EDITORIAL

Dispute Settlement in International Trade Agreements: Prospective Pathways

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The international economic order is undergoing a transformation. The World Trade Organization (WTO), which is the abiding symbol of multilateralism in the field of global trade governance,[1] is somewhat forgotten. While the WTO system, especially its dispute settlement, looked splendid[2] and efficient in its first decade (1995–2004), it demonstrated certain cracks in the next decade (2005–2014),[3] which further widened and led to a full-blown crisis in the next phase (2015-now), with the Appellate Body shutting down in late 2019. There is still some work happening before the WTO panels which leave some of the die-hard Admirers of the multilateral body with the hope that the two-tiered WTO dispute settlement system will get back on its rails – at least one day. In the meantime, some of the panel reports will get appealed into the void,[4] hastening even the complainants to forget about their own well-earned and hard-fought victories. These developments are sad, although not an unexpected outcome for any serious observer of the politics behind international trade.

While certain efforts are taking place in repairing and restoring the paralysed WTO dispute settlement system, the intent is not strong and serious enough. Some Members are busy stitching certain piece-meal solutions.[5] A clear example is creating something like the multi-party arbitral mechanism (MPIA) – an ad hoc mechanism for all practical purposes. As the legendary John Jackson noted, if no adjudicative system exists to determine the occurrence of the transgression of rules, parties will be forced to rely on their power status.[6] The recent trade wars, unilateral actions and unprecedented use of national security-related measures are reflective of this trend.[7]

In a way, the WTO dispute settlement system is a victim of its own success.[8] The efficiency and objectivity of the system encouraged Members to seek formal disputes with their trading partners with greater frequency.[9] The gradual overload of cases coupled with the increasing complexity of disputes led to natural and unavoidable delays and non-adherence to certain tight timelines, for example, the ninety-day period to conclude an appellate review.[10] However, the real reason behind the hostility was the structure and automaticity of the process itself – in short, the legalistic and adjudicative nature of dispute settlement, the impartiality and objectivity of the outcome and norm making potential of the adopted panel and Appellate Body reports.

How long will the Appellate Body impasse remain? Maria Pagan, the recently appointed United States Ambassador to the WTO, stated that the United States

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1 Andrew D. Mitchell & Elizabeth Sheargold, *Global Governance: The World Trade Organization's Contribution*, 46 Alta. L. Rev. 1062–63 (2009).

2 Bruce Wilson, *The WTO Dispute Settlement System and Its Operation: A Brief Overview of the First Ten Years,* in *Key Issues in WTO Dispute Settlement: The First Ten Years* 15, 23 (Rufus Yerxa & Bruce Wilson eds 2005); Mireille Cossy, *From Theory to Practice: Drafting and Applying the Dispute Settlement Understanding*, in *A History of Law and Lawyers in the GATT/WTO – The Development of the Rule of Law in the Multilateral Trading System* (G. Marceau ed. 2015).

3 Thomas J. Prusa & Luca Rubini, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It's déjà vu All Over Again*, 12(2) World Trade Rev. 409, 425 (2013) (noting that zeroing litigation saga is a weakness of the DSU system and the ability of a country to take advantage of it).

4 Since Dec. 2019, twelve out of fourteen cases have been appealed into the non-functioning Appellate Body, an expression called 'appeal into the void', apparently popularized by Joost Pauwelyn. *See* Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect*, 22(3) J. Int'l Econ. L. 297 (2019).

5 *See also* in this Special Double Issue, Ujal Singh Bhatia, *The WTO's Dispute Settlement System: Pathways for Reform*, 17(7/8) Global Trade & Customs J. (2022).

6 John Jackson, *Crumbling Institutions of the Liberal Trade System*, 12 J. World Trade L. 93, 980101(1978).

7 *See* generally, Colin Patch, *A Unilateral President v. a Multilateral Trade Organization: Ethical Implications in the Ongoing Trade War*, 32 Geo. J. Legal Ethics 883 (2019).

