

ACTIVITIES

I. Activities of the International Law Association of Japan

THE SIXTEENTH ACADEMIC CONFERENCE

(2008)

Date: April 19, 2008

Place: Sanjo Kaikan, University of Tokyo

The Common Theme: International Arbitration

Morning Session:

Chair: Professor Mitsuo Matsushita, Seikei University

Speaker: Emeritus Professor Yasuhei Taniguchi, Kyoto University

Afternoon Session:

Chair: Professor Masato Dogauchi, Waseda University

Speaker: Emeritus Professor Toshio Sawada, Sophia University, Vice Chairman of the ICC International Court of Arbitration

Speaker: Professor Junichi Eto, Sophia University

Speaker: Professor Toshitaka Morikawa, Yokohama National University

Speaker: Mr. Hiroyuki Ishige, Ministry of Economy, Trade and Industry

WTO Dispute Resolution as Arbitration

Yasuhei Taniguchi, Professor Emeritus, Kyoto University

The WTO's approach to dispute settlement exists as a hybrid system. In particular, it incorporates many aspects of both judicial and diplomatic methods of resolving disputes. Its diplomatic origin is undeniable, but academic observers are increasingly recognizing its "judicial" character as well.

The system's diplomatic origins are seen in many structural details. The Panel and the Appellate Body are not organized as independent decision makers like courts, but as subordinate to the Dispute Settlement Body (DSB) consisting of all the WTO member states. There must be consultation between the parties prior to the initiation of formal dispute settlement proceedings before a Panel. Moreover, there can be mediation assistance by the Director General, although this has not been used yet. Amicable settlement is favoured in that Panel proceedings can be stayed up to one year upon joint request by the parties. Additionally, in contrast to public and binding judicial decisions, Panel and Appellate Body proceedings are confidential and enforced through voluntary compliance encouraged by the communal pressure of regular surveillance by the DSB.

On the other hand, the dispute settlement process has many characteristics of a judicial proceeding. Adhering to the principle of compulsory jurisdiction, a Panel is automatically established, even against objection of the responding state, and it must decide

the case before it. Unlike other international courts, most notably the International Court of Justice, *non-liquet* is prohibited. The panel must address a legal lacuna, and cannot simply dismiss the case if the law is unclear. Also, the burden of proof is quite important in Panel and Appellate Body proceedings. Additional similarities to judicial systems include the abundant participation of outside lawyers, the strong precedential value of previous Appellate Body adopted reports, and the enforcement of adopted reports through the threat of coercive retaliation by DSB members. These judicial characteristics of the WTO dispute settlement system allow the rule of law to achieve what often would be impossible through diplomacy, such as a small country prevailing over a large country.

Certain special features of the WTO dispute settlement process are common to some national or supranational (e.g. European Court of Justice) judicial systems as well. These include the lack of a "case and controversy" requirement and the related allowance of "as such" claims (so members can challenge other members' legislation and exercise "abstract control" as in some national constitutional courts and the European Court of Justice) and the liberal participation by third party states. Some features of the WTO system, however, are unique to it and not found in national judicial proceedings. One special feature is that member states bring claims against each other on behalf of their traders or other entities, who do not participate even though they are the real parties in interest. A second feature is the principle that final decisions are non-retroactive.

The WTO dispute settlement system also incorporates many characteristics of arbitration systems, although they are not as widely discussed. The WTO dispute settlement system owes its existence to the Dispute Settlement Understanding (DSU)¹, conceptually similar to a contractual arbitration clause agreed among the WTO member states outlining its framework. The "terms of reference" dictating the scope of a Panel's inquiry are typical of those used in arbitration.² Moreover, the DSU itself refers to various types of arbitration.³ Outside of the DSU framework, arbitration has been used in the EC Bananas dispute arising out of the Doha agreement.⁴

When the entire WTO dispute settlement process is compared with national systems of dispute settlement, we find some parallels. In the national systems, it is

¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, [hereinafter "DSU"].

² *Ibid.*, at art. 7.

³ *Ibid.*, at arts. 21.3, 22.6 and 25.

⁴ Jan Bohanes & Hunter Nottage, "Arbitration as an Alternative to Litigation in the WTO: Observations in the Light of the 2005 Banana Tariff Arbitrations," in Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes (eds.), *The WTO in the Twenty-first Century: Dispute Settlement, Negotiations and Regionalism in Asia* (2007), p. 212.

always possible and commendable to settle disputes amicably, and a system of arbitration is available outside of formal litigation for that purpose. In the WTO dispute settlement system, the main method of dispute resolution is certainly the process beginning with a request for establishment of a panel and ending with adoption of a report by the DSB. Like national systems, however, arbitration remains a viable alternative.⁵ Significantly, the resulting award from such an arbitration is treated like a Panel or Appellate Body's adopted report at the compliance stage, even though formally no stage of adoption exists for the arbitration award.⁶ This seems comparable to the enforcement of arbitral awards in national judicial systems.

