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INSTRUMENT CHOICE IN RESPONDING TO PROTECTIONISM

Queen's Institute on
Trade Policy
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OUTLINE

- Current situation with WTO dispute settlement
- Avenues within the WTO framework to enforce rights
- Options under preferential trade agreements to enforce rights



CURRENT SITUATION WITH WTO DISPUTE SETTLEMENT

- Appellate Body unable to hear (new) appeals since December 10, 2019
- 21 appeals in the queue
- 10 of those = appeals “into the void”
- Panels still functioning: 8 new panels established in 2021 but requests slowing down

YEAR	NUMBER OF REQUESTS FOR CONSULTATION
2018	38
2019	20
2020	5
2021	8



WILL THE APPELLATE BODY COME BACK?

- Attempts to address US concerns (Walker Principles n October 2019)
 - Failed to satisfy US
- In context of WTO Reform?
 - Indications are it will take a long time (2 years or more)
 - will it look like the AB?
- Is return of the AB important for Canada?



CANADA: FREQUENT USER OF WTO DISPUTE SETTLEMENT SYSTEM

WTO MEMBER	AS COMPLAINANT	AS RESPONDENT
United States	124	156
European Union	105	90
Canada	40	23
Brazil	34	17
Japan	28	16
Mexico	25	15
India	24	32
China	22	47
Argentina	21	22
Korea	21	19



WTO DISPUTES LAUNCHED BY CANADA

WTO MEMBER	NUMBER OF DISPUTES LAUNCHED BY CANADA	ISSUES IN DISPUTE	RESULTS (N.B. "win/lose")
United States	20	Lumber (8), cattle, sugar syrups, export restraints as subsidies, s. 129 URAA, Byrd Amendment, COOL	6 did not proceed, 3 MAS, <u>8 wins, 1 loss, 2 on appeal</u>
European Union	9	Scallops, cereals, beef, asbestos, wood, patents, GMOs, seal products,	4 did not proceed, <u>1 settled, 3 wins, 1 loss</u>
China	4	Auto parts, financial information services, cellulose pulp, canola	<u>2 wins, 1 settled, 1 is ongoing</u>
Korea	2	Bottled water, bovine meat	<u>Both settled</u>
Australia, Brazil, Hungary, India, Japan	1 each	Salmon imports, aircraft financing, export subsidies (agricultural products), QRs	2 proceeded and Canada <u>won both</u>

OTHER DISPUTE SETTLEMENT OPTIONS WITHIN THE WTO FRAMEWORK?



DSU ARTICLE 5: GOOD OFFICES, CONCILIATION, MEDIATION

1. Good offices, conciliation and mediation are procedures that are undertaken **voluntarily if the parties to the dispute so agree**.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be **confidential, and without prejudice to the rights of either party in any further proceedings** under these procedures.
3. Good offices, conciliation or mediation **may be requested at any time by any party to a dispute**. They may begin at any time and be **terminated at any time**. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation **may continue while the panel process proceeds**.
6. The **Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute**.



DSU ARTICLE 5: GOOD OFFICES, CONCILIATION, MEDIATION

July 13, 2001: DG communication to the Members

- noted that Article 5 of the DSU had not been used
- reminded Members that he was ready and willing to assist them as is envisaged under the terms of Article 5.6
- included a set of procedures for Members to use to request assistance under Article 5
- WTO DSU statistics shows there have been 3 (1 in 2002, 2 in 2009)



INTERPRETATION OF DSU ARTICLE 5

*China – HP-SSST**

- in its appellee's submission, the EU referred to Article 5 that provides that good offices, conciliation, or mediation may be requested and take place 'at any time'. The EU suggested that a 'procedural possibility' ... would be to invite informally the participants to 'indicate whether or not they would be prepared to voluntarily participate in a short informal meeting'.
- for the EU, the purpose of the meeting would be to ascertain whether the parties would be able to reach an agreement concerning the Panel's findings under Article 2.2.2 of the Anti-Dumping Agreement, 'or indeed any other matter pending in this appeal'.
- at the oral hearing, China was given an opportunity to comment.