8 *The WTO Dispute Settlement System in 2015*, 25 Italian Y.B. Int'l L. 429 (Giorgio Sacerdoti ed. 2015); *WTO Dispute Settlement Body – Developments in 2016*, Remarks by Ambassador Xavier Carim (WTO), https://www.wto.org/english/tratop_e/dispu_e/carim318_e.htm (accessed 6 May 2022).

9 *See* generally, Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System,* 3(1) Asian J. WTO & Int'l Health L. & Pol'y 1–20 (2008).

10 *See* generally, Jayant Raghu Ram, *Cracks in the 'Crown Jewel' – Whether 'Prompt Settlement' of Disputes?,* 10(2) Trade L. & Dev. 302 (2018).

was interested in 'durable, lasting reform' to the WTO dispute settlement understanding (DSU).[11] This is a very welcome statement while the decision to yet again block the members to the Appellate Body was disappointing. Even if negotiations were to start in good faith, there is no certainty that the reform proposals will gain momentum. The Doha Round negotiations which initiated reform proposals on a broad breadth of issues is almost abandoned after two decades. In any case, reforms to the DSU are unlikely to be taken up as a standalone issue delinked from all other topics on the WTO work programme.[12] In that context, considering the negotiating dynamics and long delays associated with WTO negotiations, it is difficult to expect that a functional dispute settlement would be restored in the near term. But at least there is a ray of hope about some continued engagement on this matter.

In this backdrop, we need to seriously examine the flurry of activities in concluding free trade agreements (FTAs). Most countries have redeployed their resources for getting their FTA negotiation machinery to get on to 'mission warp speed'. Most of the recent FTAs are clear improvements over the WTO rules in their reach and coverage especially in relation to covering new age topics such as labour, environment, digital trade, innovation, small and medium enterprises (SMEs), state-owned enterprises (SOEs), regulatory cooperation, anti-corruption and so on, although some of the rules do not reflect any enduring legal or economic principle. In other words, while these agreements seek to pry open the markets, it is not uncommon to find purely transactional rules, merely serving the expediency of the moment. The bulk of the FTAs concluded in recent times have unusual product-specific rules-of-origin,[13] product-specific carve-outs and exclusions,[14] varying types of tariff-rate quotas (TRQs), trigger safeguard mechanisms[15] or an unusual kind of legal instruments called side-letters,[16] some of which are confidential, while others are not. These features are aimed at taking care of the particular sensitivities of the negotiating parties and to offer certain comfort levels to the domestic constituents.

I THE RISE OF FREE TRADE AGREEMENTS AND DISPUTE SETTLEMENT

The modern FTAs aim to construct a new international economic order around a common theme. To explain, modern FTAs are not limited in their ambition to pure market access matters but seek to create an economic order concerning the entire gamut of production and supply chains including non-trade concerns or other various externalities.[17] In this scheme of things, dispute settlement is an important pillar in ensuring that rights and obligations under the treaty are taken seriously. However, dispute settlement is not the only pillar. Some of the modern FTAs also provide for peer review or expert panel processes and private enforcement which are significantly different from state-to-state dispute settlement.

Broadly speaking, FTAs, barring a few, have rarely given rise to trade or investment disputes. Among the FTAs, the North American Free Trade Agreement[18] (NAFTA) was the first major international treaty that provided for strong dispute settlement in trade and investment matters. The NAFTA provided for three separate streams of dispute: (1) a state-to-state dispute settlement under Chapter 20; (2) a binational panel to review anti-dumping and countervailing duty decisions of domestic agencies under Chapter 19; and (3) investor-to-state dispute settlement in relation to investment matters under Chapter 11. While Chapter 20 mechanism has rarely been used partly in view of the substantial overlap with those of the WTO,[19] Chapter 11 mechanism was more widely used with more than sixty notices of arbitration and several arbitral awards during the life of the NAFTA. The binational panel reviews under Chapter 19, despite its utility, remains a unique and isolated remedy, not being replicated in other FTAs.[20]

Interestingly, outside of the NAFTA, there have been very few cases. The dispute settlement system under the Southern Common Market (Mercado Común del Sur or MERCOSUR) has issued eight arbitral awards since its

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[11] Pagan's first WTO Remarks in Geneva, Inside US Trade, https://insidetrade.com/content/pagán's-first-wto-dispute-settlement-remarks-geneva (accessed 6 May 2022).

