



## **Session 7:**

### **Protocol VIII on Dispute Settlement – Expert responses to comments and discussion**

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# Choice of Forum clause

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## **Article 3 of the Dispute Settlement Protocol: Choice of Forum**

1. If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the Parties to the dispute are party, including the WTO Agreement, that involves an obligation that is substantially the same under this Agreement and the other agreement, the complaining Party may select the forum in which to settle the dispute.
2. Once a complaining Party has requested the establishment of a panel or tribunal under any agreement referred to in paragraph (1), the forum selected shall be used to the exclusion of other fora.

This is the current  
version of Article 3  
of the DS Protocol

# Proposal to emphasize exclusivity of the CARTIF jurisdiction for issues of CARTIF law

- A proposal has been made to emphasize that all disputes arising between the Parties concerning the interpretation and application of the CARTIF Agreement shall be resolved exclusively through the dispute settlement mechanisms established by the CARTIF Agreement itself.
- This is a helpful suggestion. The revised provision could read as follows:

## **Article 3 of the Dispute Settlement Protocol: Choice of Forum**

1. All disputes arising between the Parties concerning the interpretation and application of the CARTIF Agreement shall be resolved exclusively through the dispute settlement mechanisms established under this Agreement.
2. If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the Parties to the dispute are party, including the WTO Agreement, that involves an obligation that is substantially the same under this Agreement and the other agreement, the complaining Party may select the forum in which to settle the dispute.
3. Once a complaining Party has requested the establishment of a panel or tribunal under any agreement referred to in paragraph (1), the forum selected shall be used to the exclusion of other fora.

# Purpose of the Choice of Forum clause

- Further proposal: to eliminate the remainder of the Choice of Forum clause.
- Please note that all CARTIF parties are subject to multiple judicial fora if a trade dispute were to arise
- For instance, depending on the precise issue at hand:
  - All CARTIF parties may use the CARTIF dispute settlement system
  - All CARTIF parties that are WTO Members could, for substantially the same dispute, sue each other in the World Trade Organization
  - All CARTIF parties that are parties to the CIS Agreement could, for substantially the same dispute, pursue a dispute settlement process under the CIS Agreement
  - All CARTIF parties that have a bilateral agreement with another CARTIF party could, for substantially the same dispute, pursue a dispute settlement process under that bilateral agreement: For instance, Kyrgyz Republic - Uzbekistan, Kazakhstan - Uzbekistan, China – Pakistan, China – Georgia, Azerbaijan – Georgia, and Georgia – Turkmenistan.

# Purpose of the Choice of Forum clause

- What if a CARTIF party first sues in a non-CARTIF forum, does not like the result it obtains (e.g. it loses), and then tries to bring the same/similar dispute before a CARTIF panel to obtain a better result? Or if that CARTIF party first goes to a CARTIF panel and then tries again in a non-CARTIF forum?
- There would be a risk of multiple and potentially conflicting judgments
- The Choice of Forum clause seeks to prevent this scenario:
  - If a government initiates a dispute in a non-CARTIF forum (e.g. a bilateral agreement with the same party), that government is not permitted to bring substantially the same dispute – that is, a dispute about the same import restriction or a customs regulation – under the CARTIF forum.
  - The reverse also applies = If a government initiates a dispute under CARTIF, that government is not permitted to also initiate a substantially same dispute in another forum (CIS, a bilateral treaty forum, etc.).



# Purpose of the Choice of Forum clause

- Note that the Choice of Forum clause does not subject any government to a dispute settlement system to which it has not explicitly agreed.
  - E.g. CARTIF parties that are not WTO Members are not made subject to a WTO dispute settlement forum
  - Similarly, CARTIF parties that are not CIS parties are not made subject to the CIS dispute settlement forum.
- Rather, the Choice of Forum clause protects any CARTIF party from multiple disputes in the fora to which that particular CARTIF party has signed up

# Mediators and Arbitrators



# List of mediators and arbitrators

- Currently, Article 24 of the Dispute Settlement Protocol envisages a list of arbitrators
- That list of arbitrators also serves as the list from which individuals can be proposed and appointed as mediators for purposes of the mediation procedure (Annex 3)
- A proposal has been made that a separate list of mediators should be established from which mediators could be appointed.
  - This is of course theoretically possible, if CARTIF parties so desire
  - However, keep in mind that the same individuals can be good arbitrators as well as good mediators. It may be useful for a mediator to have an accurate idea of the legal solution to a dispute when helping the parties to develop a negotiated solution
  - Also, please keep in mind that, depending on the desired qualifications of arbitrators and mediators, there may be only a limited pool of qualified individuals. It is therefore not clear whether it will be easy to establish two entire separate and sufficiently comprehensive lists of arbitrators and mediators, respectively.