* WT/DS454/AB/R • WT/DS460/AB/R , footnote 59



MEDIATION *OUTSIDE* DSU ARTICLE 5

October 2002: DG communication to Members

- on September 4, 2002, the **Philippines, Thailand and the EC** had jointly requested mediation by himself or by a mediator appointed by him with their agreement
- to examine the extent to which the legitimate interests of the Philippines and Thailand are being unduly impaired as a result of the implementation by the EC of the **preferential tariff treatment for canned tuna** originating in ACP states
- The Members considered that the matter at issue was not a "dispute" within the terms of the DSU, but they agreed that the mediator could be guided by Article 5 procedures
- amicable outcome reached by the parties based on an advisory opinion of the mediator



SUI GENERIS: THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

December 2020: **Understanding between the Philippines and Thailand** to Pursue Facilitator-assisted discussions aimed at progressing and resolving outstanding issues in regard to DS371

- Understanding was circulated to Members
- As a result of the **impasse that continues to be faced in the filling of Appellate Body vacancies**, the two appeals from Article 21.5 panel proceedings submitted to the Appellate Body in relation to DS371 have not been completed.
- Ambassador George Mina (Australia) = Facilitator (nominated by DSB Chair): seek to identify and make recommendations to the parties on ways and means of resolving the relevant outstanding issues, which will include both procedural and/or substantive approaches, including a potential comprehensive settlement, subject to the parties' agreement
- Facilitator has reported that several meetings have been held – not yet resolved
- Details are confidential



PROCEDURE UNDER SPS ARTICLE 12.2 OF THE SPS AGREEMENT

July 2014: SPS Committee adopted the “PROCEDURE TO ENCOURAGE AND FACILITATE THE RESOLUTION OF SPECIFIC SPS ISSUES IN ACCORDANCE WITH ARTICLE 12.2”

- procedure is **voluntary**
- default is **confidentiality**
- does not constitute a legally binding agreement and the consulting **Members are free to decide on the acceptability of the mediation result**
- role of the Facilitator: encourage and facilitate exchange between the consulting Members, suggest possible ways to resolve the concerns, and issue a written factual report on the mediation



PROCEDURES UNDER ARTICLE 12.2 OF THE SPS AGREEMENT

- written request for consultations setting out the measures, trade concern
- 30 days to respond in writing to accept or reject request
- if accept, agree on a Facilitator (usually the Chair of the Committee)
- meetings, technical experts, third party participation
- Complete consultations within **180 days**
- Facilitator issues confidential draft report – 30 days to comment
- Facilitator issues confidential final, factual report
- Chairperson reports on general outcome of consultations to the Committee
- **Procedure has yet to be used**



HOW USEFUL ARE THESE MEDIATION-LIKE OPTIONS?

- Hard to say given minimal resort to them
- Will they be used more now that AB is not functioning?
- Based on mutual agreement
- Confidential nature:
 - no interpretive value, or security & predictability
 - no opportunity to discuss/comment on results in DSB
 - did parties follow/comply with the recommendations?
 - not binding so cannot enforce/retaliate



DSU ARTICLE 25: ARBITRATION

1. **Expeditious arbitration** within the WTO as an **alternative means of dispute settlement** can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to **mutual agreement of the parties** which shall **agree on the procedures** to be followed. Agreements to resort to arbitration shall be **notified to all Members** sufficiently in advance of the actual commencement of the arbitration process.
3. **Other Members** may become party to an arbitration proceeding only **upon the agreement of the parties which have agreed to have recourse to arbitration**. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration **awards shall be notified to the DSB** and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.



DSU ARTICLE 25: ONLY ONCE (2001)

US – Section 110(5) Copyright Act

- EC won panel decision in challenge to Section 110(5) of the US Copyright Act which permits the playing of radio and television music in public places (bars, restaurants) without the payment of a royalty fee; inconsistent with Article 9(1) of the TRIPS Agreement.
- In 2001 the Arbitrators were called upon to **determine the level of nullification or impairment of benefits** to the EC as a result of Section 110(5)B of the US Copyright Act



MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO DSU ARTICLE 25 (MPIA)*

Interim appeals mechanism established in April 2020 – pursuant to DSU Article 25: “as long as AB is not able to hear appeals due to insufficient number of AB Members”

Now **25 Participants**: Canada, EU, China, Australia, Brazil, Chile, Mexico, New Zealand (more can join)

