



Session 6: CARTIF Implementation Arrangements – Institutional mechanism, dispute settlement mechanisms and other matters

Jan Bohanes

Senior Counsel, Advisory Centre on WTO Law (ACWL)

Agenda

- What is a dispute settlement mechanism (DSM)?
- Why is a DSM useful in a trade agreement?
- Lessons from the World Trade Organization (WTO)
- Lessons from other regional trade agreements (RTAs)
- Basic procedural steps in a trade dispute settlement regime

What is a dispute settlement mechanism?

“Most [parties to a treaty] comply with most of international law most of the time ...”

... but disagreements are
an inevitable part of all
human affairs



What is a dispute settlement mechanism?

- Any trade agreement (whether the WTO rules or an RTA) requires a **mechanism to solve disagreements** between parties to that agreement
- **KAZAKHSTAN – BORDER RESTRICTIONS - REQUEST FROM THE KYRGYZ REPUBLIC (G/C/W/745) (ID 106)**
- **Council for Trade in Goods - Formal meeting of 10 November 2017**
Kyrgyz Republic
- *Example: A new investment protection law that provides subsidies. The subsidizing government and its trading partners may disagree whether these subsidies negatively affect their respective trade interests*

Other examples of trade concerns between CAREC Members

**KAZAKHSTAN – BORDER RESTRICTIONS - REQUEST FROM THE KYRGYZ REPUBLIC
(G/C/W/745) (ID 106)**

Council for Trade in Goods - Formal meeting of 10 November 2017

- Kyrgyz Republic: Concerns about border restrictions applied by Kazakhstan against imports from Kyrgyz Republic
- Kazakhstan: Purpose of measures is to verify the weight parameters for cargo trucks and freight transport, as well as the requirement to possess a certificate to transport perishable goods. These measures were applied equally to both domestic and foreign carriers subject to transport control

Other examples of trade concerns between CAREC Members

TÜRKIYE – DISCRIMINATORY ADDITIONAL TARIFFS ON ELECTRIC VEHICLES (ID 100)

Committee on Market Access - Formal meeting of 25-26 March 2024

Committee on Market Access - Formal meeting of 16-17 October 2023

- China: Türkiye issued a presidential decree imposing a 40% additional tariff only on imported electric vehicles originating from China.
- Türkiye: The electric vehicles sector, as an infant industry, has a strategic importance for Türkiye. This sector presents potentials for technological and know-how spillover to other sectors as well. Within this framework, as a result of an import surge in this sector, Türkiye, within its bound rates, increased its MFN tariff rate on electric vehicles for non-preferential trade partners in July 2022.

Other examples of trade concerns between CAREC Members

PAKISTAN – CLOSURE OF CORRIDORS AND TRANSIT (ID 98)

Council for Trade in Goods - Formal meeting of 06 April 2017

- Afghanistan: Concerns about closure of particular border crossing points for all trade and transit

What is a dispute settlement mechanism (DSM)?

- This mechanism could be
 - **Purely political** (negotiations, governments talking to each other)
 - **Third party-assisted dispute settlement, but not judicial** – for instance, an independent mediator trying to identify a solution
 - **Adjudication**: an arbitral/judicial panel or a court could determine who is right in a legal sense
- Which approach is better? Why?

Why is a (judicial) DSM useful in a trade agreement?

- Virtually all (modern) trade agreements have a judicial (legal) dispute settlement mechanism
- An essential element for the binding nature of PTA legal commitments
- Trade disputes arise often due to protectionist pressures from domestic companies and industries that lead to trade restrictions



Why is a (judicial) DSM useful in a trade agreement?

- RTA parties are unable to resolve their disputes on their own, because, for political reasons, respondents do not want to be seen to “give in” to foreign pressure
- Importance of domestic jobs and (perceived) national economic interests



Why is a (judicial) DSM useful in a trade agreement?

