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WTO DISPUTE SETTLEMENT EXPERIENCE

WORKING PAPER

*By John Jackson
University Professor of Law
Georgetown University Law Center
Washington D.C.*

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MEMORANDUM

SEPTEMBER 17, 2001

TO : INTER-AMERICAN DEVELOPMENT BANK—MEETING OF VICE MINISTERS

FROM : JOHN H. JACKSON, UNIVERSITY PROFESSOR OF LAW, GEORGETOWN
UNIVERSITY LAW CENTER

RE : WTO DISPUTE SETTLEMENT EXPERIENCE

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**THE WTO DISPUTE SETTLEMENT EXPERIENCE AND ITS IMPLICATIONS FOR A FREE
TRADE AGREEMENT FOR THE AMERICAS (FTAA)**

I. INTRODUCTION AND SCOPE OF THE PROBLEM

This memorandum will very briefly present the author's overall observations about the experience of the Dispute Settlement (DS) System of the World Trade Organization (WTO) thus far. This memo's focus will be on the implications of that experience on the issues of services trade and of investment, which concern developing countries especially relevant to the development of a Free Trade Area of the Americas

(FTAA). Although there has not been much concrete experience on services or investment in the WTO DS system so far, there are nevertheless important implications suggested by the general jurisprudence developments in the WTO. The subject is vast, so this memo can only touch on some of the key issues and problems. A bibliography of some of this author's writings, as well as some other works on this subject is appended, in case readers wish to pursue the matter further.¹

The WTO and its DS system came into existence on January 1, 1995, so there are now almost seven years of experience with it. In that time, an astonishing number of cases (236, as of September 4, 2001) have been brought to the system, of which about 52 have resulted in a final report of a DS panel or the WTO Appellate Body.² Developing countries of the Western Hemisphere have participated (as complainants or respondents) in about 14 of these 52 cases, demonstrating that there has been much attention from that group of nations on the WTO DS procedures.

In terms of concrete experiences, which have been reasonably documented so that one can appraise their implications, it is the final reports that are the most significant, and are largely the basis of my conclusions in this report.

In this memorandum, I will discuss some of the potential implications for an FTAA, particularly as related to services and investment, in five parts following this introduction. First, in Part II of this paper I briefly outline the landscape or context of the WTO DS system, and discuss the pros and cons of dispute settlement procedures generally. Then in Part III, I will present some perspectives about some of the key jurisprudential questions of the WTO DS experiences, which have implications for almost any international economic dispute settlement system, regardless of what subjects are involved. Next, in Part IV and V, I will briefly discuss some particular observations that might specifically involve services trade and investment, respectively. It should be noted that these two subjects overlap and are often intimately linked to one another. The WTO has a major text on trade in services (GATS), but no such attention to investment. (Indeed, there is great controversy about whether the WTO should develop, under its umbrella, any major treaty provisions regarding investment, but as many persons have pointed out, the services text (GATS) of the WTO already has many provisions that are extremely important to investment. There is also a small WTO text on "TRIMS - Trade Related Investment Measures" which is relevant.) Finally in Part VI, I will conclude my observations.

As all readers surely realize, the chapter (heavily bracketed) of the FTAA Draft Agreement that deals with Dispute Settlement is extraordinarily detailed, covering many different subjects and optional procedures. Some of this text has (obviously) already tried to take into account some of the problems experienced by the WTO in its DS procedures.

II. BACKGROUND OF THE WTO AND ITS CONTEXT

Readers will recall the main points of the history leading up to the present WTO dispute settlement procedure.³ At the end of World War II, political leaders determined to build a new institutional structure for international economic relations, partly because of the perception that a failure of such institutions had contributed to the war. Thus in 1944, the Bretton-Woods conference created the World Bank and the IMF, and at that time called for a counterpart trade organization, an International Trade Organization (ITO). Negotiations of a draft ITO charter were completed in Havana in 1948, but the charter never came into being, largely because the U.S. Congress would not accept it. However, 1947 negotiations had completed a reciprocal tariff reduction agreement, the General Agreement on Tariffs and Trade (GATT), and this came into provisional effect on January 1, 1948. It did not have an institutional structure, however, and when the ITO was clearly not likely to come into being, the GATT began to assume the trade-related activities and responsibilities that nations needed, including a Dispute Settlement (DS) procedure. Gradually, this DS process became more and more elaborate as practice and trial and error created a series of detailed procedures. Thus, by the 1980's the GATT DS system was one of the most elaborate on the international scene, and began to attract the interest of many businesses and governments.

