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JAPAN, WTO DISPUTE SETTLEMENT & THE MILLENNIUM ROUND

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The new WTO dispute settlement system was a major accomplishment of the Uruguay Round. Compared to the prior GATT system, it is more legalistic, with more stress on compliance with agreed rules. It has been used frequently by WTO Members, who have submitted difficult and sometimes controversial cases to it. Indeed, much of the adverse publicity concerning the WTO in recent years have involved perceptions (sometimes inaccurate) of dispute settlement rulings. While WTO Members have praised the system in general terms, in the 1998-1999 review of the system many changes – most minor, but some fundamental – were proposed. This paper contains a brief overview of Japan's involvement with GATT/WTO dispute settlement and then catalogs some of the more important issues that may be raised in any near-term WTO negotiations on dispute settlement procedures.

I. Japan and WTO Dispute Settlement

Historically, Japan was viewed as a supporter of a less legalistic approach to dispute settlement in GATT, preferring a system relaying on negotiation and compromise instead of adjudication. This preference was shared by the EC. However, in the course of the Uruguay Round, both Japan and the EC came to support a more legalistic system, which had been strongly advocated by the US, in exchange for a requirement in the WTO that WTO Members use the WTO dispute settlement system to resolve all WTO-related

disputes. Japan and the EC hoped that a strengthened WTO dispute settlement system would reduce US tendencies toward unilateral actions under Section 301 of the US 1974 Trade Act.

Since the advent of the WTO, Japan has been a more active participant in dispute settlement proceedings than it was in the GATT system. In GATT, Japan requested only two panels – both against the EC and both involving antidumping issues. In the WTO, Japan has requested five panels:

- against discriminatory tax and tariff regimes in the Indonesian automobile sector (with the EC and US);
- against a discriminatory regime in the Canadian automotive sector (with the EC);
- against a Massachusetts law disadvantaging companies doing business with Myanmar (with the EC);
- against the 1916 US antidumping law (with the EC); and
- against certain US antidumping duties on hot-rolled steel.

In a significant case in 1995 that did not lead to the establishment of a panel, Japan started an action against the US in respect of its threatened punitive duties on Japanese auto exports to the US. It is noteworthy that Japan still seems somewhat reticent to bring cases to the point of having a panel established, as evidenced by the fact that outside the antidumping area, it has always had co-complainants (recently the EC).

On the other side of the coin, Japan was the respondent in 10 GATT panel proceedings, including four in the post-1985 period. Those cases were *Alcohol Taxes I*, *Agricultural Quotas (Japan-12)*, *Semiconductors* and *SPF Lumber*. Japan prevailed in the latter case. So far, in the WTO, Japan has had to defend itself before a panel on three occasions. Of the three, Japan lost two cases (*Alcohol Taxes II* and *Apples*) and won one

(*Film*). It has settled several challenges in the consultation stage, most notably a US/EC challenge to its failure to afford retroactively the extended copyright protection the US and EC alleged was required by the TRIPS Agreement.

Japan has appeared fairly frequently as a third party in WTO proceedings. For example, in the 11 cases where reports had been adopted in 2000 by the DSB (through August), Japan had been a party in one (*Canada Autos*) and a third-party in five others (*US Section 301*, *US FSC*, *Canada Pharmaceuticals*, *Korea Procurement*, *US Copyright*). Of the 16 active cases as of that date, Japan was a party in two (*US 1916 AD*, *US Steel AD*) and a third party in six others (*US Bananas Retaliation*), *EC Bed Linen AD*, *US Lamb*, *Thai AD*, *US Steel AD (Korea)*, *India Autos*). In general, Japan seems to be quite active as a party and third party in cases involving the automotive sector, antidumping measures, intellectual property and US 301 actions. Indeed, these four categories explain 11 of the foregoing 14 cases.