- Moreover, if the problem is a law (legislative measure), the executive cannot make compromises on its own even if it is willing to do so
- Frequently, the respondent knows that the offending measure is illegal, but cannot compromise due to domestic political pressure
- More systemically, a judicial/legal mechanism promotes the rule of law, which is very important for the legitimacy of the agreement, especially from the perspective of smaller trade parties
- Disputes can also arise because the legal provisions are written in an ambiguous manner
- Judicial decisions clarify the law and provide guidance for the future, helping WTO Members / RTA parties to manage and even to avoid disputes

Lessons from the WTO

- The WTO DSM is the most frequently-used Member-to-Member DSM in the history of international law
- 600+ disputes in almost 30 years
- “Compulsory jurisdiction” = Members cannot refuse to participate; automatic part of membership

Lessons from the WTO

- About 50% of all disputes do not go beyond initial consultations
- Members typically comply with adverse judgments (estimates of 80-90 per cent compliance, even if sometimes with delays)
- Members that litigate frequently in the WTO generally regard most disputes as not being politically sensitive (just a “technical” procedure)
- But some disputes can be politically so sensitive that a Member will not accept an adverse judicial solution
 - Disputes involving (perceived) national security concerns
 - Very sensitive/cultural issues on which the population has strong views – e.g. genetically modified food; alcohol in certain cultures, etc.

Lessons from the WTO

- It is important for the judicial system to listen to Members and their critique, but without compromising the impartiality of the process
- Some degree of formalism, overtime, is an inevitable component of a judicial process

Lessons from the WTO

- Retaliation (as an enforcement measure against non-complying respondent) is rare and does not appear to be an essential component for the functioning of the system
- Smaller Members may litigate less than larger Members, but they can make effective use of the system
- High-quality legal and administrative support from a knowledgeable Secretariat can be an important element in the functioning of the system
- Legal aid (in the form of an institution like the ACWL) can be important for smaller and resource-challenged Members

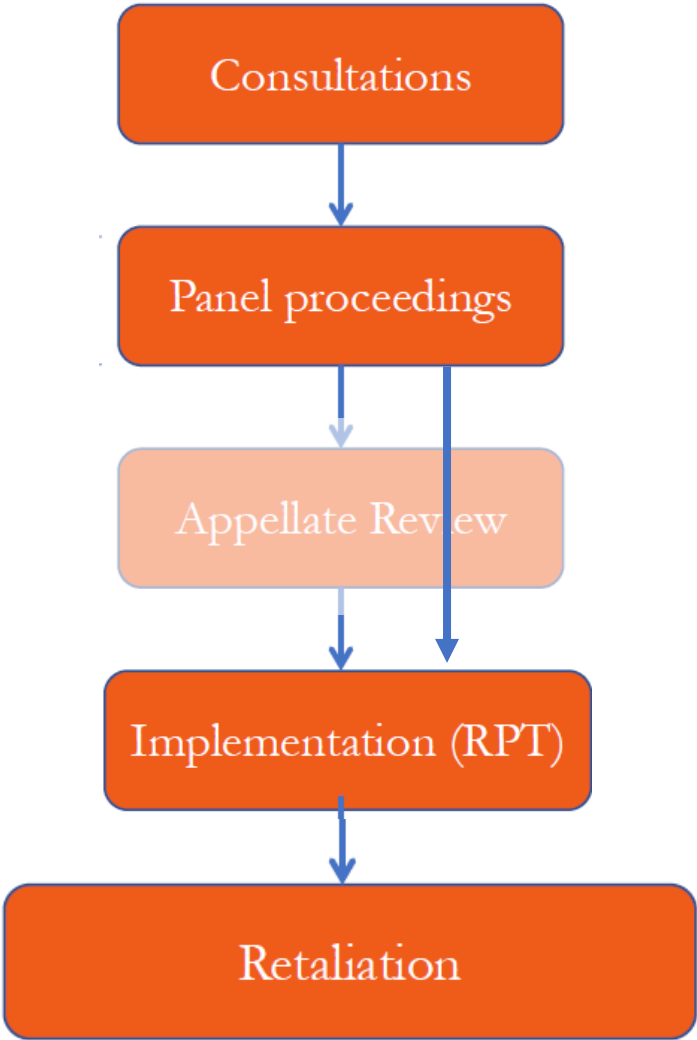
Lessons from DSMs in RTAs

- Most Members prefer litigation in the WTO over litigation under RTAs (if there is a meaningful choice to be made)
- Perhaps this is because the WTO system is well-established, trusted and benefits from a highly-experienced Secretariat; also more “peer pressure” in the WTO?
 - Will this change with the crisis of the WTO DSM?
- WTO DS is cheaper (no need to pay panelists)

