



United States Department of Agriculture

# SPS Disputes

Christina Devorshak

USDA, APHIS, PPQ

Center for Plant Health Science and Technology

# Disputes Overview

- What are disputes all about
- What sort of disputes have occurred
- What are options
- What is the WTO process
- Reviews of disputes – what can we learn
- Take home message

# Dispute perceptions from industry

## 2012 APHIS survey of US industry

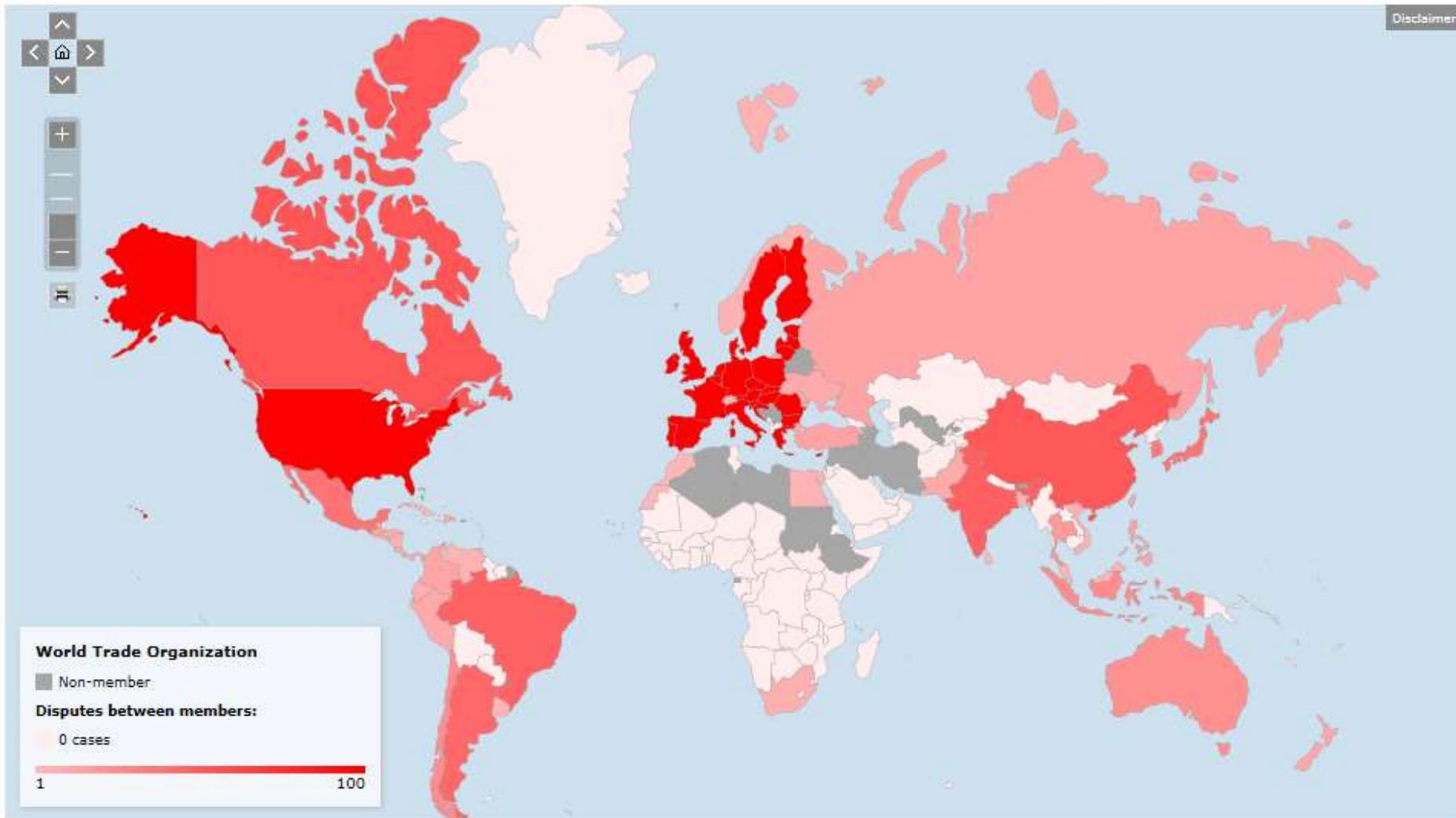
- *Desire for mechanism to settle disputes quickly*
- About half of those questioned were aware of IPPC or NAPPO dispute settlement options in addition to WTO
- Regional panels have been used a few times with limited success
- General preference for bilateral solutions