Overall, Japan has been one of the more active WTO Members in the dispute settlement system. Generally, I think that Japan should view its participation in the dispute settlement system fairly positively. In the cases where it was a complaining party, it generally received satisfactory outcomes – it prevailed against Indonesia and Indonesia has changed its auto regime; it prevailed against Canada in autos and against the US in the 1916 antidumping case and hopefully there will be implementation in due course. The Massachusetts case was effectively abandoned after the US federal courts (up to the Supreme Court) ruled against the challenged Massachusetts law. The steel antidumping case is pending. Japan's threatened action against the US in their 1995 auto dispute seemed to be a useful tool in leading to a settlement with the US that Japan could

accept. The existence of the DSU rules made it easier for Japan to argue that the US could not take unilateral action. In the highest profile case against Japan – *Film* – Japan prevailed in a claim against it. On the negative side, there were adverse rulings in the *Alcohol Taxes II* and *Apples* cases, as well as a settlement of the copyright dispute, but I think that Japan did not have very good defenses in those cases and it should not have been surprised that it lost. Overall, Japan has little to complain about in respect of the WTO dispute settlement insofar as it has involved Japan.

Japan was also an active player in the 1998-1999 review of the DSU discussed below. This occurred in part because the Japanese Ambassador in Geneva (Akao) chaired the DSB and the DSU review process during most of 1999 and his deputy (Suzuki) chaired an informal discussion group that led to the proposal made to the Seattle Ministerial that is discussed below.

II. Dispute Settlement Issues in Future WTO Negotiations

At the end of the Uruguay Round, it was decided to have a full review of the DSU before the end of 1998 and to have the WTO Ministerial Conference decide thereafter whether to continue, modify or terminate the DSU. Although virtually all WTO Members participating in the review expressed general satisfaction with the operation of the dispute settlement system, there were many proposals for minor (and some major) changes in the DSU. Some of these changes were included in a proposal made to the Seattle Ministerial Conference. Although they were not adopted since no action on any matter was taken at Seattle, I will describe them separately in this section because there seemed relatively widespread support for them, making their eventual adoption likely.

A. The proposed DSU amendment at Seattle

Although the DSU review formally ended in July 1999, a small group of Members, including the active users of the DSU, continued to work on a package of amendments to the DSU for adoption at the Seattle Ministerial. This work, which was led by Japan, culminated in a proposed amendment co-sponsored by Canada, Costa Rica, Czech Republic, Ecuador, the EC and its member States, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela.

The principal part of the proposed amendment was a modification of DSU Articles 21.5 and 22 to clarify the relationship between them so as to avoid the problems that arose in the *Bananas* case because of the split between the EC and the US as to how those articles should be interpreted. In that case, the EC argued that since it had modified its banana regime and there was a disagreement over whether the new regime was WTO-consistent, the US had to commence an action under Article 21.5 and have a new panel (and possibly Appellate Body) ruling on its new measure. The US argued that notwithstanding Article 21.5, Article 22 authorized the granting of authority to suspend concessions (i.e., retaliate) under the reverse consensus rules only within 30 days of the end of the period set for implementation and since the EC had not implemented, the US was entitled to seek and obtain such authority within that period. In the US view, to require it to pursue an Article 21.5 action would prevent it from ever exercising its right to seek authority to retaliate. Ultimately, there was a panel requested by Ecuador under Article 21.5 on whether the new regime was WTO-consistent and an arbitration of the amount of the US retaliation request under Article 22. Both proceedings were conducted by the original panel and it issued its reports to the parties in both proceedings on the

same day and the US was later authorized to retaliate on the basis of the arbitration report.

As a general proposition, the sponsors of the amendment aimed at establishing a clear sequence of procedures to be followed at the expiration of the reasonable period of time for implementation in the event that there was a dispute over implementation. Since providing for such a sequence required an overall lengthening of the time for completing a typical case and since there was a desire not to lengthen the overall process, a number of adjustments were made in the consultation and panel stages to reduce the time devoted thereto. These changes are set out in more detail below, along with several additional, unrelated changes contain in the proposed amendment.

1. Changes to DSU Articles 21 and 22

Under the proposed amendment, if a disagreement over compliance arises, the disagreement would be referred to a compliance panel (the Appellate Body, if the underlying panel report had been appealed, or the original panel, it had not been appealed). The compliance panel is to submit its report within 90 days of the referral and the report is to be adopted at a DSB meeting held 10 days thereafter, absent a consensus to the contrary. If the concerned Member is found not to have brought the measure into conformity, the prevailing party may request authorization to suspend concessions at that same meeting.

