



**Asia-Pacific  
Economic Cooperation**

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**2022/SOM3/CTI/WKSP/002**

## **Keynote Presentation - Dispute Resolution in Context**

Submitted by: PECC



**Workshop on Current Trends on Dispute  
Settlement Mechanisms in Trade Agreements  
Chiang Mai, Thailand  
25 August 2022**

# Dispute Resolution in Context

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*APEC Workshop on Current Trends on Dispute Settlement Mechanisms in Trade  
Agreements*

*Chiang Mai, Thailand*

*25 August 2022*

# Themes for Discussion

I. Disputes Between Member Economies - What's the Objective?

II. Tools and Techniques

III. Legal "Culture" in the APEC region

IV. "Conflict of Laws" and Jurisdiction

V. Dispute Settlement as a System

# I. Disputes Between Member Economies - What's the Objective?

- Relationships Matter: APEC members are committed to ongoing cooperation
- When disputes arise, resolution is intended to restore and promote friendly relations, rather than to set the terms for separation
- Reflected in the GATT/WTO emphasis on ensuring the “Balance of Concessions”, with right and wrong playing a supporting role

## II. Tools and Techniques

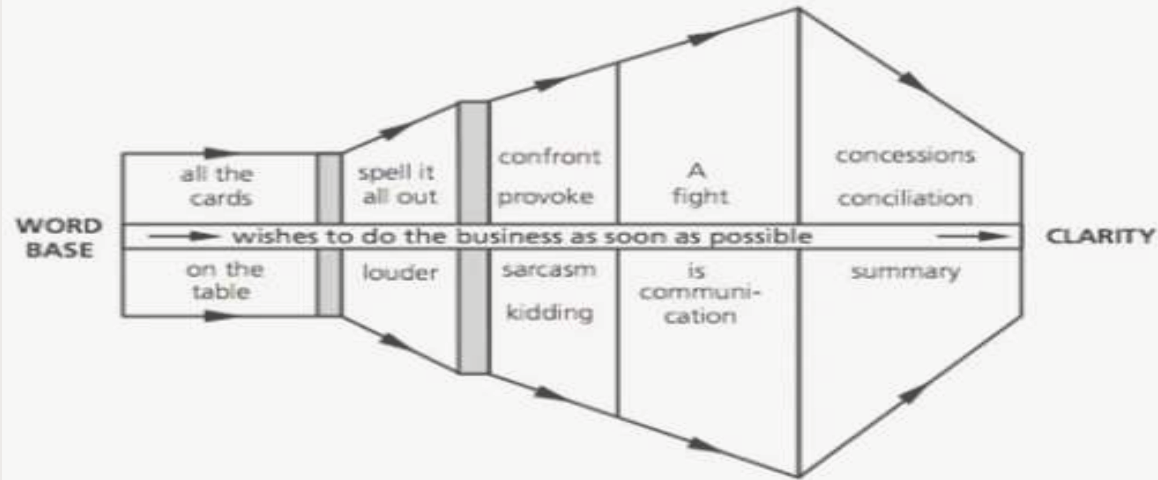
- United Nations Charter, Chapter VI (Pacific Settlement of Disputes) Article 33 (1):  
“The parties to any dispute...shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”
- A Conceptual Framework
  - Consultative: e.g., discussions, direct negotiations, formal consultations
  - Objective support: assistance to the parties to resolve a dispute themselves, by way of techniques such as good offices, fact-finding, enquiry, or other research of a non-judgemental character
  - Recommendatory: advisory mechanisms, such as mediation or conciliation, that provide recommendations, opinions, or views of a non-binding nature in support of the parties themselves settling disputes between them
  - Binding frameworks: arbitration or adjudication

### III. Legal “Culture” in the APEC region

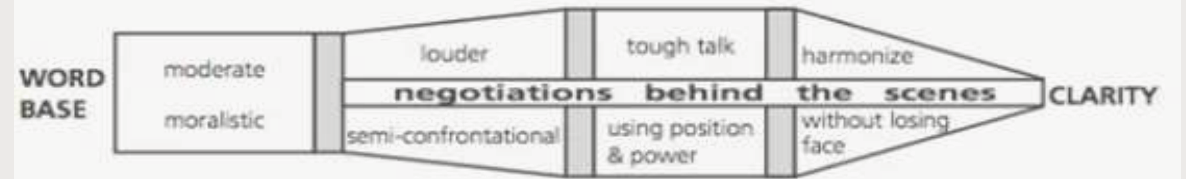
- APEC members did not often initiate GATT dispute settlement proceedings (1947-1994) (e.g., USA 88; Japan 3)
- “Asian Values” of harmony, respect and compromise, e.g.,
  - saving face through apology
  - Preserving relationships have long been part of the business fabric (e.g., in Japan, 3,146 companies over 200 years old, 21,000 companies over 100 years old, and at least 7 in continuous business for over 1,000 years)
  - ethnic and rural traditions in various member economies of village mediation committees and facilitators

