# 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 no member left as of December 2020, 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 term 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 pointed 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 considered 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 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 criticized 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 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 criticized 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 Agreements do 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 Agreements that the Members agreed through negotiations.

Furthermore, 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 Agreements. 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 Members never agreed, narrowing 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 in determining the violation of the principle of non-discrimination (GATT Article I:1 and Article III:1, 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 (GATT Article XIX); 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 GATT Article VI). 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 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 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 Member 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 Members), thereby impairing the core functions of the DSB.

Regarding item (8) (the exclusive authority to make authoritative interpretations of the WTO Agreements), 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 Agreements (Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization), the Appellate Body has undermined the rights of the 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 made under procedures other than those agreed upon as the procedures for adopting the interpretation of the WTO Agreements.

## 3. EFFORTS OF THE INDIVIDUAL MEMBERS

### (1) WALKER PROCESS

Based on the issues raised under items (1) through (5) in Section 2 above, since assuming the position of 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 an impasse of the Appellate Body, and he has held informal meetings with several Members. A total of 12 proposals were submitted by the Members through this process.

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 a proposal on matters for resolution, including the following matters, at the General Council meetings held in October and December of the same year.

<u>90-day Deadline</u>

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

<u>Scope of the Appellate Body Review</u>

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

<u>Continued service by persons who are no longer Appellate Body members</u>

- Confirm that the 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 should only be 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 should 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 to the disputed cases they review.

Overreach

- Confirm that findings and recommendations of panels and the Appellate Body, and recommendations and decisions of the DSB, cannot add to or diminish the rights and obligations of the Members.
- Panels and the Appellate Body shall interpret the provisions of the Anti-Dumping Agreement in accordance with Article 17.6(ii) thereof.

Dialogue between the Appellate Body and the 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.

A great majority of Members, including Japan, have expressed their support for the decision of the General Council on Ambassador Walker's reform proposal 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 reform proposal as above was not adopted.

## (2) WTO'S 12TH MINISTERIAL CONFERENCE

At the WTO's 12th Ministerial Conference held in June 2022, Members, including the United States, agreed to "commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."

## (3) SETTING UP FORUM FOR INFORMAL DISCUSSION

In April 2022, the United States set up a forum for informal discussions among Members on dispute settlement reform. In the process, Members identified interest on dispute settlement reform, and a total of 230 or more interests were identified.

In February 2023, a new forum for informal discussions (the "Informal Process") was established, facilitated by Marco Molina, then deputy permanent representative of Guatemala, to move the discussion towards a

more solution-oriented discussion based on the interests identified by these Members. From March 2023 to January 2024, the facilitator reported regularly to the DSB on the progress of the discussions in the Informal Process. At the special meeting of the General Council held in February 2024, the facilitator reported to the DSB the consolidated document of over 50 pages summarizing the results of the discussions in the Informal Process. The document is published as an attachment to the report of the DSB Chairman and the facilitator at the special meeting of the General Council[1].

In response to this, in February 2024, India, Indonesia, Egypt, Bangladesh and South Africa expressed concern that excessive changes were proposed in the Informal Process and submitted to the WTO the document calling for an immediate commencement of the formal discussions on dispute settlement reform[2].

### (4) WTO'S 13TH MINISTERIAL CONFERENCE

At the WTO's 13th Ministerial Conference held in February 2024, the following ministerial decision was announced on dispute settlement reform;

- Recalling the Ministers' commitment made at the WTO's 12th Ministerial Conference (MC12) to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024, and the Ministers take note of the work done thus far.
- The Ministers recognize the progress made through this work as a valuable contribution to fulfilling Ministers' commitment. The Ministers welcome all submissions from Members that help advance the Ministers' work.
- The Ministers instruct officials to accelerate discussions in an inclusive and transparent manner, build on the progress already made, and work on unresolved issues regarding appeal/review and accessibility to achieve the objective by 2024 as the Ministers set forth at MC12.

