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WTO DISPUTE SETTLEMENT BODY DEVELOPMENTS IN 2010: AN ANALYSIS

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The WTO dispute settlement mechanism has been widely acclaimed as one of the most critical and useful features of the multilateral rules-based trading system. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU) has established an independent judicial system for the enforcement of agreements or commitments made by member countries in the WTO through the Dispute Settlement Body (DSB). The agreements or commitments represent the outcome of negotiations among the member governments themselves. This brief comment highlights some of the developments relating to the key elements of both the working of the WTO dispute system and recent trade disputes in 2010, which marked the 15th anniversary of the system. Having recorded over 400 trade disputes, the WTO dispute settlement system is considered as remarkably efficient, more so as disputes run significantly faster than cases in other international or regional institutions. There has been an increase in the participation of member countries in the dispute settlement system in 2010. In particular, the majority of cases filed during the year were initiated by developing countries, who also participated in many other cases as third parties. The improved effectiveness of the system has enabled member countries, both big and small, to exercise greater international legal scrutiny on the protectionist policies and practices of trading partners, thereby promoting a transparent and predictable environment that allows trade to flow more smoothly.

* Chairman of the General Council and former Chairman of the Dispute Settlement Body in 2010. This analysis is an edited version of a speech delivered in March 2011 before the WTO Dispute Settlement Body. Presentation made at the 4th Annual Update on WTO Dispute Settlement System organised by Centre for Trade and Economic Integration, The Graduate Institute, Geneva, on 8th March, 2011.

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Serving as Chairman of the Dispute Settlement Body (DSB) in 2010 allowed me to preside over one of the most active and productive bodies of the WTO. Dispute settlement is the “perpetual motion” of the WTO mechanism and the DSB keeps the machine running. I am grateful to have had the opportunity to be a part of the most important success story of the WTO to date.

I. 2010: A VERY SPECIAL YEAR!

The year 2010 was a very special one for WTO dispute settlement, as it marked the 15th anniversary of the system.

In just 15 years, with over 400 disputes to have appeared on its docket,¹ the WTO dispute settlement system stands as the most prolific of all international dispute settlement systems. Indeed, it far outstrips the International Court of Justice – the principal adjudicative body of the United Nations – which has received just 152 disputes since its establishment, over 65 years ago.² The International Tribunal for the Law of the Sea started shortly after the WTO in 1996 and has heard merely 19 cases.³ The Chamber for Environmental Matters was established by the ICJ in 1993, but shut down in 2006, never having heard a single case.⁴

¹ In the period between January 1995 and December 2010, 419 disputes (i.e. requests for consultations) were filed at the WTO and about 200 have proceeded through to completion or settlement. *See* WORLD TRADE ORGANISATION, ANNUAL REPORT 2011, 86, available at http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf.

² *See* International Court of Justice: Cases, available at <http://www.icj-cij.org/docket/index.php?p1=3>.

³ *See* International Tribunal for the Law of the Sea: List of Cases, available at <http://www.itlos.org/index.php?id=35&L=0>.

⁴ *See* International Court of Justice: Chambers and Committees, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=4>

What does this say about the WTO? The WTO Members are a litigious group! But it also says that WTO Members have confidence in their dispute settlement system and consider that solutions can be found to their conflicts by resorting to this mechanism.

Quantity is not the only achievement of our dispute settlement system. Even more impressive, and important, is its record in achieving its main objective, namely, settlement of disputes between Members so as to provide “security and predictability to the multilateral trading system”.⁵ Since its establishment, for more than half of the disputes lodged at the WTO, it was not necessary to proceed beyond the preliminary phases to the adversarial panel process. With a few exceptions, the remaining disputes that did go to full-fledged panel proceedings were resolved by Members, who brought themselves into compliance with the rulings and recommendations of the DSB.

II. IS THE PANEL SYSTEM EFFICIENT?

As indicated above, the WTO dispute settlement system is very active and effective at resolving disputes. The next question is whether the system provides for “prompt settlement” of situations which, as the DSU reminds us, is “essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members”.⁶

Is the panel system efficient? Some say it is not. There is a myth that the WTO dispute settlement system is too slow – that panels take too long.⁷ This is simply not true.

The WTO dispute settlement is remarkably efficient. On an average, WTO disputes run significantly faster than cases in other international or regional fora, such as the ICJ, the ECJ and NAFTA. The average timeframe for WTO panel proceedings is 10 months,⁸ excluding the time it takes to compose a panel

⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

⁶ DSU art. 3.3.