Not in: USA, India, South Africa, Argentina, Korea, Russia

MPIA

- Re-affirming their commitment to a multilateral rules-based trading system,
- Acknowledging that a **functioning dispute settlement system of the WTO is of the utmost importance** for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features,



MPIA (excerpts)

- *Determined* to work with the whole WTO Membership to find a **lasting improvement to the situation relating to the Appellate Body as a matter of priority**, and to launch the selection processes as soon as possible, so that it can **resume its functions** as envisaged by the DSU,
- *Resolved*, in the interim, to put in place contingency measures based on Article 25 of the DSU **in order to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication** through an independent and impartial appellate review of panel reports, and thereby to preserve their rights and obligations under the WTO Agreement
- *Re-affirming* that **consistency and predictability in the interpretation** of rights and obligations under the covered agreements is **of significant value to Members** and that arbitration awards cannot add to or diminish the rights and obligations provided in the covered agreements
- ***Underlining* the interim nature of this arrangement**
- In view of these **extraordinary circumstances**, envisage resorting to the following multi-party interim appeal arbitration arrangement (hereafter the "MPIA"):



MPIA: HOW DOES IT WORK?

- Procedure for the most part based on AB procedures
- 10 “appeal arbitrators” were appointed by the Participants; 3 will hear each appeal
- To use the procedure for a particular dispute, the participants enter into an arbitration agreement and notify the agreement to the DSB within 60 days after establishment of the panel
- Any party may request the panel to suspend panel proceedings no later than 10 days before issuance of final report so that arbitration may be pursued
- Notice of appeal, submissions, hearing
- 90 days
- Notify award to the DSB (but not adopt): impact of the award on DS generally?
- **First appeal expected in early 2022 – may be operational for 2 or more years to come?**



RESOLUTION OF IRRITANTS VIA INQUIRY POINTS AND WTO COMMITTEES



MEMBERS' NATIONAL INQUIRY POINTS: POSE QUESTIONS ABOUT MEASURES

- SPS
 - TBT
 - GATS
 - TFA
-
- Generally not public (except EU)



WTO COMMITTEES

- Use Committees to discuss **specific trade concerns (STCs)** — specific laws, regulations or procedures that affect trade, usually in response to **notifications**
- Essentially, **members raise STCs to find out more** about the scope and implementation of each other's regulations in the light of the core WTO obligations
- The discussion is mostly about measures in the pipeline, but can also be about the implementation of existing measures
- SPS Committee, TBT Committee, others (written questions, answers)
 - All WTO Members; Geneva and capital-based
 - Chairperson = an Ambassador
 - Secretariat assists/services the committee



WTO COMMITTEES: SPS COMMITTEE

Article 12 of the SPS AGREEMENT: Administration

1. A **Committee on Sanitary and Phytosanitary Measures** is hereby established to provide a regular **forum for consultations**. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.
2. The **Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues**. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.