During its existence, the GATT sponsored eight major tariff and trade negotiating rounds, the last being the Uruguay Round ("UR") of 1986-1994. This round addressed some of the most severe defects of the GATT DS system, including the problem whereby a consensus rule for adoption of DS panel reports allowed the losing party in a case to block the result of a panel process. The UR created a new organization (the WTO) to take over the institutional activities of the GATT (while continuing the GATT legal rules as an Annex to the WTO). The UR also created a Dispute Settlement Understanding (DSU), which is now the core treaty basis of the WTO DS system. Two outstanding characteristics of the new DS rules are: the prevention of consensus blocking by using a "reverse consensus" rule that calls for almost automatic adoption of a report; and the

establishment of an appeal procedure allowing appeal of a DS panel report and findings. The appeal goes to the WTO Appellate Body (composed of seven persons appointed for four-year terms, once renewable), which appoints a division of three persons to decide each appeal. Reports of the AB are then also “automatically” adopted by reverse consensus procedures.

During the UR, two business subjects were added under the GATT (now WTO) “umbrella,” in addition to the competence of GATT over trade in goods. These new areas are trade in services and Trade Related Intellectual Property rights (TRIPS). Thus, the WTO now has a vast new area of competence regarding trade in services. It has not been given explicit or broad competence about “investment” but, as noted above, a small UR text entitled “Agreement on Trade Related Investment Measures” (TRIMs Agreement) offers some rules, and as we note below, the WTO GATS (General Agreement on Trade in Services) has many clauses relevant to investment matters. However, almost all of the case reports of the WTO DS system have dealt entirely with goods or traditional GATT subjects, although a few have jointly dealt with some services issues (mostly services closely related to trade in products, such as post-sale services, marketing services, production process services, etc.) Because of these historical facts of the WTO “landscape”, there are as yet only a few case reports on either services or investment.⁴ Consequently, in order to appropriately study the implications of the WTO DS system experience for services or investment, one must study the cases involving goods and surmise how principles from those cases might apply to services and investments.

One core question is: why have a dispute settlement system? The policies that urge an answer to this question can then illuminate what type of DS system to construct.

Although an important element of an international DS system, and certainly of the WTO, is the desire to reduce international tensions that could lead to more serious troubles (even war), there are also some other important policy goals of a DS system. One of these is outlined in the language of the WTO DSU (Article 3.2), where it says, “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.” The basic idea is that for the best operation of markets, an institutional structure is essential (as Nobel Prize winning economists have emphasized).⁵ Particularly, when the market is relatively free, the emphasis is on decentralized decision making by millions of entrepreneurs. Logic suggests that these entrepreneurs will make better decisions if they have a certain amount

of predictability and protection from arbitrary governmental decisions. Thus for hundreds of years, treaty structures have been used to try to increase this predictability, and the 1994 WTO treaty structure (26,000 pages of treaty) is the most elaborate of these structures. If such a structure gives investors and other entrepreneurs some predictability, this in turn reduces the “risk premium” of their decisions, and so enhances world welfare generally by promoting more efficient and better transactions. This is probably the core rationale for an effective, “rule oriented” trading system. To have an effective, rule oriented system⁶ means there must be procedures to make rules reasonably clear and carried out in a predictable way.

To some, the downside to this set of arguments is the fear of rigid treaty rules that have not been adequately tuned to the wide variety of needs of different societies, or have been unduly influenced by certain special interests.

Another problem, which now seems to be emerging in the WTO, is the relationship between a DS system (including the judicial-type institutions it embraces) on the one hand, and the rule-making, diplomatic/negotiation process on the other hand. Clearly there is some tension, such as worries that the judicial-type activity goes beyond its “mandate” and strays into rule-making as opposed to rule-applying. The WTO DSU partly anticipated this problem, and states in DSU Article 3.2, “recommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements.” This problem is currently exacerbated by the relative paralysis of the diplomatic/negotiating and other rule-making processes of the WTO, caused by governments’ temptation to push issues into the dispute settlement process that may be better solved by an effective diplomatic and negotiating process.⁷

III. SOME GENERAL PROBLEMS DEMONSTRATED IN THE WTO DS CASES

The experience of the WTO DS process has resulted in an extraordinarily rich body of jurisprudence of tens of thousands of report pages. This process has been described as the most important result of the Uruguay Round and the “jewel in the crown” of the WTO. Yet, as noted, appraisals of the process are not without intelligent criticisms.