[12] Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises*, 18 World Trade Rev. 524–525 (2019).

[13] Ji-Soo Yi, *A Study on the Dispute Settlement Procedure for the Preferential Rules of Origin*, 26 J. Arb. Stud. 3 (2016).

[14] *See* e.g., C. Cantore, *Prudential Carve-Outs in Preferential Trade Agreements,* in *The Prudential Carve-Out for Financial Services: Rationale and Practice in the GATS and Preferential Trade Agreements* 106–167 (Cambridge International Trade and Economic Law 2018); Lukasz Gruszczynski, *The Trans-Pacific Partnership Agreement and the ISDS Carve-Out for Tobacco Control Measures,* 6(4) Eur. J. Risk Regulation 652–658 (2015).

[15] Vietnam - Eurasian Economic Union Free Trade Agreement Art. 2.10. It is crucial to note that this provision applies to non-agriculture goods contained in Annex 2a and Annex 2b.

[16] For example, *see* CPTPP text and associated documents (Department of Foreign Affairs and Trade, Australian Government), https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents (accessed 6 May 2022).

[17] *See* Nuno Limão, *Are Preferential Trade Agreements with Non-Trade Objectives a Stumbling Block for Multilateral Liberalization?,* 74(3) Rev. Econ. Stud. 821–855 (2007).

[18] North American Free Trade Agreement, Can.-Mex.-US, 17 Dec. 1992, 32 I.L.M. 289 (1993).

[19] Only three disputes have arisen under Ch. 20, viz., Cross-border trucking services (USA-MEX-98-2008-01); The US Safeguard Action Taken on Broom Corn Brooms from Mexico (USA-97-2008-01); Tariffs Applied by Canada to Certain US-Origin Agricultural Products (CDA-95-2008-01).

[20] *See* in this Special Double-Issue, Anthony VanDuzer, *Binational Panel Review of Trade Remedies Determination: Prospects for Exporting USMCA's Unique Procedures*, Global Trade & Customs J. (2022).

inception in 1991. Another notable development was the United States – Guatemala dispute over Guatemala's labour enforcement under the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR).[21] However, this situation is soon likely to change. Immediately after negotiating the United States – Canada- Mexico (USMCA), the United States brought a dispute against Canada over certain dairy products, a final outcome in this dispute has already been circulated.[22] A few days later, that is, in December 2020, Canada requested a consultation with the United States regarding the inclusion of Canadian exports within the scope of the US safeguard measures on solar cells/modules/panels.[23] According to recent reports, Canada has requested for the establishment of the panel.[24] The USMCA is also unique in the sense that it provides for a 'rapid-response' independent panel to investigate complaints of denial of labour rights at certain facilities.