Thus, the predominant WTO dispute settlement mechanism, involving the Panel and Appellate Body, appears to be the functional equivalent of a formal national judicial system rather than an arbitration and negotiation system. However, there is no overarching sovereign power in the WTO and, therefore, its judicial character cannot be expressed in the same way as in a national system. Weak enforcement is an inevitable feature of the WTO system, which exists in such a sovereign-less universe. It is certainly weaker than for each state's judiciary, but it is uniquely strengthened by the norms and practices of the international community. In short, it does not make sense to discuss whether the WTO dispute settlement process is characterized as "judicial" in the same sense as the sovereign function of the state's courts is considered judicial. Instead, truth is that the entire WTO dispute settlement system is closest to arbitration, as a primordial form of justice existing before state sovereignty formalized judicial proceedings over the course of human history.

International Arbitration at the ICC International Court of Arbitration and Problems facing Arbitration Today

Toshio Sawada, Professor Emeritus, Sophia University
Vice Chairman of the ICC International Court of Arbitration

Founded in 1923, the ICC International Court of Arbitration (hereinafter "ICA" or "Court") provides facilities for arbitration and mediation of international investment disputes and various types of cross-border business disputes. In 2006 it received 593 new cases in which a total of 80 state and parastatal parties and several intergovernmental organizations were involved.

⁵ DSU, *supra* note 1, at art. 25. Note, however, that this arbitration provision has never been utilized by any parties. *Cf.* Bashar Malkawi, "Arbitration and the World Trade Organization: The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding," *Journal of International Arbitration*, Vol. 24, Issue 2 (2007), p. 173; see also Yasuhei Taniguchi, "The WTO Dispute Settlement as Seen by a Proceduralist," *Cornell International Law Journal*, Vol. 42 (2009), p. 10, footnote 57.

⁶ DSU, *supra* note 1, at art. 25.4.

Adhering to the principle, "La Cour ne tranche pas elle-même les différends," the ICA never decides cases, but simply oversees the work of the arbitral tribunals. Drawing up of terms of reference and scrutiny of draft awards are salient characteristics of ICA arbitration.

At the commencement of arbitration, the arbitral tribunal and the parties draw up a terms of reference to define the claims, relief sought, and the issues to be determined and arbitration can commence only after this document has been prepared. In deciding cases, the tribunal applies treaties, declarations, customary international law, *lex mercatoria* and relevant domestic laws. At the request of the parties the tribunal may also decide a case *ex aequo et bono*. When the tribunal has completed the draft award, the tribunal must submit it to the Court which may order changes as to the form and may also suggest modification of substance of the draft award. The most commonly chosen places of arbitration are Paris, Geneva, Zurich, London, New York and Brussels.

Additionally the ICA acts as appointing authority where the parties wish to resolve disputes without the help of an arbitral institution such as ICA.

Judicialization and industrialization are major problems of arbitration today.

Arbitration, institutional or *ad hoc*, unlike litigation, should be flexible and must remain personal service of arbitrators.

The Significance of Inter-State Arbitration in the Context of the Institutionalization of International Dispute Settlement Procedures

Junichi Eto, Sophia University

The interaction among the multitude of present international arbitration procedures and their relationship with compulsory judicial or quasi-judicial alternatives is an interesting and complex area of international relations. There are currently many widely varying forms of international arbitration. The UN Convention on the Law of the Sea (UNCLOS), provides for arbitration before its own arbitral tribunal as well as recourse to the International Court of Justice (ICJ) or the International Tribunal on the Law of the Sea (ITLOS) for resolution of disputes. Similarly, most Regional Trade Agreements (RTAs) establish arbitral tribunals for trade and investment disputes, though these disputes could also be subject to the WTO's dispute settlement mechanisms. In these contexts, the role of international arbitration seems to be changing.

Since the beginning of UNCLOS negotiations, there has been some concern about the possibility that arbitral tribunals may undermine the unity and uniformity of interpretation of the UNCLOS. Some commentators on the *Southern Bluefin Tuna* case⁷ suggested that the arbitral tribunal which decided that case lacked the same degree of

⁷ *Southern Bluefin Tuna* Cases (New Zealand v. Japan; Australia v. Japan), International Tribunal for the Law of the Sea, Order of August 27, 1999, Request for Provisional Measures, available at <<http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>>.

institutional commitment to the text and principles of UNCLOS as the ITLOS would have displayed, had it decided the case. They suggested that the *Bluefin* panel gave preference to the settlement of relevant issues over the integrity of treaty interpretation. Although this concern has not been supported by evidence, it remains to be seen whether arbitral tribunals might contribute to confusion and disorder in UNCLOS interpretation.

