

**Attorney-General's 25th International Trade Law
Conference
22 October 2003
Hyatt Hotel Canberra**

**WTO Dispute Resolution: Recent Developments in
Multilateral and Bilateral Dispute Resolution
Processes.**

Dominic Trindade
Assistant Secretary, WTO Trade Law Branch
Office of Trade Negotiations
Department of Foreign Affairs and Trade, Canberra

Introduction to the WTO Dispute Settlement Understanding:

- The Dispute Settlement Understanding (DSU) is part of the 1994 package of agreements establishing the World Trade Organization (WTO).
- Article 3.2 of the DSU text sets out, among other things, that the DSU is
 - “a central element in providing security and predictability to the multilateral trading system...(serving)..to preserve the rights and obligations of Members...and to clarify the existing provisions of the (covered) agreements in accordance with customary rules of interpretation of public international law.
 - Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided...” (emphasis added)

- The DSU is based upon the earlier GATT dispute settlement rules.
 - But there are some key differences from that system of GATT panels, including most significantly the “negative consensus” rule for adoption by the DSB of panel reports (unless appealed) and the very existence of a standing Appellate Body.
- Australia has had a significant involvement in the GATT/WTO dispute settlement processes.
 - We were closely involved in the negotiation of the WTO DSU, and an Australian (our then WTO Ambassador Don Kenyon) was the first Chair of the Dispute Settlement Body.
 - Australia has been involved in 5 DSU disputes as a principal party (Salmon, Korea Beef, Howe Leather, US Lamb and US Byrd Amendment); and we are currently involved in 4 active disputes as a principal party: EC sugar; EC GIs; and 2 Quarantine disputes (EC and Philippines)
 - We have also been a regular participant in other disputes as a third party.
 - A significant number of Australians, from a range of backgrounds, including government, the professions and academia, have served as panellists.
 - There is currently an Australian judge (Mr Justice Lockhart formerly of the Federal Court) sitting on the Appellate Body.
- Australia believes participation in the WTO dispute settlement process is a key element of the multilateral trade system

- While there have been disputes taken against Australia which have been the subject of critical (negative) attention at times (Salmon, Howe Leather), there have also been disputes which we have initiated to protect our own interests (US Lamb)
- Overall, we believe the DSU has served us, and the other Members of the WTO, well.

Reform of the DSU:

- But the DSU is not a static system and currently reform of the DSU is the subject of a separate, but parallel, process to the negotiation of the larger multilateral round.
 - It is not part of the so-called “single undertaking”.
 - But the last deadline set for review (31 May) was not met.
 - And, given the difficulties the broader round negotiations encountered at Cancun, it is unclear how quickly DSU review will proceed.
- As things stand, the key elements of DSU review under consideration include:
 - Suggestions for a standing panel;
 - Calls for greater transparency, including in the treatment of amicus submissions; and
 - Clarification and enhancement of timeframes, including the complex issue of “sequencing” –

- Which relates to the application of retaliation measures by the complainant in the context of disagreement as to whether the party complained against has or has not complied with a ruling against it.
- Australia has said in DSU negotiations that, although there are some reforms that we support, overall we believe the DSU is not in need of radical reform.
- It is also worth noting that elements of the DSU, particularly panel and AB practice, are arguably evolving with and through the disputes themselves.
- Which raises a broader point – the DSU panel and AB processes have to be understood as being an ongoing element of the multilateral negotiations – by clarifying the rights or obligations relevant to a dispute principally involving two or more members, the rights or obligations of all WTO members are arguably clarified.
- Some would argue that the DSU, and particularly the AB, is creating not just its own practice, but also its own international jurisprudence.
- I am not sure I want to enter the debate about the extent to which the WTO DSU now represents a body of law in itself, but it is clear that the AB and panels do have regard to previous AB rulings and to that extent at least some would speak of WTO “jurisprudence”.
- It is also interesting to consider the extent to which adjudicatory or arbitrary panels under bilateral agreements will have regard to the WTO DSB, and again particularly the Appellate Body’s decisions.
- I am sorry that I have not come here with sufficient time or, I admit, sufficiently prepared, to go into this last point in any detail.