⁷ See generally, Christina L. Davis, *WTO Adjudication as a Tool for Conflict Management*, (Northwestern University School of Law (Feb. 7, 2012), available at: http://www.law.northwestern.edu/colloquium/international/documents/Christina_WTO_Adjudication_as_a_Tool_for_%20Conflict_%20Management.pdf;

⁸ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT CASES AND MATERIALS* 204-205 (2005).

and translate reports. Compare this to the ICJ's 4 years, the ECJ's 2 years and NAFTA's Chapters 20 and 11 proceedings of 3 years and 5 years, respectively.⁹

WTO dispute settlement proceedings are also faster than the investor-state arbitrations at the World Bank's International Centre for the Settlement of Investment Disputes, known as ICSID. An ICSID arbitration takes on an average over 3 1/2 years.¹⁰ This is not just because of the time involved in parties making submissions but due to the decision-makers taking a long time to do their work. Surprisingly, it takes about 14 months between the last hearing and the issuance of an ICSID award.

Of course, there are some WTO panel proceedings that have taken longer than 10 months, and in recent years the average time for a panel process is close to a year. Two high profile cases have taken several years to go through the system: the "Airbus" and "Boeing" cases. However, these are exceptional cases. Many press reports have labelled these cases as "the largest, most difficult and most expensive in the history of the WTO".¹¹ It is therefore hardly surprising that these two cases have resulted in the longest panel proceedings to date. However, they do not represent the norm. We would do a disservice to the WTO dispute settlement system if we describe the system by reference only to the most exceptional cases, rather than by the norm.

That is not to say we cannot find deficiencies or that there is no room for improvement. Various ideas have been proposed by Members and are under consideration in the ongoing talks about possible DSU reform.¹² The important point to note is that the WTO dispute settlement continues to serve the Membership very well.

III. ACHIEVEMENTS IN 2010

Turning now to the highlights of WTO dispute settlement in 2010, I would like to draw attention in particular, to the following:

⁹ Timeframes referred to in this comparison refer to actual procedures. They exclude political processes such as consultations, good offices, mediation or conciliation.

¹⁰ Anthony Sinclair *et al.*, *ICSID Arbitration: How Long Does it Take?*, 4(5) GLOBAL ARB. L. REV (2009).

¹¹ Press Release by Peter Mandelson, European Union Trade Commissioner (May 31, 2005).

¹² See World Trade Organization: New Negotiations on the Dispute Settlement Understanding, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations

- In 2010, the number of consultation requests increased as compared to 2009.¹³ The 17 requests made in 2010 were slightly above the annual average of the previous 5 years,¹⁴ but only a little more than half the annual average of the last 15 years;¹⁵
- In 2010, 6 panels were established, which is less than the number in 2009.¹⁶ This is about half of the annual average number of panels established in the last 15 years;¹⁷
- The total number of ongoing disputes was almost 40 percent higher in 2010 than in 2009, and the number of ongoing disputes peaked at 23 during the summer of 2010;
- The majority of panels established in 2010 were composed by the Director-General,¹⁸ which has been the case every year since 2001;
- Finally, the number of panel reports and arbitration awards circulated to Members rose from a historic low of 6 in 2009 to 9 in 2010.

IV. WHAT ISSUES ARE BEING LITIGATED?

Trade remedies dominated the dispute settlement agenda for 2010. The majority of the consultation requests, panels established and reports circulated in 2010 related to trade remedies,¹⁹ that is, anti-dumping, countervailing duties, and safeguards. There were three new “zeroing” cases in 2010: *US – Shrimp from Vietnam*,²⁰ *US – Anti-dumping Measures Involving Products from Korea*,²¹ and *US – Carrier*

¹³ There were 14 consultations requested in 2009.

¹⁴ The annual average of the previous 5 years is 15.6 requests.

¹⁵ The annual average of the previous 15 years is 27.9 requests.

¹⁶ These 6 panels represent 7 disputes because two identical disputes were brought by the EU and US against the Philippines (*Philippines – Taxes on Distilled Spirits*) and a single panel was established by the DSB in Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/RWT/DS403/AB/R (Dec. 21, 2011) (*adopted* Jan. 20, 2011) . There were 10 panels established in 2009.

¹⁷ The annual average of the previous 15 years is 11.8.

¹⁸ In 2010, 4 of the 6 panels established were composed by the DG.

¹⁹ In 2010, 11 of the 17 consultations requests made relate to “trade remedies”; 4 of the 6 panels that were established were “trade remedy” panels; and 5 of the 9 Panel/Appellate Body reports circulated dealt with trade remedies.

