

# Comparing Dispute Settlement Systems: NAFTA and WTO

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# 1 Introduction

- Overlap of jurisdiction between the dispute settlement procedure under an RTA and the one under the WTO
- 1 On what basis do countries decide to go to a global forum, regional forum or both?
  - 2 How do RTAs regulate their relationship with the WTO dispute settlement procedure?
  - 3 What is the effect of dispute settlement under RTAs before a WTO panel?

# 2 Dispute Settlement Procedures under the NAFTA

- (1) general dispute settlement procedure for the interpretation and application of the NAFTA under Chapter 20, and the two procedures
- (2) procedure for the settlement of disputes related to financial services under Chapter 14, which is similar to the Chapter 20 procedure with the exception that the panelists must have expertise in financial services,
- (3) appeals to anti-dumping and countervailing duty actions under Chapter 19,
- (4) investment arbitration between investors and host governments under Chapter 11, and
- (5) the two procedures for the failure to enforce domestic environmental and labor laws under the Side Agreements.

For the purpose of today's presentation, the Chapter 20 procedure, and, to a limited extent, the Chapter 19 procedure are relevant, because they entail the problem of overlapping, conflict and forum shopping with the WTO dispute settlement procedure.

# 3 Chapter 20 procedure

Chapter 20 calls for

- (i) consultation between the Parties,
- (ii) conciliation before the North American Free Trade Commission, comprised of cabinet-level representatives of the three Parties,
- (iii) arbitration, and
- (iv) implementation of the arbitral report.

## (I) General principle

### Article 2004

Except for the matters covered in Chapter Nineteen .. and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties ..

## (II) Principle of forum choice

### Article 2005:

1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.

(III) Exceptions to the principle of the free choice of the complaining Party :

- (1) If a third NAFTA Party requests dispute settlement under the NAFTA, a dispute will ordinarily be settled pursuant to the NAFTA. (Article 2005(2))
- (2) Matters involving the relationship of the NAFTA to specified environmental agreements must be settled under the NAFTA procedure at the request of the respondent.(Article 2005(3))
- (3) Matters involving sanitary measures or standard-related measures to protect human, animal or plant life or health, or to protect the environment must also be settled under the NAFTA procedure at the request of the respondent.(Article 2005(4))

## (IV) Principle of exclusion after initiation

### Article 2005 (6)

Once dispute settlement procedures have been initiated .. ,  
the forum selected shall be used to the exclusion of the  
other, ..

What is “initiation”?

For the GATT/WTO procedure – request for a panel

(Article 2005(7))

For the Chapter 20 procedure – request for conciliation by  
the Free Trade Commission (Article 2007)



# 4 Overlapping subject matter of the NAFTA and the WTO

NAFTA's wide coverage:

- (i) trade in goods, including automobiles (Ch.3, Annex 300-A), textiles (Ch.3, Annex 300-B), energy and basic petrochemicals (Ch.6),
- (ii) customs procedures (Ch.5), sanitary and phytosanitary measures (Ch.7), and technical barriers to trade (Ch.9) ,
- (iii) special provisions on safeguards (Ch.8), government procurement (Ch.10), cross border trade (Ch.12), telecommunications (Ch.13) and financial services (Ch.14) ,
- (iv) foreign investment (Ch.11), intellectual property rights (Ch.17), competition policy (Ch.15) and business travel (Ch.16).

**Category I** those subject matters that only the NAFTA regulates:

e.g., on matters of trade in goods, special rules of origin for automobiles, textiles, part of customs procedures including certification of origin (Chapter 5A), prior determination of country of origin (Chapter 5C), special provision on bilateral safeguard measures (Chapter 8), rules on government procurement relating to Mexico, because Mexico is not the party to the WTO Agreement on Government Procurement, cross-border trade in services (Chapter 12), telecommunication n services (Chapter 13) and financial services (Chapter 14), and the majority of Chapter 11 on investment, competition policy (Chapter 15) and business travel (Chapter 16).

Category II - those subject matters that both the NAFTA and WTO regulate.

(i) Many GATT/WTO rules are incorporated by reference into the NAFTA.

e.g., GATT Article III on national treatment is incorporated into the NAFTA in Article 301(1).

GATT XI on the prohibition of quantitative restrictions is incorporated in Article 309(1) .

Concerning safeguards which are applied globally, Article 802(1) incorporates Article XIX of the GATT.

The general exceptions in GATT Article XX is incorporated in Article 2101(1).

(ii) Though not by reference, some GATT obligations are reaffirmed in the NAFTA.

E.g., On technical barriers to trade, Article 903 affirms the Parties' rights and obligations under the GATT Agreement on Technical Barriers to Trade.