Across the Atlantic, the European Union (EU) FTAs also provide for dispute settlement. There have been some notable developments in the recent times of which the EU-Korea labour dispute is of particular interest.[25] Recently, in 2020, the EU challenged certain Ukraine export prohibitions on a number of wood species in the form of unprocessed wood and sawn wood. The arbitration panel's decision in this dispute is suggestive of how FTA partners who are also WTO Members and have concurrent obligations under both the agreements prefer to settle their trade concerns when the matter could have been taken to any of the forums.[26] The third dispute relates to certain bilateral safeguard measures. Bilateral safeguards are particularly specific to an FTA and, in June 2019, the EU challenged certain bilateral safeguard measures on frozen bone-in-chicken cuts under the EU-Southern African Development Community (SADC) Economic Partnership Agreement.[27] Again, in June 2020, the EU and Algeria were involved in a dispute under the Association Agreement concerning, inter alia, Algeria's ban on imports of automobiles, imposition of certain tariff surcharges on imports, tariff increases on telecommunications hardware, and the implementation of non-automatic import licensing.[28] While the foregoing disputes seem insignificant in number, give a good flavour of the trends to come. The presence of strong institutional and dispute settlement chapters in EU's FTAs with Australia, Canada, Chile, Indonesia, Japan, Malaysia, Mercosur (Argentina, Brazil, Paraguay, and Uruguay), Mexico, New Zealand, the Philippines, Thailand, and Vietnam present the possibility of parties using these mechanisms proactively in the future.

2 WTO DISPUTE SETTLEMENT *VERSUS* FTA DISPUTE SETTLEMENT

Considering the high standards that the WTO dispute settlement has set, comparisons of the dispute settlement under both the mechanisms are natural and unavoidable. While most of the modern FTA dispute settlement mechanisms provide very detailed rules of procedures, it is difficult to assume that the FTA dispute settlement will achieve the same objective standards which the WTO dispute settlement system had achieved in the last two and a half decades. It is also probable that the legal standards developed by an FTA panel is unlikely to have the same weight or value when compared to the adopted report of a WTO panel or the Appellate Body. The key difference is that the WTO panels are serviced by a professional secretariat well-informed and well-versed of former panel and Appellate Body jurisprudence. The WTO secretariat, in other words, is a repeat player, and as Weiler notes, is the 'repository of institutional memory, of horizontal and temporal coherence, of long-term hermeneutic strategy',[29] and transnational pedigree. An FTA panel, unless it is part of any major mega-regional grouping is unlikely to have the benefit of a secretariat or resource pool of well-qualified staff including lawyers. However, on the positive side, the FTA panels could take leaf out of the functioning of the WTO Dispute Settlement Body (DSB) and ensure that some of the

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[21] Final Report, CAFTA-DR Arb. Panel, In re *Guatemala – Issues Relating to the Obligations* (U.S. *v.* Guatemala) (14 Jun. 2017).

[22] Panel Report, *Canada – Dairy TRQ Allocation Measures* (CDA-USA-2021-31-010) (20 Dec. 2021).

[23] Statement by Minister Ng on Canada's request for CUSMA dispute settlement consultations with United States on Canadian solar products (7 Jan. 2020), https://www.canada.ca/en/global-affairs/news/2021/01/statement-by-minister-ng-on-canadas-request-for-cusma-dispute-settlement-consultations-with-united-states-on-canadian-solar-products.html (accessed 6 May 2022).

[24] Request for the establishment of a panel by Canada – solar products (8 Jun. 2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/solar-products-produits-energie-solaire.aspx?lang=eng (accessed 7 May 2022).

[25] Report of the Panel of Expert, Panel of Experts proceeding constituted under Art. 13.15 of the EU-Korea Free Trade Agreement (20 Jan. 2021), https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf; *See also Panel of Experts Confirms the Republic of Korea Is in Breach of Labour Commitments Under OSur Trade Agreement* (European Commission), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203 (accessed 7 May 2022).

[26] Vitaliy Pogoretskyy, *The Arbitration Panel Report in Ukraine – Export Prohibition on Wood Products: Lessons from the 'Pegasus' of International Adjudication*, 22(5–6) J. World Inv. & Trade 732–758 (2021).

[27] Request for the establishment of an arbitration panel by the European Union, SACU – Safeguard Measure imposed on Frozen Chicken from the European Union (21 Apr. 2020), https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158717.pdf (accessed 7 May 2022)

[28] Note Verbale issued by the European Commission (4 Jun. 2020), https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159037.pdf (accessed 7 May 2022).

