

**Special Task Force on Policy Response to the  
Non-functioning of the WTO Appellate Body  
Interim Report**

**June 2022**

# **Special Task Force on Policy Response to the Non-functioning of the WTO Appellate Body Interim Report**

## **1. Purpose of establishing the Special Task Force**

### **(1) Background**

The dispute settlement procedure of the WTO is one of its central pillars. It aims to avoid politicization of inter-state trade issues and international economic disputes and to achieve objective solutions based on internationally-agreed rules. In this procedure, panels and the Appellate Body—quasi-judicial third-party bodies under the two-tier adjudicative system—have examined the WTO-consistency of laws, regulations, measures, etc., as referred by complainants, and, where a violation is found, they have issued recommendations for correction thereof. According to the WTO, about 90% of the findings and recommendations by panels and the Appellate Body have been complied with<sup>1</sup>. Also, in the WTO dispute settlement procedure, if one party does not comply with the rulings or recommendations of panels and the Appellate Body, the other party winning the case can take countermeasures and seek compliance, which ensures the effectiveness of compliance with the WTO agreements.

The Appellate Body is a permanent body established under the Dispute Settlement Body (DSB), which “shall hear appeals from panel cases”, “shall be composed of seven persons, three of whom shall serve on any one case” (Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)), and which serves as a second tier body in the WTO dispute settlement procedure. However, due to opposition from the U.S., replacements were not appointed as Appellate Body members completed their terms of office one after another since June 2017. The Appellate Body has become unable to hear appeals because all the Appellate Body member positions have been vacant since December 2019. Once appealed, the panel’s findings cannot be adopted until after the completion of the appeal (see Article 16.4 of the DSU). In this connection, since the Appellate Body ceased to function, some WTO Members have appealed the panel findings knowing that the appeal could not be heard (i.e., “appeal into the void”), thereby creating situations where the panel findings are prevented from becoming final and adopted, and the dispute settlement procedure is left in limbo.

As for the cases to which Japan is a party, the respondent countries have already appealed into the void in the cases of (1) India's safeguard measures on steel products (DS518) and (2) Korea's anti-dumping measures against Japanese stainless steel bars (DS553), and the respondent countries might also appeal into the void in two pending panel proceedings (i.e., India's measure to increase tariffs on ICT products (DS584) and China's anti-dumping measures against Japanese stainless steel products (DS601)). Japan has a rule-oriented trade policy and has sought to resolve issues with respect to other countries’ measures suspected of being inconsistent with the WTO agreements, using the WTO dispute settlement procedure. If we allow the situation where there are frequent appeals into the void, rule-based

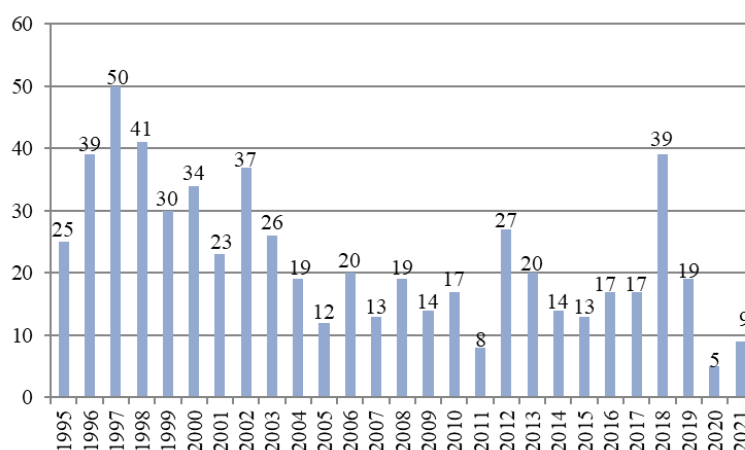
---

<sup>1</sup> [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/briefing\\_notes\\_e/bfdispu\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm)

governance may not work in the international trade system, thereby losing its effectiveness as a means of correcting the measures at issue.

