article IX 2 [9]. The right to implement interpretations of this Agreement and the Multilateral Trade Agreements shall rest exclusively with the Ministerial Conference and the General Council. Although the Ministerial Conference and the General Council shall have the exclusive jurisdiction to issue of clarifications DSU and of the Multilateral Trade Agreements. But in fact, this power exists only on paper. For example, the European Union had officially requested the General Council to interpret the multilateral trade agreements in 1999. However, upon review and discussion of the submission, the General Council decided to urge the DSB to strive to reach consensus on focusing on clarifying these issues. When appropriate, the General Council can raise the matter again at a later meeting. Although members have requested an authoritative interpretation, the General Council did not provide an explanation and instead referred the issue back to the DSB.

4.2. The USA

After the Appellate Body passed the ruling on the DS379 case, the USA did not implement it. It is displeased with the "public body" designated by the Appellate Body in the DS379 case because it considers China to be a non-market economy nation.

Furthermore, the Communist Party of China and the governmental institutions collectively form the Chinese government. Establishing a socialist market economy under the leadership of government departments is one of the functions of the Chinese government. By formulating a five-year economic plan, government departments can provide business guidance for economic goals, ensure that the development of the real economy meets the government's planning requirements, and ensure the government's leading position in the economic field. China's "public body" follow the guidance of

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the Chinese government's "five-year economic plan", and China's "state-controlled corporations" and other "public body" have the shadow of the government [10].

Although the definition of "public body" is not clearly defined in the United States anti-subsidy law, the state has gradually formed a specific identification method for the application of "public body" in its long-term judicial practice, and the identification standards for market-driven economy and state-controlled economy are different. The factors for determining a "state-controlled economy" in the United States' 1988 Omnibus Trade and Competitiveness Act include "the extent to which the government controls or owns the means of production" and "the scale of authority wielded by the government resource allocation and corporate decisions on product prices and output" [4].

4.3. China

In addition to making universal commitments when joining the WTO, China also assumed "extra-WTO obligations" to demonstrate China's determination to integrate into the world trade system and carry out its own economic reforms, and has been promoting reforms in practice. For instance, the state-owned Assets Supervision and Administration Commission was founded to strengthen the independence of state-controlled corporations in 2003, and build an effective firewall between government and enterprises, and separate state ownership from state-owned enterprises.

However, it cannot be denied that in practice, the influence of party and government agencies is reflected in many important aspects within state-owned enterprises and, to a certain extent, is the pillar of people's livelihood, which is inseparable from China's political and economic system.

5. Conclusion

After the DS379 case, the United States even raised its own identification standards in disguise, so that the subsequent DS437 case involving the identification of "public body" was won by China, but it was not actually implemented. Up to now, the Appellate Body has not resumed its operation after suspension. This is a bad signal for the operation of multilateral trade between countries. Although nations may actively provide several viable strategies to reinstate the Appellate Body's regular functioning, they cannot circumvent the United States. The United States of America significantly influences the suspension of the Appellate Body. Cases like DS379 are just a microcosm of the fuse. In the final analysis, the United States tightened its foreign trade policy. Domestic politics believes that the dispute settlement report made by the DSB has harmed its interests; furthermore, the clarification and interpretation of the Appellate Body are vague, and there is a suspicion of overstepping its authority, just like the resolution of the Appellate Body in the case DS379. At present, apart from the United States, some countries have temporarily established MPIA for arbitration in order to resolve disputes, but the organization does not involve the United States, and only some WTO member countries participate. In the long run, a feasible plan is still needed.

Consequently, since the United States believes that the WTO's power of interpretation can only be attributed to the Ministerial Conference and the President's Conference, and the Appellate Body is suspected of exceeding its authority, an independent legal interpretation review body can be established outside the DSB from a procedural mechanism perspective. This will not be suspected of exceeding its authority and can also provide a more professional judgment on legal review and interpretation.

The panel and the Appellate Body are constrained by temporal and practical limitations in executing the dispute settlement system, there are some drawbacks in their review to a certain extent. However, since it is not easy to reform the mechanism in the WTO, instead of waiting for reforms, it is better to add mechanisms that keep pace with the times.

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