RIETI BBL Seminar Handout

“The WTO Dispute Settlement System: Past, present & future”

October 31, 2013

Speaker: Ms. Valerie HUGHES

*If you quote from this handout, please specify the author and the date prepared.
http://www.rieti.go.jp/jp/index.html
WTO DISPUTE SETTLEMENT: PAST, PRESENT AND FUTURE
OUTLINE OF PRESENTATION

• Dispute Settlement Under the GATT
• Dispute Settlement Under the WTO
• Dispute Settlement Today
• Dispute Settlement Tomorrow
• Participation by Japan
Rule of law
but not HIGHLY “legalistic”

- First disputes: rulings from the chair in plenary meetings
- Moved to working parties of several members, including claimant and respondent, and eventually (1950s) to panels of 3 neutral members
- Dispute settlement: legal rulings were written by non-lawyers “with an elusive diplomatic vagueness”
EVOLUTION

• Trade policies were changing as was the approach to dispute settlement

• Increase in number of cases in 1980s

• Dispute settlement needed to respond to new realities

• Calls to strengthen dispute settlement system
NEED FOR REFORM

• Perceived weaknesses with GATT dispute settlement:

  • uneven quality of panel decisions

  • ability to delay/block DS procedures

  • “more responsive to the interests of the strong than to the interests of the weak”: might means right

prepared 30/10/2013
A NEW SYSTEM
In particular, Ministers welcome:

- The stronger and clearer legal framework they have adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism.
A CENTRAL ELEMENT

- DSU Article 3:

“The dispute settlement system of the WTO is a **central element** in providing **security and predictability** to the multilateral trading system.”

“... the maintenance of a **proper balance** between the **rights** and **obligations** of Members.”

prepared 30/10/2013
DISPUTE SETTLEMENT MECHANISM

As of right for Members (no need to seek permission to bring a case)

Automaticity

Customary rules of interpretation of public international law

Appellate Body

prepared 30/10/2013
Phases

- **Consultations** (seek to resolve) - 60 days
- **Panel** (3 persons chosen ad hoc)
  - written submissions
  - 2 hearings
  - Interim report
  - Final report
- **Appeal**: standing Appellate Body of 7 members
  - Written submissions
  - Hearing
- **Compliance**
EXPERIENCE UNDER NEW SYSTEM

1995-2013

prepared 30/10/2013
Requests for Consultations
(Total 467 since 1995)

prepared 30/10/2013
DEVELOPED AND DEVELOPING MEMBERS HAVE CONFIDENCE IN THE SYSTEM
BROAD PARTICIPATION

- **100 Members** have participated in some capacity in WTO dispute settlement

= **63 %** of Membership

prepared 30/10/2013
<table>
<thead>
<tr>
<th>Member</th>
<th>Cases Initiated</th>
<th>Member</th>
<th>Cases Defended</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>106</td>
<td>US</td>
<td>120</td>
</tr>
<tr>
<td>EU</td>
<td>89</td>
<td>EU</td>
<td>74</td>
</tr>
<tr>
<td>Canada</td>
<td>33</td>
<td>China</td>
<td>31</td>
</tr>
<tr>
<td>Brazil</td>
<td>26</td>
<td>Argentina</td>
<td>22</td>
</tr>
<tr>
<td>Mexico</td>
<td>23</td>
<td>India</td>
<td>22</td>
</tr>
<tr>
<td>India</td>
<td>21</td>
<td>Canada</td>
<td>17</td>
</tr>
<tr>
<td>Argentina</td>
<td>19</td>
<td>Japan</td>
<td>15</td>
</tr>
<tr>
<td><strong>Japan</strong></td>
<td><strong>18</strong></td>
<td>Brazil</td>
<td><strong>14</strong></td>
</tr>
<tr>
<td>Korea</td>
<td>16</td>
<td>Korea</td>
<td>14</td>
</tr>
<tr>
<td>Thailand</td>
<td>13</td>
<td>Mexico</td>
<td>14</td>
</tr>
</tbody>
</table>
Consultations According to Agreement at Issue

- TRIPS, 34
- TRIMs, 38
- GATS, 22
- Licensing, 41
- Safeguards, 44
- SPS, 40
- TBT, 47
- Agriculture, 71
- Subsidies, 98
- Anti-Dumping, 98