(iii) Subject matter overlapping

Both agreements contain provisions governing agricultural trade, safeguards, sanitary and phytosanitary measures, technical barriers to trade, trade in textiles, trade in services, and trade-related investment measures.

Both agreements have a “national security” exception using identical language (GATT Article XXI, NAFTA Article 2012).

# 5 NAFTA's solution is a standard solution under recent RTAs

- (i) Freedom of choice between the WTO procedure and the RTA procedure, and
  - (ii) exclusion of the other after initiation
- are the standard method under current RTAs.

## Article 1(2) of the Olivos Protocol for the Settlement of Disputes in MERCOSUR (Feb. 18 2002):

Disputes falling within the scope of application of this protocol that may also be referred to the dispute settlement system of the World Trade Organisation .. may be referred to one forum or the other, as decided by the requesting party. ..

Once a dispute settlement procedures pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora, ..

[<http://www.mercosul.gov.br/textos/default.asp?Key=232>]

Article 139 of the Japan-Singapore Economic Partnership Agreement (Jan. 13, 2002) :

2. Nothing in this Chapter shall prejudice any rights of the Parties to have recourse to dispute settlement procedures available under any other international agreement to which they are parties.
3. Notwithstanding paragraph 2 above, once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement .. with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this does not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.

[<http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html>]

# 6 Issues to be solved under the standard solution

(1) Which forum to choose?

- When the subject matter falls exclusively within either the WTO or the RTA, there will be no choice.
- When the subject matter is regulated by both the WTO and the RTA, there will be a choice between the two.

Risk of forum shopping will occur.



# Canada – periodicals (WT/DS31)

U.S. successfully challenged certain Canadian measures unfavorable to imported periodicals under GATT Article III, etc.

However, if the U.S. had resorted to the Chapter 20 procedure, Canada could have defended it by NAFTA Article 2106 (cultural industry protection).

The U.S., as a complainant, made a right decision. However, this in fact killed the cultural exception under Article 2016.

# 7 Experience under the NAFTA

What choice, then, have the parties to the NAFTA made so far?

- Only three Chapter 20 arbitration reports were rendered.

(1) U.S. safeguard action on broomcorn brooms from Mexico (USA-97-2008-01)

(2) Tariffs applied by Canada to certain U.S.-origin agricultural products (CDA-95-2008-01)

(3) Cross-border trucking service (USA-98-2008-01)

- (1) Only the Broomcorn Brooms safeguard case offered a choice of forum, though it is not known why Mexico chose the Chapter 20 procedure.
- (2) In the other two cases, the complainants had to choose the Chapter 20 procedure because their arguments were based entirely on certain provisions of the NAFTA.

On the other hand, there have been more than 25 cases under the WTO since 1995. Why is it so?

- (1) The WTO procedure proved more efficient, due to its neutral selection process of panelists, the possibility to appeal, and the stringent mechanism for securing compliance with the reports.
- (2) The larger WTO membership may put more political pressure on the parties to settle the dispute while preventing them to become too confrontational.
- (3) The WTO procedure is much more transparent than the Chapter 20 procedure, and could gain more support from the public.

# 8 Lessons learned and problems to be solved

- (1) The principles of (i) freedom of choice between the WTO procedure and the RTA procedure, and (ii) exclusion of the other after initiation, are the standard method in the current RTAs.  
In practice, however, the freedom may not be enjoyed by the parties due mainly to the comparative advantage of the WTO procedure.

(2) There is an additional good reason to support this.

Duplication of dispute forum would yield contradictory interpretations among different fora with respect to the same subject matter.

It is, therefore, practically adequate to bring WTO-related disputes to the WTO procedure, even when the parties have a choice to go to the RTA procedure, and to limit resort to the latter procedure to those cases governed exclusively by the RTAs.

(3) An exception to the general principle of forum choice depending on the complainant should be made.

We could grant a right to defendants to have a particular type of dispute settled under RTA, like in the NAFTA for certain environmental, health, and standard-related disputes.

The NAFTA provides a more detailed rules over these subject matters than the WTO, and that the parties to the NAFTA have a good reason to safeguard these rules.

We could and should add cultural exception to these.

#### (4) Procedural safeguard against duplication of jurisdiction should be installed

The principle of freedom of choice must be applied together with the principle of exclusion of the other after initiation. Otherwise, parties might face the risk of duplication of jurisdiction, or infringement of the principle of estoppel and res judicata.



## (5) Definition of “initiation” under the principle of exclusion after initiation

Mere request for consultations may not be deemed to initiate the procedure. A request for a panel may be deemed to initiate the procedure.

(6) Though duplication of procedures should be avoided, there may be instances where a second procedure on the same dispute addresses claims not dealt with in the first procedure.

The Japan-Singapore EPA provides a solution to such situation by providing that the principle of exclusion after initiation “does not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.”