[29] Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 (2) J. World Trade 191 (2001).

excesses including judicial overreach which the WTO tribunals have been accused of making, are not repeated. Since most of the FTAs affirm or incorporate the WTO agreements or have substantially equivalent or similarly worded provisions, it is possible to use the FTA dispute settlement, at least during the Appellate Body (AB) impasse, to resolve trade disputes affecting core trade obligations, including fundamental WTO obligations. It is also important to draw the clear dividing lines or the *Lakshmana rekhas*[30] where an FTA trade tribunal ought not enter. For example, most FTA partners would like to retain the right to regulate in a number of policy-related areas or adopt genuine national security-related measures. There is also a tendency to keep matters such as direct taxation, health and social security measures outside the purview of the FTAs or their dispute settlement.[31] The sensitives should naturally be respected.

One of the central questions in relation to FTA dispute settlement is the possibility of power asymmetry. Some sceptics of international dispute settlement argue that skewed power distribution can have its impact on litigation outcome.[32] As an illustration, the sceptics often point out that the United States has not suffered any adverse ruling under Chapter 11 of the NAFTA, although the United States was a respondent in several disputes. Despite the absence of any clear bias or any obvious favouritism by judges, there is a school of thinking that litigation outcomes often favour 'the haves' rather than 'the have-nots'. Superior legal capacity, dominant political power and financial endowment – captured by the phrase 'law, money, and politics'[33] – can all lead to a more favourable outcome in the formal dispute settlement process including prompt compliance. While the dispute settlement under the WTO could invariably be a better option for developing countries vis-à-vis FTA dispute settlement, the inexorable march to conclude FTAs leaves the smaller and weaker partners with few choices.

On the adjudicative side, conflicting jurisdictions of the WTO and FTA panels have been an issue in the past.[34] It is a fact that the WTO panels have mandatory jurisdiction with respect to claims coming under the covered agreements. However, as some of the past precedents[35] have indicated, parallel and typically subsequent proceedings on nearly the same subject matter can be frustrating and can undermine the purpose of dispute settlement. This is where the choice of forum clause can play a role. A party can use the dispute settlement provision either under the WTO or the FTA, but once a party has availed a forum, it must use it to the exclusion of others unless the chosen forum fails for procedural or substantive reasons.[36] Accordingly, the choice of forum clauses have become ubiquitous and are increasingly more sophisticated in recent FTAs.

On the whole, for the FTA dispute settlement to yield a fair outcome, the negotiating parties will have to account for possible power and resource asymmetries. The processes will have to be rooted in the principles of international law. The rich body of case law in WTO law and other international tribunals can guide the functioning of the FTAs panels. In other words, the FTA tribunals need to embrace more and not less of law and rigorous adjudicative practices. All aspects of dispute settlement staring from consultation to enforcement (including the use of countermeasures for any non-compliance) should be based on established procedures and negotiated rules. There is a lurking fear that in a number of new areas such as sustainability and labour, gender, or other new age topics, unilateral measures could be imposed by a party for any possible breaches of commitments in multilateral agreement which the parties have affirmed. Therefore, there is a clear need for parties to agree beforehand on the scope of countermeasures that can be considered. In short, the processes will have to fit the demands and principles of a rule-based system and should be fair, timely, effective, and transparent. As Raj Bhala notes in his piece in this Special Issue, the FTA parties should aim to develop a common law of international trade and in the process enhance the rule of law.[37]

At the same time, diplomacy can have its role. Parties can use consultations as a means of resolving disputes *inter se.* Formal disputes are likely to arise only if such consultations fail. Most of the modern free trade agreements include the mechanism of Joint Committees. The Joint Committees if properly constituted and run efficiently, could prevent trade issues from escalating into major trade disputes.

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[30] In the Indian epic Ramayana, this term refers to a magical boundary drawn by Lakshman to protect Goddess Sita, Lord Ram's wife, while they were in exile.