Also, since the Appellate Body ceased to function, a total of 12 dispute cases have been appealed into the void. Furthermore, 22 cases, including those above, have been left in limbo in a situation where the appeals cannot be heard because the Appellate Body ceased to function. As regards the caseload of the WTO dispute settlement system, there had been 22.5 new pending cases<sup>2</sup> per annum on average between the establishment of the WTO and 2019. This average, however, decreased significantly to 5 and 9 cases in 2020 and 2021, respectively. The malfunctioning of the WTO's rule-based governance caused by frequent instances of appeal into the void is of global concern. If it becomes easier for each Member to take WTO-inconsistent measures in this situation, and if the affected Member resorts to power-based policies by retaliating without due regard for the rules, international stability and predictability in conducting business will be damaged and it will also have a significant impact on Japanese companies.

(Reference) Caseload of the WTO's dispute settlement system since its establishment



## (2) Necessity of consideration of policy response

Currently, WTO Members who lose at the panel stage of the WTO dispute settlement procedure can block the Dispute Settlement Body's recommendations for correction by appealing into the void. This poses a serious challenge for rule-based governance of the international trading system, which will not work effectively. In order to tackle this situation, Japan has been seeking to restore the Appellate Body's function and to reform the dispute settlement system. However, the success of these efforts will depend on the attitudes of the Members concerned, and it is difficult to foresee whether the problems at issue can be solved in the near future.

The EU and certain other Members, on the other hand, have taken alternative measures to cope with the non-functioning of the Appellate Body, including establishing and participating in the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and institutionalizing their own countermeasures against appeals into the void. Some panel cases in which Japan is a

<sup>2</sup> In addition, the annual average caseload for the most recent decade (2010 – 2019) was 19.1 cases.

complainant have also been appealed into the void, and, if the current situation continues, it is highly likely that such cases will increase further in the future. Japan may need to consider alternative measures to respond to the current situation without waiting for the reform of the system to have been concluded.

With this background and awareness of the problems in mind, the Secretariat (METI) made the following proposals at a meeting of the Committee on New Direction of Economic and Industrial Policies of the Industrial Structure Council held on February 2022, and, in light of these proposals, established the Special Task Force in May 2022 to consider the necessity of alternative measures. In the event it concluded that such measures are necessary, the Special Task Force was further mandated to consider what kind of measures should be designed in light of policy needs, conformity with international rules, etc.

(Reference) Materials of the meeting of the Committee on New Direction of Economic and Industrial Policies, Industrial Structure Council (excerpts) February 4, 2022

- Amidst the world's fragmentation into multiple poles, universal trade rules have become even more important. Japan should continue to focus on the rule-based order under the multilateral trading system.
- The WTO—a post-Cold War international organization—has increased its Members to 164 but faces the situation where unanimous rule making is difficult. Also, the WTO faces the non-functioning of the Appellate Body, among other challenge, and is unable to serve as a sufficient restraint against unfair trade measures. Non-traditional approaches that complement the WTO may also need to be considered. These could include:
  - Rule-making efforts among willing countries in the WTO to strengthen a sustainable and fair economic order.
  - Considering responses to the non-functioning of the Appellate Body, in light of the moves by the EU and certain other Members to establish the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and institutionalize their own countermeasures against appeals into the void and the economic coercion, while continuing efforts towards the reform of the WTO dispute settlement system.

## **2. Members of the Special Task Force**

Chair	KAWASE Tsuyoshi	Professor, Faculty of Law, Sophia University Chair of the Subcommittee on Trade Remedy Measures, Trade Committee, Industrial Structure Council
Members	ARAKI Ichiro	Professor, Faculty of International Social Sciences, Yokohama National University Vice Chair of the Subcommittee on Unfair Trade Policies and Measures, Industrial Structure Council
	ITO Kazuyori	Professor, Graduate Schools for Law and Politics, The University of Tokyo Member of the Subcommittee on Unfair Trade Policies and Measures, Industrial Structure Council
	IWATSUKI Naoki	Professor, Faculty of Law, Rikkyo University
	KIMURA Fukunari	Professor, Faculty of Economics, Keio University Chair of the Subcommittee on Unfair Trade Policies and Measures, Industrial Structure Council
	KUNIMATSU Maki	Professor, Faculty of Global Management, Chuo University Member of the Trade Committee, Industrial Structure Council Member of the Subcommittee on Unfair Trade Policies and Measures, Industrial Structure Council
	KURODA Kazuo	General Manager (Trade Administration), Marketing Administration and Planning Division, NIPPON STEEL
	SUZUKI Kazuto	Professor, Graduate School of Public Policy, the University of Tokyo Member of the Subcommittee on Security Export Control Policy, Trade Committee, Industrial Structure Council
	MORITA Kiyotaka	Senior Manager, International Affairs Bureau, Japan Business Federation