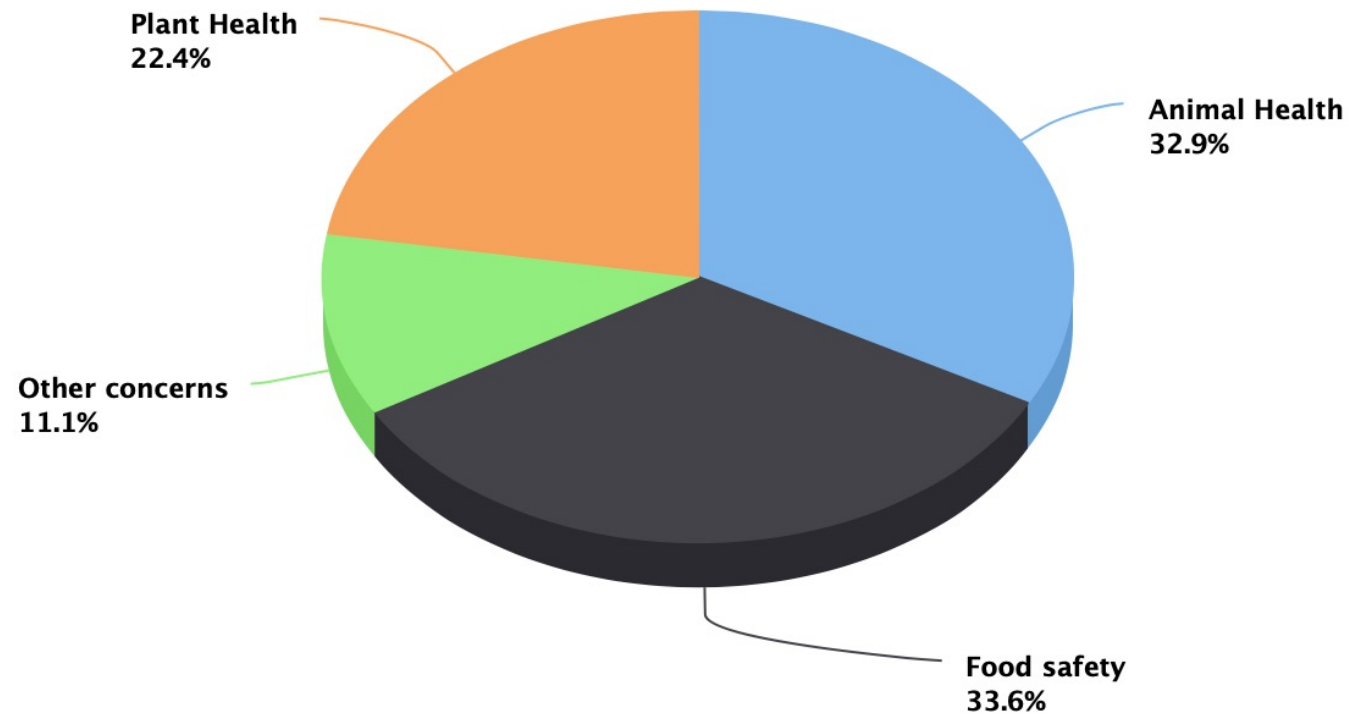
WTO COMMITTEES: TBT COMMITTEE

Article 13 of the TBT AGREEMENT: The Committee on Technical Barriers to Trade

1. A **Committee on Technical Barriers to Trade is hereby established**, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of **affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives**, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.



TRADE CONCERNS BY SUBJECT IN SPS COMMITTEE



CANADA: STCs IN SPS COMMITTEE

CANADA RAISED A MEASURE IMPOSED BY ANOTHER MEMBER		CANADIAN MEASURE RAISED BY OTHER WTO MEMBER(S)	
31 times (8 EU measures)		13 times (5 by EU)	
Resolved	20	Resolved	8
Partially resolved	5	Partially resolved	4
Not resolved	6	Not resolved	1
		(Argentina: Delay in finalizing inspection procedures on bovine and poultry meat from Argentina - 2012)	



WTO SPIMS (SANITARY AND PHYTOSANITARY INFORMATION MANAGEMENT SYSTEM)(excerpt)

487	China's actions related to COVID-19 that affect trade in food and agricultural products	China	Australia, Canada, European Union, India, Russian Federation, United States of America	NR
488	Philippines' ban on poultry imports due to COVID-19	Philippines	Brazil	NR
489	Mexico's import restrictions on pork	Mexico	Brazil	NR
490	Korea's lack of progress on pending applications for authorization of beef imports	Korea, Republic of	European Union	NR