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

### (1) MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT

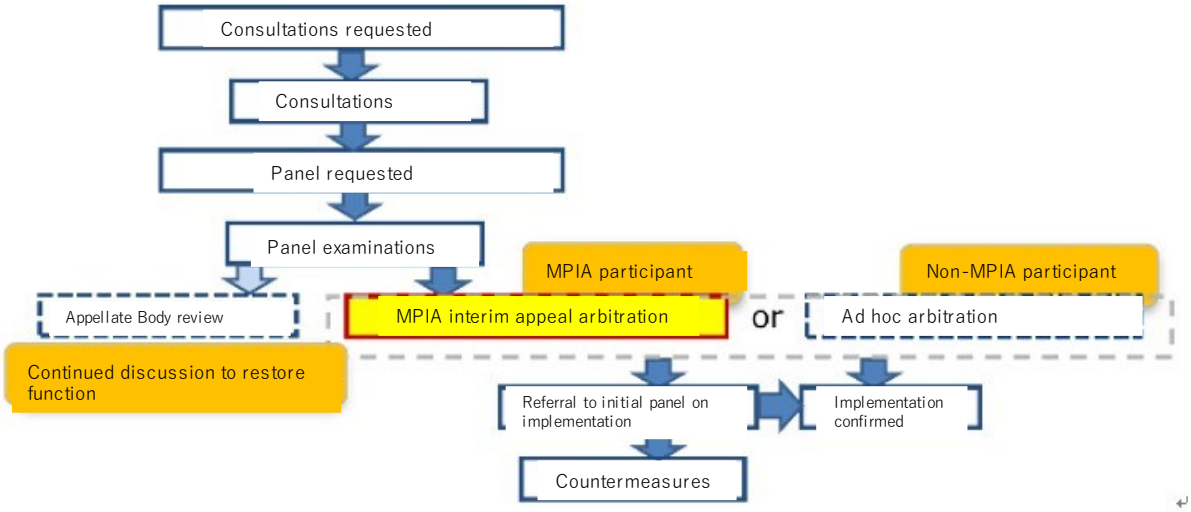
Some Members, including the European Union, launched the Multi-party Interim Appeal Arbitration Arrangement ("MPIA") in April 2020, and notified the DSB of the same. The MPIA is a gentleman's agreement which sets forth that, only for the period until the Appellate Body becomes fully functioning, disputes between Members will be resolved by arbitration rather than by appeal to the suspended Appellate Body when a Member has an objection to the panel's decision. It is necessary to execute an arbitration agreement for each case with respect to disputes between Members and notify the DSB of the same.

As of March 2024, there were 26 participating countries and regions (53 countries and regions including EU member states): Japan, Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Hong Kong, Iceland, Macau, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine and Uruguay.

Figure 1: Flow of dispute settlement procedures while the function of the Appellate Body is suspended

[1] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/385.pdf&Open=True

[2] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/DSB/8.pdf&Open=True




## (2) UTILIZATION OF MPIA

As of March 2024, there have been twelve cases in which the parties have agreed to use the MPIA (the panel proceedings have been closed in three of them through settlements and withdrawals, and the panel report was finalized in one case). An arbitral award was issued for one of the cases (DS591 below) in December 2022. Although not based on the MPIA, an arbitration was conducted between the EU and Turkey using procedural rules based on the MPIA, and an arbitral award was issued in July 2022 (DS583 below). The outline of each case is as follows.

DS583 (Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products) drew attention as the first case to use arbitration proceedings under Article 25 of the DSU as an appeal process. Since Turkey, the appellate Member, is not an MPIA participant, arbitration proceedings were developed with reference to the MPIA. The arbitrators consisted of two arbitrators chosen from ten MPIA arbitrators, and one former Appellate Body member. At the discretion of the arbitrators, in order to comply with the 90-day time-period, instructions were given regarding the maximum number of words in the documents to be submitted, the number of oral arguments and the time for making statements, and questions to be discussed at oral hearings were also sent in advance to the parties and third countries. The arbitrators found that the panel erred in its interpretation of an exception to government procurement under GATT Article III:8(a) and overruled such interpretation. However, the arbitrators upheld the panel's finding that the relevant measure does not fall under an exception to government procurement. In addition, the arbitrators upheld the panel's finding that the Turkish measures were inconsistent with GATT Article III:4 and Article 2.1 of the TRIMs Agreement, holding that they cannot be justified under GATT Article XX:(b) or Article XX:(g).