(Listed in Japanese syllabary order)

## **3. Examples of alternative measures already adopted**

The following alternative policy responses have been taken by other countries/regions to date.

### **(1) Multi-Party Interim Appeal Arbitration Arrangement (MPIA)**

In the WTO, Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides for arbitration. The EU and certain other Members proposed a particular arbitration procedure, named the MPIA, which uses Article 25 of the DSU and temporarily replaces the Appellate Body. In April 2020, the MPIA was established upon notification to the WTO by the participating Members. As of the end of May 2022, 25 Members had joined the MPIA<sup>3</sup>.

<sup>3</sup> Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, EU, Guatemala, Hong Kong, Iceland, Macao, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine, and Uruguay.

In the MPIA, three arbitrators from the pool of arbitrators shall serve any one case; in August 2020, the MPIA members notified the WTO of the ten arbitrators that comprise the pool of MPIA arbitrators.

As of the end of May 2022, there are eight cases in which the parties have agreed to use the MPIA, but there has not been a case to date in which proceedings have commenced under the MPIA.

(Reference) Text of Article 25 (Arbitration) of the DSU

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

(Reference) Cases in which the parties have agreed to use the MPIA

- 1) *Canada – Wine (Australia)* (DS537, Australia as complainant): Mutually agreed solution (MAS) made in May 2021 (the panel report issued in the same month (brief description of the MAS)). Ended without initiating the MPIA arbitration.
- 2) *Canada – Measures Concerning Trade in Commercial Aircraft* (DS522, Brazil as complainant): MAS made in February 2021 (the panel report was not issued). Ended without initiating the MPIA arbitration.
- 3) *Costa Rica – Avocados (Mexico)* (DS524, Mexico as complainant): The panel report was adopted in May 2022 without an appeal.
- 4) *China – Measures Concerning the Importation of Canola Seed from Canada* (DS589, Canada as complainant)
- 5) *Colombia – Anti-Dumping Duties on Frozen French Fries from Belgium, Germany and the Netherlands* (DS591, the EU as complainant)
- 6) *China – Anti-Dumping and Countervailing Duty on Barley from Australia* (DS598, Australia as complainant)
- 7) *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia* (DS602, Australia as complainant)
- 8) *Australia – Anti-Dumping and Countervailing Duty Measures on Certain Products from China* (DS603, China as complainant)

## **(2) DSU Article 25 arbitration other than the MPIA**

In a case involving a complaint by the EU against measures on pharmaceutical products applied by Türkiye (DS583), the EU and Türkiye (a non-MPIA member) agreed to appeal arbitration procedures under Article 25 of the DSU. The appeal arbitration was to be conducted by three arbitrators appointed in accordance with a unique arbitrator appointment procedure<sup>4</sup> separately agreed between the parties, by reference to the MPIA procedures. Since there was no pending case under the MPIA as of the end of May 2022, this case is the first appeal arbitration with procedures that resemble those of the MPIA. The arbitration award will be issued this year because the parties have agreed that the award should be issued within 90 days (maximum extension: three months) after the appeal<sup>5</sup>. Arbitration under Article 25 of the DSU has not been substantially used as an alternative to the panel and appeal procedures but may also be used by non-MPIA members as well in the future.

In addition, although not under the MPIA, there is a case in which the U.S. and Korea agreed in February 2020 to use arbitration under Article 25 of the DSU, rather than the Appellate Body, in the event either party files an appeal in any future compliance procedure under Article 21.5 of the DSU in a case involving anti-dumping measures by the U.S. against Korean OCTG (DS488)<sup>6</sup>.