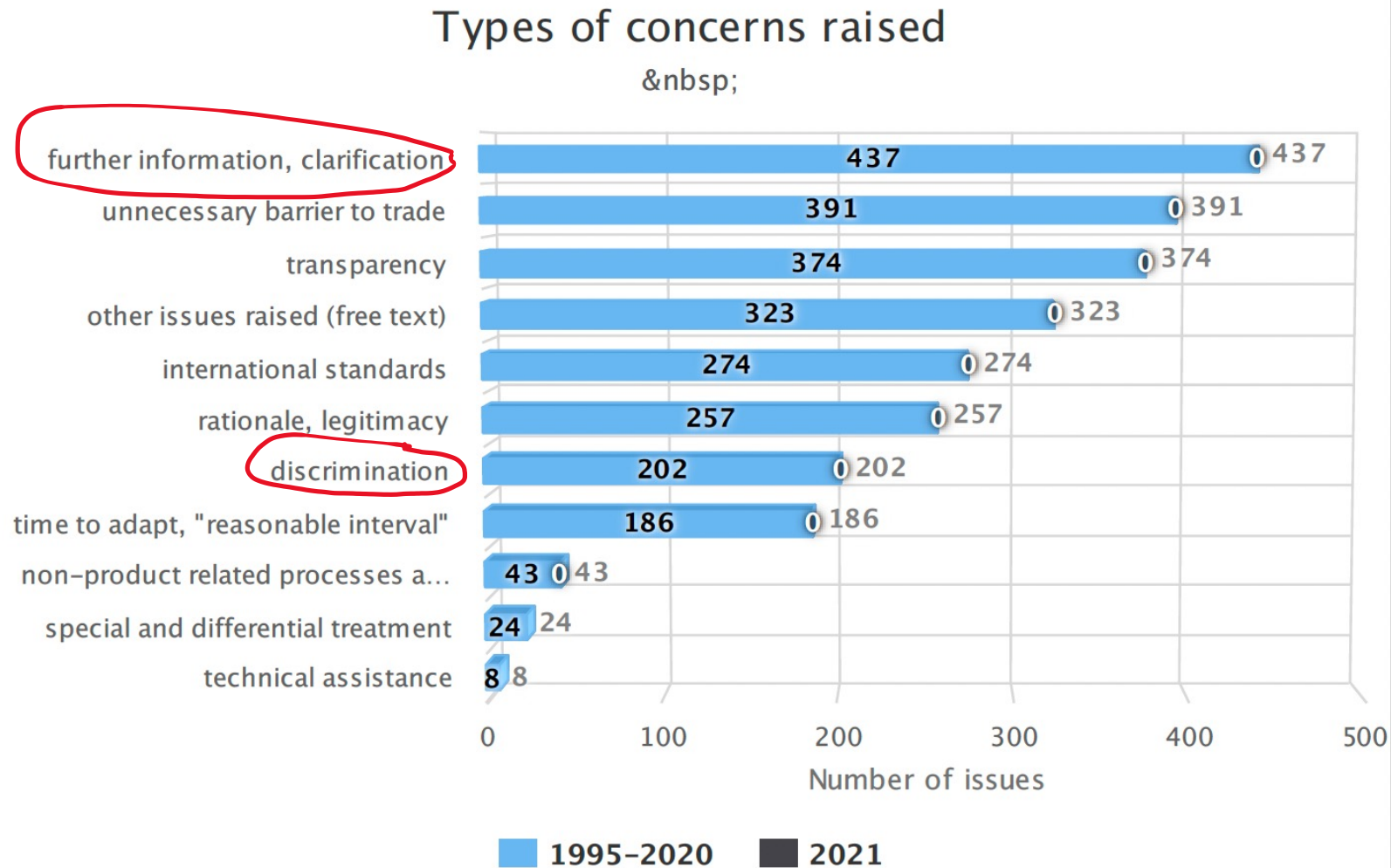


TBT IMS (TECHNICAL BARRIERS TO TRADE INFORMATION MANAGEMENT SYSTEM) (excerpt)

466	China - Registration Fees for Drugs and Medical Device Products (ID 466)	China	Australia, <u>Canada</u> , Korea, Republic of; United States of America	17/06/2015	<u>10/11/2021</u>
526	China – <u>Cybersecurity</u> Law (ID 526)	China	United States of America; Japan; European Union; Australia; <u>Canada</u> ; Korea, Republic of; New Zealand; Chinese Taipei	29/03/2017	<u>10/11/2021</u>
533	China — <u>Cyberspace</u> Administration of China – Draft implementing measures for the Cybersecurity Review of Network Products and Services (ID 533)	China	European Union; United States of America; Japan; Australia; <u>Canada</u> ; Korea, Republic of	14/06/2017	<u>10/11/2021</u>



TBT COMMITTEE STCs



TBT:
42, 503
notifications

701

**Specific Trade
Concerns
(STCs)**

Members regularly raise questions
at a full membership committee.

525

57

Disputes started

Requests for consultations in
the Dispute Settlement Body.

50

8

Dispute rulings

Number of disputes that
have resulted in a ruling.