# What are disputes all about?

May arise relating to:

- Measures unjustified
- Resulting from types of risk analysis applied
- Measures are inconsistent with standards
- No rational relationship between risk, measures and ALOP
- Use of available scientific information
- Measures applied consistently (with the risk)
- ALOP consistently applied

# Map of all WTO disputes (513 total)



## NAPPO Country SPS Disputes – Canada (9)

Australia – Measures Affecting Importation of Salmon (Complainant: Canada)	5 October 1995
Korea, Republic of – Measures concerning Bottled Water (Complainant: Canada)	8 November 1995
European Communities – Measures Concerning Meat and Meat Products (Hormones) (Complainant: Canada)	28 July 1996
European Communities – Measures Affecting Asbestos and Products Containing Asbestos (Complainant: Canada)	28 May 1998
European Communities – Measures Affecting Imports of Wood of Conifers from Canada (Complainant: Canada)	17 June 1998
United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada (Complainant: Canada)	25 September 1998
European Communities – Measures Affecting the Approval and Marketing of Biotech Products (Complainant: Canada)	13 May 2003
United States – Certain Country of Origin Labelling (Cool) Requirements (Complainant: Canada)	1 December 2008
Korea, Republic of – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada (Complainant: Canada)	9 April 2009

## NAPPO Country SPS Disputes – Mexico (3)

Mexico – Measures Affecting Trade in Live Swine (Complainant: United States)	10 July 2000
Mexico – Certain Measures Preventing the Importation of Black Beans from Nicaragua (Complainant: Nicaragua)	17 March 2003
United States – Certain Country of Origin Labelling Requirements (Complainant: Mexico)	17 December 2008

# NAPPO Country SPS Disputes – United States (19)

Korea, Republic of – Measures Concerning the Testing and Inspection of Agricultural Products (Complainant: United States)	4 April 1995
Korea, Republic of – Measures Concerning the Shelf-Life of Products (Complainant: United States)	3 May 1995
Australia – Measures Affecting the Importation of Salmonids (Complainant: United States)	20 November 1995
European Communities – Measures Concerning Meat and Meat Products (Hormones) (Complainant: United States)	26 January 1996
Korea, Republic of – Measures concerning Inspection of Agricultural Products (Complainant: United States)	24 May 1996
Japan – Measures Affecting Agricultural Products (Complainant: United States)	7 April 1997
United States – Measures Affecting Imports of Poultry Products (Complainant: European Communities)	18 August 1997
United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada (Complainant: Canada)	25 September 1998
Mexico – Measures Affecting Trade in Live Swine (Complainant: United States)	10 July 2000
Japan – Measures Affecting the Importation of Apples (Complainant: United States)	1 March 2002
European Communities – Measures Affecting the Approval and Marketing of Biotech Products (Complainant: United States)	13 May 2003
United States – Certain Country of Origin Labelling (Cool) Requirements (Complainant: Canada)	1 December 2008
United States – Certain Country of Origin Labelling Requirements (Complainant: Mexico)	17 December 2008
European Communities – Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States (Complainant: United States)	16 January 2009
United States – Certain Measures Affecting Imports of Poultry from China (Complainant: China)	17 April 2009
United States – Measures Affecting the Production and Sale of Clove Cigarettes (Complainant: Indonesia)	7 April 2010
India – Measures Concerning the Importation of Certain Agricultural Products (Complainant: United States)	6 March 2012
United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina (Complainant: Argentina)	30 August 2012
United States – Measures Affecting the Importation of Fresh Lemons (Complainant: Argentina)	3 September 2012

# Phytosanitary Disputes in WTO

- SPS Disputes addressed in Article 11
- 9 disputes related to phytosanitary measures
- Commodities include:
  - Lemons
  - Black beans
  - Wood of conifers
  - Apples
  - Stone fruit
  - Pineapple

# What are the options for DS

OPTION	BINDING	TIME	BASIS	Enforcement
WTO Dispute Settlement	<b>YES</b>	1 year process Additional time for appeal	Primarily legal / some technical	Retaliatory measures may be taken
WTO Mediation	No voluntary	240 days	Primarily legal / some technical	No enforcement
IPPC Dispute resolution	No	Agreed by parties	Technical	No enforcement
NAPPO	No	Agreed by parties Last case: 3 years	Technical	No enforcement
Other informal mechanisms (mediation / consultation)	No	Agreed by parties	Technical	No enforcement