GATT 1994, 368

prepared 30/10/2013
TOTAL DS ACTIVITY

Requests for consultations: 467
Panels established: 208
Panel reports adopted: 176**
Appellate Body reports adopted: 110**
Article 22.6 arbitrations circulated: 19
Article 25 arbitration awards circulated: 1

**Includes Article 21.5 reports

prepared 30/10/2013
COMPARE

**WTO:** 467 in 19 years
- 176/110 adopted

**GATT:** 300 in 48 years

- **ICJ:** 154 in 66 years
- **ITLOS:** 22 in 17 years
- **NAFTA:** 3 in 20 years

prepared 30/10/2013
WHY SO SUCCESSFUL?
IT’S EFFECTIVE

prepared 30/10/2013
TIMELY RESULTS

Panel process = 1 year (except SPS) after composition

Appeal = 3 months

ICJ = 4 years
ECJ = 2 years
NAFTA Chapter Twenty = 3 years
NAFTA Chapter Eleven = 5 years
ICSID = 3 ½ years
COMPLIANCE

- High compliance rate (about 90%)
- Unique surveillance requirements
- No Member has ever denied responsibility to comply or otherwise address non-compliance
- Only 18 retaliations authorized by DSB
  - 176 panel reports
  - 110 Appellate Body Reports
RESPECTED BODY OF LAW

PROCEDURAL

• Burden of proof
• Standard of review
• Due process

SUBSTANTIVE

• Numerous difficult and sensitive cases - remove irritants
• « Treasure trove » on treaty interpretation
• Security and predictability: not precedent but law is followed
PREFERRED TO RTA

- Many systems modelled after WTO
- RTA members bring cases to WTO instead
  - Instead of NAFTA
    - Canada – Periodicals (US)
    - Mexico – Soft Drinks (US)
    - Mexico – Telecomms (US)
    - Several on softwood lumber (US & Canada)
  - US & CAFTA-DR
    - Polypropeline Bags (DR, El Salvador, Costa Rica, Nicaragua)
  - MERCOSUR
    - Brazil and Argentina
    - Chile and Argentina
  - ALADI
  - ASEAN
THE SYSTEM TODAY
Requests for Consultations
(Total 467 since 1995)

prepared 30/10/2013
active panels

China – HP-SSST (EU, Japan)
China – Rare Earths (US, EC, Japan)
China – AD and CVD on Autos (US)

US – CVD Measures on Certain Products (China)
US – Boeing (compliance panel) (EU)
US – CVD on Carbon Steel Products (India)
US – Shrimp II (Viet Nam)
US -- CVD and AD (China)
US – Animals (Argentina)
US – COOL (Canada, Mexico)
ACTIVE PANELS

EC – Seal Products (Canada, Norway)
EC – Airbus (compliance panel) (US)

India – Agricultural Products (US)

Argentina – Import Measures (US, EU, Japan)

Peru – Agricultural Products (Guatemala)
COMING SOON

Panels Established / Not Yet Composed

Australia – Tobacco Plain Packaging (Ukraine)
Australia – Tobacco Plain Packaging (Honduras)
Argentina – Goods and Services (Panama)
Colombia – Textiles (Panama)
EU – Fatty Alcohols (Indonesia)
Indonesia – Horticultural and Animal Products (US)

prepared 30/10/2013
panel requests pending before dsb

- Australia—Tobacco Plain Packaging (Dominican Republic)
- Russia – Recycling Fee on Motor Vehicles (EU)
- EU and a member state—Importation of Biodiesels (Argentina)
IN CONSULTATIONS

• Australia – Tobacco Plain Packaging (Cuba)
• Australia – Tobacco Plain Packaging (Indonesia)
• EU – Biodiesel Industry (Argentina)
• India – Solar Cells (US)
• Indonesia – Horticultural Products, Animals (US)
• Indonesia – Horticultural Products, Animals (New Zealand)
• Russia – Recycling Fee on Motor Vehicles (Japan)
• US – AD and CVD on Washers (Korea)
Subjects of today’s disputes

- Aircraft disputes still in the system (Boeing, Airbus)
- Newer entrants (China, Russia, Viet Nam)
- Argentina as complainant & respondent
- Energy / green subsidies (e.g. FIT case)
- Health issues (tobacco packaging, clove cigarettes, export restrictions on rare earths)
- Public policy (tuna labels, COOL, seal ban)
- Protectionism fallout from banking crisis?
Today’s disputes are different

