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Vidigal, G.

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REMARKS BY GERALDO VIDIGAL*

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During the decade between 2007 and 2017, the World Trade Organization (WTO) became the almost exclusive forum for the settlement of interstate trade disputes.¹ The previous 1995–2005 period had seen some signs that regional trade agreements (RTAs), such as the North American Free Trade Agreement (NAFTA), the Common Market of the South (MERCOSUR), and the Andean Community, could become alternative forums for dispute settlement in trade. Between 2007 and 2017, however, the only agreement under which (two) trade disputes were brought to adjudication was the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA-DR).²

This scenario changed quickly after 2018, not only in connection with the prospect that the WTO dispute settlement mechanism would be deprived of its Appellate Body, and consequently of its ability to produce binding reports without the cooperation of the alleged violator, but also due to the increase in number and complexity of RTAs in force. While it is too soon to speak of a shift toward RTAs, there is certainly a move toward the WTO and RTAs being seen as equally depend-able alternatives for dispute settlement. The year 2020, which followed the de facto dissolution of the Appellate Body, saw the smallest number of new disputes being initiated in the history of the WTO (five requests for consultations). By contrast, between 2018 and 2020, nine new interstate disputes were initiated under RTA dispute settlement provisions. It is useful to describe and clas-sify them briefly prior to analyzing them.

Disputes leading to dispute settlement reports. Two of the new RTA disputes led to final reports by adjudicators. On June 20, 2020, the European Union (EU) brought a dispute against Ukraine under the EU-Ukraine Association Agreement³ following restrictions on exports of wood that Ukraine sought to justify on environmental grounds. The Final Report of the Arbitration Panel found that, while a ban on the exportation of specific types of wood was genuinely justifiable on environmental grounds, a broader temporary ban on all wood exports had protectionist

* Assistant Professor, Amsterdam Law School, University of Amsterdam. I thank Omar Halden for his research assistance for this piece.

¹ Geraldo Vidigal, *Why Is There so Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement*, 20 J. INT'L ECON. L. 927 (2017).

² Informe Final del Grupo Arbitral, *Costa Rica vs El Salvador – Tratamiento Arancelario a Bienes Originarios de Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/17 (Nov. 18, 2014); Final Report of the Panel, *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (June 14, 2017). Paraguay brought a dispute under MERCOSUR about the suspension of its political rights following an alleged democratic breakdown. See Geraldo Vidigal, *Enforcing Democracy at the Regional Level: Paraguay's Suspension Before the MERCOSUR Court*, 2 CAMBRIDGE INT'L L.J. (2013).

³ Association Agreement Between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part, *entered into force* Sept. 1, 2017, OJEU L 161/3 (2014).

motives.⁴ The second dispute leading to a panel report was brought by the EU against the Republic of Korea (Korea), under the Trade and Sustainable Development Chapter of the European Union–South Korea Free Trade Agreement.⁵ In its Report, the Panel of Experts found that Korea’s labor legislation was in violation of its obligations relating to the free association of workers. The Panel also found that, despite significant delays, Korea fell short of being in violation of its obligation to “make continued and sustained efforts” to ratify four core conventions of the International Labour Organization (ILO).⁶ Interestingly, shortly after the Panel of Experts issued its report, Korea ratified three ILO core conventions, including the one on freedom of association.⁷

Two disputes leading to negotiated settlements. The first dispute leading to a settlement, involving the withdrawal of the challenged measure, was that initiated by the United States against Peru on January 4, 2019, under Article 21.4 of the U.S.-Peru Trade Promotion Agreement,⁸ challenging Peru’s withdrawal of the independence of the Peruvian forestry protection agency.⁹ Three months after the United States announced its request for consultations, Peru modified its administrative structure to restore the independence of this agency.¹⁰ A second dispute leading to a negotiated settlement was brought by the United States against Korea under the U.S.-Korea Free Trade Agreement (KORUS).¹¹ On September 19, 2019, the United States requested consultations with Korea under KORUS, claiming that Korea failed to apply sufficiently high sanctions to Korean vessels engaging in illegal fishing activities, in violation of required conservation and management measures adopted by the Commission for the Conservation of required Antarctic Marine Living Resources (CCAMLR)¹²—an obligation under KORUS.¹³ Following consultations, Korea amended its legislation and the parties settled the dispute.¹⁴

Five disputes still pending. Of the five RTA disputes still pending, two concern relations between the United States and Canada. Still operating under NAFTA, on July 23, 2018, Canada requested consultations regarding the United States’ decision to impose an additional 30 percent import tariff on certain solar goods—including on imports of Canadian solar panels.¹⁵ Additionally, on

⁴ Final Report of the Arbitration Panel, *Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union*, para. 507 (Dec. 11, 2020).

⁵ Free Trade Agreement Between the European Union (EU), of the One Part, and the Republic of Korea (Korea), of the Other Part, *entered into force* Dec. 13, 2015.

⁶ Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement, *Report of the Panel of Experts*, at 78–79 (Jan. 20, 2021).

⁷ Korean Ministry of Foreign Affairs Press Release, *Ratification of Three Fundamental ILO Conventions Marked in Virtual Ceremony with ILO* (Apr. 21, 2021).

⁸ United States–Peru Trade Promotion Agreement, *entered into force* Feb. 1, 2009.

⁹ Office of the United States Trade Representative (USTR) Press Release, *USTR Requests First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA)* (Jan. 4, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/ustr-requests-first-ever>.

¹⁰ USTR Press Release, *USTR Successfully Resolves Concerns Raised in First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA)* (Apr. 9, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/ustr-successfully-resolves-concerns>.