²⁰ Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Vietnam*, WT/DS404/R (July 11, 2011) (*adopted* Sept 2, 2011) [hereinafter *US – Shrimp from Vietnam*].

²¹ Request for Consultation by the Republic of Korea, *United States – Anti-Dumping*

Bags from Thailand.²² In the *US – Tyres* case, China brought its first challenge under the China-specific safeguard restrictions under China's Protocol of Accession.²³

We saw relatively new subjects like renewable energy²⁴ and wind power equipment²⁵ find their way onto the WTO dispute settlement docket, in cases brought by Japan against Canada and by the United States against China, respectively. We witnessed the establishment of the first WTO panel dealing with a tobacco-control measure in Indonesia's case against the United States.²⁶ Unlike previous tobacco cases, this one is not about local content and taxation measures but addresses a ban on cigarettes containing certain additives including clove. We also saw cases dealing with the interpretation of agreements that have had little or no DS attention in the past:

- *Thailand – Cigarettes* addressed several novel interpretation issues under the Customs Valuation Agreement;²⁷ and
- *EC – IT Products*, a Panel Report that was not appealed, where the Information Technology Agreement (ITA) made its dispute settlement debut.²⁸

In addition, we saw the return of familiar issues, such as a case dealing with claims of tax discrimination and alcoholic beverages.²⁹ Three SPS cases, notorious generally for their complexity, occupied panels in 2010: these were *Australia –*

Measures on Corrosion- Resistant Carbon Steel Flat Products from Korea, WT/DS420/1 (Jan. 31, 2011).

²² Panel Report, *United States – Anti-Dumping Measures On Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R (Jan. 22, 2010) (adopted Feb. 18, 2010).

²³ WT/DS399. Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (Sept. 5, 2011).

²⁴ Request for Consultation by Japan, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* WT/DS412/1 (Sept. 16, 2010).

²⁵ Request for Consultation by the United States, *China – Measures Concerning Wind Power Equipment* WT/DS419/1 (Jan. 6, 2011).

²⁶ Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011).

²⁷ Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R (June 17, 2011) (adopted July 15, 2011) [hereinafter *Thailand – Cigarettes*]. See also Arbitration Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/13 (Oct. 2, 2009).

²⁸ Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products* WT/DS375/R, WT/DS376/R, WT/DS376/R (Aug. 16, 2010) (adopted Sept. 21, 2010).

²⁹ *Philippines – Taxes on Distilled Spirits*, supra note 16. There have been a line of similar “alcohol” cases: *Japan – Alcohol* in 1996; *Korea – Alcohol* in 1999 and *Chile – Alcohol* in 2000.

Apples,³⁰ *US – Poultry from China*,³¹ and *Korea – Bovine Meat*.³²

2010 was “par for the course” in that all the panels established in 2010 involved goods. Disputes on goods continue to be the most common disputes brought before the WTO. As of the end of 2010, a review of the 419 disputes lodged in the WTO has revealed that only 28 did not involve goods. In other words, since the establishment of the WTO in 1995 until the end of 2010, about 94% of disputes involved goods, while only about 6% did not.

There is no doubt that 2010 will be cited in the record books as the year in which the Panel Report in one of the biggest WTO cases to date was circulated: that is the “Airbus” case.³³ This complex dispute involves allegations of some 300 separate instances of alleged subsidization by the EU and its Member States over a period of almost forty years. The Panel Report was appealed on July 2010 and virtually monopolised the attention of the Appellate Body for several months, causing it to make special arrangements with WTO Members to delay consideration of appeals in several other cases.³⁴

The “sister” case, the “Boeing” panel, involves allegations of prohibited and actionable subsidies provided to US producers of large civil aircraft.³⁵ The Panel Report was circulated in March 2011 and appealed in April 2011.

Finally, we saw two examples in 2010 of suspension of proceedings, which happens relatively rarely. Both cases involved arbitrations under Article 22.6 of the DSU, wherein the United States objected to the level of suspension of concessions

³⁰ Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R (Nov. 29, 2010) (adopted Dec 17, 2010).

³¹ Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (Sept. 29, 2010) (adopted Oct 25, 2010).

³² Request for consultations by Canada, *Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, WT/DS391/1 (April 15, 2009) (adopted June 1, 2011).

³³ Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (May 18, 2011) (adopted June 1, 2011).

³⁴ The “Airbus” final report was more than 1000 pages long, with more than 6000 footnotes. It was circulated on June 30, 2010. Similarly, the Appellate Body report on this case, circulated on May 18, 2011, was that body’s longest ever. It contained over 600 pages and 3000 footnotes.