The jurisprudence has tackled some exceedingly difficult substantive trade policy issues. It has pushed the frontiers of the traditional GATT trade rules, including technical and remarkably intricate issues such as the interpretation of the phrase “like product”

which appears in many clauses of the GATT and other UR texts.⁸ Similarly it has been perplexed by the meanings of treaty norms regarding subsidies,⁹ and the extraordinary, detailed rules regarding anti-dumping duties and safeguards. It has also grappled with momentous issues that test the borderlines between nation-state sovereign decisions and the international rules that now constrain those (particularly in the momentous decisions regarding the European Union rules on Beef Hormones,¹⁰ on U.S. restrictions on shrimp imports,¹¹ and on French restrictions on imports of asbestos products¹²). For obvious space and time constraints, this memo cannot go into these and many other intriguing substantive issues.

In this section, however, I wish to highlight a few of the more “systemic” and procedural issues faced by the WTO DS system in general, all of which have implications for almost any issues taken up by that system, including those relating to services or investment.

To start with, in the first several cases under the WTO, the Appellate Body outlined the overall framework of its decision-making approach. It explicitly stated¹³ that the WTO legal system was truly part of the overall international law system (and not a separate “regime” as some scholars had argued previously.) The DSU calls for interpretation of treaty text to be “in accordance with customary rules of interpretation of public international law,” and the AB consequently decided that the Vienna Convention on the Law of Treaties would be the guide in this respect (particularly Articles 31 and 32). This has led the AB to be very “textual” in its interpretation, bringing to bear impressive analytical legal skills in facing questions brought to it. Sometimes the result of the AB reports have surprised diplomats, particularly some diplomats who thought they knew the law from practice and habit, as well as from participation in the negotiations in the Uruguay Round. International law, however, tends to downplay the importance of “preparatory work” (sometimes called legislative history), since that source is sometimes unfair to nation-states new to the system, or those who were not privileged to be present at some of the negotiating meetings.

A very important generic and systemic question discussed in many cases by the Appellate Body (and therefore in panels) is the degree of “deference” which the WTO and its DS system should show to nation-state government decisions (including such government views about the meaning of the UR texts). In a number of cases,¹⁴ particularly early cases, the AB has expressed a desire to give nations a wide “margin of

appreciation” or considerable deference, even when, in a specific fact circumstance, the ruling is against that nation’s “measure” or practice. The general question of “deference” or “judicial restraint” inevitably arises in international cooperation mechanisms and requires considerable nuance and sensitivity by a judicial-type body. Treaty text can give some guidance (as the DSU Article 3 suggests), but will never solve all situations of stress in this regard.

A number of procedural issues have been considered (and some resolved) by the WTO DS system. It is now apparent that the WTO DS system generally accepts the notion that disputing WTO members have the right to utilize and bring into the meetings of a dispute procedure, private counsel of their own choosing.¹⁵ More problematic is whether “amicus curiae” submittals to a panel or AB procedure by non-disputants (often non-governmental actors and organizations) will be permitted. Most likely these are permissible under a DSU article at the first level panel stage,¹⁶ although uncertainty exists for such in the appeal procedures.¹⁷ The AB has also embellished approaches to burdens of proof of disputing parties, and developed some jurisprudence regarding a sort of “precedent effect” of its rulings in prior cases.¹⁸

There is still some tension about what is the strict international law legal effect of rulings of the WTO DS system (unappealed first level panel report, or AB report), but it seems that the view for so-called “violation cases” (compared to non-violation cases, which are different) is that there is a concrete international law obligation to perform, and any “compensatory” (read “retaliatory”) measures are only temporary, pending full performance.¹⁹

Clearly there are major resource problems concerning the WTO DS system (and also the WTO generally). The DS system uses a major portion of the resources (time and expense; e.g. huge amounts of translation costs) of the WTO and of member governments. To retain outside counsel to assist in cases (almost essential for governments who do not often participate in the DS cases) can be very expensive, although there is now developing some assistance in that regard for developing countries.²⁰

Many reforms have been suggested, and some are clearly needed, but this memorandum is not the place to go into those.

IV. SERVICES AND DISPUTE SETTLEMENT

I now turn more specifically to the question of services in the WTO DS system. As noted above, so far there are few final cases that deal with the GATS (Services Agreement) alone, although cases have considered services that are closely related to product trade. An early such case stated quite clearly that both a services matter and a product matter can be considered in the same case; they do not have to be separated into distinct cases.²¹

Another case brought by Japan and the EU against Canada found that Canada measures affecting the automotive industry²² were inconsistent with some of the GATS. For example, some favorable treatment of U.S. services and suppliers of services were held inconsistent with the most-favored nation clause of Article II of GATS. Canada had argued that the measures affecting supply of wholesale trade in services were only within the scope of GATT as affecting trade in goods, but the Panel did not accept that view and found that services and the GATS text were affected, citing the bananas case.