Article 22 would be revised to make it clear that a request to suspend concessions can be made only if a Member fails to indicate that it will comply with the DSB recommendations, fails to report that it has implemented or is found not to have complied by a compliance panel. Thus, it is made clear that if there is a disagreement over

implementation, there must be a compliance panel finding of non-implementation before suspension of concessions may be authorized. The period for arbitration of the level of suspension is expanded from 30 to 45 days and more detail is added as to how the arbitrators are to approach their task of ensuring that the level of suspension does not exceed the level of nullification or impairment. The proposed amendment had two alternative texts dealing with the question of whether a party suspending concessions could change the products subject to the suspension. Under one variant, only adaptations of a technical nature would be permitted; under the other, such changes would be permitted, subject to review by the arbitrator and approval of the DSB (by reverse consensus).

Article 22 would also be amended to add a procedure by which a Member, who had failed to comply with DSB recommendations and was thereafter subject to a suspension of concessions, could implement a new measure and request that the authorization to suspend concessions be terminated. The authorization is to be withdrawn in such cases unless the complaining party objects, in which case the matter is referred to a compliance panel to consider whether the new measure implements the DSB's recommendations. The authorization must be withdrawn and the suspension lifted if the compliance panel finds that the new measure is not WTO-inconsistent and complies with the DSB's recommendations.

The proposed amendment also strengthened the reporting requirements concerning implementation. Given the potential disruption that the DSB could face if the Article 21.5/22 relationship is not resolved, this amendment would be very useful.

2. Timing adjustments

The foregoing compliance procedures would enable a determined complainant to obtain authority to suspend concessions about 145 days after the expiration of the reasonable period of time, as opposed (in the view of the US) to 60 days under the original DSU rules. In order to avoid lengthening the dispute settlement process, the proposed amendment made a number of adjustments to offset the 85 days added at the end of the process. The consultation requirement was cut from 60 to 30 days (saving 30 days), the number of DSB meetings to have a panel established was cut from two to one (saving at least 10 days), the time allotted for a panel's preparation of the interim report was cut by two weeks (saving 14 days), the time for the interim review process was cut from 5 weeks to 20 days (saving 15 days) and the period between the circulation of the report to the parties and to WTO Members generally was cut by 18 days. Thus, there was an overall time savings of 87 days. As a practical matter, it is unlikely that the new time limits will be respected in all cases (indeed they often will not be). But I see no harm in establishing hard-to-reach goals for the system (as long as they are understood to be goals), particularly if such time limits are necessary to an agreement on clarifying the Article 21/22 relationship.

3. *Third-party rights*

In the third major change proposed, the rights of third parties would be significantly expanded. At present, they receive the first round of party submissions and attend a special session of the panel devoted to hearing their oral statements. Under the proposed revisions, third parties would receive all submissions to a panel prior to the

issuance of the interim report and would be able to attend all panel sessions with the parties.

4. Other proposed changes

There were a number of other changes proposed, including a strengthening of the requirement to notify settlements, a provision allowing parties to agree to extend any time limit in the DSU, a requirement that public versions of submissions must be made available within 15 days (no time is now specified) and the substitution of the word "shall" for "should" in two provisions according differential treatment to developing countries.

5. Current status of the proposed amendments

As noted above, no action was taken on the proposed amendments at the Seattle Ministerial, although it appears that they had reasonably broad support. There remain two major sticking points. First, there are some concerns about the shortening of the consultation and panel stages. These concerns are largely felt by developing countries and the proposal would arguably give them as much or, in the case of time for filing a respondent's brief or commenting on the interim report, more time than at present. The problem is that in some cases, they would need the agreement of the other party, which is to give sympathetic consideration to their position. This is, of course, less certain than a provision that clearly grants developing countries additional time if they desire it.

Second, the US and the EC are not in agreement over whether and how a Member who has suspended concessions should be able to change the product list on which concessions are suspended. This disagreement has become more serious in recent months because recent US legislation requires US authorities to change such product lists

every six months (the so-called "carousel" provision). The US is expected to do so in the *Bananas* and *Hormones* cases in the near future, and the EC has already initiated dispute settlement proceedings in respect of the legislation itself.

