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Current Trends on Dispute Settlement: Trade and the Environment

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Current Trends on Dispute Settlement: Trade and the Environment

Environmental Chapters in RTAs WTO Fisheries Subsidies Agreement

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Enforcement of Environmental Provisions

Minimalist

Consultations between the parties

Exclusion of DSM for environmental matters/ SD chapter

Examples:

Korea – Turkey,
Australia – Peru

“Soft” quasi-judicial DS

Three steps:

Consultations

Adjudication by expert panel

Implementation

Examples:

EU – Singapore,
EU – Viet Nam,
EU – Japan

Note: EU review of SD chapters,

EU – NZ agreement

“Hard” quasi-judicial DS

Recourse to the DSM, including sanctions in the event of non-compliance

Examples:

US – Korea,
US – Colombia,
USCMA



Minimalist Approach

Peru-Australia Free Trade Agreement (PAFTA)

Article 19.5 Environmental Consultations

1. Each Party shall designate and notify a contact point on Environment, to facilitate communications between the Parties on any matter covered by this Chapter.
2. A Party may request consultations with the other Party regarding any matter arising under this Chapter by delivering a written request to the contact point of the other Party. Consultations shall commence promptly after a Party delivers a request for consultations to the contact point of the other Party. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter.

Article 19.6 Dispute Settlement

Neither Party shall have recourse to dispute settlement under Chapter 27 (Dispute Settlement) for any matter arising under this Chapter.

Soft quasi-judicial dispute settlement

EU - Viet Nam FTA

Article 13.16 Government Consultations

1. In the event of disagreement on any matter covered under this Chapter, the Parties shall only have recourse to the procedures established under this Article and Article 13.17 (Panel of Experts). [...]
2. A Party may request consultations with the other Party regarding any matter arising under this Chapter by delivering a written request to the contact point of the other Party. The request shall present the matter clearly, identifying the problem at issue and providing a brief summary of the claims under this Chapter, including the indication of the relevant provisions thereof and an explanation of how the problem affects the objectives of this Chapter, as well as any other information the Party deems relevant. Consultations shall start promptly after a Party delivers a request for consultations.
3. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter. During consultations, special attention shall be given to the particular problems and interests of the Party which is a developing country. Where relevant, the Parties shall give due consideration to the activities of the ILO or relevant multilateral environmental organisations or bodies and may, by mutual agreement, seek advice from these organisations or bodies, or any other body or person they deem appropriate, in order to fully examine the matter.

Soft quasi-judicial dispute settlement

EU - Viet Nam FTA

Article 13.17 Panel of Experts

1. If the matter has not been satisfactorily resolved by the Committee on Trade and Sustainable Development within 120 days, or a longer period agreed by both Parties, after the delivery of a request for consultations under Article 13.16 (Government Consultations), a Party may request, by delivering a written request to the contact point of the other Party, that a Panel of Experts be convened to examine that matter.
8. The Panel of Experts shall issue an interim and a final report to the Parties. These reports shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations. [...] The Panel of Experts shall issue the final report no later than 180 days after the date of its establishment, unless the Parties agree otherwise. This final report shall be made publicly available unless otherwise mutually decided.
9. The Parties shall discuss appropriate actions or measures to be implemented taking into account the final report of the Panel of Experts and the recommendations therein. [...]

Hard quasi-judicial dispute settlement

USMCA

Article 31.4: Consultations

1. **A Party may request consultations** with another Party with respect to a matter described in Article 31.2 (Scope).

Article 31.6: Establishment of a Panel

1. **If the consulting Parties fail to resolve** the matter within:
 - (a) 30 days after a Party has delivered a request for consultations under Article 31.4 (Consultations) in a matter regarding perishable goods;
 - (b) 75 days after a Party has delivered a request for consultations under Article 31.4 (Consultations); or
 - (c) another period as the consulting Parties may decide, a consulting Party may **request the establishment of a panel** by means of a written notice delivered to the responding Party through its Section of the Secretariat. [...]
4. On delivery of the request, the panel is established.

Hard quasi-judicial dispute settlement

USMCA

Article 31.19: Non-Implementation – Suspension of Benefits

1. If the disputing Parties are unable to agree on a resolution to the dispute under Article 31.18 (Implementation of Final Report) within 45 days from receipt of the final report, the complaining Party may suspend the application to the responding Party of benefits of equivalent effect to the non-conformity or the nullification or impairment until the disputing Parties agree on a resolution to the dispute.
2. In considering what benefits to suspend pursuant to paragraph 1:
 - (a) a complaining Party should first seek to suspend benefits in the same sector as that affected by the measure or other matter that was the subject of the dispute; and
 - (b) a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector, may suspend benefits in other sectors unless otherwise provided for elsewhere in this Agreement.

EU's new approach

To be applied to future and ongoing negotiations

- Results-oriented and priority-based engagement with partner countries
- More participation and support for Civil Society
- More assertive enforcement, including through trade sanctions

Example: EU-New Zealand FTA

EU's new approach

EU-New Zealand FTA

- Trade and Sustainability Chapter subject to DSM of the agreement.
- Material breaches of the commitments to the Paris Climate Agreement can be subject to trade sanctions, **regardless of their impact on trade.**
- Dispute settlement on sustainability issues have special transparency requirements, including the involvement of civil society at various stages of the process.

WTO Agreement on Fisheries Subsidies

Article 10: Dispute Settlement

10.1 The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding (DSU) shall apply to consultations and the settlement of disputes under this Agreement, except as specifically provided herein. [FN 17]

[FN 17: Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and Article 26 of the DSU shall not apply to the settlement of disputes under this Agreement.]



Thank You!

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