³⁵ Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS353/R (March 31, 2011).

proposed by the European Union in one zeroing case,³⁶ and by Japan in another zeroing case.³⁷

V. WHICH MEMBERS WERE ACTIVE IN DISPUTE SETTLEMENT IN 2010?

Turning to consider which Members were active participants in DS in 2010, of the 17 new requests for consultations, the United States is the only multiple requesting party, launching 4 of the requests. Both China and the Dominican Republic are on the receiving end in 4 requests, although the 4 requests to the Dominican Republic relate to the same matter. The European Union received 3 requests and the United States received 2 requests for consultations.

In terms of the 6 panels established in 2010, the United States is respondent in 4 panels, whereas the European Union and the Philippines are each respondent in the other 2. Including these 6 panels, there were 11 active panels at the end of 2010: the United States was respondent in 7 of those cases and China, the European Union, Korea and the Philippines were each respondent in 1 case.

The complainants included 3 each from the European Union and Mexico, and 1 dispute each brought by Brazil, Canada, China, the European Union, Indonesia, Korea, Viet Nam and the United States.

VI. DEVELOPING COUNTRIES ACTIVE IN 2010

2010 was a busy dispute settlement year for developing countries. In fact, the majority of the cases initiated in 2010 were brought by developing countries. El Salvador and Viet Nam each brought their first case as complainant: El Salvador was one of four developing country members from Central America to bring a safeguards case on bags and tubular fabric against the Dominican Republic,³⁸ and Viet Nam brought a dumping case on shrimp against the United States.³⁹ Peru requested consultations against Argentina regarding anti-dumping duties on fasteners and chains.⁴⁰ We also saw the circulation of the Panel Report in

³⁶ Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)* WT/DS294/AB/RW/Corr.1 (June 5, 2009) (adopted May 9, 2006).

³⁷ Appellate Body, *United States – Measures Relating to Zeroing and Sunset Reviews Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW (Aug.18, 2009) (adopted Jan 23, 2007).

³⁸ Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*

WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R (Jan. 31, 2012).

³⁹ *US – Shrimp from Vietnam*, *supra* note 20.

⁴⁰ Request for consultations by Peru, *Argentina – Anti-Dumping Duties on Fasteners and Chains from Peru*, WT/DS410/1 (May 31, 2010).

Thailand – Cigarettes, involving two Asian developing countries.⁴¹ Further, in 2010 there were more developing countries than developed countries involved as third parties.

In 2010 we also saw some “newcomers” in the dispute settlement arena: Ukraine requested the establishment of a panel against Armenia, a first for both countries.⁴² So far, there has been no further development on this request as it was deferred by the DSB on the request of Ukraine. (So far, this has not moved beyond the first request for panel establishment.)

VII. MOST FREQUENT USERS

The United States and the European Union still top the charts in terms of the most frequent users of the WTO dispute settlement system, both as complainants and respondents. Canada, Brazil, India and Mexico are frequent complainants, while India and China have defended numerous cases.⁴³

VIII. PANELISTS

An interesting statistic for 2010 relates to panelists. Historically, in the 15 years of WTO dispute settlement, a little less than half of the panelists have come from developing countries.⁴⁴ Seven of the 9 panel reports circulated in 2010 were decided by a panel composed mostly of panelists from developing countries.⁴⁵

At the end of 2010, 21 of the 33 panelists serving on active panels were from developing countries.

IX. CONCLUSION

In conclusion, the settling of disputes, in a timely and structured manner,

⁴¹ *Thailand – Cigarettes*, *supra* note 28.

⁴² Request for consultations from Ukraine, *Armenia – Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages*, WT/DS411/1 (July 22, 2010).

⁴³ WORLD TRADE ORGANISATION, ANNUAL REPORT 2011, 86-87, *available at*: http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf.

⁴⁴ According to *worldtradelaw.net*, the total number of panelists involved in WTO disputes was 209, of which 110 were from developed countries and 99 from developing countries. The number of panelists from developing countries thus represents 47% of the total. This data does not include panelists currently serving on ongoing panels.

⁴⁵ The exceptions were: *EC – IT Products* (no panelists from a developing country) and *EC – Fasteners* (only one panelist from a developing country).

remains at the heart of the WTO dispute settlement system. The system has been able to assist in preventing the detrimental effects of unresolved international trade conflicts. It has also helped to mitigate the imbalances between stronger and weaker member governments by having their disputes settled on the basis of rules rather than the power of taking unilateral measures to determine the outcome. The WTO dispute settlement system remains one of the major results of the Uruguay Round and has significantly contributed to ensuring a more predictable multilateral trading system.