The disagreement over the carousel provision makes it very unlikely that any of the proposed changes will be adopted in the near future. However, the fact that they are mostly agreed does make it more likely that they will be included in any future reform proposals. In this regard, it is important to recall that under the WTO Agreement, to amend the DSU requires a consensus decision of the Ministerial Conference or General Council and the amendment has immediate affect. Thus, an amendment could be implemented quite quickly if there were the will to do so.

B. Additional reform proposals for consideration

Whatever may become of the Seattle proposal to amend the DSU, there are a number other reforms that should be considered for the long term. There are four issues in particular that merit serious discussion: (a) the need to improve remedies in the WTO system; (b) the need to move toward permanent panelists; (c) the need to improve the transparency of the system and related access issues; and (d) the need to improve the capacity of developing-country Members to participate more effectively in the system. In the formal DSU review, these issues were only introduced in a very general manner.

1. Improving remedies in the WTO system

Overall, the record of compliance by WTO Members with DSB recommendations is relatively good. So far, there have been only two, long-term instances of non-compliance – the *Bananas* and *Hormones* cases. Retaliation has been authorized in those cases, but it has not led to compliance.

In considering remedies in the WTO system, it is important to recall that they are prospective – whether in the form of compensation or retaliation. In addition, it is important to consider their two principal aims – to restore the balance of concessions that was upset when one Member violated its obligations; and to give that Member an incentive to comply. The current problem with achieving the first aim – rebalancing – is that if retaliation is authorized, rebalancing takes place at a lower level of trade liberalization that had been agreed to. It would be desirable if a remedy could be devised that would not lead to that result. One could consider monetary payments or requiring the payment of compensation through a reduction in other tariffs or trade restrictions maintained by the non-complying Member.

In respect of the second aim – incentive to comply – there are two issues – timing and level of compensation or retaliation. At present, because remedies are prospective, there is an incentive initially to delay the time at which point they might be implemented, such as by seeking a long reasonable period of time for compliance and then forcing the victor to go through an Article 21.5 panel (and Appellate Body) proceeding. Moreover, if the threat of retaliation does not work, it is possible that the actual existence of retaliation will become viewed as the status quo and a long-term solution, even though the WTO rules in theory require compliance. This fear that retaliation will lose effect over time explains in part the US desire to implement a carousel provision as described above. A preferable solution may be to create incentives for early compliance, such as by providing that any retaliation will be calculated as from six months after the report finding a violation is adopted or by providing for increasing retaliation over time.

These issues will require careful thought. While retaliation seems to work when threatened by a large country against a smaller one, and has worked as between two large countries, it may not be an effective remedy for a small country (even if it can target sensitive large country sectors such as copyright holders). Moreover, the *Bananas* and *Hormones* cases show that it is not always effective between the large players. Its inefficacy and the unfavorable position in which it leaves developing countries may soon combine to create a serious credibility problem for the system that must be confronted.

2. Establishing a permanent panel body

One of the proposals made in the DSU review was to form a permanent panel body, like the Appellate Body, from which all panelists would be drawn. This idea was not given serious consideration in the review, but it seems inevitable that the WTO system will move in this direction. Most panelists serve only once or twice. Yet as cases become more complex, particularly in respect of procedural aspects and the evaluation of evidence, experience is evermore necessary. A panel body would have a host of advantages: it would speed the process since the time now taken for panelist selection would be avoided and scheduling delays would be less common. The use of a standing body would mean that panelists would likely know each other and be able to establish an effective working relationship immediately. Panelists would have greater expertise on procedural issues and could more easily meet at short notice to deal with preliminary issues. Consistency of approach and results would be more easily achievable.

There are of course a few disadvantages. From the Members' perspective, there would be more expense. Nowadays most panelists are not paid (except to reimburse travel and living expenses). The choice of the members of the panel body would be

difficult given the importance of their role. Depending on how Members handled the selection process and the importance given to nationality, there could be a politicization of the system. Moreover, the use of professional panelists would mean that delegates and government officials would be much less involved in the process than at the moment, which would mean there would less contact with the realities of governments and trade negotiations. In the end, however, these disadvantages do not seem so great, especially given that the same concerns exist in respect of the Appellate Body. Yet, in its case, they do not seem to have prevented its emergence as an effective institution.