- Expanding body of law
- Multi-party is the norm
- Evidentiary requirements more rigorous
- Regulatory measures (technical expertise)
- Language – more in Spanish now
- Language of evidence (Chinese, Russian)
- Specialized
- Increasing use of private sector counsel
## CHINA ACCESSION 2001

<table>
<thead>
<tr>
<th>Claimant</th>
<th>Respondent</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>31</td>
<td>102</td>
</tr>
</tbody>
</table>
| 8 against US  
3 against EU | US, EU, Japan, Canada, Mexico, Guatemala | Almost every dispute since China’s accession |

prepared 30/10/2013
<table>
<thead>
<tr>
<th>Respondent</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>• Recycling Fee on Motor Vehicles (EU and Japan)</td>
<td>• US—CV and AD Measures on Certain Products from China</td>
</tr>
<tr>
<td></td>
<td>• US—Countervailing Measures (China)</td>
</tr>
<tr>
<td></td>
<td>• EC—Seal Products (Norway, Canada)</td>
</tr>
<tr>
<td></td>
<td>• China—Rare Earths (US, EU, Japan)</td>
</tr>
<tr>
<td></td>
<td>• China—HP-SSST (Japan, EU)</td>
</tr>
</tbody>
</table>
## DS ACTIVITY: RECENTLY ACCEDED MEMBERS

<table>
<thead>
<tr>
<th>Member</th>
<th>Complainant</th>
<th>Respondent</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moldova (2001)</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>China (2001)</td>
<td>11</td>
<td>31</td>
<td>102</td>
</tr>
<tr>
<td>Chinese Taipei (2002)</td>
<td>3</td>
<td>0</td>
<td>76</td>
</tr>
<tr>
<td>Armenia (2003)</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Saudi Arabia (2005)</td>
<td>0</td>
<td>0</td>
<td>19</td>
</tr>
<tr>
<td>Viet Nam (2007)</td>
<td>2</td>
<td>0</td>
<td>16</td>
</tr>
<tr>
<td>Ukraine (2008)</td>
<td>3</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Russia (2012)</td>
<td>0</td>
<td>2</td>
<td>8</td>
</tr>
</tbody>
</table>

Prepared 30/10/2013
AUSTRALIA – PLAIN PACKAGING

- 5 complainants:
  - Ukraine, Honduras, Dominican Republic, Cuba, Indonesia
  - In Ukraine’s case: 35 third parties
  - In Honduras’ case: 28 third parties
  - DR: still in DSB
  - Cuba and Indonesia: still at consultations phase
JAPAN AND WTO DISPUTE SETTLEMENT
Since 1995, involved in 170 disputes:

<table>
<thead>
<tr>
<th>Claimant</th>
<th>Respondent</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>15</td>
<td>137</td>
</tr>
<tr>
<td>Member</td>
<td>Cases Initiated</td>
<td>Member</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------</td>
<td>---------</td>
</tr>
<tr>
<td>US</td>
<td>106</td>
<td>US</td>
</tr>
<tr>
<td>EU</td>
<td>89</td>
<td>EU</td>
</tr>
<tr>
<td>Canada</td>
<td>33</td>
<td>China</td>
</tr>
<tr>
<td>Brazil</td>
<td>26</td>
<td>Argentina</td>
</tr>
<tr>
<td>Mexico</td>
<td>23</td>
<td>India</td>
</tr>
<tr>
<td>India</td>
<td>21</td>
<td>Canada</td>
</tr>
<tr>
<td>Argentina</td>
<td>19</td>
<td>Japan</td>
</tr>
<tr>
<td>Japan</td>
<td>18</td>
<td>Brazil</td>
</tr>
<tr>
<td>Korea</td>
<td>16</td>
<td>Korea</td>
</tr>
<tr>
<td>Thailand</td>
<td>13</td>
<td>Mexico</td>
</tr>
</tbody>
</table>
## DISPUTE SETTLEMENT ACTIVITY: JAPAN

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Respondent</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>15</td>
<td>137</td>
</tr>
<tr>
<td>Claims brought against Argentina, Brazil, Canada, China, EU, Indonesia, Russia, US</td>
<td>Claims brought by Canada, EU, Korea, US</td>
<td></td>
</tr>
<tr>
<td>Trade remedies, Autos, Steel, FIT, IT Products, Rare earths, etc</td>
<td>Alcoholic Beverages, Film, Apples, Laver, DRAMS</td>
<td></td>
</tr>
</tbody>
</table>
Dispute settlement activity: Japan