# Retaliation methodologies

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## ***Article 16: Temporary remedies in case of non-compliance***

*It is suggested to remove the following paragraph from Article 16*

~~3. In suspending obligations, the complaining Party may choose to increase its tariff rates on a volume of trade to be determined in such a way that the volume of trade multiplied by the increase of the tariff rates equal the value of the nullification or impairment caused by the violation.~~

- This suggestion is (legally) of course perfectly fine
- However, please note that deleting this paragraph does not imply a prohibition of this methodology
- If Members wish to prevent the use of this methodology, they should state so explicitly
- Currently, the methodology remains legally permissible, but the deletion of the paragraph might trigger discussions between Members

# Relationship CARTIF law and non-CARTIF law (in particular WTO law)

# References to WTO law in the CARTIF text

- CARTIF law applies only between CARTIF parties.
- CARTIF law does not affect (add to or diminish from) CARTIF parties' rights and obligations under any trade agreement. For instance:
  - For instance, CARTIF law does not make a CARTIF party that is not a WTO Member into a WTO Member, nor does it make that party subject to WTO dispute settlement procedure.
  - As another example, CARTIF does not affect regional/bilateral agreements to which CARTIF parties are signatories.
    - However, please note that, to the extent of a conflict, CARTIF law shall prevail over regional or bilateral agreements between two or more CARTIF parties
- CARTIF law does not regulate the relationship between CARTIF parties and non-CARTIF parties

# References to WTO law in the CARTIF text

- The draft CARTIF agreement incorporates certain WTO provisions and legal instruments into the CARTIF legal framework (e.g. in the SPS and TBT protocols).
- In that situation, the explicitly incorporated WTO obligation is enforceable within the CARTIF framework, before a CARTIF panel.
  - However, this does not mean that these obligations would also be enforceable before a WTO panel
  - Enforceability of compliance with WTO law before a WTO panel is possible only if both complaining and responding party are WTO Members. Thus, CARTIF parties that are not also WTO parties are not subject to WTO dispute settlement, even if the provision at issue is a WTO legal provision that has been incorporated into the CARTIF legal framework

# Conflicts between CARTIF law and regional/bilateral trade agreements

Proposed change to Article 14

## **Article 14: Relationship with Existing Regional Agreements**

1. In the event of a conflict between this Agreement and any other existing regional or bilateral agreements between Parties, ~~this Agreement shall prevail to the extent of the specific inconsistency, unless otherwise agreed by the Parties~~ **the Parties shall immediately consult with a view to finding a mutually satisfactory solution.**

# Conflicts between CARTIF law and regional/bilateral trade agreements

Proposed change to Article 14

- This suggestion is of course (legally) perfectly fine
- Enables Members to find a tailor-made solution for each individual case
- But note that an increase in political discretion of Member governments carries with it a reduction of legal predictability and certainty



MFN

# MFN concerns under CARTIF law

- For **CARTIF parties that are WTO Members**, the WTO MFN principle applies
  - This means that, as stated in the concept note, these CARTIF parties must currently apply the CARTIF text on an MFN basis, because CARTIF is not a WTO-consistent FTA under Article XXIV and thus does not justify a departure from MFN
  - If/when CARTIF includes enough trade liberalization to constitute an FTA under Article XXIV of the GATT 1994, compliance with the WTO MFN requirement will no longer be necessary
- For **CARTIF parties that are not WTO Members**, the WTO MFN principle does not apply
  - However, these parties must check their obligations under any other regional or bilateral agreements
  - For instance, other regional or bilateral agreements may require that parties to these agreements “match”/extend preferential treatment under CARTIF to the parties of those regional or bilateral agreements.

# Suggested rewording of Article 14

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## **Article 14: Relationship with WTO law and existing regional agreements**

1. Nothing in this Agreement shall create any rights or obligations of parties to this Agreement vis-à-vis countries that are not parties to this Agreement. Without prejudice to paragraph 4, nothing in this Agreement shall affect the existing rights and obligations of CARTIF parties under other trade agreements, including the WTO Agreement.
2. CARTIF parties that are not Members of the WTO are subject only to WTO legal provisions and WTO legal instruments that are explicitly incorporated into this Agreement. Compliance with WTO provisions and WTO legal instruments incorporated into this Agreement can be enforced solely through the dispute settlement protocol under this Agreement.
3. Each CARTIF party shall ensure that the implementation of its CARTIF obligations under its domestic law is consistent with its obligations under other trade agreements, including the WTO Agreement, as relevant. [[In particular, CARTIF parties that are WTO Members shall give due regard to whether the implementation of their CARTIF obligations is subject to WTO MFN requirements.]]
4. In the event of a conflict between this Agreement and any other existing regional or bilateral agreements between the Parties, the Parties shall immediately consult with a view to finding a mutually satisfactory solution.

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