Concurrent dispute resolution proceedings under an RTA and the WTO have become a real problem in some MERCOSUR⁸ disputes. Most RTAs provide for a choice between several international dispute resolution procedures. But such forum selection provisions are not sufficient to exclude the possibility that a dispute might be resolved concurrently by multiple arbitration panels. If an arbitral tribunal prescribed by a RTA rendered a decision different from that of the WTO panel, adjustment of the arbitral awards would have to be made by the parties concerned.

Because of these concerns, present international arbitration must fulfill its duty to support existing dispute settlement institutions and must further define its function as different from that of traditional *ad hoc* arbitration.

Application and Function of International Law in ICSID Arbitrations

Toshitaka Morikawa, Yokohama National University

Until the middle of the 1990s, most arbitration cases of the International Center for the Settlement of Investment Disputes (ICSID) were brought under arbitration clauses in investment contracts — concession contracts, which often included these clauses, are a prime example. Around 2000, however, arbitration initiated on the basis of international investment agreements, such as bilateral investment treaties (BIT) or a free trade agreement's investment chapter, has drastically increased. It is worth examining how international law applies and functions in this new area of arbitration, an area whose legal rules are based upon treaties rather than contractual language. The awards and decisions of ICSID Arbitral Tribunals and *ad hoc* committees, particularly in cases where an international agreement does not provide for any rule of law applicable to the investment dispute between a contracting state and an investor of another contracting state, suggest the contours of international law's role in these disputes.

In the absence of agreement on the applicable law by the parties to the dispute, the second sentence of Article 42(1) of the ICSID Convention is to be applied in principle.⁹ The treaty-based source of these new arbitration cases justifies a different legal

⁸ See, e.g., Treaty Establishing a Common Market between Argentine–Brazil–Paraguay–Uruguay, Mar. 26, 1991 (founding the South American common market which is the forerunner to MERCOSUR (“*Mercado Común del Sur*”)), reprinted at *International Legal Materials*, Vol. 30 (1991), p. 1041.

⁹ Convention on the Settlement of Investment Disputes Between States and Nationals of

framework than traditional contract-based arbitration cases. Relying on the distinction between treaty-based and contract-based claims, ICSID tribunals have allowed for the application of international law, as embodied in both the BIT and customary law, as well as the domestic law of the contracting state for arbitration claims brought under treaties. In these situations, international law overrides domestic law when there is a contradiction between them. Furthermore, international law may be applied by itself as a body of substantive rules, if the specific facts of the dispute so justify.

Arbitrations under International Economic Agreements and Japanese Practice

Hiroyuki Ishige

Director-General, Trade Policy Bureau
Ministry of Economy, Trade and Industry

Responsible for Japanese policy on both inbound and outbound foreign direct investment, Hiroyuki Ishige, director general of the Ministry of Economy, Trade and Industry's Trade Policy Bureau, contributed to the conference by providing his insights on recent trends in investor-state arbitrations. His analysis touched on these arbitrations' most frequently disputed industrial fields, the time span of dispute settlement, the spread of countries defending claims, popular legal strategies, and winning rates, among other issues.

He also recounted the experiences of Japanese companies related to bilateral investment treaties (BITs) and investment arbitrations, including the recent *Saluka* case¹⁰ involving a Japanese securities company, and some difficulties that Japanese mining companies faced in making investments in Latin America.

Mr. Ishige then elaborated on how investment treaties can be reinforced by inter-government consultation on improving foreign business operating environments. To this end, he described the Japanese experiences related to the Japan-Mexico Economic Partnership Agreement (EPA) and the Japan-Vietnam joint initiative. He extended his presentation to show how business environment consultations could facilitate investment treaty negotiations between Japan and China, and other countries in the future.

The Director-General also described the trends of BIT negotiation worldwide. He pointed out that Japan should increase its number of BITs promptly and set out a strategic framework to select candidates for future BIT partners. He concluded his presen-

Other States art. 42(1), Oct. 14, 1966, reprinted at *International Legal Materials*, Vol. 4 (1965), p. 539 ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.")

¹⁰ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, March 17, 2006 (Permanent Court of Arbitration), available at <http://www.pca-cpa.org/showpage.asp?pag_id=1149>.

tation by mentioning some policy areas where further efforts may be made, such as creating a closer link between investment insurance and BITs.