(Reference) Timeline of *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products* (DS583)

- September 30, 2019 Panel established
- March 22, 2022 Arbitration agreement to use appeal arbitration under Article 25 of the DSU with rules and procedures similar to those of the MPIA, notified to DSB (panel proceeding suspended)
- April 25, 2022 Türkiye filed a notice of recourse to appeal arbitration and the appeal submission
- May 4, 2022 Three arbitrators appointed:  
Seung Wha CHANG, ex-Appellate Body member (Korea)  
Mateo DIEGO-FERNÁNDEZ ANDRADE, Member of the MPIA Pool (Mexico)  
Guohua YANG, Member of the MPIA Pool (China)
- May 13, 2022 The EU filed its appellee submission

### **(3) Countermeasures against appeals into the void**

The above is an example that uses the arbitration mechanism established under the WTO agreements. In addition to this, the EU and Brazil (both MPIA members) have introduced a legislation allowing them to take countermeasures against any appeal into the void by a non-MPIA member against them.

In December 2019, the EU announced a proposal amending EU regulations in response to the non-functioning of the Appellate Body. Before the amendment of the regulations, the EU was required to complete the WTO procedures, including a hearing at the Appellate Body, before it could take countermeasures. However, in the situation of the non-functioning of the Appellate Body, other Members can avoid binding decisions by appealing them. Therefore,

---

<sup>4</sup> This agreement between EU and Türkiye differs from the MPIA arbitration procedures, in that the method of arbitrator appointment of the former uses a unique roster that consists of the MPIA pool of arbitrators and of the former Appellate Body members. In this case, one of the three arbitrators was actually appointed from the former Appellate Body members.

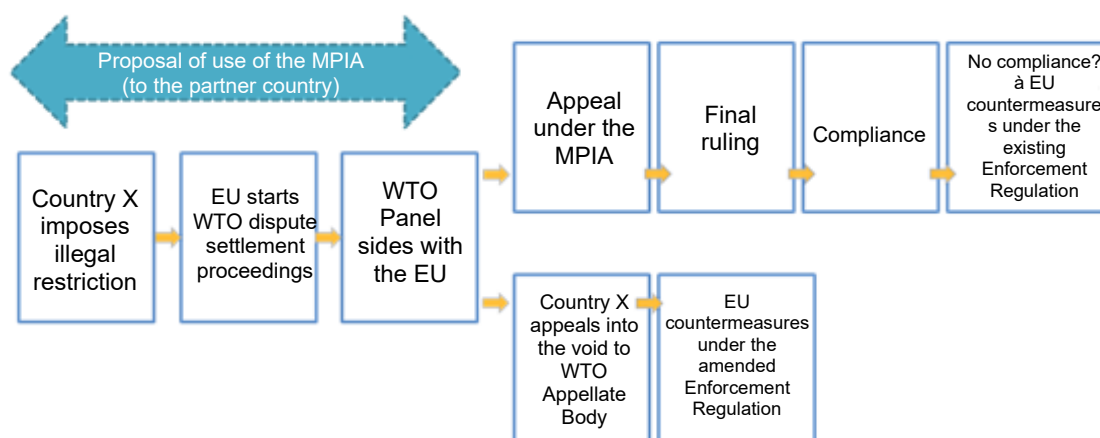
<sup>5</sup>In addition, there was also a similar arbitration agreement concluded between the parties, in which case Türkiye filed a complaint against the EU's safeguard measures on steel (DS595), but the EU did not appeal.

<sup>6</sup> WT/DS488/16.

in December 2019, the EU announced an amendment of the EU regulations that would allow it to take countermeasures against a non-MPIA member which avoids the WTO's final ruling. In February 2021, the amendment of the regulations was enacted by resolution of the European Parliament and the European Council.

(Reference) The EU's system of countermeasures against appeals into the void.

