ESSAY, DISPUTE SETTLEMENT PROCEDURES AND MECHANISMS

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I. THE ROLE THAT THE WTO CAN PLAY FOR THE SETTLEMENT OF UNITED STATES-JAPAN TRADE DISPUTES

A. In General

The role that the World Trade Organization (WTO) plays in the settlement of United States-Japan trade disputes is, but should not be, U.S. and Japan-specific. The WTO is a multilateral forum and this aspect of its character must be maintained for the WTO to acquire credibility in the settlement of trade disputes. Trade disputes, if at all, should be exceptional not because of the parties involved, but because of their subject matter. Nothing indicates that the U.S.-Japan trade disputes are subject matter-specific. In fact, the opposite is true: there is ample evidence demonstrating that disputes over the same issues among different actors are a recurrent theme. For example, see the *Tuna-Dolphin* cases and the recent *Shrimps-Turtle* case; also see *Japan-Alcoholic Beverages* and the *Korea-Alcoholic Beverages* cases; moreover, check the series of antidumping cases submitted to the GATT/WTO regime.

Consequently, my comments on this point should be viewed in the context described above. In other words, my comments reflect that the WTO is a forum to address disputes in a consistent manner independent of the identity of the parties to the dispute.

B. Specific Points

1. Recent Case Record

Big improvements have recently been made in the way panels handle cases, especially since the inception of the WTO. Panel reports are internally consistent and the requirements of the Dispute Settlement Understanding (DSU) have facilitated the interpretation of the covered agreements in accordance with customary international law. Consequently, case law develops in a linear way. This panel report, like previous reports, is persuasive. The panel chose its standard, the Vienna Convention on the Law of Treaties, in full compliance with Article 3.2 DSU and built a very reasonable argument concerning the interpretation of the term "like products." Moreover, the panel went on not only

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to find support for its argument in previous GATT case law, but also to dismiss the argument presented in an unadopted report, the "Gas Guzzler" panel report, thus demonstrating that it does not conceive its role as an *ad hoc* institution, but rather as part of a continuum.

In my opinion, this is by far the most important role panels, and any adjudicating body for this purpose, have to fill. Thomas M. Franck, author of Fairness in International Institutions (1995), makes, in my opinion, the correct argument that consistency in the application of the law is the most suitable means for any adjudicating body, especially for international bodies where the monopoly of enforcement is often lacking, to acquire credibility. I read William J. Davey's article, "Dispute Settlement in GATT," 11 Fordham Int'l L.J. 51 (1987), which appeared in the *Fordham International Law Journal* in the same vein. Davey's remarks concerning adjudicating bodies that simply settle disputes, those that are results-oriented, and bodies which are law-oriented make a similar argument. In the case of law-oriented bodies, the means—in the form of legal reasoning—is what counts. And this is precisely the area where consistency is required.

The Appellate Body (AB) was supposed to provide the necessary consistency in WTO law. Taking into account that panels are *ad hoc* bodies, the Uruguay Round negotiators decided that some form of more permanent institution was necessary to hold the system together. Panels however, act as if they were a permanent body, as described above, notwithstanding the fact that one of their components, the panelists, changes every time a panel is established.

At best, commentators have mixed feelings about the AB's record thus far. Yet this is not a reproach to the AB. On issues of law, one may sometimes disagree as to their expediency, although not always, since law is to a large extent quite precise. With too much controversy, law does not fulfill its major objective, namely legal security. For example, I have expressed skepticism concerning the outcomes of the *Hormones* case and the *Indian Textiles* case. Here I am personally addressing the role of the AB. In this discussion, it is not only the AB which can affirm its role—through the "inside out" perspective, to paraphrase Keohane—but also the way WTO Members see the AB—the "outside in" perspective.

The AB's purpose is to ensure consistency in the interpretation of WTO law. According to its mandate, it should confine itself to issues of law only and moreover, only to those issues of law raised by the parties to a dispute. So far this is not always what the AB has done. When it decided to exceed the aforementioned limit, the AB illustrated that it has and knows how to use a considerable amount of imagination. See, for example, the *Periodicals* case. Moreover, governments seem to understand the AB as a necessary second look at the same case and almost all panel reports have been appealed. The AB is invariably perceived to be more like a later-in-time panel rather than the guardian of law. Otherwise, it is difficult to assess the behavior of a number of WTO Members who appeal quite "weak" cases. Public choice theory most likely

dictates such behavior for governments. By appealing panel reports, governments can persuasively tell domestic lobbyists that they did everything at their disposal to defend "domestic interests." Moreover, in the event they lose, government's can always blame modifications of national policy to the WTO as the reason for the loss, even though the government would undertake the changes regardless of some lobbyist's reactions. Robert E. Hudec refers to the "use GATT as an excuse" argument in "GATT and the Developing Countries," 1992 Colum. Bus. L. Rev. 67.