Dispute Settlement under Bilateral or Regional Agreements:

- But it does provide me a link – if a somewhat clumsy one – to some broader questions regarding the interaction between the WTO DSU and dispute settlement under bilateral or regional trade agreements.
- In the wake of Cancun, some commentators have suggested that multilateral trade liberalisation should no longer be our highest priority, and instead Australia should focus more on bilateral and regional trade agreements (such as FTAs).
 - I do not want to get dragged into that debate either, other than to say that I share the Government's position that the multilateral negotiations remain our priority trade focus, but that activity on the bilateral and regional trade agreement front can be complementary to the multilateral process – and we do not need to choose between chewing gum and walking, as they say.
 - What I am interested in considering briefly here is the implications that there might be for WTO dispute resolution of an increasing involvement in bilateral and or regional trade agreements.
 - Compared to others Australia has had limited involvement in such FTAs.
 - To date we have only completed FTAs with New Zealand (CER) and Singapore.
 - And, as has been announced only this week, we have now concluded negotiations for an agreement with Thailand.

- And of course we are still very much in negotiation with the USA.
- I will not focus in particular detail on CER, given that one of my fellow panellists may have covered this agreement in more detail. However, I should note that CER, quite consciously, contained no dispute resolution provisions – it was agreed disputes would be resolved politically or through our respective domestic legal systems.
 - This reflects both the historic closeness of our political and economic systems, but also the strong harmonisation of our legal systems, particularly in those areas of law of strongest relevance to trade, commerce and investment.
 - (And for that matter, it remains a fact that Australia and NZ have not had to resort to WTO dispute settlement with each other.)

Singapore Australia FTA

- Our FTA with Singapore was therefore our first effort at a bilateral dispute settlement provision.
- It is, in some ways, a straightforward, standard dispute settlement chapter.
 - It provides initially for consultations between the parties.
 - if consultations fail to resolve the dispute, an arbitral tribunal will be established.
 - The parties may agree on the use of good offices, conciliation or mediation at any stage, including while the dispute is before an arbitral tribunal.

- A party found in breach must comply with the arbitral tribunal's recommendations within a '*reasonable period of time*' – as agreed by the parties.
- If a party fails to comply with the report of the arbitral tribunal, the parties may enter into negotiations for compensation.
- Upon failure to agree on consultation, the complaining party may request the arbitral tribunal to determine appropriate levels of suspension of benefits.
- As you can see it is a model with some clear similarities to the WTO DSU, and I hope my colleagues who negotiated the text will forgive me for conceding if it is not a particularly innovative model.

Australia -Thailand FTA

- As you would all I am sure be aware, Prime Minister Howard and the Thai Prime Minister Thaksin just announced (on 19 October) the conclusion of negotiations on the Australia-Thailand FTA.
- As I understand it, the agreement will include a chapter on consultations and dispute settlement, which will provide for binding dispute settlement in relation to most disputes.
 - However, any disputes about Sanitary and Phytosanitary (SPS – or quarantine) issues will be carved out from the scope of the dispute settlement chapter, as these disputes are better considered in the WTO DSU context.
 - In cases where the subject matter of the dispute is such that it could be considered either under the

agreement or in the WTO DSU context, the party bringing the complaint will be able to choose the forum (but will have to choose one only).

- The agreement will include investment protection provisions which will apply to all investments (post-establishment).
 - These provisions will include investor-state dispute settlement provisions largely reflecting Australia's general approach to investor-state dispute settlement, as incorporated in most of our existing bilateral investment protection and promotion agreements (IPPAs).
 - The state-state dispute settlement provision, generally included in our IPPA model, has been replaced by the general dispute settlement chapter.
- It would appear that the negotiators have sought to create a relatively simplified bilateral dispute resolution mechanism which is nonetheless complementary to the WTO DSU, rather than exclusive of it.

Australia US FTA

- No doubt the FTA that will raise the greatest interest in its dispute settlement provisions will be the US FTA.
- Needless to say, I am not in a position to discuss the provisions under negotiation in any detail.
 - But we have seen the US recently finalise two FTAs – with Singapore and Chile – which might provide an indication of their preferred model.
- The US model as found in their Singapore and Chile FTAs does have a number of innovations, including:

- Provision for further accelerated timelines in matters regarding perishable goods;
- A contingent list from which panellists are drawn by lot where a party fails to nominate a panellist or the parties fail to agree on a third panellist within specified times;
- Fines to be payable where a party is not complying with obligations in the labour or environment chapters
 - The US would argue such fines are needed because it is not appropriate for the complaining party to suspend benefits under the agreement for non-compliance with these chapters; any such fines are to be allocated to the joint committee established under an agreement and to be spent on improving either labour or environmental law compliance (as the case may be) in the territory of the party complained against.
- The US of course has now had considerable experience of dispute resolution under bilateral/regional agreements – particularly under NAFTA – and it is clear that their current FTA model has evolved since NAFTA.