### Amendment of the EU Enforcement Regulation (flowchart until the imposition of countermeasures)



Reference: [https://trade.ec.europa.eu/doclib/docs/2019/December/tradoc\\_158504.pdf](https://trade.ec.europa.eu/doclib/docs/2019/December/tradoc_158504.pdf)

In January 2022, Brazil also enacted transitional legislation designed to allow it to take countermeasures, in the same way as the amended EU regulations. The transitional legislation puts in place a system that allows Brazil to impose countermeasures against a non-MPIA member that refuses negotiation and appeals into the void. Brazil can do so within 60 days after giving notice of its intention to take countermeasures. The system was originally introduced as a transitional law issued under authority of the President and, in May 2022, such a mechanism was adopted as a permanent measure as a result of deliberations in the Brazilian Congress. This system differs from the EU mechanism, in that it ensures a certain grace period before countermeasures are imposed, by allowing Brazil to impose countermeasures only after 60 days from the date when it notifies the counterparty of its intention to impose such countermeasures.

(Reference) Brazil's system of countermeasures against appeals into the void

- Countermeasures can be taken in the following cases:
  - 1) where approved by the DSB; or
  - 2) where a claim filed by Brazil as a complainant is (even partially) accepted in the WTO panel report, (a) the report is appealed by the respondent, (b) the Appellate Body cannot hear the appeal, or the DSB cannot approve the Appellate Body report, and (c) 60 days have elapsed since the notice of intention to take countermeasures was given to the respondent.
- The level of countermeasures may not exceed that of nullification or impairment of benefits made.

#### **4. Policy response to the non-functioning of the WTO Appellate Body**

Japan has pursued a "rule-oriented" trade policy that aims at settling trade issues and



international economic disputes based on rules. It continues to be important to ensure the rule-based international economic order under the multilateral trading system. If the instances in which countries violate the rules or adopt power-based responses not based on rules increase, international relations will become unstable, which could endanger the foundation of the existence of Japan and its industries that depend on the connection with the global economy as their lifeline. In order to avoid such situation and restore and develop the rule-based international economic order, Japan should make maximum efforts to reform the WTO dispute settlement system and restore it.

However, as mentioned above, restoring the function of the Appellate Body and reforming the dispute settlement system will depend on the attitudes of WTO Members, and it is difficult to tell whether the problems at issue can be solved in the near future. The Special Task Force considers that, Japan should immediately pursue policy response that seeks to restore “the rule of law”, including through innovative approaches that temporarily complement the WTO. This is on the assumption that the Appellate Body will not function for the time being, while continuing efforts towards the improvement of the functions of the WTO dispute settlement system. It is essential to consider such policy response, which is for the benefit of the Japanese economy and industries, which are expected to develop further along with the global economy.

The Special Task Force considered policy responses, focusing on the following: “(1) the MPIA”, “(2) DSU Article 25 arbitration other than the MPIA”, and “(3) Countermeasures against appeals into the void” as referred above in “3. Examples of alternative measures already adopted”.

#### **A. Use of “(1) MPIA” and “(2) DSU Article 25 arbitration other than the MPIA”**

The Special Task Force considered that the use of “(1) the MPIA” and “(2) DSU Article 25 arbitration other than the MPIA”—both of which are responses based on the current WTO agreements—are effective and practical options.

First, with respect to the MPIA, the Special Task Force considered that the use of the MPIA is an effective and practical option to cope with potential appeals into the void, specifically in the situation where the panel's finding will be issued in the future in the case against China (DS601), which is an MPIA member. Since the MPIA applies to cases in which both parties have joined the MPIA before the issuance of the panel's interim report, the use of the MPIA should be considered and determined through the coordination within the government sufficiently prior to the issuance of the interim report. If Japan does not participate in the MPIA, it will lose an effective trade policy tool in its relationship with China.

