

COLUMN:

ISSUES CONCERNING THE WTO APPELLATE BODY

1. BACKGROUND

The WTO's Appellate Body is a standing body established by the Dispute Settlement Body (DSB) "that hears appeals from panel cases" and is "composed of seven persons, three of whom serve on any one case" (Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)). However, members of the Appellate Body have finished their terms of office consecutively since June 2017, and there was only one Appellate Body member remaining as of December 2019, meaning the Appellate Body has become unable to hear appeals.

Normally, the selection of a successor Appellate Body member is conducted before the end of the terms of the leaving Appellate Body member. However, to date the consensus required for the commencement of the selection process has yet to be reached at the DSB.

2. PROBLEMS POINTED OUT BY THE UNITED STATES ABOUT THE APPELLATE BODY

In "The President's Trade Policy Agenda" announced in March 2018, the United States stated that "[t]he most significant area of concern has been panels and the Appellate Body adding to or diminishing rights and obligations [of the WTO Members] under the WTO Agreement" and that "[i]t has been the longstanding position of the United States that panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements, as negotiated and agreed by its Members." The United States raised the following five points as specific examples of concerns: (1) disregard for the 90-day deadline for appeals; (2) continued service by persons who are no longer Appellate Body members; (3) issuing of advisory opinions on issues not necessary to resolve a dispute; (4) Appellate Body review of facts and review of a member's domestic (municipal) law *de novo*; and (5) claims by the Appellate Body that its reports are entitled to be treated as precedent.

Regarding item (1) (disregard for the 90-day deadline for appeals), Article 17.5 of the DSU has made it mandatory for the Appellate Body to issue a report, in principle, within 60 days of filing of an appeal to the Appellate Body, and at the most, within 90 days. The United States points out that, prior to 2011, it was the practice of the Appellate Body to comply with this deadline and to obtain consent from member countries to extend the deadline if a delay were to exceed 90 days. On the other hand, since 2011, the Appellate Body has been criticized for its non-compliance with the DSU and its non-transparency as evidenced by it not consulting with the member countries to obtain their consent and only informing them that the deadline could not be met.

Regarding item (2) (continued service by persons who are no longer Appellate Body members), Rule 15 of the Working Procedures for Appellate Review states that "[a] person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB,

complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.” The United States considers this problematic because it implies that Appellate Body members practically conduct member appointment themselves under said Rule, even though the right to appoint Appellate Body members belongs to the DSB and decisions concerning the appointment of Appellate Body members should be made by the WTO Members.

* Note that in February 2020, two Appellate Body reports (namely DS499 and DS505) were adopted [by the DSB] in accordance with Rule 15 of the Working Procedures for Appellate Review.

Regarding item (3) (issuing of advisory opinions on issues not necessary to resolve a dispute), the United States criticizes that, based on relevant provisions of the DSU, such as Article 3.4 of the DSU stipulating “[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements,” and Article 3.7 of the DSU stipulating “[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute,” the purpose of the dispute resolution system is not about “making the law,” but to help member countries resolve their disputes, and that, unlike national courts and some international courts, the WTO Members have not authorized panels and the Appellate Body to issue “advisory opinions.”

Regarding item (4) (Appellate Body review of facts and review of a member’s domestic (municipal) law *de novo*), the United States criticizes that, despite Article 17.6 of the DSU stipulating “[a]n appeal [to the Appellate Body] shall be limited to issues of law covered in the [relevant] panel report and legal interpretations developed by the panel,” the Appellate Body has stated that it could review the meaning of a Member’s municipal law as an issue of law and drawn conclusions not based on the panel’s fact findings and facts not disputed between the parties.

Regarding item (5) (claims by the Appellate Body that its reports are entitled to be treated as precedent), the United States criticized that, although the WTO Agreement does not give the Appellate Body authority to issue rulings that set binding precedent, the Appellate Body has ruled that a panel must follow a prior Appellate Body report absent “cogent reasons” and has treated the Appellate Body reports in the same manner as the WTO Agreement that the Members agreed through negotiations.

3. EFFORTS OF THE INDIVIDUAL MEMBERS

Based on the issues raised under items (1) through (5) in Section 2 above, since assuming a facilitator in January 2019, Ambassador Walker of New Zealand (DSB Chair) has assisted efforts to find a workable solution to improving the functioning of the Appellate Body and to avoid impasse of the Appellate Body, and he has held informal meetings with several WTO Members. At the General Council meetings held in February, May and July 2019, Ambassador Walker reported on the progress of the discussions so far, and he also made the proposal on matters for resolution, including the following, at the General Council meetings held in October and December of the same year.