How will dispute resolution under these bilateral trade agreements interact with WTO dispute resolution?

- One pointer as to how the WTO DSU process and the dispute resolution processes of bilateral and regional FTAs may interact may be found in the recent history of dispute resolution between the parties to NAFTA.
- Like you I am sure, I am looking forward to Prof Trakman's panel presentation this afternoon on what we may learn from the NAFTA experience.

- So I certainly would not want to venture too far into what I imagine Prof Trakman will cover.
 - But I would perhaps like to raise for consideration some issues regarding the choice between bilateral trade dispute resolution and WTO DSU processes, as seen from the NAFTA context.
- Under NAFTA, the complainant in a trade dispute can choose to pursue resolution either through NAFTA or under the WTO DSU.
 - Once procedures have begun under one forum, however, the other is generally excluded.
 - Nevertheless, one dispute – a long (and for me at least, far too complicated) dispute or series of disputes between Canada and the US on softwood lumber – has appeared in both. Actions have been brought on essentially the same grounds to both NAFTA and WTO panels.
 - But it is worth reminding that a primary factor in the choice between dispute resolution under NAFTA and under the WTO DSU is that NAFTA disputes have largely been investor-state claims.
 - Under NAFTA Chapter 11, an investor can bring an action directly against another NAFTA government
 - But the WTO DSU does not provide for private actions against governments, being a forum for state v state claims only.

- Assuming then, that we are talking about a dispute in which a state v state claim is being considered under either a bilateral agreement or the WTO DSU, the complaining member will probably consider several things.
 - One factor is likely to be whether there is a legal or procedural advantage in one over the other:
 - In terms of legal advantage, one system may provide tighter rules, or restrictions which may assist the complainant.
 - One system may provide some procedural advantage.
 - » For example, complaints under the DSU are open to third parties, complaints under NAFTA are not.
 - » A complainant may wish to involve third parties, if they believe the third parties will support their case and add pressure to the respondent;
 - » Or they may wish to exclude the possibility of third parties for either commercial or system reasons.
 - It is also likely that bilateral, political relations will be considered:
 - However, speaking for myself, I am not sure whether it would always be seen as more “friendly” to pursue a dispute bilaterally, where no third parties can be involved and the dispute might therefore be considered more private,
 - or whether in fact a WTO DSU claim could be seen equally as having less of a bilateral “edge”, given the extent of WTO disputes and the range of parties involved.

- In theory, the ability to choose the forum also widens the scope to pursue strategic litigation: ie to pursue a claim in order to encourage the development of “jurisprudence” (if I may use that term) in a particular direction, in pursuit of a long-term advantage. (Although, as I have already said, I do not wish to enter the debate about the extent to which the WTO DSU, and particularly the Appellate Body, has been, let alone ought to be, creating “jurisprudence”, rather than simply resolving disputes between parties by “clarification”.)
- Although this long-term strategic alternative might operate in theory, I am not sure if it is possible to discern any particular pattern of strategic litigation in the choice (where it may have existed) between pursuing NAFTA claims or WTO DSU claims.
- In the end, it has probably been the specific issues of the dispute which have most informed the choice of forum, including decision making by counsel at an operating level, rather than by governments at the higher strategic level.

Conclusion:

- There is no doubt a great deal more upon which we could speculate concerning the likely interaction between the WTO DSU and the new bilateral and regional FTA era in which we now find ourselves.
 - To take a not-very-brave line, I could say simply: time will tell.
 - But I should perhaps chance my arm a bit and say that I believe that dispute settlement under such bilateral and regional agreements will evolve as

possible alternatives to the WTO Dispute settlement system, but in a complementary way.

- To the extent that such agreements allow for a choice of forum, and to the extent that the subject matter of a potential dispute allows such a choice, then I believe that choice will probably be made having regard to the sorts of considerations identified earlier.
 - And over time, practice or “jurisprudence” will develop in respect of bilateral dispute resolution which will be heavily influenced, if not guided by WTO DSU “jurisprudence”.
- And on that harmonious or at least converging note, I will end.