Independent of the way WTO Members look at the AB, it is up to the AB to re-define its role. It can achieve this only through its case law. While it is true that under the Statute of the International Court of Justice Article 59 considerations are prevalent in the WTO, and that AB decisions bind only the parties to the dispute, one has to accept that there is an inherent intellectual inconsistency; how can the AB be requested to confine itself to legal interpretations of terms mentioned in the covered agreements and at the same time make the argument that its decisions are dispute-specific? Cross-border applications are not only appropriate, but should be welcome. It is true that the AB refers to its own law. Sometimes however, its own law suffers from imprecision. What comes under the notion of GATT-*acquis*, for example what did the AB, in defiance of existing texts, invent in the *Japan-Alcoholic Beverages* case? And how exactly do WTO Members discharge their obligations when they have to create a presumption as the AB clarified in the *Indian Textiles* case? And what should we deduce from the AB's confusion with respect to burden of proof and restrictive interpretation in the *Hormones* case?

So far, the AB's decisions have not been criticized in the doctrine. One explanation could be that it is too soon and people want to give the AB a chance to establish itself first. Such an argument is reinforced by the fact that a rules-oriented approach has not always been welcome in most corners of the trade field. Another explanation might be that, in essence, the AB has not overruled the crux of the panels' recommendations, although perhaps in some peripheral respects it did so in the *Periodicals* and the *Gasoline* cases, and as far as the remedy is concerned in the *Hormones* case. This last observation may explain why governments have not reacted yet, but can hardly account for the nonchalance of academics.

2. Fact Finding in De Facto Discrimination

This area provides some confusion. The *Kodak/Fuji* panel is referred to in the context of *de facto* discrimination. This panel, though, did not address a violation-complaint and *de facto* discrimination is a violation because Article III of GATT does not distinguish between *de jure* and *de facto* discrimination. Additionally, relevant GATT case law has interpreted it to cover both.

My comments, therefore, are of a more general nature and address the issues of fact-finding as such. In "The Need for Due Process in WTO Proceedings," published in the *Journal of World Trade*, Thomas makes the point that GATT panels traditionally base their decisions on an undisputed cluster of facts. Even in very recent cases, such as the *Japan-Alcoholic Beverages* case, the panelists used the evidence submitted by the parties, which served as adequate proof. For example, in the case of the Japanese panel mentioned previously, even evidence submitted by Japan did not deny the existence of demand substitutability between *sochu* and western drinks in the Japanese markets.

The first time that there was a dispute before a panel over a factual issue was in the *Hormones* case where the parties disagreed about the harmful effects of hormones. Interestingly, the panel record shows no divergence between the opinions of the experts called by the parties to present their opinions. This is an issue, however, that could come up in the near future, especially in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). If this situation does arise, panelists and AB Members might be called to weigh conflicting scientific evidence. It is hard to come up with a convincing solution in this context. Then again, this is not a WTO-specific issue; adjudicating bodies around the world sometimes exercise discretion when facing similar issues. Therefore, the challenge facing the WTO in this context is not unique—the WTO, like other fora, will have to ensure that it has not blurred the fine line between discretion and arbitrariness.

When it comes to more "banal" issues, like market studies showing the negative impact of government regulation on foreign products, two things should be kept in mind. First, we must remember that GATT is not an instrument for deregulation. Article III prohibits discrimination. There is no *ex ante* presumption of illegality of any governmental intervention. Second, it is worth noting that nothing prohibits panels, in cases of conflicting evidence, from requesting additional evidence through expert submissions. So far, however, a case of conflicting evidence is this context has not arisen.