Lessons from DSMs in RTAs

- RTA litigation is used typically to enforce obligations that go beyond WTO obligations (“WTO+” obligations)
- Also, some RTAs have special mechanisms that do not exist in the WTO – USMCA “Rapid Response Labor Mechanism”

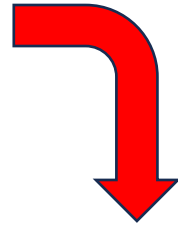
Basic procedural steps in a trade dispute settlement regime



Annex – Examples of dispute resolution mechanisms from FTAs between CAREC Members

Examples of DS regimes from the CAREC region

**Judicial, but no
detailed procedural
provisions**



Article 32 Dispute Settlement

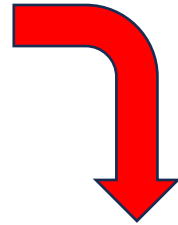


Georgia-Türkiye
FTA

1. Either Party may refer to the Joint Committee any **dispute** relating to the application or interpretation of this Agreement.
2. The Joint Committee may settle the **dispute** by means of a decision.
3. Each Party shall be bound to take measures involved in carrying out the decision referred to in paragraph 2.
4. In the event of it not being possible to settle the **dispute** in accordance with paragraph 2, either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months.

Examples of DS regimes from the CAREC region

**Judicial, but no
detailed procedural
provisions**



**Article 32
Dispute Settlement**

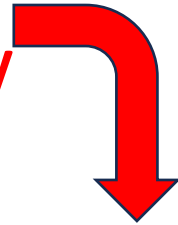


Georgia-Türkiye
FTA

5. The two arbitrators shall agree on a third arbitrator being a citizen of a third country of which both Parties have diplomatic relations. In case of failure to agree on the third arbitrator within two months, the necessary appointment shall be made by the Joint Committee.
6. The arbitrators' decisions shall be taken by majority vote.
7. Each Party to the **dispute** must take the steps required to implement the decision of the arbitrator.

Examples of DS regimes from the CAREC region

**Political, without any
judicial procedure**



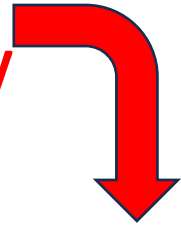
Article 21 Settlement of disputes

1. The Parties shall take all necessary measures to fulfill their obligations under this Agreement.
2. Without prejudice to the provisions of Article 15 of this Agreement, in case when one of the Contracting Parties considers that another Contracting Party does not fulfill its obligations under this Agreement and if such non-fulfillment of obligations causes or may cause damage to economic interests of the former



Examples of DS regimes from the CAREC region

**Political, without any
judicial procedure**

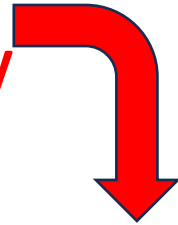


Contracting Party it may request the latter Contracting Party to conduct consultations, which shall be held within two months since the date of written request with a view to search for a settlement acceptable for both Contracting Parties. A copy of such request shall be sent to all other Contracting Parties to this Agreement and any Party may take part in the consultations if it deems that the circumstances mentioned in the first sentence of this paragraph concern its interests.

The written request shall be supplemented by all information concerning the merits of case.

Examples of DS regimes from the CAREC region

**Political, without any
judicial procedure**



3. In case when the Contracting Parties do not reach a mutually acceptable settlement of the problem during the consultations mentioned in the paragraph 2 of this Article, the Contracting Party that made request for consultations has a right to settle the disputes concerning rights and obligations of the Contracting Parties within the framework of a special conciliation recommended by the Working Body during 30 days after the date of receipt of request (through establishment of working groups for studying the materials of the dispute and elaboration of recommendations).