90-day Deadline

- Confirm that the Appellate Body is required to issue an Appellate Body report within 90 days
- Parties may agree with the Appellate Body to extend the 90-day time-period, and written notification must be provided to the DSB when such agreement is reached

Scope of the Appellate Body Review

- Confirm that the interpretation of municipal law is a question of fact, and therefore is not subject to appeal
- Confirm that the WTO Members engaged in appellate proceedings are to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal

Continued service by persons who are no longer Appellate Body members

- Confirm that the WTO Members possess the right to appoint Appellate Body members
- Automatic launch of the selection process 180 days before the expiry of an Appellate Body member's mandate
- A leaving Appellate Body member's continuation of work only allowed for an appeal which was assigned to that member no later than 60 days before the expiry of his/her term of office and for which the oral hearing has been completed before the expiry.

Issuing advisory opinions on issues not necessary to resolve a dispute

- Limit the Appellate Body's review to the extent necessary for resolving an individual dispute; the Appellate Body shall not make decisions on any issues not raised by the parties

Precedential Value

- Confirm that no binding precedent will be created through WTO dispute settlement; at the same time, acknowledge the value of consistency and predictability in the legal interpretation of rights and obligations under the covered agreements
- Confirm that panels and the Appellate Body may take previous panel/Appellate Body reports into account to the extent relevant

Overreach

- Confirm that panels, the Appellate Body, and the DSB will not add to or diminish the rights and obligations of the WTO Members
- Panels and the Appellate Body shall interpret provisions of the Anti-dumping Agreement in accordance with Article 17.6(ii) thereof

Dialogue between the Appellate Body and the WTO Members

- Informal dialogue to be conducted between the DSB and the Appellate Body once a year in addition to the discussion at the time of adoption of Appellate Body reports
- Establish rules to ensure that there should be no discussion of any individual Appellate Body member or ongoing disputes in order to safeguard the independence and integrity of the Appellate Body

In response to the concerns raised by the United States, Japan submitted with Australia and Chile in May 2019 the joint proposal, including that “[Members] confirm that [the Appellate Body shall (not review the panel’s fact-finding, but shall) review issues of law,” that “[Members] confirm that [recommendations and rulings of the DSB] cannot add to or diminish the rights and obligations of member countries,” and that “[Members] confirm that [an interpretation by the Appellate Body of any WTO provision] does not constitute a binding precedent” with regard to a decision of the Appellate Body. The proposal by Ambassador Walker was derived by finding common ground among Members through informal meetings based on the 12 proposals in total made by Members, including the Japan-Australia-Chile joint proposal. A great majority of Members, including Japan, have expressed their support for the draft decisions on the Appellate Body reforms and for resuming the selection process of succeeding Appellate Body members at the General Council. The United States, however, did not support the draft decisions, stating that there had been no discussions as to “why the Appellate Body has deviated from the rules” and on “the need to consider how to ensure that the Appellate Body will follow the rules,” and the draft decisions were not adopted.

The United States Trade Representative (USTR) published the “Report on the Appellate Body of the World Trade Organization” (174 pages in total) on February 11, 2020 and raised cases of the Appellate Body overstepping its authority in addition to the five points mentioned above: (6) failing to make the recommendation required in instances where a measure has expired; (7) overstepping its authority by opining on matters within the authority of other WTO bodies; and (8) acting inconsistently with the exclusive authority of the Ministerial Conference and General Council to make authoritative interpretations of the WTO Agreement. The report also asserted that these cases of the Appellate Body overstepping its authority have resulted in the Appellate Body erroneously reading into the rights and obligations to which WTO Members never agreed, narrowing WTO Members’ legitimate policy space, and favoring non-market economies. Specifically, the report raised the following cases as such instances: erroneous interpretation of the term “public body” (Article 1.1(a)(1) of the SCM Agreement); detrimental impact test (Articles 1.1 and 3.1 of the GATT, Article 2.1 of the TBT Agreement); zeroing (Article 2 of the AD Agreement); a stringent and unrealistic test for using out-of-country benchmarks (Article 14 of the SCM Agreement); creation of an “unforeseen developments” test and serious causation analysis (Article 19 of the GATT); and the prohibition of “double remedies” through the concurrent application of countervailing duties on subsidies and antidumping duties (Article 19.3 of the SCM Agreement and Article 6 of the GATT). Based on these, the USTR asserted that the Appellate Body’s overstepping of its authority has undermined not only the WTO’s dispute settlement system, but the effectiveness and functioning of the WTO more generally and that lasting and effective reform of the WTO dispute settlement system requires all WTO Members to come to terms with the failings of the Appellate Body.