13

SPS:
28, 990
notifications

PROs AND CONs OF COMMITTEE TOOL

- Non-litigious forum
- Low or no cost
- Success rate for finding a resolution is very high
- Reverse notification
- Maybe faster than dispute settlement (but some STCs raised multiple times over many years)
- Not always transparent regarding resolution
- “Interpretive” guidance? No “security and predictability” like DSM
- No enforcement/retaliation opportunity if do not bring measure into conformity



DISPUTE SETTLEMENT PROCEDURES UNDER PREFERENTIAL TRADE AGREEMENTS



CUSMA STATE-TO-STATE DISPUTE SETTLEMENT

- Had this under the NAFTA but only used 3 times – last time 20 years ago
 - Mexico brought 2 cases against the US (and won)
 - Safeguard action on Broom Corn Brooms (1998)
 - Cross Border Trucking Services (2001)
 - Canada brought a case against US (and won)
 - Tariffs on agricultural products (1996)
- Why not used more? Because of a procedural flaw – meant one party could block establishment of dispute settlement panels



PANEL SELECTION UNDER NAFTA

- Each dispute decided by 5 Panelists – besides a chair, each side must pick 2 people who are citizens of other party
- US would not pick – time dragged on
- If you refuse to pick, then the 2 are chosen by lot from a roster
- Roster of 30 members **had to be** appointed by consensus; for **3 year terms**
- Problem: US would not act, no agreed roster, or expired roster
- Can you pick off roster?
 - Possible but preemptory challenge
- **Bottom line:**
 - Avoid dispute by refusing to pick your 2



FIXED THE PROBLEM UNDER CUSMA

- Panel of 5 members (unless agree to **have only 3**)
- Again – must pick 2 from other party and if don't, they are selected by lot from the roster
- BUT HERE: If responding party doesn't participate in the lot procedure, the complaining party chooses the 2 -- its own citizens from the roster
- No preemptory challenge if pick off roster
- ALSO: roster of 30 people doesn't have to be selected by consensus – each party can choose 10 (**so if US won't cooperate, can still compose a panel**)
- And the roster doesn't expire until there is a new one
- Had a roster of 30 by time CUSMA came into force



TWO ONGOING DISPUTES, 1 IN THE WORKS

- 1) May 25: US requested panel – measures through which Canada allocates its **dairy tariff rate quota**
 - Certain amount of dairy products come in at low tariff and after that, very high
 - US says Canada is in violation b/c not allocating low-access quantities fairly
- 2) June 18: Canada requested panel regarding imposition of **safeguard measure on solar products**
 - Canada says Canada does not account for a substantial share of imports and did not contribute importantly to serious injury
- 3) August 20: Mexico (later joined by Canada) requested consultations with the US
 - interpretation of **auto content rules**



BINATIONAL PANEL REVIEW: CARRIED OVER FROM NAFTA

- An alternate to judicial review by domestic courts of final determinations in anti-dumping and countervailing duty cases
- US did not want to keep this – of 123 total cases under NAFTA, US determinations subject of review in 83 of them (67%)
- 5 actions filed under CUSMA to date (4 against US, 1 against Canada)



COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

- Canada and the EU
- detailed provisions governing all aspects of the dispute process, including panel composition, timelines for establishing panels and making submissions, confidentiality and transparency arrangements, and rules governing compliance.
- requirement for the Parties to maintain a roster of 15 panellists to ensure there is no possibility of procedural delay resulting from the refusal of a Party to identify panellists for dispute settlement proceedings
- rosters not yet done?
- no secretariat
- responding party is in charge of the logistical administration of the arbitration proceedings, in particular the organization of hearings; the parties bear equally the administrative expenses of the arbitration proceedings as well as the remuneration of travel expenses of the arbitrators and their assistants

Canada/UK Continuity Agreement

- Incorporates CETA



COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP)

CPTPP:

- Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam
- roster of panel chairs (15 individuals) have been selected
- detailed rules of procedure and code of conduct
- responding party is to establish a responsible office to provide administrative assistance to the panel and the disputing parties. The office's responsibilities are, among others, arrange remuneration, organize and coordinate logistics required for hearings, retain permanently a complete record of the panel proceedings



ARE PTA MECHANISMS A GOOD ALTERNATIVE TO WTO DISPUTE SETTLEMENT?

- Early days for CUSMA
- Others not yet used
- Interpretation fragmentation?
- Limited number of parties
 - Less opportunity to have support from other members as third parties
- No mechanism with China
- Administrative/logistical support?



THANK YOU!

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