The GATS has many clauses that most observers predict will bring cases to the WTO DS system in the future. For example, GATS Article VI, and particularly Article VI, Paragraph 4, has clauses outlining obligations about “domestic regulation” of services, requiring judicial-type tribunals, legal remedies for redress against certain government actions, and authorizing the GATS Council to establish and develop disciplines. The GATS also has an article (VIII) explicitly addressing “monopolies and exclusive service suppliers”, and the separately negotiated “Telecoms Agreement” has a short but meaty “reference letter” relating to appropriate requirements for competition policy in that sector.²³ While the question of whether or not the WTO should embrace “competition policy” generally is quite controversial, we can see that this subject is already embedded in parts of the UR texts. A more recent exercise of the negotiators relating to accountancy norms has outlined a series of “due process” type rules which some suggest could be expanded into other service sectors.²⁴ All of these subjects, and many more, will almost certainly find their way into the WTO DS system in the future. In addition, certain traditional GATT-type rules have been phrased in the GATS differently from that of GATT (see e.g. most-favored-nation in GATS Article II), and the national treatment obligation of GATS is very different from that of GATT, including many interpretive difficulties.

V. INVESTMENT

The subject of investment, as noted above, is not one that has its own broad text in the WTO. Yet there are many clauses in the GATS referring to investment (e.g. certain rights to supply services in another Members' territory by the presence of national persons in that other territory.) Of course, investment and protections against expropriation have been subjects of many other trade-type treaties (e.g. the NAFTA, and the BITs - Bilateral Investment Treaties) and of many general international law disputes and activities. Thus it can be anticipated that the WTO (and perhaps even more certainly, an FTAA) will be engaged in various interpretive struggles relating to this subject. Some of the generic or systemic experiences of the WTO DS system will certainly be relevant, and one might anticipate a particular amount of consideration will deal with "conflicts" between various treaty texts and various international institutional frameworks.

The GATT and WTO cases that deal with investment are relatively rare, but several WTO cases have addressed questions such as national government licensing or investment permission, questions that could be inconsistent with the "national treatment" clause of the GATT.²⁵ In the largest case yet brought in the WTO (judged in terms of monetary impact), that by the European Union against the United States for its tax practices relating to "foreign sales corporations," one can see potential implications for investment.²⁶

A case by the European Union against the U.S. "Cuban Liberty and Democratic Solidarity Act" (often called the Helms Burton act) had lurking in it some major questions relating to investment and expropriation, with the U.S. Act providing certain trade restraining measures against firms, individuals, or countries who, in the U.S. view, trafficked with "expropriated property" or made investments in Cuba. The case was withdrawn however, by agreement between the disputants, although it could again be revived someday.²⁷

A series of cases concerning measures affecting the automobile industry of Indonesia (cases were brought by the EU, the US, Japan, etc.) found that certain local content requirements were inconsistent with the TRIMs norms, particularly Article 2.1 which says, "no Member shall apply any TRIM" which is inconsistent with GATT Articles III (national treatment) or XI (prohibition of quotas.) Thus these cases dealt with "investment measures" such as requirements of local inputs ("content") in the manufacturing of automobiles, as a requirement of investment permission.²⁸

VI. CONCLUSION

For any international trade institution, the dispute settlement system is an extremely critical part of the institutional structure. The general or systemic lessons to be learned from the WTO DS experience is already extensive, even though specifically regarding services and investment, it is necessary to derive much of this knowledge from cases which so far have been basically concerned with the trade in products, since so few cases have addressed either service or investment issues. But most observers see very great potential for significant and difficult cases to materialize regarding services and investment in the WTO or in other international fora currently in force or to be developed in the future.

While an effective DS system offers important, and indeed essential, advantages, it is obviously not entirely without pain and problems. Also, it is clear that the WTO DS system needs some considerable reforms and the recommendations for those reforms could guide the drafting of rules for a new system (such as the FTAA) in constructive directions. This may particularly be the case not only for the efficiency of specific procedures (time limits, sequencing of procedures and of burdens of proof, etc.) and of resource needs to ensure a high quality of DS activity, but also attention to serious problems of general public acceptance of the procedures and their results, influenced by questions of transparency and participation which could not be addressed within the scope of this paper.²⁹

¹ See Annex 1-Bibliography Notes. Also see Chapter 4 of: Jackson, John H. *The World Trading System: Law and Policy of International Economic Relations*. 2d ed. Cambridge: MIT Press, 1989. Professor Jackson's full bibliography and curriculum vitae are online at the GULC website (www.law.georgetown.edu), under "full time faculty".