ACTIVITIES OF THE OFFICE IN 2008

1. The General Meeting of the Japan Branch was held on April 19, 2008 at Sanjo Kaikan, Tokyo.
 - a. With regard to fiscal year 2007:
 - (i) The financial account of the Japan Branch for fiscal year 2007, audited by Mr. Masaki Orita and Mr. Akira Kawamura, Auditors, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved by the Meeting.
 - (ii) The general affairs of the Branch during this term were reported by Professor Naoya Okuwaki, Secretary-General.
 - (iii) The academic activities of the Branch during this term were reported by Professor Yuji Iwasawa, Director of Planning.
 - (iv) The publication of Number 50 of *The Japanese Annual of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
 - b. With regard to fiscal year 2008:
 - (i) The financial account of the Japan Branch for fiscal year 2007, audited by Mr. Masaki Orita and Mr. Akira Kawamura, Auditors, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved by the Meeting.
 - (ii) The budget for fiscal year 2008, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved by the Meeting.
 - (iii) The general affairs scheduled for this term were presented by Professor Naoya Okuwaki, Secretary-General.
 - (iv) The academic activities scheduled for this term were presented by Professor Yuji Iwasawa, Director of Planning.
 - (v) The progress of the editorial work for Volume 51 of *The Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
2. Council Meetings were held twice for fiscal year 2008 and dealt with the following matters.
 - a. At the first regular Council Meeting of 2008 held on April 19, 2008 at Sanjo Kaikan, Tokyo:
 - (i) The financial account of the Branch for fiscal year 2007 and its budget for fiscal year 2008 were reported.
 - (ii) The general affairs of the Branch for fiscal year 2007 and the program for fiscal year 2008 were approved.

- (iii) The academic activities of the Branch during fiscal year 2007 and the program for fiscal year 2008 were approved.
 - (iv) The publication of Number 50 of *The Japanese Annual of International Law* and the progress of the editorial work for Volume 51 of *The Japanese Yearbook of International Law* were reported.
 - (v) The following persons were admitted as new members of the Branch:
 - Yoshiyuki Lee, Associate Professor, Nagasaki Prefectural University
 - Kentaro Wani, Assistant Professor, University of Tokyo
 - Sookyeon Huh, Project Researcher, University of Tokyo
 - Kazuyuki Nemoto, Lecturer, Sophia University
 - Hae Bong Shin, Professor, Aoyama Gakuin University
- b. At the second Regular Meeting of 2008 held on November 11, 2008 at Shigaku Kaikan, Tokyo
- (i) The financial condition of the Branch was reported.
 - (ii) The general affairs of the Branch were reported.
 - (iii) The academic activities of the Branch were reported.
 - (iv) The progress of the editorial work for Volume 51 and Volume 52 of *The Japanese Yearbook of International Law* was reported.
 - (v) The following persons were admitted as new Members of the Branch:
 - Yumiko Nakanishi, Professor, Senshu University
 - Fabian Jee, Attorney at Law, Kelvin Chia Partnership
 - Takami Hayashi, Professor, Doshisha University
 - Keisuke Takeshita, Associate Professor, Tokyo Metropolitan University
 - Hajime Sakai, Professor, Nagoya University
 - Yoko Hayashi, Attorney at Law, Athena Law Office

NOTICE

Professor Emeritus Ribot Hatano of Gakushuin University passed away on 16 March 2008 at the age of 76. He was a member of the Council of the Japan Branch from 1997 to 2006.

Professor Emeritus Ichiro Kato of the University of Tokyo passed away on 11 November 2008 at the age of 86. He was a member of the Council of the Japan Branch from 1980 to 2003.

ACTIVITY OF THE JAPAN BRANCH COMMITTEE ON CLIMATE CHANGE

Initiated by the proposal of the Japan Branch in September 2008, the ILA Executive Council approved the creation of the International Committee on the Legal Principles on Climate Change chaired by Professor Shinya Murase in November 2008.

Upon the establishment of the International Committee, the Japan Branch Committee on Climate Change was established in December 2008 in order to facilitate and provide inputs to the work of the International Committee. The officers and members of the Japan Branch Committee are as follows:

Akiho Shibata (Kobe Univ., Co-chair); Yukari Takamura (Ryukoku Univ., Co-chair); Osamu Yoshida (Univ. of Tsukuba, Rapporteur); Yoshinori Abe (Gakushuin Univ.); Junichi Eto (Sophia Univ.); Takeo Horiguchi (Hokkaido Univ.); Kenji Kamigawara (Sophia Univ.); Tsuyoshi Kawase (Sophia Univ.); Mari Koyano (Hokkaido Univ.); Shinya Murase (Sophia University); Kazuhiro Nakatani (Univ. of Tokyo); Tomoakio Nishimura (Ritsumeikan Univ.); Yumi Nishimura (Univ. of Tokyo); Masataka Okano (Ministry for Foreign Affairs); Takako Onitsuka (Ministry of Economy, Trade and Industry); Mari Takeuchi (Okayama Univ.); Jun Tsuruta (Japan Coast Guard Academy).

The Japan Branch Committee had intensively undertaken research to prepare a preliminary paper by holding three meetings from April to June 2009. As an outcome of this work, it submitted the informal paper, reproduced from page 500 to page 537, to the members of International Committee for their consideration with a view to stimulating a lively discussion among them.

Kazuhiro Nakatani