3. Defects of the WTO DSU: Fact-finding and Competition Cases

The WTO has been criticized, on the one hand, for its fact-finding defects and, on the other hand, for its inability to deal with competition cases. This is not entirely correct. When it comes to fact-finding, I do not think any other method would effectuate better results than the existing system does. Panels have the power to request any information they deem necessary to resolve disputes. If this has a repercussion on the time frame of the whole procedure, I think that parties to a dispute should always be willing to extend the time limits, which are arguably unreasonable to begin with, in order to secure a sound judgment. Otherwise, the parties risk sacrificing soundness of the panel report for the sake of an ill-conceived speedy remedy.

When referring to competition-related cases, the opinion that there is a need to bring in the framework of the WTO in such disputes has been presented a number of times, for example, in the work of Petersmann. I ascribe to the skeptic's view. In a paper about to be published entitled "Do Negative Spillovers from Nationally Pursued Competition Policies Provide a Case for Multilateral Competition Rules?" Bacchetta, Horn and Mavroidis argue that proponents of a WTO agreement have not yet addressed a series of issues necessary for the international community to justify an intervention and regulation. These issues are as follows: (i) although economic theory suggests that negative externalities can exist from nationally pursued antitrust policies, no one thus far has measured such externalities and use of existing mechanisms (even instruments that have low admissibility thresholds, like U.S. Section 301) suggests that they are not that important; (ii) existing instruments both in the antitrust and in the trade fields seem *prima facie* appropriate to address such concerns and, when used, have been proved to be quite effective; and (iii) there is a long unfinished trade agenda (antidumping, agriculture, textiles, government procurement) and no one has persuasively argued why the negotiation of a multilateral agreement on competition should take precedence.

II. BILATERAL APPROACH FOR THE SETTLEMENT OF U.S-JAPAN. TRADE DISPUTES

One comment on this topic is worth noting. Article 3.6 DSU makes it clear that all bilateral settlements on matters formally raised under the DSU have to be submitted to the Dispute Settlement Body (DSB). Thus, the issue is whether or not discussion on solutions not formally raised should be addressed. However legally speaking, the only difference between the two situations is an obligation of transparency that is present in the former scenario and absent in the latter. Even in the case where a matter has not been formally raised under the DSU and a bilateral solution has still been reached, any WTO Member can bring a complaint against the solution to the extent that its rights have been nullified or impaired as a result of the settlement. After all, wasn't the *Semiconductors* case similar to this example?

III. THE ROLE OF U.S. SECTION 301 IN THE WTO

A. In General

Most of the critics of U.S. Section 301 have focused their attention on its actual use, which sometimes, arguably violates existing multilateral rules, and then proceed to make sweeping statements about its overall compatibility with the WTO rules. Section 301 is a classic instrument of diplomatic protection.

Because private parties do not have *locus standi* before an international forum, such instruments are necessary for complaints to be brought to the attention of the government, which in turn will represent the interests concerned.

Such instruments do not exist only in the U.S. I am not familiar with the situation in Japan, but in the European Community (EC) the Trade Barriers Regulation operates, in principle, in a similar fashion. It is difficult to make an assessment about the overall compatibility of such instrument within the international framework, as most of the time these instruments allow ample discretion to the government entertaining private complaints. Consequently, criticism must focus on the actual use of such instruments.

B. Specific Points

1. The Importance of U.S. Section 301 in the WTO Era

As stated above, in principle, U.S. Section 301 should be unaffected by the formation of the WTO to the extent that it functions as an instrument of diplomatic protection. U.S. Section 301 will remain a procedural vehicle to bring private complaints before the appropriate international forum, either before a WTO panel or the AB, as the case may be.

2. The Role of U.S. Section 301 in Cases Dealing with WTO Covered Issues

First, we need to clarify what is meant when we qualify something as an "uncovered issue." Lax enforcement of competition laws could be a covered issue. For example, claiming that they can make millions of yen around the world, two exporting companies have requested that the Japan Fair Trade Commission (JFTC) allow them to form an export cartel and then subsequently cross-subsidize domestic sales for the benefit of the Japanese consumer. Because the JFTC likes this idea, it proceeds to issue a letter of clearance stating that the two exporting companies are immune from any potential governmental pursuit. In this case, any WTO Member may have a legitimate Article XI GATT claim against Japan, although competition as such is not a covered agreement.

If we are referencing unambiguously uncovered agreements, the benchmark to assess U.S. Section 301 actions is public international law. This means that the fact that WTO rules do not extend to a particular area does not render any of U.S. Section 301 mandates legal. Other rules of public international law could apply and may eventually prohibit a particular behavior.