

**“The Future of Dispute Resolution in
International (Agricultural) Trade”**

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Motivation

- Since Uruguay Round of GATT, little progress in multilateral trade liberalization, but significant proliferation of PTAs – current total of 371 (WTO, 2024)
- Increased demand for “deep” reforms reflected in PTA provisions, covering, e.g., labor, environment, FDI, and IPRs
- Ongoing debate about status of WTO:
 - “Two-pillar” system – Baldwin (2016)
 - “WTO not passé” – Bagwell *et al.* (2016)
- Parties to debate do agree on one thing: dispute resolution mechanism of WTO (DSU) is/was its “crown jewel”
- DSU effectively paralyzed with Appellate Board (AB) ceasing to function post-2019 (Hoekman and Mavroidis, 2020)



WTO Dispute Resolution

- With inception of WTO, clear switch from GATT's "diplomacy-based" to more "legalistic" system
- Key components of DSU:
 - "Negative consensus"/"automaticity" rule, preventing parties to dispute blocking panel or adoption of panel/AB reports
 - Two-instance adjudication – DSB must adopt panel/AB decisions before they have legal effect
- Pushback against unilateral enforcement of own trade rules by large countries, and retaliatory behavior of targeted countries
- Dispute resolution with defined deadlines and consistent enforcement of decisions – "depoliticization"



Breakdown of Dispute Settlement

- US believes AB has exceeded authority, engaging in “judicial activism”, rejecting existing US rights, as well as inventing new rights/obligations in rulings against US (Chow, 2023):
 - AB created to correct legal errors by panels, but no check on AB decisions, e.g., *de facto* application of *stare decisis*
 - AB has addressed issues not raised by parties, and provided unnecessary opinions, i.e., *obiter dicta*
 - Could influence future disputes if treated as precedent
- US view – AB decisions outside defined authority, and it has no obligation to abide by them (Mavroidis and Hoekman, 2020)

Implications of DSU Breakdown

- **Four possible scenarios (Pauwelyn, 2019):**
 - **Panel decisions appealed “into the void”, e.g., panel ruling against US tariffs against China**
 - **Some panel reports will not be appealed, getting automatically adopted**
 - **Implementation of DSU Article 25 (WTO, 1994) appeal arbitration, with automatically binding results**
 - **“Floating” panel reports that are neither adopted nor appealed/blocked**
- **Judicial dispute resolution mechanisms contained in PTAs could be utilized, but depends on major trading partners being in a PTA**

PTAs and Dispute Resolution

- Initially political/diplomatic option dominant, but by 2012 65% of PTAs had quasi-judicial option (Chase *et al.*, 2016)
- Key features of option:
 - Complainants can choose between PTA and WTO forum, but if one chosen the other forum then foreclosed
 - *Ad hoc* panels of typically three members, with automaticity of composition
 - Appellate review not typical
- Prior to 2012, disputes typically adjudicated by WTO not PTA, exceptions being EFTA, EU, and MERCOSUR
- Period 2007-16, virtually no disputes via PTA forums (Vidigal, 2017)

Current US Approach to Dispute Resolution

- **Unilateral/Bilateral with China:**
 - **Bipartisan support for move from “rule” to “power-oriented” – potential for ratcheting up trade war***
 - **USCTA contains dispute resolution mechanism where US can effectively impose trade sanction(s) unilaterally, with no retaliation possible (Article 7.4.4(b)) (Chow, 2022)**
 - **US calculated China unlikely to use dispute clause, but nothing prevents them from being complaining party, i.e., clause drafted in neutral language**
 - **Also, under Article 7.6.1, China can bring claims under USCTA that US has violated its WTO obligations**
 - **Potential to backfire on US (Chow and Sheldon, 2024)**

* e.g., Recommendation to discontinue PNTR by House Committee/Senate Bill



Current US Approach to Dispute Resolution

- **Regionalism:**
 - **US engaged in PTAs covering 20 countries, all of which require use of independent and neutral arbitration panels**
 - **NAFTA procedure(s) modified under Chapter 31 of USMCA: (i) choice of forum – WTO or USMCA; (ii) establishment of panel; (iii) panel report cannot be appealed; (iv) suspension of benefits possible**
 - **Rate at which USMCA dispute resolution being utilized already greater than under NAFTA – four cases resolved since 2020, two involving Canada’s dairy TRQs**
 - **WTO issues can be resolved via USMCA, e.g., GM corn dispute draws on Chapter 9, which is based on SPS Agreement (Chow and Sheldon, 2024)**



Current EU Approach to Dispute Resolution

- **Multilateralism:**
 - **EU led coalition of 19 (now 26) countries in creating Multiparty Interim Appeal Arbitration Arrangement (MPIA) in 2020**
 - **Participants agreed not to appeal WTO panel reports, but use arbitration under DSU Article 25 (WTO, 1994)**
 - **Effectively two-instance adjudication system – designed to prevent appeals “into the void”**
 - **Appellate award in 2023: EU filed dispute over Colombian anti-dumping duties on frozen fries – panel ruled against Colombia, and MPIA arbitrators upheld three findings (Pauwelyn, 2023)**
 - **EU remains committed to multilateral approach**



Current EU Approach to Dispute Resolution

- **Regionalism:**
 - **EU has continued to sign PTAs, and beginning to test dispute resolution outside of WTO**
 - **Shift to quasi-judicial option began with EU-Mexico PTA in 1997, designed to be compatible with DSU**
 - **EU-Chile PTA signed in 2002 model for all subsequent PTAs, e.g., CETA (2017) and EU-Japan Partnership (2019)**
 - **Rules very similar to other PTAs – but lack two-instance adjudication, i.e., no equivalent to AB**
 - **Prior to 2018, EU chose to follow WTO option, but since then initiated several disputes via PTAs**

Future of Trade Dispute Resolution

- US appearing to reject multilateralism for foreseeable future – unlikely to join MPIA, and no movement on AB*
- Commonality across US and EU in utilizing PTA dispute resolution has potential to resolve WTO and other issues
- With PTA members having official delegations in Geneva, possible WTO could offer legal and technical assistance, as well as be a clearinghouse for PTA disputes
- Major trading partners involved in some type of PTA, with obvious exception of US and EU (TTIP negotiations ended)
- Proposal: opt-in clauses in PTAs for non-members, allowing third countries to use dispute resolution mechanism to resolve disputes with PTA members

*US-floated proposal for reform of DSU looks very much like return to GATT-era (Chow and Sheldon, 2024)