[31] For instance, health related measures are specifically excluded from Investor-State Dispute Settlement of Singapore-Australia Free Trade Agreement (Art. 22).

[32] Sungjoon Cho, *Beyond Rationality: A Sociological Construction of the World Trade Organization,* 52 Va. J. Int'l L. 321 (2012).

[33] Gregory Shaffer & Hakan Nordstrom, *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?,* 7 World Trade Rev. 587–640 (2008). *See also* Alvaro Santos, *Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 Virginia. J. Int'l L. 551 (2012).

[34] *See* Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19(3) Eur. J. Int'l L. 571 (2008).

[35] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 Oct. 2005; Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 Mar. 2006; Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, 22 Apr.2003, para. 7.38.

[36] Most modern FTAs include such provisions. Art. 2005(6) of the NAFTA included a forum exclusion clause, but the new generation FTAs also provide for opting for another forum in certain contingencies.

[37] Raj Bhala, *Writing a Script for India's FTA Dispute Settlement Chapters*, 17(6/7) Global Trade & Customs J. (2022).

3 FTAs and Investor-State Dispute Settlement (ISDS)

The practice of countries signing stand-alone bilateral investment treaties is increasingly becoming rare. A vast majority of investor protection and liberalization agreements are concluded as part of FTA negotiations. While ISDS is missing or its use is severely constricted in some of the investment chapters of the FTAs, there is a fresh approach, at least in the EU, to create investment courts. The concept of investment court system will have some permanent features with judges having a fixed tenure and remuneration, and rules of procedure. Some of the agreements involving the EU, such as the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam FTA foresee setting up a permanent multilateral mechanism and contain a clear reference to it.[38] However, the success of the concept of multilateral investment courts will depend up on the progress achieved in Working Group III of the United Nations Commission on International Trade Law (UNCITRAL).

While certain countries continue to believe that stand-alone Bilateral Investment Treaties (BITs) are more flexible in as much as the dissatisfied parties can terminate the treaties at any time, investment chapters in trade agreements can limit this policy flexibility. Once a country is a party to a trade agreement with an investment chapter, walking out of the investor chapter will not be easy. Accordingly, countries are likely to adopt conservative approaches in negotiating investment chapters in trade agreements.

While these developments are interesting, there are signs that the dispute settlement under trade agreements is veering towards the path of ad hoc*ism* and the use of arbitral panels characteristic of the ISDS system, while arbitration in investment disputes is giving way to permanent panels and institutional mechanisms, with the possibility of appellate review. These trends look deeply puzzling. These are early days for providing any definitive comment on the possible directions in which trade and investment dispute settlement would evolve, but at least the trends indicate that the 'twain shall never meet'.

4 Symposium special issue

The background for this double issue was an international virtual symposium organized by the Centre for Trade and Investment Law (CTIL), which is established by the Ministry of Commerce and Industry in India and the Rajiv Gandhi National University of Law, Punjab, India. The symposium touched upon several issues relating to dispute settlement in international trade agreements, including the WTO Agreement. The symposium addressed in particular the trends in dispute settlement in key jurisdictions such as North America, the EU, and Asia-Pacific, and finally India. Experts dealt in detail the practices under the NAFTA/USMCA, CPTPP, RCEP and the FTAs signed by the EU. There were dedicated sessions on the dispute settlement provisions in India's FTAs as well.

I would like to express our deep gratitude to Mr Jeffery L. Snyder, General Editor of Global Trade and Customs Journal (GTCJ), who enthusiastically accepted our proposal for a special double issue on this important topic of dispute settlement in international trade agreements. I would also like to appreciate the editorial help of Mr Rishabha Meena, Ms. Amandeep Kaur Bajwa and Ms. Apoorva Vishnoi, research staff at CTIL. While we are unable to carry the entire gamut of issues that were discussed in the two-day symposium, it is our hope that the readers will find the ideas presented in this issue stimulating and engaging.

Notes

[38] Article 8.29 of the CETA states: 'The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements'.