In DS591 (Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands), which is the first MPIA arbitration, since Colombia, the appellate Member, limited its claims in the appeal to four points, the arbitral award was issued within 90 days (76 days) after the notice of appeal. As a way of making the proceedings more efficient, guidelines were given regarding the maximum number of words in the documents to be submitted, as in the case of DS583, and a pre-hearing (held via virtual means) was conducted for the first time in an attempt to clarify the parties' interests to the arbitral tribunal before the oral arguments. A unique feature of the findings is that they included the findings regarding the second sentence of Article 17.6(ii) of the AD Agreement that stipulates that if there are two or more permissible interpretations, the panel should not decide on a single interpretation (if the measure is based on a

permissible interpretation, the panel should find that it is consistent with the Anti-Dumping Agreement). Specifically, the arbitrators emphasized the need to respect the discretion of investigating authorities in Anti-Dumping cases and that the interpretation of the treaty does not inevitably lead to a single result. The arbitrators made a general statement that could be considered to expand the scope of the application of the second sentence of Article 17.6(ii) of the AD Agreement, by stating that it was necessary to begin the review by examining whether the interpretation claimed by the Member imposing an anti-dumping measure was permissible (even if it differed from the interpretation of the arbitrators). However, in conclusion, the arbitrators found that the interpretation of Colombia, the appellate Member (the investigating authority), was not permissible and upheld the panel's finding that Colombia's measures were inconsistent with the Anti-Dumping Agreement.

### (3) COUNTERMEASURES AGAINST APPEALS INTO THE VOID

(A) Efforts by the EU

The European Union announced a proposal for an amendment of the Regulation concerning the exercise of the European Union's rights for the application and enforcement of international trade rules in December 2019 in response to the Appellate Body impasse. Prior to the amendment to the EU Regulation, the WTO dispute settlement procedures, including the appellate review by the Appellate Body, had to be completed before the European Union took trade enforcement countermeasures. If, however, another Member appeals a panel report during the period in which the Appellate Body has ceased to function, that Member may be able to avoid receiving, and hence may be able to evade, binding rulings by the Appellate Body. Therefore, the amendment to the EU Regulation was conducted to allow the European Union to take retaliation measures in situations where another Member not participating in the MPIA is to avoid binding rulings through the WTO dispute settlement (including the situation where the other Member does not agree to the recourse to an interim appeal arbitration arrangement), and in February 2021, the amendment was enacted after a resolution of the European Parliament and of the European Council (EU Regulation 2021/167 (amending EU Regulation 2014/654)).

(B) Efforts by Brazil

In January 2022, Brazil also enacted an interim law aimed at taking retaliation measures, as was the case with the amendment of the EU Regulation. Under this interim law, if another Member not participating in the MPIA does not agree to the negotiations and files an appeal into the void, Brazil is able to take countermeasures 60 days after Brazil notifies such Member of its intention to take such countermeasures. This interim law was subsequently approved by the Congress in May 2022 and became a permanent law.

## 5. EFFORTS BY THE JAPANESE GOVERNMENT

In response to the concerns raised by the United States, Japan submitted a joint proposal together with Australia and Chile in May 2019, which included proposals such as: "[The Members] confirm that [the Appellate Body] shall (not review the panel's fact-finding, but shall) review issues of law," "[The Members] confirm that [recommendations and rulings of the DSB] cannot add to or diminish the rights and obligations of member countries," and "[The 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. Ambassador Walker's reform proposal (see 3 (1) above) was prepared based on the 12 proposals in total made by Members, including the Japan-Australia-Chile joint proposal.

The Japanese government has also committed itself to the target agreed upon at the WTO's 12th Ministerial Conference held in June 2022 (to "commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024"). Japan has also participated in and contributed to the discussions initiated by the United States in April 2022 and the Informal Process

launched in February 2023.

At the WTO's 13th Ministerial Conference held in February 2024, Mr. Kozuki, State Minister of Economy, Trade and Industry of Japan, stated that it is necessary to work towards resolving the remaining issues, including the treatment of two-tier system, in order to restore the dispute settlement function by 2024 while using the progress made so far as the basis for future discussions, and that the political will to make efforts towards the prompt and final settlement of disputes until the dispute settlement function is fully restored is important.

At the same time, as an interim measure until the dispute settlement function is fully restored, on March 10, 2023, the Japanese Cabinet approved Japan's participation in the MPIA, and Japan notified the DSB to that effect.

## 6. 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 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, thereby preventing final settlement of disputes.

In order to achieve an early recovery of the functioning Appellate Body and to have the dispute settlement mechanism function as it should, all Members need to proactively participate in discussions toward a long-lasting solution. Japan has also been actively engaged in discussions, including the submission of proposals, and should continue to make efforts to reform the WTO dispute settlement system and contribute to seeking a solution to this problem. It is also important to use the MPIA and arbitration procedure under Article 25 of the DSU as an interim measure until the dispute resolution function is restored.