Regarding item (6) (failing to make the recommendation required in instances where a measure has expired), the United States pointed out that even though “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement,” the Appellate Body clearly has acted inconsistently with such obligations, including by failing to issue a recommendation on the ground that the measure has expired during the WTO dispute settlement proceedings. On top of that, the United States offered the criticism that

such failure to issue recommendations creates adverse consequences by leaving a complaining WTO Member with no further recourse in a proceeding, making it unable to initiate subsequent compliance proceedings (such as compliance panel proceedings and retaliation measures), and encouraging a respondent WTO Member subject to amend the non-conforming measure during the proceedings to avoid a recommendation or withdraw the measure for the time being and later reinstitute it.

Regarding item (7) (overstepping its authority by opining on matters within the authority of other WTO bodies), the United States offered the criticism that the Appellate Body has, without any authority, dictated or expressed views on matters such as Annex V procedures of the SCM Agreement and procedures to appoint Appellate Body members, which clearly fall within the responsibilities of the DSB (i.e., the WTO Members), thereby impairing core functions of the DSB.

Regarding item (8) (the exclusive authority to make authoritative interpretations of the WTO Agreement), the United States offered the criticism that, although it is clearly stipulated that the “Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of” the WTO Agreement (Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization), the Appellate Body has undermined the rights of the WTO Members by asserting that “it can deem decisions not made under the procedures required in Article IX:2 of the Marrakesh Agreement to be ‘subsequent agreements’ that interpret the WTO Agreement” and by giving authoritative interpretations to decisions or the like reached outside the required procedures.

4. INTERIM MEASURES WHILE THE FUNCTION OF THE APPELLATE BODY IS SUSPENDED

While the function of the Appellate Body is suspended, discussions concerning the use of the arbitration procedures under Article 25 of the DSU are in progress among certain WTO Members. The European Union has reached agreements with Canada and Norway (reached in July 2019 and October 2019, respectively) to use an interim appeal arbitration arrangement should there be any matters requiring an appeal in the future.

Further, the European Union announced a proposal concerning an amendment of the relevant EU Regulation in December 2019 in response to the Appellate Body impasse. Under the current EU Regulation, the WTO dispute settlement procedures, including the appellate review by the Appellate Body, must be completed before the European Union takes trade enforcement countermeasures. If, however, another Member appeals a panel report during the period in which the Appellate Body cannot function, that Member may be able to avoid receiving and hence may be able to evade binding rulings by the Appellate Body. Therefore, the objective of the amendment is to allow the European Union to take retaliation measures in situations where another WTO Member is to avoid binding rulings through the WTO dispute settlement (including the situation where the other WTO Member does not agree to the recourse to an interim appeal arbitration arrangement). The proposed amendment is scheduled to enter into force by mid-2020, after a resolution of the European Parliament and of the European Council.

In addition, 17 WTO Members, including the European Union and China, issued at the WTO mini-ministerial conference held in Davos in January 2020 a joint ministerial statement to the effect that, as a

contingency measure enabling an interim appeal mechanism pending the discussions on Appellate Body reforms, the participating WTO Members will work together on a multi-party interim appeal arrangement that utilizes the arbitration procedure set forth in the WTO Agreement and will aim for speedy finalization of that arrangement.

5. FUTURE CHALLENGES

The WTO dispute settlement procedure is a core pillar of the WTO that supports multilateral free-trade systems through resolving disputes between the WTO Members. While any appeal of panel reports must be reviewed by the Appellate Body, it no longer has a quorum necessary for appellate reviews, which is a situation the WTO rules had not anticipated.

Since panel reports, if appealed, will be considered for adoption by the DSB only after completion of the appeal (see Article 16.4 of the DSU), the losing party would, by appealing panel reports, be able to block the DSB recommendations, meaning there is possibility that the dispute settlement mechanism may become dysfunctional if such a situation prevail.

In order to achieve an early recovery of the functioning Appellate Body and to have the dispute settlement mechanism function as it should, all WTO Members need to proactively participate in discussions toward a long-lasting solution. Japan should become more involved and communicate positive messaging in discussions among the WTO Members concerning reforms of the Appellate Body so as to proceed with a view to finding a solution to this problem.