# Dispute Settlement Process

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
<b>Total = 1 year</b>	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
<b>Total = 1y 3m</b>	(with appeal)

# Some notes about Dispute Settlement

- WTO DS is binding with consequences
- Retaliatory measures
  - May target similar sectors
  - Benefits of retaliation may not benefit original industry

# Example: NZ apples dispute

## New Zealand vs. Australia

- NZ vs. Australia
  - USA official observer
- Key issues
  - PRA methodology
  - Scientific evidence
  - 3 pests/16 measures
  - Consistency with requirements of the SPS Agreement

# NZ apples dispute

## New Zealand vs. Australia

- Australia found to be in violation of SPS Agreement
- WTO Panel report 600+ pages (!)
- Appellate body supported original findings

# NZ apples dispute Australia's PRA model

- Probabilities for importing infested apples (on a per apple basis)
- Probabilities associated with entry, establishment and spread of pest(s)
- Expert elicitation used for estimates

# NZ apples dispute Australia's PRA model

- Semi-quantitative approach
- Unmitigated risk considered, then mitigated
- Rare events included in analysis

# NZ apples dispute

## New Zealand's case (in part)

- Three fundamental flaws with the PRA
  - Inflated values for “negligible” events
  - Use of uniform distribution to model events
  - Inflated estimated likely volume of trade
- Result—grossly overestimating risk

# NZ apples dispute

## Panel findings (in part)

- Probability of importation did not rely on adequate scientific evidence
- Little insight on how probability values assigned
- No explanation why negligible events assigned numerical maximum value of one in a million

# NZ apples dispute

## Panel findings (in part)

- Uniform distribution + high maximum level for probability intervals overestimates likelihood
- Issue of events that “can” happen (theoretically) but which have not been proven, tested or verified

# Lessons learned: The role of science

- Scientific/technical information is essential to the process
- Risk assessments should incorporate available scientific information
- There should be rational relationship between level of risk and risk management (measures)

# Lessons learned: The role of law

- Risk Analysis must be done!
- Countries should observe standards (harmonization)
- Countries should be consistent in application of measures according to risk
- Measures should be consistent with ALOP and least trade restrictive

# Final thoughts

- Dispute settlement is complex, lengthy process
- Dispute findings may be based on legal or technical basis
- Limited alternatives to dispute settlement, and none of them are expeditious
- A better option is ***dispute avoidance***
- ***Dispute avoidance*** can be achieved by:
  - Have measures consistent with standards
  - Developing standards where gaps exist
  - Providing technical justification for measures

# Dispute Quiz!

True or False?



The only option for resolving disputes is going straight to the WTO Dispute Settlement Process



# Dispute Quiz!

True or False?

The bingo-fruit industry of Alphaland wants their NPPO to go to dispute settlement against Zeeland because of overly restrictive measures against bingo-fruit. The bingo-fruit industry feels that, if they win the dispute, they will be financially compensated for loss of market.

# Dispute Quiz!

Zeeland decides to prohibit bingo-fruit from Alphaland because there is not enough information to conduct a PRA.

Choose the correct answer:

- a. Alphaland has grounds for dispute because Zeeland is a larger country with more money
- b. Alphaland has grounds for dispute because Zeeland allows bingo-fruit from other countries
- c. Alphaland has grounds for dispute because Zeeland failed to perform a risk assessment

# Dispute Quiz!

Zeeland decides to conduct a PRA on bingo-fruit from Alphaland. The PRA shows the bingo-fruit borer is a risk for Zeeland. Based on international standards, Zeeland requires that bingo-fruit is cold treated to mitigate bingo-fruit borer.

Alphaland considers cold treatment to be an excessive requirement. In your opinion, should Alphaland pursue a dispute to argue against this requirement?

dank u  
 Tack ju faleminderit  
 Asante 谢谢 Tak mulțumesc  
 kiitos  
**Salamat!** Gracias  
 Merci Terima kasih Aliquam  
 ありがとう Dankie Obrigado  
 köszönöm grazie  
 Aliquam Go raibh maith agat  
 děkuii Thank you