**Current activity:** total 29 disputes

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Respondent</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>9 (=3 panels, 1 consultation)</td>
<td>0</td>
<td>19 (=16 panels)</td>
</tr>
</tbody>
</table>
DISPUTE SETTLEMENT ACTIVITY: JAPAN

As Complainant (**active**)

- At panel proceedings stage (**ongoing**)
  - Argentina—Import Measures
    - Co-complainants are US and EU
  - China—HP-SSST (AD on stainless steel tubes)
    - EU has a case on same issue
  - China—Exportation of Rare Earths
    - Co-complainants are US and EU

- At consultations stage:
  - Russia—Recycling Fee on Motor Vehicles
    - EU has similar case but has already asked for panel establishment

prepared 30/10/2013
DISPUTE SETTLEMENT ACTIVITY: JAPAN

As Third Party (active)

China—Autos (US) (re AD and CVD)
EC—Seal Products (Canada, Norway) (re import ban)
EC—Large Civil Aircraft (US) (Airbus)
India—Agricultural Products (US) (re poultry SPS)
US—Shrimp II(Viet Nam) (re AD)
US—Large Civil Aircraft (EU) (Boeing)
US—CV and AD Measures (China)(re GATTArt X)
US—CVD Measures on Certain Products (China)
FURTHER CONTRIBUTION OF JAPAN

- Panelists: 6
  - Ichiro Araki
  - Naoshi Hirose
  - Mitsuo Matsushita
  - Akio Shimizu
  - Yoichi Suzuki
  - Jun Yokota

- Appellate Body members: 3
  - Mitsuo Matsushita
  - Yasuhei Taniguchi
  - Shotaro Oshima
DSU REVIEW: JAPAN’S CONTRIBUTION

- A committed and key participant
- First Chair of negotiations: Ambassador Suzuki

- 1999: Submitted “Proposed Amendment of DSU” on behalf of 15 Members to Ministerial Conference in Seattle addressing:
  - Surveillance
  - Implementation
  - Sequencing (Articles 21 and 22)
  - Compliance proceedings
  - Retaliation

- Not adopted due to Seattle meeting general impasse

prepared 30/10/2013
DSU NEGOTIATIONS

- Third party rights
- Compliance
- Post-retaliation
- Developing country interests
- Member control
- Remand
- Sequencing
- SCI
- Timeframes
- Transparency

prepared 30/10/2013
DSU REVIEW: JAPAN’S CONTRIBUTION

- **Japan’s proposals during current phase:**
  - Post-retaliation
  - Sequencing
  - Third party rights at consultations stage

- **Japan has supported proposals on:**
  - Transparency
THE FUTURE?
FUTURE OF WTO
DISPUTE SETTLEMENT

• Active

• Specialized

• Multi-issue/multi-party

• Preferred to mechanisms in RTAs
FUTURE OF WTO
DISPUTE SETTLEMENT

• Subject matter:
  • regulatory, environment, health, energy, state-owned enterprises, trade remedies
FUTURE OF WTO
DISPUTE SETTLEMENT

• Broad Participation
  • Dominated by: China, EU, US
  • Other big players: Brazil, Canada, India, Japan, Mexico, Russia (?)

• Latin America ?

• Absent players?
  • LDCs, Africa
CIVIL SOCIETY

- Only Members (states, customs territories) have right to participate
- Discretion for panels to consider other submissions
- Amicus curiae briefs in 36 disputes
- Issues often generate public interest
  - Shrimp/turtle  Tuna/dolphin  GMOs
  - Seal products  Hormone treated beef

prepared 30/10/2013
Open hearings

- traditionally, confidential process
  - diplomatic beginnings
  - hearings usually behind closed doors
  - a few members make submissions public

- first “open” hearing in 2005
- 12 panels so far have held open hearings
- Appellate Body too
FUTURE OF WTO
DISPUTE SETTLEMENT

• Modernization? (digital filing)
• Traditions?
  • public hearings?
  • private counsel over diplomats/government lawyers?
  • paper evidence
  • Increasing use of Spanish
• Standing panel body?
• Size of Appellate Body?
• Timelines?
• DSU review?
IN SUM

WTO DISPUTE SETTLEMENT

- Is used often and regularly
- By a large cross section of developed and developing country Members
- Is responsive to developed and developing
- It works (many disputes resolved before « court » but if not, high rate of compliance)
- It’s fast
- Preferred to RTA mechanisms
- Established body of law

prepared 30/10/2013