# III. Legal “Culture” in the APEC region, cont’d

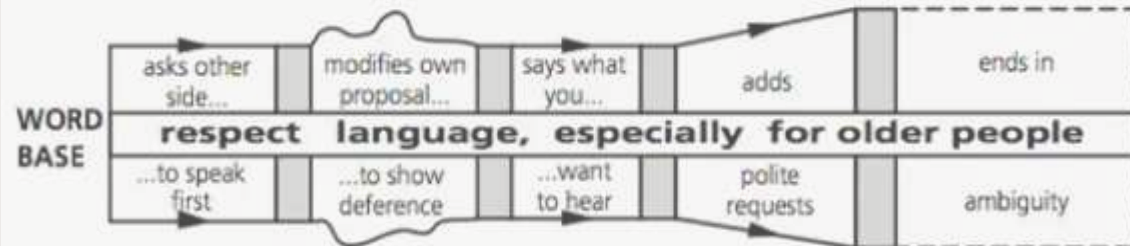
## AMERICAN



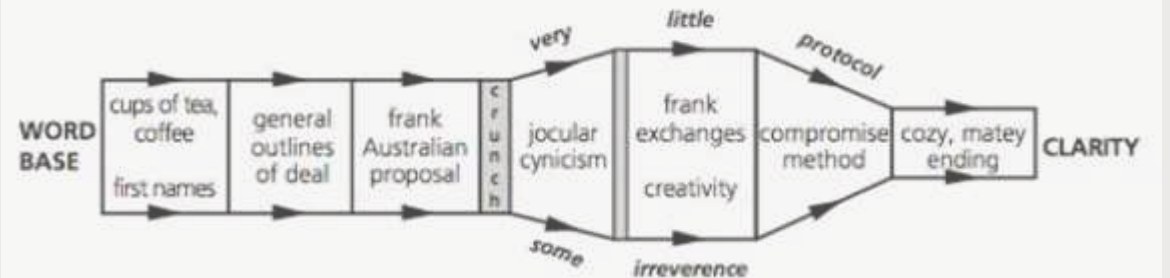
## CHINA



## INDONESIAN



## AUSTRALIAN



# IV. “CONFLICT OF LAWS” AND JURISDICTION

- The “Spaghetti Bowl”: WTO and bilateral, regional and plurilateral agreements may have overlapping or potentially conflicting obligations
- Trade “and ...”: various subjects may be addressed by other non-trade agreements, with their own rules and institutional arrangements, e.g.,
  - Intellectual Property: WIPO and specific treaties and conventions
  - SPS: Codex Alimentarius, IPPC, OIE
  - Telecommunications: ITU and related agreements
  - Health: WHO obligations
  - Environment: hazardous waste, fisheries conventions; etc.

...Thus, risk of blinders in approaching solely from a trade agreement lens

- Domestic vs. International
  - Certain trade agreement obligations are administered through domestic agencies, e.g., right to customs review
  - are the actions of a domestic judiciary “state action?”
  - Lessons from state claims and Foreign Claims Commissions



# Trade and Environment as an Example

**Over 250 Multilateral Environmental Agreements (MEAs) deal with various environmental issues, and about 15 of them include provisions to control trade to prevent damage to the environment:**

- United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- International Plant Protection Convention (IPPC)
- Convention on Biological Diversity (CBD)
  - Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
  - Cartagena Protocol on Biosafety to the Convention on Biological Diversity
  - Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety
- International Tropical Timber Agreement (ITTA)
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
- Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported, and unregulated fishing (PSMA)
- United Nations Fish Stocks Agreement (UNFSA)
- Montreal Protocol and the Vienna Convention on Substances that Deplete the Ozone Layer
- Stockholm Convention on Persistent Organic Pollutants
- Minamata Convention on Mercury

# V. CONCLUSION: DISPUTE RESOLUTION AS A SYSTEM

- The best form of dispute resolution is dispute avoidance: Bogor and Putrajaya highlight the value of transparency and predictability
- Dispute resolution avenues are means to the end of preserving and promoting a cross-border and regional environment conducive to growing trade and investment
- Proactive consideration of non-adversarial options, including use of third-party assistance, can foster mutual confidence, and save time and money in the process
- Even under the WTO, it is the members themselves, not an independent judiciary, who are the custodians of the rules