Also, more than 600 complaints have been filed in the WTO dispute settlement system so far, but panel proceedings have not been commenced in more than half of them, which is considered to indicate that the possibility of findings by panels or Appellate Body have an effect of promoting consultation or amicable settlement<sup>7</sup>. Similarly, with respect to the MPIA, it is expected that participation in the MPIA and the potential for appeal arbitrations in the future may have an effect of promoting consultation (e.g., amicable settlement) with the

---

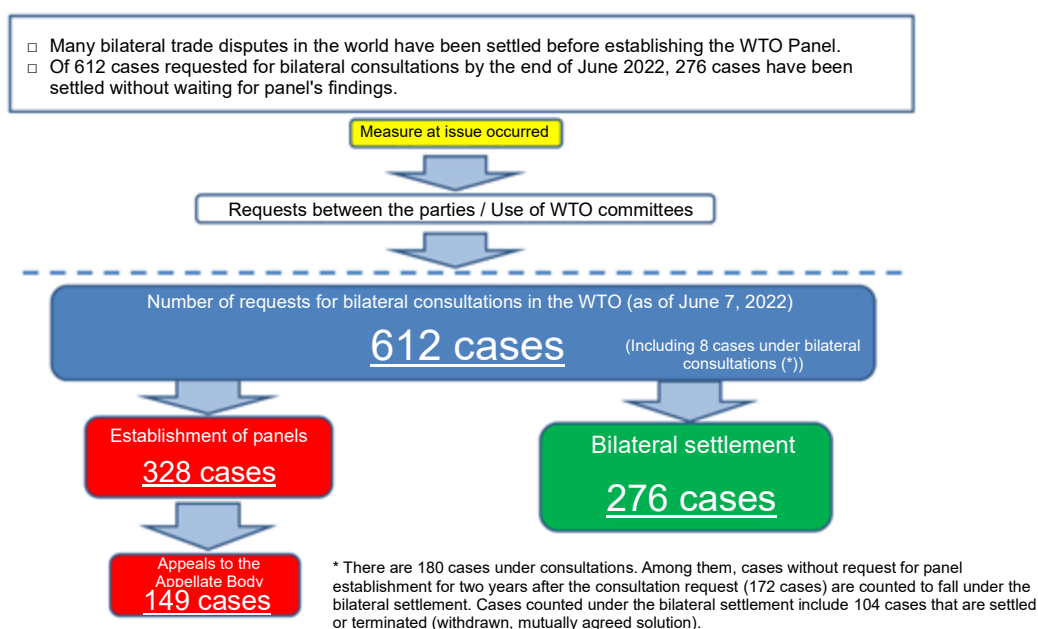
<sup>7</sup> In fact, according to the WTO report in footnote 1, the WTO has been notified of more than 100 cases of mutually agreed solution.

counterparty in the dispute.

Furthermore, the MPIA has introduced improvements (e.g., strict deadline for the distribution of reports, restriction on certain assertions) for dealing with procedural issues faced by the Appellate Body, the operation of which are expected to have an influence on the future direction of the reform of the dispute settlement system. Thus, Japan can exert leadership in the Appellate Body reform in the future, by its earlier participation in the MPIA and contribution to the formation of practice within it.

Finally, it is also expected that Japan will encourage Asian Members (particularly those of ASEAN) with limited participation in the MPIA, to participate in the MPIA based on the long relationship of trust with Japan, thereby restoring the rule of law, even if temporarily. With the above points in mind, consideration should be given to the utilization of the MPIA and a decision should be made in that regard.

(Reference) Caseload of the WTO dispute settlement system



“(2) DSU Article 25 arbitration other than the MPIA” can be an effective option, including its use for disputes with non-MPIA members. However, the potential use of ad-hoc DSU Article 25 arbitration will remain limited because it requires an ad-hoc agreement for each dispute between the parties thereto and the counterparty might file an appeal into the void without cooperating in the use of such arbitration, and because such parties need to consider the arbitration procedures from scratch even in cases where the counterparty cooperates in the use of this option. Whilst “(2) DSU Article 25 arbitration other than the MPIA” may be effective to some extent to settle disputes with non-MPIA members, the Special Task Force believes that the use of the MPIA will be a more effective and practical option in dispute settlement with MPIA members.