3. Transparency and access to the WTO dispute settlement system

There have been complaints, particularly by non-governmental organizations (NGOs), that the WTO dispute settlement system lacks transparency and does not permit sufficient access for non-Members. In this regard, the United States has proposed that dispute settlement proceedings be open to the public, that submissions be made public and that non-parties be permitted to file "friend-of-the-court" submissions to panels. While these proposals were discussed in the review, there was considerable opposition to them. Many developing country Members view the WTO system as exclusively intergovernmental in nature and hesitate to open it to NGOs. In their view, if a NGO wants to make an argument to a panel, it should convince one of the parties to make it and if no party makes the argument, those Members would view that as evidence that the argument is not meritorious. Moreover, they view such openness as favoring the positions espoused by western, developed country NGOs, which they view as likely not to be in their interest. Other Members argue that the credibility of the system would be much enhanced if it were more open and that openness would have no significant

disadvantages. Given popular fears of globalization and the WTO's connection therewith, such increased credibility is viewed as essential to ensure the future effectiveness of the WTO itself, as well as the dispute settlement system.

In this regard, it is noteworthy that the Appellate Body recently ruled that it and panels have the right to accept non-requested submissions from non-parties (such as NGOs). It remains to be seen how frequently panels will exercise this right, although one may anticipate that panels will accept such submissions, at least once procedures are worked out in respect of timing, etc. Unfortunately, it is not clear how such procedures will be put in place.

On balance, I think that it is clearly in the interest of the system to become more transparent. In the end, the system has nothing to hide in the way in which decisions are made and the basis on which they are made. Indeed, all of the arguments of the parties and the reasoning of the panels and Appellate Body is made public when the reports are circulated to WTO Members. The openness issue is essentially a matter of timing. I see no gains to the system in delaying access to the parties' arguments, whereas there is much to be gained, at least symbolically, by openness. I also see no downside in allowing NGOs or others to file amicus briefs with panels and the Appellate Body, so long as parties are assured that they will have a chance to respond to any arguments or facts so submitted on which a panel or Appellate Body intends to rely. It is a question of whether one can trust the good judgment of the panels and the Appellate Body to handle such filings responsibly and I think that they can be so trusted.

4. Developing countries and dispute settlement

Developing countries have been more involved in the WTO dispute settlement system than they were in the GATT system – both as complainants and respondents. The principal issue of interest to developing countries in the DSU review concerned the resource difficulty that many developing countries face when they participate in the dispute settlement system. For the moment, the DSU Article 27.2 addresses this problem by requiring the WTO Secretariat to provide legal assistance to such countries, which it does through two staff lawyers in the Technical Cooperation Division and through the use of lawyers (typically ex-Secretariat employees) who are hired on a consultancy basis to provide assistance on a regular (e.g., one day a week) or case-specific basis. The Secretariat also conducts a number of training courses that either include or are exclusively focused on dispute settlement. Recently, UNCTAD announced plans for a training program on dispute settlement in the WTO and elsewhere for developing countries. At the Seattle Ministerial, a group of developed and developing countries announced the creation of an Advisory Centre on WTO law, which would be an international intergovernmental organization providing legal assistance to developing countries in respect of WTO matters. While the training programs will be valuable in the long run, for the immediate future, the Centre seems to offer the best hope for a significant improvement in dealing with inadequate developing country resources.

References

For more information on the various WTO dispute settlement cases referred to, see the WTO's website (www.wto.org) where all WTO and GATT dispute settlement reports are available, as well as an overview of activities to date in the WTO dispute settlement system. For Japan's view of the DSU and specific dispute settlement cases, see MITI's Report on the WTO Consistency of Trade Policies by Major Trading Partners (issued annually)(the 2000 report is available at www.miti.go.jp/report-e/gCT00coe.html.

The proposed changes to the DSU at Seattle were contained in WT/MIN(99)/8 & Corr. 1, which are also available on the WTO website.

On remedies, see Joost Pauwelyn, Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach, American Journal of International Law, vol. 94, no. 2, p. 335 (April 2000).