Examples of DS regimes from the CAREC region

Political, without
judicial proced

4. In case of a dispute, the Contracting States shall settle the dispute through the mechanism provided in this Article. In the absence of a dispute settlement mechanism provided in this Article, the Contracting States shall refer the dispute to a panel of experts to be established by mutual agreement. The panel of experts shall be composed of three members, one appointed by each Contracting State and one appointed by mutual agreement. The panel of experts shall be established within 30 days of the date of the request for the establishment of the panel of experts. The panel of experts shall be empowered to recommend measures, including the suspension of the Agreement, that are necessary to resolve the dispute. The panel of experts shall be empowered to recommend measures, including the suspension of the Agreement, that are necessary to resolve the dispute. The panel of experts shall be established within 30 days of the date of the request for the establishment of the panel of experts. The panel of experts shall be empowered to recommend measures, including the suspension of the Agreement, that are necessary to resolve the dispute.

5. The dispute settlement mechanism shall be set by international law.

Article – 20

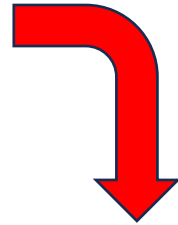
Dispute Settlement Mechanism

1. Any dispute that may arise among the Contracting States regarding the interpretation and application of the provisions of this Agreement or any instrument adopted within its framework concerning the rights and obligations of the Contracting States will be amicably settled among the parties concerned through a process initiated by a request for bilateral consultations.
2. Any Contracting State may request consultations in accordance with paragraph 1 of this Article with other Contracting State in writing stating the reasons for the request including identification of the measures at issue. All such requests should be notified to the Committee of Experts, through the SAARC Secretariat with an indication of the legal basis for the complaint.
3. If a request for consultations is made pursuant to this Article, the Contracting State to which the request is made shall, unless otherwise mutually agreed, reply to the request within 15 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.



Examples of DS regimes from the CAREC region

Procedures involving a committee of experts, but ultimately non-judicial



Article – 20

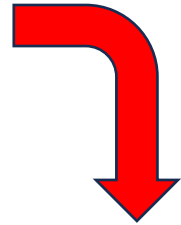
Dispute Settlement Mechanism

1. Any dispute that may arise among the Contracting States regarding the interpretation and application of the provisions of this Agreement or any instrument adopted within its framework concerning the rights and obligations of the Contracting States will be amicably settled among the parties concerned through a process initiated by a request for bilateral consultations.
2. Any Contracting State may request consultations in accordance with paragraph 1 of this Article with other Contracting State in writing stating the reasons for the request including identification of the measures at issue. All such requests should be notified to the Committee of Experts, through the SAARC Secretariat with an indication of the legal basis for the complaint.
3. If a request for consultations is made pursuant to this Article, the Contracting State to which the request is made shall, unless otherwise mutually agreed, reply to the request within 15 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.



Examples of DS regimes from the CAREC region

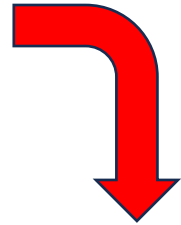
Procedures involving a committee of experts, but ultimately non-judicial



4. If the Contracting State does not respond within 15 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Contracting State that requested the holding of consultations may proceed to request the Committee of Experts to settle the dispute in accordance with working procedures to be drawn up by the Committee.
5. Consultations shall be confidential, and without prejudice to the rights of any Contracting State in any further proceedings.

Examples of DS regimes from the CAREC region

Procedures involving a committee of experts, but ultimately non-judicial

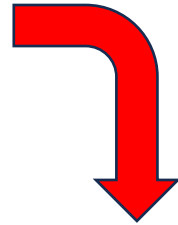


6. If the consultations fail to settle a dispute within 30 days after the date of receipt of the request for consultations, to be extended by a further period of 30 days through mutual consent, the complaining Contracting State may request the Committee of Experts to settle the dispute. The complaining Contracting State may request the Committee of Experts to settle the dispute during the 60-day period if the consulting Contracting States jointly consider that consultations have failed to settle the dispute.
7. The Committee of Experts shall promptly investigate the matter referred to it and make recommendations on the matter within a period of 60 days from the date of referral.
8. The Committee of Experts may request a specialist from a Contracting State not party to the dispute selected from a panel of specialists to be established by the Committee within one year from the date of entry into force of the Agreement for peer review of the matter referred to it. Such review shall be submitted to the Committee within a period of 30 days from the date of referral of the matter to the specialist.