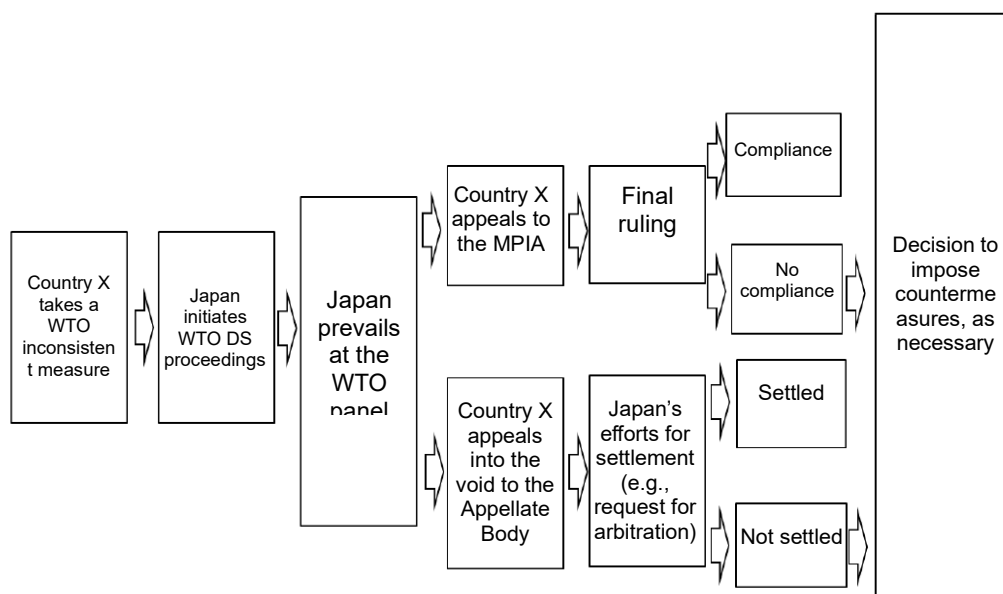
In addition, the Special Task Force also considered countermeasures against appeals into the void as described below, but there was a majority opinion that it is necessary to make efforts to solve problems through arbitration, including through the MPIA, before taking countermeasures in particular cases.

### B. “(3) Countermeasures against appeals into the void”

The Special Task Force agreed that the use of arbitration, including the MPIA option, is an effective and practical option to deal with appeals into the void, but, even if Japan participates in the MPIA, it will need to take action to deal with non-MPIA members filing appeals into the void. In this connection, we also considered the feasibility of introducing countermeasures, such as those institutionalized by the EU and Brazil, as an option that can deal with appeals into the void in such cases.

The process in the following flowchart could be used for consideration of the imposition of countermeasures against an appeal into the void after resorting to arbitration:

<Flowchart of countermeasures against appeals into the void>



Some members of the Special Task Force were of the view that careful consideration would need to be given to following issues in relation the use of countermeasures:

- (a) How to construct the logic for countermeasures to be taken at the stage where the WTO finding is not finalized. Countermeasures might be seen as economic coercion or other offensive measures in the eyes of the counterparty. There may be concern that this might further weaken the WTO-centered international trading order.
- (b) How to ensure conformity with international rules (e.g., Article 23 of the DSU<sup>8</sup>) with

<sup>8</sup> DSU Article 23 Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
2. In such cases, Members shall:
  - (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

respect to the imposition of countermeasures at the stage where the WTO finding is not finalized.

- (c) Trade restrictions imposed as countermeasures may have a negative impact on other industries or the social welfare of Japanese people, while having only a limited effect in terms of encouraging the correction of the challenged measures.

On the other hand, the following opinions were offered from the perspective that a policy response (including countermeasures) to deal with appeals into the void is necessary:

- (a) The imposition of countermeasures at the stage before the WTO finding is finalized may not fit the WTO's traditional interpretation and theory, but it is necessary to restore the rule-based order amidst the situation where a growing number of panel findings are effectively left in limbo. Countermeasures against appeals into the void may be seen as temporary measures in the absence of the Appellate Body, and as attempts to restore the rule-based order.
- (b) We should make the best of the WTO in areas where the WTO supports the rule-based international trading order, but, in areas where the WTO is not functioning, each Member may be justified in using means such as countermeasures against appeals into the void in order to restore the international trading order.
- (c) There are no effective means other than countermeasures to deal with appeals into the void in cases where the counterparty does not accept clear-cut panel findings, and also refuses arbitration. Even if Japan participates in the MPIA, options for cases involving non-MPIA members may be necessary.
- (d) Even in cases where countermeasures are not actually imposed, the possibility to take countermeasures as an option will deter other Members from taking measures in violation of the WTO agreements, and it might be useful in seeking the settlement of disputes with the counterparties through negotiation, etc.
- (e) When countermeasures are actually imposed, it may have a temporary negative impact on the domestic economy of Japan. However, the necessity of such measures will outweigh their negative impact if such countermeasures fix the situation where the dispute settlement system is left in limbo due to appeals into the void, ensure the settlement of disputes, and contribute to the maintenance of a stable international economic order.
- (f) In light of the current situation of the non-functioning of the Appellate Body, with regard to the conformity of the countermeasures with international rules,