¹¹ Free Trade Agreement Between the Republic of Korea and the United States of America, *revised* Jan. 1, 2019.

¹² USTR Press Release, *USTR to Request First-Ever Environment Consultations Under the U.S.-Korea Free Trade Agreement (KORUS) in Effort to Combat Illegal Fishing* (Sept. 19, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/september/ustr-request-first-ever>.

¹³ KORUS, Art. 20.2, Annex 20-A.

¹⁴ USTR Press Release, *USTR Welcomes Passage of Amendments to Korea’s Distant Water Fisheries Development Act Following First Ever Environment Consultations Under the United States-Korea Free Trade Agreement* (Nov. 1, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/november/ustr-welcomes-passage-amendments>.

¹⁵ Global Affairs Canada, *Request for Consultations by Canada, US – Safeguards on Solar Products (Canada)* (July 23, 2018).

December 9, 2020 the United States announced a request for consultations under Article 31.4 of the United States-Canada-Mexico Agreement (USMCA), challenging a variety of determinations made by Canada regarding the allocation of dairy tariff-rate quotas on milk, cream, cheese, industrial cheese, milk powders, condensed milk and butter, among other goods.¹⁶ This was the first dispute launched under the USMCA, which had entered into force on July 1, 2020. Both disputes remain at the stage of consultations.

Two other RTA disputes still pending were brought by the European Union. The first was brought on June 14, 2019, challenging safeguard measures on frozen bone-in chicken cuts, adopted by South Africa, under the European Union–SADC Economic Partnership Agreement (EPA).¹⁷ Following unsuccessful consultations, on April 21, 2020 the EU formally requested the establishment of an arbitration panel.¹⁸ The second was initiated on June 24, 2020 against Algeria, under the EU-Algeria Association Agreement,¹⁹ to challenge a series of trade-restrictive measures introduced by Algeria.²⁰ Following unsuccessful consultations within the EU-Algeria EU Association Council, the EU formally requested an arbitration panel on March 19, 2021.²¹

Finally, on March 15, 2019, the United States requested consultations with Korea under KORUS with respect to procedures in competition hearings concerning U.S. companies held by the Korea Fair Trade Commission (KFTC). The United States claimed that competition hearings held by the KFTC under Korea's Monopoly Regulations and Fair Trade Act denied U.S. firms due process rights protected under KORUS, including the opportunity to review and rebut evidence presented against the companies.²² On July 9, 2019, the United States and Korea officially held consultations.²³

Taken collectively, these nine disputes of the new era of RTA adjudication show that disputes are being brought under a variety of RTAs. Significantly, other than for the dispute initiated by Canada under NAFTA, all of these disputes were initiated by the United States or the European Union. The ability of smaller economies and developing countries to resort to dispute settlement to demand compliance by larger economies with their obligations, developed under the WTO dispute settlement system over the past two decades, still appears to be missing—or perhaps developing countries believe that their cases will have a higher chance at having some impact if presented at the WTO. One may nonetheless wonder whether the Advisory Centre on WTO Law (ACWL), which

¹⁶ USTR Press Release, Request for Consultations by the United States (USMCA), *Canada – Tariff-Rate Quotas on Dairy (US)* (Dec. 9, 2020), available at <https://ustr.gov/sites/default/files/files/Press/Releases/CdaDairyTRQConsultationsReq.pdf>.

¹⁷ Economic Partnership Agreement (EPA) Between the SADC EPA States, of One Part, and the European Union and Its Member States, of the Other Part, signed June 10, 2016, fully operational since Feb. 4, 2018.

¹⁸ Request for the Establishment of an Arbitration Panel by the European Union (Apr. 21, 2020), available at https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158717.pdf.

¹⁹ Euro-Mediterranean Agreement Establishing an Association Between the European Community and Its Member States, of the One Part, and the People's Democratic Republic of Algeria, of the Other Part, entered into force September 2005.

²⁰ European Commission, *Note Verbale* (June 24, 2020), available at https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159037.pdf.

²¹ European Commission, *Note Verbale* (Mar. 19, 2021), available at https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159529.pdf.

²² USTR Press Release, USTR Requests First-Ever Consultations Under the U.S.-Korea Free Trade Agreement (KORUS) (Mar. 15, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/ustr-requests-first-ever>.

²³ USTR Press Release, USTR Pursues Competition-Related Concerns Under the U.S.-Korea Free Trade Agreement (July 9, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-pursues-competition-related>.

advises and acts as counsel for states in legal matters arising under the WTO Agreements, should not have its mandate extended to cover legal advice and assistance in disputes under RTAs.

Another aspect of these disputes that stands out is that four of them concern so-called WTO-X areas, that is, areas in which WTO rules do not establish obligations.²⁴ These include disputes concerning environmental obligations (U.S.-Peru, U.S.-Korea), labor rights obligations (EU-Korea), and competition law obligations (U.S.-Korea). Of the other five disputes, two concerned trade remedies (Canada-U.S. and EU-South Africa) and three general trade barriers (to exports of wood in EU-Ukraine, to imports of dairy in U.S.-Canada, and to imports in general in EU-Algeria). This variety indicates that, even with a recast WTO dispute settlement system, disputes should continue to arise under RTAs. It also shows that, contrary to what has sometimes been suggested, labor and environmental obligations under RTAs are not mere legitimization devices in agreements whose objectives continue to be purely commercial. What these disputes show is that sustainability provisions in RTAs may indeed be instrumental in empowering states (and sustainability-minded constituencies within them) to demand from each other adherence to, and enforcement of, sustainability standards in production.

²⁴ Henrik Horn, Petros C. Mavroidis & André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 *WORLD ECON.* 1565 (2010).