Examples of DS regimes from the CAREC region

Procedures involving a committee of experts, but ultimately non-judicial

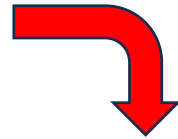


9. Any Contracting State, which is a party to the dispute, may appeal the recommendations of the Committee of Experts to the SMC. The SMC shall review the matter within the period of 60 days from date of submission of request for appeal. The SMC may uphold, modify or reverse the recommendations of the Committee of Experts.
10. Where the Committee of Experts or SMC concludes that the measure subject to dispute is inconsistent with any of the provisions of this Agreement, it shall recommend that the Contracting State concerned bring the measure into conformity with this Agreement. In addition to its recommendations, the Committee of Experts or SMC may suggest ways in which the Contracting State concerned could implement the recommendations.
11. The Contracting State to which the Committee's or SMC's recommendations are addressed shall within 30 days from the date of adoption of the recommendations by the Committee or SMC, inform the Committee of Experts of its intentions regarding implementation of the recommendations. Should the said Contracting State fail to implement the recommendations within 90 days from the date of adoption of the recommendations by the Committee, the Committee of Experts may authorize other interested Contracting States to withdraw concessions having trade effects equivalent to those of the measure in dispute.



Examples of DS regimes from the CAREC region

Political dispute settlement



FREE TRADE AGREEMENT BETWEEN THE KYRGYZ REPUBLIC AND KAZAKHSTAN



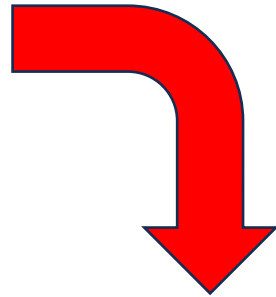
Article 15

1. Disputes between the Parties regarding the interpretation or application of the provisions hereof shall be settled by way of negotiations.
2. The Parties shall aspire to avoid conflict situations in mutual trade.
3. The Parties shall determine that if claims and disputes between business entities of both countries, as a result of the interpretation or fulfilment of commercial contracts or transactions, are impossible to be settled in a friendly way on the basis of consultations and negotiations, unless otherwise agreed, shall be under the exclusive competence of Arbitration Courts (permanent or "ad hoc") created on the territory of the Parties or on the territory of the third States determined by the Parties which have signed the Contract.
4. The latter may also determine the applied material right, standards and procedures, and a place for conducting the hearing of the case.
5. Each Party shall ensure that effective means on the acknowledgement and implementation of arbitration decisions be on its territory.

Examples of DS regimes from the CAREC region

FREE TRADE AGREEMENT BETWEEN GEORGIA AND TURKMENISTAN

**Political dispute
settlement**



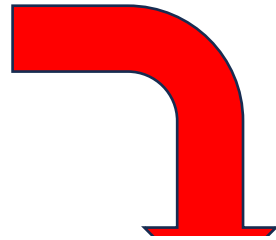
Article 12

Disputes between Sides concerning interpretation and application of the agreement's provisions will be settled through negotiations.

Sides will endeavour to avoid conflicts in reciprocal trade.

Examples of DS regimes from the CAREC region

**Political dispute
settlement**



Article 112
Dispute Settlement



Disputes relating to the interpretation and (or) the application of provisions of this Treaty shall be settled through consultation and negotiation.

If no agreement has been reached within 3 months from the date when one party of dispute send the other party of the dispute a formal written request for consultations and negotiations, unless otherwise provided by the Statute of the Court (Annex 2 to the Treaty), the dispute may be submitted by either of the parties to the dispute to the Court of the EAEU, if the parties to the dispute have not agreed upon the use of other mechanisms for its resolution.