- 
- (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
  - (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

the countermeasures can be justified under the WTO agreements and general international law if they are taken as a means to urge the counterparty to use the MPIA or arbitration.

- (g) The EU and Brazilian schemes also assume that they will first use the MPIA for disputes with the MPIA members. But the legitimacy to take countermeasures will be increased if the counterparty does not cooperate to use the MPIA or other arbitration without a valid reason and appeals into the void, in spite of the efforts made in advance to persuade the counterparty to use them.
- (h) When taking countermeasures, in order to avoid being misunderstood or seen by the counterparty as exerting economic coercion, it is advisable to explain the significance and purpose of countermeasures in a respectful manner so that Japan's intent can be properly communicated to the counterparty.

### **C. Conclusion**

For many years, concerns have been raised about the functioning of the WTO. These concerns have been mainly about the rule-making and negotiation function and stemmed from the inability of the WTO to update its rules. However, the Appellate Body ceased to function in December 2019, which has led to the prolonged situation where the WTO dispute settlement function also no longer operates adequately, even though it is one of its important pillars of the WTO. Thus, the WTO is now facing a crisis in which its rule-based governance does not work. Amidst this crisis that was not expected at the time of its establishment, Members are seeking to ensure the rule-based governance in the international economic system, while complementing the WTO's functions through means like the MPIA and countermeasures against appeals into the void.

As noted above, if the rule-based governance is impaired, and the violation of rules by Members or the use of power-based responses that are not based on rules increases, international relations will become unstable, which could endanger the foundation of the existence of Japan and its industries that depend on the connection with the global economy as their lifeline. The current situation, where the caseload of the WTO dispute settlement system has decreased, and where the clear violations of the WTO rules by certain Members are left unresolved, is one that should give rise to a shared sense of crisis because the aforementioned concerns are becoming the reality. This is a global issue that affects not only Japan, but also developing countries. Up to the present, various approaches (e.g., EPA/FTA and plurilateral trade agreements) have been taken to complement the WTO's functions in the field of rule-making amidst the stagnation of negotiations at the WTO, but Japan may need to endeavor to restore and develop the international economic order also in the field of rule-enforcement with innovative ideas, too. Thus far, some WTO dispute settlement cases to which Japan is a party have been appealed into the void already, and this is expected to continue to happen in the future. Seen in this light, Japan needs to take an immediate policy response even if this is understood as a matter of Japan only.

We consider that the MPIA and arbitration are effective and practical options to restore and develop the rule-based international economic order, while ensuring the interests of

Japanese economy and industries. In addition, Japan should proceed with the concrete consideration of institutionalization of countermeasures against appeals into the void as a means of urging the parties to the dispute to use the MPIA and arbitration. In so doing, it is advisable to give sufficient consideration to the impact that countermeasures will have on the Japanese economy and specifically on the perceptions of friendly Members, in particular ASEAN Members, which appreciate Japan's commitment to the multilateral trading system. Also, when imposing countermeasures, it will be important to explain the significance and purpose of countermeasures in a respectful manner to the counterparty so that Japan's intent can be properly communicated to the counterparty. Moreover, while it is an issue that the Special Task Force was unable to fully discuss, Japan also needs to consider the use of the dispute settlement procedures under EPA/FTA, in addition to those of the WTO.

As discussed above, Japan needs to clarify its basic approach, which is intended to make the best of the existing international trading system, and to proceed further with consideration and implementation of the respective options in a speedy manner.