² See www.wto.org under "dispute settlement." Rather than give the full citation of each of the WTO cases mentioned in this memorandum, in the interest of brevity, I will sometimes provide only the DS number. Each case has such a number, and with that number it is easy to find the full text on the WTO website.

³ Readers can find more on this history at: Jackson, John H. *World Trade and the Law of GATT*. Indianapolis: The Bobbs-Merrill Company, Inc., 1969. Also see Jackson, *The World Trading System*, op cit supra note 1.

⁴ See Parts IV and V below, and the cases cited therein.

⁵ See Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990); Ronald H. Coase, *The Firm, the Market, and the Law* (1988). See also Jan Tumlir, *Protectionism: Trade Policy in Democratic Societies* (1985). Also see Jackson, *The World Trading System*, op cit supra note 1, and Jackson, John H. *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations*. New York: Cambridge University Press, 2000.

⁶ Jackson, John H. "Global Economics and International Economic Law." *Journal of International Economic Law* 1 (1998): 1-24.

⁷ Jackson, John H. "Dispute Settlement and the WTO: Emerging Problems." *Journal of International Economic Law* 1 (1998): 329-51.

⁸ *Japan - Taxes on Alcoholic Beverages*, WT/DS8, 10 & 11, 11 July 1996.

⁹ *U.S. - Tax Treatment for "Foreign Sales Corporations"*, WT/DS108, 8 October 1999.

¹⁰ *EC - Measures Affecting Livestock and Meat (Hormones)*, WT/DS26, 16 January 1998.

¹¹ *US - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58, 15 May 1998.

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- ¹² *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135, 12 March 2001.
- ¹³ *U.S. – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996.
- ¹⁴ E.g. DS2 & 4, DS8, DS26 & 48, DS58. See also Jackson, “Emerging Problems,” op cit supra note 7.
- ¹⁵ App Body decision re: private counsel (early decision).
- ¹⁶ E.g. DS58, op cit supra note 11.
- ¹⁷ *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001.
- ¹⁸ It should be noted that the “precedent effect” is not a common law “stare decisis”, but is more related to the notion of “guidance” as expressed in the WTO Charter at Article XVI: 1, and also under general international law as well as ICJ rules.
- ¹⁹ See Jackson, *The Jurisprudence of the GATT and the WTO* (op cit supra note 5), particularly chapter 10 at pg. 118 (also published as: Croley, Steven P., and John H. Jackson. “WTO Dispute Settlement Procedures, Standard of Review, and Deference to National Governments.” *American Journal of International Law* 90 (1996): 193–213.
- ²⁰ “This refers to the recent establishment of an “Advisory Center on WTO Law” which will assist developing countries in their cases in the WTO and train personnel for such activity.”
- ²¹ *EC - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27, 22 May 1997.
- ²² *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139&142, 11 February 2000.
- ²³ *World Trade Organization Agreement on Telecommunications Services, adopted 30 April 1997*, S/L/20 30 April 1997. Also see *Reference Paper*, 36 I.L.M. 367 (1997).
- ²⁴ *Council for Trade in Services - Special Session -Communication from the United States - Transparency in Domestic Regulation*, S/CSS/W/102, 13 July 2001 and *Disciplines on Domestic Regulation in the Accountancy Sector- Adopted by the Council for Trade in Services on 14 December 1998*, S/L/64, 17 December 1998.
- ²⁵ *Canada Administration of Foreign Investment Review Act (FIRA)*, GATT B.I.S.D. (30th Supp.), 7 February 1984.
- ²⁶ See supra note 9.
- ²⁷ *U.S. - The Cuban Liberty and Democratic Solidarity Act*, WT/ DS38, 13 May 1996.
- ²⁸ *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54,55,59, 2 July 1998.
- ²⁹ Jackson, John H. “The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited.” *Journal of International Economic Law* 4 (March 2001): 67-78.

ANNEX 1: IADB MEMORANDUM
PROFESSOR JOHN H. JACKSON

September 17, 2001

ANNEX 1: Brief Selected Bibliographical Notes on WTO and it’s Dispute Settlement System

WORKS BY PROFESSOR JOHN H. JACKSON

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DOCUMENTS

WTO documents (including all dispute settlement reports) can be found online at: www.wto.org.

**For more selected bibliographical information, see the website of the Institute of International Economic Law (Georgetown University Law Center) at www.iiel.org.*